February 2, 1999

OPINION NO. 99-011

Thomas W. Johnson, Director
Office of Budget and Management
30 East Broad Street
Columbus, Ohio 43266-0411

Dear Director Johnson:

Your predecessor requested an opinion concerning the authority of state agencies to pay fees and other expenses to witnesses in a variety of situations.[1] The request specifically asks:

1. Does Revised Code Section 2711.06 require that witnesses in arbitration hearings shall be paid for attendance and mileage in accordance with Revised Code Section 2335.06? The section provides that the fees paid to witnesses subpoenaed to attend an arbitration hearing shall be the same as the fees of witnesses in the court of common pleas.

2. May a state agency agree to pay a witness a fee or mileage expenses in excess of the applicable statutory witness fee or mileage rate?

3. May a state agency agree to pay a witness for items that are not covered by the applicable statutes, such as meals, lodging, child care expenses, lost wages, value of time, etc.?

---

[1] According to a member of your staff, these questions concern the authority of state agencies to pay fees to, and expenses of, witnesses who appear before them. We have also been informed that certain of the agencies described have no statutory authority to call witnesses. As will be apparent from the following discussion, without examination of the laws under which a particular agency operates, it is not possible to address the extent of the agency's powers and duties, including its power to pay witnesses who appear before it. We will, therefore, limit our discussion to the payment of witness fees in proceedings of those state agencies that are authorized by statute to call witnesses to appear in those proceedings.

4. During preparation prior to an arbitration hearing, absent specific statutory authority may a state agency pay a necessary witness for any of the above items? These expenses may be incurred during investigations, meetings, interviews, depositions, etc. If so, what rates apply?

5. Is there legal authority for a state agency to pay witnesses asked (but not subpoenaed) by a state agency to testify before legislative committees; other committees, Chapter 119. rule hearings, councils, task forces, pre-discipline hearings, advisory boards, etc., convened (a) pursuant to various sections of law, including Revised Code Section 121.13, (b) pursuant to collective bargaining contracts, (c) by executive order, or (d) by invitation of a director or the Governor when the agency's own statutes and authority creating the entity or authorizing the meetings do not provide for calling or paying such witnesses? If so, what rates apply? Are the witness fees and mileage specified in Revised Code Section 2335.05 applicable?

6. Is there legal authority for a state agency to pay witnesses responding to subpoenas issued by state agencies pursuant to a section of law such as Revised Code Section 126.28 which empowers the Office of Budget and Management to subpoena witnesses? If so, what rates apply? Are the witness fees and mileage specified in Revised Code Section 2335.05 applicable?

7. Would your answers to any of the above questions be different depending on whether or not the witness is either an expert or a state employee or whether the witness is subpoenaed?

Because these questions relate to the authority of state agencies generally,[2] it may be useful to begin by setting forth certain fundamental principles governing all such agencies. First, as creatures of statute, state agencies have only such authority, either express or implied, as is conferred upon them by the General Assembly. *See Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). In addition, state agencies may expend public funds only if the authority to make such expenditures is clearly granted by statute; any doubt as to an agency's authority to make an expenditure must be resolved against such authority. *See State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph three) ("[i]n case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power").

In order to address the questions asked, we must first examine the manner in which the General Assembly has provided for the payment of witnesses by state agencies. For ease of discussion, we will, at the same time address the sixth question, which asks whether a state agency may pay witnesses responding to subpoenas issued by the agency pursuant to a specific

---

[2] The term "state agency" is defined in various ways by statute. *See, e.g.*, R.C. 1.60 (defining "state agency," as used in Title I of the Ohio Revised Code, unless otherwise defined therein, as meaning "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government"); R.C. 9.55(A) (as used in R.C. 9.55 concerning the installation of teletypewriters, "state agency" means "the house of representatives, the senate, the governor, the secretary of state, the auditor of state, the treasurer of state, the attorney general, the department of human services, the bureau of employment services, the department of mental retardation and developmental disabilities, the department of education, the department of health, the department of aging, the governor's office of advocacy for disabled persons, and the civil rights commission"); R.C. 149.011(B) (for purposes of R.C. Chapter 149 governing public records, "state agency" includes "every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, or any legislative agency, any court or judicial agency, or any political subdivision or agency thereof"); R.C. 1347.01(A) (for purposes of R.C. Chapter 1347 governing personal information systems, "state agency" means "the office of any elected state officer and any agency, board, commission, department, division, or educational institution of the state"); R.C. 1551.25(A)(3) (for purposes of statute governing fee for use of government vehicle in ridesharing arrangements, "state agency" means "the state or any department, agency, board, commission, or instrumentality of the state"). For purposes of answering the questions presented, we will use the term "state agencies" in its general sense as referring collectively "to the various offices, boards, commissions, departments, divisions and institutions created by the ... laws of the state for the exercise of any function of state government." 1977 Op. Att'y Gen. No. 77-090 at 2-302. We will, however, exclude from consideration any entities that may be created by the Ohio Constitution.

section of law that empowers the agency to subpoena witnesses. Part of the sixth question asks, if the agencies may pay fees in such circumstances, what rates apply.

The General Assembly has addressed the authority of state agencies to pay fees to witnesses in various ways throughout the Ohio Revised Code. Each state agency is governed not only by its own statutory scheme but by other statutes made applicable to the agency or its activities. The many statutory schemes governing the different state agencies reveal no uniformity in the payment of witnesses in agency proceedings. The differences in these statutes arise with respect to, among other things, the nature of the agencies' proceedings, *e.g.*, hearings, investigations, examinations, inquiries,[3] whether witnesses are to be called by subpoena, by order, or by some other means,[4] the language describing the fees payable to witnesses,[5] as well

---

[3] *See, e.g.*, R.C. 9.31 (allowing certain state entities to conduct a hearing at which testimony may be given concerning withdrawal of a bid made in error on a state contract); R.C. 119.09 (adjudication hearings by certain state agencies); R.C. 4123.08 (in part, authorizing members and employees of the Industrial Commission and certain employees of the Bureau of Workers' Compensation to "administer oaths, certify to official acts, take testimony or depositions, conduct hearings, inquiries, and investigations, issue subpoenas, and compel the attendance of witnesses"); R.C. 4766.11 (the Ohio Ambulance Licensing Board may call witnesses in investigations into alleged violations of R.C. Chapter 4766); R.C. 4903.03 (authorizing the Public Utilities Commission to examine all books, contracts, records, documents, and papers of any public utility, and to "compel the attendance of such witnesses as it requires to give evidence at such examination").

[4] *See, e.g.*, R.C. 117.18(A) (authorizing the Auditor of State, in the performance of any audit, to issue subpoenas and compel the attendance of witnesses); R.C. 1121.47(A)(1) (authorizing the Superintendent of Financial Institutions to "[s]ummon and compel, *by order or subpoena*, witnesses to appear ... and testify under oath regarding the affairs of a bank or trust company or, in relation to matters concerning a state bank, foreign bank, or trust company, a regulated person" (emphasis added)); R.C. 1331.16(B) (authorizing the Attorney General, in investigating possible violations of R.C. Chapter 1331, to "issue in writing, and cause to be served upon any person or the representative or agent of the person, an *investigative demand* that requires the person ... to appear and testify under oath before the attorney general or the attorney general's duly authorized representative" (emphasis added)).

[5] It most commonly occurs that the statute describes the fees payable to witnesses in terms of the amount of fees and mileage payable to witnesses in either civil or criminal cases in courts of common pleas. *See, e.g.*, R.C. 119.09 (in administrative hearings conducted by an agency, the fees and mileage of witnesses "shall be the same as that allowed in the court of common pleas in *criminal cases*" (emphasis added)); R.C. 4301.04(G) (witnesses appearing before the Liquor Control Commission in obedience to subpoenas receive "the fees and mileage provided for witnesses in *civil cases* in courts of common pleas" (emphasis added)).

as the circumstances in which,[6] and the persons to whom,[7] such fees are payable. Similarly, while one state agency's governing statutes differentiate between the types of proceedings the agency conducts in prescribing the fees payable to witnesses,[8] another agency's governing

---

[6] *See, e.g.*, R.C. 1321.07 (in conducting annual examinations of licensees, the division of financial institutions is required to pay witnesses the same fees and mileage "as that allowed in the court of common pleas in criminal cases," but "[n]o witness subpoenaed at the instance of parties other than the division is entitled to compensation from the state for attendance or travel unless the division certifies that the witness' testimony was material to the subject matter of the hearing"); R.C. 4735.04 (witnesses before the Real Estate Commission are to receive fees and mileage "as allowed in civil actions in courts of common pleas," but "[i]f two or more witnesses travel together in the same vehicle, the mileage fee shall be paid to only one of those witnesses, but the witnesses may agree to divide the fee among themselves in any manner"); R.C. 4741.03(D)(1) (in proceedings of the Veterinary Medical Licensing Board, "[e]xcept for any officer or employee of the state or any political subdivision of the state, the treasurer of state shall pay all witnesses in any proceeding before the board, upon certification from the board, witness fees in the same amount as provided in [R.C. 2335.06]").

[7] In certain instances, special provision has been made concerning the payment of witness fees to state or other public employees. *See, e.g.*, R.C. 4741.03(D)(1) (in proceedings of the Veterinary Medical Licensing Board, "*[e]xcept for any officer or employee of the state or any political subdivision of the state*, the treasurer of state shall pay all witnesses in any proceeding before the board, upon certification from the board, witness fees in the same amount as provided in [R.C. 2335.06]" (emphasis added)); 2 Ohio Admin. Code 124-11-18(A) (in hearings before the Personnel Board of Review, "[p]ublic employees may be paid witness fees only if they were subpoenaed to a hearing which they attended at a time they were not scheduled to work").

Although certain statutes expressly provide for the use of expert witnesses and their payment, *see, e.g.*, R.C. 109.35(C) (authorizing the Attorney General, when approving or disapproving proposed transactions by nonprofit health care entities to "retain, at the nonprofit health care entity's expense, one or more independently qualified experts ... as the attorney general considers reasonably necessary to provide assistance in making a decision"); R.C. 117.09 (stating in part, "[t]he auditor of state may employ experts or assistants necessary to disclose the facts concerning any matter and fix their compensation"), many do not.

[8] *See, e.g.*, R.C. 1121.38 (authorizing the Superintendent of Financial Institutions, in the course of administrative hearings under R.C. 1121.32, R.C. 1121.33, R.C. 1121.35, or R.C. 1121.41, to issue subpoenas and to pay witnesses the "same fees and mileage that are paid witnesses in the courts of common pleas in *civil cases*" (emphasis added)); R.C. 1321.07 (requiring the division of financial institutions to do annual examinations of licensees, and, for such purpose, authorizing it to "require the attendance of, and examine under oath, any person relative to such loans or such business" and to pay the fees and mileage of witnesses in an

statutes may simply prescribe one fee to be paid to witnesses appearing before the agency, regardless of the nature of the proceedings.[9] Yet other statutes that authorize an agency to call witnesses are silent as to the amount of fees the agency is to pay.[10]

In addition to the differences in the various state agencies' statutory schemes, there are other factors that may affect the fee payable to a witness. For example, the General Assembly has enacted certain statutes that prescribe witness fees to be paid in a particular type of proceeding, regardless of which agency conducts the proceeding.[11] Finally, as noted in your predecessor's request, it is possible that the terms of a collective bargaining agreement may dictate the fee to be paid to certain state employee witnesses in a particular agency proceeding.[12]

---

amount which is "the same as that allowed in the court of common pleas in *criminal cases*" (emphasis added)).

[9] *See, e.g.*, R.C. 1315.06 (in making an investigation or conducting a hearing, the Superintendent of Banks may subpoena witnesses and "pay any witnesses the fees and mileage for their attendance provided for witnesses in civil actions").

[10] *See, e.g.*, R.C. 102.06 (Ohio Ethics Commission); R.C. 121.43 (Inspector General).

[11] *See, e.g.*, R.C. 119.09 (fees payable to witnesses in adjudicatory hearings conducted in accordance with R.C. Chapter 119 by any "agency," as defined in R.C. 119.01(A)).

[12] As stated in *City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991) (syllabus, paragraph one), "[t]he provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for those laws specifically exempted by R.C. 4117.10(A)." In determining whether the terms of a collective bargaining agreement supersede the statutorily prescribed witness fees payable in a particular proceeding, the following analysis applies:

> Unless otherwise excepted by R.C. 4117.10(A), when parties to a collective bargaining agreement have negotiated a provision pertaining to wages, hours, or terms and conditions of employment and there is a conflict either with the express language or the judicial interpretation given to a similar provision of the Revised Code, *the interpretation of the agreement prevails*.

Cuyahoga Falls Educ. Ass'n v. Cuyahoga Falls City School Dist., 61 Ohio St. 3d 193, 574 N.E.2d 442 (1991) (syllabus, paragraph two) (emphasis added). *See generally* R.C. 4117.10(A) (stating in part, "[a]n agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement.... Where no agreement exists or where an

As part of our survey of the statutes to which the various state agencies are subject in the payment of witness fees to agency witnesses, we must also address R.C. 2335.05,[13] which prescribes the fees payable to witnesses "[i]n all cases or proceedings not specified in [R.C. 2335.06[14] and R.C. 2335.08]."[15] (Emphasis and footnotes added.) Pursuant to R.C. 2335.05, a subpoenaed witness shall be paid one dollar for each day's attendance and the same mileage as is

---

agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees").

[13] R.C. 2335.05 states:

> In *all cases or proceedings not specified in [R.C. 2335.06 and R.C. 2335.08], each person subpoenaed* as a witness shall be allowed *one dollar for each day's attendance* and the *mileage allowed in courts of record. When not subpoenaed* each person called upon to testify in a case or proceeding shall receive twenty-five cents. Such fee shall be taxed in the bill of costs, and if incurred in a state or ordinance case, or *in a proceeding before a public officer, board, or commission*, the fee shall be paid out of the proper public treasury, upon the certificate of the court, officer, board, or commission conducting the proceeding. (Emphasis added.)

[14] R.C. 2335.06 states, in pertinent part:

> Each witness *in civil cases* shall receive the following fees:
>
> (A) Twelve dollars for each full day's attendance and six dollars for each half day's attendance at a *court of record, mayor's court, or before a person authorized to take depositions*, to be taxed in the bill of costs. Each witness shall also receive ten cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony, to be taxed in the bill of costs.
>
> (B) For attending a *coroner's inquest*, the same fees and mileage provided by division (A) of this section, payable from the county treasury on the certificate of the coroner. (Emphasis added.)

[15] R.C. 2335.08 states in pertinent part:

> Each witness attending, under recognizance or subpoena issued by order of the prosecuting attorney or defendant, before the *grand jury* or *any court of record, in criminal causes*, shall be allowed the *same fees as provided by [R.C. 2335.06] in civil causes*, to be taxed in only one cause when such witness is attending in more causes than one on the same days, unless otherwise directed by special order of the court. (Emphasis added.)

payable in courts of record. R.C. 2335.05, however, prescribes a lower fee of twenty-five cents to be paid to any person who testifies without subpoena. Finally, R.C. 2335.05 directs that, if such a fee is incurred in a proceeding before a public officer, board, or commission, such fee is payable upon the certificate of the officer, board, or commission conducting the proceeding.

Examination of R.C. 2335.06 and R.C. 2335.08 reveals no mention of proceedings before state agencies. Because state agencies are authorized to call witnesses in a variety of circumstances, whether the provisions of R.C. 2335.05 pertain to any of such circumstances depends, in part, upon the meaning of the term "proceedings," as used therein. The word "proceedings" is not defined by statute as used in R.C. 2335.05. We must, therefore, look to the common meaning of that word. *See* R.C. 1.42 (stating in part, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). The term "proceedings" means "a record of the business transacted by a learned society or other organized groups" or "legal action." *Webster's New World Dictionary* 1133 (2d college ed. 1978). This definition suggests that, for purposes of R.C. 2335.05, the proceedings of a state agency to which R.C. 2335.05 applies are those instances in which the agency, in the conduct of its business, is authorized to call witnesses.

The application of R.C. 2335.05 to the proceedings of a state agency was explained in 1986 Op. Att'y Gen. No. 86-066, which discussed the fees payable to witnesses who testify either in investigations or in hearings conducted by the State Dental Board. 1986 Op. Att'y Gen. No. 86-066 began by noting that R.C. 4715.03(D) authorizes the State Dental Board to conduct investigations of its licensees and, if necessary, to conduct disciplinary hearings. As explained in 1986 Op. Att'y Gen. No. 86-066, because R.C. 4715.03(D) requires the Board to conduct its disciplinary proceedings in accordance with R.C. Chapter 119, the witnesses in disciplinary hearings must be paid the fees prescribed by R.C. 119.09, *i.e.*, the fees and mileage payable in criminal cases in a court of common pleas. In contrast, because the General Assembly has not subjected the Board's investigative proceedings to the procedures of R.C. Chapter 119 and has not specifically provided for the payment of fees to witnesses called for purposes of such investigations, 1986 Op. Att'y Gen. No. 86-066 found R.C. 2335.05 to govern the payment of witness fees in Dental Board investigations.

Implicit within the analysis of 1986 Op. Att'y Gen. No. 86-066 is the finding that R.C. 2335.05 is a general statute that dictates the fees payable to witnesses in any "proceedings" of a state agency. As a general statute, however, R.C. 2335.05 is subject to exceptions contained in more specific statutes, *e.g.*, the requirement in R.C. 4715.03(D) that the Board's disciplinary hearings be conducted in accordance with R.C. Chapter 119, including the witness fee provision in R.C. 119.09. *See Acme Engineering Co. v. Jones*, 150 Ohio St. 423, 83 N.E.2d 202 (1948) (syllabus, paragraph one) ("[a] special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subjects as well as the specific subject matter which might otherwise be included under the general provision"). *See also* R.C. 1.51 ("[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision,

unless the general provision is the later adoption and the manifest intent is that the general provision prevail"). Accordingly, if there is a specific provision of law applicable to the agency concerned, the particular type of proceeding, or the particular type of witness, the more specific provision supersedes the application of R.C. 2335.05.

In addition to the potential statutory and collectively bargained exceptions[16] to the application of the fees and mileage payable under R.C. 2335.05, there may also be instances in which the statutory witness fees prescribed by R.C. 2335.05 may be superseded by the terms of an administrative rule. *See Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one) ("[a]dministrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law"). *See generally State ex rel. Curtis v. DeCorps*, 134 Ohio St. 295, 298, 16 N.E.2d 459, 461 (1938) ("[i]t is not conceivably possible for the Legislature to prescribe the entire host of details incident to administration. Of necessity, many of these must be left to the administrative bodies charged with putting the policy into practical effect. 'In the nature of things there must be many things on which the wisdom of legislation must depend, which can only properly be determined in the course of the administration of the legislative will as expressed in law.' *Green v. State Civil Service Commission*, 90 Ohio St., 252, 256, 107 N.E., 531").

For example, R.C. 4141.06, which establishes the Unemployment Compensation Review Commission, in part requires the Commission and its hearing officers to:

> hear appeals arising from determinations of the administrator of the bureau of employment services involving claims for compensation and other unemployment compensation issues. The commission shall adopt, amend, or rescind rules of procedure, and undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary and consistent with [R.C. 4141.01-.46]. The rules adopted by the commission shall be effective to the extent that the rules are consistent with such sections.

Although the amount of fees or mileage payable to witnesses for the hearings described in R.C. 4141.06 is not specified therein, the Commission has adopted 10 Ohio Admin. Code 4146-15-04, which states that, "[w]itness fees shall be allowed to those witnesses who were duly subpoenaed and pursuant thereto appeared in person at a hearing. For each day of attendance each of such witnesses shall be allowed the amount prescribed by law in civil cases."[17] It is

---

[16] *See generally* note twelve, *supra*.

[17] Pursuant to R.C. 2335.06, a witness in a civil case in a court of record is entitled to receive "[t]welve dollars for each full day's attendance and six dollars for each half day's attendance" plus "ten cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony."

pursuant to its duty to "adopt, amend, or rescind rules of procedure" and to "take such action required for the hearing and disposition of appeals as it deems necessary and consistent with [R.C. 4141.01-.46]," R.C. 4141.06, that the Commission has adopted rule 4146-15-04, which entitles subpoenaed witnesses who appear before the Commission to receive a larger fee than that prescribed by R.C. 2335.05.[18] *See also* 1980 Op. Att'y Gen. No. 80-052 (fees payable to witnesses before the State Personnel Board of Review are specified by agency rule). There may be instances, therefore, in which a state agency, pursuant to its statutory power to adopt rules governing its procedures, has adopted a rule that entitles a witness in a proceeding before the agency to receive a fee greater than that prescribed by R.C. 2335.05.[19]

In answer to the sixth question, it is evident that the amount payable to a witness in a state agency proceeding depends upon a number of factors, including the particular state agency's governing statutes, any statute governing the particular type of proceeding at which the witness appears, and any provision of law governing payment of fees to the particular category of witness called. In the absence of a more specific provision, R.C. 2335.05 determines the fee and mileage payable to witnesses in any state agency proceeding not covered by R.C. 2335.06 or R.C. 2335.08.

Having outlined the fundamental process by which the fee payable to a witness in a proceeding before a state agency may be determined, we find that it is beyond the scope of an Attorney General opinion to address each of the questions asked as it applies to every category of witness in each type of proceeding before each state agency. This opinion will, therefore,

---

[18] If R.C. 2335.05 were applicable to Unemployment Compensation Review Commission hearings, subpoenaed witnesses at such hearings would receive only one dollar per day, plus mileage, while non-subpoenaed witnesses would receive only twenty-five cents per day. Pursuant to rule 4146-15-04, however, subpoenaed witnesses at Commission hearings are entitled to receive twelve dollars for a full day's attendance or six dollars for one half day's attendance plus mileage. *See* note thirteen, *supra*.

[19] In those instances, however, where the witness fees payable by a specific agency in a particular type of proceeding or to a particular type of witness are expressly provided by statute, *see, e.g.*, notes six and seven, *supra*, it is doubtful that a broad grant of authority to the agency to adopt necessary rules or rules governing its proceedings would authorize the agency, through the adoption of a rule, to supersede the statutorily defined fees. Rather, as stated in *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948), an administrative agency's rule, "issued pursuant to statutory authority, has the force and effect of law *unless* it is unreasonable or is in clear conflict with statutory enactment governing the same subject matter." (Emphasis added.) Moreover, "[i]t is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner." *Akron Transportation Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951).

attempt to address the remaining questions by setting forth the general analysis that must be undertaken in determining whether state agencies may expend their funds for the types of witness expenses described in these questions.

The first question asks whether R.C. 2711.06 requires that witnesses in arbitration hearings be paid for attendance and mileage in accordance with R.C. 2335.06. By way of background, let us note that R.C. 2711.01(A) provides, with certain exceptions specified in R.C. 2711.01(B), for the validity and enforceability of a provision in a written contract calling for the settlement of a controversy by arbitration. *See generally Mahoning County Bd. of Mental Retardation and Developmental Disabilities v. Mahoning County Trainable Mentally Retarded Educ. Ass'n*, 22 Ohio St. 3d 80, 83, 488 N.E.2d 872, 875 (1986) ("[a]rbitration occurs when disputing parties contractually agree to resolve their conflict by submitting it to a neutral third party for resolution. It provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets"). R.C. Chapter 2711 establishes a statutory procedure for conducting such arbitrations.

Concerning the use of witnesses in arbitration hearings, R.C. 2711.06 authorizes the arbitrator or arbitrators to "administer oaths or affirmations to witnesses ... and [to] subpoena in writing any person to attend before any of them as a witness...." In addition, R.C. 2711.06 states: "The fees for such attendance shall be the same as the *fees of witnesses in the court of common pleas*." (Emphasis added.) It is necessary, therefore, to determine what fees are paid to witnesses in courts of common pleas.

R.C. 2335.06, *see* note fourteen, *supra*, prescribes the amount payable to witnesses as fees and mileage in civil cases in a court of record, mayor's court, before a person authorized to take depositions, or at a coroner's inquest. Because a court of common pleas is a court of record, *see* R.C. 2303.14 (requiring the clerk of the court of common pleas to "keep the journals, records, books, and papers appertaining to the court and record its proceedings"), the witness fees, plus mileage, prescribed by R.C. 2335.06 are payable in civil cases in courts of common pleas. Similar provision is made in R.C. 2335.08, *see* note fifteen, *supra*, for the payment of witness fees in criminal cases conducted in courts of record, including courts of common pleas, or in grand jury proceedings in the same amounts as are prescribed by R.C. 2335.06. Accordingly, the witness fees prescribed by R.C. 2335.06 are the fees paid to witnesses in courts of common pleas and, pursuant to R.C. 2711.06, are also payable to witnesses subpoenaed to testify in arbitration hearings conducted pursuant to R.C. 2711.01-.14.

It is important to note, however, that, although R.C. 2711.06 specifies the fees that are payable to witnesses in arbitration hearings conducted under R.C. 2711.01-.16, there may be exceptions to the witness fee provisions of R.C. 2711.06. As mentioned in your predecessor's opinion request, an exception to the witness fee provisions of R.C. 2711.06 may arise from a

conflicting provision contained in a collective bargaining agreement.[20] *See generally* note twelve, *supra*. Thus, to the extent that a collective bargaining agreement varies the witness fees payable to employees in arbitration proceedings under R.C. 2711.06, the provisions of the agreement, rather than the terms of R.C. 2711.06, dictate the fee payable to those witnesses subject to the collective bargaining agreement.

In answer to the first question, we conclude, therefore, that pursuant to R.C. 2711.06, witnesses in arbitration proceedings conducted in accordance with R.C. 2711.01-.16, are entitled to the witness fees prescribed by R.C. 2335.06, unless the terms of an applicable collective bargaining agreement specify a different amount to be paid to persons subject to the terms of the agreement.

The second question asks whether a state agency may agree to pay a witness a fee or mileage in excess of the applicable statutory witness fee or mileage rate. Having reviewed in answer to the sixth question the process by which the fee payable to any particular witness is determined, it is apparent that there is no uniform "statutory rate" to be paid to witnesses by state agencies. We will assume, therefore, that the second question is asking whether a state agency may pay its lay witnesses an amount greater than the fees and mileage prescribed by statute applicable to the proceeding before that agency.[21] Because this question involves issues almost

---

[20] The opinion request notes several provisions contained in collective bargaining agreements covering various groups of state employees. These provisions may be characterized generally as addressing the calling of witnesses in hearings or other matters. Because it is beyond the scope of an Attorney General opinion to interpret particular contractual provisions, *see* 1990 Op. Att'y Gen. No. 90-111, at 2-502 (the Attorney General is "unable to make findings of fact or to interpret provisions of a particular contract or agreement"), we are unable to determine if, or to what extent, these agreements may vary the witness fee provisions of R.C. 2711.06 for those employees subject to the agreements.

[21] The opinion request references two Attorney General opinions that discuss the payment of amounts in excess of statutory witness fees and mileage. 1943 Op. Att'y Gen. No. 6558, p. 709, concluded that a municipal transit authority's payment to a witness called on its behalf in a judicial proceeding of any sum in addition to the witness's statutory fees and mileage is contrary to public policy, and, therefore, unlawful, "even though it violates no positive statutory law." 1943 Op. Att'y Gen. No. 6558 at 712. Upon reconsideration, 1954 Op. Att'y Gen. No. 4447, p. 540, noted that, because, subsequent to the issuance of the 1943 opinion, the transit authority had been granted legislative powers pursuant to city charter amendment, "[i]f the transit board in the exercise of the legislative power so granted has sanctioned the payment of necessary expenses and loss of pay to witnesses in addition to statutory fees, it would appear that this is declarative of the public policy so far as the [city] is concerned in the operation of its transit system." 1954 Op. Att'y Gen. No. 4447, at 542-43. In reaching this conclusion, the 1954 opinion rejected the notion that payment to a witness for actual expenses incurred in excess of statutory fees is always prohibited as an action contrary to public policy, but found instead that such a payment

identical to those posed in the third and fourth questions ☞ whether a state agency may agree to pay a witness for items such as meals, lodging, child care expenses, lost wages, and value of time, incurred for the purpose of testifying at the various types of agency proceedings, if there is no express mention of that expense in the statutory provisions governing the particular agency, proceeding, or type of witness; and if so, what rates apply ☞ we will address all three questions together.

The underlying issue presented by these questions is whether, in the absence of statutory authority expressly authorizing such payment, a state agency may pay a witness who appears in a proceeding before that agency a sum of money in addition to the customary witness fee and mileage or for expenses incurred by the witness as a result of such agency appearance, *e.g.*, lost wages, lodging, meals. While we have found few statutes expressly addressing the authority of state agencies to pay witnesses any sums or for any expenses in addition to fees and mileage,[22] we must consider, in the absence of express statutory authority to make the types of payments described, whether state agencies have the implied authority to make such payments.

Because a state agency's payment of the sums described involves the expenditure of public funds, we must bear in mind the general rule that the authority to expend public funds must be clearly granted by statute, and any doubts as to the authority to make an expenditure must be resolved against such authority. *See State ex rel. A. Bentley & Sons Co. v. Pierce*, *supra*; *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916).

Although the General Assembly has enacted numerous statutory schemes addressing the authority of state agencies to conduct proceedings at which witnesses may be called, most such statutes provide only that state agencies pay their witnesses fees and mileage for their attendance. *See, e.g.*, R.C. 2335.05; notes five, eight, and nine, *supra*. Similarly, most such statutes authorize the agencies to seek judicial enforcement of their orders or subpoenas for the

---

"is not per se unlawful, so as to support a finding to that effect by the Bureau of Inspection and Supervision of Public Offices [whose duties have since been assumed, in part, by the Auditor of State and, in part, by the Office of Budget and Management]," so long as such payment is authorized by the entity empowered to exercise legislative authority on behalf of the municipality with respect to its transit system. 1954 Op. Att'y Gen. No. 4447 p. 540 (syllabus). Similarly, payment to a witness by a state agency might be authorized pursuant to an agency's legislatively granted statutory authority or by the agency's exercise of its quasi-legislative rule-making function.

[22] *See, e.g.*, R.C. 5703.30 (allowing an officer of a taxing district or member of a board of revision who appears before the department of taxation or the board of tax appeals by its order in relation to the appraisal of property "his actual and necessary traveling expenses").

attendance of witnesses or the production of documents.[23] It might be argued, therefore, that because the General Assembly has expressly authorized state agencies to pay witnesses fees and mileage only and has provided mechanisms for the enforcement of such agencies' demands that witnesses attend their proceedings, the payment of additional sums to witnesses cannot be implied as necessary to carry into effect the agencies' powers and duties with respect to the conduct of their proceedings.

While we agree that the General Assembly does not appear to have intended that, as a general rule, witnesses who appear in state agency proceedings be paid sums in addition to the customary fees and mileage, our analysis cannot end there. The ruling of the Ohio Supreme Court in *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981), makes it clear that the absence of express authority to pay a particular expense does not necessarily preclude a statutory entity from expending public funds for payment of that expense. At issue in the *Seminatore* case was a public agency's authority to use public funds to disseminate information to the public and potential clients by means of a newspaper advertisement, in the absence of either express statutory authorization for or prohibition against the expenditure of public funds for that purpose. In resolving this issue, the *Seminatore* court reasoned as follows:

> [I]t is within the implied power of a public agency to disseminate information both to those who are directly affected by its operation and the general public. Such a function may be fairly implied where it is *reasonably related to the duties of the public agency*.
>
> Whether or not it is appropriate to disseminate the information, the means to be utilized therefor, including advertising in newspapers, lies in the first instance within the sound discretion of the public agency involved. Only where an *abuse of discretion* is shown either as to the nature of the information, the means of dissemination or the amount of money expended are the courts authorized to interfere with the exercise of such implied power.

---

[23] *See, e.g.*, R.C. 117.18(A) (Auditor of State may "apply to a court of competent jurisdiction to punish for disobedience of subpoena, refusal to be sworn, refusal to answer as a witness, or refusal to produce records"); R.C. 119.09 (stating in part, "[i]n any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein"); R.C. 3770.04 (stating in part: "In the event of the refusal of any person to comply with the terms of a subpoena issued by the [State Lottery Commission] or refusal to testify on matters about which he may lawfully be questioned, the prosecutor of the county in which such person resides, upon the petition of the commission, shall bring a proceeding for contempt against such person in the court of common pleas of that county").

66 Ohio St. 2d at 470-71, 423 N.E.2d at 113 (emphasis added). Accordingly, the *Seminatore* court concluded in syllabus, paragraph four, that, "[u]nless prohibited by statute, utilization of newspaper advertisement for dissemination of information to the general public and to those directly affected by agency action is an implied power of a public agency authorized to perform specific functions and to expend monies therefor, so long as money for such purposes has been appropriated by the proper authority." *See also Bell v. Bd. of Trustees*, 34 Ohio St. 2d 70, 75, 296 N.E.2d 276, 279 (1973) ("[w]hen the General Assembly enacts a law to accomplish some purpose it either gives express power to carry out that purpose, or the power is implied from *the practical necessity* of the situation" (emphasis added)); *State ex rel. Copeland v State Medical Bd.*, 107 Ohio St. 20, 24, 140 N.E. 660, 661 (1923) (a governmental entity created by statute "must be held to have such implied powers as are necessary to carry into effect the express powers and duties enjoined upon it" by statute).

Applying the reasoning of the *Seminatore* case to the questions presented, it appears that, in the absence of a statutory prohibition against the payment of an additional sum to a witness or certain witness expenses, if the payment of an additional sum or the types of witness expenses described is necessary to carry into effect a power or duty expressly imposed by statute upon a state agency, the agency's authority to make such payments may be implied from the agency's express power or duty, so long as sufficient sums have been appropriated to the agency and are otherwise available for that purpose. *See, e.g.*, 1946 Op. Att'y Gen. No. 1277, p. 714 (a county prosecuting attorney may use funds granted his office under G.C. 3004 (now at R.C. 325.12) for the purpose of providing for expenses the prosecuting attorney may incur in the performance of the prosecuting attorney's official duties and in the furtherance of justice to pay the expenses of board and lodging for witnesses in a trial lasting several days and held in another county).

In answer to the second, third and fourth questions, we conclude that, although state agencies do not, as a general rule, have authority to pay witnesses who appear in agency proceedings an amount in addition to the customary witness fees and mileage or for actual and necessary expenses incurred as a result of their testifying in an agency proceeding, if a state agency reasonably finds that payment of such additional amounts or such expenses in a particular instance is necessary to the performance of its powers and duties and absent a statutory prohibition against such payments, the agency possesses the implied authority to pay such additional amounts or expenses to the extent that moneys have been appropriated to the agency and are otherwise available for that purpose. Of course, any such decision is subject to judicial review for abuse of discretion. *See, e.g., State ex rel. Butram v. Industrial Comm'n*, 124 Ohio St. 589, 180 N.E. 61 (1932) (a court will not substitute its judgment for that of an administrative body, but determinations made by such body are subject to judicial review for abuse of discretion); *Hocking Valley Railway Co. v. Public Utilities Comm'n*, 92 Ohio St. 362, 110 N.E. 952 (1915). *See generally State ex rel. Shafer v. Ohio Turnpike Comm'n*, 159 Ohio St. 581, 590, 113 N.E.2d 14, 19 (1953) ("[t]he rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner").

The second, third, and fourth questions also concern the rates which a state agency may pay for the types of witness expenses mentioned. In those instances in which a state agency possesses only the implied authority to pay a witness expense, it follows that there will be no express provision of law addressing the rate at which such expenses are to be paid. In the absence of a statutorily determined rate of payment, the state agency must exercise its discretion in a reasonable manner in determining the amount to be paid. *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365, 372 (1960) ("[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*"). *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty").

While we appreciate the difficulty involved in determining whether particular expenditures are reasonable, the nature of any such determination requires that it be made on a case-by-case basis, depending upon the particular facts and circumstances in which the expenditure is proposed to be made. Moreover, such determinations require the exercise of discretion, which this office cannot exercise on behalf of another public officer or entity. Accordingly, an opinion of the Attorney General is not the appropriate means by which the reasonableness of a particular expenditure may be determined. *See, e.g.*, 1985 Op. Att'y Gen. No. 85-066 at 2-250 (addressing the duty of a board of county commissioners to review and allow or disallow claims to be paid from the county treasury, and stating: "the making of a determination as to whether particular claims should be allowed involves questions of fact and matters of judgment, and, thus, ... I am unable to provide specific advice on such matters"), *overruled in part on other grounds*, 1991 Op. Att'y Gen. No. 91-008. *See also* 1993 Op. Att'y Gen. No. 93-066 at 2-312 ("[u]ltimately, the question whether any particular expense is a necessary and reasonable expense incurred in the performance of a trustee's duties is a question of fact, to be determined in the first instance by the board"); 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("I am not authorized to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity. Further, it is inappropriate for me to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals" (various citations omitted)).

The fifth question asks whether there is legal authority for a state agency to pay witnesses asked, but not subpoenaed, by a state agency to testify before legislative committees, other committees, R.C. Chapter 119 rule hearings, councils, task forces, pre-discipline hearings, and advisory boards, convened pursuant to various sections of law, including R.C. 121.13,[24] pursuant

---

[24] R.C. 121.13 states: "The director of each department may, with the approval of the governor, establish and appoint advisory boards to aid in the conduct of the work of his department or any division thereof. Such advisory boards shall exercise no administrative

to collective bargaining contracts, by executive order, or by invitation of a director or the Governor when the agency's own statutes and authority creating the entity or authorizing the meetings do not provide for calling or paying such witnesses. As we discussed in answer to the sixth question, unless the provisions of R.C. 2335.05 are superseded by a more specific provision of law ✍ whether within a collective bargaining agreement, a statute applicable to the particular entity conducting the proceeding, a validly promulgated administrative rule, or otherwise ✍ the fee prescribed by R.C. 2335.05 for persons who testify without subpoena is payable to non-subpoenaed witnesses in any proceeding not specified in R.C. 2335.06 or R.C. 2335.08.

The final question asks whether the answers to the first six questions would be different if the witness were an expert or a state employee or if the witness were subpoenaed. Let us begin with the portion of this question concerning whether the fee payable to a witness who appears in a state agency proceeding depends upon whether the witness appeared pursuant to a subpoena issued by the agency. As discussed above, R.C. 2335.05 prescribes different rates to be paid to witnesses, depending upon whether the witness appears pursuant to a subpoena. *See generally* note thirteen, *supra*. Beyond the terms of R.C. 2335.05, however, we are not aware of a general distinction between the fees payable to a subpoenaed witness and those payable to witnesses who were not subpoenaed. Rather, whether a witness must be subpoenaed before a state agency in order to receive the witness fee and mileage payable to witnesses in such a proceeding depends upon whether the statutes governing the particular agency or proceeding or the nature of the witness create such a requirement.[25]

---

function, and their members shall receive no compensation, but may receive their actual and necessary expenses."

[25] Certain statutes specify a fee payable to a witness, without mention of whether the witness appears in response to a subpoena. *See, e.g.*, R.C. 119.09. Other statutes, however, authorize payment only to witnesses who appear in response to subpoenas. *See, e.g.*, R.C. 4112.04(B)(3)(c) ("[w]itnesses *summoned by subpoena* of the [Ohio Civil Rights Commission] are entitled to the same witness and mileage fees as are witnesses in proceedings in a court of common pleas"); R.C. 4723.29 (stating in part, "each witness who appears, in obedience to a subpoena, before the [Board of Nursing], shall receive the fees and mileage provided for witnesses in civil cases in courts of common pleas"). In other instances, a state agency may be limited in the payment of witness fees to only a restricted category of subpoenaed witnesses. *See, e.g.*, R.C. 1321.07 (in conducting its annual examination of licensees, the division of financial institutions may subpoena witnesses and pay them fees and mileage at the rate allowed in criminal cases in common pleas court, but "[n]o witness subpoenaed at the instance of parties other than the division is entitled to compensation from the state for attendance or travel unless the division certifies that the witness' testimony was material to the subject matter of the hearing"); R.C. 4301.04 (stating in part, "[n]o witness subpoenaed at the instance of a party other than the liquor control commission or any member thereof, the superintendent, or such agent, is

The question also asks whether a state agency's obligation to pay fees to a witness in its proceedings is different if the witness is a state employee. Again, we have been unable to find a statute that prescribes a fee to be paid to all state employees who testify in state agency proceedings.[26] There are certain state agencies, however, that have adopted rules that expressly address the payment of fees to witnesses who are state employees.[27] In answer to this portion of the final question, we can advise only that a state employee is entitled to a fee that is different from that payable to other witnesses who appear in a particular proceeding before a state agency either if the statutes governing the particular proceeding before the agency authorize a different fee or if the agency is authorized by statute to prescribe witness fees and has prescribed a fee for

---

entitled to compensation unless the commission certifies that the testimony of the witness was material to the matter investigated").

[26] *Cf.* R.C. 124.135 (stating in part, "[s]tate employees are entitled to paid leave when summoned for jury duty by a court of competent jurisdiction or when subpoenaed to appear before any court, commission, board, or other legally constituted body authorized by law to compel the attendance of witnesses, if the employee is not a party to the action"). *See generally* 2 Ohio Admin. Code 123:1-34-03(C) (stating in part, "[c]ompensation or reimbursement for jury duty or for court attendance compelled by subpoena in excess of fifteen dollars per day, when such duty is performed during an employee's normal working hours, shall be remitted by an employee who is paid directly by warrant of the auditor of state to the payroll officer for transmittal to the treasurer of state").

[27] For example, the Personnel Board of Review has adopted 2 Ohio Admin. Code 124-11-18, which provides for the payment of mileage reimbursement and subpoenaed witness fees for public employees who are witnesses at Personnel Board of Review hearings, as follows:

> (A) *Public employees* may be paid witness fees only if they were subpoenaed to a hearing which they attended at a time they were not scheduled to work. Public employees shall be paid by their appointing authority for the time they are absent from their jobs to attend hearings before the board, provided they were either subpoenaed or were parties to the action.
>
> (B) Mileage shall be paid to any subpoenaed witness, not a party, who works or resides outside of [F]ranklin county and who incurs unreimbursed travel expense to attend hearings before the board. Neither parking costs nor food and lodging are reimbursable.
>
> (C) Parties may not subpoena themselves.
>
> (D) Mileage and witness fees shall not be paid to anyone who fails to register at the hearing attended. (Emphasis added.)

See also 1980 Op. Att'y Gen. No. 80-052 (witness fees prescribed by rule for hearings before the State Personnel Board of Review).

state employees that differs from the fee prescribed for other witnesses. In addition, as discussed in answer to the first question, should an employee be covered by a collective bargaining agreement that prescribes a different fee payable in state agency proceedings to employees covered by the agreement who appear as witnesses, the terms of the agreement prevail.

The final concern set forth in the opinion request is whether a state agency may pay an expert witness a fee other than the fee prescribed for lay witnesses who testify in that agency's proceedings. In addressing the sums payable by state agencies to expert witnesses, we must begin by noting the difference between lay witnesses and expert witnesses. As defined in *Landskroner v. Public Utilities Comm'n*, 5 Ohio St. 3d 96, 97, 449 N.E.2d 760, 761 (1983) (quoting *McKay Machine Co. v. Rodman*, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967) (syllabus, paragraph one)), an "expert witness" is "one who testifies concerning '* * * matters of scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen * * *.'" In contrast, a "lay witness" is a "'[p]erson called to give testimony who does not possess any expertise in the matters about which he testifies.* * *'" 5 Ohio St. 3d at 97, 449 N.E.2d at 761 (quoting *Black's Law Dictionary* 799 (5th ed. 1979)).

Unlike lay witnesses, expert witnesses are generally called upon to provide testimony, evidence, or other related services as to matters within their area of particularized knowledge, and are, therefore, compensated for providing their services. *See, e.g.*, R.C. 307.06 ("[w]henever it is necessary for the board of county commissioners to determine the value of any real property owned by the county, or which it proposes to acquire by purchase, lease, or appropriation, the board may employ competent appraisers to advise it of the value of such property, or *expert witnesses* to testify thereto in an appropriation proceeding, and *shall pay a reasonable compensation for such services*" (emphasis added)); R.C. 307.52 ("[u]pon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the board of county commissioners may allow and *pay the expert such compensation as it deems just and proper* and as the court approves" (emphasis added)); Ohio R. Civ. P. 26(B)(4)(c) ("[t]he court may require that the party seeking discovery under subdivision (B)(4)(b) of this rule pay the expert a *reasonable fee* for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B)(4)(a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert" (emphasis added)); *Vassil v. Able Fence & Guard Rail, Inc.*, 81 Ohio App. 3d 533, 611 N.E.2d 919 (Cuyahoga County 1992).

The governing statutes of many state agencies expressly authorize the agencies to hire experts.[28] In other situations, however, a state agency without express authority to employ an

---

[28] S*ee, e.g.*, R.C. 117.13(A)(1) (stating in part, "[t]he costs of any assistant auditor, employee, or expert employed pursuant to [R.C. 117.09] called upon to testify in any legal

expert witness may find the hiring of an expert to be necessary to carrying out one of the agency's express powers or duties, in which case the authority to pay for the services of the expert would be implied from the agency's express power or duty, so long as sufficient sums have been appropriated to the agency and are otherwise available for that purpose. *See State ex rel. Corrigan v. Seminatore*; *State ex rel. Copeland v State Medical Bd*. In the absence of a statute directing the amount to be paid to such experts, the agency may exercise its discretion in any reasonable manner to prescribe the expert's compensation for his services. *See State ex rel. Butram v. Industrial Comm'n*. *See generally Fletcher v. Bolz*, 35 Ohio App. 3d 129, 132, 520 N.E.2d 22, 25-26 (Franklin County 1987) ("[t]he reasonableness of any expert's fee must be determined on a case-by-case basis").

It is our understanding that, as a general rule, state agencies engage experts pursuant to personal services contracts. The compensation to be paid to such experts, as well as the services to be rendered by those experts, including the giving of testimony in a proceeding, whether judicial or administrative, are generally included within such contracts. In such situations, the compensation established by the contract would dictate the amount, if any, to be paid by the agency for the expert's service as a witness in any proceeding. Concerning an expert witness's receipt of the fees and mileage payable to lay witnesses in addition to compensation for services to the agency, we find no reason that an expert who testifies in an agency proceeding would not also be entitled to receive the fees and mileage payable to lay witnesses, so long as the expert witness complies with any conditions imposed upon lay witnesses in the receipt of such fees and mileage. *See, e.g.*, note six, *supra*.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. Lay witnesses who appear in proceedings before a state agency are entitled to receive the witness fees and mileage set forth in R.C. 2335.05,

---

proceedings in regard to any audit, or called upon to review or discuss any matter related to any audit, may be charged to the state agency to which the audit relates"); R.C. 122.42(B)(7) (Director of Development may employ, among others, construction and accounting experts); R.C. 154.06(E) (Public Facilities Commission may "[c]ontract for the services of financial consultants, appraisers, consulting engineers, architects, construction and accounting experts, attorneys, and other consultants and independent contractors, as are necessary in its judgment to carry out [R.C. Chapter 154]"); R.C. 3745.02 (Environmental Review Appeals Commission "may retain the services of experts"). *Cf.* R.C. 126.31(B) (consultant to state agency "whose compensation is paid in whole or in part from state funds may be reimbursed for his *actual and necessary traveling and other expenses* incurred while attending any gathering, conference, or convention, or while performing official duties, inside or outside this state, if authorized by that state agency. Notwithstanding any other statute to the contrary, reimbursement shall be made in the manner, and at rates that do not exceed those, provided by rule of the director of budget and management adopted in accordance with [R.C. Chapter 119]" (emphasis added)).

unless a more specific provision of law applicable to the particular state agency or type of proceeding at which the witness appears or a more specific provision of law governing payment of specific categories of witnesses supersedes the provisions of R.C. 2335.05.

2. Pursuant to R.C. 2711.06, witnesses in arbitration proceedings conducted in accordance with R.C. 2711.01-.16, are entitled to the witness fees and mileage prescribed by R.C. 2335.06, unless the terms of an applicable collective bargaining agreement specify a different fee to be paid to persons subject to the agreement.

3. Although state agencies do not, as a general rule, have authority to pay witnesses an amount in excess of the customary witness fees and mileage or for expenses actually and necessarily incurred in appearing in agency proceedings, if a state agency reasonably finds that payment of additional amounts or expenses in a particular instance is necessary to the performance of its powers and duties and if no statute prohibits the payment of such additional amounts or expenses, the agency possesses the implied authority to pay such additional amounts or expenses, so long as sufficient funds have been appropriated to the agency and are otherwise available for that purpose. Similarly, if a state agency possesses the express authority to establish its own procedures, it may authorize, as part of its procedures, the payment of actual and necessary expenses of witnesses who appear before it, so long as payment of witness fees by that agency, in the particular type of proceeding, or to a particular category of witness is not otherwise expressly provided by statute.

4. Whether a witness who appears before a state agency without having been subpoenaed is entitled to be paid the witness fee and mileage payable to witnesses in such a proceeding depends upon the conditions imposed by law upon the payment of witness fees in that agency or proceeding.

5. A state employee is entitled to a fee that is different from that payable to other witnesses who appear in a particular proceeding before a state agency if either the statutes or rules governing the proceeding before the agency authorize a different fee or if the provisions of an applicable collective bargaining agreement require payment of a different fee.

6. The compensation which an expert witness engaged by a state agency pursuant to a personal services contract is entitled to receive for his services, as well as the services to be provided by the expert, are dictated by the terms of the contract of employment. An expert who testifies in a state agency proceeding is entitled to receive the fees and mileage payable to lay witnesses in such proceeding, so long as the expert witness satisfies

any conditions imposed upon lay witnesses in the receipt of such fees and mileage.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 2, 1999

Thomas W. Johnson, Director
Office of Budget and Management
30 East Broad Street
Columbus, Ohio 43266-0411

SYLLABUS: 99-011

1. Lay witnesses who appear in proceedings before a state agency are entitled to receive the witness fees and mileage set forth in R.C. 2335.05, unless a more specific provision of law applicable to the particular state agency or type of proceeding at which the witness appears or a more specific provision of law governing payment of specific categories of witnesses supersedes the provisions of R.C. 2335.05.

2. Pursuant to R.C. 2711.06, witnesses in arbitration proceedings conducted in accordance with R.C. 2711.01-.16, are entitled to the witness fees and mileage prescribed by R.C. 2335.06, unless the terms of an applicable collective bargaining agreement specify a different fee to be paid to persons subject to the agreement.

3. Although state agencies do not, as a general rule, have authority to pay witnesses an amount in excess of the customary witness fees and mileage or for expenses actually and necessarily incurred in appearing in agency proceedings, if a state agency reasonably finds that payment of additional amounts or expenses in a particular instance is necessary to the performance of its powers and duties and if no statute prohibits the payment of such additional amounts or expenses, the agency possesses the implied authority to pay such additional amounts or expenses, so long as sufficient funds have been appropriated to the agency and are otherwise available for that purpose. Similarly, if a state agency possesses the express authority to establish its own procedures, it may authorize, as part of its procedures, the payment of actual and necessary expenses of witnesses who appear before it, so long as payment of witness fees by that agency, in the particular type of proceeding, or to a particular category of witness is not otherwise expressly provided by statute.

4. Whether a witness who appears before a state agency without having been subpoenaed is entitled to be paid the witness fee and mileage payable to witnesses in such a proceeding depends upon the conditions imposed by law upon the payment of witness fees in that agency or proceeding.

5. A state employee is entitled to a fee that is different from that payable to other witnesses who appear in a particular proceeding before a state agency if either the statutes or rules governing the proceeding before the agency authorize a different fee or if the provisions of an applicable collective bargaining agreement require payment of a different fee.

6. The compensation which an expert witness engaged by a state agency pursuant to a personal services contract is entitled to receive for his services, as well as the services to be provided by the expert, are dictated by the terms of the contract of employment. An expert who testifies in a state agency proceeding is entitled to receive the fees and mileage payable to lay witnesses in such proceeding, so long as the expert witness satisfies any conditions imposed upon lay witnesses in the receipt of such fees and mileage.