



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Reinstated by 0-64
Overruled in
part by
0-3091

Hon. John R. Shook
Criminal District Attorney
San Antonio, Texas

Dear Sir:

Attention of Mr. Jay Sam. Levey

Opinion No. O-1529

Re: Is the regular judge's salary to be reduced by the amount that is paid to the special judge? And related questions.

We are in receipt of your request for an opinion of this department on the questions as are herein stated.

Your letter reads in part as follows:

"We are writing you at the request of John K. Weber of this City and the Commissioners' Court of Bexar County for a clarification of the above opinions which you rendered on May 27, 1939, to Honorable Fred T. Porter, County Attorney of Kaufman County, and on August 12, 1939 to Honorable Dwight Whitwell, Assistant County Attorney of Collin County, Texas, respectively. We believe the answers to the questions we are about to ask are self-evident from your former opinions, but are, nevertheless, complying with the request made us.

"You have ruled, and correctly so, we feel sure, that a special county judge, agreed upon by the parties or appointed by the Governor upon the disqualification of the regular county judge in either a civil suit or a probate case, is entitled to 1/365 of the annual salary of the county judge for each day that he serves. You further ruled

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that such payment was to be made out of the regular officer's salary fund.

"We ask you the following questions:

"1. Is the regular judge's salary to be reduced by the amount that is paid to the special judge?

"2. Would the same hold true if the regular county judge is not disqualified, but fails to act by reason of illness, other inability or by taking a short vacation, and a special judge is elected by the practicing lawyers to serve as provided for by Article 1934 of the 1925 Revised Civil Statutes?

"3. In determining the amount of compensation to be paid to the special county judge, should the additional compensation which the regular county judge receives as a member of the juvenile board be included in the calculation?"

In your letter you refer to our opinions Nos. O-722 and O-1234. The first opinion mentioned was written by Hon. Edgar Cale, Assistant Attorney General, and directed to Hon. Fred C. Porter, County Attorney, Kaufman, Texas and holds that a special county judge whether serving in a general capacity or in a probate capacity, only should be compensated on the following basis:

The annual salary of the judge of the county court divided by three hundred and sixty-five and the quotient multiplied by the number of days actually served by such special judge, and that this compensation should be paid from the Officers' Salary Fund of the county.

Opinion No. O-1234 was written by Hon. Wm. J. Fanning, Assistant Attorney General, directed to Hon. Dwight Whitwell, Assistant County Attorney, Collins County, and holds directly in accord with opinion No. O-722.

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Article 1933, Vernon's Civil Statutes, reads as follows:

"Whenever the county judge or the special judge shall be disqualified from trying a case, the parties or their counsel may agree upon an attorney for the trial thereof; and, if they shall fail to agree upon an attorney at or before the time it is called for trial, or if the trial of the case is pending and the county judge should become unable to act, or is absent, and a special judge is selected who is disqualified to proceed with the trial, and the parties then fail to select or agree upon a special judge who is qualified, the county judge or special judge presiding shall certify the fact to the Governor immediately, whereupon the Governor shall appoint a special judge, qualified to try same. Such appointment may be made by telegram or otherwise. The special judge shall proceed to the trial or disposition of such case. Any special judge agreed upon or appointed to try cases shall receive the same pay for his services as is provided by law for county judges."

Articles 554, 555, and 556, Code of Criminal Procedure provide that when the judge of the county court or county court at law is disqualified in any criminal case pending in the court of which he is a judge, that the parties may, by consent, agree upon a special judge to try such case and if the parties fail to agree upon a special judge to try such case on or before the third day of the term at which such case may be called for trial, the judge presiding shall forthwith certify that fact to the Governor who shall appoint some practicing attorney to try the case. These statutes further provide that the attorney agreed upon or appointed shall, before he enters upon his duties as special judge, take the oath of office required by the Constitution and that the clerk of the court shall enter in the minutes, as a part of the proceeding in such cause, a record showing that the judge of the court was disqualified to try the cause, that the special judge (naming him) was by consent of the parties agreed upon and was appointed by the Governor to try the cause, and that the oath of office prescribed by law had been duly administered to such

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special judge.

Article 557, Code of Criminal Procedure, reads as follows:

"A special judge selected or appointed in accordance with the preceding articles shall receive the same compensation as provided by law for regular judges in similar cases."

Bexar County had a population of two hundred and ninety-two thousand five hundred and thirty-three (292,533) inhabitants according to the last Federal Census, and paragraph (d) of Section 19 of Article 3912e, Vernon's Civil Statutes, specifically designates the amount of salaries to be paid county officials in counties having a population in excess of One Hundred and Ninety Thousand inhabitants. Therefore, Bexar County would come within the provisions of paragraph (d) of Section 19 of Article 3912e, wherein the salaries of the county officials of such counties are definitely provided. Section 15 of Article 5142b, Vernon's Civil Statutes provides additional compensation for county judges of counties having the population designated in Article 3912e as members of the county Juvenile Board in such counties.

Sections 1, 2 and 15 of Article 5142b, Vernon's Civil Statutes, read as follows:

"Section 1. That the provisions of this Act shall apply to and affect such counties only in the State of Texas as have, according to the last preceding Federal Census, a population of not more than three hundred and twenty thousand (320,000) inhabitants, and not less than two hundred and twenty thousand (220,000) inhabitants, according to the last preceding or any future Federal Census.

"Section 2. The Juvenile Board of such counties shall be composed of the Judges of the several District and Criminal District Courts, thereof, together with the County Judge thereof.

"Section 15. The members composing said Juvenile Board in such counties, on account

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of the additional duties hereby imposed on them, are each hereby allowed an additional compensation of Seventy-five (\$75.00) Dollars per month to be paid by the Commissioners' Court in such counties, and the same to be in addition to all other compensation now allowed by law to such officers."

In the case of Holland vs. Harris County, 102 SW 2nd, 196, a decision of the Commission of Appeals of the State of Texas, adopted by the Supreme Court, it was held that a special judge of a criminal district court of Harris County, acting in the absence of the regular judge was entitled to compensation on a basis of salary, payable to the regular district judges of that county, including salary payable to the regular district judges as members of the Juvenile Board, notwithstanding the special judge performs no duties as a member of the Juvenile Board, and that the amount allowed regular judges for services performed as members of the board, was allowed as part of their annual salary and not merely as additional compensation.

In view of the foregoing authorities, we answer your questions as follows:

1. The regular judge's salary is not to be reduced by the amount that is paid to the special judge. The regular judge is entitled to his full compensation as allowed by law, although it is necessary for a special judge to act in certain instances.

2. The same answer applies to your second question as it is immaterial whether the judge was disqualified or failed to act by reason of illness or some other inability or by taking a short vacation. It must be assumed that the regular judge will faithfully perform his duties and act in all cases except where he is disqualified or is unable to act by reason of some legal excuse.

3. In determining the amount of compensation to be paid to the special county judge, the additional compensation which the regular county judge receives as a member

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of the Juvenile Court should be included in the calculation in arriving at the amount which the special county judge is entitled to.

Trusting that the foregoing fully answers your inquiry, we remain

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

Ardell Williams
Assistant

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APPROVED DEC 19, 1939

Gerard B. Mann

ATTORNEY GENERAL OF TEXAS

