
 ELARBEE THOMPSON

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ATTORNEYS**


**The Gratuities Clause and  
Public Sector Employment  
Benefits**

Presented by  
R. Read Gignilliat

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 ELARBEE THOMPSON  
*Labor, Employment and Complex Litigation Specialists*

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**INTRODUCTION TO THE  
GRATUITIES CLAUSE**

- General View: GC is an exceptions-riddled source of restrictions on a state or local gov't's authority to use or provide public funds, services or assets.
- Not wrong, but not a complete description.
- It's what we don't know about the GC that can come back to haunt us (and our clients)

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## Gratuities Clause: In the News

AJC

News Politics County by County

### Make government gratuities a crime, Cobb DA says

Aug 22, 2018  
By Dan Klepal, The Atlanta Journal-Constitution

Cobb County District Attorney Vic Reynolds wants the Georgia Legislature to put some teeth in a provision of the state Constitution that prohibits government from giving gifts to individuals without a benefit to taxpayers in return.

Reynolds said violations of the so-called gratuities clause should be criminal offenses, and the associated punishment should be clearly spelled out in statute.



- Some want the Legislature to criminalize GC violations
- Incentivize compliance (compare Sunshine Laws)
- Motivate local gov't officials to improve their understanding of the GC
- *But see Kennedy v. State.*

## Gratuities Clause: In the News

- *Kennedy v. State*, 205 Ga. App. 152 (1992).
  - Commissioner violated GC by providing county labor, materials and equipment to pave parking lot for private organization.
  - Commissioner convicted for “malpractice in office” under O.C.G.A § 45–11–4 based on GC violation.
  - “Malpractice in office” defined as “a wrongful or unjust doing of an act which the doer has no right to do, ....”
  - Court rejected the Commissioner’s contention that the indictment failed to clearly inform him of the law that made his actions criminal, holding that he was fully apprised of the prohibitions of the GC. *Kennedy*, 205 Ga. App. at 153.

## Gratuities Clause: In the News

- The GC made this year's agenda because of recent media coverage involving high profile public officials.
  - Associated with some of the largest, most sophisticated local gov'ts in the state.
  - Access to some of the most experienced and knowledgeable local gov't attorneys in the state.
  - Still managed to run afoul of the GC (or come close enough to doing so to invite challenges and media attention).

## Gratuities Clause: In the News

**AJC**

News Politics County by County

### ██████████ commissioners told to halt spending on charities

Oct 13, 2015  
Mark Niesse

██████████ County's attorney is advising commissioners to stop using their office budgets to benefit nonprofit and charitable organizations, a practice that investigators have said may be illegal.

County Attorney ██████████ wrote Tuesday that there's no "bright line rule" that prohibits public funds from being allocated to charities.

But she also said government donations that don't bring a substantial benefit to the county appear to run afoul of the Georgia Constitution's ban on gratuities.

"As you make expenditure decisions in the future, I suggest that you try and ensure that the expenditure does not result in the appearance of providing personal gain or benefit to you. If you and your staff use this concept as guidance as you make decisions, I am hopeful that your future expenditures will not be questioned," ██████████ wrote.

# Gratuities Clause: In the News

## AJC

News Politics County by County Things to do Life Sports

## ██████████ paid \$21,000 to bury beloved staffer. But was it legal?

MON, AUG 27

By Dan Klepal and Jennifer Peebles

When a beloved deputy commissioner in ██████████ Public Works Department died in 2013, Mayor ██████████ wanted to help the family by paying for the funeral and related expenses, but legal experts say it violated a provision in the Georgia Constitution, which specifically prohibits

government from giving donations or gifts — known as gratuities — to individuals without taxpayers receiving a tangible benefit in return. A report commissioned by Mayor ██████████ earlier this month found that such giveaways violated the state constitution's gratuities clause and the city's charter.

# Gratuities Clause: In the News

## AJC

News Politics County by County Things to do Life Sports

## Legal defense for ██████████ judge's ethics case climbs to \$56K

Friday, August 17, 2018  
By Dan Klepal

Legal representation of Municipal Court Judge ██████████, which the city of ██████████ now says was improper, will nonetheless cost taxpayers \$56,000, The Atlanta Journal-Constitution and Channel 2 Action News have learned.

The last of ██████████ attorney ██████████'s legal invoices were submitted to the city's Law Department on Aug. 6 — **two weeks after City Attorney ██████████ wrote a letter to ██████████ and ██████████** informing them that it was improper under state law to use public money to pay for the private legal matter.

██████████ letter doesn't say why the billing is improper, but a clause in the Georgia Constitution prohibits government from giving gifts, also known as gratuities, to individuals without the public receiving a substantial benefit in return.

## Gratuities Clause: In the News

- Decisions leading to these and other recently reported GC challenges likely were not approved by legal counsel.
- But improving our familiarity with the GC puts us in a better position to help our local gov't clients understand these issues better.
- Goal is to identify potential GC issues on the front end, because they are apparently much easier to spot after-the-fact (often after it's too late).

## Text of Gratuities Clause

- The GC of the Georgia Constitution provides, in pertinent part, that except as otherwise provided:
  - The General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public, and
  - The General Assembly shall not grant or authorize extra compensation to any public officer, agent, or contractor after the service has been rendered or the contract entered into.
- Ga. Const. Art. III, Sec. VI, Para VI.

## Text of Gratuities Clause

- As otherwise provided:
  - Compensation for innocent crime victims.
  - Health insurance plans for public school retirees.
  - Disability and life insurance benefits for public safety employees and public school employees.
  - Temporary disability benefits for public safety employees.
- Ga. Const. Art. III, Sec. VI, Para VI(c), (d), (e), (f) & (g).

## Gratuities Clause: Threshold Issues

- While the GC expressly applies to acts of the General Assembly ...
- It has been applied by extension to:
  - State agencies
  - County & municipal gov'ts
  - Development authorities
  - Local gov't pension boards
  - Hospital authorities
  - School boards
  - Among others

## Gratuities Clause: Threshold Issues

- So the GC is expressed as a limitation imposed on the state legislature's authority to dispose of public funds / services / assets, but in practice has been applied to all branches of state and local gov't.
- But what about individual public officials?
  - Mayors?
  - City/County Managers?
  - Fire/Police Chiefs?
  - Municipal/Magistrate Judges or Solicitors?
  - Constitutional Officers (e.g., Sheriffs and Clerks of Court)?

## Gratuities Clause: Threshold Issues

- GC's direct application to individual public officials is a bit of an open issue, but some cases provide useful guidance.
- *Griffies v. Coweta County*, 272 Ga. 506 (2000).
  - Involved Clerk of Court's use of public funds to purchase bottled water for employees due to problems with courthouse water.
  - GC is never cited in the decision; instead, Court's inquiry focused on whether the expenditure was "within the sphere of [the Clerk's] delegated powers."
  - Expenditure deemed lawful because Clerk had access to funds budgeted for miscellaneous expenses and had valid basis for the expenditure (despite arguably gratuitous nature).

## Gratuities Clause: Threshold Issues

- *Gwinnett County v. Blaney*, 275 Ga. 606 (2002).
  - Involved Solicitor’s use of public funds to retain an attorney to defend him in litigation after County determined he had forfeited coverage under its defense & indemnification policy.
  - GC is never cited in the decision; instead, Court’s inquiry again focused on whether the expenditure was “within the sphere of [the Solicitor’s] delegated powers.”
  - Expenditure deemed unlawful because, while Solicitor (apparently) had access to funds budgeted for miscellaneous expenses, he lacked a valid basis for the expenditure (since it was in circumvention of the defense & indemnification policy).

## Gratuities Clause: Threshold Issues

- *Gwinnett County v. Blaney*, 275 Ga. 606 (2002) (*Con’t*)
  - In applying the “sphere of legally delegated powers” standard to a public official’s disposition of public funds/assets, might the GC become a relevant consideration?
    - In *Blaney*, what if the County had allowed the expenditure despite the Solicitor’s forfeiture of coverage under the defense & indemnification policy?
    - Might the Court have applied the GC to determine whether the Solicitor’s expenditure of funds for retaining an attorney was pursuant to a *legal* delegation of power?
  - If so, then perhaps the GC’s application to the disposition of public funds/assets by an individual public official is best described as indirect; i.e., it applies to the delegation of power to the official (by the governing authority, charter, or state law).



## Gratuities Clause: Why is Compliance Important?

- Potential criminal exposure under existing law.
- Bolster support for legislative expansion of criminal exposure.
- Negative publicity.
- Loss of public trust & confidence.
- Enhanced risk of legal challenges under GC.
- Enhanced risk of Whistleblower Act claims.
- Potential disparate treatment claims / morale issues

## What is a “Gratuity”?

- “Gratuity” within meaning of the GC of the Ga. Constitution has been defined as:
  - “[s]omething given freely or without recompense; a gift”  
or
  - “[s]omething voluntarily given in return for a favor or now especially a service; hence, a bounty; a tip; a bribe.”
    - *McCook v. Long*, 193 Ga. 299, 303 (1942)
    - *Garden Club of Ga., Inc. v. Shackelford*, 266 Ga. 24, 24-25 (1995)

## What is a “Gratuity”?

- An unlawful “gratuitous” action occurs when the gov’t gives something of value without “sufficient consideration” in return.
  - *Swanberg v. City of Tybee Island*, 271 Ga. 23, 25 (1999);  
*Haggard v. Bd. of Regents*, 257 Ga. 524 (1987)
- Conversely, therefore, there is “no ‘gratuity’ involved [where] the [local gov’t] is recovering *substantial benefits* in return.”
  - *Smith v. Bd. of Comm’rs of Roads & Revenues of Hall County*, 244 Ga. 133, 140 (1979)

## Identifying Gratuities Clause Issues

- First, does the local gov’t (or official) have legal authority to provide the benefit?
  - If not, perhaps better characterized as an ultra vires act, but often referred to as a GC violation.
- Second, in exchange for the benefit, did the local gov’t receive sufficient consideration; i.e., fair return-of-value or “substantial benefits”?
  - Or was the local gov’t “just as well without [the return]”?
  - Or were the benefits merely “indirect or incidental”?

## Sources of Legal Authority to Provide Benefit

- Constitution's Home Rule provisions
  - Ga. Const. Art. IX, *et seq.*
- General Law, including County and Municipal Home Rule Acts
  - O.C.G.A. § 36-1-1, *et seq.*
- City Charter or Local Legislation
- Case law?
  - Caution: Expenditure must be *expressly* authorized and such authority is *narrowly* construed.

## What is “Sufficient Consideration” or a “Substantial Benefit”?

- Monetary consideration
- Services
  - Op. Att’y Gen. 70-28
- Reduced administrative burden
  - Op. Att’y Gen. 73-145
- Direct benefit to the public (most closely scrutinized)
  - Op. Att’y Gen. 81-17

## Gratuities Clause Issues in the Employment Relationship

- Key inquiry:
- Was there a legal entitlement to the compensation or benefit – whatever its form – when the employee entered into the performance of services for the employer?
- Or does it amount to “extra compensation” for services already rendered; i.e., compensation or benefits in excess of what was contemplated or committed to when the employee entered into performance?

## Gratuities Clause Issues in the Employment Relationship

- Key inquiry (con't):
- Whether a benefit has flowed from the local gov't to the employee without his or her providing sufficient consideration – irrespective of the actual cost to the local government.
  - Op. Att'y Gen. 2004-3

## Common And Some Not So Common Fringe Benefits

- Pay Raises & Shift Differentials
- Paid Leave / Time-Off
  - Sick, Vacation, Holiday, Bereavement
- Pension & Retirement Benefits
- Health Insurance
  - Including Retiree Health Insurance
- Disability Insurance
  - Short-Term & Long-Term
- Life Insurance

## Common And Some Not So Common Fringe Benefits

- Bonuses & Pay Incentives:
  - Signing Bonuses, Performance Bonuses, Longevity Bonuses
  - Ad Hoc (Morale) Bonuses / Gifts (e.g., names drawn at holiday party to win cruise)
- Educational Incentives / Tuition Reimbursement
- Wellness Program Incentives (e.g., gym memberships or discounted health insurance premiums)
- Onsite Gym with Trainers
- Free Parking

## Common And Some Not So Common Fringe Benefits

- Expense Reimbursement:
  - Travel, Lodging Meals, Tips
  - Entertainment, Alcohol, Spouse/Significant Other
  - Moving / Relocation Expenses
- Day Care Services (e.g., subsidized or onsite)
- “Free Lunch Fridays”
- Funeral Benefits
- Debt Forgiveness Programs

## Legal Authority for Fringe Benefits?

- “Fringe benefits of numerous sorts have become a substitute for actual direct increases in wages .... They are no longer bonuses in the traditional sense ... but ... an inherent part of compensation. Payments ... of employees' pension contributions, and insurance [premiums], both life and health, have all become vital ingredients of employment [and] can no longer be considered as gratuities ... since they are essential elements of most compensation arrangements benefit[ing] both the employer and the employee.... [O]ne must overlook present realities to apply a moribund rule ... that where an employer [provides such benefits] for its employees that this constitutes a mere gratuity.” *City of Athens v. McGahee*, 178 Ga. App. 76, 78 (1986).

## Legal Authority for Fringe Benefits?

- “[E]ven for individuals performing basically the same tasks increases in salary are given in order to meet the severe increases in the cost of living. To equate such raises with a gift or gratuity is *obviously fallacious reasoning*. To say a raise or a fringe benefit of that type is without consideration is *no longer rational*. For, without the raise or added benefit, the employee will actually suffer a reduction in wages and would therefore seek employment elsewhere. Also, raises are often given for seniority or time in service without regard to increased tasks or responsibility. The consideration to the employer is the ability to retain experienced employees.” *Dinnan v. Totis*, 159 Ga. App. 352, 354 (1981).

## Substantial Consideration for Fringe Benefits?

- The consideration to the employer is the ability to retain experienced employees.” *Dinnan v. Totis*, 159 Ga. App. 352, 354 (1981).
- “Such benefits aid in securing more efficient and desirable public employees, resulting in greatly enhanced public security and peace.” In “this is the day and age, ... fringe benefits, such as sick benefits, retirement, etc., are extremely important to the working public, and many people take and hold onto jobs because of such benefits.” *Griffin v. Bass*, 96 Ga. App. 892, 896 (1958).
- What happened to “Expenditure must be *expressly* authorized and such authority is *narrowly* construed?”

## Retirement and Pension Plans

- “It is well established that a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee’s contract of employment ..., and if the employee performs services while the law is in effect. Thus, the payment of retirement benefits in compliance with our statutes is not a gratuity.” *Gold v. DeKalb Cty. Sch. Dist.*, 815 S.E.2d 259, 263-64 (Ga. Ct. App. 2018).

## Retirement and Pension Benefits: Timing Matters

- Newly enacted retirement plan can take into account past service of current employee
  - *Aldredge v. Rosser*, 210 Ga. 28, 32, 77 S.E.2d 515, 517 (1953).
- Impermissible to provide:
  - “Increased retirement benefits” in the form of “adjusted compensation for services rendered” to a retired employee “since the service was completed prior to the increase of the retirement benefits” and “the grant of extra compensation to a public officer after the service has been rendered.” *Carter v. Haynes*, 228 Ga. 462, 465-66 (1971).
  - A “pension or retirement allowance granted for services previously rendered and ... fully paid for at the time they were rendered.” *Burks v. Bd. of Trustees of Firemen's Pension Fund of City of Atlanta*, 214 Ga. 251, 253 (1958).



## How Would the Gratuities Clause Apply?

- Small city's maintenance man retires after 40 years on the job. Several weeks later, newly elected mayor discovers that the man was not a participant in any retirement plan and is receiving no retirement benefits. Because the man had devoted his entire adult life to the city, the mayor and council agree that the city has a morale obligation to provide him retirement benefits. Can this be done without violating the GC?

## How Would the Gratuities Clause Apply?

- County administrator learns that board chairman will not seek reelection when his term ends. He does not like the board member in line to become the next chairman and therefore tells the current chairman that he plans to resign. To entice the administrator to stay, the chairman renegotiates his contract to provide for substantial pay raises and bonuses, a 6-figure severance package, 12-weeks of paid vacation, and increased service credit in the retirement plan. Local legislation requires that contracts be approved by majority vote of the board of commissioners and be published with the minutes, but this was not done. A year later, when the administrator clashes with new chairman, he resigns and demands his severance. Board knows the contract is invalid but wants to pay it anyway to avoid media attention. Can this be done without violating the GC?

# QUESTIONS?