



*Everyday Ethics for Local Officials*

## **Honoring Retirees: Legal and Ethical Considerations**

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### **QUESTION**

*Our planning director of 13 years will be retiring soon. He is a lifelong resident of our community, and has a total of 34 years of public service locally. In addition to his public service, he has contributed significantly to the community through his involvement with numerous local nonprofit organizations. Several elected officials have indicated an interest in having our agency contribute toward a retirement party to celebrate and honor his public service. In addition, numerous local businesses, nonprofits and local officials and employees have expressed their wish to contribute to the event. What are the rules that govern this situation?*

### **ANSWER**

It is important to recognize and honor those who have dedicated their careers to public service, often foregoing more lucrative opportunities in the private sector.

It's not the question of whether to honor public service, but the how. There are a number of legal and ethical issues to consider.

### **Laws Relating to Permissible Expenditures of Public Resources**

The California Constitution prohibits local agencies from making gifts of public funds for private purposes.<sup>1</sup> The key issue in evaluating any expenditure of public resources is whether the expenditure serves a public purpose.

Court decisions make clear that the determination of whether a particular expenditure constitutes a public purpose is primarily a matter for the agency's legislative body to determine. A court will not second-guess an agency's exercise of discretion in this area so long as its determination of public purpose has a reasonable basis.<sup>2</sup>

State statute contains similar restrictions: public resources may not be used for personal purpose or any other purpose not authorized by law.<sup>3</sup> Under this law, "personal purpose" means activities that are for personal enjoyment or not related to the public's business.<sup>4</sup>

Although the courts have not yet analyzed the retirement celebration issue, an interpretation similar to the constitutional gift prohibition seems likely. If the agency's governing body has determined that a particular expenditure or use of public resources serves a public purpose, that determination would be given substantial deference by a court.

So what does this mean? The safest approach is for the governing body to approve spending to honor public service, making specific findings about the public purposes served by such recognition.<sup>5</sup> This express approval is particularly important if the amount of public funds involved is significant. A sample resolution is available on the Institute's website at [www.ca-ilg.org/honoringpublicservice](http://www.ca-ilg.org/honoringpublicservice).

Assuming the governing body approves the retirement party expenditure, would a court uphold that expenditure if it were challenged? Odds are good that a court would defer to elected officials' determination that an expenditure serves a public purpose so long as there is a reasonable basis for that legislative judgment.<sup>6</sup>

## **Considering Public Perception and Other Ethical Issues**

Making sure that a particular expense is legal is the beginning, not the end, of the issues that must be considered in planning a retirement event. An agency must still determine whether using funds for this purpose is consistent with its own fiscal stewardship standards, taking into account competing uses for the money and public perception. This inquiry includes consideration of the type and amount of the money involved, as well as fairness considerations in making sure that long-serving employees are recognized in an equitable, considered manner.

Particularly in today's troubled economic times, it is important to recognize that the public's perception of expending funds to celebrate a retiring employee's public service may be very different than that of the employee's colleagues, and public officials. And public perceptions may vary based on the local community standards. This is a classic "right versus right" ethical dilemma in which local officials must weigh competing right values. On one side of the equation is the "right" value of recognizing employees' longstanding and talented public service. On the other is the "right" value of being prudent stewards of scarce taxpayer resources and the public's perceptions that these resources are being wisely used.

One way of balancing these values is to ask whether it might cause heartburn or embarrassment if the details or amount of the agency's funding of the recognition were to appear on the front page of the local newspaper (keeping in mind that the newspaper may not balance its coverage with a discussion of the importance of recognizing longstanding public service and promoting employee morale). If so, you may want to think about scaling back or reconsidering using public resources. Also, there may be less concern if the public agency contribution to the event is in-kind, such as the use of a public agency facility, rather than an actual appropriation of public funds.

The goal is for the focus of the celebration to be the contributions of the employee, not a public controversy about a potential public perception that too many public resources were used.

### **A Question of Morale and Fairness**

If an agency does use its resources connection with a retirement event for a particular employee, it should do so recognizing that it may be setting a precedent for other long-term employees who will be retiring in the coming months and years. One of the important public purposes served by such celebrations is to increase employee morale. A perception by employees that an agency plays favorites in honoring retiring employees may do more to harm, than enhance, employee morale. Some public agencies adopt policies specifying what level of recognition accompanies how many years of service to avoid inconsistencies.

## **Relying on the Kindness of Others**

An alternative to the using public funds to pay the costs of the retirement event is to seek private funding, including contributions from the employee's colleagues and members of the local community. Although funding the event solely through such private donations eliminates any objections to the use of public funds for the event, this approach raises its own set of issues, particularly if the event will include the presentation of gifts to the retiring employee.

Two aspects of state law restrictions on gifts are particularly relevant to retirement celebrations.

1. Public officials generally may not receive gifts from a single source in a calendar year that total more than \$420 in value (2009-10 limit);<sup>7</sup> and
2. Public officials must disclose on gifts from a single source that total \$50 or more during the previous 12 months; in the case of a retiring official, those gifts would have to be disclosed on his leaving office statement of economic interests.<sup>8</sup>

The rules governing the receipt of gifts are complex, and your agency attorney should be consulted about how they apply in a given situation. With that caution in mind, some of the considerations raised by these rules are as follows.

One consideration is timing. As a general matter, if the retirement event and receipt of gifts occurs *after* the employee leaves public service (and the employee is not aware of the donors of the gift before the event), the gift rules do not apply.<sup>9</sup> The analysis then becomes one of public perception if those who benefitted from decisions the employee was involved in are lavish in their gifts to the former employee.

If the retiring employee receives the gift *prior* to leaving public service, the gift limit and reporting rules apply. A special rule applies if the gift is from multiple donors. If the value of the gift is \$50 or more, the public official must report the gift on his leaving office statement and must describe in general terms who gave the gift.<sup>10</sup> If the share of any single donor of the gift is \$50 or more, the official must report that donor's name.<sup>11</sup>

In addition, in determining the value of gifts received by the retiring official, his pro rata share of the cost of the event must also be included.<sup>12</sup> This means that, if 100 people attend the event, all public officials who attend must consider whether their 1/100<sup>th</sup> share of the cost of the event's entertainment, food and drink is over the \$50 reporting threshold by itself or when combined with other gifts the public officials have received from event sponsors.

If an agency chooses to go the private funding route for retirement celebrations, someone should be assigned to keep track of the value of the proposed gifts and pro rata share of the cost of the event to make sure that all the gift reporting and gift limit requirements are kept in mind. It is especially important to let potential contributors know about the \$420 gift limit. You don't want the retiring employee's last days in public service to be taken up with completing his leaving office statement or determining how to gracefully deal with a gift in excess of the \$420 limit (2009-10).

For more information about the gift limit and reporting rules, check out the materials on this topic at [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust).

And, as always, considering the legal limits is just the first step. As with any fundraising endeavor, it is important to consider from whom funds are sought. No one should be made to feel that they must contribute to the celebration in order to remain in the agency's good graces. In particular, don't ask anyone who has current matters pending with an agency (a permit application, pending contract or other matter). (For more about ethical and legal issues relating to fundraising, see [www.ca-ilg.org/fundraising](http://www.ca-ilg.org/fundraising)).

Because of the legal and ethical issues that can come with private funding, many agencies opt for modest events in which every attendee pays his or her own way and makes a small contribution to a gift to the retiring official. This enables lots of people to participate in the event, while avoiding any controversies about how the event is paid for.

### **New Rules Relating to Gifts to and from Public Agencies**

Some officials may have occasion to wonder if the gift limit and reporting rules might apply differently because people would be donating funds to the retiring official's agency to pay for the event and a gift. Doesn't that mean that their gift is to the agency and not the official? Doesn't that mean that the gift is not reportable?

There are a few issues to keep in mind in answering this question. One is that gifts to public agencies are just as reportable as gifts to individuals—the agency has to publicly report, among other things, information about the value of the gift, information about the gift-giver and how the gift was used.<sup>13</sup>

Also, it's important to keep in mind that a gift that ultimately benefits an individual is *presumed* to be a gift to that individual (and must be reported as such), unless certain criteria are satisfied. One of those criteria is that the donor of the gift may not designate by name, title or class who receives the payment.<sup>14</sup> If the agency, in essence, solicits gifts *for* a retiring official, it will be hard to argue that the beneficiary of the gift was not somehow pre-determined. Also, if part of the retirement gift involves travel, the gift is reportable by the official, not the agency.<sup>15</sup>

The state Fair Political Practices Commission has declared that public agency gifts of food, beverages, entertainment, goods or services are subject to the gift limit and disclosure requirements—except when those gifts involve lawful expenditures of public money.<sup>16</sup> Although this regulation has a number of attorneys scratching their heads (because unlawful expenditures of public resources are punishable under other laws), it appears that the state's ethics watchdog is signaling a certain amount of disapproval of gifts from public agencies.

Finally, of course, whenever one finds oneself closely parsing the language of ethics laws and regulations, it can be helpful to take a step back and ask what approach is most consistent with what the public expects of the agency and its officials. Doing everything in as above-board and transparent manner as possible is always the safest and most ethical approach.

## Conclusion

Honoring a public employee who has dedicated his career to public service is a very worthy goal. The key is to be aware of both the legal and public perception issues that arise when planning such celebrations.

### About Those Resolutions and Plaques

Sometimes people organizing retirement celebrations will encourage attendees to bring resolutions and plaques attesting to the honoree's contributions to the community and profession. Are *these* reportable as gifts? The answer is there is an exception to the gift reporting requirements for personalized plaques and trophies, as long as they are worth \$250 or less.<sup>17</sup>

It may be considerate to consider the honoree's preferences on these kinds of gestures. Some find it quite meaningful to have one's accomplishments documented in this fashion; others may have troubles finding places to display such tributes (or have too many to properly display already).

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This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust).

ILG is grateful to Randy Riddle who is a partner with [Renne Sloan Holtzman Sakai LLP](#), the Public Law Group, which serves public entities and others through offices in San Francisco, Sacramento and Los Angeles.

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## Endnotes:

<sup>1</sup> See Cal. Const. art. XVI, § 6 ("nor shall it [the Legislature] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . ."). See also *Jordan v. California Dept. of Motor Vehicles*, 100 Cal. App. 4th 431, 450, 123 Cal. Rptr.2d 122, 136-137 (2002) (finding gift of public funds); *Albright v. City of South San Francisco*, 44 Cal. App. 3d 866, 870, 118 Cal. Rptr. 901, 902 (1975) (making the connection between council member expenses and the prohibitions against a gift of public funds). Although the prohibition is directed to the Legislature, the courts' theory is that, since general law cities, counties and special districts derive much of their authority from the Legislature, such local agencies also do not have the power to make gifts of public funds.

<sup>2</sup> *California Housing Finance Agency v. Elliot*, 17 Cal. 3d 575, 552 P.2d 1193 (1976); *City and County of*

*San Francisco v. Patterson*, 202 Cal. App. 3d 95, 103-104, 248 Cal. Rptr. 290, 295 (1988).

<sup>3</sup> Cal. Gov't Code § 8314(a).

<sup>4</sup> Cal. Gov't Code § 8314(b)(1).

<sup>5</sup> *See Jarvis v. Cory*, 28 Cal. 3d 562, 620 P.2d 598 (1980). In that case, the California Supreme Court upheld a determination by the Legislature to grant lump sum compensation to state employees for work already performed, against a claim that the additional compensation constituted a gift of public funds in violation of the Constitution. In doing so, the court deferred to the Legislature's finding that the appropriation was necessary to ensure the continued recruitment and retention of qualified employees.

The same public purpose is served by expending funds to honor the long service of retiring employees. A decision by the governing body to approve an expenditure for this purpose demonstrates that the agency values the public service of its employees and officials, which in turn benefits employee morale, and the recruitment and retention of valuable employees.

<sup>6</sup> *Sturgeon v. County of Los Angeles*, 167 Cal. App. 4th 630, 84 Cal. Rptr. 3d 242, 248 (2008)

<sup>7</sup> *See* Cal. Gov't Code § 89503; 2 Cal. Code Regs. § 18940.2.

<sup>8</sup> Cal. Gov't Code §§ 87204, 87207(a)(1); 2 Cal. Code Regs. §§ 18722(b), 18730.

<sup>9</sup> *See* 2 Cal. Code Regs. § 18941 (gift is received or accepted when recipient knows that he has either actual possession of the gift or takes any action exercising control over it).

<sup>10</sup> Cal. Gov't Code § 87207(a)(1).

<sup>11</sup> 2 Cal. Code Regs. § 18945.4.

<sup>12</sup> 2 Cal. Code Regs. § 18946.2.

<sup>13</sup> *See* 2 Cal. Code Regs. § 18944.2(c)(3).

<sup>14</sup> *See* 2 Cal. Code Regs. § 18944.2(c)(1).

<sup>15</sup> *See* 2 Cal. Code Regs. § 18944.2(d)(1).

<sup>16</sup> *See* 2 Cal. Code Regs. § 18944.3 (operative 2/7/09).

<sup>17</sup> *See* Cal. Gov't Code § 82028(b)(6).