

1984 S.C. Op. Atty. Gen. 100 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-42, 1984 WL 159849

Office of the Attorney General

State of South Carolina

Opinion No. 84-42

April 12, 1984

*1 Preston F. McDaniel, Esquire
Senior Staff Attorney
State Workers' Compensation Fund
800 Dutch Square Blvd., Suite 160
Columbia, South Carolina 29210

Dear Preston:

You have inquired whether the State Workers' Compensation Fund may lawfully require that witness fees and allowances paid to employees of that agency who are subpoenaed to appear as witnesses in state and federal court pursuant to their official duties be turned over by the employee to the agency for remittance to the General Fund. It is our opinion that an agency has this authority.

At the outset, we note that Regulation 19-703.10A.3, promulgated by the State Personnel Division of the Budget and Control Board provides:

An employee subpoenaed in line of duty to represent a State agency as a witness or defendant shall not be granted administrative leave with pay, and appearance in such cases shall be considered a part of the employee's job assignment. The employee shall be reimbursed according to the Budget and Control Board regulations for any meals, lodging and travel expenses that may be incurred while serving in this capacity.

Therefore, it is apparent that state employees subpoenaed in their official capacities to appear as witnesses in state and federal court proceedings draw their regular salary and receive, in accordance with state law, reimbursement for expenses incurred if their presence is required at a distant location. Thus, a state employee who is subpoenaed in the line of duty to testify in a judicial proceeding suffers no loss of pay or other benefits of employment as a consequence of having to attend the deposition or court to which he is subpoenaed.

[Section 19-19-40, Code of Laws of South Carolina](#), 1976, prohibits salaried state employees from receiving the nominal witness fee and mileage allowance provided by Section 19-19-10, *id.*, for witnesses attending state court.¹ Rule 87I, of the Rules of Practice for the Circuit Court for South Carolina provides that ' a witness attending any deposition held pursuant to these rules shall receive \$15.00 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and nine cents per mile for going from and returning to his place of residence.' Rule 87 does not distinguish between salaried state employees and other persons as does [§ 19-19-40](#). Therefore, while a salaried state employee is prohibited from receiving any fee for appearing in Circuit Court to testify², he may receive the \$15.00 fee and mileage allowance prescribed by Rule 87I even though his appearance at the deposition is pursuant to his official duties. *See generally* 97 C.J.S. *Witnesses* § 38 (1957) (that witness is public employee does not, of itself, defeat right to receive fees and allowances; question of whether public employee is entitled to fees and allowances depends upon statute and whether public employee is within its terms). Nevertheless, for the reasons hereinafter discussed with respect to the issue of the receipt and retention of federal witness fees and allowances, any such fees and allowances received must be turned over to the employing agency.

*2 Witness fees for those subpoenaed to testify at the trial of a case or on deposition in a federal court proceedings are prescribed by [28 U.S.C. § 1821](#) which provides, in pertinent part:

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(b) A witness shall be paid an attendance fee of \$30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

The legislative history of this provision leaves no doubt that the \$30.00 *per diem* allowance for witnesses was intended to provide some minimal compensation for time—and inferentially, wages—lost from work as a result of witness service. See H.R. Rep. No. 95–1651, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Congressional and Admin. News 4631. A state employee subpoenaed in the line of duty to represent a state agency in federal court proceedings, however, does not lose any time from work or wages: by the express terms of R. 19–703.10A.3, attendance as a witness in such capacity is the work of the employee for such time as his presence is required and, consequently, the employee is paid his regular salary during such service. Accordingly, permitting a state employee subpoenaed in the line of duty to represent a state agency or to produce records of the agency in a federal court proceeding to retain the \$30.00 *per diem* which, by the express terms of [28 U.S.C. § 1821\(b\)](#), must be paid to him, cf. [Pressgrove v. Kuntz](#), 52 F.R.D. 230 (N.D. Miss. 1971) (that highway patrolmen called as witnesses traveled to site of trial in highway patrol vehicles and therefore incurred no personal expense is irrelevant to issue of their entitlement to witness fees and mileage)³, would enable him to earn extra compensation—above that provided by the General Assembly through the Personnel Division of the Budget and Control Board—solely as a result of his position as a state employee. This, in our opinion, would contravene the spirit, if not the letter, of Section 134 of the 1983–84 Appropriations Act (Act No. 151 of 1983, 63 STAT. 424, 1118) which provides, in pertinent part:

[T]he salaries paid to officers and employees of the State, including its several boards, commissions, and institutions shall be in full for all services rendered, and no perquisites of office or of employment shall be allowed in addition thereto . . .

‘Perquisite’ has been variously defined as “[a]n allowance paid in money for a thing beyond the ordinary salary or fixed wages for services rendered; especially a fee allowed by law to an officer for a specific service []’[;] ‘[s]omething received incidental and in addition to regular wages, salary, etc.” [County Auditors of McKean County v. Anderson](#), 133 Pa. Super. 475, 3 A.2d 28, 30 (1938). As the court noted in [State ex rel. Harbage v. Ferguson](#), 68 Ohio App. 189, 36 N.E.2d 500, 503 (1941), ‘All the definitions [of ‘perquisite’] contemplate a profit to be secured by the officer out of the office he occupies in addition to his fixed compensation.’ (Emphasis in original.) We have no difficulty in concluding that the retention of a witness fee by a state employee whose regularly assigned duties entail his testifying as a witness or producing records of his agency in federal court proceedings constitutes a prohibited perquisite of office.

*3 The only remaining question, therefore, is whether the employing agency has the right to insist that those of its employees who are paid witness fees and any other allowances provided by federal law for appearing in their official capacities in federal court proceedings pay over such fees and allowances to the agency for deposit to the State's General Fund. We think an agency has this right.

The general rule is that fees collected by public officers and employees in the performance of their official duties are subject to the control of the state. 67 C.J.S. Officers § 224b. (1978). Although this rule is most obviously applicable to the collection of fees such as license fees, there is no sound reason why the rule should not likewise extend to the receipt of witness fees or allowances by an employee who receives such fees or allowances in the performance of his official duties for which the state pays him a salary. Accordingly, it is our opinion that a state agency may lawfully require those of its employees who, in the performance of their official duties, are subpoenaed to appear as witnesses in state or federal actions, either on deposition or at trial, to remit any witness fee or allowance received to the agency. The agency, in turn, is required to remit these fees and allowances to the State Treasurer for deposit to the General Fund of the State by the terms of the Appropriations Act. See Act No. 151 of 1983, § 1 (64 STAT. 424, 431).

To summarize, it is the opinion of this office:

(1) that the receipt and retention of witness fees and allowances by a salaried state employee incidental to the performance of his official duties constitutes a prohibited perquisite of office;

(2) that a state agency is entitled to insist that any of its employees who are paid such fees and allowances as an incident of their performance of duty pay over such fees and allowances to the agency; and

(3) that any state agency that receives any such fees and allowances from its employees must remit the same to the State Treasurer for deposit to the General Fund.

Sincerely,

T. Travis Medlock
Attorney General

Footnotes

- 1 An exception is made for medical doctors from the State Hospital who are called to testify in a criminal case. These physicians, although salaried state employees, are entitled to receive Five Dollars (\$5.00) per diem and Five Cents per mile actually traveled to the trial situs as witness fees. [Section 19–19–220, Code of Laws of South Carolina](#), 1976. A proviso to the 1983–84 Appropriations Act requiring state agencies to ‘provide at no cost . . . such services as are necessary to carry out the provisions of Article 7, Chapter 17 of Title 44 of the 1976 Code (Judicial Commitment), Chapter 3 of Title 17 of the 1976 Code (Defense of Indigents), and Article 1 of Chapter 3 of Title 16 of the 1976 Code (Death Penalty), as amended upon request of the Judicial Department and/or the appropriate court[.]’ would appear to suspend, at least in part, the provisions of [Section 19–19–220](#) for the current fiscal year.
- 2 It bears noting that the statutory prohibition against salaried state employees receiving any fee for appearing in Circuit Court to testify does not distinguish between salaried state employees appearing in court in the performance of their official functions and those appearing for reasons unrelated to their state employment. [Section 19–19–40](#) flatly prohibits any fees being paid to any salaried state employee who appears as a witness in State Circuit Court.
- 3 We express no opinion as to whether a federal judge might properly deny the witness fees provided by [28 U.S.C. § 1821\(b\)](#) to a state employee who suffers no loss of pay or other benefits of employment as a result of his appearance as a witness either at a deposition or at the trial of a case in federal court. Although the statute is couched in mandatory terms, as we have pointed out, the congressional intent behind this provision was to provide some minimal form of remuneration for time and wages lost from work due to witness service. It is at least questionable whether this purpose is furthered by paying the prescribed witness fees to persons who lose no wages as a result of their appearing as a witness.

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