

**OPINION NO. 80-052****Syllabus:**

A party to a proceeding conducted by the State Personnel Board of Review who appears at such proceeding pursuant to subpoena issued by that Board under the authority of R.C. 124.03(G) and R.C. 124.09(E) is entitled to witness and mileage fees as set forth in R.C. 2335.06 and 1 Ohio Admin. Code 124-11-19. An officer or employee of the state or any political subdivision thereof who is a party to a proceeding before the Board is entitled to witness fees only if he is subpoenaed by the opposing party to a hearing which he attends at a time he is not scheduled to work, and is entitled to a mileage allowance only if he is subpoenaed by the opposing party and is not reimbursed for his travel expenses by his employer. (1923 Op. Att'y Gen. No. 786, p. 639, modified.)

**To: Charles V. Schwenker, Chairman, State Personnel Board of Review, Columbus, Ohio**  
**By: William J. Brown, Attorney General, September 8, 1980**

I have before me your request for my opinion concerning the payment of witnesses fees and mileage allowances to persons testifying before the State Personnel Board of Review. Specifically, you have asked "whether or not such mileage and witness fee payments are required to be made to the parties to the hearings before this Board."

The powers and duties of the State Personnel Board of Review are set forth, in part, in R.C. 124.03. R.C. 124.03(G) directs the State Personnel Board of Review:

To subpoena and require attendance and testimony of witnesses and the production of books, papers, public records, and other documentary evidence pertinent to any matter which it has authority to investigate, inquire into or hear in the same manner and to the

same extent as provided by division (E) of section 124.09 of the Revised Code and all witness fees shall be paid in the manner set forth in said division.

R.C. 124.09(E) grants the Director of Administrative Services, and pursuant to R.C. 124.03(G), the State Personnel Board of Review, "the power to subpoena and require the attendance and testimony of witnesses and the production of books, papers, public records, and other documentary evidence pertinent to the investigations, inquiries, or hearings on any matter which he [or it] has authority to investigate, inquire into, or hear." It goes on to provide:

Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the treasurer of the state. . .for attendance and traveling, as is provided in section 2335.06 of the Revised Code for witnesses in courts of record. All officers in the civil service of the state or any of the political subdivisions thereof and their deputies, clerks, and employees shall attend and testify when summoned to do so by the director [of Administrative Services] or the state personnel board of review. (Emphasis added.)

R.C. 2335.06, to which R.C. 124.09(E) refers, provides:

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.

(C) As used in this section, "full day's attendance" means a day on which a witness is required or requested to be present at proceedings before and after twelve noon regardless of whether he actually testifies; "half day's attendance" means a day on which a witness is required or requested to be present at proceedings either before or after twelve noon, but not both, regardless of whether he actually testifies. (Emphasis added.)

Under R.C. 2335.06, the determining factor as to whether or not a person receives witness and mileage fees is whether his presence is "required or requested." Moreover, it is also clear that if a person's presence is "required or requested" then he is entitled to mileage and witness fees "regardless of whether he actually testifies."

R.C. 124.03(F) authorizes the State Personnel Board of Review "[t]o adopt and promulgate rules in accordance with Chapter 119. of the Revised Code, relating to the procedure of the board in administering the laws which it has authority or duty to administer." Apparently pursuant to this rule-making authority, the Board adopted 1 Ohio Admin. Code 124-11-19, which governs the payment of mileage and witness fees. 1 Ohio Admin. Code 124-11-19 provides 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 are not scheduled to work. Public employees shall be paid by the 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 a party.

(B) Mileage shall be paid to anyone incurring unreimbursed travel expense to attend hearings before the board. Neither parking costs nor food and lodging are reimbursable by the state personnel board of review.

- (C) Parties may not subpoena themselves.  
 (D) Mileage and witness fees shall not be paid to anyone who fails to register at the hearing which he attended. (Emphasis added.)

It is firmly established in Ohio law that rules validly promulgated by an administrative agency have the force and effect of law unless they are unreasonable or in clear conflict with a statutory enactment governing the same subject matter. Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 488, 79 N.E. 2d 228 (1948); State ex rel. Kildow v. Industrial Commission, 128 Ohio St. 573, 192 N.E. 873 (1934). A valid rule must be applied as it is formulated, until it is amended or repealed as provided by law. Kroger Grocery. It appears that, in connection with the question you have raised, the provisions of 1 Ohio Admin. Code 124-11-19 may be read in harmony with those of relevant statutes. See generally State ex rel. Curtis v. DeCorps, 134 Ohio St. 295, 16 N.E. 2d 459 (1938); American Wine & Beverage Co. v. Board of Liquor Control, 66 Ohio L. Abs. 161, 116 N.E. 2d 220 (1951).

The payment of witness fees is wholly a matter of statute and rule. Benda v. Fana, 10 Ohio St. 2d 259, 227 N.E. 2d 197 (1967); City of Euclid v. Vogel, 152 Ohio St. 538, 90 N.E. 2d 593 (1950); 1979 Op. Atty Gen. No. 79-089. At common law, witnesses received no fees whatsoever. See United Development Corp. v. State Highway Department, 133 N.W. 2d 439, 22 A.L.R. 3d 662 (N. D. 1965).

I am aware of no case authority in Ohio which touches directly upon the question of whether a party to a civil case is entitled to fees pursuant to R.C. 2335.06 when he testifies. The proper response to your opinion request, therefore, depends entirely upon construction of the relevant statutes and rules. The key language of R.C. 2335.06 is, in my opinion, the phrase "required or requested to be present." Since, in general, the proceedings before the State Personnel Board of Review are adversarial, involving two parties (the employee and the appointing authority, or in the case of "reclassification" hearings under R.C. 124.14(E), either the employee or the appointing authority and the Director of the Department of Administrative Services) who are themselves responsible for subpoenaing witnesses, the only time at which a "party" would be either "required or requested" to be present is when he is subpoenaed by the adversary. Under R.C. 2335.06, the controlling factor is not whether the witness actually testifies but whether his presence is "required or requested." It thus appears that if a party has not been subpoenaed by his adversary, but is called upon to testify by the adversary after appearing voluntarily, he is not entitled to either witness fees or mileage expenses. I reach this conclusion for the reason that, in the absence of a subpoena, a party is not required to attend any hearing before the State Personnel Board of Review, but may, instead, send an authorized agent to act in his behalf. See 1 Ohio Admin. Code 124-11-20. Moreover, it is clear under 1 Ohio Admin. Code 124-11-19(C) that a party may not issue a subpoena compelling his own attendance. Accordingly, the only instance in which a party's presence will be "required" or "requested" is when he has been subpoenaed by the opposing party.

Additionally, it should be pointed out that, under R.C. 124.09(E), an officer or employee in the civil service of the state or any political subdivision thereof is required to appear at the State Personnel Board of Review upon being "summoned" by the Board to do so. In construing this requirement, one of my predecessors concluded, in 1923 Op. Atty Gen. No. 786, p. 639, that when such an officer or employee appeared before what was then known as the State Civil Service Commission he was performing a job-related duty and was to be paid his regular salary. Hence, no witness fee was necessary. With respect to mileage allowances, the opinion concluded that the same analysis applied but added that, "[a]s it is a part of the duty of a person under civil service to attend when summoned. . . , such person is entitled to his actual and necessary expenses to be paid from the traveling fund of the department to which he is attached." The syllabus of that opinion states:

The State Civil Service Commission may not pay a per diem attendance fee and mileage to state, county and municipal employes or elective officials who are summoned under authority of section 486-7 [presently R.C. 124.09(E)] to testify before such Commission.

Rule 124-11-19(A) qualifies the conclusions reached in 1923 Op. No. 786 in two respects. First, it adds that "[p]ublic employees may be paid witness fees only if they were subpoenaed to a hearing which they attended at a time they are not scheduled to work." This provision is in accordance with the concept adopted in 1923 Op. No. 786 that attendance by a public employee constitutes a job-related duty of the employee, for which the employee shall receive his ordinary compensation, rather than a fee for attendance and traveling. It carries the concept a step further: if the employee is not being compensated as a public employee for the time involved, he may receive a witness fee.

Second, Rule 124-11-19(B) provides that "[m]ileage shall be paid to anyone incurring unreimbursed travel expense to attend hearings before the board." The word "anyone" is so general that, if construed according to its ordinary meaning, it would apply even to a person who is in no way connected with a case before the Board, but chooses simply to come and watch. This clearly cannot be the result intended. Rather, read in the context of Rule 124-11-19 and R.C. 2335.06, "anyone" must be limited to any person whose presence is required or requested at a hearing—that is, to one who is subpoenaed to attend the hearing. It does appear, however, to include subpoenaed public employees whose travel expenses are not reimbursed. Compare 1 Ohio Admin. Code 124-11-19(B) with 1 Ohio Admin. Code 124-11-19(A). Again, the rule can be viewed as elaborating upon the conclusion of 1923 Op. No. 786: if a public employee who is required to attend a hearing is not reimbursed for his travel expenses by his employer, the Board will provide him with a mileage allowance.

In conclusion, it is my opinion, and you are advised, that a party to a proceeding conducted by the State Personnel Board of Review who appears at such proceeding pursuant to subpoena issued by that Board under the authority of R.C. 124.03(G) and R.C. 124.09(E) is entitled to witness and mileage fees as set forth in R.C. 2335.06 and 1 Ohio Admin. Code 124-11-19. An officer or employee of the state or any political subdivision thereof who is a party to a proceeding before the Board is entitled to witness fees only if he is subpoenaed by the opposing party to a hearing which he attends at a time he is not scheduled to work, and is entitled to a mileage allowance only if he is subpoenaed by the opposing party and is not reimbursed for his travel expenses by his employer. (1923 Op. Atty Gen. No. 786, p. 639, modified.)