

OPINION
64-236

May 25, 1964 (OPINION)

STATE

RE: Employees - Witness Fees

Your letter dated April 23, 1964, has been received.

Your letter provides as follows:

A question has come up in this department, on several occasions, concerning whether or not a state employee can accept witness fees when subpoenaed to appear as a witness. Many times we are called upon to testify in behalf of another state agency or a law enforcement agency of a political subdivision. There is a feeling amongst the employees of the department that at some time or other there was a statement issued to the effect that state employees could not collect witness fees when subpoenaed by another state department or agency.

There is also the situation where a state employee might be subpoenaed to witness in a private case that is involving individuals or companies not of a political subdivision. Sometimes the testimony might involve information or evidence obtained by laboratory work or analysis.

This problem, as I stated, has occurred on some occasions and we would appreciate the advice of your department in this matter."

Section 31-01-16.1 of the North Dakota Century Code was enacted by the 1961 Legislature and provided that municipal police officers testifying while "off duty" shall be allowed witness fees and mileage if a plea of not guilty was entered and they were subpoenaed. This is apparently the only statute pertaining to witness fees for public employees.

However it is our opinion that a state employee is entitled to receive the fees and mileage provided by statute for witnesses when called to testify concerning matters regarding his official duties unless called by the state or a state agency. It is our further opinion that these fees are not to be kept by the employee, but are to be deposited by the department in the state general fund. The employee, of course, would be allowed the regular mileage and subsistence normally allowed a state employee on official business. If such fees were not collected from private litigants, it could amount to a violation of Section 185 of the state constitution which prohibits the state from giving aid to any private individual, except for reasonable support of the poor. Where a state employee is called to testify by another state agency we believe the employee would not be entitled to collect witness fees, but the department calling the

state employee as a witness would be liable for mileage and subsistence the employee is normally entitled to collect from his own department if additional expenses are involved.

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