

Opinion No. 2012-138

February 20, 2013

The Honorable Sue Madison
State Senator
573 Rock Cliff Road
Fayetteville, Arkansas 72701-3809

Dear Senator Madison:

I am writing in response to your request for my opinion on the following questions:

1. May a county use public funds to furnish coffee, soft drinks, or food items to employees or elected officials during the regular course of their working day?
2. Assuming water fountains are readily available in county buildings, may a county use public funds to furnish bottled water or water coolers to employees or elected officials during the regular course of their working day?
3. May a county use public funds to furnish coffee or soft drinks to members of the public who may visit county offices?
4. Assuming water fountains are readily available to members of the public who visit county facilities, may a county use public funds to furnish bottled water or water coolers to members of the public who may visit county offices?
5. May a county use public funds to furnish coffee, soft drinks, bottled water, or food items to elected officials or employees for work-related special events, such as a quorum court meeting

during dinnertime or an employee training session conducted over lunchtime?

6. May a county use public funds to purchase meals for jurors as a routine matter, or may meals be purchased for jurors only when it is not feasible for them to eat lunch on their own?

You indicate in your statement of background facts that these questions arose in “Washington County’s recent budget meetings.” You have attached to your request a memorandum opinion, produced at the request of the Washington County Quorum Court, in which the Washington County Attorney addressed the propriety of supplying county employees with coffee at public expense, concluding that this was a “close question.”

RESPONSE

Neither the Arkansas Supreme Court nor the General Assembly has directly addressed any of your first five questions, rendering it impossible for me to answer these questions with an unequivocal “yes” or “no.” Although both the Arkansas Supreme Court and this office have articulated general principles that will control in determining the propriety of county expenditures, applying these principles in any given instance will require considering all the attendant facts, possibly including proper legislative endorsement of a challenged expenditure. Accordingly, only county officials, presumably in consultation with the county attorney, will be situated initially to weigh the propriety of any proposed expenditure.

Without attempting exhaustively to list the pertinent constitutional and statutory inquiries – issues I will address more particularly below – I will simply note here that a court reviewing any particular public expenditure of the sort contemplated in your questions would in all likelihood inquire into the following: (1) whether the specific expenditure has been expressly authorized through appropriate legislation¹; (2) if not, whether the expenditure accords with legislation clearly authorizing an expenditure of the sort at issue; (3) whether the expenditure is

¹ Although this consideration, if satisfied, would be significant as reflecting a legislative determination that an expenditure serves a public purpose, *see* discussion *infra*, its satisfaction is not absolutely required to justify any given expenditure. The legislature, after all, cannot be expected directly and specifically to endorse every expenditure made in the conduct of public business.

consistent with established custom and practice, reflecting the shared view of officials authorizing the expenditure and of auditors reviewing its propriety over time that the expense conforms to the legislature's intentions; (4) whether a legislative body has expressly identified the expenditure as serving a public purpose; and (5) whether the expenditure benefits individuals, if at all, only incidentally. Any practice of the sort at issue in your questions that has by express legislation been approved as serving the public welfare will be set aside only if the legislative body is shown to have acted arbitrarily, unreasonably or capriciously.

With respect to your sixth question, the legislature has expressly mandated that jurors be provided with meals during the time of their deliberations. Determining whether they might be provided or reimbursed for meals at other times would entail conducting a factual inquiry based upon the factors just recited and discussed at length below.

Question 1: May a county use public funds to furnish coffee, soft drinks, or food items to employees or elected officials during the regular course of their working day?

Although I cannot, in the absence of direct legal precedent, categorically answer this question in the affirmative or the negative, I believe a reviewing court might uphold such expenditures if it deems they meet the general conditions discussed below. As this office has previously observed, in the absence of applicable authority directly on point, I cannot simply declare certain local expenditures permissible or impermissible, since doing so would amount to an arrogation of local discretion and responsibility to determine what expenditures are permissible under the given circumstances.²

² See, e.g., Op. Att'y Gen. No. 92-188 (declining to address the propriety of a school district's providing publicly funded meals and snacks in connection with various events). In this opinion, my predecessor offered the following analysis:

I have also enclosed . . . a copy of Op. Att'y Gen. 92-179 which, in responding to similar issues, concludes that any attempt on the part of this office to determine such questions without the benefit of case law or secondary authority on point would be tantamount to the Attorney General substituting his judgment for that of the local school boards. See *Safferstone v. Tucker*, 235 Ark. 70, 357 S.W.2d 3 (1962). This we will decline to do. Such questions, absent resort to the judiciary, should therefore be left to the discretion of the local school boards, whose duty it is, with the aid of employed counsel, to determine the lawfulness of such expenditures.

Without presuming to predict a judicial outcome, I will note that a court might be inclined to approve the widely accepted practice of providing public employees and officials with coffee and, perhaps not quite so commonly, with bottled water at public expense during working hours.³ A reviewing court might prove reluctant, on the other hand, to draw a similar conclusion with respect to the regular provision of other forms of refreshment such as snack items. Authorizing such expenditures, whether expressly or by necessary implication, is in the first instance a legislative task, and testing both the existence of such authorization and its constitutional propriety falls ultimately to the judiciary, not to this executive office. I consequently can do no more than set forth the pertinent areas of inquiry discussed below.

With regard to both this and your other questions, the Arkansas Constitution imposes various restrictions on a county's expenditure of public funds. A county is precluded, for instance, from donating or appropriating money to private corporations, associations, institutions, or individuals.⁴ A county may further not provide extra-contractual compensation to its officers, agents, and employees.⁵ The Arkansas Constitution also expressly prohibits "illegal exactions" – a category that includes any unauthorized expenditure of public funds.⁶ Finally, the

³ If not expressly endorsed by legislation, the practice of supplying coffee in public offices might be interpreted as reflecting a supportable consensus among officials charged with authorizing and auditing such expenditures that they conform with a general legislative appropriation that would permit providing reasonable amenities to promote productivity in the workplace. I will note, in this regard, that the County Code anticipates and endorses the enactment of such general local appropriations:

(a)(1) GENERALLY. An appropriation ordinance or amendment to an appropriation ordinance is defined as a measure by which the county quorum court designates a particular fund, or sets apart a specific portion of county revenue in the treasury, *to be applied to some general object of expenditure* or to some individual purchase or expense of the county.

A.C.A. 14-14-907 (Repl. 1998) (emphasis added). *See generally* 2002-232 (generally discussing county appropriations).

⁴ Ark. Const. art. 12, § 5.

⁵ Ark. Const. art. 5, § 27. *See also* Ark. Const. art. 16, § 4 (providing that "no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person").

⁶ Ark. Const. art. 16, 13. This provision authorizes any taxpayer to bring suit "against the enforcement of any illegal exactions whatever." There are two types of illegal-exaction suits: "public funds" cases and "illegal tax" cases. *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992). A "public funds" case involves the prevention of a misapplication of public funds or the recovery of funds wrongfully paid to a public official. *Id.* at 128.

overarching “public purpose” doctrine precludes the expenditure of public funds for other than a public purpose.

With respect to the scope of the public purpose doctrine, one of my predecessors has noted as follows:

The doctrine is a constitutional common law doctrine. It was discussed in *Chandler v. Board of Trustees*, 236 Ark. 256, 365 S.W.2d 447 (1963) as follows:

No principle of constitutional law is more fundamental or more firmly established than the rule that ***the State cannot, within the limits of due process, appropriate public funds to a private purpose.*** A century ago the basic doctrine was simply stated in the leading case of *Brodhead v. City of Milwaukee*, 19 Wis. 624: “The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot in the form of a tax take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well being of the community required to contribute.”

Chandler, 236 Ark. at 258 quoting *Brodhead v. City of Milwaukee*, 19 Wis. 624. See also generally, Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 St. Louis U. Pub.L. Rev. 143 (1993).⁷

The Arkansas Supreme Court has offered the following gloss on this doctrine:

In the past, we have declined to give a judicial definition to the phrase “public purpose” because its meaning is not exact, nor is it prone to a static definition. Instead, ***we look to legislative language***

⁷ Op. Att’y Gen. No. 2001-180 (emphasis added). The constitutional due-process guarantee referenced in *Chandler* is set forth at Ark. Const. art. 2, § 8.

for such pronouncements. The Act must prevail unless there is something in the Arkansas Constitution which restrains the legislature from saying that a designated course of conduct or a policy is for the public welfare, or unless the thing authorized is so demonstrably wrong that reasonable people would not believe that this was the legislative intent. We reverse a legislative public-purpose declaration only if the legislature acted arbitrarily, unreasonably, or capriciously.⁸

With regard to expenditures legislatively authorized in pursuit of a declared public purpose, the court has declared as follows:

“It is only in those cases where the discrepancy between an expressed objective and *actuality* is so great that no reasonable person would believe that the purported purpose was a necessary expense of government that the courts will intervene.”⁹

*Any local ordinance enacted in the exercise of this legislative power will be entitled to the same presumption of validity as is a state legislative enactment,¹⁰ meaning that the ordinance will be presumed to fulfill a public purpose.*¹¹

The mere fact that a public expenditure results in an incidental private benefit is not constitutionally offensive.¹² In recently discussing this point, I noted that “the

⁸ *City of North Little Rock v. Pulaski County*, 332 Ark. 578, 582, 968 S.W.2d 582 (1998) (citations omitted; emphases added).

⁹ *Turner v. Woodruff*, 286 Ark. 66, 73, 689 S.W.2d 527 (1985), quoting *Humphrey, State Auditor v. Garrett*, 218 Ark. 418, 236 S.W.2d 569 (1951) (emphasis in original).

¹⁰ *Harris v. City of Little Rock*, 344 Ark. 95, 104, 40 S.W.3d 214 (2001).

¹¹ See Op. Att’y Gen. No. 2012-051 (generally discussing the application of these principles).

¹² See Op. Att’y Gen. No. 2004-319 (stating that “[a]n authorized use for a public purpose is not . . . invalid even though it involves an incidental private benefit”) (quoting Op. Att’y Gen. No. 93-343 and citing 64 C.J.S. *Municipal Corporations* § 1725 (1950)); accord Op. Att’y Gen. No. 95-038. As the Washington County Attorney notes in his memorandum opinion, this office has noted with approval the following formulation by the California Court of Appeal: “‘So long as a public interest is served, there is no unlawful expenditure of public funds even though there may be incidental benefits to private persons.’” Op. Att’y Gen. No. 2000-243, quoting *League of Women Voters of California v. Countywide Criminal Justice Coordination Committee*, 203 Cal.App.3d 529, 554, 250 Cal.Rptr. 151 (1988).

public benefit attending any expenditure of public funds must be clear and direct, with any private benefit being merely incidental,” further stressing that “the determination of a public purpose is one to be made by the legislature.”¹³

Subject to the above restrictions, quorum courts enjoy considerable latitude under the home-rule provisions of the Arkansas Constitution in crafting local laws.¹⁴ The constitution provides that “[a] county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law.”¹⁵ It further provides: “In addition to other powers conferred by the Constitution and by law, the Quorum Court shall have the power to . . . adopt ordinances necessary for the government of the county.”¹⁶

Several statutes further bear on your question. Echoing the constitutional provision just cited, the Code generally affords the quorum court local legislative authority to “[p]rovide for any service or performance of any function relating to county affairs” and to “[e]xercise other powers, not inconsistent with law, necessary for effective administration of authorized services and functions.”¹⁷ Likewise tracking constitutional mandates, the Code authorizes a county government, acting through its quorum court, to “provide through ordinance for the establishment of any service or performance of any function not expressly prohibited by the Arkansas Constitution or by law.”¹⁸ The Code specifies a variety of activities as falling within the scope of such “legislative services and functions,” and it further generally approves the funding of “[o]ther services related to county affairs.”¹⁹ Within these broad parameters, the county judge is statutorily both empowered and obligated to approve vouchers for any payment of county funds based upon his determination that the expenditure complies with the purpose for which the funds were appropriated.²⁰ The Code further authorizes the

¹³ Op. Att’y Gen. No. 2012-094.

¹⁴ See Op. Att’y Gen. No. 2005-062 (discussing the scope of this latitude).

¹⁵ Ark. Const. amend. 55, § 1(a).

¹⁶ Amendment 55, § 4.

¹⁷ A.C.A. § 14-14-801(b)(10) & (13). See also generally *Walker v. Washington Co.*, 263 Ark. 317, 564 S.W.2d 513 (1978).

¹⁸ A.C.A. § 14-14-802(b)(1) (Repl. 1998).

¹⁹ A.C.A. § 14-14-802(b)(2) (Repl. 1998).

reimbursement of “official and nondiscretionary” expenses incurred by county elected officials and employees in the conduct of county affairs.²¹ Expenses incurred in connection with “discretionary functions and services” are reimbursable “when provided for by a specific appropriation of the quorum court.”²² The expenditures of county officers and employees are subject to various statutory ethical restrictions against self-dealing.²³

As noted above, neither a court nor this office has previously found occasion to apply the above principles to the issue set forth in your first question – namely, public expenditures for snacks and beverages consumed by county employees and officials while on duty.

The analytical approach I consider appropriate in addressing your questions is illustrated in various Arkansas Attorney General opinions that bear on similar types of expenditures of public revenues. Perhaps most directly relevant is an opinion, which is attached hereto, that reviews city and county expenditures for such purposes as funding parties for public officers and employees; paying traveling expenses of officials’ spouses; providing reimbursement of expenses for the purchase of alcoholic beverages; funding office decorations; and purchasing flowers, gifts or cards for public officials and employees, their respective families, officials of other political subdivisions, guests of the county or citizens with no direct relationship to the county.²⁴

My predecessor reviewed the various types of expenditures applying the constitutional and statutory provisions discussed at the outset of this opinion. He opined, for instance, that public expenditures for birthday, Christmas and other parties for officials, employees and their families would violate the public purpose doctrine and Article 12, § 5 of the Arkansas Constitution.²⁵ He drew the same

²⁰ A.C.A. § 14-14-1102(b)(2)(B) (Supp. 2011).

²¹ A.C.A. § 14-14-1207(a) (Supp. 2011).

²² *Id.*

²³ *See* A.C.A. §§ 14-14-1202 (Supp. 2011) and 21-8-304(a) (Supp. 2011).

²⁴ Op. Att’y Gen. No. 91-410. A companion opinion, Op. Att’y Gen. No. 91-411, addresses the propriety of a school district’s incurring similar expenditures.

²⁵ *Id.* He further opined that publicly financing Christmas parties would offend the establishment clause of the First Amendment to the United States Constitution.

conclusion regarding the reimbursement of “spouse or non-employee traveling expenses.” In the absence of legislative guidance on the issue, he characterized it as “unclear . . . whether in all instances the expenditure of public funds for alcoholic beverages would be allowable or prohibited” under the public purpose doctrine and Article 12, § 5. He opined only that “[t]he individual facts may vary the results,” adding that “such gifts as certificates of appreciation or plaques, etc.,” might “fall outside the prohibition.” Although he opined without qualification that the purchase at public expense of “flowers, cards and gifts for employees and other persons” would offend Article 12, § 5, he somewhat cautiously opined that “the expenditure of public funds for flowers for official school functions such as graduation, or for office decorations, would more nearly accomplish a ‘public purpose’ than expenditures which inure primarily to the benefit of private individuals.” This caution, I suspect, reflects a recognition that the entity contemplating making such an expenditure is charged in the first instance with determining its authority to do so, subject, of course, to judicial review in the event of a challenge.

In a more recent opinion,²⁶ I expressly acknowledged the fact-intensive nature of inquiries regarding the propriety of particular governmental expenditures. At issue in this opinion was the propriety of a city’s using public revenues to purchase tickets to the governor’s ball on behalf of the mayor and select aldermen. I opined that “public funds generally may not be used to pay for dinners or parties for public officers or employees” – a conclusion that “follows from the fact that such expenditures seem [‘]prima facie to primarily benefit those individuals, rather than the public.[’]”²⁷ The exact question posed, however, characterized the purchase as occurring “under the pretense of ‘networking’ for the benefit of the city.” Demurring at the requester’s tendentious use of the term “pretense,” I opined that a factual issue existed “whether ‘networking’ for the benefit of the city” under the circumstances would yield “a primary benefit to the public sufficient to satisfy the public purpose test.”

The rare opinions from other jurisdictions addressing the issues raised in your questions are likewise instructive primarily in suggesting the considerations that

²⁶ Op. Att’y Gen. No. 2008-026.

²⁷ The internal quotation in this passage is from Op. Att’y Gen. No. 2001-364, in which one of my predecessors opined, *inter alia*, that a regional airport authority’s use of tax revenues “to pay for thirty-two people to have dinner at a cost of \$125 per person” would be deemed suspect under the public purpose doctrine and the proscription against illegal exactions set forth at Ark. Const. art. 16, § 13.

might bear on a finder-of-fact's determination in addressing any particular expenditure. In an opinion mentioned by the Washington County Attorney, for instance, the Ohio Attorney General concluded that coffee, meals, refreshments and other amenities might qualify as fringe benefits offered as compensation to local government employees if the authority charged with fixing compensation has so determined.²⁸ He further concluded that, if such amenities have not been classified as fringe benefits, they may nevertheless be provided under the following standard: "The provision of meals, refreshments or other amenities, although invariably conferring a private benefit, may be a permissible expenditure of public funds, if the legislative authority has determined that the expenditure is necessary to further a public purpose." This determination, he further noted, must be upheld unless it is "palpabl[y] and manifestly arbitrary and incorrect."

Although the Ohio Attorney General's "fringe benefit" analysis is not reflected in any Arkansas authority dealing with similar public expenditures, I do not consider it necessarily inconsistent with the Arkansas law discussed above. I can do no more than note its potential applicability if an appropriate authority has indeed designated expenditures as constituting an element of consideration paid an employee for his or her services.

On the other hand, as the Washington County Attorney further pointed out, the Attorneys General of Alabama and Mississippi, in addressing similar issues, have reached conclusions that might be difficult to reconcile with that of the Ohio Attorney General. In a strikingly abrupt opinion, the Alabama Attorney General concluded that "municipal funds may not be expended to provide cake and coffee at monthly meetings of city employees with birthdays in the respective month, even if the work done at these meetings is clearly related to the achievement of one or more municipal purposes."²⁹ This opinion appears to reflect a conclusion that the payment of such expenses may not be incurred if *any* activity occurs at a meeting that does not exclusively serve a public purpose. This conclusion, in my

²⁸ Ohio Op. Att'y Gen. No. 82-006. In its "fringe benefit" analysis, the Ohio opinion focuses on a standard constitutional proscription, which is mirrored in Article 5, § 27 of the Arkansas Constitution, barring the payment of extra compensation to public officers and employees.

²⁹ Ala. Op. Att'y Gen. No. 2002-049. Apparently for purposes of comparison, the Alabama Attorney referred in passing to two other opinions – one concluding that a City Board of Recreation may furnish meals for board members at a board meeting if the meals are incidental to the meeting, Ala. Op. Att'y Gen. No. 82-00423, and the other concluding that a state agency may not provide refreshments during a break in a meeting that does not extend through a mealtime, Ala. Op. Att'y Gen. No. 2001-168.

opinion, is both too abbreviated and too categorical to be of help in considering the scope of Arkansas law. It is, moreover, of merely tangential relevance, since the question you have asked assumes, unlike that posed to the Alabama Attorney General, that all activities performed by the public officials and employees would serve a public purpose.

As further noted by the Washington County Attorney, the Mississippi Attorney General has opined on various occasions that a city under Mississippi law may not buy coffee for city employees.³⁰ These opinions turn on a conclusion that public expenditures for such amenities should be expressly authorized by state statute.³¹ As an example of properly authorized expenditures, the Attorney General referenced a statute approving the purchase of coffee for jurors upon a court certification of need to the city's board of supervisors.³² So far as I can determine, only the Mississippi Attorney General has opined categorically that only the state legislature by express declaration can authorize a local government's supplying coffee for its employees during business hours. I question that an Arkansas court would adopt or endorse this standard.

As regards similar expenditures incurred by school districts and state agencies in connections with any meeting or "similar event," the Mississippi Attorney General articulated a different standard:

[I]t is our opinion that state agencies and school districts in an effort to achieve a particular goal or perform a particular function which has been imposed upon them by legislative enactment(s) may lawfully purchase coffee, coffee supplies, and soft drinks to be consumed by the participants in a meeting, seminar, workshop, or similar event provided the proper responsible officer or governing entity makes the determination, consistent with the facts, that the activity in question is reasonably related and incidental to said goal or function.³³

³⁰ See, e.g., 1986 WL 81917 and 1986 WL 81466 (no opinion numbers available) (enclosing as attachments a number of previous opinions bearing on the issue).

³¹ The Attorney General concluded that Mississippi's enactment of home-rule legislation did not amount to legislative authorization of the purchases because the legislation expressly barred municipalities from "grant[ing] any donation." *Id.*

³² *Id.*

³³ *Id.*

This standard appears both sensible and consistent with the Arkansas law set forth above. In my opinion, a reviewing court may adopt such a standard in reviewing a practice of providing coffee and other refreshments to county officials and employees in the ordinary course of business. Needless to say, and express legislative declaration addressing such practices would both simplify the court's task and maximize the likelihood that the court would approve the practice.

The Louisiana Attorney General in one opinion addressed similar questions in terms of constitutional mandates virtually identical to those applicable in Arkansas.³⁴ After noting the general principle that tax proceeds must be used for the purposes designated by the voters, the opinion discussed Louisiana's constitutional prohibition, which is in all material respects indistinguishable from Article 12, § 5 of the Arkansas Constitution, against the state or its political subdivisions' "loaning, pledging or donating public funds, assets or property to persons, associations or corporations, public or private."³⁵ The Attorney General noted that both case law and his office's precedents have interpreted this provision as mandating the following:

[T]he requirement of a legal obligation to expend public funds or use public property is the threshold, but not the only predicate[,] for the constitutionality of the expenditure or use. The expenditure must also be for a public purpose and create a public benefit proportionate to its cost.³⁶

The Attorney General approvingly quoted a previous opinion that set forth a relatively straightforward "reasonableness" standard as controlling in weighing the propriety of expenditures for beverages and refreshments. Significantly, for purposes of your question, he characterized this "reasonableness" standard as necessary to avoid "the strictest interpretation" of the constitutional provision that

³⁴ La. Op. Att'y Gen. No. 03-0157, 2003 WL 21940050. Specifically, the opinion addressed the propriety of expending tax revenues pledged "to pay the operation and maintenance cost of firefighting personnel" for the following purposes: (1) providing meals at Volunteer Fire Department meetings, workshops or training programs; (2) providing food and awards for a Firemen's banquet; (3) providing flowers for a hospitalized fireman; and (4) defraying expenses associated with conferences/conventions held at a location 50 miles/one hour from home, and in out of state locations.

³⁵ *Id.*, citing La. Const. art. 7, § 14.

³⁶ La. Op.. Att'y Gen. No. 03-0157, 2003 WL 21940050.

tracks our Article 12, § 5 – namely, a reading under which “providing even ‘coffee and donuts’ is a prohibited gratuitous alienation of public funds.”³⁷ Rather than endorsing any such interpretation, he reiterated the above quoted standard distilled from applicable precedents. In the wake of a subsequent Louisiana Supreme Court case explicating the referenced constitutional provision,³⁸ he refined this formulation as follows:

[T]he public entity must have the legal authority to make the expenditure and must show: (i) a public purpose for the expenditure or transfer that comports with the governmental purpose the public entity has legal authority to pursue; (ii) that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and (iii) that the public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds.³⁹

Quoting a previous opinion, he further concluded that, when appropriate, “in connection with purchasing food-refreshments with public funds, . . . ‘champagne, alcoholic beverages and caviar are unreasonable, but coffee, soft drinks and doughnuts are reasonable.’”⁴⁰

For purposes of my current analysis, these opinions from other jurisdictions, though variably instructive, are obviously not precedential. However, with the exception of the Alabama opinion, which frankly eschews analysis in favor of blunt declaration, these opinions appear consistent in focusing on the priorities set forth in the above recited Arkansas law. More specifically, these opinions focus on such factors as whether a challenged expenditure is legislatively sanctioned; whether the advantage served by the expenditure is reasonably characterized as something other than gratuitous, with any private benefit being incidental; and, finally, in a more general inquiry that clearly overlaps with the others, whether the expenditure is reasonably related to the achievement of a clear public purpose. In

³⁷ *Id.*, quoting La. Op. Att’y Gen. No. 02-0125, 2002 WL 1298156.

³⁸ *Board of Duiirectos of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, et al.*, 938 So.2d 11 (La. 2006).

³⁹ La. Op. Att’y Gen. No 08-08328, 2009 WL 1652678.

⁴⁰ *Id.*, quoting La. Op. Att’y Gen. No. 90-63, 1990 WL 544613.

my opinion, a reviewing Arkansas court would likely ask these same questions, meaning that a particular practice would be most likely to withstand challenge if it were expressly sanctioned by either a legislative body or, absent any such express legislative authorization, by an official arguably charged with making expenditures of the sort at issue; and if it clearly served a public purpose in a manner that predominated over any incidental benefit to one or more individuals.

Again, applying these guidelines in each instance will entail conducting a factual inquiry of the sort I am neither equipped nor authorized to undertake within the framework of a formal opinion. I will note, however – as has the Washington County Attorney – that the practice of purchasing coffee for on-duty governmental employees appears to be widespread and generally accepted. The fact that such public purchases are so common may reflect a consensus among officials charged with making expenditures on behalf of the government that the provision of such refreshment is incidental to public service – i.e., to the fulfillment of a public purpose – in a manner that would withstand challenge.

Question 2: Assuming water fountains are readily available in county buildings, may a county use public funds to furnish bottled water or water coolers to employees or elected officials during the regular course of their working day?

I have not located any authority in this or any other jurisdiction that directly addresses this question. Moreover, as reflected in my response to your previous question, determining the propriety of any such expenditure would entail conducting a factual investigation of the sort I am neither equipped nor authorized to undertake. I can only note that the provision of bottled water has become increasingly widespread in recent years – including, apparently, in governmental offices. A court might consider this fact as in itself reflective of a general consensus that providing such amenities is appropriately incidental to public employment. Nevertheless, in the absence of judicial guidance on this question, I am unable to provide you with a definitive response. Under the circumstances, I can do no more than point out that any challenge to the practice you describe would be subject to review under the standard set forth above.

Question 3: May a county use public funds to furnish coffee or soft drinks to members of the public who may visit county offices?

To date, no Arkansas judicial decision has directly addressed this issue, and I cannot confidently predict how a reviewing court would rule. A court faced with

this issue, however, would almost certainly conduct a factual inquiry applying the standard discussed in my response to your first question.

Question 4: Assuming water fountains are readily available to members of the public who visit county facilities, may a county use public funds to furnish bottled water or water coolers to members of the public who may visit county offices?

I will note initially that providing water to members of the public who are using public services is unquestionably lawful. At issue in your question is whether, assuming that water is available, it would be permissible to provide water to the public in a more desirable or convenient manner.

My response to this question is essentially the same as my response to the preceding question. In my opinion, a finder of fact would review any particular practice under the standard set forth above, focusing primarily on whether the provision of water in a particular manner to members of the public was properly authorized as reasonably serving a public purpose. Given that addressing this question will entail considering the attendant circumstances, I cannot supply a categorical answer.

Question 5: May a county use public funds to furnish coffee, soft drinks, bottled water, or food items to elected officials or employees for work-related special events, such as a quorum court meeting during dinnertime or an employee training session conducted over lunchtime?

The Arkansas analysis indirectly bearing on this question is that contained in the Attorney General opinion, discussed in my response to your first question, dealing with a city's use of public funds to purchase tickets to a governor's ball on behalf of the mayor and certain aldermen intent on "networking" at the event.⁴¹ In accordance with the principles discussed in my response to your first question, I noted in this previous opinion that "public funds generally may not be used to pay for dinners or parties for public officers or employees." The reasoning underlying this proposition was simply that such dinners and parties normally amount to perquisites that "primarily benefit those individuals, rather than the public." This conclusion might not hold, however, if the provision of beverages and/or food

⁴¹ Op. Att'y Gen. No. 2008-026.

items were incidental to “work-related special events,” “a quorum court meeting during dinnertime” or “an employee training session conducted over lunchtime.”

To reiterate, among the factors that bear on your question are whether a particular activity has been legislatively acknowledged as serving a public purpose, whether a challenged expenditure is reasonably related to that activity and whether the personal benefit accorded to individuals as a result of the expenditure might reasonably be described as incidental. By way of comparison, these considerations appear consistent with those applied by the Mississippi Attorney General in concluding that it would be lawful for a state agency or school district to “purchase coffee, coffee supplies, and soft drinks” for “participants in a meeting, seminar, workshop, or similar event” that fulfills a legislatively imposed function, so long as the purchase is “reasonably related and incidental to said goal or function” and is approved by “the proper responsible officer or governing entity.”⁴² Determining whether such conditions have been met necessarily involves a factual inquiry, rendering it impossible for me to provide a global answer to your question.

Question 6: May a county use public funds to purchase meals for jurors as a routine matter, or may meals be purchased for jurors only when it is not feasible for them to eat lunch on their own?

Given your focus on county expenditures, I will assume that you are concerned with such expenses on behalf of circuit court juries. As regards meals furnished during jury deliberations, I believe the following statutory provision controls:

(d)(1) After the cause is submitted to the jury, they must be kept together in the charge of the sheriff, in the room provided for them, except during their meals and periods for sleep, unless they are permitted to separate by order of the court.

(2) Suitable food and lodging must be provided by the sheriff and the expense paid by the county.⁴³

⁴² See note 30, *supra* and accompanying text.

⁴³ A.C.A. § 16-89-125 (Repl. 2005). Compare the Mississippi statute discussed *supra*, at text accompanying note 29, authorizing the purchase of coffee for jurors upon court certification.

This statute reflects a clear legislative determination that providing meals for jurors at public expense during their deliberations serves a public purpose. In my opinion, a reviewing court would conclude that this statute is in all respects consistent with the principles discussed in my response to your first question.

The question of whether jurors might be provided or reimbursed for meals consumed during periods when they are actively serving on a jury but not actually deliberating is more difficult. Of possible application in considering this question is the following: “The phrase *expressio unius est exclusio alterius* is a fundamental principle of statutory construction that the express designation of one thing may properly be construed to mean the exclusion of another.”⁴⁴ This principle may apply to foreclose any county expenditure for jurors’ meals other than those specified in the statute quoted above. If a court reviewing such non-statutory expenses deemed the principle of *expressio unius* inapplicable, it would review any such expenditure for jurors’ meals applying the standards discussed in my response to your first question.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure

⁴⁴ *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 575, 864 S.W.2d 233 (1993). *Accord Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988); *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930 (1946).