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TRANSIT SYSTEM—CITY CHARTER—TRANSIT BOARD VESTED WITH LEGISLATIVE AND ADMINISTRATIVE POWERS OF CITY RELATIVE TO OWNERSHIP AND OPERATION OF SYSTEM—WITNESSES IN LITIGATION INVOLVING TRANSIT SYSTEM—MAY BE PAID ACTUAL EXPENSES INCURRED IN EXCESS OF STATUTORY FEES—PAYMENT NOT PER SE UNLAWFUL—FINDING.

SYLLABUS:

Where provisions of a City Charter vest a transit board with all legislative and administrative powers of the city relative to the ownership and operation of a transit system, and the transit board in the exercise of such legislative authority promulgates a policy whereby witnesses in a litigation involving such transit system may be paid for actual expenses incurred in excess of statutory fees, such payment is not per se unlawful, so as to support a finding to that effect by the Bureau of Inspection and Supervision of Public Offices.

Columbus, Ohio, October 21, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion which reads as follows:

“On December 21, 1943, Attorney General Herbert in Opinion No. 6558 ruled that:

‘Where a witness other than an expert witness is within the reach of process, it is unlawful for a *municipality*, party to a suit in which the attendance of such witness is desired, to pay or agree to pay such witness anything in addition

to the statutory witness fee, even though such additional payment represents only compensation for the witness' expense and loss of time.'

"Based upon this ruling this office has each year made findings against each individual witness to whom the Cleveland Transit Company paid in excess of \$1.00 for appearing for conferences in preparation for trial and as witnesses in litigated matters. Findings were also made against the comptroller of the Company and each of the five members of the transit board.

"The amounts involved in these findings have not been paid since it is the contention of the Cleveland Transit Company that the findings are invalid for the following reasons:

"(1) Section 2335.06 (3012) Ohio General Code does not prohibit the payment of more than the statutory fee of \$1.00.

"(2) Modern public policy does not prohibit such payments in excess of \$1.00 but requires that witnesses be paid for their actual expenses and loss of wages or salary.

"(3) The Cleveland Transit System is not operated as a municipality but is operated as a private utility under special charter provisions of the City of Cleveland.

"I would appreciate your opinion as to whether the opinion issued by Attorney General Herbert in 1943 now applies to the Cleveland Transit Company and whether that Company is now limited to the payment of fees of \$1.00 to witnesses appearing in litigated matters."

Your question would appear to comprehend the legality of two separate transactions which may be stated as follows:

(1) The payment of fees to a prospective witness in a litigation, for time lost from his regular occupation or expenses necessarily incurred in connection with conferences or other proceedings incidental to the preparation of a case for trial.

(2) Payment of a fee in excess of that prescribed by Sections 2335.05 and 2335.06, Revised Code, to a witness as compensation for lost time or expense incurred by reason of his appearance and testifying during trial.

The first aspect of your inquiry may be answered without extended discussion or reference to Opinion No. 6558, Opinions of the Attorney General for 1943, page 709, to which you have referred in your letter. Clearly, in the case of preparation by way of conference or otherwise prior to trial, the prospective witness is not subject to process making his attendance compulsory; the preparation for trial is as essential as

the trial itself; and there can be no objection to reimbursing the prospective witness for lost time and necessary expenses incurred in this connection.

The second aspect of your inquiry requires a re-examination of Opinion No. 6558, supra, the salient conclusions of which may be summarized as follows:

(1) A contract to pay a witness fees for testifying in excess of those allowed by statute is unenforceable as contrary to public policy.

(2) As a consequence thereof a payment made to such witness is an illegal expenditure when made by a municipality by a municipal official on its behalf, which expenditure may be the subject of an appropriate finding by the Bureau of Inspection and Supervision of Public Offices under Section 286, General Code (now Section 117.10, Revised Code.)

Since the publication of Opinion No. 6558, supra, the City of Cleveland has by charter provision effective December 1, 1949, vested all powers relative to the operation of the transit system in a transit board in the following terms as provided, in part, by Section 113-3 of the City Charter:

“* * * Except as otherwise provided in Section 113-1 to 113-7, of this charter, all powers of the city, both legislative and administrative, deriving from or relating to the ownership, operation, maintenance, improvement, and extension of the transit system and the supervision, management and control thereof are hereby vested in the Transit Board. * * *”

It will be noted upon further analysis of Opinion No. 6558, supra, that the keystone upon which its conclusions rest is the fact that courts in other jurisdictions have refused to enforce contracts to pay a witness a sum in excess of the statutory allowance, on the ground that such an agreement is contrary to public policy. It is fundamental that a court may declare a transaction void or unenforceable on grounds of public policy only in the absence of a legislative expression on the subject. Once the proper legislative authority has acted upon such subject its pronouncement becomes declarative of public policy notwithstanding that the act or transaction which is sanctioned was enjoined under the judicial concept of public policy which previously obtained.

Applying these principles to the second aspect of your inquiry, it is apparent that the portion of Section 113-3, of the Charter of the City of Cleveland, quoted supra, has vested all legislative powers of the City relative to the operation of the transit system in the transit board. If

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 of Cleveland is concerned in the operation of its transit system. Such a declaration made in the proper exercise of a municipality's constitutionally endowed powers of home rule is controlling in the absence of any supravening statute dictating a contrary policy enacted by the General Assembly.

I am unable to find any enactment of the legislature which would tend to promulgate a contrary policy. In this connection, I am not unmindful of Section 12827, General Code, now Section 2917.06, Revised Code, which was incidentally referred to in Opinion No. 6558, supra, by my predecessor, which provides as follows:

“No person, with intent to corrupt a witness, or to influence him in respect to the testimony he is about or may be called upon to give in an action or proceeding pending, or about to be commenced, either before or after he is subpoenaed or sworn, shall offer, promise, or give to him or to any one for him, any valuable thing.

“Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than sixty days.”

It is apparent that the “intent” to corrupt or influence is an indispensable element to establishing a violation of this section. I cannot presume to pass upon the factual question as to with what intent the payments referred to in your letter of inquiry were made, and accordingly, I can express no opinion on that subject. I can, however, state that the payment per se, absent an accompanying intent to corrupt or influence, is not prescribed. Presumably, had the legislature intended to make payment alone unlawful or criminal it would have so stated. Although, like my predecessor, I am unable to find any decisions of the Ohio courts bearing directly on this subject, it might be stated, parenthetically, that the receipt by a witness of per diem sums in excess of the statutory fees, has been recognized in at least one Ohio case as a basis for cross-examination, as affecting his credibility on the ground of interest, without incurring any judicial censure as being immoral or unlawful. Thus, in *Volk v. Village of Westerville*, 3 Nisi Prius (N.S.) 241, it was stated in part, at page 245:

“The credibility of a material witness is always in issue and his interest, if any, in the result of the case or in the prosecution

may be shown by cross-examination. Hence, it seems, some of the witnesses like Mr. Allaman were to be paid a per diem for attending the trial in addition to the fees allowed them by the statutes as witnesses. The amount of such per diem was a proper subject of cross-examination, and should, when proved, be considered by the trial court as a proper circumstance touching the witnesses' credibility. *Such a circumstance might be entitled to but little, if any weight, or it might seriously affect the witnesses' credibility.* The question here is not as to what weight the circumstance, if proven, would have had, but the question goes to the right of the defendant to investigate and show to the court, if he could, that the witnesses were not credible but were influenced by some undue or improper motive or consideration. Proof, however, of what per diem, or pay, the several witnesses were to have, appears from the testimony of other witnesses in the case, and for this reason it is probable that no injustice was done. Rev. L. F. Johns testified that Mr. Allaman by agreement was to be paid a per diem and his expenses; that he was to have three dollars a day; that he had been paid in all about thirty-five dollars; that Allaman could employ other persons (bill of exceptions, pages 90, 91); the others, it appears from the testimony of other witnesses, received the same per diem and expenses as Allaman." (Emphasis added.)

I do not presume to express herein any opinion as to the wisdom or propriety of the transit board in promulgating its policy pursuant to the legislative powers expressly granted by the electors of the city of Cleveland, by city charter, in the exercise of the power of home rule. Moreover, I do not purport to overrule Opinion No. 6558, supra, as issued by my predecessor, insofar as that opinion relates to payments made without direct authorization of the legislative authority of a municipal corporation. However, a conclusion contrary to that reached in said opinion must be expressed in the instant case by reason of the after occurring circumstance of the enactment of Section 113-3 of the City Charter, and the act of the transit board in approving these payments. Furthermore, I believe that the rule of the instant case must be applied to all cases in which such payments have been authorized or specifically appropriated by the legislative authority of a municipal corporation.

Accordingly, and in specific answer to your questions it is my opinion that:

Where provisions of a City Charter vest a transit board with all legislative and administrative powers of the city relative to the ownership and operation of a transit system, and the transit board in the exercise of

such legislative authority promulgates a policy whereby witnesses in a litigation involving such transit system may be paid for actual expenses incurred in excess of statutory fees, such payment is not per se unlawful, so as to support a finding to that effect by the Bureau of Inspection and Supervision of Public Offices.

Respectfully,
C. WILLIAM O'NEILL
Attorney General