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DEPARTMENT OF JUSTICE
CIVIL DIVISION
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OPINION 22-0027

90-A-I-(a) PUBLIC FUNDS & CONTRACTS - Constitution

Ms. Christina Carroll
Executive Counsel
Civil Service Commission
City of New Orleans
1340 Poydras St., Suite 900
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City of New Orleans
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La. Const. art. VII, §14(A)

The City of New Orleans may institute a retention pay program as long as it has a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the retention pay. We hereby recall La. Atty. Gen. Op. No. 10-0299 to the extent that the opinion concluded that, in general, supplemental salary payments made for purposes of retaining the employment of current public employees is considered an unearned payment or bonus in violation of La. Const. art. VII, § 14(A).

Dear Ms. Carroll and Mayor Cantrell:

The Civil Service Commission for the City of New Orleans (the "Commission"), has requested an opinion from this office concerning the constitutionality of the City of New Orleans' (the "City") proposed retention pay plan under La. Const. art. VII, § 14(A). The Commission also provided our office with memorandum prepared by the city attorney and memorandum prepared by legal counsel for the Police Association of New Orleans ("PANO") regarding the proposed retention pay plan. Subsequently, our office received a request from Mayor Cantrell that also asks whether the proposed retention pay plan violates La. Const. art. VII, §14(A) or any other state laws. Absent a specific legal question under state law, our opinion is limited to an analysis of La. Const. art. VII, § 14(A).

At issue is a proposed retention pay program that includes police officers, juvenile detention counselors, mechanics, and emergency medical technicians and paramedics ("EMS"). Although the retention pay varies according to employee classification, the gist for each is the same. After a set number of years of employment, those qualifying employees who have reached the requisite years of service will be eligible for retention pay in the form of a one-time lump sum payment.

Since this arrangement will result in the use of public funds, it must be analyzed under the Louisiana Constitution (the "Constitution") to determine whether this proposed action

by the City would be considered a *prohibited donation*. Louisiana Constitution Article VII, §14(A) prohibits the donation of public funds, and specifically states that "the funds,

credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."

The Louisiana Supreme Court has held that a *prohibited donation* occurs "when public funds or property are gratuitously alienated."¹ In light of the court's interpretation of this constitutional provision, this office has consistently opined that in order for the use of public funds to be permissible under the Constitution, the public entity must have the legal authority to make the expenditure and must show all of the following:

1. a public purpose of the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue;
2. that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and
3. that the public entity has a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the expenditure or transfer of public funds.²

First, compensating City employees constitutes a public purpose that comports with the City's governmental purpose for which it has the legal authority to pursue.³ Expending public funds for the purpose of recruiting, hiring, and retaining qualified employees in each of the above-mentioned categories (police, juvenile counselors, mechanic, EMS) appears to be a valid public purpose of the City.⁴ Thus, the first prong is satisfied.

Under the second prong of the analysis, the City must show that the retention pay is not gratuitous when taken as a whole. As the Louisiana Supreme Court has pointed out, the term *donation* in the Constitution can be equated to a gratuitous contract under the Civil Code, with an emphasis on the gratuitous intent of the parties.⁵ The Court also focused on the presence of a "counter-performance" and a "reciprocity of obligations" in determining whether a transaction was of a gratuitous, rather than onerous nature.⁶ This office has consistently surmised that where both parties to the arrangement derive some advantage or benefit in return for their performance, it is one of a non-gratuitous nature.⁷

¹ *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, et al.*, 2005-2298 (La. 9/6/06); 938 So.2d 11. ("Cabela's")

² See e.g., La. Atty. Gen. Op. Nos. 16-0198, 10-0299, 10-0171, and 09-0271.

³ See La. Atty. Gen. Op. Nos. 21-0060, 19-0005, 18-0170, 17-0174; citing *Knecht v. Bd. of Trs. for State Colls. & Univs.*, 591 So. 2d 690, 694 (La. 1991)(citing, 1 Litvinoff § 135 at p. 227 (1975).

⁴ See La. Atty. Gen. Op. Nos. 21-0125 and 14-0080.

⁵ *Cabela's*, 938 So.2d at 22; see also La. C.C. arts. 1468 and 1910.

⁶ *Id.*

⁷ La. Atty. Gen. Op. Nos. 21-0125 and 20-0074.

We emphasize, as did the Louisiana Supreme Court, that when analyzing the second prong, the focus is on the intent of the public entity (i.e., the City). As this office has stated in prior opinions (albeit pre-*Cabela's*), "the constitutionality of a particular payment to a public employee is determined by whether the payment is made out of a motive of beneficence solely to enrich the employee or whether the payment is deserved and made as reasonable recompense for valuable performance or service for which the employee is not otherwise adequately compensated."⁸ In other words, the question is whether the City reasonably believes that by providing this retention pay program it will be receiving a benefit that is reasonably commensurate with the amount of pay.

Here, we cannot say that when taken as a whole the proposed retention pay program appears gratuitous. In the City's opinion request to this office dated March 16, 2022, it outlines the various reasons why it believes the proposed retention pay plan is constitutionally permissible. The City first points to a reciprocity of obligations on behalf of the City and its employees. Of course, the obligation on behalf of the City is to make the payment to the employee. The employees, however, will be required to remain employed by the City at least one year prior to receiving any retention pay. Thereafter, police officers would become eligible for retention pay at five, ten, fifteen, and twenty years of service. Thus, this creates an obligation on behalf of the employee.

Both prior opinions from this office and courts have also looked to the timing of the payment to determine whether it was gratuitous.⁹ While retroactive payments to public employees are generally discouraged, "salaries for services rendered but for which no salary was drawn when the services were rendered" may be constitutionally permitted.¹⁰ This analysis requires a "factual determination" which depends on the circumstances in each scenario.¹¹ Nonetheless, as this office has recognized, not all retroactive payments are unconstitutional. In this case, the City contends that the retention pay program will only take affect prospectively. The soonest any employee would receive retention pay is one year from enactment of the policy. Again, police officers would become eligible for additional retention pay at those five-year intervals.

Furthermore, there appears to be a third reason the City considers its proposed retention pay constitutional. The City states that the retention pay will assist in combatting a significantly reduced workforce in these various departments. New Orleans, in fact, is facing a "catastrophic" officer shortfall.¹² This officer shortfall comes as the City has recently seen an extraordinary increase in violent crime, including a year-to-date 24.5% increase in armed robberies, 45.9% increase in carjackings, and a 30.8% increase in

⁸ See La. Atty. Gen. Op. Nos. 99-137, 97-190, and 95-323.

⁹ See La. Atty. Gen. Op. Nos. 21-0125, 20-0074, and 17-0174; see also *State v. Davis*, 539 So.2d 803, 811 (La. App. 3 Cir. 1989); *McElveen v. Callahan*, 309 So.2d 379 (La. App. 3 Cir. 1975); *Varnado v. Hosp. Serv. Dist. No. 1*, 98-0468 (La. App. 1 Cir. 04/01/99); 730 So. 2d 1066, 1068.

¹⁰ *State v. Davis*, 539 So.2d 803, 811 (La. App. 3 Cir. 1989).

¹¹ *Id.*

¹² Perlstein, Mike, *New Orleans police facing 'catastrophic officer shortage'* WWL-TV (July 12, 2021 at 9:03 PM, Updated July 13, 2021 at 7:07 PM), <https://www.wwltv.com/article/news/investigations/mike-perlstein/nopd-facing-catastrophic-staffing-shortage/289-a6547c7e-1c96-493a-b668-745567bca6d9>.

murders.¹³ Thus, there is little doubt a well-trained, experienced police force and EMS are imperative. Some reports indicate that younger people are committing many of these crimes.¹⁴ Hence, well-educated and experienced juvenile detention counselors are also likely needed. As a result, granting retention pay to those employees who have provided, and continue to provide, vital public safety services such as police officers, juvenile counselors, and EMS, does not appear to be gratuitous. Therefore, the second prong is likely met because there is a reciprocity of obligations between the City and its employees, the retention pay takes effect prospectively, and the City is facing an unprecedented shortage of employees.

Finally, the City must also have a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the proposed retention pay. A determination of whether this requirement is satisfied depends on the facts and circumstances surrounding the proposed expenditure. As a general rule, this office refrains from conducting such a fact-intensive analysis and leaves such determinations to the public entity seeking to expend public funds or property. Here, the City has provided our office with the amount of proposed retention pay.¹⁵ This office, however, cannot determine whether such pay is reasonable in relation to the benefit received by the City. Therefore, ultimately the City must make the determination as to whether it has a reasonable expectation that the retention pay is commensurate with the benefit to the City.

Considering the foregoing, it is the opinion of this office that the City of New Orleans may institute a retention pay program as long as it has a demonstrable, objective, and reasonable expectation of receiving something real and substantial in exchange for the retention pay. We hereby recall La. Atty. Gen. Op. No. 10-0299 to the extent that the opinion concluded that, in general, supplemental salary payments made for purposes of retaining the employment of current public employees is considered an unearned payment or bonus in violation of La. Const. art. VII, § 14(A).

¹³ See New Orleans Crime Stats for March 21, 2021 to March 22, 2022 at <https://council.nola.gov/committees/criminal-justice-committee/#crime-dashboard> (last accessed March 21, 2022).

¹⁴ Lentes, Morgan, *Advocates discuss violent crime and young people in New Orleans* WDSU (Feb. 9, 2022), <https://www.wdsu.com/article/advocates-discuss-violent-crime-and-young-people-in-new-orleans/39028082>.

¹⁵ The proposed retention pay includes the following: \$5,000 every five years (5-20) for police officers; \$3,500 for juvenile detention counselors and mechanics; \$1,500 or \$4,500 for EMS, depending on classification.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Best regards,

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BY:



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JL/CPC