

CORRESPONDENT Floyd Shimomura

DATE  
REC'D. 4-1

DATED 3-29 RE: CV 97/102 12 - Gifts of Lodging from Friends

ADMINISTRATION

- BOB T.
- LINDA
- JUDY

CONFLICTS

- TED
- DWIGHT
- KEN G.

ENFORCEMENT

- FRED
- ROGER
- BOB G.
- JIM

*(Gray Bar)*

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- JOHN K.
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\_\_\_\_\_, PLEASE:

- \_\_\_\_ TAKE WHATEVER ACTION YOU CONSIDER APPROPRIATE
- \_\_\_\_ REPLY DIRECT BY \_\_\_\_\_ --COPY TO \_\_\_\_\_
- \_\_\_\_ PREPARE SUGGESTED REPLY AND RETURN TO \_\_\_\_\_
- \_\_\_\_ COORDINATE REPLY WITH \_\_\_\_\_

*tape*

*A-78-332*



OFFICE OF THE ATTORNEY GENERAL

## Department of Justice

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March 29, 1978

Mr. Gray Davis  
Executive Secretary  
Governor's Office  
State Capitol  
Sacramento, California 95814

Re: Gifts of Lodging from Friends  
Our No. CV 77/102 1L

Dear Mr. Davis:

You have requested our opinion on the following questions:

1. May a state officer or employee claim the state "per diem" allowed for a traveling employee when he stays with friends and does not pay for his food or lodging?
2. In the event the state officer or employee accepts such hospitality from a friend, must he declare the same as a gift under the Political Reform Act?
3. If the state officer or employee reciprocates the hospitality in one fashion or other, would that relieve his duty to disclose the gifts?
4. If the traveling officer or employee did not claim the state "per diem," would that affect his obligation to disclose the receipt of the meals and lodging?

The conclusions are:

1. A state officer or employee who stays with friends and who does not incur any out-of-pocket expenses for food or lodging is not legally entitled to state reimbursement and should not submit a claim for such on his Travel Expense Claim Form.

2. A state officer or employee who accepts an unreciprocated gift of home hospitality from a friend aggregating \$25 or more in value in any reporting period, will have to report such if he files pursuant to article 2 of chapter 7 of the Political Reform Act and may be required to report such under his agency's Conflict of Interest Code if he files pursuant to article 3 of chapter 7 of the Act.

3. A state officer or employee can avoid a requirement of disclosure by reciprocating his host's gift of home hospitality within the same reporting period with a gift of reasonably similar benefit or value.

4. The failure of a state officer or employee to claim state travel reimbursement would not affect the officer or employee's obligation to disclose an otherwise reportable gift of food and lodging received from a friend.

#### ANALYSIS

State personnel will travel on state business to other parts of the state where they will, from time to time, stay with friends rather than in commercial establishments. In such cases, the employee or officer involved will normally not pay for his room or lodging, but such will be a gift to him from his host. This may occur on more than one occasion during a year.

#### I

The first question asks whether or not the officer or employee can claim the state "per diem" allowed for traveling employees in this situation. The officer or employee cannot.

Before reimbursement can be paid to officers or employees for any expense incurred in connection with performance of state business, statutory authority must exist for such payments. (39 Ops.Cal.Atty.Gen. 310, 312 (1962).) It is well settled that statutes granting compensation or expenses to public employees are strictly construed in favor of the government and where there is ambiguity the construction must be in favor of the government. (County of San Diego v. Milotz (1956) 46 Cal.2d 761, 767; County of Marin v. Messner (1941) 44 Cal.App.2d 577, 585.) The purpose of the rule is to protect the public fisc from unnecessary or excessive claims from public officials. (60 Ops.Cal.Atty.Gen. 16, 21 (1977).)

The general statute governing reimbursement for state traveling expenses is Government Code section 11030. This provision provides, in pertinent part, that:

"All . . . officers and employees of the state when away from their headquarters for purposes of state business . . . shall receive in addition to their salaries, their actual necessary traveling expenses."  
(Emphasis added.)

The word "actual" has generally been defined to mean ". . . real, not nominal; existing in fact, as opposed to constructive, speculative, potential, possible, ostensible, virtual, conceivable, ideal, theoretical, or hypothetical." (Mason v. Hart (1956) 140 Cal.App.2d 349, 355.) By use of the word "actual," it is clear that the Legislature intended reimbursement for traveling expenses which are in fact incurred by the officer or employee. Thus, this provision has been construed to refer to ". . . actual living expenses while away from home. . . ." (Collins v. Riley (1944) 24 Cal.2d 912, 915; 24 Ops.Cal.Atty.Gen. 65, 66 (1954); 14 Ops. Cal.Atty.Gen. 280, 282 (1950).)

Government Code section 13920 gives the Board of Control significant control over the allowance of reimbursement for traveling expenses. (See, 39 Ops.Cal.Atty.Gen. 310 (1962).) This provision provides, in pertinent part, that:

"By a majority vote, the board shall adopt general rules and regulations:

"(a) Limiting the amount, time, and place of expenses and allowances to be paid to officers, agents, and employees of the state while traveling on official state business. . . ."

Pursuant to this authority, the Board of Control has adopted rules and regulations which are contained in title 2, California Administrative Code, section 700 et seq. The Board of Control rules leave no ambiguity as to the meaning of "actual" traveling expenses. Title 2, California Administrative Code, section 700 provides, in pertinent part, that:

"It is the purpose of this Article to provide reimbursement for the necessary out-of-pocket expenses incurred by state officers

and employees because of travel on official state business. . . ." (Emphasis added.)

Title 2, California Administrative Code, section 701, subdivision (c) provides, in pertinent part, that:

"Travel expenses include:

"(1) Per diem expenses consist of the charges and attendant expenses for meals and lodging and all charges for personal expenses incurred while on travel status." (Emphasis added.)

Pursuant to Government Code section 13920, the Board of Control has established the amount traveling state employees may claim for food and lodging while on state business. (See, tit. 2, Cal. Admin. Code, § 706.) With regard to short-term, in-state travel, title 2, California Administrative Code, section 706, subdivision (a)(1) provides:

". . . A short-term allowance will be authorized when the circumstances and duration of travel are such that the traveler incurs expenses comparable to those arising from the use of good, moderately priced establishments, catering to the general public. The short-term allowance is intended for trips of such duration that weekly or monthly rates are not obtainable." (Emphasis added.)

Title 2, California Administrative Code, section 706 provides, in pertinent part, that:

". . . Agencies will authorize payment for lodging, meals and incidental expenses as claimed by the employee in accordance with Section 706(c). . . ."

Title 2, California Administrative Code, section 706, subdivision (c) provides, in pertinent part, as follows:

"(1) In computing the allowance for travel, the following reimbursement will be allowed in any 24-hour period or fractional part thereof:

Lodging . . . . .	\$21.00
Breakfast . . . . .	3.00
Lunch . . . . .	5.00
Dinner . . . . .	8.00

"(3) An additional \$3.00 incidental allowance may be claimed for each 24-hour period."

Thus, the allowable reimbursement for short-term, in-state travel expenses for food, lodging, and incidental expenses is presently \$40.00 in any 24-hour period. (See, State Admin. Manual § 0762.)

When filing a travel expense claim for food, lodging, and incidental expenses with respect to short-term, in-state travel, State Administrative Manual section 0762 provides, in part, that, "[N]o receipts are required to substantiate such claims." However, the officer or employee is required to sign the following certification:

"I hereby certify that the above is a true statement of the travel expenses incurred by me in accordance with Board of Control rules in the service of the State of California, and that all items shown were for the official business of the State of California." Title 2, Cal. Admin. Code, § 704, subd. (f); Travel Expense Claim, Standard Form 262. (Emphasis added.)

The Board of Control establishes the allowable levels of reimbursement set forth in title 2, California Administrative Code, section 706, subdivision (c) after a careful consideration of the expenses that a typical employee on state business is likely to incur. The Board periodically reviews such figures. Thus, most traveling state employees who are forced to use commercial establishments for food and lodging will normally incur expenses substantially close to that authorized by the Board of Control; sometimes more, sometimes less. Although reimbursement is made by reference to standard amounts, the purpose is "to provide reimbursement for the necessary out-of-pocket expenses incurred by state officers and employees. . . ." (2 Cal. Admin. Code, § 700.)

It is well settled that average, flat expense allowances arrived at after deliberation by a legislative-type body and codified in a rule or regulation will be

upheld so long as there is some reasonably conceivable basis for the allowances arrived at. (See, Porter v. City of Riverside (1968) 261 Cal.App.2d 832; cf., Albright v. City of South San Francisco (1975) 44 Cal.App.3d 866.)

In affixing his signature to his Travel Expense Claim Form, an employee certifies that he has actually "incurred" out-of-pocket expenses for the meals, lodging, and incidental expenses claimed. Once some out-of-pocket expenses are actually incurred for a given expense claim item, the employee is entitled to reimbursement according to the average allowances provided for in the Board of Control Rules; viz. 2 Cal. Admin. Code, § 706, subd. (c). However, it is the opinion of this Office that Government Code section 11030 and Board of Control rules require that some expense actually be incurred. To conclude otherwise would be tantamount to declaring state traveling allowances a form of compensation rather than reimbursement for expenses. (See, 3 Ops.Cal.Atty.Gen. 249, 252 (1944).)

Accordingly, it is the opinion of this Office that an officer or employee who stays with friends and who does not incur any out-of-pocket expenses for food or lodging is not legally entitled to reimbursement and should not submit a claim for such on his Travel Expense Claim Form.

## II

The second question asks whether or not a state officer or employee who accepts a gift of home hospitality (meal, lodging) from a friend must declare the same as a gift under the Political Reform Act.

The Political Reform Act of 1974 (Gov. Code, § 81000 et seq.) was adopted by the voters as an initiative statute on June 4, 1974, and became effective January 7, 1975. Chapter 7 of such Act contains provisions relating to conflicts of interest. (See, Gov. Code, §§ 87100-87312.)

With respect to disclosure of gifts by state officials, article 2 of chapter 7 (Gov. Code, §§ 87200-87208) requires elected state officers, such as the Governor, and certain appointed state officials to file periodic

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1. Government Code section 87200 provides:

"This article is applicable to elected state officers, judges of courts of record, members of the Public Utilities Commission, members of the

financial disclosure statements disclosing, among other things, "income." (Gov. Code, §§ 87200 and 87203.) The Act defines "income" to include a ". . . gift, including any gift of food or beverage. . . ." (Gov. Code, § 82030.) While the Act's definition of "gift" excludes certain gifts, such as gifts from most relatives (Gov. Code, § 82030, subd. (b)), it does not generally exclude gifts from friends. The word "gift" is defined to include ". . . any payment to the extent that consideration of equal or greater value is not received." (Gov. Code, § 82028.) Gifts aggregating \$25.00 or more during any filing period from any one source must be disclosed. (Gov. Code, § 87207, subd. (a)(1) and (4).) Thus, food and lodging provided to an official, such as the Governor, specified in article 2 of chapter 7 of the Act will constitute a reportable gift if the gift meets the \$25.00 threshold and the official has not provided consideration of equal or greater value in return.

Article 3 of chapter 7 (Gov. Code, §§ 87300-87312), provides for the adoption of a Conflict of Interest Code by virtually all state and local public agencies. (Gov. Code, § 87300.) Among other things, such Codes are to provide for the disclosure of financial interests which may be foreseeably and materially affected by designated positions within the agency in question. (Gov. Code, § 87302, subd. (b).) Government code section 87302, subdivision (b) provides, in pertinent part, that:

". . . The manner of reporting reportable items shall be substantially equivalent to the requirements of Article 2 of this chapter. . . ."

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1. (Cont'd.)

State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Zone Conservation Commission, members of the board of supervisors, district attorneys and chief administrative officers of counties, mayors, city managers, chief administrative officers and members of city councils of cities, members of each of the six regional coastal zone conservation commissions, and to candidates for any of these offices at any election."

Thus, if a state officer or employee is required to report gifts under his agency's Conflict of Interest Code and if his friend who provides the food and lodging, falls within the scope of the employee's disclosure category, the officer or employee will be required to report the gift of hospitality if the gift meets the disclosure threshold provided for in the Code (usually \$25.00) and the official has not provided consideration of equal or greater value in return.<sup>27</sup>

In conclusion, a state officer or employee who accepts unreciprocated gifts from a friend aggregating \$25.00 or more in value in any reporting period, will have to report such if he files pursuant to article 2 of chapter 7 of the Act and may be required to report such under his agency's Conflict of Interest Code if he files pursuant to article 3 of chapter 7 of the Act.

### III

The third question asks if the state officer or employee reciprocates the hospitality of food and lodging in some fashion or other, would that relieve his duty of disclosure of the gifts.

Title 2, California Administrative Code, section 18727 provides:

"For the purposes of Government Code Section 87207(a), the term 'income' does not include the value of gifts of hospitality involving food, beverages or lodging provided to any person filing a statement of economic interest if such hospitality has been reciprocated within the filing period.

"'Reciprocity' as used in this paragraph includes the providing by the filer to the host of any consideration, including entertainment or a household gift of a reasonably similar benefit or value."

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2. The Conflict of Interest Code for the Governor's Office contains a \$25.00 threshold for the reporting of gifts.

Accordingly, a state officer or employee can avoid a requirement of disclosure by reciprocating his host's hospitality within the same reporting period with a gift of reasonably similar benefit or value.

IV

The fourth question asks whether or not the failure to claim a state "per diem" would affect a state officer or employee's obligation to disclose the receipt of the meals and lodging.

The mere fact that the state officer or employee does not subsequently claim state reimbursement would not appear to alter the fact that a gift of food or lodging was previously given and received. Accordingly, the failure to claim a state reimbursement would not affect a state officer or employee's obligation to disclose an otherwise reportable gift of food and lodging received from a friend.

Very truly yours,

EVELLE J. YOUNGER  
Attorney General

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FLOYD D. SHIMOMURA  
Deputy Attorney General

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