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**MEMORANDUM
PRIVILEGED AND CONFIDENTIAL**

TO: Lynne Rhode, Vice President & Chief Legal Officer, JEA

FROM: Kort Parde, Assistant General Counsel, OGC
Sean Granat, Deputy General Counsel, OGC

RE: Compensation Plans

DATE: June 17, 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 a bonus or incentive program so long as the program complies with the requirements of § 215.425, Florida Statutes. The program must (1) be based on work performance; (2) have pre-determined performance standards and evaluation processes; (3) provide notice of the program to all JEA employees prior its commencement; and (4) be available to all JEA employees. In addition to the requirements of §215.425, Florida Statutes, any bonus or incentive program JEA adopts should provide for objective metrics measured by impartial analysts and not potential program award recipients. Also, the program would have to comply with the specific constraints itemized in Part III of this memo, which include ethics laws, Civil Service Rules, and collective bargaining.

ANALYSIS:

I. General Authority for Incentive Programs by Governmental Agencies

A. Florida Statute

The relevant statutory authority on the awarding of incentives by a unit of government to its employees is found in § 215.425(3),¹ Florida Statutes, which states that:

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.

Section 215.425 also contains 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), Florida Statutes. 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, a governmental agency has the authority to provide for bonuses or incentive programs so long as the programs strictly comply with the requirements set out in § 215.425(3), and offer no compensation for any work performed prior to the commencement of the programs.

B. Florida Constitution

Any action of a governmental agency, including providing a bonus program for employees, must be analyzed in light of the Article VII, § 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

¹ Section 215.425, Florida Statutes, applies broadly to “units of government” without limitation. Fla. Att’y Gen. Op. 2013-09 (2013). As an independent agency of the Consolidated City of Jacksonville, JEA is a unit of government subject to § 215.425, Florida Statutes. See *City Charter* §§ 18.07 and 21.

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, § 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.* In the past, Florida Statutes expressly authorized counties and municipalities "to adopt extra compensation programs to reward outstanding employees. See §§ 125.01 and 166.021, Florida Statutes (2010). These statutes allowed for lump-sum bonus payments, but required that the bonuses not be included in an employee's regular base rate of pay and not be carried forward in subsequent years. *Id.* In 2011, the Florida Legislature revised § 215.425, Florida Statutes, and deleted the express authorization to pay bonuses in §§ 125.01 and 166.021, Florida Statutes. The restriction that a bonus payment not be included in an employee's regular base rate of pay and not be carried forward in subsequent years was also deleted. Instead, the Legislature created §215.425(3), Florida Statutes, which permits any unit of government to establish a bonus or incentive program as long the program strictly complies with § 215.425(3)(a)-(d), described in section 1(a) above.

II. General Authority for Incentive Programs by JEA

Article 21 of the Consolidated City of Jacksonville's Charter² "created and established a body politic and corporate to be known as JEA." *City Charter*, §21.01. Under § 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." *City Charter*, §§21.04(e) and (t).

² 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.

Most relevant to the issue of whether JEA has the authority to create a bonus or incentive program is § 21.08 of the Charter, which prescribes JEA's powers with respect to its employees. Under § 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 gives JEA the express authority to establish employment policies and the implied authority to establish bonus or incentive programs 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.*

III. Specific Constraints on the Contemplated Incentive Program

JEA may establish a bonus program, subject to several constraints. First, as explained above, a bonus or incentive program policy must be strictly implemented under the requirements of §215.425(3), Florida Statutes, in that it must base the award of the bonus on work performance, provide for performance standards and an evaluation process, notify all employees of the policy before the beginning of the evaluation period, and consider all employees for the bonus. Further, the program must comply with state and local ethics laws. Lastly, bonus plans must comply with the City's Civil Service Personnel Rules and Regulations and collective bargaining requirements.

A. Constraints Under State and Local Ethics Law

Under state and local ethics laws, an otherwise proper JEA long-term incentive program benefiting both management and non-management employees is permissible within the following key parameters designed to prevent the misuse of public funds:

Article II, § 8 of the Florida Constitution (Ethics in Government) requires financial disclosure by public officials and generally prohibits public officials from acting in a manner in breach of the public trust. This general prescription has been codified by Florida Statute, namely

Chapter 112 Part III (Code of Ethics for Public Officers and Employees), and further enumerated for Jacksonville officials and employees within the Jacksonville Ethics Code (Chapter 602 of the Jacksonville Ordinance Code).

Within the state ethics code, which generally applies to all public officials and employees within the state, § 112.313, Florida Statutes, is the primary provision that should be considered when analyzing an incentive program adopted by an independent agency of the City. Section 112.313 (Standards of conduct) subsection (6) (Misuse of public position) states, in relevant part and with emphasis added, that “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. ...”. Pursuant to subsection (6), an independent agency employee may not corruptly use his position or perform his official duties in order to secure for himself or other individuals a unique benefit.

Similar to § 112.313(6), Florida Statutes, the city ethics code (which expressly at §602.631, Ordinance Code, applies to officers and employees of independent agencies) at §602.401 (Misuse of position, information, resources etc.) subsection (a) prohibits an employee of an independent agency from intentionally using his position or otherwise acting in a manner inconsistent with his official duties in order to obtain a special privilege, financial or otherwise.

Both § 112.313(6), Florida Statutes, and Jacksonville, Florida, Municipal Code §602.401(a) contain intent and uniqueness components. An incentive program developed and implemented by managers generally responsible for developing and implementing compensation measures, that fully comports with all § 215.425, Florida Statutes, and JEA Charter strictures, under which all JEA employees are considered for the bonus in a transparent, impartial manner, and which is based upon objective financial metrics measured by an independent party generally would not run afoul of either the state or city ethics codes.

B. Constraints Under Civil Service Rules and Collective Bargaining Agreements

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 serve to limit JEA to the award of lump sum bonuses, as JEA employees’ base salary may not exceed their pay bands.

Additionally, many of JEA’s employees are members of collective bargaining units. Florida Law requires that changes to wages and terms and conditions of employment are collectively bargained prior to being implemented. Thus, any bonus or incentive plan would have to be collectively bargained prior to implementation. *See Hamilton County Education Association v. Hamilton County School District*, 30 FPER ¶ 180(2004)(Unfair labor practice to unilaterally implement a bonus plan without negotiating its terms).