

Opinion No. 57-266

October 16, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Hon. Walter R. Kegel, District Attorney, First Judicial District, Santa Fe, New
Mexico

QUESTION

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Does the Penitentiary have the right, subject to the approval of the Governor, to pay former Warden Swenson mileage and per diem, at the regular out-of-state travel rates, to come from San Pedro, California to Santa Fe, New Mexico to testify in the case of State of New Mexico vs. Dr. R. F. Boone, based on his contractual relationship with this State as former Warden?

CONCLUSION

Yes.

OPINION

ANALYSIS

The General Appropriation Act, being Ch. 235, Laws 1957, provides, in part (Ch. 235, § 9-A, also being § 11-4-4, § 9-A), as follows:

"No officer or employee of the state shall be allowed or paid any sum for transportation, lodging or subsistence, except when traveling away from his designated post of duty on official business, nor in excess of necessary traveling expense actually incurred and paid; except that state officers and department heads may allow in lieu of actual expenses for lodging and subsistence a sum not to exceed ten dollars (\$ 10.00) per day, the rate allowed being at the discretion of the state board of finance. The maximum rate which may be allowed for travel by privately owned cars shall be ten cents (\$ 0.10) per mile. Any state officer or department head authorizing the use of a privately owned car shall file such written authorization with the de-department of finance and administration prior to submitting vouchers in payment of such use."

It is understood from the information furnished along with the above submitted question, that Harold R. Swenson, at the time of filing the stated criminal action and some months prior thereto, was the duly appointed and acting Superintendent (Warden) of the New Mexico State Penitentiary, but that he is presently residing in the State of California and

employed by the Federal Prison Bureau. There is further indication that during the entire period of investigation, which gave rise to the stated action, the said warden personally acquired knowledge and information which has been relied upon by the appropriate state prosecuting officials.

By virtue of Warden Swenson's instigation and conduct of investigations which served as a basis for the prosecution considered, it may well be reasoned that a constructive official relationship exists, for the purposes and during the pendency of the considered case, with the State of New Mexico. The State had a contract of employment with him at that time, and the portion of the duties he was employed to perform are not yet complete; so, until completion we must carry out our side of such contract, as well as expect the former Warden to fulfill his side.

Accordingly, it is our opinion that the New Mexico State Penitentiary may properly allow travel and subsistence reimbursement to former Warden Swenson in accordance with the procedure provided in § 11-4-4, supra, subject to authorization by the Governor, in writing, as called for in § 11-4-4, 9-B, N.M.S.A., (ps).