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OPINION	:	No. 81-1206
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of	:	<u>AUGUST 24, 1982</u>
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THE HONORABLE PAUL B. CARPENTER, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following question:

Does a California city have authority to expend its funds to reimburse as travel expenses those costs which a physically handicapped member of a city council incurs for the handicap related assistance of others needed by the member to travel in the performance of official duties?

CONCLUSION

A California city has authority to expend its funds to reimburse as travel expenses those costs which a physically handicapped member of a city council incurs for the handicap related assistance of others needed by the member to travel in the performance of official duties if a demand for reimbursement of such costs is approved by the city council unless the charter or an ordinance of the city provides otherwise.

ANALYSIS

The question presented concerns the expenditure of funds of a California city, specifically payment for the assistance provided by another to a physically handicapped member of the city council who requires such assistance for travel in the performance of the member's official duties. This presents the question of the city's power to expend its funds for such purpose.

Article XI, section 2(a), of the California Constitution¹ provides:

"The Legislature shall prescribe uniform procedure for city formation and provide for city powers."

The Legislature has complied with this mandate by the enactment of title 4 (§ 34000 et seq.) of the Government Code.

Article XI, section 3(a), provides in part:

"For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. . . ."

Article XI, section 5, provides:

"SEC. 5. (a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

"(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several

¹ Article references shall be to the California Constitution and unidentified section references shall be to the Government Code unless otherwise indicated.

municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

Thus the powers of a California city are derived from the state Constitution, statutes and the city charter, if a charter has been adopted. Of course, these powers are subject to the requirements and limitations of the state and federal Constitutions.

The statute pertinent to the payment of the travel expenses of members of a city council is section 36514.5 which provides:

"City councilmen may be reimbursed for actual and necessary expenses incurred in the performance of official duties."

This statute provides the basic authority for cities which do not have a charter to pay the travel and other expenses of members of their city councils from city funds. However, a number of other constitutional and statutory provisions affect the extent of this power and the manner of its exercise.

Article XVI, section 6, provides in part:

"The Legislature shall have no power . . . to . . . authorize the making of any gift, of any public money"

This provision confines the expenditures of public funds to public purposes. In *Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866, 869 the court stated:

"An expenditure of municipal funds is permitted only where it appears that the welfare of the community and its inhabitants is involved and benefit results to the public."

In the *Albright* case the court held that payments of city funds which exceed the amounts actually expended for a verifiable municipal purpose is the equivalent of a gift of public funds in contravention of the state Constitution. Performance of official duties by a member of the city council clearly serves a municipal purpose. In *Collins v. Riley* (1944) 24 Cal.2d 912, 918 the court stated:

"When an officer is required to travel in order to perform his duty, the payment of his actual necessary living expenses while away from home is a proper item of state expense and, unless expressly forbidden by the Constitution, it is a proper exercise of legislative authority to provide for the officer's reimbursement."

In *Collins* the court specifically addressed the constitutional prohibition against increasing a legislator's compensation during his term of office holding that reimbursement of expenditures made necessary by reason of the office is not compensation within the meaning of the constitutional prohibition. The *Collins* case made no reference to the prohibition of gifts of public funds (then art. IV, § 31) but ordered payment of the travel expense claim thus ruling *sub silentio* that such payment did not constitute a gift of public funds.

In *Albright v. City of South San Francisco*, *supra*, 44 Cal.App.3d 866 a taxpayer sought to enjoin the city's practice of paying councilmen \$50 a month as reimbursement for miscellaneous unitemized expenses and also sought reimbursement for prior payments. The judgment denying relief was reversed and the trial court was directed to issue the injunction and order reimbursement of the improper monthly payments. The court observed (at p. 870):

"Respondents' reliance upon the authority of Government Code section 36514.5 is misplaced. The section reads: 'City councilmen may be reimbursed for actual and necessary expenses incurred in the performance of official duties.' This section does not abrogate the applicability of sections 37201 through 37205 of the same code. These require the filing of 'demands' that are to be audited in the manner prescribed by ordinance or resolution and are accompanied by a verification of the accuracy of the demand. In *Adams v. City of Modesto* (1901) 131 Cal. 501, at page 502 [63 P. 1083] the court stated that the purpose of the requirement that funds be expended only upon demands presented to the council 'is that they may be "audited."'

"To audit is 'to examine and verify.' (Webster's Third New Internat. Dict.) The informal practice that became custom in South San Francisco is such that neither *actuality* nor *necessity* of the components of the allowance is subject to verification. The specifics of where, when and purpose simply do not appear in the demands. Obvious questions arise: Are these expenses the same when a councilman is ill or on vacation? What portion is automobile expense or 'availability'? If compensable, does the 'availability' of a compact represent the same expenditure as medium or luxury automobiles? Were coffee breaks or meals with interested citizens related to

specific municipal affairs? If audit is to be meaningful, some answer to these question must appear. In this connection, we see no impropriety in permitting these officers to now supplement their pro forma claims with the detail necessary to show the actual and necessary expenditures that were reimbursable under Government Code section 36514.5."

Thus reimbursement of a member of a city council for expenses under section 36514.5 is subject to the demand requirements of sections 37201 through 37205.

The rule is settled "that compensation for official services depends entirely upon the law; that statutes relating to such compensation are strictly construed in favor of the government; that a public officer may only collect and retain such compensation as is specifically provided by law, and that any money paid by a governmental agency without authority of law may be recovered from such officer." (*County of San Diego v. Milotz* (1956) 46 Cal.2d 761, 767. The rule applies as well to reimbursement for expenses as to compensation for services. (*Madden v. Riley* (1942) 53 Cal.App.2d 814, 822; 60 Ops.Cal.Atty.Gen. 16, 21 (1977).)

Next we focus on the kinds of expense for which section 36514.5 authorizes reimbursement. For convenience we repeat its language: "City councilmen may be reimbursed for actual and necessary expenses incurred in the performance of official duties." This language indicates that an expense must meet four requirements to be reimbursable: (1) It must be an expense of a member of the city council; (2) It must be an "actual" expense; (3) The expense must have been "incurred in the performance of official duties"; and (4) It must be a "necessary" expense. We consider each of these requirements in turn and its application to the question presented.

Section 36514.5 does not purport to authorize reimbursement of the expenses of any person other than a member of the city council. Thus payment of a claim presented by the person who provided assistance to a member of the city council on account of such assistance is not authorized by section 36514.5. Those who provide services to a member of the city council must look to that member, not the city, for payment for their services in the absence of some contractual arrangements with the city.

Webster defines "actual" as real or genuine as distinguished from potential, possible, hypothetical or nominal. In the context of section 36514.5 we believe an actual expense refers to a specific sum of money which the council member has either paid or become legally liable to pay. Thus if the member of the city council neither paid for nor became legally liable to pay for the assistance to such member, such assistance is not the actual expense of the member. Creation of a legal liability to pay for such expenses would

normally require an agreement to pay an ascertainable sum as consideration for the services made prior to the rendition of the services.

The requirement that the expense be "incurred in the performance of official duties" places another qualitative restriction upon the kinds of expenses reimbursable under section 36514.5. The question assumes that the travel of the city council member is in the performance of official duties. Thus we are not concerned in this opinion with the question of what activities constitute official duties. (See 60 Ops.Cal.Atty.Gen. 16, 21-24 for a discussion of that question regarding a similar statute.)

Section 36514.5 requires that the expense must be "necessary" to be reimbursable. Determining whether an expense of a public officer was necessarily incurred was considered in *County of Yolo v. Joyce* (1909) 156 Cal. 429. In the *Joyce* case the district attorney claimed reimbursement for the transcript of testimony in a criminal case he was prosecuting. The board of supervisors paid the claim but later sued to recover the amount paid because the court had not approved preparation of the transcript. The Court of Appeals reversed the judgment ordering reimbursement making these observations:

"By section 228 of the County Government Act it is provided, however, that expenses necessarily incurred by the district attorney in the 'prosecution of criminal cases' are county charges which under subdivision 11 of section 25 of the same act are to be paid out of the county funds under a claim presented to and allowed by the board of supervisors.

". . . The district attorney is an executive officer charged with the detection of crime and the prosecution of criminal cases. In furtherance of the proper discharge of his duties the legislature has, under the section of the County Government Act, enlarged his power so as to permit him to incur expense necessary to enforce the criminal law. His authority to do so for that purpose is not made subject to the control or supervision of any court or judicial officer, but is a matter for the consideration of the board of supervisors alone to the extent of determining whether the expense was necessarily incurred so as to constitute a county charge. Of course, the right of a district attorney to incur expense is not an arbitrary one. All that the section of the County Government Act permits is to give to the district attorney, in the first instance, the discretion to determine whether it is necessary in the detection of crime, or the prosecution of a criminal case, to incur an expense chargeable against the county. Any such claim, however, must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly. And as the board of supervisors is

vested with the authority to determine the question whether the expense was necessary or not, and is the tribunal to which is committed under the County Government Act the jurisdiction to supervise the action of the district attorney in incurring the expense, its determination that it was a proper and necessary expense, is conclusive [citations].

While the city council's discretion to determine what expenses are necessary is very broad as indicated in the *Joyce* case it is not unlimited. There must be some connection between the services being reimbursed and the performance of official duties to make the services "necessary" thereto. In *California Teachers Assn. v. Board of Trustees* (1977) 70 Cal.App.3d 431, 435 Presiding Justice Gardner discussed this question in a related context and observed:

"Necessity connotes that which is indispensable, necessary, unavoidable because compelled, a requisite, required by social or legal compulsion or imperative need. Perhaps a good working definition is something that cannot be done without."

Thus "necessary" suggests a relationship of dependence. In the context of section 36514.5 this would mean that the performance of official duty is dependent upon incurring the expense in question. Yet the courts have not required a necessity in any absolute sense. In *Collins v. Riley, supra*, necessary traveling expenses were held to include an expenditure for hotel room and meals when traveling away from home on public business. It is physically possible to perform official duties at remote points without expenditures for hotel rooms and meals. One could carry meals from home and sleep in the car though this may not be convenient or very practical. The *Collins* case indicates that practical necessity is all that is required under the reimbursement statutes—a practical need based upon the prevailing business practices.

Applying the requirement that reimbursable expenses be "necessary" to the question presented we note that the question assumes that the assistance of others is needed by the council member to travel in the performance of official duties. The assistance of others is often a practical necessity in modern travel. Payment for the services of many are included in hotel and restaurant bills. In the case of the handicapped person some of the services of others needed for travel may be unique because of the handicap so there may be no general prevailing business practice to provide such unique services. Nevertheless there is nothing in the word "necessary" which suggests that because something is not necessary for all it may not be necessary for some. A special service may be absolutely essential for a handicapped member of the city council to travel and there can be no doubt that such service is "necessary" within the meaning of section 36514.5 in such a case. But as we have seen, absolute necessity is not required, practical necessity will suffice.

Whatever services are normally employed by those having a particular handicap to enable them to travel become practically necessary for travel by those with such handicap. Such services would therefore constitute a "necessary" expense within the meaning of section 36514.5.

The determination whether a particular expense is "necessary" under section 36514.5 is made initially by the council member but is subject to review and final determination by the city council when it considers the member's demand for reimbursement. If the demand meets the statutory requirements that the expense is both actual and necessary, the city council may approve the demand for payment. It should be noted, however, that section 36514.5 authorizes but does not require reimbursement of specified expenses of members of the city council. The statute says such expenses "may be reimbursed." Section 14 provides that "shall" is mandatory and "may" is permissive and section 5 provides that these definitions shall govern the construction of the Government Code unless the provisions or context otherwise requires. Nothing in the provisions or context of section 36514.5 requires a different construction. Thus a city council may refuse to reimburse an expense of one of its members which was actually incurred and necessary to the performance of the member's official duties.

Many cities have specified the kinds of expenses which are reimbursable and the kind of information and verification required on the demand for reimbursement by city ordinance or resolution.² While preliminary audit procedures may be delegated the final audit responsibility rests with the city council in its approval or rejection of the demands. Of course, any ordinance would constitute a legislative act binding on the city council and its members until amended or repealed in the manner provided by law.

We noted at the beginning of this analysis that a city may derive some of its powers from a city charter. Article XI, section 5 (quoted *supra*), provides that a city charter may provide for the regulation of municipal affairs and the regulation of municipal affairs pursuant to such charter shall supersede all laws inconsistent therewith.

In *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 385 (overruled on other grounds in *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 585-586; see also *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 317) the court observed:

"The hiring of employees generally by the city to perform labor and services in connection with its municipal affairs and the payment of the city's

² Section 37202 provides that "the legislative body shall approve or reject demands only after such demands have been audited in the manner prescribed by ordinance or resolution."

funds for services rendered to the city by its employees in the administration of its municipal affairs is not subject to or controlled by general laws."

We believe that reimbursement of city officers and employees for expenses incurred in performing city duties is a municipal affair within the meaning of article XI, section 5. (Cf. *Mayes v. Kuhn* (1950) 97 Cal.App.2d 203 affirming a judgment that county supervisor was not entitled to mileage authorized by state statute because county charter provided otherwise.) Thus a city charter may provide for the reimbursement of expenses of members of a city council in a manner different from that provided in section 36514.5. In such case the provisions authorized by the charter would supersede those in section 36514.5.

We conclude that city funds may be lawfully expended to reimburse as travel expenses those costs which a physically handicapped member of a city council incurs for the handicap related assistance of others needed by the member to travel in the performance of official duties if a demand for reimbursement of such costs is approved by the city council unless the charter or an ordinance of the city provides otherwise.
