



ALAN WILSON  
ATTORNEY GENERAL

August 22, 2017

Mr. Brian D. Lamkin, Inspector General  
Office of the Inspector General  
111 Executive Center Drive  
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Columbia, SC 29210

Dear Inspector General Lamkin:

You have requested our opinion regarding “the authority of the Office of the State Inspector General (SIG) to conduct a review of a non-profit, charitable foundation created for the specific purpose of supporting a [publicly]-funded state agency.” By way of background, you provide the following information:

In March 2017, a member of the South Carolina Senate requested the SIG undertake a review of the organizational structure of the South Carolina Governor's School for Science and Mathematics (SCGSSM) and the South Carolina Governor's School for Science and Mathematics Foundation, Inc. (“GSSM Foundation”), which appeared to be a blended structure between the school and its non-profit supporting foundation. Specifically, the request pertained to reviewing the appropriateness of SCGSSM's publicly funded employees being supervised by employees of the non-profit GSSM Foundation. The SIG was asked to provide a review and opinion on the appropriateness of this structure.

#### Governing Statutes

The governing statutes for the SIG are found in S.C. Code of Laws, §1-6-10 through §1-6-100. The governing statutes for the SCGSSM are found in S.C. Code of Laws, §59-48-10 through §59-48-70.

#### SCGSSM

The SCGSSM was created in 1988 by the South Carolina General Assembly as a statewide special school for the purpose of providing accelerated instruction in science, technology, engineering, and math (STEM) in a residential setting for high school juniors and seniors in the State who are academically talented in the areas of science and mathematics. The school receives state appropriations each year to educate approximately 288 high school juniors and seniors in science and mathematics. The SCGSSM is overseen by an eleven-member Board of Trustees (“BoT”), which is comprised of nine members appointed by the Governor, the State

Superintendent of Education, and the Executive Director of the Commission on Higher Education. In addition, ex officio members include the provost or vice president for academic affairs from Clemson University, the University of South Carolina, and the Medical University of South Carolina, and the president of the GSSM Foundation.

Daily operations are overseen by a president of the school, who is hired by the SCGSSM BoT.

#### GSSM Foundation

The GSSM Foundation was incorporated in November 1988 as a non-profit corporation for educational and eleemosynary purposes. Among the stated purposes of the GSSM Foundation are the support for the charitable, educational, scientific, and outreach purposes of SCGSSM; to provide academic and other scholarships to students; to support the educational programs of SCGSSM; and “to build an endowment fund, the income from which would be expended annually by the Board for the exclusive benefit of the School.” (See [Appendix A](#))

The GSSM Foundation is overseen by a BoT and the daily operations are directed by a chief executive officer (CEO) who is hired by the GSSM Foundation BoT. The GSSM Foundation is staffed by approximately twelve employees, to include the CEO, none of whom are state employees. The GSSM Foundation does not receive any state appropriations for its operations and salaries.

#### SCGSSM and GSSM Foundation Structural Relationship

By statute, §59-48-20 (B)(1), the GSSM Foundation BoT president is an ex officio member of the SCGSSM BoT. However, the chief administrative officer for all SCGSSM affairs is the SCGSSM director. (See §59-48-50)

From approximately 2001 through his retirement in April 2016, SCGSSM was directed by President Murray Brockman. Following a national search, the SCGSSM BoT hired Dr. Hector Flores as the SCGSSM president in April 2016.

In 2005, Kim Bowman was hired as the GSSM Foundation CEO and continues in this capacity today. Between July 2010 and September 2010, Brockman gave Bowman the title of Executive Vice President (EVP) for Strategic Direction of SCGSSM. In July 2017, Dr. Flores named a new EVP and advised Bowman he intended to change her title to Vice President (VP) of Development for SCGSSM.

Over the course of Mr. Brockman's tenure, certain SCGSSM functions were delegated to the GSSM Foundation by agreement between him and Mrs. Bowman. Specifically, beginning on or about 2010, Mr. Brockman transferred the student recruitment program to the GSSM Foundation, which was followed by the outreach program in 2012, and the student admissions process in 2014. The transfer of the school's outreach and admissions programs included the realignment of the corresponding SCGSSM employees under Mrs. Bowman's supervision. The employees continued as SCGSSM employees with their salaries paid by the school through state appropriated funds.

Beginning in 2003, the SCGSSM organizational structure included direct supervision of GSSM Foundation activities associated with the school. Specifically,

the GSSM Foundation CEO at that time held the title of VP of Institutional Advancement. In addition, the GSSM Foundation BoT maintained an indirect oversight relationship of the SCGSSM through the SCGSSM BoT. ([Appendix B](#))

In 2014, former President Brockman realigned the organizational structure to more clearly define EVP Bowman's SCGSSM role and supervision of SCGSSM employees. This organizational structure detailed the SCGSSM Board's oversight of SCGSSM, its president and EVP Bowman's role as it pertained to those programs previously delegated to the Foundation, as well as the realignment of SCGSSM employees associated with these programs. Furthermore, it provided clarity as to the oversight role of the GSSM Foundation BoT and differentiated its direct/indirect supervision of EVP Bowman and GSSM Foundation operations. ([Appendix C](#))

#### GSSM Foundation Support to SCGSSM

The GSSM Foundation provides financial support to SCGSSM through ongoing fund-raising campaigns and the management of an endowment. By statute (§59-48-70), the General Assembly authorized SCGSSM to establish and maintain an endowment to support the school. This endowment was created through the incorporation of the GSSM Foundation and is maintained by the GSSM Foundation.

As a member of the SCGSSM leadership team, EVP/CEO Bowman is part of the strategic development process for the school, as well as the prioritization of programs in need of financial support from the Foundation. Each year, the school puts forth a financial support request to the Foundation based on anticipated needs in the forthcoming school year which are aligned with its strategic plan and priorities. This request is then presented to the GSSM Foundation BoT for consideration or modification. Approximately half of the financial support provided to SCGSSM is represented by expenditures made by the Foundation on behalf of the school for various programs and activities as opposed to direct transfers of funds to the school. Included in the support is the cost of Foundation employees allocated to the programs and activities.

In an April 2017 report to the GSSM Foundation BoT, EVP/CEO Bowman identified her many accomplishments throughout the 2016-17 fiscal year on behalf of the Foundation and the school. Among those identified were: (a) Government Affairs: presented before the education subcommittees in the House and Senate, and the Ways and Means committee for additional staffing of outreach coordinators; requested human resource staffing increases, admissions software and a new engineering building; hosted legislative breakfast for 42 General Assembly members and staff; (b) fundraising outcomes, to include an alumni and parent campaigns, as well as a satellite camps campaign; and (c) outcomes associated with SCGSSM programs, such as the "accelerate" engineering program, recruiting and admissions programs, as well as SCGSSM staffing oversight.

Consistent with EVP/CEO Bowman's roles and responsibilities to the GSSM Foundation, input was provided by former SCGSSM president Brockman on EVP/CEO Bowman's job performance, in particular as it pertained to the school's outsourced programs to the Foundation.

The working relationship between the school and the Foundation has matured over the years. With the increase in student enrollment to its full capacity of 288

students in grades 11 and 12, the complexity of this relationship has also increased. However, this relationship and intertwined organizational structure has never been memorialized through a Memorandum of Understanding (MOU) or operational agreement which specified the roles and responsibilities, and oversight of each entity, much less its leadership. Consequently, the 2016 change in leadership at SCGSSM exposed the pitfalls in not having this MOU in place. Most recently, the GSSM Foundation has refocused its efforts on priorities and programs not directly related to the strategic plan and priorities of SCGSSM. These have been initiated by EVP/CEO Bowman without the approval and the authority of the SCGSSM's leadership which is contrary to the Foundation's stated purposes.

Your questions are as follows:

1. The appropriateness of SCGSSM employees, who are publicly funded employees, being reassigned to the supervision of employees at a non-profit foundation;
2. The appropriateness of delegating publicly funded programs at the SCGSSM to a non-profit foundation; and
3. The SIG's authority to conduct a review of the GSSM Foundation, a non-profit educational and eleemosynary corporation, based upon its support to the SCGSSM.

#### Law/Analysis

#### Authority of SIG

We will first address your third question, whether the SIG possesses “authority to conduct a review of the GSSM Foundation, a non-profit educational and eleemosynary corporation, based upon its support of the SCGSSM.” We conclude that the SIG possesses such authority.

As you note, the governing statutes for the SIG are found in S.C. Code Ann. §§ 1-6-10 through 1-6-100. Section 1-6-20(B) provides that “[t]he State Inspector General is responsible for investigating and addressing allegations of fraud, waste, abuse, mismanagement, misconduct, violations of State or federal law and wrongdoing in agencies.” (emphasis added). An “agency” is defined by § 1-6-10(1) to mean:

. . . an authority, board, branch, commission, committee, department, division, or other instrumentality of the executive department of state government, including administrative bodies. “Agency” includes a body corporate and politic established as an instrumentality of the State. “Agency” does not include:

- (a) the judicial department of state government;
- (b) quasijudicial bodies of state government;
- (c) the legislative department of state government;
- (d) political subdivisions.

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There is little doubt that the SCGSSM is an “agency” pursuant to this broad definition. As you note, the enabling statutes for the SCGSSM are found at S.C. Code Ann. §§ 59-48-10 et seq. Section 59-48-10 provides:

[t]here is established a special school of science and mathematics for the purpose of fostering educational development of high school juniors and seniors in this State who are academically talented in the areas of science and mathematics and who show promise of exceptional development in these subjects.

(emphasis added). We have noted in an opinion that the Board of Trustees for the Governor’s School of Science and Mathematics is “clearly a ‘governmental body’ as defined in the Procurement Code in that the Procurement Code applies to ‘any state government . . . board. . .’” Op. S.C. Atty. Gen., 1987 WL 342736 (December 1, 1987).

The real question is whether the SIG also possesses the power to investigate the non-profit foundation, GSSM. Section 59-48-70 authorizes the SCGSSM to “establish and maintain an endowment fund for the school.” It is well recognized that

[o]ur courts have long held that an agency created by statute is limited to the authority granted to it by the Legislature. Med. Society of South Carolina v. Med. Univ. of South Carolina, 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999); Nucor Steel, a Div. of Nucor Corp. v. South Carolina Pub. Service Comm’n., 310 S.C. 539, 543, 426 S.E.2d 319, 321-22 (1992). “An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose. Bazzle v. Huff, 319 S.C. 443, 445, 472 S.E.2d 273, 274 (1995).

Op. S.C. Att’y Gen., 2006 WL 1207269 (April 14, 2006). And, in Carolina Water Service, Inc. v. S.C. Pub. Serv. Comm., 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978), the Court quoted with approval Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948), which stated:

[e]ven a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the field which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors, it is not to be doubted that a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. 49 S.E.2d at 567.

In this instance, the SIG possesses, pursuant to § 1-6-10 et seq., the express authority to investigate state agencies of which SCGSSM is one. The SCGSSM is given express power, pursuant to § 59-48-70 to “establish and maintain an endowment fund. . . .” Thus, it must be certainly implied that the SIG’s authority includes the operation of that endowment and whether state and federal laws concerning SCGSSM’s operation and maintenance are being complied

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with. Therefore, in our opinion, the SIG possesses authority to examine the operation of the GSSM Foundation, which has been created by SCGSSM.

### **Unlawful Delegation**

Your other two questions involve the operation of the GSSM Foundation and its interaction with SCGSSM. In one instance, you are concerned with whether “publicly funded” programs at the SCGSSM may be delegated to GSSM, a non-profit corporation. We have addressed the governing law on this issue in previous opinions.

The seminal opinion regarding the authority of an administrative agency or body to delegate certain powers or authority to a private corporation in Op. S.C. Att’y Gen., 1985 WL 166051 (No. 85-81) (August 9, 1985). There, we addressed the authority of the Department of Corrections to operate a privately run prison. We stated:

. . . a private corporation ‘may be employed to carry a law into effect.’ 16 C.J.S., Constitutional Law § 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y. 728, 738 (1933),

While it is true that strictly governmental powers cannot be conferred upon a corporation or individual . . . still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.

While ‘an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties...’ Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5<sup>th</sup> Cir. 1957); see also 73 C.J.S. Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and a private company for the control, management and operation of waterworks plant is valid). This law has been applied to analogous situations such as the administration of hospitals. . . .

[I]n Bolt v. Cobb, 225 S.C. 408, 415, 825 S.E.2d 789 (1954), [our] own Supreme Court upheld a contract between a county and a private entity for the ‘performance of a public, corporate function,’ i.e. medical services in the form of a hospital. . . . [I]n S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982), our Court found a contract between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a corporation for the management of a water plant. Green v. City of Rock Hill, *supra*. See also 16 C.J.S., Constitutional Law, § 137 (a state may validly use a private corporation

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as an agent for the treatment of inebriates). See also Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control of the corporation by virtue of an contractual agreement.

Moreover, in State ex rel. Medlock v. South Carolina State Family Farm Development Auth., 279 S.C. 316, 306 S.E.2d 305 (1983), our Supreme Court dealt with the question of an alleged unlawful delegation “of governmental functions to private persons and institutions.” The Supreme Court explained that any such delegation was not unconstitutional because the Authority maintained control over the private entities:

[u]nder the Act the Authority may delegate the implementation of the loan programs to governmental agencies and financial institutions, but the Authority retains ultimate responsibility for the programs through regulation and contractual agreement with the lenders. A lending institution cannot loan Authority funds to someone not in the prescribed class nor to an unworthy credit risk. All loans must be made at an interest rate sufficient to pay principal and interest on the bonds and the Authority’s administrative costs. The Authority, not the lending institution, must determine that each loan is not otherwise available to the borrower on reasonably equivalent terms. The Authority determines whether and on what terms a loan may be assumed, whether to include a due-on-sale clause and the method of securing the loan. Each loan must comply with all the Authority’s regulations. In short, the Authority maintains final control over the management of its loan programs, while delegating the ministerial duties for which lending institutions possess the necessary organization and experience.

We have held that delegation of administrative and ministerial duties is not unconstitutional. Clarke v. S.C. Public Service Authority, et al., 177 S.C. 427, 181 S.E. 481 (1935); Green et al. v. City of Rock Hill, et al., 149 S.C. 234, 147 S.E. 346 (1929). Since the legislature in this instance delegated only administrative duties, the Act is not violative of Article III, § 1 of the South Carolina Constitution.

279 S.C. at 322, 306 S.E.2d at 609-10.

Thus, the answer to this question, as to any unlawful delegation, will obviously depend upon the facts – i.e. what powers have actually been delegated. This Office is unable to resolve factual issues in an opinion. See e.g. Op. S.C. Att’y Gen., 1999 WL 986738 (September 3, 1999). However, it is clear from the foregoing authorities that an administrative agency may delegate only ministerial or administrative functions and may not delegate the powers which the General Assembly has delegated to it. In short, a private entity may assist the agency, but cannot replace it. Accordingly, “publicly funded programs” may not be delegated by SCGSSM.

### **Supervision of SCGSSM Employees**

Your final question relates to “the appropriateness of SCGSSM employees, who are [publicly] funded employees, being reassigned to the supervision of employees at a non-profit foundation.” This is not appropriate, in our opinion.

It is well known that many state colleges and universities, as well as state agencies, have established foundations for the support of the agency’s mission. We have addressed the authority of a particular agency to create such a foundation in various opinions. See Op. S.C. Att’y Gen., 2014 WL 4787521 (September 21, 2014) (Fifth Circuit Solicitor’s Office, Op. S.C. Att’y Gen., 2004 WL 2451471 (October 22, 2004) (Hunley Commission)); Op. S.C. Att’y Gen., 2006 WL 148723 (January 11, 2006) (Union County); Op. S.C. Att’y Gen., 1997 WL 87934 (January 16, 1997). Each of these Opinions addressed the enabling statute or statutory authority of the agency or political subdivision and determined if that agency possessed the requisite authority to create the foundation or endowment.

In South Carolina, the creation of such foundations has been occurring for many years. Audits have been highly critical over time as to the merging of functions, employees and revenues between the foundation and the agencies. Over thirty years ago, the Legislative Audit Council issued a comprehensive report, entitled “A Review of the Relationship Between State Agencies and Associated Endowments,” (March 2, 1983). There, the Audit Council stated the purpose of its Report as follows:

[d]espite the fact that private endowments are separate from associated agencies, it has been a matter of concern that operations often are not independent. The adequacy of controls has been brought into question, ensuring that legislative intent is not circumvented through resources made available to agencies outside State oversight.

Report at 10. The Report made a number of recommendations including that “State agencies should strictly adhere to statutes and regulations governing their relationship to privately chartered endowments by operating ‘at arm’s length.’” Report at 3. In this regard, the Audit Council identified three major problems in this regard:

- (1) the intermingling of State resources and private endowment funds,
- (2) the diversion of State funds and resources to private endowments,
- and
- (3) the fact that agency personnel serve on endowment boards.

Consistent with the Audit Council Report, we have stated in the past that “this Office has issued previous opinions concluding that public funds may not be issued to private foundations or other such corporations except payment for goods and services unless the agency has specific statutory authority.” Op. S.C. Att’y Gen., 2014 WL 4787521 (September 12, 2014), (citing Ops. Att’y Gen., 2000 WL 1205928 (May 1, 2000); 1993 WL 720111 (May 21, 1993); 1976 WL 23033



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(August 3, 1976); 1973 WL 21052 (August 10, 1973)). In addition, we have commented on your specific question as follows:

[t]he use of agency employees as part of their prescribed duties to assist the Foundation would also be for a valid public purpose presuming the agency maintains sufficient supervision and control over the employees of its agency [citing cases]. . . . The appropriation of public funds to these private entities is, in effect, in effect, an exchange of value which results in the performance by those entities of a public function for the State [citing cases]. . . .

Op. Att’y Gen., Nov. 16, 1983. The same reasoning of the above Opinion would also apply as well to the use of an agency’s employees by a nonprofit corporation for a public purpose. Of course, the agency or agencies in question must at all times maintain adequate supervision and control over such employees in carrying out the assigned tasks and you would want to avoid the situation where the Foundation or nonprofit corporation possesses ultimate control over State employees.

Moreover, in carrying out this proposal, I would advise that you must be careful to insure that all State Personnel regulations and statutes are complied with in full. I would suggest that you may wish to speak with legal counsel at State Personnel in this regard. While I am satisfied that PRT possesses sufficient legal authority to create the nonprofit corporation and agency employees can be used in carrying out the public purpose enumerated above, so long as supervision and control is maintained, the day to day details of carrying out the project would need to be carefully monitored by your own counsel as well as State Personnel officials to insure that all pertinent rules and regulations are complied with. . . .

Op. S.C. Att’y Gen., 1997 WL 87934 (January 16, 1997) (emphasis added). Thus, an agency cannot be placed in the position of Foundation employees supervising the employees of that agency.

### **Conclusion**

Based upon the foregoing authorities, our conclusions are as follows:

1. SIG possesses authority to conduct a review of the GSSM Foundation. The Foundation was created by SCGSSM pursuant to its statutory authority. Thus, the Foundation, created by the agency, which is subject to SIG review, is also subject to investigation and review by the SIG.
2. The SCGSSM may only delegate ministerial or administrative duties to the GSSM Foundation. Even then, such ministerial or administrative delegation is subject to SCGSSM oversight and supervision. Certainly, SCGSSM may not constitutionally

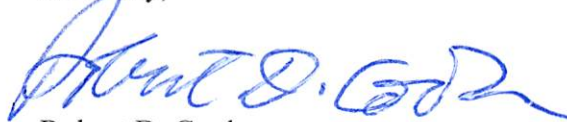
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delegate its legislatively created authority to the Foundation. Thus, “publicly funded programs” may not be delegated to the Foundation.

3. As we stated in our 1997 Opinion, an agency “must at all times maintain adequate supervision and control over [the agency’s employees] in carrying out the assigned tasks and . . . avoid the situation where the Foundation or nonprofit corporation possesses ultimate control over State employees.” We believe it best, as recommended by the Audit Council, for the agency to maintain an “arms length” relationship.

The creation of a non-profit foundation can serve a valuable purpose in assisting an agency in carrying out its mission. However, legal concerns arise when the Agency loses its ability to supervise and control, or when the function of the Agency and the Foundation become blurred. The tail cannot wag the dog. In short, it is the Agency to which the General Assembly has assigned particular functions, not to the Foundation. The Agency cannot allow the Foundation to perform its legislatively assigned powers.

Sincerely,



Robert D. Cook  
Solicitor General