

OFFICERS AND EMPLOYEES: Public officers and employees may be
WITNESS FEES AND EXPENSES: reimbursed out of the treasury for
expenses instant to attendance in
response to a subpoena, and whatever
amount is collected by such officers
as witnesses and for mileage should
be turned into the state treasury.

January 22, 1940

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein
you request an opinion based on the following statement:

"This office desires your opinion
or ruling in regard to the matter
of claiming, collecting and retain-
ing of witness fees by employees
of my several departments who ap-
pear or may appear in State and
Federal Courts as a witness.

"Should the employee to whom the
subpoena is directed or who is
designated by me to appear as a
witness if the subpoena is
directed to me, or the head of
one of my departments, claim his
attendance collect and retain same
and not make any claim against the
state through this department for
expenses incident to such attend-
ance; or should he present a claim
against the state through this
department for his expenses incurred
by reason of his attendance and
claim and collect witness fees
due him and turn the same into his
department or State Treasury; or
should he not make any claim for
or collect any witness fee, but
make claim for his expenses against
the state through this department
or the department in which he is
employed."

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Section 11798, R. S. Missouri 1929, which deals with the subject of witnesses and their fees, provides as follows:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day, \$2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, \$1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself

from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

Section 3837, Laws of Missouri 1939, page 357, provides as follows:

"No officer, appointee or employe holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employes as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed: Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session."

This last section has to do with fees in criminal cases. It will be noted that this section prohibits public officers or employees from claiming witness fees or mileage in criminal cases and hearings before a grand jury or at coroner's inquest in which such officer is not compelled to travel more than five miles. In case such officer or employe travels more than five miles in response to a subpoena, as is provided for in said Section 3837, then it seems that he would be entitled to compensation and mileage the same as any other witness.

On the question of public officers collecting fees

and expenses as witnesses, we find the rule stated in Volume 70 Corpus Juris, page 71, Section 72, as follows:

"Allowance of witness' fees to public officers is determined by the statute and whether claimant is within its terms. The fact that one who is subpoenaed and attends as a witness is a public officer does not, in itself, generally defeat his right to compensation; but an officer who is called on to testify while present in court in the performance of his official duties is not entitled thereto, the distinction between attendance by a public officer in performance of duty and attendance merely as a witness being specifically made in some statute. A statute prohibiting a policeman accepting a fee for any service related to the duties of his office does not make it unlawful for him to accept a witness' fee, testimony in court not being regarded as a service related to the duties of his office, * * * * *

In State ex rel. v. Gifford, 70 Mo. App. 522, the question of whether a policeman in Kansas City was entitled to witness fees in the case in which he gave testimony was involved. In that case it was shown that the Charter of Kansas City, for the purpose of creating a fund for a police relief association, provided in part as follows (l. c. 526):

"* * * And in addition, members of said relief association shall be allowed witness fees in all cases in all courts of record; also, in all municipal or city police courts, coroners' inquests, justice of the peace courts, whenever attending therein in matters pertaining to

the discharge of their duties as witnesses; said witness fees to be collected solely by such officer as may be designated and authorized to collect the same, under the corporate authority of said relief association, and for its exclusive benefit; and no judge, justice of the peace or presiding officer of said courts or tribunals shall have power to remit any witness fees legally belonging to any member of said relief association, organized and existing as aforesaid.' * * * * *

And at l. c. 528, the court in the same case, in speaking of the contention of the defendant, said:

"But the defendant insists that police officers are not entitled to witness fees for attendance at the police court, because they receive a salary which includes all such services. To sustain this contention a sentence appearing in paragraph 17, of section 1, article 3, of the city charter, before alluded to, is relied on. The particular clause reads: 'And that no officer receiving a salary shall receive any fees or other compensation for his services.' The foregoing language occurs in the general and specific powers granted by the charter to the mayor and common council. They 'shall have power by ordinance,' says that instrument, * * * 'to establish the salaries of all officers and the compensation of all employees * * * except as is otherwise provided in this charter; provided that the salary, fee, or compensation of no officer shall be

changed during the term for which he is elected or appointed, and that no officer receiving a salary shall receive any fees or other compensation for his services."

Again at l. c. 529 in the same case the court said:

"Again, even to concede that the clause of the charter prohibiting a city officer from receiving fees or other compensation than his salary for his 'services' should apply to police officers, it can, by no reasonable stretch of language, be made to cover fees such officer may be entitled to as a witness in a cause, whether such fees be earned in attendance on a police or other court. * * * "

Following the ruling in the Gifford case, supra, it seems that the court took the view that an officer might receive compensation as a witness in a cause and not violate the law as to increase of compensation or salary during his term of office. An employe or a state official might receive and retain a witness fee and not be violating the statutes which prohibit the increase of salary during the term of office.

In the case of Sackett v. Sanborn, 91 N. E. 133, 134, the Supreme Court of Massachusetts had before it a statute somewhat similar to Section 3837, supra, insofar as it refers to officers receiving fees as witnesses applies, and the court said:

"* * * * The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of

witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but not in the performance of the duties for which they are paid, at a place other than their residence, then, according to the provision quoted above from section 44, instead of their expenses they are to be allowed witness fees. * * * * *

Applying the rule announced in the Sackett v. Sanborn case, supra, to the provisions of Section 3837, supra, of the Missouri law, it would seem that where an officer testifies in a criminal case or before a coroner's inquest or before a grand jury and does not have to travel more than five miles to the place of giving such testimony, then he would not be permitted to charge or collect a witness fee therefor but would be compensated for his expenses necessarily incurred in the same manner that he is compensated for expenses in performing any other official duty. However, in a case where such an officer or an employe is required to travel more than five miles for the purpose of giving such testimony, then it seems that the lawmakers have intended that he would be permitted to claim his witness fees and mileage for such services and attendance.

There is no doubt but that if a state officer or his employe is subpoenaed as a witness to testify in either a criminal or civil case that he is compelled to respond to such subpoena and testify. This duty is imposed upon him whether he appear as an officer or as a private citizen. We think the rule as it applies in cases where an officer is compelled to furnish testimony is stated in 46 Corpus Juris, Section 246, page 1018, as follows:

"The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a

provision of the constitution or a statute conferring it either directly or by necessary implication, and the officer cannot recover compensation additional to the compensation fixed by statute for such expenses. But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done. * * * * *

So if the officer or employe, by virtue of his office, is compelled to appear as a witness and testify, he does so as a part of his official duties and should be reimbursed for his expenses incurred thereunder in the same manner as he is recompensed for expenses incurred in performing any other official duty.

In case such officer or employe is authorized to claim witness fees and mileage as a witness, he may do so, but since he has been paid his expenses and salary by the state, then such witness fees and mileage should be turned into the state treasury. We fail to find much statutory authority which requires the officer or employe to turn into the state treasury fees and mileage when collected, however, in the Highway Patrol Act in Section 11, page 234, Laws of Missouri 1931, it seems to be indicated that the lawmakers intended that witness fees by highway patrolmen be handled in the manner hereinbefore stated. This section provides as follows:

"The necessary expenses of the members of the patrol in the performance of their duties shall be paid by the state when such members are away from their places of residence or from the district to which they

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are assigned, subject to the approval of the commission. All fees for the arrest and transportation of persons arrested and witnesses' fees for members of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law."

In connection with this question, I am enclosing a copy of an opinion rendered by this department in June, 1938, to Captain Thomas L. Leigh of the State Highway Patrol and written by Mr. Max Wasserman. This opinion somewhat supports the view that we are taking in our conclusion here.

CONCLUSION.

From the foregoing it is the opinion of this department that should an official of the state or any employe be subpoenaed to appear as a witness, either in a civil or criminal case, except criminal cases in which such officer or employe is not required to travel more than five miles, shall claim his attendance and collect for same.

We are further of the opinion that such officer or employe may present his claim through the department in which he is employed for the expenses which he incurs by reason of his attendance as a witness and when the witness fees and mileage are paid for such attendance, then such party should turn the same into the state treasury.

Respectfully submitted

APPROVED:

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W. J. BURKE
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