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NO.
STATE OF NEBRASKA
OFFICE
NOV 22 1994
DEPT. OF JUSTICE

DATE: November 21, 1994

SUBJECT: Public Officials; Entitlement To Fees Received For Licenses, Permits And Other Services

REQUESTED BY: John Breslow
Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an Opinion of the Attorney General regarding the proper disposition of various fees received by the County Clerk, the County Sheriff, and the Clerk of the District Court. You have briefly described certain services performed by the public officials and your specific question is, ". . . who is to receive moneys collected for fees earned while an individual is acting on the behalf of or in the official capacity of an elected official." You indicate that the fees are being handled inconsistently in that, in some instances, fees are being retained by the officials and in other instances, the fees are being remitted to the county treasurer.

At the outset, we point out that the issues you raise by your question are highly factual in nature and the statutes do not address some of the services you describe nor the disposition of fees. Further, the services may be rendered pursuant to a contract entered into by a public official and the disposition of fees in that circumstance would be governed by the terms and provisions of the contract. The general rule is that county and public officials must remit administrative fees received in their official capacity to the county treasurer. Set forth below is our analysis regarding

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the services performed by the officials and the disposition of fees you have inquired about.

I. COUNTY SHERIFF

"Deer-tagging fees earned by a County Sheriff or their employees for identifying deer and comparing them to permits issued by Game and Parks."

It is the duty of county officials, including the sheriff, to charge and collect fees set by statute for official services. Commissions and fees received in performance of official duties by the sheriff must be reported to the county board and remitted to the county treasurer. *See* Neb. Rev. Stat. § 33-117 (1993).

The services you have described do not appear to be official duties that a sheriff is required by law to perform. Generally described, official duties and responsibilities of the sheriff include maintaining the peace, enforcement of the criminal laws of the state, and exercise of powers and duties conferred and imposed by statute and the common law. The powers and duties are generally provided under the provisions of Neb. Rev. Stat. §§ 23-1701 to 23-1720 (1991 and Cum. Supp. 1994).

The Nebraska Supreme Court has addressed the question regarding fees and compensation received by county sheriffs. In viewing this question, the Court has held that county sheriffs may receive additional compensation for performance of other duties such as jailer. ***Dorrance v. County of Douglas***, 149 Neb. 685, 32 N.W.2d 202 (1948); ***Iler v. Merrick County***, 96 Neb. 114, 147 N.W. 118 (1914). In Op. Atty Gen. No. 327, October 24, 1980, it was concluded that an increase in jailer fees which may or would be received by a county sheriff is not an increase in compensation of the sheriff in violation of the Constitution. Since the services you have described are not official duties of a county sheriff, we believe that a county sheriff appropriately may retain fees for performance of the services you describe.

Neither Nebraska statutes nor rules and regulations of the Game and Parks Commission address the performance of tagging or identifying deer to compare with game permits. Reportedly, the Game and Parks Commission contracts with local officials and other individuals for performance of these services. Accordingly, entitlement to the fees in question would be a matter of contract. Generally, the terms and provisions of the contract would govern

and determine the entitlement to fees for performance of the services.

II. COUNTY CLERKS

A. "Game and Parks permit fees earned by a County Clerk or their employee for issuing Game and Parks permits to the public for parks, hunting and fishing."

Fees received by county clerks from sale of hunting and fishing permits and park entry permits must be remitted to the Secretary of the Game and Parks Commission pursuant to the provisions of Neb. Rev. Stat. §§ 37-205 and 37-1113 (1993). For purposes of your question, we assume that you are inquiring about the administrative fees permitted to be collected rather than the permit fees. Permits to hunt and fish may be procured from persons and corporation designated by the Commission to issue permits and collect the fees. Any person, firm, or corporation authorized by the Commission to sell permits may collect and retain an additional fee ranging from fifty cents to one dollar for each permit issued pursuant to Neb. Rev. Stat. § 37-203 (1993).

The issue raised by your question is the same issue raised with respect to entitlement to fees earned by county sheriffs. That is, whether sale of the permits are official duties of the public official. If sale of the permits fall with the scope of official duties, then the administrative fees necessarily would be remitted to the county treasurer and may not be retained by the county clerk. In ***Hoctor v. State***, 141 Neb. 329, 3 N.W.2d 558 (1942), the Nebraska Supreme Court addressed the question whether administrative fees for issuing certificates of title and for notation of liens and cancellation could be retained by the county clerk. The ***Hoctor*** court concluded that the fees belonged to the county and could not be retained by the county clerk since the fees were collected by the county clerk in his official capacity. That is, the services the county clerk performed were duties required by law.

In another case addressing fees received by a county official, the Nebraska Supreme Court concluded that a county treasurer could retain fees for issuing motor vehicle licenses since the duties delegated to the county treasurer are outside the scope of his office. ***See Mehrens v. Bauman***, 120 Neb. 110, 231 N.W. 701 (1930).

The statutes do not require that county clerks issue or sell park and game permits and it would seem that these services would

be outside the scope of official duties of a county clerk. The duties and responsibilities of county clerks are provided in Neb. Rev. Stat. §§ 23-13-1 to 23-1312 (1991 and Cum. Supp. 1994). In addition to specific statutory duties, the county clerk is required to maintain records of county board proceedings, resolutions, and decisions and maintain the county inventory of personal property. Accordingly, it is our conclusions that a county clerk appropriately may retain administrative fees for issuance and sale of game and park permits.

B. "Notary fees earned by a County Clerk for notarizing a document."

County officials are expressly required by statute to remit fees received for taking acknowledgements to the county treasurer whether received by the official acting in an official capacity or as a notary public. Neb. Rev. Stat. § 33-153 (1993) states:

> All fees received for taking acknowledgements, oaths and affirmations, by any county officer, or any deputy or employee in his office, whether received for taking acknowledgements, oaths and affirmations, in an official capacity as a county officer or while acting in the capacity of a notary public, must be reported to the county board and paid into the county treasury. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not in excess of one hundred dollars. Any county officer or deputy so offending shall also be subject to removal from office.

(Emphasis added). Based on these express provisions, it is our conclusion that notary fees received by a county clerk must be remitted to the county treasurer.

IV. CLERK OF THE DISTRICT COURT

"Passport fees earned by a Clerk of District Court for issuing passports to the public."

The general duties of a clerk of the district court are set forth in Neb. Rev. Stat. §§ 25-2204 to 25-2214.01 (1989 and Cum. Supp. 1994). Briefly summarized, official duties involve keeping the required records of the court which include the appearance docket, the trial docket, the journal, the complete record, the execution docket, the fee book, the general index, and the judgment

record. All writs and orders for provisional remedies and legal process of every kind are issued by the clerks of the district courts. All properties and moneys are to be managed, invested, and returned to proper parties.

Any fees or other revenue provided for in Nebraska statutes may not be retained by clerks of the district courts. Neb. Rev. Stat. § 33-106.02 (1993) states:

> The clerk of the district court of each county shall not retain for his or her own use any fees, revenue, perquisites, or receipts, fixed, enumerated, or provided in this or any other section of the statutes of the State of Nebraska. The clerk shall on or before the fifteenth day of each month make a report to the county board, under oath, showing the different items of such fees, revenue, perquisites, or receipts received, from whom, at what time, and for what service, and the total amount received by such officer since the last report, and also the amount received for the current year. The clerk shall account for and pay any fees, revenue, perquisites, or receipts not later than the fifteenth day of the month following the calendar month in which such fees, revenue, perquisites, or receipts were received in the following manner: (1) Of the forty-dollar docket fee imposed pursuant to section 33-106, five dollars shall be transmitted to the State Treasurer who shall deposit the same in the General Fund; and (2) the remaining fees, revenue, perquisites, or receipts shall be credited to the general fund of the county.

(Emphasis added).

We have found no statutes which impose a duty on the clerk of the district court to issue U.S. passports nor have we found any statutory authority that specifically addresses the disposition of fees earned for issuance of passports.

The issuance of passports is under the jurisdiction of the U.S. Secretary of State pursuant to 22 U.S.C.A. § 211a and governed by Title 22 of the Code of Federal Regulations (CFR). The federal regulations include the clerk of a state court as an official authorized to give oaths and issue passports. *See* 22 CFR § 51.21(b) (1994). The federal regulations also provide that an administrative fee may be charged and collected for execution and

issuance of a passport. 22 CFR § 51.21(b)(3) (1994) in material part states:

> . . . the fee for execution of an application for a U.S. passport is $10.00, which shall be remitted to the U.S. Treasury when an application is executed before a federal official, but which may be collected and retained by any state official before whom an application is executed. . . .

State statutes and federal regulations do not address whether the fees belong to the state official, state agency or other political division. However, the issue regarding entitlement to passport execution fees has been reviewed by the Supreme court of Montana in ***Platz v. Hamilton***, 653 P.2d 144 (Mont. 1982). In this case, the clerk of a Montana district court filed an action for declaratory relief to determine whether the clerk of the court was required to remit the fees received for issuance of passports to the county treasurer. The Montana Court found that the clerk is not required to remit fees to the county general fund since no statute imposed a duty on the clerk of the district court to issue passports, and no statute provided for the disposition of the fees.

The Nebraska Supreme Court arrived at a similar conclusion in a case involving naturalization fees retained by the Clerk of the District Court for Douglas County. In ***State, ex rel. Douglas County v. Smith***, 102 Neb. 82, 165 N.W. 896 (1917), the county brought a lawsuit to require the clerk to pay into the county treasurer a portion of naturalization fees collected and retained by the clerk of the district court. The Court held that Nebraska statutes did not require the clerk of the district court to account to the county for naturalization fees he was authorized to collect and retain under federal statute. We believe the rationale of the ***Platz*** and ***Smith*** cases are applicable to the issue regarding the disposition of passport fees received by a Nebraska clerk of the district court. That is, since the execution of applications and issuance of passports are not mandatory duties imposed by federal or state law, and since Nebraska statutes do not require payment to the county or state, the passport execution fees may be retained by the clerk of the district court. Accordingly, it is our conclusion that execution fees for issuance of passports appropriately may be retained by clerks of district courts.

While we conclude the administrative fees may be retained, we point out that clerks of courts exercise powers and perform duties under the direction of the court. ***See*** Neb. Rev. Stat. § 25-2214

(1989). Thus, a court may direct the disposition of fees received by a clerk of the district court not otherwise provided for by statute.

Sincerely,

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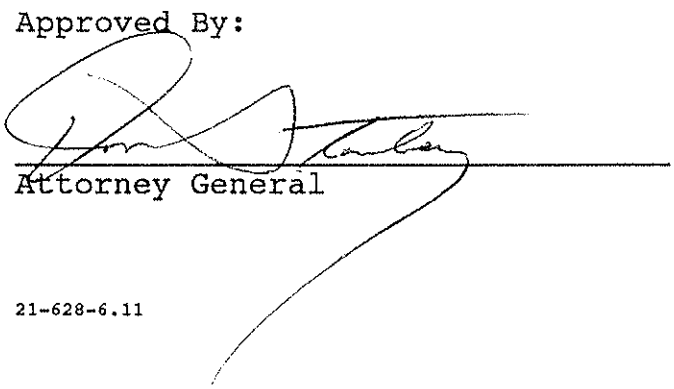
Approved By:



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