

OFFICE OF THE ATTORNEY GENERAL

M E M O R A N D U M

May 14, 1987

TO: Lee Reaves, Chief Examiner
Division of Municipal Corporations
Office of State Auditor

FROM: James K. Pharris
Sr. Assistant Attorney General

SUBJECT: Eating and Drinking at Public Expense

This is in response to your request, communicated in several meetings and most recently by Ken Ehlers, that we prepare a comprehensive memorandum on the general subject of food and beverage consumption at public expense, including a number of related but somewhat separate topics (such as the circumstances under which public employees are entitled to paid meals, the circumstances under which public bodies can pay for food and beverages in connection with a particular transaction, the extent to which public funds can be used for entertainment and "hosting").

I have tried to cover the subject in a fairly comprehensive way, but the subject does not admit of easy analysis, for reasons stated in the body of the memorandum. For the most part, I rely upon earlier case law and opinions to reach conclusions, only applying a little fresh paint here and there to cover matters not covered by earlier opinions or to note evolution in our thinking on these matters.

INTRODUCTION

The consumption of nourishment is perhaps the classic example of what is ordinarily to be regarded as a private, personal and not public activity. While the later Roman Empire mollified a restless citizenry with bread and circuses (a policy eventually unsuccessful in holding the Empire together), neither bread nor circuses have been regarded as the traditional responsibility of the state in contemporary times. Public employees, just like their brothers and sisters in the private sector, are compensated in the form of salary and are generally expected to select and pay for their own food and entertainment without looking to their employers for these items. Except for a long recognized (and

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inconsistently carried out) exceptional responsibility for the necessary needs of the poor and the sick, the providing of food and entertainment to the general public has, again, not been thought to be a necessary or (in most cases) even an appropriate object of public expenditure.

Thus, to pay for food and drink with public money is very much the exception rather than the rule. Because the purchase of food and beverages at public expense is almost never explicitly mentioned in law, the recognized exceptions to the general rule must be searched for in the shadowy areas of implied authority or derived by extension from principles primarily relating to some other topic.

All of this makes it almost impossible to generalize about those circumstances under which it is appropriate to pay for food and drink at public expense. The question can only be answered with reference to a specific fact situation and generally only after answering the following questions:

1. Who consumed this food and drink?
2. What was the nature of the occasion for the consumption?
3. What public purpose or policy objective was served?
4. Was the consumption of food and beverages an appropriate way to carry out the legal or policy objective in question?
5. Was the expenditure of public funds for the food and beverages in question somehow inconsistent with some constitutional or statutory provision or public policy?

With that background, I will proceed first to discuss the general legal issues involved, then I will discuss the typical fact patterns which seem to emerge in this area, and finally I will suggest a form of analysis for an auditor or other interested party trying to decide whether particular expenditure of funds for food or beverages is justified.

I. LEGAL BACKGROUND

As noted earlier, there is virtually no law explicitly authorizing public bodies to pay for food and beverages with public funds. The state constitution is silent on the subject and even statutory law is rare. A typical exception is such a statute as RCW 28A.58.136, authorizing school districts to

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establish lunchrooms for pupils and school district employees. Note that even this statute appears to contemplate that districts recover their costs by charging for the lunches provided. Other governmental institutions, such as hospitals operated by counties and hospital districts and jails and other correctional facilities operated by cities and counties, have implied (but rarely express) authority to supply their "guests" with food and similar necessities of life. These well known exceptions to the general rule do not extend, however, to the provision of food and beverages to institutional employees or to those not directly under the care of the institution.

Accordingly, where there is authority to provide food and beverages at public expense, it is almost never directly the authority to do that but rather is implied in the authority to do something else. For instance, when RCW 52.14.010 provides that a board of fire commissioners shall "receive necessary expenses incurred in attending meetings of the board or when otherwise engaged in district business . . ." one must infer (despite no explicit mention in the statute) that this authority includes the authority to reimburse or pay for meals for the commissioners, at least under certain circumstances. Or again, when article 8, section 8 of the state constitution and RCW 53.36.120 and .130 allow ports to spend certain funds for "promotional hosting," only the historical context of these provisions gives a clue that "promotional hosting" includes the purchase of food and drink for people who are not port employees under certain circumstances.

While there are few statutes explicitly authorizing the purchase of food and beverages at public expense, there are some which, in effect, provide procedural requirements for accounting for such expenditures. An obvious example is RCW 42.24.080 through .110, which apply to almost all municipal corporations and political subdivisions in the state and impose certain procedural requirements upon municipal corporations before they can reimburse officers and employees for certain expenses, including expenses for meals and other food items. Another example already mentioned would be RCW 53.36.120 through .150, which impose certain procedural requirements on port districts engaged in promotional hosting.

Thus, one who is considering whether or not a particular expenditure of public funds for food and beverages is appropriate must look, first, to see whether there is any statute authorizing the expenditure, expressly or impliedly ("home rule" cities and counties need only show that the expenditure relates to some valid municipal purpose and is not inconsistent with statute). Second, one must check to see if there are any statutes imposing

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procedural requirements on the expenditure. Finally, one must check to see that the expenditures have been authorized by some local ordinance or policy and are consistent with such a policy. Except where a statute itself authorizes the expenditure in question, the enactment of an appropriate authorizing local legislation is a prerequisite, because expenditures of this type must be affirmately authorized by law. See James v. Seattle, 22 Wash. 654 (1900).

II. FACTUAL PATTERNS

The two most important variables in the fact patterns to be considered in this area of the law are (1) the identity of those consuming the food and beverages, and (2) the nature of the occasion for the consumption. I have organized this section of the memorandum by first considering, in broad categories, consumption by public employees, consumption by "quasi-employees," and consumption by nonemployees. Within each of these groups, I have organized the material by the typical circumstances of consumption, with comments on each category.

A. Public Employees

1. Travel Expenses

As noted earlier, the general rule is that public employees, like private parties, are responsible for supplying their own food and drink and are not expected to receive these at public expense. A long recognized exception to this general rule concerns employee travel on public business. Virtually all municipal employees are authorized to claim reimbursement for their necessary expenses in connection with such travel, and it has long been recognized that a legitimate component of these expenses may be the cost of meals purchased during travel. RCW 42.24.090 is the general statute regarding such reimbursement.

Expense reimbursement in the case of travel is apparently based upon the notion that public employees when traveling incur extraordinary food expenses, presumably because they will not be able to purchase and prepare their own food at home but rather must (at least in most cases) eat in restaurants and other places where food is more expensive.

Although it is well established that a public employee is entitled to reimbursement for a meal consumed during official travel, there are questions which should be asked about such an expenditure. First, what was the purpose of the travel and was it really public business? Second, has the employee properly

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documented (see the procedural requirements of RCW 42.24.090 or any other applicable statute) that the expense was actually incurred? Third, were the expenses consistent with the statute, ordinance or policy authorizing reimbursement (or, in a few cases, direct payment)? Finally, many statutes authorize reimbursement of only "reasonable" expenses. For a couple of examples, note RCW 54.12.080 (public utility district commissioners) and RCW 57.12.010 (water district commissioners). Or note a phrase like "actual and necessary expenses" such as in RCW 28A.58.310 (school superintendent candidate).

In my opinion, a limiting term such as "reasonable" or "necessary" was not intended to allow the state auditor or another reviewing party to substitute his or her own judgment for the judgment of the officer who had authorized the payment in question. At the same time, the words do underscore the public fiduciary responsibility that officers have in disbursing public funds. Close questions should undoubtedly be resolved by deferring to the judgment of local officers, but where a particular incurrence of expenses was either patently unnecessary or patently excessive, there is authority to criticize or question the payment, the payment level, or the method of payment selected by the municipality.

2. Non-Travel Business Expenses

While the necessity for eating meals away from home and therefore public expense while traveling on public business has long been recognized, the law has been slower to recognize the legitimacy of public payment for meals consumed at home but on "public business." State employees, for instance, are still entitled to claim reimbursement only for meals consumed in the course of official travel. See RCW 43.03.050. The statutes authorizing expense reimbursement for local governments, however, do not contain similar limitations, so that, if properly authorized by local ordinance or policy, municipal officers and employees can claim reimbursement for meals consumed on official business but not necessarily in the course of official travel.

AGLO 1974 No. 92 (cited by Ken Ehlers in his recent memorandum to me addressing this issue) illustrates the legislature's movement away from the position of requiring travel as a necessary prerequisite to reimbursement for meal expenditures. Former RCW 36.17.030 authorized county officers to "their necessary reasonable traveling expenses in the performance of their official duties . . ." (Emphasis supplied.) However, this statute was repealed in 1974, and county officials are now governed solely by RCW 42.24.090, which has no limitation to

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reimbursement of travel expenses. This precise point is discussed in AGLO 1974 No. 92.

Many of the same questions can be asked about nontravel expense reimbursement as can be asked about travel expense reimbursement, of course. An officer or employee claiming such reimbursement must still be prepared to show (1) what was the occasion for incurrence of the expense, (2) what were the expenses incurred, and (3) that the expenses were incurred in the course of official business as defined and permitted in an applicable local law or policy.

Again, it is appropriate to ask whether nontravel meal expenses are reasonable and necessary. Must a city council choose the breakfast, lunch, or dinner hour for its meetings? If the council meets at, say, 7 p.m., is it reasonable and necessary for the members and/or staff of the council to eat their dinner at public expense just before the meeting? Is it really necessary for a department head to take his staff to lunch at public expense? Again, local officials should be given the broad benefit of any doubt, and are primarily answerable to their voters. In egregious circumstances, however, the auditor should consider audit criticism of expenses which appear to be excessive and unreasonable or make public comment so that the voters know what they are paying for.

It is always important of course to analyze what sort of "business" is being conducted at a meal paid for with public funds. Typically one would expect that the "business" would consist of a meeting conducted during the meal or so near just before or just after the meal as to justify treating the meal as a part of the meeting. A different kind of example would be a circumstance under which, say, a firefighter or jail employee is permitted to consume a meal at public expense because he or she is "on duty" and expected to be available throughout the meal period. This sort of expense reimbursement should be covered either by a union contract or by local policy.

3. Ceremonies and Celebrations

As of the late 20th Century, I discern a continuing public ambivalence about the place of ceremonies and celebrations, of feasts and fanfares, in American public life, and specifically in American public expenditure. The modern American loves banquets and parades as much as any other example of the species and almost seems to leap at any chance to commemorate civic events, from centennials to dam openings.

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At the same time, there is a deep sense, perhaps inherited from the Puritan and agrarian strains in American history, that there is something unseemly about lavish public expenditure on ceremonies and "events." Perhaps it is nothing more than a sense of equity, that where 400,000 taxpayers are footing the bill, there is something wrong about having only 40 or 400 drinking the champagne and eating the caviar.

Again, there is very little "hard" law on the subject. The only attorney general opinion I could find significantly addressing the point is AGO 53-55 No. 314, an opinion to the Benton County prosecutor concerning the authority of Benton County to contribute funds to the McNary Dam Dedication Committee.

The conclusion of the opinion was that the county could not simply contribute money to the Committee (which was apparently a private group) but that the county could (following applicable statutory procedures) pay directly for certain dedication expenses. The significance of the opinion is to recognize that an "event" such as the dedication of a dam can be recognized and can be supported in part with public funds. But the opinion also (without citing any clear legal basis) reflects the traditional American sense that only certain dedication expenses are "appropriate" objects of public expenditure. I quote the final paragraph of the opinion.

Finally, we deem it necessary to make certain observations as to the propriety of expending public funds for specific purposes. Under no circumstances could expenditures for personal entertainment be considered a public purpose. Neither do we believe that the expense of travel, housing and subsistence for visiting dignitaries could be so considered. However, general publicity, physical improvements on the property (grandstands, etc.), public relations booths and similar items are ordinarily considered expenditures for a public purpose and these, we think, could properly be paid by the county. Each expenditure should be scrutinized by the auditing officers, to the end that they be limited to items reasonably connected with a public purpose. AGO 53-55 No. 314, p. 3.

I sense that public opinion has gradually evolved over the thirty years since the opinion was written to a more liberal attitude about the proper objects of expenditure in connection with ceremonies and celebrations. On two or three occasions, we have advised your office informally that a municipality commemorating a dedication or an unveiling can pay for the reasonable expenses

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of the event, including the food and beverages consumed. The old tendency to try to draw an imaginary line between weak punch and stale cookies (which, after all, are not particularly pleasant and enjoyable) and champagne and caviar (which are very expensive, highly enjoyable, and likely to excite envy on the part of the uninvited taxpaying public) seems weaker than it was a generation ago.

How do we analyze the propriety of expenditures for public celebrations, whether municipal employees or others are the primary consumers of the celebratory cakes and ale? Only a couple of years ago, we took the position (letter of Assistant Attorney General Marjorie Schaer to the Board of Commissioners of Kittitas County Sewer District No. 1 dated October 4, 1984) that the purchase of champagne for a dedication ceremony was inappropriate and should be recovered. Yet I am inclined to think that the position we took in that letter (which I strongly shared at the time) was based upon unstated assumptions which, upon further examination, are not terribly strong. I suggest that, for purposes of analysis, we analyze "celebrations" in terms primarily of the extent to which they serve a recognized public purpose. At one end of the spectrum, the public utility district has a right to celebrate the dedication of a new hydroelectric dam. At the other end of the spectrum, the arrival of a new package of pencils in the city purchasing office would appear to be an insufficient cause to justify a celebratory dinner. Again, I think close issues should be resolved in favor of local discretion, but we can reserve the right to criticize public expenditures on events and celebrations which quite clearly serve no public purpose.

A related portion of the analysis would be to look at who is invited to attend. In this sense, ironically, I am arguing that major expenditures are more justifiable, on the whole, than smaller ones. As an example, let me go back to the hydroelectric dam dedication by a public utility district. This could be logically treated as a major event, and the public utility district could choose to purchase champagne and hors d'oeuvres for a thousand people (commissioners and staff, visiting dignitaries, but mostly interested members of the general public). Such an expenditure would appear to serve a public purpose, and we can reliably leave it to the political process (that is, the voters/ratepayers of the district might rise up in protest and choose different commissioners) to keep the process honest.

On the other hand, if the public utility district chose to limit its celebration to a quiet dinner at district expense attended

