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Dear Mr. Norton and Mr. Etheridge:

You have requested an opinion from this Office regarding whether it would constitute dual office holding for an individual to serve as Chairman of the South Carolina Public Charter School District Board of Trustees and as City Manager of the City of Darlington.

### LAW/ANALYSIS

The South Carolina Constitution provides for dual office holding:

[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public .... The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1A.

Our South Carolina Supreme Court has explained the difference between an office and an employee:

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the

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performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907).

In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the Court provided some criteria to consider when determining if a position is an office:

Criteria to be considered in making the distinction between an officer and an employee include whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.

This Office has determined that a member of the South Carolina Public Charter School District Board of Trustees is an officer for dual office holding purposes. See Ops. S.C. Atty. Gen., 2006 WL 2382436 (July 7, 2006); 2006 WL 3199988 (Oct. 11, 2006). Therefore, the issue is whether the City Manager of the City of Darlington holds a public office.

The City of Darlington has a council-manager form of government. See City of Darlington, S.C. Code of Ordinances § 2-1 (May 19, 2022). In this form of government, “[a]ll legislative powers of the municipality and the determination of all matters of policy shall be vested” in the city council. S.C. Code Ann. § 5-13-30 (1976 Code, as amended). The city council is required to employ a city manager and set his salary. S.C. Code Ann. §§ 5-13-30; 5-13-50; 15-13-70 (1976 Code, as amended). The city manager is employed “solely on the basis of his executive and administrative qualifications” and he does not have to be a resident of the municipality or state when he is employed. S.C. Code Ann. § 5-13-50. The city manager’s term of employment “shall be at the pleasure” of city council and city council has the discretion to “employ the manager for a definite term.” S.C. Code Ann. § 15-13-70. The city council “may require suitable surety bonds of the manager and other municipal employees.” S.C. Code Ann. § 5-13-60 (1976 Code, as amended).

The manager in a council-manager form of government is granted certain “responsibilities” by the Legislature:

The manager shall be the chief executive officer and head of the administrative branch of the municipal government. He shall be responsible to the municipal council for the proper administration of all affairs of the municipality and to that end, subject to the provisions of this chapter, he shall:

(1) Appoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality and fix the salaries of such officers and employees, except as otherwise provided in this chapter or prohibited by law and except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office;

(2) Prepare the budget annually, submit it to the municipal council and be responsible for its administration after adoption;

(3) Prepare and submit to the municipal council at the end of each fiscal year a complete annual report on the finances and administrative activities of the municipality for the preceding year and make such other financial reports from time to time as may be required by the council or by Chapters 1 through 17;

(4) Keep the municipal council advised of the financial condition and future needs of the municipality and make such recommendations as may seem to him desirable; and

(5) Perform such other duties as may be prescribed by law or required of him by the municipal council, not inconsistent with the provisions of Chapters 1 through 17.

S.C. Code Ann. § 5-13-90 (1976 Code, as amended).

As stated in Crenshaw,<sup>1</sup> some of the criteria to be considered for an office are legislative creation; the establishment of qualifications for appointment, duties, tenure, salary, bond, and oath; and an exercise of the sovereign power of the State. The position of city manager is created by the Legislature.<sup>2</sup> Although a city council in a council-manager form of government is statutorily required to employ a city manager, the city council has discretion in the hiring. Section 5-13-50 generally provides that a “manager shall be employed solely on the basis of his

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<sup>1</sup> State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

<sup>2</sup> The South Carolina Constitution provides that “[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law . . .” S.C. Const, art. VIII, § 9.

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executive and administrative qualifications.” S.C. Code Ann. § 5-13-50. This grants city council the authority to determine the specific qualifications that meet this mandate. The city council sets the manager’s salary and term of employment. It determines whether surety bonds should be issued. Because of the discretion granted to a city council, a city manager’s qualifications for appointment, term, salary, and bond are not dictated by statute.

A city manager does not appear to exercise the sovereign power of the State pursuant to the statutes regarding a council-manager form of government. All matters of policy are determined by city council. A city manager, although chief executive officer and head of the administrative branch of the city government, is responsible to the city council for the administration of all affairs of the city. The position is given “responsibilities,” and not powers or duties. See S.C. Code Ann. § 5-13-90, entitled “Responsibilities of manager.” Some of these responsibilities involve basic administrative functions. Other responsibilities include performing duties required by city council and making recommendations to it. From a reading of the statutes alone, it appears that a city manager is not a public officer. However, our inquiry does not end there. We must also examine a city’s ordinances to determine if a city manager is an officer for dual office holding purposes.

As you pointed out in your request letter, we concluded in a prior opinion that a city manager held a public office pursuant to the statutes regarding a council-manager form of government. See Op. S.C. Atty. Gen., 1985 WL 165972 (Jan. 4, 1985). However, we relied on section 5-13-90’s characterization of a city manager as the chief executive officer of the administrative branch and ignored its proviso that a city manager is responsible to the city council for the administration of all city affairs. Similarly, we did not acknowledge that a city council determines all matters of policy. We did not examine a city manager’s statutory responsibilities to determine if they involved an exercise of the sovereign power of the State. Finally, we did not consider that city ordinances must be reviewed because of the discretion granted to a city council in the employment of a city manager.

We have previously stated:

The standard for review of opinions issued previously by this Office is whether such opinion is ‘clearly erroneous.’ A prior opinion will not be overruled unless and until it is found to be clearly erroneous.

Op. S.C. Atty. Gen., 2022 WL 4074465 (Aug. 25, 2022) (quoting Op. S.C. Att’y Gen., 1991 WL 632941 (March 14, 1991)). For the reasons stated above, we believe that the conclusion reached in our January 4, 1985 opinion that a city manager holds a public office based on the statutes regarding a council-manager form of government is clearly erroneous. We overrule our January 4, 1985 opinion to that extent.

The position of City Manager is established by the City of Darlington Ordinances. City of Darlington, S.C. Code of Ordinances § 2-170 (May 19, 2022). The City Council sets the City Manager's salary, as it is authorized to fix the compensation of all city appointed officers and employees. City of Darlington, S.C. Code of Ordinances § 2-143 (May 19, 2022). A term of office is not set for the position, because all appointed officers and employees serve at "the pleasure of the appointing authority." City of Darlington, S.C. Code of Ordinances § 2-142 (May 19, 2022). The Ordinances do not provide the qualifications for appointment or whether a bond or oath is required.

However, they do provide for the duties of the City Manager:

Subject to the direction of the council, the city manager shall perform the following duties:

- (1) See that all ordinances and laws of the city are enforced and carried out;
- (2) Direct and supervise the administration of all departments, offices and agencies of the city;
- (3) Attend all council meetings and shall have the right to take part in discussion but may not vote;
- (4) Prepare and submit the annual budget and capital program to the council;
- (5) Be the city purchasing agent and administer the city's purchasing rules and regulations;
- (6) Make reports as the council may require concerning the operations of city departments, offices and agencies;
- (7) Keep the council fully advised as to the financial condition and future needs of the city and make recommendations to the mayor and council concerning city affairs as is deemed desirable; and
- (8) Perform such other duties as are specified by the mayor and council.

City of Darlington, S.C. Code of Ordinances § 2-171 (May 19, 2022) (emphasis added). The Ordinances also provide that all powers of the city are vested in the City Council. City of Darlington, S.C. Code of Ordinances § 2-24 (May 19, 2022).

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The Darlington Ordinances establish the position of City Manager and its duties. The duties consist of basic administrative functions, performing duties required by City Council and the Mayor, and making recommendations. The duties are subject to City Council's direction. Furthermore, all powers of the city are vested in City Council. Accordingly, the Darlington City Manager is most likely not exercising the sovereign power of the State. The qualifications for appointment, tenure, and salary for the position are not established and an oath or bond is not required. Because of these factors, we believe that the Darlington City Manager does not hold an office for purposes of dual office holding. It is therefore our opinion that serving simultaneously as City Manager of the City of Darlington and as a member of the South Carolina Public Charter School District Board of Trustees would not constitute dual office holding.

#### CONCLUSION

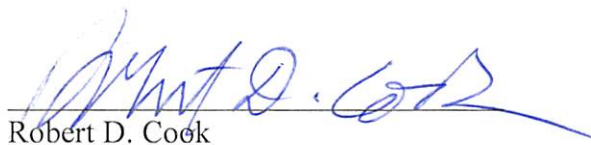
In our opinion, serving simultaneously as City Manager of the City of Darlington and as a member of the South Carolina Public Charter School District Board of Trustees would not constitute dual office holding. We hereby overrule our January 4, 1985 opinion, Op. S.C. Atty. Gen., 1985 WL 165972 (Jan. 4, 1985), to the extent that it concluded that a city manager held a public office based on the statutes regarding a council-manager form of government, S.C. Code Ann. § 5-13-10 et seq (1976 Code, as amended). A city's ordinances must be reviewed because of the discretion granted to a city council in the employment of a city manager.

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General