

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ALAN A ASCHE,

Appellant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No 90-0159-PC

\* \* \* \* \*

DECISION  
AND  
ORDER

On August 4, 1992, appellant filed a "Motion to Compel Payment of Salary For Witness Appearing Before Personnel Commission" The parties were permitted to file briefs and the briefing schedule was completed on December 30, 1992. The following findings of fact appear to be undisputed and are made for the sole purpose of deciding the instant Motion:

1. A hearing in the underlying appeal was conducted on April 8 and 9 and May 20 and 21, 1992. On May 20, 1992, Samuel Clemons was called by appellant as a witness at this hearing.

2. On May 20, 1992, Mr. Clemons was employed by respondent Department of Corrections in a civil service position classified in the Officer series. Mr. Clemons had not been scheduled to work on May 20, 1992. Mr. Clemons was not paid a salary or a witness fee by respondent for his appearance as a witness for appellant at the subject hearing on May 20, 1992.

3. On April 4, 1992, Cookie Swingen was called as a witness by appellant at the subject hearing. On April 4, 1992, Ms. Swingen was employed in a nursing position by the University of Wisconsin-Madison. Ms. Swingen was scheduled to work the second shift on April 4, 1992. Ms Swingen's appeared as a witness at the subject hearing on April 4, 1992, prior to the start of the

second shift. Ms Swingen was awarded two hours of compensatory time by the University of Wisconsin-Madison for the time she spent appearing as a witness for appellant at the subject hearing on April 4, 1992.

4. The hearing examiner for the subject hearing certified that the testimony of all witnesses had been relevant and material to the matters in issue.

Section 230.44(4)(b), Stats., states as follows:

**(4) HEARING.** (b) An employe shall attend a hearing under this subsection and testify when requested to do so by the commission. Any person not under the civil service who appears before the commission by order shall receive for his or her attendance the fees and mileage provided for witnesses in civil actions in courts of record under ch. 885, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the commission and charged to the proper appropriation for the commission. No witness subpoenaed at the insistence of a party other than the commission is entitled to compensation from the state for attendance or travel, unless the commission certifies that his or her testimony was relevant and material to the matter investigated.

Section PC 113(2), Wis. Adm Code, provides as follows:

**(2) PAY STATUS OF STATE EMPLOYE WITNESSES.** State civil service employes who are interviewed as part of commission investigations or attend hearings, whether held in person or via telephone, as witnesses shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s 20.916(8), Stats., unless the hearing examiner or the commission determines that their testimony was or would have been irrelevant, immaterial or unduly repetitious.

It is difficult to ascertain from appellant's Motion whether he is arguing that Mr Clemons is entitled to payment of salary for the time he spent testifying at the above-referenced hearing, whether he is arguing that he is

entitled to witness fees from the state for his appearance as a witness at such hearing or both. Although the title of the Motion refers to "payment of salary," the body of the motion refers only to "witness and appearance fees." In view of this ambiguity, the Commission will address both issues below.

In regard to the salary issue, §PC 1.13(2), Wis. Adm. Code, provides that a state employe who attends a commission hearing "shall do so without loss of state salary. . . ." <sup>1</sup> Mr. Clemons did not lose any state salary as the result of his appearance as a witness at the subject hearing because he was not on work status at the time of such appearance. The cited provision does not require an employing agency to pay salary to an employee solely on the basis of that employee's appearance as a witness at a commission hearing. The cited provision does require that a state employee not be deprived of salary he or she would have been entitled to receive for the period of time he or she was appearing as a witness at a commission hearing. Mr. Clemons was not entitled to receive salary for the period of time he was appearing as a witness at the subject hearing since he had not been scheduled to work during that period of time and his argument in this regard fails. The cited provision does not prevent a state agency from awarding salary to one of its employees for his or her appearance at a commission hearing during a period of time he or she is not on work status. This is apparently what occurred in regard to Ms Swingen's appearance as a witness at the subject hearing. However, the voluntary policy followed by one agency in this regard is certainly not binding on another agency.

In regard to the issue of witness fees, §230.44(4)(b), Stats, limits the entitlement to witness fees paid by the state to "any person not under the civil service" At the time of his appearance as a witness at the subject hearing, Mr. Clemons was a state civil service employee and, as a result, not entitled to witness fees pursuant to §230.44(4)(b), Stats.

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<sup>1</sup> There is a potential issue in this case, involving Mr Clemons' status as represented or unrepresented. If he is a represented employe, arguably this rule is superseded by operation of §111.93(3), stats., which provides that a collective bargaining agreement overrides the civil service code as to bargainable subjects. However, neither party has raised this issue and the Commission will not address it.

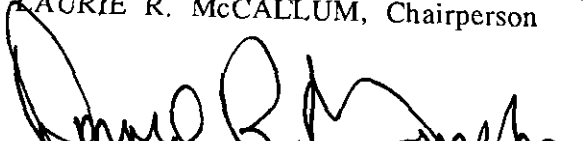
ORDER


Appellant's Motion is denied.

Dated: January 27, 1993 STATE PERSONNEL COMMISSION

dkd

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner