

2937.

CIVIL SERVICE—WITNESS MAY BE SUBPOENAED BY MUNICIPAL CIVIL SERVICE COMMISSION WHEN LIVING WITHIN THAT OR ADJOINING COUNTY—IF LIVING ELSEWHERE ENTITLED TO FEE WHEN.

SYLLABUS:

A municipal civil service commission may subpoena witnesses living in the county where the trial is conducted or in an adjoining county to the one where the trial is conducted. A witness who lives beyond those limits and who voluntarily appears in the county where the trial is to be held and is there served with a subpoena is entitled to be paid his witness fee but not his mileage.

COLUMBUS, OHIO, July 19, 1934.

HON. RUSSELL M. WILHELM, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“The following case has been submitted to the writer for opinion by both the County Treasurer and the City Solicitor, and I would appreciate your opinion on the matter.

FACTS

In a hearing concerning the suspension of a fireman the Civil Service Commission of the City of Marion, Ohio, authorized the City Solicitor of said city to call witnesses residing within the State, but beyond the limits of Marion County and the adjoining County, said witnesses to be served with subpoenas on their arrival in the City of Marion for trial. After being so served, as authorized by the Commission, and after trial had, the commission certified the vouchers for said witness fees and mileage, said fees and mileage, to be payable out of the County Treasury as provided for under General Code, Section 485-7. We were of the opinion that there was no question concerning the payment of witnesses of this case since General Code, Section 486-7 and General Code, Section 3012 seem to provide for the calling of witnesses for such cases even outside the County but within the State. However, the payment has been questioned under the decision of the Court in the case of *Wylie vs. Duffey*, 1 N. P. (n. s.) 353.

QUESTION

If a Municipal Civil Service Commission authorizes the subpoenaing of a witness beyond the limits of a County adjoining the County for trial and authorizes the subpoenaing of said witness on arrival for trial, and after hearing had, certifies vouchers for witness fees and mileage, can the County Treasurer under General Code, Section 486-7, sub-division 5, legally pay said witness fee and mileage?”

Section 486-7, General Code, reads in part as follows:

“The Commission shall” * * * *

“Fifth: Have the power to subpoena and require the attendance and

testimony of witnesses and the production thereby of books, papers, public records and other documentary evidence pertinent to the investigations, inquiries, or hearings on appeal from the action or decision of an appointing officer as is herein authorized, and to examine as it may require in relation to any matter which it has authority to investigate, inquire into or hear. Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions by the county treasurer, for attendance and traveling, as is provided in section 3012 of the General 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, subordinates and employes shall attend and testify when summoned so to do by the commission. Depositions of witnesses may be taken by the commission in the manner prescribed by law for like depositions in civil actions in the courts of common pleas. In case any person, in disobedience to any subpoena issued by the commission, or any of them, or their chief examiner, fails or refuses to attend and testify to any matter regarding which he may be lawfully interrogated, or produce any documentary evidence pertinent to any investigation, inquiry or hearing, it shall be the duty of the court of common pleas of any county, or any judge thereof, where such disobedience, failure or refusal occurs, upon application of the state commission, or a municipal commission, or any commissioner thereof, or their chief examiner, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such courts or a refusal to testify therein;" * * *

Section 3012, General Code, referred to in the above section, reads as follows:

"Each witness in civil cases shall receive the following fees: For each day's attendance at a court of record, before a justice of the peace, mayor or person authorized to take depositions, to be paid on demand by the party at whose instance he is subpoenaed, and taxed in the bill of costs, one dollar, and five cents for each mile necessarily traveled from his place of residence to the place of giving such testimony and return, provided the distance be more than one mile; for attending coroner's inquest, the same fee and mileage, provided above, to be paid from the county treasury on the certificate of the coroner."

While Section 486-7, General Code, does not mention the territorial limits from which a witness may be subpoenaed, it nevertheless seems to classify actions before a Municipal Civil Service Commission as civil actions and provides for the same witness fees as are granted in courts of record. The limitations in subpoenaing witnesses in ordinary civil cases are stated in Section 11506, General Code. This section reads as follows:

"A witness shall not be compelled to go out of the county where he resides, or is subpoenaed, except to an adjoining county, to testify in a civil action, except where the case has been removed from the county in which such witness resides by change of venue. But no witness shall be required to go out of the county in which he resides or is subpoenaed

to so testify, in the trial of a civil action, unless the party subpoenaing him, upon demand, shall pay him at the time he is subpoenaed, his legal mileage and per diem fees. When such witness is the official custodian of a paper or document necessary to be produced in the trial as evidence in any cause, which paper or document can not lawfully be attached as an exhibit to a deposition, the judge of the court in which such cause is pending, upon being satisfied of the necessity thereof, by his order to that effect may compel a witness from another county to bring such paper or document into his court to be used as evidence in such case. A person subpoenaed to any other county as such official custodian, may demand the legal fees for attendance and mileage as in other cases, and need not attend unless such fees are paid."

In other words, a witness in an ordinary civil case may not be compelled to appear in court in a county beyond the adjoining county to the one where the witness lives, except where a change of venue has been secured. The case of *Wylie vs. Duffy*, 1 N. P. (n. s.) 353, referred to in your letter, is the exact parallel to the situation as stated in your letter, with the exception that it was a case before a Common Pleas Court, while here we are concerned with a hearing before a municipal civil service commission. The syllabus of that case reads as follows:

"1. A witness residing in the county of the suit, or in an adjoining county, who is notified to report, and in good faith to facilitate justice and prevent delay does report and is subpoenaed upon arrival, is entitled to statutory mileage from his place of residence.

2. But there being no jurisdiction to compel attendance beyond these limits, a witness from beyond the adjoining county who so reports voluntarily and is there subpoenaed, is entitled to one dollar and no more."

Unless the authority of a municipal civil service commission in the subpoenaing of witnesses is greater than that of a Common Pleas Court, the above decision is dispositive of your present inquiry. The above case was followed by this office in an opinion to be found in the Opinions of the Attorney General for 1927, Volume 1, page 212. The first branch of the syllabus of that opinion reads as follows:

"1. Where a witness voluntarily reports to the court upon notice to do so and there receives a subpoena, under such circumstances he is entitled to his statutory fees and mileage only when his attendance could have been required by compulsory process."

It seems improbable that the legislature intended to grant to a municipal civil service commission any greater power in the subpoenaing of witnesses than it granted to a Common Pleas Court. The legislature in the enactment of Section 486-7 seemed to have recognized this principle when it provided for the taking of depositions. The following sentence appears in Section 486-7:

"Depositions of witnesses may be taken by the commission in the manner prescribed by law for like depositions in civil actions in the courts of common pleas."

In a civil suit before a Common Pleas Court, it might be necessary to take a deposition where the witness lived beyond the adjoining county and the legislature seems to have recognized this principle in authorizing the taking of depositions in a hearing before a state or municipal civil service commission. From an examination of the civil service laws as a whole, it would appear that the same principles in subpoenaing witnesses in a civil suit before a Common Pleas Court would be applicable to a municipal civil service commission.

Without further extending this discussion, it is my opinion in specific answer to your question that a municipal civil service commission may subpoena witnesses living in the county where the trial is conducted or in an adjoining county to the one where the trial is conducted. A witness who lives beyond those limits and who voluntarily appears in the county where the trial is to be held and is there served with a subpoena is entitled to be paid his witness fee but not his mileage.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2938.

COUNTY COMMISSIONERS—AUTHORIZED TO COMPENSATE DOG
 WARDEN FOR GASOLINE AND OIL USED BY HIM IN DRIVING
 HIS CAR ON OFFICIAL BUSINESS WHEN.

SYLLABUS:

County Commissioners are authorized to enter into a contract with a dog warden and agree to compensate him for gasoline and oil used by such dog warden in driving his car on official business and pay for the same out of the dog and kennel fund, pursuant to the provisions of Section 5652-13 G. C.

COLUMBUS, OHIO, July 19, 1934.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads in part as follows:

“I am writing you for your opinion in the following matter: Under the sections of law relative to the appointment of a County Dog Warden, the County Commissioners appointed the Dog Warden for Putnam County after he had been certified by the Civil Service Commission for this position. He is working under contract at a monthly salary. However, it is necessary for this man, in order to cut the animal claims to the minimum, to drive throughout the county during the night season.

The County Commissioners desire to know whether or not the Dog Warden can be allowed gasoline and oil for his automobile for this additional night driving, same to be paid out of the Dog and Kennel fund. Sections 5652-7, 5652-7a, 5652-13, 5653 and 5846 of the General Code provide the manner and method of the expenditures of moneys out of the Dog and Kennel fund for this position. If it is provided in the