

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Darrin P. Sobin
Director of Government Ethics
Board of Ethics and Government Accountability

FROM: Janet M. Robins
Deputy Attorney General
Legal Counsel Division

DATE: January 29, 2014

SUBJECT: Legal Advice Concerning the Circumstances Under Which Public Funds
May Be Used to Purchase Food for Government Employees
(AL-13-874B)

This memorandum responds to your request for legal advice concerning the circumstances under which public funds may be used to purchase food for government employees. It is our understanding that you regularly receive questions on this issue from staff and managers of District agencies. The following reflects our analysis of the legal principles applicable to this issue.

QUESTION: Under what circumstances may public funds be used to provide food to government employees?

ANSWER: Appropriated funds may not be used to provide food to government employees without specific statutory authorization. Donated funds may be used for this purpose under certain circumstances.

Principles of federal appropriations law govern the expenditure of District funds.¹ Appropriated funds may only be used for the purposes for which they were appropriated, with the purpose

¹ Section 446 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 801, D.C. Official Code § 1-204.46 (2012 Repl.), provides that, with limited exceptions relating primarily to the Water and Sewer Authority and borrowed funds, "no amount may be obligated or expended by any officer or employee of the District of Columbia unless such amount has been approved by Act of Congress, and then only according to such Act."

determined by the language and (sometimes) the legislative history of the relevant appropriations act. See U.S. Government Accountability Office (“GAO”), *Principles of Federal Appropriations Law* at 4-6-7, 4-9-13 (Third Edition – Volume I) (January 2004) (“Federal Appropriations”). Where the purpose of an appropriation is stated generally, an expenditure of appropriated funds will be authorized if it falls within the “necessary expense” doctrine. This doctrine requires that the expense be necessarily incident to accomplishing the objective of the appropriation, not otherwise prohibited by law, and not otherwise provided for. *Id.* at 4-19-30. In general, appropriated funds may not be used for entertainment, which includes food, unless specifically authorized by statute. See *Federal Appropriations, Volume I*, at 4-100, 4-123. Although the purchase of food may sometimes be related to a legitimate government function, specific statutory authorization is required because food and other forms of entertainment are seldom necessary to carry out the purpose of an appropriation and because public confidence in the government could be undermined by the use of public funds for this purpose.

Providing food and other entertainment at an event for government employees at their place of employment² is not considered to be a necessary expense incident to the accomplishment of a legitimate public objective, even if a government purpose is advanced at the event. As a result, appropriated funds may not be used without specific statutory authorization. There are at least two federal statutes that apply to the District that authorize the purchase of food. Food has been found to be a necessary expense in the case of awards ceremonies that provide public recognition of the work-related accomplishments of employees. Employee awards are authorized by 5 U.S.C. § 4503, which provides that “[t]he head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of an employee who (1) ...by...personal effort contributes to the efficiency, economy, or other improvement of Government operations...or (2) performs a special act or service in the public interest in connection with or related to his official employment.”³ The costs of awards ceremonies have been considered to be incident to the making of these awards, and expenses for food have been allowed when the agency head has determined that refreshments will materially enhance the effectiveness of the ceremony. In such cases, appropriated funds may be used. See GAO Decision B-288536, November 19, 2001; B-270327, March 12, 1997.

Training events are another federal statutory exception to the rule against providing food to government employees. Under the Government Employees Training Act, approved September 6, 1966, 80 Stat. 436, 5 U.S.C. § 4109 (“Training Act”), an agency may pay or reimburse an employee for necessary expenses incident to an authorized training program. Federal Appropriations at 4-115. For appropriated funds to be used for food under this exception the

Because District funds are appropriated by Congress, principles of federal appropriations law apply to their expenditure.

² Meals for employees on government travel are authorized under a different federal statute, see 5 U.S.C. § 5702.

³ This section is part of section 1 of the Government Employees Incentive Awards Act, which is made applicable to the District by 5 U.S.C. § 4501. This section defines “agency” to include the government of the District of Columbia.

event must meet the statute's definition of "training,"⁴ and the agency must determine that providing meals is necessary to achieve the objectives of the training program. *Id.* at 4116. An agency official would have to find that the training could not be conducted effectively without the food – a difficult matter to prove. The Comptroller General has found that a government agency can provide meals and refreshments at formal conferences if there is an administrative determination that:

(1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendee's' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussion, speeches, lectures or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.

GAO Decision B-300826 (March 3, 2005); 5 U.S.C. § 4110.⁵

Simply providing food to members at meetings or while performing other official functions is not covered by either of the two statutory exemptions described above. The Comptroller General has therefore addressed the question of when appropriated funds can be used to supply food during other government events. The Comptroller General has consistently found that appropriated funding may not be used to provide food to government employees in the course of regular business meetings, even if the meetings involve discussion of matters within the agency's mandate. Federal Appropriations at 4-108-115. These conclusions reflect the underlying principle that food is essentially a personal expense.

Based on these principles and authorities, it would violate federal appropriations law for the District to use appropriated funding to provide food to government employees in support of their regular activities. The main mechanism for enforcing this law is the federal Anti-Deficiency Act ("ADA"), 31 U.S.C. §§ 1341-1351 and 1511-1519, which prohibits a District employee from, among other things, making an obligation or expenditure in the absence or in advance of an appropriation.⁶ Because federal law prohibits the use of appropriated funding for food, except under limited circumstances, it would not be reasonable for the District to argue that an

⁴"Training" is defined in 5 U.S.C. § 4101 as "the process of providing for and making available to an employee, and placing or enrolling the employee in, a planned, prepared, and coordinated program, course, curriculum, subject, system, or routine of instruction or education, in scientific, professional, technical, mechanical, trade, clerical, fiscal, administrative, or other fields which will improve individual and organizational performance and assist in achieving the agency's mission and performance goals."

⁵ This section states that "[a]ppropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."

⁶ The District also has its own local Anti-Deficiency Act, which parallels the federal law in several important respects. *See* the District Anti-Deficiency Act of 2002, effective April 4, 2003, D.C. Law 14-285, D.C. Official Code § 47-355.01 *et seq.* (2012 Repl.).

appropriation would be available for this purpose. Violations of the federal ADA can subject the employees involved to a fine, imprisonment, and disciplinary action.

Although the restrictions on the use of appropriated funding to purchase food for government employees are quite strict, government entities have more flexibility to use donated funds for this purpose. Donated funds are not included in direct appropriations to agencies or other District entities, and the acceptance of donations by these entities must be statutorily authorized. Federal Appropriations at 6-222-23 (Third Edition – Volume II) (February 2006). Donations are treated as trust funds and may be expended for the purposes stated in the statute authorizing their acceptance, consistent with the purposes of donation. *Id.* at 6-226-227. The District's general gift acceptance statute, codified at D.C. Official Code § 1-329.01 (2012 Repl.), applies to gifts to the District government generally, and some agencies have additional authorization to accept gifts.⁷ In addition, rather than requiring express statutory authorization to support the use of donated funds for food or other types of entertainment, these funds may be used if doing so would further a valid government function for which the funds were provided and the government could not accomplish the function as effectively without the expenditure. *Id.*, Volumes I and II, at 4-101, 6-227; 61 Comp. Gen. 260 (1982); 46 Comp. Gen 379 (1966); GAO Decision B-142538 (1961).

If a meeting or event serves a legitimate government function, a government official could authorize the use of donated funds for the costs of conducting the event, including food, if these costs are consistent with the terms of the donation. To do so, the authorizing official would have to determine that the event, as planned, furthered the agency's interests and that these interests could not be advanced as effectively without incurring the associated expenses. The more an event is structured as an optional social event designed for the enjoyment of employees and others, the more difficult such a finding might be. However, if the event is more narrowly focused to accomplish the government entity's stated objectives, a stronger argument can be made in support of using donated funds for food and refreshments.

⁷ The District's general gift acceptance statute is contained in 4602 of the Acceptance and Use of Gifts by District Entities Act of 2000, effective October 19, 2000, D.C. Law 13-172, D.C. Official Code § 1-329.01 (2012 Repl.). This section provides in relevant part:

- (a) An entity of the District of Columbia government may accept and use a gift or donation during fiscal year 2001, or any subsequent fiscal year, if:
 - (1) The Mayor approves the acceptance and use of the gift or donation; provided, that the Council of the District of Columbia may accept and use gifts without prior approval by the Mayor; and
 - (2) The entity uses the gift or donation to carry out its authorized functions or duties.
- (b) Each entity of the District of Columbia government shall keep accurate and detailed records of the acceptance and use of any gift or donation under subsection (a) of this section, and shall make such records available for audit and public inspection.

These provisions were also enacted by Congress in section 115 of the District of Columbia Appropriations Act, 2002, approved December 21, 2001, Pub. L. 107-96. In conjunction with Mayor's Order 2002-2, dated January 11, 2002, and Mayor's Memorandum 2002-1, dated January 8, 2002, they outline the general requirements and procedures for the acceptance and use of donations by District government entities.

I hope this analysis is useful to you in determining whether appropriated or donated funds can be used for food. If you have any questions, please call Laurie A. Ensworth, Senior Assistant Attorney General, Legal Counsel Division, at [REDACTED], or me at [REDACTED].

JMR/lae