



FAIR POLITICAL PRACTICES COMMISSION

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November 24, 2008

Daniel S. Hentschke
General Counsel
San Diego County Water Authority
4677 Overland Avenue
San Diego, California 92123

Re: Your Request for Informal Assistance
Our File No. I-08-174

Dear Mr. Hentschke:

This letter responds to your follow-up request¹ for advice regarding the gift provisions of the Political Reform Act (the "Act").² Because you seek general guidance, we are providing informal assistance, rather than advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

QUESTION

Is the location of a meeting away from an official's agency headquarters relevant in determining whether payments are for "travel" within the meaning of Section 89506(a)(2)? If so, is there a simple test for determining when a person "travels" for purposes of Section 89506(a)(2)?

CONCLUSION

While there is no rule setting a minimum distance one must travel to bring such travel within the meaning of Section 89506(a), we find it useful to be guided by federal tax laws and state personnel rules regarding travel in concluding that travel that is over

¹ You first requested advice in the *Hentschke* Advice Letter, No. I-08-166.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

fifty miles from headquarters constitutes "travel" within the meaning of Section 89506(a).

FACTS

From time to time, public officials and designated employees of the San Diego County Water Authority (the "Water Authority") meet to discuss government business over breakfast, lunch, or dinner with public officials and designated employees of other local government agencies. Sometimes the Water Authority pays for these meals, while at other times the other agency pays. In response to your prior letter, *Hentschke* Advice Letter No. I-08-166, we said that the meals were reportable gifts subject to the gift limits to the officials of the non-paying agency. We determined that Section 89506(a)(2) did not apply because the meetings you described failed to suggest that any "travel" was involved.

You have now provided additional facts and ask if, under certain circumstances, the meals may fall within the travel provisions of Section 89506(a)(2). When meetings take place "away from" the non-paying officials' agency headquarters, they are sometimes held just a few miles from the agency's headquarters, while at other times they are held in a different county. You ask whether, under these circumstances, there is a rule by which the distance between the location of the meeting and the headquarters of the agency determines whether attendance at the meeting would be deemed "travel" under Section 89506(a)(2).

ANALYSIS

As we stated in our previous letter, in most cases, food and drink received by a public official are considered gifts under Section 82028(a) because the meal confers a personal benefit on the officials and designated employees of the other agency.

Section 89506(a)(2) sets out a special rule for certain gifts that must be reported but are not subject to the gift limit of Section 89503. Section 89506(a) provides, in pertinent part, that payments for "travel, including actual transportation and related lodging and subsistence, that is reasonably related to a legislative or governmental purpose" are not prohibited or limited if the travel is provided by a government or government agency. (Section 89506(a)(2).)

Your question is one of first impression. Consequently, we have sought guidance outside of our normal sources, being mindful of the rule of statutory construction that exceptions are narrowly construed. (*Estate of Banerjee* (1978) 21 Cal.3d 527, 540.)³

³ Indeed, we have often relied on this rule of construction in analyzing exceptions to the gift rules. (See *Litvack* Advice Letter, No. A-93-105, *Sutton* Advice Letter, No. I-92-561, *Hansen* Advice Letter, No. A-90-424, *Mester* Advice Letter, No. A-90-389.)

In our quest for a rule of thumb for a minimum distance one must go in order to invoke this exception to the gift limit, we found several sources that use fifty miles as the minimum distance required for travel in order that an individual may receive a travel related benefit: the California State Administrative Manual, the federal Internal Revenue Code and employment policies of other government agencies and private sector employers.

The State Administrative Manual ("SAM") is a reference source for statewide policies, procedures, regulations and information developed and issued by authoring agencies such as the Governor's Office, Department of General Services ("DGS"), Department of Finance ("DOF"), and Department of Personnel Administration. To provide a uniform approach to statewide management policy, the contents have the approval of and are published by the authority of the DOF Director and the DGS Director. Chapter 0700 provides guidelines for obtaining reimbursements for traveling on official state business. Travel expenses are reimbursed in accordance with the policies found in the California Code of Regulations and employee Memoranda of Understanding (MOU). Section 0721 of the SAM explains how state employees on travel status for more than one 24-hour period and less than 31 consecutive days may claim lodging expenses, if applicable, and breakfast or dinner expenses. It provides that these expenses must be incurred "at least fifty miles from headquarters." Section 0724 addresses costs associated with attendance at conventions, conferences or business meetings called by a state agency. It provides that "no per diem expense will be allowed within 50 miles of an employee's headquarters."

Section 162(a)(2) of the Internal Revenue Code⁴ allows a deduction for all ordinary and necessary expenses paid or incurred in carrying on any trade or business, including traveling expenses (including amounts expended for meals and lodging) "while away from home." This rule has been narrowly construed to allow a deduction only when the trip requires the taxpayer to stop for sleep or rest.⁵ The deduction has also been disallowed to a resident physician claiming the cost of meals eaten in the hospital or nearby even though he was required to sleep at the hospital and dine in close proximity in order to be available for emergencies. Because both his residence and the hospital were located in the same city, he was not deemed "away from home."⁶ We believe, however, that these examples are unnecessarily restrictive, especially in light of Section 162(h), which allows a state legislator whose residence is more than fifty miles from the state capitol to make an election that the legislator's residence within his or her legislative

⁴ 26 USC Section 162(a)(2)

⁵ *Unites States v. Correll* (1967) 389 US 299.

⁶ *Moffit v. Commissioner* (1972) Tax Commissioner Memorandum 1972-187, 31 CCH TCM 910.

district is his or her tax home. Upon making that election, the legislator may then deduct his or her per diem as a travel expense.⁷

Finally, we have observed in our research that it is not uncommon for private companies and government agencies who have established policies for paying their employees "per diem" for traveling expenses to restrict these payments to travel that is more than 50 miles from the employee's normal work place or residence.

We are persuaded that these are reasonable guidelines and conclude that travel that is over fifty miles from an agency's headquarters constitutes "travel" within the meaning of Section 89506(a).

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

⁷ Most state legislators do not utilize this election because under 26 USC Section 62(2)(C) such expenses, paid as "per diem," are excluded from adjusted gross income.