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OPINION NO. 95-10

TO: Council Member Rebekah Coty
FROM: Stephen M. Kemp, City Attorney
DATE: July 7, 1995
SUBJECT: City Attorney Opinion

QUESTION:

May the City Council provide for reimbursement of expenses incurred by public officials while performing the duties of their office by attendance of Council meetings, including, but not limited to expenses for child care required in order to attend Council meetings.

OPINION:

The starting place for this opinion is a review of the Peoria City Charter. The Charter provides in Article 2, Section 7 for salaries of Mayor and Council members.¹ The Charter further

¹The relevant provision states as follows:

The mayor shall be the chairman of the council and shall preside over its deliberations. He shall have a voice and vote in all its proceedings, except he shall not make or second motions unless he temporarily relinquishes the presiding chair until the vote on the motion has been taken, or until disposition on the motion has been otherwise completed. The mayor shall have no veto

provides in Article 14, Section 7 that the City Council has implied powers to carry out the express and implied powers granted in the Charter. Further, Article 2, Section 21, the City is granted the power to enact Ordinances and procedures when state law is silent on an issue.

Arizona Statutes permit public officers of the state to receive reimbursement for certain defined expenses. The relevant provisions are A.R.S. §38-621 through §38-627. The statute provides:

"When the official duties of a public officer, deputy or employee require him to travel from his designated posted duty, he should be allowed expenses and allowances therefor."

The issue of payment of incidental expenses incurred to attend meetings of a governing body has not been addressed in the case law. The only statute addressing such issues in Arizona pertains to County Supervisors. The provisions of A.R.S. §11-215 authorize members of the Board of Supervisors to be reimbursed for all mileage and subsistence expenses incurred to attend meetings of the Board of Supervisors up to a maximum of \$15.00 per day.

Under the Peoria City Charter, the City Council has the ability to reimburse its members for expenses incurred in the performance of their official duties. Although this issue has not been addressed on a City Council level in Arizona, there are numerous court decisions in other jurisdictions addressing this issue.

In Collins v. Riley, 24 Cal.2d. 912; 152 P.2d 169 (1944), the Supreme Court of California held that the California Legislature was authorized to provide for reimbursement of living expenses for members of the Legislature while attending sessions of the Legislature.

A different result was reached by the Washington Supreme Court in State ex rel. O'Connell v. Yelle, 51 Wash.2d 594; P.2d 1079 (1958). In the Yelle case, the Washington Supreme Court held that an increase in the reimbursement for living expenses of state officials was improper since there were no statutes authorizing

power. He shall be recognized as head of the city government for all purposes. The mayor shall have no regular administrative duties, but he shall, on behalf of the council, confer and advise with the city manager to insure that council programs and policies are being carried out in full. In addition thereto, the mayor shall govern the city by proclamation during times of riot, civil insurrection, major disaster and times of great public danger.

reimbursements for the new types of expenses being claimed. The Washington case involved state officials seeking reimbursements for increased cost of living in addition to travel and mileage.

A similar result was held by the Colorado Supreme Court in the matter of Hillman v. Chmelka, 118 Colo. 252; 195 P.2d 945, 1948. In this case, the Colorado Supreme Court held that a Constable may only receive reimbursement for mileage even though they incurred other expenses in performing their duties since the Legislature only authorized by statute, reimbursement for mileage.

Applying these cases and the statutes cited above to this question, it must be concluded that the City has the legal authority to provide for reimbursement of travel, mileage and subsistence expenses incurred in the performance of the duties of an elected official or public officer. As noted in Article 2, Section 1 and Article 2, Section 21, of the Peoria City Charter, such authority must be exercised by ordinance.

Absent an ordinance, the Council would have the implied power to reimburse Councilmembers and public officials only for those items authorized by state law. The only items authorized for reimbursement to state officials under state law are travel, lodging and per diem.² While these provisions only apply to state offices and state employees, based upon the implied powers language of the City Charter, it may be construed that the City Council had the power to permit such reimbursements for Councilmembers and City employees.

It is a matter of legal concern to this office that the City is basing its ability to reimburse public officers and employees for their mileage, travel and necessary expenses based upon the provisions of state law. A better practice and procedure would be for the Council to provide specifically in the City Code for such reimbursements. Such an ordinance would provide an enhanced legal basis for the current City Policy and Procedure as well as allowing Council to address any other issues it deems appropriate.

The City Council would have the ability to provide for reimbursement of other expenses incurred in the performance of the duties of an elected official while attending Council meetings; however, such a power would have to be exercised by Ordinance. The ordinance would need to be limited to providing reimbursement for expenses directly attributed to the performance of official duties. Reimbursement for other expenses would constitute a gift in violation of Article 9, Section 7 of the Arizona Constitution.

²See A.R.S. §38-621 through 627.

For example, the City could not reimburse a Councilmember for expenses incurred in upkeep of their residence even though a Councilmember may use their residence for constituent meetings and constituent contacts. Such expenses are not directly related to the performance of the official duties of a Councilmember.

Under the question presented, the City Council would have the authority to reimburse for expenses directly arising out of the performance of a Councilmember's duties attending Council meetings. This could include travel to and from the meeting as well as expenses incurred in attending the meeting such as, meals, child care and other incidental expenses, provided such expenses are directly necessary to the performance of the duties of the elected officials.

Generally, in many cities and other jurisdictions, this is done through the establishment of a set allowance for such expenses. The elected or appointed officials must then submit claims for such expenses that may not exceed the amount of the allowance. Finally, I would like to note that this is a discretionary power of the City Council. The City Council is under no obligation to reimburse for any of these expenses or even travel, mileage and per diem.

In conclusion, it is the opinion of this office that absent a specific authorizing ordinance, the City is limited to reimbursing elected and appointed officials and employees to reimbursements for mileage, travel expenses and per diem incurred in the performance of their official duties. If you should have any further questions, please feel free to contact me.

cc: Honorable Mayor and Council