

From: Columbo, Elizabeth <EColumbo@nixonpeabody.com>
Sent: Monday, May 20, 2019 11:19 AM
To: Wannemacher, Ryan F. - Chief Financial Officer; Vinyard, Herschel T. - Chief Administrative Officer
Cc: Deaton, Daniel; Rothchild, Barry (NYC)
Subject: JEA Memorandum Regarding Employee Incentive Programs (Final dated May 20, 2019) 4820-9203-1639 v.2
Attachments: JEA Memorandum Regarding Employee Incentive Programs (May 20, 2019) 4820-9203-1639 v.2.docx

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Ryan and Herschel,

Please see attached a draft of the memorandum on the long-term employee incentive program. We are still in process of having it proofread and citations checked which is why it is marked as a draft.

Please let us know if you have any questions.

Thanks,

Liz

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MEMORANDUM

Date: May 20, 2019
To: JEA
From: Elizabeth Columbo, Barry Rothchild and Daniel Deaton
Subject: Long-Term Employee Incentive Program

ISSUE

You have asked us to analyze whether JEA may create or establish a long-term employee incentive program (the “Program”) to pay a bonus or additional amounts to the employees of JEA over a period of one-to-three years if JEA were to achieve specific and mechanical financial metrics (such as an increase in the net asset value of JEA or an increase in the amount transferred annually to the City of Jacksonville). In addition, you have asked us, if JEA could create the Program, whether JEA could pay such additional amounts to the employees for such program in the form of a JEA bond that JEA would issue directly to the employee.

BRIEF ANSWER

We do not believe that the Program would be able to clear legal hurdles under Florida law.

While JEA is authorized to adopt a program to award employees bonuses, and has done so as recently as fiscal year 2018, the specific features of the Program present challenges past JEA bonus programs do not. Our main concern is that JEA would be presented with an unresolvable dilemma between two legal restraints. First, JEA’s authorization to maintain an employee bonus program must be extended to all employees. Second, employees of JEA could influence financial and operating decisions of JEA could not participate in the Program as we read the conflicts of interest provisions of Florida law because they could impact the financial metrics being measured under the Program and would derive a direct financial benefit if the financial metrics were reached—which is the ostensible purpose of the Program. In addition, we have concerns regarding whether JEA would be able to establish a strong legislative record regarding the public purpose of the Program that could allow a court to conclude that the Program is in furtherance of a legitimate public purpose due to the narrowly focused objectives of the Program. While our analysis involved a general review of JEA’s charter, the City’s Charter, local and state laws and other available

sources, the attorneys involved in the preparation of this memorandum are not licensed to practice law in the State of Florida (the “State”) nor do we have or maintain an office in the State and if JEA would like to move forward in developing such a program, we believe it would be prudent for JEA to retain Florida counsel to provide additional analysis or further determinations regarding the issues we have raised in this memorandum.

DISCUSSION AND ANALYSIS

JEA is a municipal utility owned by the City of Jacksonville, Florida (the “City”). JEA was established as a body politic and corporate and was renamed as the current JEA through Article 21¹ of the City’s Charter² (“City’s Charter”). Article 21 of the City’s Charter serves as the charter for JEA (“JEA’s Charter,” together with the City’s Charter, the “Charters”). Although it is the intent of the article “to grant to JEA full power and right to exercise all authority necessary for the effective operation and conduct of JEA,” JEA’s power is nevertheless limited in accordance with City, State, and Federal laws^{3,4}.

JEA’s Authority to Create Incentive Program Plans or Bonus Schemes

JEA’s Charter was created for “the specific purpose . . . to repose in 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 Jacksonville⁵.” Acting as an extension of the City, JEA’s power is limited in the same way that the City’s would be. Accordingly, we must first look to the City’s Charter and ordinance code of the City to determine what powers, if any, the City and therefore JEA has to create an employee incentive program.

While the City’s Charter does not specifically authorize the creation of an employee incentive program, the City’s Municipal Ordinance Code (“Code”) does. The City’s Municipal Ordinance Code Title V, Chapter 116, Part 11, (the “Incentive Program Ordinance”) provides for the creation of “employee incentive programs, solely for the purpose of encouraging excellence in

¹ See Chapter 92-341, Special Acts, Laws of Florida; Establishing the JEA under the City’s charter.

² See Laws of Fla. Ch. 78-538, §1.

³ See City of Jacksonville, Florida, Municipal Code §21.05.

⁴ This memorandum does not address issues of Federal law that are applicable to employee incentive programs.

⁵ See *Id.* at 21.01.

public service⁶.” This section 116.1101, which appears under the Employees and Employee Benefits section of the Code, authorizes the establishment of employee incentive programs in accordance with the following conditions:

- (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 President⁷.

Because the City’s power is self-executing under the Florida Constitution, the Incentive Program Ordinance’s authorization of the creation of employee incentive programs is clearly within the power of the City, and by extension, JEA. To satisfy the requirement of section 116.1101(c), an employee incentive program of JEA would be subject to the prior approval of the JEA Managing Director/CEO and the Mayor.⁸

While JEA is authorized under the Code to create employee incentive programs and expressly authorized to create employee suggestion plans⁹, the terms of any such program would be subject to applicable Florida law. Section 215.425, Florida Statutes, addresses the payment of extra compensation and bonuses for public employees. While section 215.425(1) generally prohibits the payment of any extra compensation to public employees after service has been rendered or the contract made, section 215.425(3) (the “Bonus Statute”) provides clear guidelines

⁶ See City of Jacksonville, Florida, Municipal Code §116.1101; regulations granting authority and governing the establishment of an employee incentive program.

⁷ See *Id.*

⁸ In addition to authorizing employee incentive programs, the City’s Municipal Ordinance Code Title V, Chapter 116, Part 10 (the “Employee Suggestion Plan Ordinance”) expressly provides for the creation by the Mayor of “a program of meritorious awards to employees who propose procedures or ideas which are adopted and which will result in eliminating or reducing City expenditures or improving operations or who, by their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in the operations of City government.” The Employee Suggestion Plan Ordinance also specifies that all suggestions meriting an award shall be classified as having tangible or intangible value and that no award shall exceed \$1,000, except that the Council may approve a larger award in exceptional cases. We have not addressed the Employee Suggestion Plan Ordinance because it would not provide a legal basis for the implementation of the Program.

⁹ Section Fla. Stat. §116.1005 contains express authorization for JEA to create an employee suggestion plan for meritorious awards to employees of JEA who (a) propose procedures or ideas which are adopted and which will result in eliminating or reducing JEA's expenditures or improving JEA's operations or (b) by their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in the operations of JEA.

for implementing a “bonus scheme¹⁰” for public agencies. The current version of the Bonus Statute, last amended in 2011, provides that:

- (3) 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 bonus¹¹.

As described above, under section 215.425(3), JEA clearly has the authority under Florida law to create an incentive program or bonus scheme for its employees provided that (1) all employees are considered for a bonus, (2) the award of the bonus is based on work performance and (3) the public agency describes the performance standards and evaluation process for which a bonus is awarded. As provided in section 116.1101 of the Code of the City, the award can take the form of “cash, plaques, trophies, clothing, food and nonalcoholic beverage, and other forms of tangible personal property.” Stocks and bonds are considered intangible personal property under Florida law and so JEA would not be able to issue its revenue bonds to the employee as payment of such award.¹²

Analysis of Application of Conflict of Interest Statutes to Program

Section 112.311(5) of the Florida Code of Ethics for Public Officers and Employees (ss. 112.311-112.3261, Florida Statutes) (the “State Ethics Code”) provides as follows:

It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest.

Similarly, the City Charter in providing for the enactment of an ethics code that would apply to officers and employees of the City and its independent agencies, including JEA, reiterated

¹⁰ See Fla. Stat. §215.425(1) and (3); Section 3 was included through amendment in 2011 specifically to allow public agencies to administer bonus schemes for public employees, notwithstanding section 1 of the same.

¹¹ See Fla. Stat. §215.425(3)(2011).

¹² See Fla. Stat. §192.001(11)(b).

that “[t]he proper operation of responsible government requires that public officials and employees be independent, impartial, and responsible to the people; that government decisions and policy be made in the best interests of the people, the community and the government; that public office not be used for personal gain, and that the public have confidence in the integrity of its government”¹³ and the City’s ethics code expressly makes the State Ethics Code applicable to officers and employees of the City and to JEA.¹⁴

To further reduce the likelihood or appearance of conflicts of interest, Section 112.311(3)(a), Florida Statutes, provides that “[n]o county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss” (emphasis added). Similarly, Section 112.311(4), Florida Statutes, provides that “[n]o appointed public officer shall participate in any matter which would inure to the officer’s special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter.”¹⁵

These state law provisions governing conflicts of interest would effectively prohibit any JEA employee from participating¹⁶ in any business transaction from which the JEA employee would personally benefit. To us, this strikes at the heart of the Program. The very nature of the Program is that employees of JEA will be incentivized to make financial and operating decisions that will increase specific financial goals. If implemented, the Program would vest any employee involved in or in a position to influence financial and operating decisions that could increase those financial goals with a concrete financial interest in the outcome of those decisions. This would make it very difficult for such an employee to demonstrate that their actions are in the public interest and not based on their own private interest. Past JEA bonus programs have not operated like this. Instead, the JEA Board retained the authority to award bonuses based on the totality of

¹³ See Charter of the City of Jacksonville, Part A §1.201.

¹⁴ See City of Jacksonville, Florida, Municipal Code §602.1203.

¹⁵ The City’s ethics code may also create some concerns in that it requires employees to perform their responsibilities “regardless of personal considerations.”

¹⁶ The term “participate” is defined in section 112.3143(4)(c), Florida Statutes, to mean “any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer’s direction.”

numerous factors, many of which were not quantitative at all¹⁷. This creates space between the employee's compensation and the financial or operating decision. Under the Program, however, there would be no such space—in fact, that would be the entire purpose of the Program.

Tension between the Program and JEA's Public Purpose

In addition to our concerns above, we are also concerned that a court could call into question whether the narrow focus of the Program on a few financial metrics is in reasonable furtherance of JEA's public purpose. The authority of municipal governments to issue bonds and to make expenditures of public funds are required to be exercised in furtherance of a public purpose and the concept of public purpose is consistently used by courts in Florida and across the country to evaluate whether a particular expenditure is a "legitimate exercise of the people's power surrendered to the state".¹⁸ Most of the case law interpreting what constitutes a public purpose in Florida involves the validation of debt issued by a government entity and an examination of whether the state or local government is lending its credit to a private party in violation of Article VII, section 10 of the Florida state constitution.¹⁹ The courts in Florida have generally held that if a local government issues bonds where a pledge of public credit or taxing power is involved for a project that includes a private component, the bonds are validly issued only if the bond issuance serves a "paramount public purpose" and any benefits to a private party are merely incidental.²⁰ If it is a revenue bond financing and there is no lending of credit the courts have often found that it is enough to show only that an ordinary public purpose is served by the issuance of such bonds²¹, however this rule has not always been followed by the courts.²² The lack of a specific definition of public purpose and inconsistent analysis by the courts creates uncertainty as to whether the

¹⁷ JEA's Pay for Performance Program tracks five key metrics: (1) Customer Satisfaction; (2) Safety; (3) Cost per unit of Electricity delivered (Kwh); (4) Cost per unit of Water delivered (Kgal); and (5) Cost per unit of Wastewater collected (Kgal). See JEA Board Meeting Agenda Item Summary, October 24, 2018.

¹⁸ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017)

¹⁹ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017)

²⁰ See *Poe v. Hillsborough County*, 695 So. 2d, 672, 675 (Fla. 1997) (holding that "a bond issue does not violate [A]rticle VII, [s]ection 10 so long as the project serves a 'paramount public purpose,' and any benefits to private parties from the project are incidental").

²¹ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 489 (2017).

²² See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 490 (2017).

establishment of the Program and the issue of bonds to provide awards under such program would survive a legal challenge. However, the courts are clear that if there are specific findings “by the legislature, the Board of County Commissioners, and the Authority that the project is related to the health, safety, morals, and welfare of the residents” then

What constitutes a public purpose is, in the first instance, a question for the legislature to determine, and its opinion should be given great weight. A legislative declaration of public purpose is presumed to be valid, and should be deemed correct unless so clearly erroneous as to be beyond the power of the legislature[...] and the issuance of the Authority’s revenue bonds is adequately supported by a proper public purpose.²³

In making such a legislative declaration, one commentator itemized the list of elements that a governing body should consider in any legislative record to establish that an action is in furtherance of a “public purpose” so that a subsequent review by a court would make it difficult for the court to overturn the findings of the legislative body:

- A concise statement of the problem;
- How the problem is affecting the public;
- Identification of the factors causing or contributing to the problem;
- Which factors the proposal will influence, including the ones that will not or cannot be affected;
- How the proposal will operate to influence the factors that will be affected; that is, the mechanics of the nexus between action and purpose;
- What the alternatives are; what has been tried that didn’t work or why this proposal is being suggested over alternatives;
- How the success of the proposed project will be measured and when;
- How the public will be protected if the project fails and rewarded if it succeeds; and
- What the city’s risks and upsides are, what the private party’s risks and upside are, and a comparison of the two.²⁴

In connection with any approval of the Program by JEA’s Board, the Board should specifically articulate what problem the Program solves and how the Program is reasonably related to solving that problem. In doing that, if the Board articulates the purposes of the Program solely in terms of the financial goals of JEA, then it could expose JEA to a court that questions whether that purpose is consistent with JEA’s mission. Conversely, if the Board articulates its purpose as

²³ Housing Finance Authority of Polk County, 376 So .2d at 1159. (

²⁴ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the “Public Purpose” Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017).

broad as its traditional mission has been, then a court could question why the Program furthers only a portion of that overall mission.

While we do not suggest that it represents a clear legal prohibition, we do note that the Program would potentially be viewed by a court as in tension with JEA's stated public purpose and role as a municipal utility—particularly since the Program would be unusual for municipal-owned utilities. JEA as a municipal utility is a not-for-profit entity. As JEA's website states, "As your not-for-profit, community-owned utility, JEA is committed to providing you the most reliable service at the lowest possible cost in an environmentally friendly way." This is consistent with how JEA has approached its mission in the past and is consistent with other municipal-owned utilities. Municipal-owned utilities exist for an array of quantitative and qualitative purposes which further the interests of the communities they serve. Low utility rates for low-income members of the community, environmental considerations and securing long-term power sources to support the local economy are as important of purposes as generating net revenues in the short term.

Our observation of the Program is that it furthers a very small set of the overall purposes of JEA while giving at least the perception of being inconsistent with other critical aspects of JEA's stated mission. Since the Program would be unique in nature among municipal-owned utilities (we are not aware of another similar program and particularly in Florida), we believe that the Program's narrow focus on the generation of profits and financial performance to the exclusion of other considerations exposes the Program to a legal challenge that it is not in furtherance of JEA's overall public purpose. As the Supreme Court of Florida stated in *State v. City of Panama City Beach*:

The constitutional prohibition against pledging public credit to private enterprise, article IX, section 10, Florida Constitution (1885) (now contained in article VII, section 10), was designed "to restrict the activities and functions of the State, county and municipality to that of government and forbid their engaging directly or indirectly in commercial enterprises for profit." This prohibition is closely tied to revenue bonds and to what constitutes a proper public purpose.²⁵

We do not consider this to represent a clear legal prohibition but one of those uncertain legal issues that will affect any employee incentive program that awards bonuses solely on the basis of a few narrow financial metrics instead of an after-the-fact assessment by the Board of

²⁵ See *State v. City of Panama City Beach*, 529 So. 2d 250, 253 (Fla. 1988).

whether employees furthered the full public purposes of JEA. It also could be viewed as a possible interpretative framework a court would use in evaluating any legal analysis of the Program.

CONCLUSION

While JEA is authorized to adopt a program to award employees bonuses, and has done so as recently as fiscal year 2018, the specific features of the Program present challenges past bonus programs do not. Under Florida law, JEA would be legally required to make the Program available to all employees – which would include high-level employees who are involved or influence many if not all significant financial and operating decisions. But, under Florida conflict of interest laws, no employee could participate in the making of a financial decision if he or she has a financial interest in that decision without first disclosing the financial interest and concluding that the financial interest is not in substantial conflict with the duties that employee has to act first and foremost in the public interest. In our view, we believe this creates an unresolvable dilemma where JEA would either have to exclude several employees from the Program thereby rendering the Program in violation of Florida law or several employees would be unable to carry out their responsibilities under Florida conflict of interest laws.

In addition, the narrowly focused goals of the Program could present challenges whether the Program is in furtherance of a legitimate “public purpose.” Key to any expenditure or transfer of property by a municipality is whether that expenditure or transfer furthers a “public purpose.” To protect it from a court having the ability to fully re-consider whether the Program were in furtherance of a “public purpose,” JEA’s Board would likely need to have a complete record as to the problem the Program solves and how the Program is reasonably connected to the solution of the problem. To that end, the Program may present challenges if JEA’s Board narrowly articulates JEA’s purposes – as it exists for an array of public purposes and not just narrow financial ones – or broadly articulates JEA’s purposes and cannot explain why the narrow focus of the Program on a few financial goals reasonably furthers those more-broadly articulated goals.