



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

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ATTORNEY GENERAL

Hon. Z. D. Allen
District Attorney
Wichita Falls, Texas

Dear Sir: Attention of Mr. C. C. Fillmore

Opinion No. O-1526

Re: Is a State Highway Patrolman entitled to mileage as out-of-county witness in a felony case and before the grand jury investigating a felony?

Is a State Highway Patrolman entitled to the \$2.00 per diem, as out-of-county witness, in a felony case and before the grand jury investigating a felony?

Your request for an opinion on the above stated questions has been received by this department.

Article 1036, Code of Criminal Procedure, reads in part as follows:

"Any witness who may have been recognized, subpoenaed or attached, and given bond for his appearance before any court, or before any grand jury, out of the county of his residence to testify in a felony case, and who appears in compliance with the obligations of such recognizance or bond, shall be allowed his actual traveling expenses, not exceeding four cents per mile going to and returning from the court or grand jury, by the nearest practical conveyance, and two dollars per day for each day he may necessarily be absent from home as a witness in such case.

"Witnesses shall receive from the State, for attendance upon district courts and grand juries in counties other than that of their

residence, in obedience to subpoenas issued under the provisions of law their actual traveling expenses, not exceeding four cents per mile, going to and returning from the court or grand jury, by the nearest practical conveyance, and two dollars per day for each day they may necessarily be absent from home as a witness, to be paid as now provided by law;...."

Section 3 of the above mentioned article provides that:

"Before the close of each term of District Court, the witness shall make an affidavit stating the number of miles he will have traveled going to and returning from the court, by the nearest practical conveyance, and the number of days he will have been necessarily absent in going to and returning from the place of trial; which affidavit shall be filed with the papers of the case. No witness shall receive pay for his services as a witness in more than one case at any one term of the court. Fees shall not be allowed to more than two witnesses to the same fact, unless the judge before whom the cause is tried shall, after such case has been tried, continued, or otherwise disposed of, certify that such witnesses were necessary in the cause...."

It is well settled that no public official is entitled to receive and retain any fees or compensation unless there is a provision made by the Legislature giving the same to him. See the cases of M. C. Callan vs. City of Rockdale, 246 SW 654; Duclos vs. Harris County, 298 SW 417 and authorities cited therein. Along the same line, the courts have held that the Legislature may provide for the allowance of expenses incurred by an officer in addition to the compensation fixed by law. Terrell vs. King, 14 SW 2nd 786. Article 3897, Vernon's Civil Statutes and authorities cited thereunder, pertaining to the filing of expense accounts of various officials.

In the case of Iay vs. State, 202 SW 729, the question was whether a salaried policeman was entitled to

his per diem under the old Article 1137b, Code of Criminal Procedure (now repealed). The court, in this case, after holding this article applicable only to felony cases and not the case under consideration, which was a misdemeanor, used the following language:

"There being no difference with reference to misdemeanor cases as to the character of witnesses, whether officers or not, the officer would come within the general category, as we understand the law, as witness. His official character, so far as that proposition is concerned, would make no difference...."

We quote from Senate Bill No. 427, Acts of the 46th Legislature, as follows:

"No traveling expenses shall be claimed, allowed, or paid unless incurred while traveling on official business of the State. Any state official or employee entitled to traveling expenses out of state appropriations herein made, who is legally or officially required to be present at the trial of any state case, shall not claim traveling expenses from the state and also from the court, wherein said case is pending. If, by oversight, duplicate claims are filed for said traveling expenses and collected then said officers or employees shall reimburse and refund to the state treasurer in an amount equal to the respective amount collected under such witness fee and mileage claimed."

Under the case of Lay vs. State, supra, it seems that the official character of the witness makes no difference as to the per diem, where the statutes do not specifically draw a line between officers as witnesses and ordinary witnesses. Article 1036, Code of Criminal Procedure, supra, the present statute providing fees and mileage for out of county witnesses does not make this distinction. It has long been the departmental construction of the Comptroller's office that State Highway Patrolmen are entitled to mileage and the \$2.00 per diem as out-of-county witnesses in a felony case in the court and before the grand jury investigating a felony. However, such highway patrolmen receiving mileage

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fees and \$2.00 per diem from the court are not entitled to collect the mileage fees and the \$2.00 per diem and also the traveling expenses allowed by the general appropriation bill. If the per diem and mileage under Article 1036 and the traveling expenses as allowed by the general appropriation bill are collected, then such highway patrolmen would be required to reimburse and refund to the State Treasurer an amount equal to the respective amount collected as such witness fee and mileage Under Article 1036, supra; that is, Highway Patrolmen when subpoenaed as out-of-county witness before the court in a felony case or before the grand jury investigating a felony case cannot claim both the mileage fees and per diem as allowed by Article 1036, supra, and also the traveling expenses allowed by the General Appropriation Bill. We believe the Comptroller has correctly construed the law.

We want to thank you for the able brief submitted with your inquiry which has been very helpful in answering your questions.

Trusting that the foregoing fully answers your inquiry, we remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

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APPROVED NOV 2, 1939

Grady Mann

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