

OPINION NO. 70-127

Syllabus:

A municipal police officer, on or off active duty, who is subpoenaed as a witness in a criminal case or before a grand jury, is entitled to witness fees pursuant to Section 2335.17, Revised Code. The witness fees must be paid into one of the funds enumerated in Section 2335.17, Revised Code, and may not be retained for personal use by the officer.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: Paul W. Brown, Attorney General, September 10, 1970

You have requested my opinion on the following questions:

"1. Is a police officer employed by a municipal corporation prohibited from retaining for his own use a witness fee paid to him as a result of his being subpoenaed to appear as a witness in a criminal case or before the Grand Jury at a time when such officer is on active duty and where such officers' testimony relates to his participation in the investigation of such case?

"2. Would such an officer be prohibited from retaining for his own use such a witness fee if he were required to testify at a time when he would be off active duty?"

Section 2335.17, Revised Code, provides:

"No police officer is entitled to witness fees in a cause prosecuted under an ordinance of a city before a magistrate. In all prosecutions under a criminal law of the state involving a felony, municipal police officers shall be allowed the same fees for attendance as are allowed by section 2335.06 of the Revised Code. Such officers shall immediately deposit the fees so received with the treasurer of the police relief and pension fund, for the credit of the fund. Such fees shall be taxed in the bill of costs. In any municipal cor-

poration in which no such fund is maintained, such fees shall be deposited with the treasurer of the municipal corporation, to the credit of the general fund."

In State, ex rel. Shaffer v. Cole, 132 Ohio St. 338, 7 N.E. 2d 647 (1937), the Ohio Supreme Court stated:

"The provisions of section 3024, General Code, do not prohibit payment of the usual witness fee to a police officer who, in response to a subpoena, appears and testifies before a grand jury or in the trial of a criminal case in the Court of Common Pleas."

Section 3024, General Code, governed the payment of witness fees to police officers just as Section 2335.17, supra, does today. However, Section 3024, supra, differed materially from the present statute on the subject. Section 3024, supra, provided:

"No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city before a police judge or mayor of such city, justice of the peace, or other officer having jurisdiction in such causes."

The Court in Shaffer, supra, based its decision on a very narrow reading of the above section. At pages 339-40, the Court stated:

"The first thing to be noted is that this latter section [section 3024, supra] makes no mention of the grand jury or the Court of Common Pleas. It names only 'a police judge or mayor * * *, justice of the peace, or other officer having jurisdiction in such causes.' If the Legislature had desired to include tribunals of the importance of the grand jury and the Court of Common Pleas, the great probability is that this intention would not have been left to mere inference. Application of the maxim expressio unius est exclusio alterius seems proper."

Section 3024, supra, was a forerunner of Section 2335.17, supra. Even though the two statutes differ materially, neither prohibits payment of witness fees to municipal police officers who are subpoenaed to testify in criminal cases or before a grand jury. In fact, Section 2335.17, supra, broadened the category of those officers who were eligible to receive witness fees by providing that "[i]n all prosecutions under a criminal law of the state involving a felony" [Emphasis added], municipal police officers shall be allowed witness fees which are to be paid into special funds. The Legislature did not expressly preclude the payment of fees to officers who testify before a grand jury."

The weight of authority holds that grand jury proceedings are criminal proceedings within the terms of statutes authorizing the issuance of a subpoena to a witness to appear before a grand jury. In re Thompson, 213 F. Supp. 372, 375 (D.C. N.Y. 1963).

The phrase "* * * all prosecutions under a criminal law of the state" should be read to refer to the entire prosecutorial procedure. Thus, a police officer subpoenaed to appear as a witness in a criminal case or before a grand jury is entitled to witness fees pursuant to the requirements of Sections 2335.17, supra. The officer receiving such witness fees must pay them into one of the special funds enumerated in the above mentioned statute, and he may not retain the fees for his personal use.

Since no distinction is made between officers on and off active duty, the presumption is that the Legislature did not intend to differentiate between the two categories. Therefore, Section 2335.17, supra, applies to all officers both on and off active duty.

Therefore, it is my opinion and you are accordingly advised that a municipal police officer, on or off active duty, who is subpoenaed as a witness in a criminal case or before a grand jury, is entitled to witness fees pursuant to Section 2335.17, Revised Code. The witness fees must be paid into one of the funds enumerated in Section 2335.17, Revised Code, and may not be retained for personal use by the officer.