
From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Tuesday, June 4, 2019 11:39 AM
To: Rhode, Lynne C. (City of Jacksonville)
Subject: CONFIDENTIAL ATTORNEY WORK PRODUCT
Attachments: Memorandum.docx; Memorandum.pdf

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Lynne,

As discussed here is the rough draft for us to start with. I look forward to speaking with you tomorrow morning. I have attached it both in word and pdf, just in case it helps.

Kort

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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Lynne Rhode, Vice President & Chief Legal Officer, JEA
FROM: Kort Parde
RE: Compensation Plans
DATE: June 4, 2019

ISSUE:

You have asked whether JEA may create or establish a long-term employee incentive program to pay a bonus or additional amounts to the employees of JEA over a period of years.

ANSWER:

Yes, JEA is authorized to adopt bonuses or incentive programs so long as the program complies with the requirements of Section 215.425, Florida Statute, wherein the bonus or incentive program would be part of an adopted JEA policy, of which the bonus or incentive is based upon an employee's work performance, which notifies all employee of the policy prior its initiation, and which is available to all JEA employees. To do so would require JEA to develop and adopt a policy. Further, JEA would have to engage in collective bargaining with its five bargaining units given that such a policy would impact wages, a mandatory subject of bargaining. It would also be recommended that JEA consider proposing an Advisory for inclusion into the City's Civil Service and Personnel Rules and Regulations.

ANALYSIS:

Whether or not JEA may adopt a bonus or long term incentive program involves a review and analysis of Florida law. Beyond Florida statutes, JEA is subject to the City of

Jacksonville Charter, its Ordinances, and its Civil Service and Personnel Rules and Regulations. Additionally most JEA employees belong to certified bargaining units, and JEA is subject to the contractual obligations of five collective bargaining agreements.

FLORIDA STATUTES

“Section 215.425, Florida Statutes, has long prohibited state and local governments from using public funds to pay additional compensation for work that has already been performed and for an agreed-upon wage.” Fla. AGO 2016-14 citing Fla. AGO 97-21 (where it was held that Section 215.425 “is intended to carry out a basic and fundamental principle that public funds may be used only for a public purpose and it is contrary to this policy to use public funds to give extra compensation for work which has already been performed for an *agreed upon wage*.”)

While Section 215.425, Florida Statute, generally prohibits units of government¹ from providing “extra compensation”, government employers may award officers, agents and employees incentives, bonuses and severance payments without running afoul of the general prohibition. Not only does Section 215.425, Florida Statute, contain safe harbor provisions for government employers to provide bonuses² and severance payments³, various Florida statutes explicitly permit ‘extra compensation for work which has already been performed for an *agreed upon wage*.’ For example, under Section 1012.02, Florida Statute, the Legislature has created the Florida Best and Brightest Teacher Scholarship Program, awarding classroom teachers who have demonstrated a high level of academic achievement. In the law enforcement context, Section 943.22, Florida Statutes, provides a “salary incentive program for full-time officers.” Generally, the statute provides for “a basic salary incentive shall be paid to any law enforcement officer” on a monthly basis for education an officer has received. §943.22(2), Fla. Stat. Of note, and interest to our matter, is the restriction within Section 943.22 in subsection (4):

No individual filling a position in the Senior Management Service as defined in s. 110.402 is eligible to participate in the salary incentive program authorized by this section.

§943.22(4), Fla. Stat.

¹ “The Seminole County Port Authority, a dependent special district, a ‘body politic and corporate,’ created to operate the Port of Sanford. The port authority is empowered to serve as a local governmental body within the meaning of Section 10(c) of Article VII of the State Constitution or as a local agency under part II of Chapter 159, Florida Statutes.” As such, “The Seminole County Port Authority, a dependent special district, is a ‘unit of government’ for purposes of section 215.425, Florida Statutes, and employment contracts entered into by the authority after July 1, 2011, would be subject to the restrictions on severance pay contained therein.” Fla. AGO 2013-09.

² See Section 215.425(2) and (3), Fla. Stat.

³ See Section 215.425(4), Fla. Stat.

Additionally, the general prohibition in Section 215.425 is limited further by the Florida Attorney General's interpretation of "extra compensation". With respect to teachers, the Florida Attorney General has held "that 'professional leave' and 'extended professional leave' with compensation are not extra compensation prohibited by section 215.425, Florida Statutes". Fla. AGO 97-21

Section 215.425, Florida Statute, safe harbor provisions for bonuses and severance payments provide JEA a means by which to institute a long term incentive program for its employees. Section 215.425(2), Florida Statute, permits JEA to provide "bonus or severance pay that is paid wholly from nontax revenues and nonstate-appropriated funds, the payment and receipt of which does not otherwise violate part III of chapter 112", of the Florida Statutes. §215.425(2)(a), Fla. Stat. Subsection 3 provides the means by which JEA may legally institute such an incentive program.

Any policy, ordinance, rule, or resolution designed to implement a bonus scheme must:

- (a) Base the award of a bonus on work performance;
- (b) Describe the performance standards and evaluation process by which a bonus will be awarded;
- (c) Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
- (d) Consider all employees for the bonus.

§215.425(3), Fla. Stat.

The Florida Attorney General succinctly stated the issue in Florida AGO 2000-48 where it stated

The payment of bonuses to existing employees for services they have already performed and have been compensated for would violated section 215.425, Florida Statutes, unless there is a preexisting employment contract making such bonuses a part of their salary or the city council has adopted a lump-sum bonus payment program to reward outstanding employee whose performance exceeds standards, provided the bonus payment is not included in the employee's regular base rate of pay or carried forward in subsequent years.

...

[T]he allowed "extra compensation" referred to in section 215.425 is limited to bonus payments that may not be included in the employee's base pay or be carried forward in subsequent years. With the adoption of these exemptions to section 215.425, Florida Statutes, however, the Legislature has recognized such employee bonuses as an innovation that serves the public interest.

Fla AGO 2000-48.

The only concern for JEA would be the issue with respect to how to individually measure each employee's work performance, because the statutory language would not permit a bonus based upon JEA's overall financial improvement. The program would have to be structured accordingly.

CITY CHARTER AND ORDINANCES

With respect to the City's Charter and Ordinances, Chapter 116 of the City's Ordinances "Employees and Employee Benefits" expressly authorizes JEA to create employee incentive programs. Of note in our context are Sections 116.1005, 116.1101 and 116.1102, provided below. While none of these sections explicitly anticipate the type of long term incentive program JEA is exploring to implement, not only do the Ordinances not pose a barrier to JEA's implementation of a bonus or incentive program, they are included in this Memorandum to demonstrate that such a program's properness as related to the City's policies.

Section 116.1005. - Employee Suggestion Program for employees of the JEA.

JEA is authorized to adopt and implement a program of meritorious awards to employees of the JEA who propose procedures or ideas which are adopted and which will result in eliminating or reducing the JEA's expenditures or improving the JEA's operations. This Employee Suggestion Program of the JEA may also recognize and make awards to employees of the JEA who, by their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in the operations of the JEA.

(Ord. 90-319-114, § 1)

Section 116.1101. - Incentive programs.

Public officer and employee incentive programs, solely for the purpose of encouraging excellence in public service and specifically not for the purposes of ordinary recreation or entertainment, are hereby authorized in accordance with the following:

- (a) Such programs may include recognition of performance or achievement in the form of cash, plaques, trophies, clothing, food and nonalcoholic beverage, and other forms of tangible personal property.
- (b) Such programs shall be in accordance with applicable pay plan or collective bargaining agreement, or both; and
- (c) Such programs shall be subject to prior approval of (1) the applicable department or agency head and (2) the Mayor or, as to the Council and its staff, the Council President.

(Ord. 92-1649-1436, § 1; Ord. 95-279-205, § 1; Ord. 97-970-E, § 1)

Section 116.1102 – Retreat programs

Public officer and employee retreat programs are hereby authorized in accordance with the following:

- (a) Such programs shall be for the purpose of employee orientation, education, training, motivation and staff or group development and may include food and beverage as a part thereof;
- (b) Such programs shall be in accordance with applicable pay plan or collective bargaining agreement, or both; and
- (c) Such programs shall be subject to prior approval of (1) the applicable department or agency head and (2) the Mayor or, as to the Council and its staff, the Council President.

(Ord. 92-1649-1436, § 1; Ord. 95-279-205, § 1; Ord. 97-970-E, §

CIVIL SERVICE BOARD

With respect to the Civil Service Personnel Rules and Regulations, the following Rules are applicable to our analysis. Rule 2 covers Compensation. It anticipates pay plans, and salary schedules. Of note in our context are Rules 2.01, 2.11, 10.01 and 10.02, provided below. While none of the Rules would pose a barrier to JEA's implementation of a bonus or incentive program, they are included in this Memorandum to ensure that should JEA proceed with implementing any program, that any policy draft adhere to these terms.

Rule 2.01 "Statement of Policy"

- (4) It is the policy of the City to pay a fair and equitable salary based on the responsibility of the position within the City and upon the performance of the individual occupying that position.
- (5) This rule shall be consistent with public policy and shall be within allocated financial resources and in accordance with procedures established by the appropriating authority and shall be administered in accordance with the nondiscrimination policy enunciated in the Statement of Policy of the General Provisions of these Rules.

Rule 2.11 "Limitations"

- (1) Budgetary Limitations
 - (a) All provisions of these Rules related to salaries are contingent upon funds being available.
 - (b) Any deviation from paying employees in accordance with the provisions in these Rules because of budgetary limitations must be approved by the Head of Human Resources.

Rule 10.01 "Statement of the Policy"

- (1) Any department personnel policies, practices or procedures which are in conflict with the provisions of these Rules, or any policies or procedures issued in connection therewith, shall not be applicable to Civil Service employees.

- (6) The establishment of all personnel, policies, practices, and procedures, and the maintenance of all records related to them shall be in accordance with the nondiscrimination policy enunciated in the Statement of Policy of the General Provisions of these Rules.

Rule 10.02 "Personnel and Related Programs"

- (3) Award for Superior Performance:
Employees who by their superior accomplishments make exceptional contributions to the efficiency, economy or other improvements in the operation of the City government shall be recognized under the authority of the Ordinance Code.

COLLECTIVE BARGAINING OBLIGATIONS

Florida law prohibits JEA, as a public employer, from unilaterally establishing the wages, hours and terms, and conditions of employment for its employees who are represented by a bargaining agent. School Bd. Of Orange County v. Palowitch, 367 So.2d 730 (Fla. 4th DCA 1979). Mandatory subjects of bargaining include wages, benefits, working hours, evaluations, and grievance procedures. If management wishes to alter a mandatory subject of bargaining, regardless of whether there is an existing collective bargaining agreement or not, any unilateral change by management may be subject to an unfair labor practice charge before Florida's Public Employees Relations Commission (PERC).

During a permissible bargaining window, management may initiate the proposed new term and seek mutually satisfactory language of the term under a new collective bargaining agreement. If the bargaining agent refuses to reach an accord, then JEA may declare impasse and litigate the matter before an arbitrator. Currently, JEA recognizes five certified bargaining representatives for various JEA employees including: Professional Employees Association (PEA); Northeast Florida Public Employees' Local 630 Laborers' International Union of North America, AFL-CIO (LIUNA Local 630); The American Federal of State, County and Municipal Employees, Council 79, AFL-CIO Local 429 (AFSCME 79); JEA Supervisors Association (JSA); and International Brotherhood of Electrical Workers Local #2358 (IBEW).

CONSEQUENCES OF BONUS OR INCENTIVE PROGRAM

The question of when compensation is “earned” is a difficult question. It is partially subject to practicalities of the business and partially subject to judicial interpretation. It may require minute analysis of the compensation plan.

What payments may be denied terminating employees? In the case of plans that calculate compensation based on performance over an extended period, e.g., monthly, quarterly or annually, as incentive plans typically do, the plan should be closely analyzed to determine whether qualifying for payment under the plan is, as a matter of fact, not possible without an employee’s completing the period, or whether qualifying can, in fact, occur mid-period as well. In the former case, it is likely safe to deny payment to an employee who terminates before completion of the period. In the latter case, it is likely not.

When retention of personnel is a plan objective, a plan that requires an employee to remain employed through completion of a period of time is probably defensible.

How should overtime be calculated?

When non-exempt personnel are paid incentive payments or bonuses additional overtime must be paid for those workweeks covered by the payment and in which the employee worked overtime, as defined by the appropriate collective bargaining agreement or civil service rule provision.

These rules are inapplicable to any employee exempt from payment of overtime, including executive, administrative, and professional employees, and certain commission-compensated employees.

These rules are inapplicable to *discretionary* bonuses, i.e. bonus payments not promised in advance, but genuinely discretionary bonuses are exceedingly rare and not permitted under Section 215.425, Florida Statute.