

## **Audubon Commission/Audubon Nature Institute Response**

### **Office of the Inspector General Payroll Audit**

#### **I. Executive Summary**

Well over five years ago, Audubon participated in three audits by the Office of the Inspector General (“OIG”) and fully cooperated with all requests for information and documents, understanding the importance of complete transparency and accountability to the public.

The third audit entitled “Payroll” Audit pertains to Audubon’s payroll practices from over eight years ago-- 2012-2014. In the Payroll Audit, the OIG did not find a single instance of fraud, abuse, or impropriety in Audubon’s operations. In fact, the OIG highlighted in the report that Audubon has adequate controls in place that were designed properly and are implemented effectively.

Audubon has reviewed the OIG’s findings and observations with respect to payroll. While we are always open to feedback for improvement, Audubon strongly disagrees with the subjective and inflammatory opinions provided by the OIG regarding executive compensation and observes that several of the findings related to procedures in place over eight years ago have been resolved.

It is noteworthy that significant portions of this third audit repeat conclusions reached in the first and second audits, raising the important issue of whether these audits could have been completed as one, saving significant time and resources for both Audubon and the OIG.

With respect to the OIG’s repetitive legal opinion that the contract governing the partnership between the Audubon Commission (“Commission”) and the Audubon Nature Institute (“Nature Institute”) (collectively, “Audubon”) *may* not comply with the Louisiana Constitution, we again disagree. The Cooperative Endeavor Agreement (“CEA”) governing the respective obligations of the parties is fully compliant with the Louisiana Constitution and the independent authority granted to the Commission by Louisiana State Act 191 of 1914. Moreover, the CEA complies with all applicable local and state law.

We have reviewed and considered the operational findings presented by the OIG and have already started the process of evaluating alternatives such as implementing a revised means of segregating funds generated by the Nature Institute. We are also reviewing the CEA to determine if additional best practices can be implemented.

While Audubon has fully cooperated with the OIG for the last five years and welcomes opportunities to improve, the audits unfortunately come at a time when Audubon has incredibly pressing matters to address and very limited resources. Audubon is projecting revenue losses of over \$20 million for 2020 and an operating deficit of over \$15 million. Audubon has laid off over 75% of its staff and is engaging in essential operations only at this time including the care and feeding of thousands of animals whose significant needs continue during the pandemic. As we

have expressed at every meeting with the Office of the Inspector General, Audubon is always open to ways in which it can improve and will consider the OIG's observations accordingly.

## **I. OIG Constitutional Position**

Audubon continues to raise that the OIG has misapplied La. Const. art. VII § 14(A) and its relationship to the *Cabelas'* case. The OIG cites La. Const. art VII § 14(A) for the proposition that the Agreement between the Audubon Commission and the Audubon Nature Institute is a gratuitous donation from the public agency to the nonprofit when the Agreement in fact says just the opposite. If the Agreement did not provide for strict obligations on the part of the Audubon Nature Institute, there may be some validity to a donation. But just the opposite is true. The agreement is onerous and requires a fulfillment of obligations and cannot be interpreted as a donation.

The Constitution prohibits "...donations...". If there is no donation there is no violation of the Constitution. The term donation, as used in La. Const. art. VII, § 14(A), is plain and unambiguous. The generally understood meaning of a donation is an act whereby one gratuitously gives something to another. The term donation contemplates giving something away. The constitutional provision at issue seeks to prohibit a gratuitous alienation of public property.

In the *Cabelas'* case the Court was faced with a factual interpretation of public financing of private improvements to determine if La. Const. art VII § 14(A) was violated. But the facts of that case are unrelated to the issues presented here. The OIG fails to understand the sequencing in the analysis of a potential Constitutional violation. The first test is was there a "**donation**". If no donation the analysis stops. If there is a donation then the issue can then be determined under the exculpatory Section C of that article which permits Cooperative Endeavor Agreements. The generally understood meaning of the term donation correlates with gratuitous donations as defined by the Civil Code, and the constitution's use of the term envisions a gratuitous intent. There is no gratuitous intent by the Commission—in fact the Commission's intent is for the Nature Institute to manage and operate all aspects of all ten of its facilities.

The OIG also fails to recognize the independent nature of the Audubon Commission as provided by its originating legislation, Act 191 of 1914. The original legislation created an independent agency outside of the day to day structure of the City of New Orleans. The current City Charter perpetuated that status when it stated that the Commission was "continued in existence... with the same powers, duties, and functions enjoyed by the Commission previously. It specifically mentioned as provided in "State" law which was Act 191 of 1914. See Section 5-801 and particularly Section 5-803 which provided only limited structuring of the Commission as a part of the City. By providing limited obligations of the Commission it excluded it a department of the City subject to other obligations within the Charter.

Further the OIG completely ignores the authority granted to the Audubon Commission to enter into the very contract which the OIG says is unconstitutional. The Agreement absolutely complies with the publicly adopted Ordinance which provides the Nature Institute authority to operate the Audubon facilities. The agreement does exactly that.

## **II. Executive Compensation**

### **Finding 1:**

The Institute *may* have violated the Louisiana Constitution because it used Commission funds to pay \$447,695 in bonuses and on-call pay to employees.

### **Response:**

In order for this finding to have any validity one must assume that the payments by the Commission of these bonuses are a gratuitous donation and as such violate La. Const. art VII § 14(A) which they do not. Finding 1 addresses payroll expenses incurred for performance bonuses paid to Audubon Nature Institute employees. The over 900 (pre-Covid-19) full and part-time dedicated employees who steward Commission property, care for endangered and threatened animals, and manage and operate Commission facilities are Audubon Nature Institute employees, not public employees. Audubon notes that 604 Audubon employees received the performance bonus, and no executive received a performance bonus.

Audubon has reviewed this operational finding and has already started the process of evaluating alternatives for bonus structures and will be implementing a revised means of segregating funds generated by the Nature Institute for Nature Institute employee-related operational expenses, including establishing a separate bank account for such expenditures, rather than a separate accounting code. ***This finding is being resolved.***

Audubon has updated its on-call pay policies since the OIG audit and we are identifying supporting documentation at this time. As the OIG is aware, in response to the COVID-19 global pandemic and the devastating economic impact on Audubon, we have had to lay off or furlough over 500 employees. Remaining employees are performing all essential functions of the organization and priorities remain sustaining the viability of Audubon and the public facilities it supports. Audubon has already started the process of implementing a revised means of segregating funds generated by the Nature Institute for Nature Institute employee-related operational expenses, including on-call pay for those employees required to be on-call for emergency purposes. We will provide the OIG with additional information as it becomes available. ***This finding is being resolved.***

## **Finding 2:**

The Institute's executive compensation *may* have violated La. Const. art VII § 14(A) because compensation was not comparable to other similar sized organizations and, therefore, *may* have been gratuitous in nature.

### **Response:**

***There is no dispute that the Audubon Nature Institute implemented a policy for evaluating and setting executive compensation and followed that policy. There is also no evidence that Audubon's executive compensation isn't completely earned, and therefore, not gratuitous.***

First, this finding falls well outside the jurisdiction of the OIG. It is highly questionable that the OIG is using public funds and resources to make recommendations to a private non-profit board on alleged best practices. The OIG's ***opinion*** (not fact based on evidence or legal requirement) regarding executive compensation carries no weight and serves no purpose other than to sensationalize the issue of executive compensation at Audubon. Somehow the OIG unilaterally determines the standards for executive compensation while ignoring the expertise of those board members who participated in the process. The OIG seems to ignore the longevity and success of the executive team and the competitiveness of the marketplace.

Further, the OIG has acknowledged that Audubon has a written policy on executive compensation and has found ***no instance*** where this policy was not followed. As such, it appears that although the OIG acknowledges that the Nature Institute Board followed its policy on executive compensation and conducted a complete comparative analysis to peer organization on which to base executive compensation—the OIG simply doesn't like it.

The Audubon Nature Institute maintains a robust policy on Executive Compensation and has fully complied with that policy. The compensation packages of the Chief Executive Officer and the Executive Vice President were determined by guidance provided by the IRS and nonprofit best practices, which sets forth a process for evaluating the total compensation packages of executives by obtaining valid comparable market data for comparable positions in for-profit and tax-exempt organizations and then reviewing individuals and market data and documenting a decision on a presumption of reasonable compensation.

The Compensation Committee of the Audubon Nature Institute considered:

- Comparison of leading zoos and aquariums executive compensation from comparable positions in peer market groups
- Independent consultant studies that concentrate on comparable Zoo and Zoological Societies with an emphasis on wildlife preservation and protection
- Independent consultant studies on non-zoological organizations that have a significant impact on their city's culture and economy
- Independent consultant studies on peer group comparable metrics such as number of employees, revenue, budget and assets

- Association of Zoos and Aquariums Compensation studies
- Review of Charity Navigator's nonprofit Executive Compensation Comparison

After a thorough review of comparable market data, the Compensation Committee recommended an executive compensation package to the Audubon Nature Institute Board's Executive Committee who approved a personal services agreement with the executives. This process is fully reflected in minutes of the Compensation Committee and the Executive Committee. This personal services agreement also sets forth the expectations and duties of the executives.

The Compensation Committee of the Board of the Audubon Nature Institute performs the necessary work to review and set salaries of executive leadership. Over the last four decades, the Compensation Committee has conducted thorough and professional analyses to set executive compensation packages.

**It is imperative to recognize that the Audubon Nature Institute Board is not limited to considering peer comparable data in setting compensation.** It is incumbent upon the Board to also consider intangible criteria to ensure that the organization is attracting and retaining the best talent to lead.

In setting executive compensation, the Nature Institute Board through its Compensation Committee and Executive Committee considered:

- Overall performance
- Length of service
- Experience in Zoo/Aquarium/Park management and operation of ten (10) separate facilities
- Substantial development and fundraising experience and successes
- Competition in the market
- Experience and success in securing state and federal capital funding
- Experience and success in securing conservation partnerships with other zoos and aquariums
- Incentive to continued employment with Audubon
- Leadership in the community and professional organizations including the Association of Zoos and Aquariums

Paramount to its consideration was the performance of Audubon's Chief Executive Officer. In setting compensation, the Board considered the overall success of the organization, due to the leadership of Ron Forman whose accomplishments include:

1. Transformed one of the worst zoos in the country into the 6<sup>th</sup> Best Zoo in the country, according to USA Today
2. Installed professional management to build a collection of museums dedicated to nature that millions of people have enjoyed, including some of the most underserved communities in our region

3. Opened the view of the Mississippi River to the New Orleans community and visitors in 1990 with the Aquarium of the Americas, the 3<sup>rd</sup> Best Aquarium in the country according to USA Today
4. Built the first national Insectarium in the United States, exposing the ecology of bugs to children around the world
5. Built the first center in the country that combines saving species with the breeding of endangered animals at the Audubon Species Survival Center and Audubon Center for the Research of Endangered Species. Having taken an old military outpost on the Westbank of New Orleans, this land now houses an historic partnership between the Audubon Nature Institute and the San Diego Zoo and Wild Animal Park
6. Rebuilt and reopened the Louisiana Nature Center in New Orleans East to its wilderness glory, incorporating trails next to the planetarium and newly designed main campus.
7. Established Woldenberg Park next to the French Quarter, a riverfront park enjoyed by millions of residents and visitors every year
8. Reignited Audubon Park through an extensive oak tree conservation and planting program, as well as on the Audubon Park batture, where thousands of children now play organized team sports, including special needs children at Miracle Field.
9. Managed capital projects for Audubon facilities on time and on budget, recruited top critical staff and Board positions, and raised millions of dollars to support all Audubon facilities
10. Served as President of the Association of Zoos and Aquariums, and on the Boards of the American Association of Museums, Chimp Haven and the Urban Conservancy. Civic work includes Chairman of the following: New Orleans Convention & Visitors Bureau, New Orleans Marketing Committee, Louisiana State Museum, New Orleans Chamber of Commerce, and the Louisiana Stadium Exposition District and on the Boards of the following: The Urban League of Greater New Orleans, New Orleans Jazz Orchestra, Tulane President's Council and New Orleans Business Council. He has received Woodrow Wilson Award for Excellence and was named New Orleanian of the Decade by New Orleans Magazine.

**The OIG's characterization that the compensation "may have violated the Constitution" is both untrue, and reckless.**

Additionally, the statement by the OIG that the executive compensation *may* violate "best practices" is misplaced. Criteria chosen only by the OIG is not a best practice standard. It is only a best practice in the mind of the OIG and not in this instance.

The opinion of the staff of the OIG does not and cannot replace the review and judgment of the non-profit board assigned to setting executive compensation. ***This finding is not based on any objective evidence and should be removed.***

### **Finding 3:**

Although the executives' compensation was paid in accordance with terms of employment contracts, the executives' fringe benefit payments *may* have violated La. Const. art. VII, § 14(A) because no additional performance or duties were required of the executives to receive the additional compensation.

### **Response:**

As was the case with respect to Finding No. 2, the conclusion regarding fringe benefits reflects the OIG's troubling eagerness to opine, without any statutory or jurisprudential support, that Audubon's conduct "*may*" violate the state constitution, while nonetheless leaving open the clear possibility that it equally "**may not.**"

Finding No. 3 exemplifies the OIG's willingness to use public funds to guess at issues of constitutionality at the expense of its auditee. Once again, the OIG does not cite one legal opinion for its wholly subjective determination that fringe benefits included in an executive compensation contract may violate the Constitution. Even worse, this finding ignores the express terms of the contract, which plainly sets forth the duties of the Chief Executive Officer in exchange for ***all compensation.***

Section II of the Agreement for Personal Services states clearly:

The Institute Agrees to: Pay the said L. Ronald Forman the agreed upon sum, detailed below in Section IV, ***as consideration for his performance of all the conditions of the contract.*** (emphasis added)

Section III states that the Chief Executive Officer agrees to:

Administer and operate the Audubon Park, Audubon Zoo, Audubon Aquarium of the Americas, Woldenberg Riverfront Park, Freeport McMoran Audubon Species Survival Center, Entergy IMAX Theatre, Audubon Louisiana Nature Center, Audubon Center for Research of Endangered Species, Audubon Wilderness Park, Audubon Insectarium and other facilities subject to the guidelines and policies established by the Audubon Commission and the Audubon Nature Institute, coordinate....facilities' operations, prepare and administer budgets and carry out liaison with governing authorities, coordinate architects, engineers, landscape architects, and consultants in building programs. The position demand total administrative responsibility for all personnel and development and carrying out of long-term planning recommendations.

Examples of the work shall include but not be limited to:

- The President-Chief Executive Officer shall be the Institute's chief executive officer and shall be responsible for executing the policies and projects of the Institute;
- The President-Chief Executive Officer shall have control over all personnel matters of the Institute;

- The President-Chief Executive Officer shall conduct all negotiations on behalf of the Institute;
- The President-Chief Executive Officer shall administer all fundraising efforts of the Institute;
- The President-Chief Executive Officer shall execute all contracts and agreements on behalf of the Institute.

The Agreement for Personal Services also lists all the skills and abilities required of the Chief Executive Officer.

Section IV *in its entirety* lists the compensation to be paid to the Chief Executive Officer. The description of the compensation makes clear that it is intended to afford the executive the opportunity to purchase life insurance on his own and pay for insurance premiums, which is not provided for by Audubon. The OIG contends that “no additional duties” were required to receive the “additional compensation.” No additional duties were required because the compensation was not “additional”—it was the full agreed upon compensation.

Simply because one element of compensation is described as “fringe” does not in any way change that it is part of the executive’s total compensation being paid in return for full performance by the executive. The OIG’s finding not only ignores the express contract language, it also ignores language from the Louisiana Legislative Auditor which states that compensation includes **everything** an employee or officer receives to compensate him or her for their work, including related benefits such as premiums for insurance and contributions to retirement.

The executives at Audubon were required, by contract, to perform all of the duties set forth in the professional services contracts in exchange for their total compensation. The OIG has not provided any evidence that the executives failed to perform the obligations set forth in the employment agreement. As such, the total compensation was earned and is, in fact, ***the opposite of gratuitous***.

While Audubon completely disagrees with any characterization of executive compensation as gratuitous, it is certainly worth noting that the agreement in question was for 2011—nine years ago. The current agreement for personal services between the Institute and the CEO does not contain the language referenced by the OIG.

***This finding ignores plain language in the employment contracts and violates the obligation of the OIG to consider objective evidence and should be removed. If not removed, the OIG should acknowledge that this finding has been resolved.***

### III. New Hire Process

**Positive Finding 1**—The Institute developed and adopted a new hire policy that complied with COSO’s best practices. The Institute’s internal controls over new hire processing were designed properly and implemented and operating effectively.

Response:



We are pleased that the OIG recognized that Audubon developed and adopted policies governing new hires and those policies complied with best practices.

#### **IV. Payroll Processing**

##### **Finding 4:**

Although the Institute developed a policy aligned with best practices, the Institute did not comply with the policy because hourly employees did not utilize the time reporting procedures; PTO information for salaried employees was not maintained; and Institute supervisors did not approve hourly and/or salaried employees' time.

##### **Response:**

Nonexempt employees' timesheets are now reviewed online by supervisors for completeness and accuracy. Supervisors approve exempt employees' timesheets. Exempt employee timesheet exceptions, e.g., PTO, Leave Without Pay and Jury Duty are approved. Prior to finalizing the bi-weekly payroll, the Payroll Administrator reviews all timesheets for completeness and reasonableness. We will continue to adhere to our policies on time approval and remind supervisors of their obligations.

PTO requests are no longer processed through paper forms. All PTO requests and approvals are now handled online through ADP Workforce Now.

The OIG Payroll Audit pertains to audit years 2012-2014. Several years ago, Audubon replaced the full hand bio-recognition scanners with biometric single fingerprint time clocks. The new clocks are more reliable and less prone to clock in/out issues. On occasion, hourly employees may have had issues with clocking in/out on the full hand bio-recognition scanners, however, all hours worked would have been verified and updated in ADP by the supervisors. ***This finding has been resolved.***

#### **V. Termination Process**

**Positive Finding 2**—The Institute developed and adopted a termination policy compliant with best practices. The Institute's internal controls over the termination process were designed properly and implemented and operating effectively.

##### **Response:**

We are pleased that the OIG recognized that Audubon properly adhered to its termination policies.

### **Finding 5:**

Despite effective internal controls over the termination process, the Institute management could not verify all property was returned upon termination and prior to issuing each employees' final paycheck.

### **Response:**

Audubon has maintained an asset policy since 2008. Audubon has used Sage Fixed Asset system to track all capitalized assets since 2010. Audubon barcodes and tags all movable assets over \$10,000 and we inventory annually. This also includes laptops and tablets and all assets regardless of value purchased with federal funds. Audubon also maintains an offboarding policy that ensures all protocols are followed upon termination of an employee.

It is also notable that the OIG already issued a finding that concluded:

Auditors randomly selected 40 employees terminated during calendar year 2014 for testing and noted:

- Payroll Status Change Forms were completed by the supervisor, approved by the departmental Vice President, Human Resources, and COS and included in the personnel file.
- Human Resources changed the employee status from "active" to "terminated" in ADP for all employees tested, and terminated employees did not receive payments for unused PTO.
- The Institute removed computer access for all terminated employees to ensure that terminated employees were unable to access company sensitive programs.

***This finding has been resolved.***