

Kirwan, Michael B.

From: Kirwan, Michael B.
Sent: Thursday, August 15, 2019 3:45 PM
To: Hyde, Kevin E.
Subject: RE: Draft Letter to Ashley Moody from Herschel

Kevin,

The letter is much better than the initial draft. Although I have not reviewed the exhibits that are referenced to be attached to the letter, a few thoughts from my earlier email are still germane.

1. The letter still refers to vesting and forfeiture of unvested units. If there is a purchase occurring upfront, what is the purpose of vesting? Is the purchase intended to accomplish an 83(b) election to minimize tax upon the final payout? Letter does not suggest that is the point of the upfront purchase.
2. The calculation of the redemption price appears to focus only on the final year. If it is a 3 year unit, then typically the whole 3 years are considered. — *Now understood*
3. The argument that the units are not compensation rings a bit hollow. It would seem that the argument can be strengthened by actually making the units look like securities. Have the proceeds actually be used for funding a specific purpose. I am sure there are lots of potential purposes. Have the program set up to be an annual program — not a one-time event. If the sale does not occur, then the participants still earn what the plan provides and the program can continue into the future.
4. My earlier comment about a cap on unit payouts is hopefully in the plan document that is an exhibit.

Happy to discuss,
Michael

Michael B. Kirwan

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From: Hyde, Kevin E. <KHyde@foley.com>
Sent: Thursday, August 15, 2019 2:48 PM
To: Kirwan, Michael B. <MKirwan@foley.com>
Subject: FW: Draft Letter to Ashley Moody from Herschel

This is the final draft of the letter. It will be issued by the Office of General Counsel.

-Kevin E. Hyde

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From: Rodriguez, Colleen A. <crodriguez@foley.com>
Sent: Thursday, August 15, 2019 9:15 AM
To: Hyde, Kevin E. <KHyde@foley.com>
Subject: Draft Letter to Ashley Moody from Herschel

Chanley dropped this off and asked that I sent it to you immediately.

From: flscan@foleylaw.com <flscan@foleylaw.com>
Sent: Thursday, August 15, 2019 9:24 AM
To: Rodriguez, Colleen A. <crodriguez@foley.com>
Subject:

[OGC Info]

DRAFT

The Honorable Ashley Moody
Attorney General, State of Florida
The Capitol PL01
Tallahassee, Florida 32399-1050

August 14, 2019

RE: Request for Advisory Opinion

Dear General Moody:

We write to request an informal advisory opinion regarding a matter of importance to JEA (formerly known as the "Jacksonville Electric Authority") and, critically, to the approximately 2000 JEA employees who provide dedicated service to JEA and its customers. JEA is an independent agency of the City of Jacksonville and is subject to the jurisdiction of the Jacksonville City Charter, ordinances and, of course, state laws and regulations.

Over the past few months, the Board and Senior Leadership Team of JEA have been exploring multiple scenarios of operation and investment to ensure that JEA customers and Northeast Florida receives the most cost-effective and efficient electric, wastewater, and water utility services. This inquiry is necessary due to the rapidly evolving utility industry and declining sales resulting from energy efficiency measures taken by its customers. In short, JEA is facing financial constraints because homeowners and businesses are investing in more energy efficient light bulbs, appliances, and building materials, which has resulted in declining per account revenue and simultaneous increasing costs. This fiscal and technological shift has necessitated development of a number of initiatives designed to improve and optimize the fiscal health of the utility.

As part of JEA's response to its evolving and challenging financial landscape, the JEA Board on July 23, 2019 passed Resolution 2019-10, approving a Long Term Performance Unit Plan (the "PUP" or the "Plan"). The PUP is designed to allow employees to personally invest in the enterprise growth of JEA in the next three years (i.e. encourage employees to have "skin in the game" with respect to improving the health of the utility). JEA's performance will be measured on the change in JEA's net position during the performance period.

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Attached is a copy of Resolution 2019-10 and Exhibits 1 and 2 to that resolution. Exhibits 1 and 2 provide a detailed summary of the PUP and Redemption Price Schedule for the PUP. Also

attached is the Long Term Performance Unit Plan and Form of Long Term Performance Unit Agreement.

In summary, and as detailed below, the PUP is a benefit to full-time JEA employees that affords them the opportunity to purchase units at \$10.00 per unit and redeem them for an amount dependent on JEA's current year value. Participation in the Plan is voluntary, and eligibility is dependent upon employment status. Benefits like the Plan are commonplace in the corporate world, where employees invest in the success of a company, but are less so in government. The Office of General Counsel of the City of Jacksonville (the "OGC") and JEA Special Counsel (selected by the OGC) have assisted throughout the development and drafting of the PUP and associated PUP Agreement, and OGC confirmed the JEA Board's authority to pass Resolution 2019-10. In the absence of available case law or advisory opinions directly on point, however, we seek this opinion as well. **JEA specifically seeks an advisory opinion whether (1) the PUP is subject to section 215.425, Florida Statutes; if it is, whether it comports with section 215.425, and (2) whether the PUP violates any other state law deemed to be implicated.**

A. Description of Long-Term Performance Plan:

The PUP allows eligible employees to purchase a specified number of performance units from JEA and redeem them for a cash payment equal to the redemption price. The PUP is entirely voluntary. Any eligible employee may decide to participate or decline.

Eligible employees include all full-time employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA) actively employed with JEA for at least three months prior to the purchase date. The eligibility of employees to participate in the program is dependent solely on their employment status and execution of and compliance with a performance plan participation agreement. To participate, the employee must agree in a performance plan participation agreement to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any action that would be contrary to the best interests of the JEA and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. The agreements regarding the Plan will be subject to Sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.

A total of 100,000 performance units, allocated¹ amongst employees based on his/her position level and the most recent annual JEA Performance Ranking Program, will be available for purchase at \$10.00 per unit on January 15th of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool for pro rata reallocation. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary equal to the aggregate purchase price for the performance units. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the

¹ The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

redemption price, and it will be certified no later than 30 days following the completion of JEA's annual financial audit statement.

The calculation of the redemption price is dependent on JEA's current year value, which is the sum of JEA's net position per JEA's annual audited financial statement, the aggregate consideration paid, distributed, credited, or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited, or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.²

The employee must be actively employed on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

B. Questions:

1. Whether section 215.425, Florida Statutes, is applicable to the PUP and, if so, whether the PUP comports with section 215.425.
2. Whether the PUP violates other Florida laws, if any, deemed applicable to employee participation in enterprise creation.

C. The Plan does not Violate Section 215.425, Florida Statutes

Very simply, JEA's PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases and decrease in value if the value of JEA decreases. The Plan is voluntary and requires employees that wish to participate to buy-in by using their personal monies to purchase the units and to execute an agreement pertaining to the Plan. The Plan does not constitute "extra compensation" under section 215.425, Florida Statutes.

Section 215.425 provides that "no extra compensation shall be made to any [public employee] after the service has been rendered or the contract made." The intent behind this provision is that public employees should not receive gratuities for services that were already rendered. AGO 2005-07 ("The purpose of such a provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.") The provision has mostly been applied in instances where public employees were to receive retroactive compensation for work already performed. See AGO 92-49 (holding that the Police Pension Board of Trustees could not pay a cost of living allowance to a retired police officer already receiving pension benefits for prior

² As a part of the JEA Board's exploration of alternative scenarios to address the utility's fiscal challenges, JEA is also considering selling the utility. If that occurs, the performance period ends, the amount owed to the employee will be paid, and the Plan will be extinguished.

services); *see also* AGO 91-51 (holding that severance payments in lieu of notice violated the provision because the employee renders no service after termination and the payments were compensation for work already performed).

JEA's PUP plainly does not constitute "extra compensation" because the redemption payments are not compensation for the services that the employees render as part of their employment with JEA. Rather, the PUP allows employees to participate in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP is in stark contrast to the factual scenarios in which this office has previously applied the provision. The PUP does not serve to provide gratuities to the employees for their past service that they have been previously paid for and does not serve as a bonus program or incentive program to reward employees. Indeed, to participate in the Plan, JEA employees must opt-in at their sole discretion and expend their personal funds to purchase the units. The number of performance units available for purchase by each employee is directed by the Plan Administrator and is based on the employee's position level and annual JEA Performance Ranking Program. The redemption payments for the units depend solely on the change in value of JEA. Thus, section 215.425 does not apply to the Plan, and the Plan does not constitute "extra compensation."

D. No Other Law are Implicated

As to Question 2, we seek the guidance of this office to determine whether any other Florida laws of which we currently are not aware are implicated. Our legal research has not identified any other statutes prohibiting the PUP. We intend to send the Florida Commission on Ethics a request similar to this letter to receive its opinion.

We appreciate your assistance with this matter. Please let us know if you need any additional information.

Sincerely,