

From: [Roesle-Parde, Kort Parde](#)
To: [Rhode, Lynne C. \(City of Jacksonville\)](#)
Cc: [Granat, Sean](#); [Gay, Kamaran](#); [Phillips, Jon](#)
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT
Date: Monday, June 10, 2019 10:28:31 AM
Attachments: [Final JEA Comp Memo June 10 2019.docx](#)

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Lynne,

Attached please find the most recent draft memo. Both Jon and Sean are in meetings but I have copied them on this email.

Kort

From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Monday, June 10, 2019 9:34 AM
To: Roesle-Parde, Kort Parde <KParde@coj.net>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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Assuming Jon / Sean agree and you are okay with this approach -- would you mind please rewording subsection b to summarize what you say below (including a statement that management should not be the sole arbiter of whether JEA achieves financial success but rather should use an independent analyst) and include a statement about how you could not find any ethics opinions or case law on point and recommend that the City Ethics Officer be contacted to further analyze the proposed program?

Then if you could send me a full draft, I will take another look and share any edits/questions.

Lynne C. Rhode
Vice President and Chief Legal Officer
21 West Church Street Jacksonville, FL 32202
Office: (904) 665-4115
Email: rhodlc@jea.com



From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Monday, June 10, 2019 9:27 AM
To: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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I spoke with Sean Granat and he said that Jon Phillips had some experience, but my research indicates that the City's Ethic Office would have the most knowledge.

I worked this weekend attempting to draft the analysis you seek, i.e. how to design the program to avoid violations of State's misuse of position and unauthorized compensation ethical provisions. The problem is that an analysis is almost impossible without specifics. The potential to avoid violations is both position specific and bonus terms specific. The best I could do is to generalize which positions, i.e. those JEA management involved in choosing the parameters for the LTIP, are most likely to have potential violation of specific ethics standards. The best we could say is that if JEA wished to implement a bonus scheme based solely on financial metrics, ethical constraints on management would prevent management from being able to be the sole "measure" JEA's finances.

The case law is not on point. I could not find a single decision involving an ethical violation associated with the implementation of a bonus scheme under 215.425.

Kort

From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Monday, June 10, 2019 9:00 AM
To: Roesle-Parde, Kort Parde <KParde@coj.net>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
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Thank you, Kort. I think subsection b needs explanation and recommendation (an analysis of the ethical constraints on management of an LTIP in light of the quoted footnoted language and how the program should be designed to avoid violations). Were you able to find anyone at OGC with expertise here who could help provide that analysis? Are there ethics opinions on point?

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From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Sunday, June 9, 2019 7:09 PM
To: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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Lynne,

Attached please find a draft for Section 3 of the Comp Memo. Our server at the City is having issues, and I also wasn't sure I had the latest draft. I

Thanks
Kort

From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Friday, June 7, 2019 4:31 PM
To: Roesle-Parde, Kort Parde <KParde@coj.net>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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Thank you. Let's discuss possibly a less formal approach.

Lynne C. Rhode
Vice President and Chief Legal Officer
21 West Church Street Jacksonville, FL 32202

Office: (904) 665-4115

Email: rhodlc@jea.com



From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Friday, June 7, 2019 4:27 PM
To: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Cc: Granat, Sean <SGranat@coj.net>; Gay, Kamaran <KGay@coj.net>
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Here is the Ordinance provision we discussed to seek an advisory opinion from the City.

Kort

From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Thursday, June 6, 2019 12:16 AM
To: Roesle-Parde, Kort Parde <KParde@coj.net>
Subject: FW: CONFIDENTIAL ATTORNEY WORK PRODUCT

Sec. 602.940. - Advisory opinions.

Any person within the jurisdiction of the Commission, when in doubt about the applicability or interpretation of any provision within the Commission's jurisdiction to himself or herself in a particular context, may submit in writing the facts of the situation to the Commission with a request for an advisory opinion to establish the standard of public duty, if any. A person requesting an advisory opinion may withdraw the request at any time up to ten days before the Commission convenes a public meeting to consider the request. An advisory opinion shall be rendered by the Commission on a timely basis, and each such opinion shall be numbered, dated and published.

(Ord. 2011-167-E, § 2)

From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Tuesday, June 4, 2019 3:10 PM
To: Roesle-Parde, Kort Parde <KParde@coj.net>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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I don't think there are many specifics yet. They are looking at a long-term (1-3 year) incentive (form of typically cash or stock) bonus program based on JEA's financial performance and available to all (management and non-management) employees. I think if we hit those four general brackets, that will suffice. Any specific program can be analyzed later. Does that make sense?

Lynne C. Rhode
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From: Roesle-Parde, Kort Parde <KParde@coj.net>
Sent: Tuesday, June 4, 2019 1:46 PM
To: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Subject: RE: CONFIDENTIAL ATTORNEY WORK PRODUCT

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Lynne,

I think there is some confusion because I literally have no information regarding how or what type of program JEA intends to implement. I have only spoken with you and just received the memo from the other firm.

I will work on this tonight and believe I can answer most of the questions you have posed but any information you can provide me with will really help the end product.

Thank you,
Kort

Sent from my Verizon Motorola Droid

On Jun 4, 2019 1:38 PM, "Rhode, Lynne C. (City of Jacksonville)" <rhodlc@jea.com> wrote:

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Thanks Kort. I think there are some key questions/thoughts that need developing.

- (1) You state on p. 4 that statutory language would not permit a bonus based on JEA's overall financial improvement. Why not? This is THE KEY question and needs to be fleshed out. I don't see that restriction anywhere.
- (2) Need to include language confirming (if accurate) that an LTIP award of *cash or stock* to any employee is permissible
- (3) Need to include language/ analysis about how LTIPs are consistent (if accurate) with municipal purpose, public purpose, and ethical considerations
- (4) I don't understand the "consequences" section and think it can come out. We don't need details on specific aspects of the plan at this point. We just need to know if a long-term incentive cash or stock bonus program available to all employees and based on JEA's financial performance is permissible.
- (5) Need statement about relationship between FS 215.425 and Ord Chap 116
- (6) JEA Charter 21.08 gives JEA broad authority over employment policies – I think JEA's Charter (as the relevant Special Law) must be included in the analysis. JEA employees, by Charter, are expressly subject to City Charter Art 16 & 17 (Civil Service, which excludes management).
- (7) While the 943.22 and 1012.02 programs for police and teachers may be examples for a footnote, don't think they (or their restrictions, except potentially to show the lack of such express restrictions on utilities) are really relevant to the analysis
- (8) All of the 116 examples can just be a footnote – don't need the details if they are not relevant to the LTIP.
- (9) Civil Service and union discussions can be shortened to a note about compliance as long as you don't see any specific conflict with an LTIP (they know that CS and Unions are a factor in any bonus program)

Overall, I think they are looking for a more direct answer (yes, no, or maybe as to each aspect) related to the specific contemplated LTIP program. I think the structure of that analysis (considering at each step constitutional, state, and local laws and ethical factors) would be most useful as – (1) Authority for bonus programs by independent agencies generally, (2) general constraints on such programs, (3) authority for and constraints on the LONG TERM (1-3 years) aspect of the incentive program, (4) authority for and constraints on the availability of the incentive program to MANAGEMENT AND ALL OTHER employees, (5) authority for and constraints on use of FINANCIAL PERFORMANCE as the program's metric, and (6) authority for and constraints on the TYPE of the award (cash, stocks, other).

I don't know if you have any availability to discuss before tomorrow, but if so I am generally available today/tonight and can also be reached on my cell – 904-212-7943 – if not, we can discuss tomorrow at 10.

Lynne C. Rhode
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21 West Church Street Jacksonville, FL 32202
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Email: rhodlc@jea.com



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

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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

Tracey Kort Parde
Assistant General Counsel
480 West Duval Street, Suite 480
Jacksonville, Florida 32202

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Disclaimer regarding Uniform Electronic Transactions Act (UETA) (Florida Statutes Section 668.50): If this communication concerns negotiation of a contract or agreement, UETA does not apply to this communication; contract formation in this matter shall occur only with manually-affixed original signatures on original documents.

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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Lynne Rhode, Vice President & Chief Legal Officer, JEA
FROM: Kort Parde, Assistant General Counsel, OGC
RE: Compensation Plans
DATE: June 10, 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, whereby all employees receive notice of the policy prior its initiation, and which is available to all JEA employees. In addition to the requirements of Section 215.425, Florida Statute, any bonus or incentive program JEA adopts should provide for lump sum awards, with objective metrics measured by impartial analysts and not potential program award recipients so as to comport with the Florida Ethics Code.

ANALYSIS:

(1) General Authority for Incentive Programs by Independent Agencies

a. Florida Statute

The relevant statutory constraint on the awarding of incentives by a unit of government to its employees is a prohibition on providing “extra compensation...to any officer, agent, employee, or contractor after the service has been rendered or the contract made.” §215.425(a), Fla. Stat. The term “extra compensation” “. . . denotes something done or furnished in addition to, or in excess of the requirement of the contract; something not required in the performance of the contract.” *Fla. AGO 91-51* citing *Fla. AGO 81-98*. Therefore, an independent agency has the authority to provide for bonuses or incentive programs either by means of a new employment contract or policy or where existing employment contracts or policies contemplate the awarding of such incentives.

b. Florida Constitution

Any action of an independent agency, including providing a bonus program for employees, must be analyzed in light of the Article VII, Section 10, Florida Constitution, prohibition against the State and its subdivisions from using their taxing power or pledging public credit to aid any private person or entity. The purpose of this constitutional provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited." *Fla AGO 2012-26* citing Bannon v. Port of Palm Beach District, 246 So.2d 737, 741 (Fla. 1971). “If the expenditure primarily or substantially serves a public purpose, however, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10. *Id.* citing State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979). The Legislature “has recognized that lump sum bonus payments for county and municipal employees serve the public interest and represent a progressive innovation in personnel management.” *Id.* The Attorney General noted that the Legislature amended Section 215.425, Florida Statutes “to authorize both counties and municipalities to adopt extra compensation programs to reward outstanding employees” and that in the same act, the Legislature amended section 166.021, Florida Statutes, to provide in subsection (7):

Notwithstanding the prohibition against extra compensation set forth in s. 215.425, the governing body of a municipality may provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years.

Id.

The 2011 Florida Legislature, in revising Section 215.425, Florida Statute, deleted the express provisions in both the respective county and municipal statutory provisions in Sections 125.01 and 166.021, Florida Statute “permitting programs providing extra compensation to employees after the work had been performed” and that providing that such programs served a public interest. *Fla. AGO 2016-14*. Instead the Legislature amended Section 215.425(2)(a) to include the additional requirement that any bonus or severance awarded by a unit of government be “paid wholly from nontax revenues and nonstate-appropriated funds.” §215.425(a), Fla. Stat. Adding the restriction on what

types of funds a government unit could utilize in awarding extra compensation, effectively eliminated the constitutional requirement that the expenditure of public funds “primarily or substantially serves a public purpose”. *Fla. AGO 2012-26*.

(2) General Authority for Incentive Programs by JEA

Article 21 of the Consolidated City of Jacksonville’s Charter¹ “created and established a body politic and corporate to be known as JEA.” *Jacksonville, Fla., City Charter*, §21.01. Under Section 21.01 the City delegated to JEA “all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been but for this article, exercised by the City of Jacksonville”. *Id.* Section 21.04 explicitly prescribes the powers of JEA to include the right to contract, and the more broad authority “to do all acts and deeds necessary, convenient or desirable, incidental to the exercise and performance of the power and duties granted to JEA in this article.” *Jacksonville, Fla., City Charter*, §§21.04(e) and (t).

Most relevant to the issue of whether JEA has the authority to create a bonus or incentive program is Section 21.08 of the Charter, which prescribes JEA’s powers with respect to its employees. Under Section 21.08 the City delegated to JEA the following authority:

JEA shall have full and independent authority to hire, transfer, promote, discipline, terminate and evaluate employees engaged to provide any and all of the utilities services for which it is responsible and accordingly, consistent with the provisions of article 17, JEA may establish employment policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment and take such other employment related action as needed to assure effective and efficient administration and operation of the utilities system. In order to effectively implement the foregoing, JEA shall perform all functions with regard to its own employees that are performed by the City department or division which oversees city employees in regard to personnel matters.

Id. at §21.08. Section 21.08 provides JEA the express authority to not only establish employment policies, but the implied authority to establish bonus or incentive programs

¹ See *Jacksonville, Fla., City Charter*, §3.01(a), providing that the Consolidated City of Jacksonville:

Shall have and may exercise any and all powers which counties and municipalities are or may hereafter be authorized or required to exercise under the Constitution and the general laws of the State of Florida, including, but not limited to, all powers of local self-government and home rule not inconsistent with general law conferred upon counties operating under county charters by s. 1(g) of Article VIII of the State Constitution; conferred upon municipalities by s. 2(b) of Article VIII of the State Constitution; conferred upon consolidated governments of counties and municipalities by section 3 of Article VIII of the State Constitution; conferred upon counties by ss. 125.85 and 125.86, Florida Statutes; and conferred upon municipalities by ss. 166.021, 166.031, and 166.042, Florida Statutes; all as fully and completely as though the powers were specifically enumerated herein.

under the authority to establish ‘other term and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment’ . *Id.*

(3) Specific Constraints on the Contemplated Incentive Program

Section 215.425, Florida Statutes’ general prohibition of extra compensation, excludes bonuses under certain conditions. First, a bonus scheme policy must be implemented under the requirements of §215.425(3), Fla. Stat. Further, the payment and receipt of bonus must comply with the Florida Code of Ethics for Public Officers and Employees under §215.425(2)(a).

a. Constraints on the Use of Financial Performance as the Program’s Metric

A public employer may implement a bonus scheme or incentive program be in the form of a policy, ordinance, rule or resolution which bases the award of the bonus on work performance, provides for performance standards, and an evaluation process, which notifies all employees of the policy before the beginning of the evaluation period and which considers all employees. §215.425 (3), Fla. Stat.

While, JEA is not constrained in using financial performance as the program’s metric, the use of financial performance must be quantifiable and based on work performance. To withstand challenge under Section 215.425, any program JEA adopts 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;

§215.425(3)(a)-(b), Fla. Stat.

b. Constraints on the Availability of the Bonus or Incentive Program to Management and All Other Employees

Section 215.425(2)(a), Florida Statute, requires that “the payment and receipt” of a bonus payment by a public officer or employer must not violate Part III of Chapter 112, Florida Statutes. Section 112.313, Florida Statute, contains the “Standards of Conduct for Public Officers, Employees of Agencies, and Local Government Attorneys.” §112.313, Fla. Stat. Receipt of bonus payments by public officers and employees have the potential to be found to violate those Standards of Conduct including, but not limited to, both

unauthorized compensation² and misuse of public position³ provisions in Sections 112.313(4) and (6), Florida Statutes, respectfully.

This requirement impacts the availability of incentive bonus programs to JEA's management to a much greater degree than all other JEA employees.⁴ This provision impacts management to a greater degree because of management's role with respect to implementation of any bonus scheme policy may amount to a violation the Florida Code of Ethics. Further, Section 215.425(2)(a)'s requirement disproportionately limits management's availability of any bonus program, in that management's receipt of a bonus payment may also amount to a violation of the Florida Code of Ethics.

While legal research did not yield any ethics opinions or case law involving Section 215.425 and the receipt of bonus payments, liability for JEA's management implementation of a bonus program depends on the metrics adopted to award the bonus payment. Given management's role in the implementation of a bonus program and ethical constraints of Section 215.425(2)(a), management should not be the sole arbiter of whether JEA achieves financial success if JEA utilizes final performance as the program's metric. It is recommended that the City's Ethics Officer be contacted to further

² Section 112.313(4) prohibits unauthorized compensation, providing:

No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.

§112.313(4), Fla. Stat.

The statute "merely allows proof of an ethical violation by demonstrating the public employee's actual or constructive knowledge of" intent. Further, "the statute places a specific duty upon the public employee to exercise such care before accepting a gift or anything else of value....This statute fairly creates a zone of danger into which a public official or employee may not safely venture." Goin v. Fla. Commission on Ethics, 658 So.2d 1131, 1134 (Fla. 1st DCA 1995).

³ Section 112.313(6) defines the violation of misuse of public position, providing

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. [104.31](#).

§112.313(6), Fla. Stat.

"An essential element of the charged offense under Section 112.313(6) is the statutory requirement that appellant acted with wrongful intent, that is, that she acted with reasonable notice that her conduct was inconsistent with the proper performance of her public duties and would be in violation of the law or the code of ethics in part III of chapter 112." In Re: Wellington Rolle, 1998 WL 1295411, *7 (Fla. DOAH 1998). "Moreover, wrongful intent implies action 'with reasonable notice that the conduct complained of was inconsistent with the proper performance of public duties and would be a violation of the law or the code of ethics in part III of chapter 112.'" Id. at *8 *citing* Blackburn vs. Fla. Commission on Ethics, 589 So. 2d 431 434 (Fla. 1st DCA 1991).

⁴ In addition to the Florida Code of Ethics, the City of Jacksonville has ethical ordinances. The City of Jacksonville's Ethic Code may impact the availability of a bonus program to management as well.

analyze how a proposed implementation of a bonus program should be structured to avoid violations of Florida's Code of Ethics, as well as the City's Ethics Code.

c. Constraints on the Type of the Award⁵

JEA is constrained in the type of award it may issue to the extent that it is bound by the City's Civil Service Personnel Rules and Regulations. Those JEA employees covered by the Civil Service Personnel Rules and Regulations are subject to pay plans and salary schedules. Civil Service Personnel Rules and Regulations 2.01, 2.11, 10.01 and 10.02 constrict JEA to the award of lump sum bonuses, as JEA employees' base salary may not exceed their pay bands.

⁵ While it is presumed that the bonus award will be monetary, this Memorandum does not address whether an alternative award, like annual leave, is permissible.