



*Lynn Fitch*  
**ATTORNEY GENERAL**  
OPINIONS AND POLICY

October 11, 2022

The Honorable Keith Gaskin  
Mayor, City of Columbus  
Post Office Box 1408  
Columbus, Mississippi 39703-1408

Re: Incentive Pay for Municipal Employees

Dear Mayor Gaskin:

The Office of the Attorney General has received your request for an official opinion.

### **Background**

According to your request, the Columbus City Council (the “Council”) has passed a resolution recommending incentive payments for future performance to municipal employees under the American Rescue Plan Act’s State and Local Fiscal Recovery Funds. The payments have not yet been made but are scheduled to be made in the future. You ask our office to review the resolution passed by the Council.

### **Question Presented**

Are incentive payments to municipal employees using American Rescue Plan Act’s State and Local Fiscal Recovery Funds legal?

### **Brief Response**

When incentive pay for future performance is contracted for prior to the date when services are to be performed, determined in accordance with objective standards of measurement, and earned by personal services performed by the employees, then the city is authorized to make such payments.

### **Applicable Law and Discussion**

Opinions of this office may not interpret ordinances or resolutions of a municipality. Therefore, to the extent your request asks this office to review and interpret the resolution regarding incentive pay, we must decline to respond with an official opinion. *See* MS AG Op., *Banks* at \*1 (May 11, 2018); MS AG Op., *Tullos* at \*1 (Aug. 27, 2018) (“[O]ur office cannot interpret municipal

ordinances by official opinion, and this is especially true with regard to proposed ordinances.”); MS AG Op., *Turnage* at \*2 (July 1, 2011) (declining to interpret and opine on the wording of the city’s bond resolution). Further, this office is not authorized to interpret or opine on federal laws or regulations by official opinion. Therefore, we decline to respond by way of an official opinion regarding the legality of using federal funds in a specific manner and limit this opinion to the authority of a municipality to grant incentive pay in general.

Regarding incentive pay, Sections 66 and 96 of Article IV of the Mississippi Constitution prohibit a public entity from paying employees extra compensation for past services because it would constitute an unlawful donation. MS AG Op., *Eleuteris* at \*1 (Nov. 1, 2013). Payments in the form of bonuses are prohibited for this reason. *Id.* Employee incentive payments, however, that “are implemented prospectively and for which payment is made pursuant to conditions met in the future do not run afoul of [the] constitutional provisions.” MS AG Op., *Campbell* at \*1 (Apr. 12, 2010). Therefore, in order for the city to implement employee incentive pay, it must be “(1) contracted for between the parties or with the employee prior to the date when services are to be performed; (2) determined in accordance with objective standards of measurement; and (3) earned by personal services performed by the employees.” MS AG Op., *Chiles* at \*1 (Nov. 10, 2020). Whether the proposed ordinance meets these requirements is a determination that must be made by the Council. You may also wish to consult with the Mississippi Office of the State Auditor to determine whether American Rescue Plan Act’s State and Local Fiscal Recovery Funds may be used for the proposed incentive payments.

Additionally, while performance-based incentive pay for municipal employees may be authorized when the above-cited conditions are met, such payments are excluded from “earned compensation” as defined by Section 25-11-103(k) of the Mississippi Code and may not be reported to the state’s Public Employees’ Retirement System (PERS) for purposes of retirement. *Chiles* at \*2.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ *Misty Monroe*

Misty Monroe  
Assistant Attorney General