MATTERS OF CURRENT INTEREST -- UPDATE ON ARTICLE VIII, SECTION 7 -- MUNICIPAL BREAD AND CIRCUSES

by

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I. MAY CITIES SPEND PUBLIC MONEY ON EMPLOYEE AWARDS, PRIZES AND OTHER TANGIBLE SYMBOLS OF SPECIAL RECOGNITION?

Answer: Yes, if the city has the sense to adopt an appropriate ordinance or policy first.

My first point about this question is that it probably is not really a "gift of funds" situation involving Article VIII, Section 7 of the state constitution but rather an "extra compensation" question involving Article II, Section 25. As such, I think the question can be answered directly on the basis of the principles announced in Christie v. Port of Olympia, 27 Wn.2d 534, 179 P.2d 294 (1947).

Christie involved an agreement entered into between the Port of Olympia and its longshoremen shortly after World War II. At the time of the labor negotiations in question, the port was restrained by federal law from increasing longshoremen wages. The port manager agreed with the employees, that whenever federal price controls were removed, their pay increases would be effective October 1, 1944. When the price controls came off in November of 1945, a question arose whether payment of the increase for the year beginning October of 1944 and ending in November of 1945 was either an unconstitutional gift or unconstitutional "extra" compensation for services already rendered. The supreme court held that neither constitutional provision restrained payment of the back wages in question, on the theory that "if such an agreement had not been made, the men would not have continued to work. . . ." Christie, 27 Wn.2d at 551. In other words, the expectation of a retroactive increase was a part of the bargained for consideration for the longshoremen's work.

The same principles apply to employee awards programs. A city may either contract for the establishment of an award program, or it may by ordinance or other policy establish such a program, which thereby becomes an element of the consideration which city employees are entitled to receive. Thus, a particular employee is working not only for his current salary but also in the knowledge, that, for instance, if she is the best employee in her unit, she will be entitled to a certificate, or a $75 watch, or a dinner at city expense, or a cash bonus, or something else.

By contrast, Article II, Section 25 does prohibit the situation where, after an employee's work has been performed, his superiors or the city council decide that the work was so meritorious as to deserve a bonus or award. In such a case, the bonus or award (if of more than nominal value) truly is extra compensation and, thus, prohibited by the state constitution.

The primary task for a city attorney then is to draft an employee awards policy or ordinance which provides sufficient standards to establish that any awards

actually made are "earned" by the employee and are not simply gratuitous transfers of public funds into private pockets. At a minimum, those standards should include (1) a description of the basis on which the city will make employee awards, (2) a description of the process by which the city will decide who is to receive such awards, and (3) a description of the type of award to which a city employee will be entitled if certain standards are met. Awards can be based upon some objective factor (such as obtaining a certain level of productivity, or maintaining an absence-free attendance record, or working a certain number of years), or the standards can include subjective and evaluative factors, such as judgments about merits or contests for "employee of the year."

It would appear that all classes of cities have sufficient authority to adopt employee awards policies, such authority being implied in the authority to fix compensation. See, for instance, RCW 35.27.130 (city council to fix compensation of town officers). Since awards would be interpreted to be a form of "compensation," they would logically be subject to any constitutional restrictions on midterm increases in compensation, such as in the case of city council members who fix their own salaries. See Article XI, Section 8 of the state constitution as amended by Article XXX, Section 1.

II. MAY CITIES OFFICIALLY SPONSOR FESTIVALS, PARADES, FAIRS, AND SIMILAR EVENTS, AND DIRECTLY SUPPORT THEM WITH CITY FUNDS?

Answer: For "home rule" cities, the answer is yes. For other cities and towns, the answer is "no" except where the festival or other event can somehow be shown to serve an enumerated municipal purpose.

The relationship of cities to parades and festivals seems to be a hot topic again. Many Washington communities have long had a "mud fair" or "dust days" in which parades are held, horses are ridden, carnivals come to town, art and industry are displayed, and (the local businesses hope) many things are purchased and consumed.

Historically, most of these celebrations have either no official status or a quasi-official status, and it is my impression that city funds were rarely used in any direct way to support them. In recent years, there seems to be renewed interest in direct city support and sponsorship. Since a community celebration (whether annual, centennial, or one-time in frequency) serves some demonstrable municipal purposes, I see no inherent problem with the proposition that first class and optional code cities in Washington can officially declare "mud fair" to be an annual city festival and, having so declared, budget and spend city funds to sponsor such an event.

As noted earlier, I can find no explicit authority for second, third, or fourth class cities (or unclassified cities) to sponsor fairs, festivals, or parades. By contrast, note that counties have explicit authority to sponsor agricultural fairs and related events. RCW 36.37.010. Thus, a city without home rule authority would have to show that the authority to sponsor and spend public funds on a proposed event arises necessarily out of some express municipal power for the city in question. I will not attempt to guess how that might be done in any particular case. Official city sponsorship of a festival or other event raises more questions than it answers, of course. It means in general that a city may budget funds and use city employee time and city facilities in support of the event but

what else can the city do? Can it distribute free food or presents? That would appear to be forbidden by Article VIII, Section 7 of the state constitution.
As a related point, my office continues to adhere to the view that the authority to sponsor an event does not include the authority to make a gratuitous transfer of public funds to a private party in connection with the event. This point was early established in Johns v. Wadsworth, 80 Wash. 352, 141 Pac. 892 (1914), involving the attempted appropriation of county funds to a private county fair association. Johns has never been directly questioned or overruled, and I regard it as good law. Besides, any city attorney worth his salt can draft a contract for services accomplishing the same purposes as a gratuitous transfer of funds.

As a further related matter, we occasionally get questions about the authority of a city to provide city services, such as law enforcement, fire protection, street cleaning and garbage removal, in connection with celebrations and special events. Obviously, the city can do all of these things in connection with an event which is officially sponsored by the city, but it should be equally obvious that a city which engages in law enforcement, fire protections, street cleaning and garbage removal does so for all persons within the city, including persons responsible for special events. Accordingly, my opinion is that any city clearly does have authority to provide city services, whether reimbursed or not, for events occurring within the city.[1]

III. MAY CITIES PURCHASE COFFEE AND REFRESHMENTS WITH PUBLIC FUNDS AND SERVE THEM TO CITY EMPLOYEES, VOLUNTEERS, AND NONEMPLOYEES?

Answer: It depends. My division currently takes the position that the serving of coffee and other light refreshments at meetings involving volunteers and other "quasi-employees" can be justified as a sort of limited form of compensation for people who otherwise might be entitled to monetary payment, if properly authorized by city ordinance or policy. In effect, the city is determining that the city will provide refreshments in lieu of compensation to persons who otherwise might be entitled to compensation and/or certain types of expense reimbursement.

As to city employees themselves, we continue to adhere to the rule that coffee, soft drinks, and other refreshments are not necessary personal expenses and, thus, are neither directly payable nor reimbursable pursuant to RCW 42.24.090. Cities could perhaps by contract or by ordinance include such refreshments as compensation -- a type of fringe benefit -- for one or more categories of city employees. To the best of my knowledge, no city has formally done so.

IV. TO WHAT EXTENT MAY CITIES JUSTIFY EXPENDITURE OF PUBLIC FUNDS IN SUPPORT OF SPECIAL EVENTS AS TOURIST PROMOTION AS DEFINED IN RCW 35.21.700?

Answer: To a limited extent. RCW 35.21.700 reads as follows:

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[1] Indeed, a more serious question is the extent to which a city has the authority to request or require reimbursement from the private sponsors of such events. I do not address that question in these remarks.

> "Any city or town in this state acting through its council or other legislative body shall have power to expend moneys and conduct promotion of resources and facilities in the city or town, or general area, by advertising, publicizing, or otherwise distributing information for the purpose of attracting visitors and encouraging tourist expansion."

Note also RCW 35.21.703, authorizing cities to engage in economic development programs.

These two statutes provide "gateway" authority for cities to involve themselves in tourist promotion and economic development, but they carry with them the burden of showing that a particular expenditure is directly related to tourist promotion or economic development. They also must be read in light of Article VIII, Section 7, especially as interpreted by State ex rel. O'Connell v. Port of Seattle, 65 Wn.2d 801, 399 P.2d 623 (1965).

Thus, it appears that neither tourist promotion nor economic development can justify traditional "hosting" activities on the part of cities. Neither tourist promotion nor economic development would justify the gratuitous giving or lending of city funds to private parties.

In the case of tourist promotion, the statute is remarkably explicit as to the types of tourist promotion permitted: advertising, publicizing, or otherwise distributing information for the purpose of attracting visitors and encouraging tourist expansion.

May a city sponsor a frog race or a "grand prix" event as a tourist promotion device? I have earlier indicated that I think most cities can sponsor such events, but I do not think tourist promotion is the proper source of authority. Rather it is (for those cities which can act on such a basis) the inherent municipal purpose in defining and sponsoring a community festival or "event." RCW 35.21.700 might indeed authorize cities to publicize and advertise events going on in the city (publicly - or privately - sponsored), but the statute does not explicitly allow expenditures not directly related to advertising.

Questions occasionally arise concerning the authority of cities to give away items -- apples, key chains, t-shirts -- as a tourist promotion device. Particularly in discussions over the years with port districts, we have taken the position that the distribution of such items is permissible if the value of the item is relatively small and the conferral of a gift or item of value is purely incidental to the tourist promotion purpose. Thus, a t-shirt emblazoned with "Fabulous Fun-Filled Fife" is a legitimate object of tourist development, while the same t-shirt without the tasteless slogan is transformed into an unconstitutional gift.