



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

July 23, 2021

Alfred Rankins, Jr., Ph.D.
Commissioner of Higher Education
Mississippi Institutions of Higher Learning
3825 Ridgewood Road
Jackson, Mississippi 39211

Re: Incentive Pay in Employment Contracts

Dear Dr. Rankins:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, the Mississippi Board of Trustees of State Institutions of Higher Learning (“Board of Trustees”) enters into four-year employment contracts with the public university presidents/chancellors (“employees”). The Board of Trustees is interested in including in the employment contract an additional provision that would provide that an employee would be paid an additional sum at the end of the four-year contract period if the employee remains in the position of president/chancellor for a specified period of time. If the employee remains employed for the required period of time, the additional sum would be provided by a university affiliated foundation to the university, to then be paid to the employee by the university.¹ You state that the purpose of this additional sum would be to retain the employee for the full period of the contract and avoid losing the employee to another university thereby promoting stability in leadership within the current administration.

Issue Presented

May the Board of Trustees include a provision in its employment contracts that provides an additional sum to be paid if the employee remains employed for a specified period of time?

¹ We offer no opinion on the donation by the foundation, which we understand to be a private entity. However, we note that donations to a public entity may be made and accepted for specific purposes authorized by law. Once the funds are received by the university, they become public funds and must be treated in the same manner as other public funds. MS AG Op., *Bryant* at *3 (Nov. 6, 1998) (“The foundations are not agencies or political subdivisions of the State of Mississippi, and the funds raised and collected by them are not public funds as defined by the statute until such time as they are paid over to the universities.”); MS AG Op., *Snell* at *1 (August 17, 2018).

Brief Response

Incentive payments may be included within contracts. A public body may pay employee incentives, provided that the incentives are contracted for prior to the date when services are to be performed, are determined in accordance with objective standards of measurement, and are earned by personal services performed by the employee.

Legal Analysis

Section 66 of the Mississippi Constitution provides:

No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the Legislature, nor by any vote for a sectarian purpose or use.

Section 96 of the Mississippi Constitution provides:

The Legislature shall never grant extra compensation, fee, or allowance, to any public officer, agent, servant, or contractor, after service rendered or contract made, nor authorize payment, or part payment, of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrections.

Using public funds to grant bonuses after services have been rendered would be an unlawful donation in violation of Sections 66 and 96 of the Mississippi Constitution. *Nichols v. Patterson*, 678 So. 2d 673 (Miss. 1996); *Golding v. Salter*, 107 So. 2d 348 (Miss. 1958). This office has consistently opined that to avoid such a violation, a public body may pay employee incentives provided that the incentives: (1) are contracted for prior to the date services are to be performed, (2) are determined in accordance with objective standards of measurement, and (3) are earned by personal services performed by the employees. MS AG Op., *Permenter* at *1 (Oct. 30, 2015). Whether the proposed contract meets these requirements is a determination that must be made by the Board of Trustees.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: /s/ Beebe Garrard

Beebe Garrard
Special Assistant Attorney General