

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-09

Date issued: June 21, 1991

Requested by: Daniel G. Diemert, Dickey County State's Attorney

- QUESTION PRESENTED -

Whether N. D. C. C. ' 11-15-08 authorizes a sheriff to receive a commission if the sheriff has not received and disbursed moneys in enforcement of an execution.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that N. D. C. C. ' 11-15-08 does not authorize a sheriff to receive a commission if the sheriff has not received and disbursed moneys in enforcement of an execution unless personal property has been taken by the sheriff on an execution and is applied in satisfaction of the debt without sale of such property.

- ANALYSIS -

N. D. C. C. ' 11-15-08 provides:

- 11-15-08. Commissions collected by sheriff.
1. Except as provided in section 11-15-09, the sheriff is entitled to collect commissions on all moneys received and disbursed by the sheriff on an execution, order of sale, order of attachment, requisition in claim and delivery, or decree for the sale of real or personal property as follows:
 - a. On the first one thousand dollars, fifty dollars.
 - b. On all moneys in excess of one thousand dollars, one percent.
 2. If personal property is taken by the sheriff on an execution, under a requisition in claim and delivery, or under a writ of attachment and applied in satisfaction of the debt without sale, the sheriff is entitled to collect the commission specified in subsection 1 based upon the appraised value of the property. The sheriff shall deliver the commissions to the county treasurer under section 11-15-14.

In a March 3, 1961, opinion to McLean County State's Attorney John Romanick, Attorney General Leslie H. Burgum concluded that N. D. C. C. ' 11-15-08

commissions are recoverable by a sheriff after the sheriff has levied on property of the judgment debtor pursuant to an execution, but, prior to sale after the levy, payment of the judgment was made by the debtor. Attorney General Burgum concluded that once a levy had been made by the sheriff, the commission was to be based upon the amount of the settlement carried out by the parties to the action even though the sheriff received and disbursed no money pursuant to the levy.

In a January 25, 1983, letter to Special Assistant Attorney General James M. Vukelic, Attorney General Robert O. Wefald concluded that N. D. C. C. ' 11-15-08 did not permit a sheriff to receive a commission when a judgment debtor pays a judgment creditor prior to a sale on a special execution because the sheriff has not received or disbursed moneys upon enforcement of court process. Attorney General Wefald concluded that a commission payment would provide a windfall to a sheriff who did not actually have to take custody and control of moneys from the sale of property.

Because of the conflict between my predecessors concerning interpretation of N. D. C. C. ' 11-15-08 upon the identical question, it is necessary for me to resolve this conflict. To the extent that this opinion is inconsistent with those of my predecessors, this opinion prevails.

N. D. C. C. ' 11-15-08 is comprised of two parts, each of which is a legislative effort to define when commissions may be received by a sheriff for enforcement of court process.

N. D. C. C. ' 11-15-08(1) permits the sheriff to receive a commission on "all moneys received and disbursed by him" on an execution or other court process. This subsection contemplates that the commissions will be applied to proceeds from a sale of property or money which has been seized pursuant to the execution.

The wording of N. D. C. C. ' 11-15-08(1) directs that the sheriff receive a commission on "all moneys received and disbursed by him" in enforcement of court process. When the wording of a statute is clear and free of all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. N. D. C. C. ' 1-02-05. The rules of construction will not be utilized where the words of a statute are plain and unambiguous. Fredrickson v. Burleigh County, 139 N.W.2d 250 (N.D. 1965). N. D. C. C. ' 11-15-08(1) unambiguously provides that the sheriff will receive the commissions on only moneys "received and disbursed by him" in enforcement of the court process. If the sheriff has not received and disbursed moneys as required by this section, the sheriff is not entitled to the commission pursuant to N. D. C. C. ' 11-15-08(1).

N. D. C. C. ' 11-15-08(2) authorizes the sheriff to receive a commission upon the appraised value of personal property which has been taken by the sheriff on an execution or other court process and which has been applied in satisfaction of the debt without sale. In other words, if the sheriff has taken property pursuant to court process and the property taken is applied in satisfaction of the debt without sale so that there is no monetary sale proceeds, the sheriff

will be entitled to receive a commission to the extent of the appraised value of that property. There is no requirement in N.D.C.C. ' 11-15-08(2) that the sheriff receive and disburse moneys before the sheriff is entitled to the statutory commission.

Personal property is "taken" by a sheriff on an execution by the making of a levy. N.D.C.C. ' 28-21-08. Once a levy has been made, a lien attaches to that personal property. Jamestown Terminal Elevator, Inc. v. Knopp 246 N.W.2d 612 (N.D. 1976). Pursuant to N.D.C.C. ' 11-15-08(2), once a sheriff has made a levy upon personal property, if that personal property levied upon is applied to the satisfaction of the debt then the sheriff is entitled to a commission based upon the appraised value of that personal property if the property is applied to satisfy the debt.

Identifiable guidelines are necessary to avoid confusion and uncertainty when determining both the amount of the sheriff's commission and the money or property subject to the commission. If in all cases only a levy is required before commissions may be charged, considerable uncertainty as to the application of N.D.C.C. ' 11-15-08 is created. As an example assume a sheriff levies upon property which could be claimed as exempt by a debtor. The debtor and creditor reach an agreement for settlement of the action prior to the time period necessary to claim the exemptions. A sheriff cannot sell or retain exempt property and would not be entitled to a commission. However, a broad reading of N.D.C.C. ' 11-15-08 would authorize the sheriff to receive a commission upon money or property which could be claimed as exempt if the settlement had not been reached. In other words, the sheriff could receive a commission upon money or property that he would not otherwise be entitled to if a full or partial exemption had been claimed.

In addition, uncertainty may exist if money or property different than the money or property levied upon was used to pay the debt. This money or property may be from sources other than under the direct control of the debtor. Such property may not have been levied upon or otherwise be subject to the custody or control of the sheriff.

In the enactment of a statute, it is presumed that a result feasible of execution is intended. N.D.C.C. ' 1-02-38(4). To ensure an identifiable basis for determining the amount of a sheriff's commission and the money or property subject to the commission, it is my opinion that, if moneys are received and disbursed by the sheriff, N.D.C.C. ' 11-15-08(1) authorizes the sheriff to receive a commission upon the moneys actually received and disbursed. If no moneys are received and disbursed by the sheriff, the sheriff will not be entitled to a commission unless N.D.C.C. ' 11-15-08(2) applies.

As to N.D.C.C. ' 11-15-08(2), if the sheriff has "taken" personal property by virtue of his levy and such property is not sold but is applied to the satisfaction of the debt, the sheriff is entitled to a commission upon the appraised value of that property. However, if the actual property levied upon is not used to satisfy the debt, the sheriff cannot receive a commission

pursuant to N. D. C. C. ' 11-15-08. In addition, if property not levied upon is used to satisfy the debt, the sheriff is not entitled to a commission under this section.

The conclusions drawn in this opinion are necessary to ensure an identifiable basis for determining the amount of the sheriff's commission and the money or property subject to that commission. A sheriff, in enforcing an execution or other court process, is not acting as an agent for the creditor or debtor but as an officer of the court. The sheriff is entitled to a commission in enforcement of this court process if such enforcement is within the limits prescribed by the North Dakota Legislature in N. D. C. C. ' 11-15-08. Any extension of these limits must be accomplished by legislative action.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

Assisted by: Robert P. Bennett
Assistant Attorney General

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