

The State of South Carolina



Office of the Attorney General

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April 24, 1987

The Honorable Addison G. Wilson
Senator, District No. 23
606 Gressette Building
Columbia, South Carolina 29202

Dear Senator Wilson:

By your letter of March 24, 1987, you have asked for the opinion of this Office on several questions, as follows:

May a county or political subdivision of South Carolina pay for bar bills and liquor charges with public funds? May such a political subdivision reimburse public officials or employees for such charges while traveling on official business? Is there a limit to any such expenditure to where it exceeds official business?

May a county or political subdivision of South Carolina pay for movies or pay television included in hotel bills with public funds? May such political entities reimburse public officials and employees for such charges while traveling on official business?

The same principles of law to be discussed below would be applicable to both questions.

Statutes Authorizing Reimbursement

At least two statutes of South Carolina permit reimbursement to public officials of political subdivisions of this State. Section 4-9-100, Code of Laws of South Carolina (1976, as revised), provides that members of county councils "may also be reimbursed for actual expenses incurred in the conduct of their official duties." As to municipalities, Section 5-7-170 of the Code provides that mayors and council members "may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance." We will discuss decisions from other jurisdictions construing similar statutes, to

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formulate a response to your questions, but we must advise that we have not examined any ordinances of any political subdivision and thus make no comment or judgment as to any subdivision's policy of reimbursement or to any specific instance in which reimbursement was provided.

Constitutional Provisions

There are two constitutional arguments which are usually advanced in issues such as you have raised: extra compensation to the public official being reimbursed and use of public funds for other than public purposes. The Constitution of the State of South Carolina contains provisions similar to those which are raised when the issues arise in other jurisdictions. Article III, Section 30 provides:

The General Assembly 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;

In addition, Article X, Section 11 provides that

[t]he credit of neither the State nor any of its political subdivisions shall be pledged or loaned for the benefit of any individual, company, association, corporation, or any religious or other private education institution... .

Whether the practice of a political subdivision of the State violates either of these constitutional provisions can be determined only by a review of the facts of a particular situation, applying applicable law. While this Office may not make factual determinations, see Op. Atty. Gen. dated September 9, 1986, the law will be discussed for your guidance.

Discussion of Applicable Law

The general rule as to reimbursement for expenses of public officials is succinctly stated in 62 C.J.S. Municipal Corporations § 535: "The general rule is that a municipality [or political subdivision] may, when not prohibited by its charter, reimburse one of its officers for moneys actually and necessarily expended by him in the discharge of a duty pertaining to his office." See also Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985); Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596 (1931). Courts interpret strictly the right of public officials to be reimbursed for their necessary expenses incurred in the performance of their official duties. Housing Authority of City of Harlingen v. State ex

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rel. Velasquez, 539 S.W.2d 911 (Tex. Civ. App. 1976); Op. Atty. Gen. dated September 9, 1986. The test to be applied in determining the propriety of a particular request for reimbursement is found in McQuillin, Municipal Corporations, § 12.190:

[W]as the act done by the officer relative to a matter in which the local [political subdivision] had an interest, or have an affect [sic] upon [the political subdivision's] rights or property, or the rights or property of the citizens which the officer was charged with an official obligation to protect and defend. No expenditure can be allowed legally except in a clear case where it appears that the welfare of the community and its inhabitants is involved and direct benefit results to the public.

In Terrell v. Middleton, 187 S.W. 367 (Tex. Civ. App. 1916), the Governor of Texas sought reimbursement for food items, horse feed, gasoline, horse shoeing, party invitations, waiter hire, and similar expenses. The court stated:

Clearly, the items ... were for private and individual purposes, and not for the public good, and the appropriation made for that purpose by the Legislature was directly in the face of article 16, § 6 of the Constitution, which commands that "no appropriation for private or individual purposes shall be made." The articles named were clearly not for the Governor in his official capacity, but for his individual satisfaction and gratification.

* * *

A lending of the credit of the state to a Governor for his private expenses, to increase his compensation is ... a violation of the constitutional provision as to his compensation... .

Id., 187 S.W. at 372-373.

Courts have noted the distinction, in numerous cases, between official expenses and those personal to the officer. See Annot., 5 A.L.R.2d 1182 for a comprehensive collection of decisions. In Funk v. Milliken, 317 S.W.2d 499 (Ky. Ct. App. 1958), the court stated that reimbursement "may be allowed for expenses that are reasonable in amount, beneficial to the public, and not predominantly personal to the officer in the sense that

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by common understanding and practice they are considered to be personal expenses." Id., 317 S.W.2d at 506. To receive reimbursement, the officer was required to show the amount and purpose of each expenditure, reasonableness, and that each expenditure was in an allowable category as determined by the political subdivision. To determine the latter factor, the "court will be governed by the consideration of whether the expense is official rather than personal in nature." Id., 317 S.W.2d at 507.

As long as the reimbursement is made for actual and necessary expenses for such items as lodging and subsistence incurred by a public officer in the performance of his official duties, courts do not view such reimbursement as extra compensation. Earhart v. Frohmler, 178 P.2d 436 (Ariz. 1947). If the public officer is reimbursed for expenses which were in excess of the officer's entitlement, such has been deemed to be extra compensation, which is prohibited by constitutional provisions such as Article III, Section 30 of South Carolina's Constitution. Terrell v. Middleton, supra.

The only judicial determination relative to Section 5-7-170 (reimbursement of expenses of municipal mayor and council members) is Brown v. Wingard, supra; Section 4-9-100 has apparently not been construed in a reported decision. In Brown, the practice of a municipality's paying the expenses of spouses accompanying the mayor and city council members to a National League of Cities convention was successfully challenged. The Supreme Court stated that "[o]nly actual expenses incurred by the Mayor and Council members themselves in the performance of their official duties are contemplated by the statute." Id., 285 S.C. at 480. The court apparently did not examine the various expenses incurred such as lodging or food, however, and thus this case is not of great assistance in responding to your questions.

At least two South Carolina cases have challenged the practice of paying per diem to legislators: Scroggie v. Scarborough, supra, and Scroggie v. Bates, 213 S.C. 141, 48 S.E.2d 634 (1948). While the courts in many states were not allowing personal expenses of legislators to be paid with public funds, State ex rel. Griffith v. Turner, 117 Kan. 755, 233 P. 510 (1925); Annot., 5 A.L.R.2d 1182, South Carolina's Supreme Court declined to follow, declaring that expenses of necessary travel were in the nature of official expenses. Due to the difference in per diem and reimbursement of actual expenses, these cases are not particularly helpful as to your issues.

We have not been able to locate a decision in which the court expressly considered the payment of bar tabs, pay television, or in-room movies as a part of one's "actual expenses" while traveling or otherwise

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performing official duties.^{1/} Thus, the test as provided in McQuillin, supra, and the consideration of official expenses as opposed to those personal to the official must be the guidelines for determining the propriety of any given expense or reimbursement thereof. These factors could be utilized by a municipality in adopting an ordinance, as required by Section 5-7-170, establishing limitations on expenditures.^{2/} For possible guidance as to reimbursement of meals, which might include alcoholic beverages, enclosed is an opinion of this Office dated August 16, 1985, as to the policy which applies to reimbursement of meal expenses by the State.

In addition to constitutional considerations, that reimbursed expenditures were for private rather than public purposes and thus may be considered to be extra compensation, the State Ethics Act, in Section 8-13-410 of the Code, mandates that "[n]o public official or public employee shall use his official position or office to obtain financial gain for himself." See Op. Atty. Gen. dated September 9, 1986 (enclosed), cautioning that in other jurisdictions, monies received in excess of the official's entitlement would be deemed to be extra compensation and therefore illegal. We also note that because public funds are involved, the following from Scroggie v. Bates is appropriate:

^{1/} But see Russ v. Commonwealth, 210 Pa. 544, 60 A. 169 (1905). The Pennsylvania legislature appointed a committee to arrange an excursion to New York to attend the dedication of a monument to General U. S. Grant. The committee contracted for table supplies, wines and liquors, supper, china and breakage, cigars, car fare, and other related charges. The wine and liquor accounted for half of the challenged expenditures. The expenditures were argued to have been incurred for personal and private objects; though the dedication was a public service, participation of the legislators was argued to be a private or personal affair. The Supreme Court disagreed and noted the patriotic nature of the event. In determining that such did not result in extra compensation to the legislators, the court stated that "[p]roper entertainment of the Legislature was not merely incidental to its attendance at the dedication, but was necessary, and therefore formed part of the state's expenses in making suitable recognition of the ceremony." Id., 60 A. at 174.

This case does not appear to be apposite to your questions but is noted because it is the only decision located which expressly discussed payment of expenses relative to alcoholic beverages.

^{2/} While municipalities are required to establish limits by ordinance, no such requirement exists as to counties. Adoption of such limits would be a decision left to the discretion of each county council.

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Nothing in fiduciary law is better settled than that the trustee shall not be allowed to advantage himself in dealing with the trust funds. While of course, the matter here does not in a legal sense involve a trust such as exists between individuals or corporations, the principle of trusteeship in authorizing disbursements of funds to its own members during their term of office is quite apposite. A cogent statement of this idea is found in 49 American Jurisprudence, 248. In speaking generally of the Legislature it says: "It is an instrumentality appointed by the state to exercise a part of its sovereign powers. In that capacity it holds the public funds in trust for the people."

Id., 213 S.C. at 152.

This Office advises that a political subdivision may reimburse its officers and employees for only official business expenses incurred in the performance of their official duties. Reimbursement of purely private or personal expenses would most probably violate Article III, Section 30 and Article X, Section 11 of the State Constitution and Section 8-13-410 of the Code. As to the specific expenditures mentioned in your letter, we were not able to locate any law or judicial determinations and thus can respond only generally to your inquiry. Only a court could make a determination with absolute certainty that an expense was an official business expense rather than a private or personal expense after a review of the facts involved in a given situation. The determination of whether to reimburse an individual for a particular expense should be made using the test enunciated by McQuillin, supra. This Office herein makes no comment as to specific practices by a specific municipality or county and leaves such a determination to the courts. Funk v. Milliken, supra. Due to the lack of guidance from the courts on your questions, the General Assembly may wish to consider adopting legislation which would clarify the issue.

With kindest regards, I am

Sincerely,

Patricia D. Petway
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Assistant Attorney General

PDP/rhm
Enclosures

REVIEWED AND APPROVED BY:

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