

N.D.A.G. Letter to Falck (April 10, 1986)

April 10, 1986

Mr. Thomas H. Falck, Jr.
Grand Forks County Assistant State's Attorney
P. O. Box 607
Grand Forks, North Dakota 58206-0607

Dear Mr. Falck:

Thank you for your letter dated December 24, 1985. I apologize for the delay in responding.

In your letter, you requested an Attorney General's opinion as to whether the clerk of Grand Forks County District Court may keep fees received for the issuance of passports if her duties are outside of those set forth by statute.

N.D.C.C. §11-10-14 provides as follows:

11-10-14. FEES RECEIVED BY COUNTY OFFICERS TURNED OVER TO COUNTY TREASURER. The salaries fixed by this chapter shall be full compensation for all county officials, deputies, clerks, and assistants, respectively, and all fees and compensation received by any official, deputy, clerk, or assistant for any act or service rendered in his official capacity shall be accounted for and paid over monthly to the county treasurer and be credited to the general fund of said county, except that such official, deputy, clerk, and assistant shall be entitled to retain such fees as now are allowed to him and permitted by law or as may be hereafter permitted and allowed. [Emphasis supplied.]

This section clearly requires county officials, deputies, clerks, and assistants to turn over to the county all fees received as compensation for services performed by these county officials if such services were performed by virtue of official capacity. Therefore, in order to resolve the question of retention of fees by a clerk of district court for the issuance of passports, it is necessary to determine whether the issuance of passports can be construed to be an official act.

There is no statutory mandate which requires the clerk of district court to issue passports. It would appear that in so doing, the clerk acts as an agent for the United States Department of State at the request of the Department of State. In addition, it would appear that the clerk issues passports during working hours through the use of county equipment. In view of this situation, an argument could be made both to support the proposition that the clerk is acting in an official capacity and the proposition that the clerk is acting only as an agent of the Department of State.

The North Dakota Supreme Court has considered the matter of retention of fees by county officials in several cases. County of Sargent v. Sweetman, 150 N.W. 876 (N.D. 1915); Dickey County v. Austin, 237 N.W. 831 (N.D. 1931); Appeal of Peschel, 4 N.W.2d 194 (N.D. 1942). These cases established a general rule that fees received by county officials for the rendition of acts which are wholly voluntary and are not part of their official duties may be retained by county officials as their individual remuneration for the services rendered. The Court gave a broad construction to those acts which are unofficial in nature.

However, subsequent to the decisions of the North Dakota Supreme Court in the Austin and Sweetman cases, an initiated measure amending N.D.C.C. §11-10-14 which fixed the salaries of county officers was approved by popular vote. Section 8 thereof provides as follows:

§8. The salaries fixed by this act shall be full compensation for all said officials, deputies, clerks and assistants respectively, and all fees and compensation received for any act or service rendered in official capacity, shall be accounted for and paid over by them monthly to the County Treasurer and be credited to the general fund of said county. 1933 N.D. Sess. Laws 497, §8.

In Appeal of Peschel, the clerk of district court was allowed to retain a 10¢ fee for each application for a driver's license received by the clerk, which fee was specifically allowed by statute as an additional fee which the clerk was permitted to receive for such service.

Immediately following the court's decision in Appeal of Peschel, the Legislature, in 1943, again amended N.D.C.C. §11-10-14 to include the following:

. . .except that such officials, deputies, clerks and assistants shall be entitled to retain such fees as are now allowed and permitted them by law, or as may be hereafter permitted and allowed. 1943 N.D. Sess. Laws 153.

In view of the legislative amendments to N.D.C.C. §11-10-14, it would appear that if the question of retention of fees by county officials were again considered by the court, a result contrary to the decisions in the Austin and Sweetman cases might be reached.

In addition, N.D.C.C. §11-17-05 provides as follows:

11-17-05. CLERK TO KEEP RECORD OF FEES--MONTHLY REPORT TO COUNTY AUDITOR. The clerk of the district court shall keep a public record of all money received as fees for services rendered as clerk. Within three days after the close of each calendar month and also at the close of the clerk's term of office, the clerk shall file with the county auditor a statement under oath showing the amount of fees received as clerk since the date of the clerk's last report, and within three days thereafter the clerk

shall deposit with the county treasurer the total sum of such fees, except fees which the clerk is authorized expressly to retain. [Emphasis supplied.]

There is no express statutory authorization which permits the clerk of district court to retain fees received for the issuance of passports. Therefore, in view of the present provisions of N.D.C.C. §11-10-14 and the provisions of N.D.C.C. §11-17-05, it would not be advisable for the clerk of district court to personally retain fees for the issuance of passports.

Sincerely,

Nicholas J. Spaeth

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