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DEPARTMENT OF JUSTICE

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BATON ROUGE

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77 – OFFICERS – Local & Municipal
159 – TAXATION

La. R.S. 33:404
La. R.S. 47:2154

La. R.S. 47:2154(A) is mandatory and no discretion is allowed. No resolution or ordinance is necessary to require a City Clerk/Tax Collector to follow this law. The municipal City Clerk/Tax Collector continues to hold her job until the Harahan City Council approves of her removal upon the Mayor's recommendation. It is permissible for an employer to place their employee on unpaid FMLA leave, even if the employee objects. Without a law to the contrary, the Mayor of Harahan may temporarily assign the duties of the City Clerk/Tax Collector to another City officer or employee. Such an action is under the authority of the Mayor by statute and does not require Council approval.

Tina Miceli
Mayor
City of Harahan
6437 Jefferson Highway
Harahan, LA 70123

Dear Mayor Miceli:

Your opinion request submitted to our office has been assigned to me for research and reply. Your request is based on issues arising in the City of Harahan ("City"), which is governed by the Lawrason Act in La. R.S. 33:321 *et seq.* Your letter indicates that the City's clerk also serves as the City's tax collector, which you refer to as the City Clerk/Tax Collector. Many of your questions are based on the Legislative Auditor's 2015 Investigative Audit, which found that "[a]lthough required by state law, the City did not seize, advertise, and sell properties on which delinquent property taxes were due."¹ Each of your questions will be answered in turn.

1. May a municipal City Clerk/Tax Collector refuse to follow La. R.S. 47:2154(A)?

La. R.S. 47:2154(A) provides, "[t]he tax collector shall seize, advertise, and sell tax sale title to the property or an undivided interest therein upon which delinquent taxes are due, on or before May first of the year following the year in which the taxes were assessed, or as soon thereafter as possible."

La. R.S. 1:3 provides that, "the word 'shall' is mandatory, and the word 'may' is permissive." When laws are mandatory, no discretion is allowed. Thus, the law is clear that the City, through the City Clerk/Tax Collector, must comply with La. R.S. 47:2154(A).

¹ Louisiana Legislative Auditor, City of Harahan Investigative Audit, Letter to City dated September 9, 2015, p.1.
[http://app.lla.state.la.us/PublicReports.nsf/DAC82750C947CEB886257EBB0076ABC6/\\$FILE/0000A57D.pdf](http://app.lla.state.la.us/PublicReports.nsf/DAC82750C947CEB886257EBB0076ABC6/$FILE/0000A57D.pdf).

2. Does a municipal City Clerk/Tax Collector require resolution or an ordinance to carry out La. R.S. 47:2154(A)?

La. R.S. 47:2154 is a state statute, and as noted above, mandatory for City Clerk/Tax Collector to follow. This statute does not require the Council to adopt a resolution or ordinance. However, we note that the City Clerk/Tax Collector must follow out the notice requirements discussed in La. R.S. 47:2153 before he or she could proceed with pursuing any recovery available to the City under La. 47:2154. No resolution or ordinance is necessary to require a City Clerk/Tax Collector to follow this law. However, we note that regulations and policies may be helpful in determining the process for the City's collection of delinquent taxes in the future, and you provide no information as to whether notice of delinquency has been provided to property owners.

3. If the Mayor recommends the City Clerk/Tax Collector be removed from office, but the council votes to keep her, what is the Mayor's recourse?

La. R.S. 33:404(A)(3) states that the, "appointment or removal of a nonelected chief of police, the municipal clerk, the municipal attorney, or any department head shall be subject to approval by the board of aldermen, except that in the case of a tie vote, the recommendation of the mayor shall prevail." Therefore, the board of aldermen (in this case, the Harahan City Council), must approve of the removal of the City Clerk/Tax Collector from office. In accord is La. Atty. Gen. Op. No. 94-385. Therefore, the municipal City Clerk/Tax Collector continues to hold her job unless the Harahan City Council approves of her removal upon the Mayor's recommendation.

4. May the Mayor place the City Clerk/Town Collector on leave under the Family and Medical Leave Act ("FMLA") after learning of the employee's health issues even if the City Clerk/Tax Collector objects?

The FMLA allows eligible employees to take twelve workweeks of leave during any twelve month period for various reasons such as birth of a child or a serious health condition.² According to 29 U.S.C.A. § 2616, it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter," which provides the general requirements for leave under the FMLA. Federal courts have addressed the issue of whether forced leave violates this provision.³ In the Middle District of Louisiana, the court addressed this problem and found that an employee failed to state a cause of action against his employer for the employer forcing him to take FMLA unpaid leave.⁴

² 29 U.S.C.A. § 2612.

³ In *Sista v. CDC Ixis North America Inc.*, 445 F.3d 161, 175 (2nd Cir. 2006), the court held, "[t]he FMLA says nothing about an employer's ability to 'force' an employee to take such leave, and such forced leave, by itself, does not violate any right provided by the FMLA," and it further noted, "[t]he FMLA does not create a right to be free from suspension with or without pay."

⁴ *Moss v. Formosa Plastics Corp.*, 99 F.Supp. 2d 737, 741 (M.D. La. 2000).

Therefore, it is permissible for an employer to place their employee on unpaid FMLA leave, even if the employee objects, as long as the employee has a serious health condition that precludes her from performing an essential job function. Whether an employee meets the conditions authorized for involuntary leave is a factual determination that is inappropriate for our office to address.

However, we note that courts have said the employee could have a cause of action should the employee wish to take FMLA leave in the future and be unable to do so due to their previous forced leave.⁵

5. If the City Clerk/Tax Collector is out on maternity leave, can the Mayor hire someone to perform her duties on an interim basis? Does this action require approval of the Council?

La. R.S. 33:404(A)(1) provides that the Mayor has the authority:

To supervise and direct the administration and operation of all municipal departments, offices, and agencies, other than a police department with an elected chief of police, in conformity with ordinances adopted by the board of aldermen and with applicable provisions of state law; however, no such ordinance may limit the authority granted to the mayor by this Paragraph. All administrative staff shall be subordinate to the mayor.

Furthermore, La. R.S. 33:404(A)(2) provides that the mayor has the duty, "[t]o delegate the performance of administrative duties to such municipal officers or employees as he deems necessary and advisable." Additionally, La. R.S. 33:404(A)(9) provides that the mayor has, "any other power" and may "perform any other duty as may be necessary or proper for the administration of municipal affairs not denied by law." While appointment of the clerk is subject to the approval of the council under La. R.S. 33:404(A)(3), La. R.S. 33:404(A)(2) clearly gives the mayor the authority to assign duties to employees as he deems necessary. The law does not specifically prohibit the assignment of the City Clerk/Tax Collector's duties on a temporary basis while the City Clerk/Tax Collector is on approved leave. While La. R.S. 33:381(B) provides that the "clerk or chief of police may be a tax collector or assessor," it is silent as to the transfer of the City Clerk/Tax Collector's duties while the City Clerk/Tax Collector is temporarily unable to perform their duties due to a temporary absence.

La. R.S. 33:381(B) does not mandate the tax collector be a clerk or chief of police, it simply provides that the clerk or chief of police "may" perform that duty. Our office has supported this position in the past, as we stated, "statutes authorizing the designation of a particular office of a municipality to collect and enforce taxes are permissive rather than mandatory."⁶ We also note that in La. Atty. Gen. Op. No. 93-208, we stated, "a sheriff and a municipality may enter into a cooperative endeavor agreement to provide that the sheriff will collect the municipal property tax." Therefore, the sheriff could

⁵ See *Wyson v. Dow Chemical Co.*, 503 F.3d 441, 449 (6th Cir. 2007).

⁶ La. Atty. Gen. Op. No. 93-208.

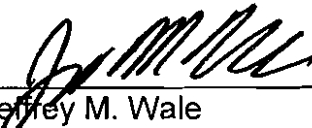
temporarily collect the delinquent taxes while the City Clerk/Tax Collector is on temporary leave.

Without a law to the contrary, the Mayor of Harahan may temporarily assign the duties of the City Clerk/Tax Collector to another City officer or employee. La. R.S. 33:404 clearly allows for the mayor to assign duties to employees as necessary, and the temporary absence of the City Clerk/Tax Collector calls for the City to designate another employee to enact City Clerk/Tax Collector's duties. Such an action is under the authority of the Mayor by statute and does not require Council approval. This action is allowed because maternity leave and FMLA involve a temporary absence, not a permanent absence. We note further that FMLA leave on its own does not create a vacancy in the position of a municipal officer, as "it cannot be said that the office is vacated until such is declared by a court or other authorized official or governing body."⁷

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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ATTORNEY GENERAL

BY: 

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⁷ *Williamson v. Village of Baskin*, (La.App. 2 Cir. 1976), 339 So.2d 474