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July 30, 2020

**CONFIDENTIAL**

The Honorable Lowell Siler, Esq.  
Durham County Attorney  
County of Durham  
200 East Main Street, 2nd  
Floor Durham, NC 27701

Re: Complaint Against County Manager Wendell Davis

Dear Mr. Siler:

The Durham County Board of Commissioners (the “Board”) retained me to conduct a review of two matters arising out of allegations made by the County Manager in a February 11, 2020, letter to Commissioner Heidi Carter, including whether the County Manager’s letter violated his ethical or legal obligations as a senior County official. This letter confirms my oral report to the Board at its closed session on July 13, 2020.

The Board specifically asked me to review the following two related matters. First, the Board asked me to investigate the complaint made by County Manager Wendell Davis in his February 11, 2020, letter to Commissioner Carter, alleging that the Commissioner had “demonstrated a consistent pattern of disparate treatment towards [him] and employees of color.” Based on this perception, he expressed concern that the alleged disparate treatment “is due to an inherent bias that [Commissioner Carter] harbor[s] not merely towards [him], but people of color in general.” Mr. Davis emailed his letter to Commissioner Carter on February 14, 2020, and also emailed a copy to Commissioners Howerton, Reckhow, Jacobs, and Hill.<sup>1</sup> Second, the Board asked me to determine if, by sending and/or publicly discussing the letter to Commissioner Carter, Mr. Davis violated the International County/City Managers Association’s (the “ICMA”) Code of Ethics, the Code of Ethics for Appointed and Elected Officials of Durham County (the

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<sup>1</sup> The ICMA closed its investigation on July 1, 2020. Mr. Davis sent a copy of the confidential decision to the Board, “in light of the public nature of the subject ethics investigation by ICMA regarding my violations of the ICMA Code of Ethics, the Committee on Professional Conduct has completed their investigation and opined.” In the ICMA’s decision it noted that, “The CPC understands it was not your intention for it to be made public as evidenced by your sending it to her personal, not public, email address.” The Board Chair noted that, “This is not true. The letter was sent to Commissioner Carter’s county email address. It also was sent to each county commissioner’s email address.” In fact, Mr. Davis accurately informed the ICMA that he had sent the letter to “their personal County email address not their public “Commissioner” address—which all of the key senior leadership on my staff receives.” The ICMA apparently misunderstood what that meant.

“Durham County Code of Ethics”<sup>2</sup>, or N.C.G.S. § 153A-99, a state law based on the federal Hatch Act, 5 U.S.C. § 73323(a)(1). This report summarizes my findings with respect to the second matter.

*Mr. Davis did not violate the ICMA Code of Ethics or N.C.G.S. § 153A-99.*

On February 23, 2020, an anonymous “Durham Resident” sent an email to Board Chair Wendy Jacobs and Vice-Chair James Hill advising that he or she had “filed a complaint regarding violations of the ICMA Code of Ethics [by] Durham County Manager Wendell Davis.” The same anonymous individual subsequently sent the Board Chair and Vice Chair a second email further advising that he or she had “emailed the County Commission, the clerk for the Durham District Attorney, and the Chair of the Durham Board of Elections asking [them] to investigate if Durham County Manager Wendell Davis had violated [N.C.G.S. § 153A-99].” Based on these two emails, the Board decided to launch this inquiry.

a. The ICMA Code of Ethics.

The anonymous email to the Board Chair and Vice-Chair on February 23, 2020, merely informed them that the individual had “filed a complaint regarding violations of the IMCA [sic] Code of Ethics” against the County Manager. Although the ICMA’s handling of an ethics complaint is strictly confidential<sup>3</sup>, the anonymous individual claimed that when he or she “reached the ICMA they were already aware of this significant ethical concern with Durham County’s Manager. ICMA has confirmed receipt of this complaint and has begun an investigation.” Under the ICMA’s policy, that representation was likely false. Nevertheless, the anonymous individual alleged violations of two tenets of the ICMA Code of Ethics: that, “in failing to follow grievance procedures for Durham County, Mr. Davis violated tenets 7 and 12 of the ICMA’s Code of Ethics.” The individual also alleged “[t]here are rumors circulating in the community that Mr. Davis recruited former Commissioners to run for County Commission.”

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<sup>2</sup> The Board did not specifically identify the Durham County Code of Ethics as a standard by which to judge Mr. Davis’ conduct. Instead, it asked if his conduct was “consistent with expected conduct for appointed officials reporting directly to the Durham County Board of Commissioners.” That is not a meaningful standard against which Mr. Davis’ conduct can be measured. The Durham County Code of Ethics, which covers officials such as Mr. Davis and the County Commissioners, however, at most, establishes a standard of conduct that is no more than coterminous with the standard established by the ICMA Code of Ethics for county managers. Thus, because I do not believe Mr. Davis violated the ICMA Code of Ethics (a conclusion that the ICMA also independently reached on July 1, 2020), it is not necessary to consider separately whether his conduct violated the Durham County Code of Ethics. In addition, as County Manager, Mr. Davis is not subject to the Durham County Grievance Policy and consequently was not required to follow the grievance procedures established under that Policy for other County employees.

<sup>3</sup> In response to my inquiry, Jessica Cowles, ICMA Ethics Advisor, advised that the “ICMA does not comment on whether a member’s conduct may be under review or share the outcome of the ethics review unless and until it results in a finding from the ICMA Executive Board that a member has violated the Code and the appropriate sanction is a public one.” As noted, as a result of Mr. Davis’s disclosure of the results of the ICMA’s review of the anonymous complaint, the ICMA “voted to close the case finding your conduct did not violate the ICMA Code of Ethics.”

These are the issues that the Board asked me to review.

I do not believe that Mr. Davis' conduct violated either tenet 7 or tenet 12 of the ICMA Code of Ethics. Tenet 7 requires a manager to "refrain from all political activities which undermine public confidence in professional administrators. Refrain from participation in the election of the employing legislative body." Tenet 12 provides that "Public office is a public trust. A member shall not leverage his or her position for personal gain or benefit." Other than speculation, there is no evidence to support the claim that the February 11, 2020, letter was intended to influence the primary election that was about to begin, in which Commissioner Carter was a candidate. I independently reached the same conclusion as the ICMA that Mr. Davis's letter was primarily to "encourage Ms. Carter to reflect how her [alleged] pattern of statements had impacted [him] with . . . the hope there would be a positive change by sharing [his] candid observations." Several individuals who have known Mr. Davis for many years, including one of his predecessors as County Manager, dismissed the likelihood that his letter was intended to influence the election of County Commissioners. The two former Commissioners whom he allegedly was rumored to have recruited to be candidates for County Commissions in the 2020 Primary election denied that Mr. Davis recruited them.

Although not referenced in the anonymous email to the Chair and Vice-Chair, I believe Mr. Davis's conduct should also be examined under Tenet 3 of the ICMA Code of Ethics. Tenet 3 requires a county manager to "demonstrate by word and action the highest standards of ethical conduct and integrity in all professional, and personal relationships in order that the member may merit trust and respect of the elected and appointed officials, employees, and the public." Indeed, I believe this is the most relevant provision of the ICMA Code of Ethics in this matter. The issue is whether Mr. Davis' decision to send the February 11, 2020, letter to Commissioner Carter, thereby permitting the dispute to become public, and his subsequent public statements about the letter, including a videotaped interview, violated Tenet 3 of the ICMA Code.

My review of decisions made under Tenet 3 of the ICMA Code of Ethics and interviews of experts on the Code, suggest that under normal circumstances Mr. Davis's conduct would have violated Tenet 3. The experts and a former County Manager advised that the standard under Tenet 3 is whether the manager could reasonably expect his conduct to undermine the elected official or the public's trust in the Board. By that standard, it is clear that Mr. Davis knew or should have known that his letter and subsequent public discussion of the allegations made in the letter would have had that impact. Indeed, numerous public comments sent to the Board over the last two months by supporters of both Commissioner Carter and Mr. Davis reflect the significant impact of Mr. Davis's letter on the public. However, the failure of the Board to take action after Commissioner's critical remarks at the Board's February 3, 2020, work session about Mr. Davis' alleged responsibility for the significant delay in presenting a proposal for the Durham County School's Capital Improvement Plan relieved Mr. Davis of his ethical obligation to treat his complaint privately.

Every member of the Board was struck by Commissioner Carter's public rebuke of Mr. Davis at the work session. The reaction ranged from one Commissioner who characterized it as "racist" to another who said, "I just kind of winced when I heard . . . because the truth is, and I told her to her face later, I said, 'Heidi, it wasn't us that held it up. It was the school district; the

district didn't have their act together. The district didn't have a capital plan for us.'" At the end of the Board meeting, Commissioner Hill spoke to Commissioner Carter about what he thought was her unfair criticism of Mr. Davis and subsequently told Mr. Davis that "it was like talking to a brick wall."

At the end of the meeting, Mr. Davis also asked the Chair "to do something to get Commissioner Carter under control." The Chair recalled that Mr. Davis yelled across the room for her "to tell her colleague that she can't talk to me that way." Ms. Jacobs responded, "I don't tell my colleagues how to act, or I don't control my colleagues' behavior or something like that. *Well, you know, I think that was really a trigger for him.*" (Emphasis added). Ms. Jacobs subsequently told Commissioner Carter about this exchange with Mr. Davis. At the Board's April 27, 2020, public meeting, the Chair's public remarks appeared to dismiss the seriousness of Mr. Davis' complaint. "I just wish that we had been able to address this in a different way, I acknowledge that our manager has had his feelings hurt. And I feel sorry I feel very bad about that." But, she added, "I don't believe that Commissioner Carter meant to make any racist statements. I don't think that was her intent. And I'm sorry. . . . I think there are a lot of victims in this situation."

There was nearly a consensus among senior members of the County staff that Commissioner Carter's public rebuke was uncalled for and unfair. One senior member of the staff said she was "shocked and embarrassed."

In light of Commissioner Carter's resistance to criticism of her public remarks and the Chair of the Board disavowing any responsibility to take action, Mr. Davis had a right to complain directly to Commissioner Carter and set out in writing what he perceived to be her bias against him and other employees of color.<sup>4</sup> This was especially true in the absence of any formal procedure for him to complain to the Board.<sup>5</sup> Mr. Davis was not required to pursue a course of action that he reasonably viewed would be futile.

Likewise, I find that Mr. Davis' decision to discuss his complaint with the press, including his video interview with Spectacular Magazine, was warranted under the circumstances. One of the first public reports of Mr. Davis' letter was in INDY Week on February 18, 2020. The article linked to a copy of Mr. Davis' letter and Commissioner Carter's email response. The next day, INDY Week posted a second article under the heading, "After Durham's County Manager Accused a Commissioner of Racism, Several Officials Question His Motives." The article quoted several Durham officials, including Commissioner Carter and School Board Chair Mike Lee. Several of these officials dismissed Mr. Davis' complaint as motivated by politics. Commissioner Carter said, "It's clear that even though this letter is addressed to me, its primary audience was the press." Mr. Lee charged that "Davis was using racism to obscure his real goal: getting his lucrative contract renewed next year."

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<sup>4</sup> I don't suggest that the tone of Mr. Davis' letter was warranted; as I said in my oral report, I don't think it was the most constructive way to respond to what he perceived as the Commissioner's personal attack. Nevertheless, it is relevant that his letter expressed a perception of Commissioner Carter's rebuke that was shared across racial lines by other members of the County staff.

<sup>5</sup> The County's Grievance Policy does not apply to the County Manager.

Mr. Davis initially declined to respond to these attacks. The article quoted him as saying, “At the end of the day, I’ve said what I needed to say in my letter. It’s about being treated with decency.” Nevertheless, the attacks on his motives continued. On February 21, an anonymous person also filed a complaint against Mr. Davis under the ICMA Code of Ethics. The next day, Mr. Davis gave his on-camera interview to Spectacular Magazine. In light of what appeared to be a coordinated public campaign against him, dismissing his complaint and ascribing bad motives to him, it was neither inappropriate nor unethical for him publicly to defend his conduct.

b. N.C.G.S. §153A-99.

N.C.G.S. §153A-99 is a state Hatch Act. Section (c)(2) of the Act prohibits employees from “[u]s[ing] his or her official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for political office” while “on duty or in the workplace.”<sup>6</sup> In a lengthy introduction, the Act states that its purpose is not to infringe upon the First Amendment rights of government employees, but instead to ensure county employees are not subjected to political or partisan coercion while performing their official duties, to allow county employees engage in political activities while off duty, and to prevent the use of public funds for political or partisan activities.<sup>7</sup> None of Mr. Davis’ activities involved the kind of political or partisan conducted prohibited by N.C.G.S. §153A-99.

There is little case law directly associated with this statute. The most relevant statement of law comes from *Montgomery v. Anson County Board of Education*, in which the district court dismissed an employee’s §1983 claim that her First Amendment rights had been violated when she was reprimanded for using the school’s email system to send emails to the Defendants staff requesting that they support her candidacy for political office.<sup>8</sup> The court held it was “clear that Plaintiff was not reprimanded for merely engaging in protected speech; rather, she was reprimanded for using the technology resources of the school district to do so in violation of board policy and state statute.”<sup>9</sup> Other decisions under the Act concern the legality of dismissals

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<sup>6</sup> N.C.G.S. §153A-99.

<sup>7</sup> *See id.* The Statute explicitly states that “It is not the purpose of this section to allow infringement upon the rights of employees to engage in free speech and free association. Every county employee has a civic responsibility to support good government by every available means and in every appropriate manner. Employees shall not be restricted from affiliating with civic organizations of a partisan or political nature, nor shall employees, while off duty, be restricted from attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America.”

<sup>8</sup> *See Montgomery v. Anson Cty. Bd of Ed.*, 2016 WL 6139933.

<sup>9</sup> The court cited NC §153A-99(e) which states that “No employee may use county funds, supplies, or equipment for partisan purposes, or for political purposes except where such political uses are otherwise permitted by law.

of employees for political reasons, none of which is relevant here.<sup>10</sup>

I do not believe that Mr. Davis' actions in writing the February 11, 2020, letter complaining about Commissioner Carter's alleged biased treatment of him and other County employees of color and his subsequent public discussion of the letter violate N.C.G.S. §153A-99. To the contrary, his activities were protected by the First Amendment, and therefore also by the Act. His letter and public discussion of it clearly involved matters of public interest to the citizens of Durham County.

In conclusion, I do not believe that Mr. Davis' conduct in this matter was either unethical or illegal.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. E. Coleman, Jr.", with a long horizontal line extending to the right.

James E. Coleman, Jr.

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<sup>10</sup> See e.g., *Young v. Bailey*, 368 N.C. 665, 669 (N.C. 2016) (holding that a former deputy sheriff who was dismissed for allegedly failing to contribute to a sheriff's re-election campaign was not an employee for the purposes of §153A-99, and thus could not maintain a suit for wrongful termination.) See also *McLaughlin v. Bailey*, 368 N.C. 618 (N.C. 2016) (affirming the lower court's decision to grant summary judgment in favor of defendant, after plaintiff sued under §153A-99 alleging wrongful termination.)