

Rhode, Lynne C. (City of Jacksonville)

From: KHyde@foley.com
Sent: Thursday, October 3, 2019 11:49 AM
To: Rhode, Lynne C. (City of Jacksonville)
Cc: crodriguez@foley.com
Subject: Letter to Attorney General Ashley Moody
Attachments: 2019-10-01 - Final Letter to The Honorable Ashley Moody (SIGNED) 4833-3472-6056 v.1.pdf

[External Email - Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email.]

Attached is a copy of the letter delivered to the office of Attorney General Ashley Moody on October 10, 2019. Foley & Lardner reviewed this letter and agrees with its analysis and content. Please call me if you have any questions.

-Kevin E. Hyde

Foley & Lardner LLP
One Independent Drive | Suite 1300
Jacksonville, FL 32202-5017
P 904.359.8786
C 904.613.1437

Visit Foley.com [foley.com]

FOLEY
FOLEY & LARDNER LLP



The information contained in this message, including but not limited to any attachments, may be confidential or protected by the attorney-client or work-product privileges. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this message in error, please (i) do not read it, (ii) reply to the sender that you received the message in error, and (iii) erase or destroy the message and any attachments or copies. Any disclosure, copying, distribution or reliance on the contents of this message or its attachments is strictly prohibited, and may be unlawful. Unintended transmission does not constitute waiver of the attorney-client privilege or any other privilege. Legal advice contained in the preceding message is solely for the benefit of the Foley & Lardner LLP client(s) represented by the Firm in the particular matter that is the subject of this message, and may not be relied upon by any other party. Unless expressly stated otherwise, nothing contained in this message should be construed as a digital or electronic signature, nor is it intended to reflect an intention to make an agreement by electronic means.



OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE

JASON R. GABRIEL*
GENERAL COUNSEL



CITY HALL, ST. JAMES BUILDING
117 WEST DUVAL STREET, SUITE 480
JACKSONVILLE, FLORIDA 32202

KAREN M. CHASTAIN
DERREL Q. CHATMON
JEFFERY C. CLOSE
ARIEL P. COOK
JULIA B. DAVIS
STEPHEN M. DURDON
SHANNON K. ELLER
CRAIG D. FEISER
OILBERT L. FELTEL, JR.
LOREE L. FRENCH
CHRISTOPHER GARRETT
KYLE GAVIN
SEAN B. GRANAT
SUSAN C. GRANDIN
KATY A. HARRIS
MIRZAN R. HILL
LAWSIKIA J. HODGES
SONYA HARRELA HOENER
PAIGE HOBBS JOHNSTON
EMERSON LOTZIA
RITA M. MAIRS

BRETT G. MERENESS
JAMES R. MCCAIN, JR.
WENDY L. MUMMAW
KELLY H. PAPA
KORT PARDE
JACOB J. PAYNE
TIFFINY DOUGLAS PINKSTAFF
JON R. PHILLIPS
CHERRY SHAW POLLOCK
STEPHEN J. POWELL
LYNNE C. RHODE
ASHLEY B. RUTHERFORD
JOHN C. SAWYER, JR.
MARGARET M. SIDMAN
JASON R. TEAL
ADINA TEODORESCU
KEALEY WEST
STANLEY M. WESTON
GABY YOUNG

October 1, 2019

*BOARD CERTIFIED CITY, COUNTY
AND LOCAL GOVERNMENT LAW

The Honorable Ashley Moody
Attorney General, State of Florida
The Capitol PLO1
Tallahassee, Florida 32399-1050

RE: Request for Opinion

Dear General Moody:

Pursuant to Section 16.01(3), Florida Statutes, JEA (formerly known as the "Jacksonville Electric Authority") requests respectfully an official opinion and legal advice regarding a matter of importance to JEA 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. Pursuant to section 16.01(3), Florida Statutes, JEA constitutes a "unit of local government" entitled to request an official opinion in writing on a question of law.¹

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 receive the most cost-effective and efficient electric, wastewater, and water utility services. This exploration is necessary due to the rapidly evolving utility industry and declining sales resulting from energy efficiency measures taken by its customers. This fiscal and

¹ JEA is established as a "body politic and corporate," an independent authority of the City of Jacksonville pursuant to Laws of Florida 78-538, 80-515, 92-341 and Section 21.01 of the Charter of the City of Jacksonville, Florida. JEA is a unit of local government within the meaning of F.S. 16.01(3). The Florida Attorney General has previously issued advisory opinions at the request of the General Counsel of JEA. See AGO 92-43.

Office Telephone
(904) 255-3100

Writer's Direct Line
(904) 665-4115

Facsimile
(904) 665-4238

Writer's E-Mail Address
rhodlc@jea.com

Office Web Site
GeneralCounsel.coj.com

JEA0422

technological shift has necessitated development of a number of initiatives designed to improve and optimize the fiscal health of the utility and promote employee retention

In order to proactively engage and retain employees in this 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 benefit from the enterprise growth of JEA in the next three years. JEA's performance will be measured on the change in JEA's net position during the performance period.

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 provides full-time JEA employees an opportunity to defer compensation in order to purchase units at \$10.00 per unit and later 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 benefit from for 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 have confirmed the JEA Board's authority to pass Resolution 2019-10. While, as outlined herein, we believe the PUP complies with Florida law, given the absence of available case law or advisory opinions directly on point, JEA requests respectfully an opinion confirming that the PUP is not subject to section 215.425, Florida Statutes; and, if it is, that the PUP is not prohibited by section 215.425.²

A. The Long-Term Performance Plan:

The PUP allows eligible employees to defer compensation in order 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, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance units 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

² While JEA has not identified any other Florida Statutes implicated by the Plan, JEA intends to seek similar guidance from the Florida Commission on Ethics.

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 pool of units will be allocated³ amongst employees based on his/her position level and the most recent annual performance review. The units 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. 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) into an FDIC-insured savings account. 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 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 defined as 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.⁴

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. The Plan does not Violate Section 215.425, Florida Statutes

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 deferring their personal compensation to purchase the units and to execute an agreement pertaining to the Plan. As

³ 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.

⁴ As a part of the JEA's 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 by the Purchaser, and the Plan will be extinguished.

developed below, the Plan does not therefore 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.").

We have reviewed the applicable legislative history of section 215.425 and have not identified anything suggesting that plans such as the PUP are, or are intended to be, prohibited by the statute. Moreover, the consistent theme of prior Opinions from your Office -- which are consistent with the clear intent of the statute -- is that the provision applies principally 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 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 is a benefit that allows all eligible employees to participate through a voluntary payment in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP also 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 performance review. 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."

C. Conclusion

In sum, while it appears clear based on our research that the PUP is permissible under Florida law, given the potential significance of the Plan to both JEA and its approximately 2000 employees, we seek guidance from your Office to confirm that the PUP is lawful. Particularly, whether section 215.425, Florida Statutes, is applicable to the PUP and, if so, whether the PUP comports with section 215.425.

JEA appreciates greatly your attention to and assistance with this matter. Please advise if you or your Office have any question or would like additional information.

Sincerely,



Lynne Rhode
VP and Chief Legal Officer
JEA Office of General Counsel,
City of Jacksonville