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State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
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September 3, 2015
OPINION 15-0050

The Honorable Lee Posey
Mayor
City of Natchitoches
Post Office Box 37
Natchitoches, LA 71458

90-A-1 PUBLIC FUNDS & CONTRACTS
La. Const. art. VII, § 14
La. R.S. 33:2212(F)
La. R.S. 33:1992(A)

A one-time, sign-on employment incentive payment constitutes a donation of public funds prohibited by Article VII, Section 14 of the Louisiana Constitution.

Dear Mayor Posey,

Your request for an Attorney General's Opinion has been assigned to me for research and reply. On behalf of the City of Natchitoches (the "City"), you ask whether the City can provide a one-time, sign-on payment to entry-level police officers and firefighters. You further ask whether, if authorized, the one-time, sign-on payment must be added to the police officer's or firefighter's base pay for purposes of determining wage differentials for higher-ranking firefighters and police officers.

Since the proposed sign-on payment would be paid with public funds, the proposed payment must be viewed in light of Louisiana Constitution art. VII, § 14(A), which states:

Prohibited Uses. Except as otherwise provided by this constitution, 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. Neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.

The Louisiana Supreme Court has determined that this constitutional provision "is violated when public funds or property are gratuitously alienated." *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*, (La. 9/6/06), 938 So. 2d 11, 20 (the "Cabela's" case). This standard places a strong emphasis on the reciprocal obligations between the parties to ensure that public property or funds are not gratuitously alienated.

Our office has interpreted the *Cabela's* case to confirm that in order for an expenditure or transfer of public funds to be permissible under art. VII, § 14(A), the public entity must have the legal authority to make the expenditure and must show:

1. a public purpose for 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 at least equivalent value in exchange for the expenditure or transfer of public funds.

Addressing the first prong of the *Cabela's* test, our office has previously determined that the expenditure of public funds for the recruitment of new police officers qualifies as a public purpose. In La. Atty. Gen. Op. No. 14-0080, we noted that the recruitment of new and additional officers was necessary in order to maintain and strengthen the police department of the City of New Orleans. In that opinion, the City paid a nominal sum to active police officers who were not, by job description, recruiters for the department. However, no payment or fee was being made to the prospective employee in that scenario. Acknowledging that maintaining and strengthening its police department furthered the City's interest in ensuring the safety and welfare of its citizens, we concluded that the use of public funds for recruitment incentive payments served a public purpose that the governmental entity had legal authority to pursue.

Here, the City has a similar interest in ensuring the safety and welfare of its citizens by maintaining and strengthening its police and fire departments. The expenditure of public funds for the recruitment and hiring of new officers in order to further that interest therefore qualifies as a valid public purpose. However, the question presented in your request is whether public funds can be used for a one-time, sign-on payment to the prospective employee and not to a third party. In addition, it does not appear that the sign-on payment would be in return for any additional services from the prospective employee or considered an advance on salary.

Turning our attention to the second and third prongs of the *Cabela's* test, the proposed payment must not appear gratuitous and the public entity must have a demonstrable, objective and reasonable expectation of receiving equivalent value in return for the expenditure of public funds. This office has consistently found that additional compensation beyond that which is owed to a public employee or public official for performance of their normal duties violates Louisiana Constitution art. VII, § 14(A). Absent the performance of additional or unusual duties, payments such as the proposed would appear to be a gratuitous donation of public funds because the public entity would not be receiving anything of equivalent value in return. In order to be legal, additional compensation must be in the form of salary increases for future services or

for additional, unusual or extraordinary duties, rather than extra compensation for services already rendered or not rendered at all. See, e.g. La. Atty. Gen. Op. Nos. 89-0190, 90-0128, 92-0295, 00-0125, 01-0406, 02-0315, 06-0321, 06-0342, 07-0050, 09-0260 and 14-0080.

Our office has also concluded that La. Const. art. VII, § 14 does not prohibit a prospective payment as part of a compensation package for services to be rendered. See La. Atty. Gen. Op. No. 06-0342. In this opinion, we determined that a hospital service district's payment of a sign-on incentive to a physician pursuant to a written contract did not violate the Constitutional prohibition of donations of public assets. We reasoned that the payment there was "a prospective payment for services to be rendered and not a retro-active payment, or prohibited extra payment for past services rendered" *Id.* This office did recommend that "language be added which provides for the return or refund of the payment in the event the terms of the agreement are not fulfilled or in the event the contract is terminated" prior to the prospective services being rendered. *Id.*

This office has also expressed the opinion that "Article VII, § 14 does not prohibit an earned increase in compensation" in the form of a lump sum payment, as long as the payment can be classified as "a salary increase for future services" and not "extra compensation for past services." See La. Atty. Gen. Op. No. 01-0406. Thus, we are of the opinion that certain types of incentive payments to public employees would not violate the Constitution. See, e.g., La. Atty. Gen. Op. Nos. 00-0481 (incentives to encourage employees to retire are "in the nature of a purchase of the value of the employee's continued right to employment" that are not prohibited); 96-0150 (Constitution does not prohibit the payment of a one-time lump-sum salary supplement to teachers and support personnel by a school board from gaining revenues previously dedicated to such purposes, but not received or distributed to some future date). Such earned supplemental compensation, even if in the form of a lump-sum payment, is viewed by this office as a "legislatively created benefit, earned by virtue of the employment itself" if created prior to the work being performed in exchange for the payment. La. Atty. Gen. Op. No. 92-0241.

In La. Atty. Gen. Op. No 90-0128, this office noted previous opinions recognizing the constitutionality of "incentive pay plans which promise additional but reasonable future compensation for future performance by a public employee which is of demonstrable public benefit." We cautioned, however, that:

To meet constitutional muster, an incentive program such as you suggest must be formal, i.e., it must be adopted formally by the school board and must be completely stated in writing. The grounds for additional incentive pay must be objective criteria clearly stated in writing. For instance, an example of an objective criteria for an incentive award would be whether a management recommendation by an employee results in an actual

savings of budgeted public funds. Finally, the program must have effect prospectively only, with regard to future performance by employees only. To give the incentive retroactive effect would be to pay employees unconstitutional bonuses.

La. Atty Gen. Op. No. 90-0128. In La. Atty. Gen. Op. No. 93-0227, we noted that such incentive plans are "widely used" in private enterprises to "stimulate maximum productivity" of employees and confirmed that to meet the constitutional criteria, the plan must be "prospective, quantifiable, and rationally related to the legislative mandate ..." and involve expenditures that are "proportionate to the benefits realized as a result of the incentive program"

Based on the facts you have presented, it appears that the proposed sign-on payment, as described in your request, would not be related to any services to be rendered. The City has not identified a reasonable expectation of receiving a benefit of equivalent value to the sign-on payment and would not require repayment of the incentive if the prospect does not ultimately take apposition with the City. It thus appears that the payment is being made solely to entice a person to seek employment, with no return of services of equal value. We therefore are of the opinion that as explained in your request, the incentive plan would appear to violate the provisions of La. Const. art. VII, § 14.

You have also asked whether, if permitted, the one-time sign-on payment must be included in the firefighter or police officer's base pay for purposes of determining wage differentials for higher-ranking firefighters and police officers. You express concern that including the sign-on payment in the base salary of entry-level police officers and firefighters would require the City to increase the salaries of all other non-entry-level police officers and firefighters. Since we are of the opinion that the sign-on payment is not legally permitted a response to this question is not necessary.

We hope this sufficiently answers your inquiry; however, if we may be of further assistance, please do not hesitate to contact our office.

With best regards,

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By: 
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