

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-20

Date Issued: October 28, 1996

Requested by: Bruce A. Selinger, Slope County State's Attorney

- QUESTION PRESENTED -

Whether a municipal court judge or city governing body has supervisory authority over a municipal court clerk or deputy clerk.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the separation of powers doctrine in the North Dakota Constitution places a municipal court clerk or deputy clerk under the supervision of the municipal court judge when performing a judicial function on behalf of the court, but that the clerk or deputy clerk is otherwise under the supervision of the city governing body or a designated city employee.

- ANALYSIS -

The North Dakota Constitution vests the judicial power of the state in a unified judicial system administered by the North Dakota Supreme Court. N.D. Const. art. VI, §§ 1, 3. The North Dakota Supreme Court has recognized the existence of the separation of powers doctrine under the North Dakota Constitution:

[I]rrespective of the fact that a constitution does not contain a general distribution clause expressly providing for the division of governmental powers among the legislative, executive, and judicial branches of government . . . , the creation of those branches of government operates as an apportionment of the different classes of power. As all of the branches derive their authority from the same constitution, there is an implied exclusion of each branch from the exercise of the functions of the others.

City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969). Thus, under the separation of powers doctrine, the judiciary's

authority over the unified judicial system is exclusive, except as otherwise limited by the North Dakota Constitution.

The unified court system is composed of the supreme court, district courts, and other courts as provided by law for cities. N.D. Const. art. VI § 1; N.D.C.C. § 27-01-01. Municipal courts are authorized in N.D.C.C. §§ 40-05.1-06(5), 40-14-01, and 40-15-01. The powers and duties of a municipal court clerk are addressed in N.D.C.C. § 40-18-06.1, which provides:

The governing body of a city may appoint any qualified person to serve as municipal court clerk for municipal ordinance violations. A municipal court clerk is entitled to receive a salary as fixed by the governing body and has that authority which may be assigned by a judge having jurisdiction over municipal ordinance cases of the city. The supreme court may adopt rules for the qualifications of municipal court clerks, the extent and assignment of authority by municipal court judges, and the conduct of the office, including rules for training sessions and for continuing education.

The use of the permissive word "may" in this section indicates that the decisions to appoint a municipal clerk and establish the clerk's salary, like the decision to have a municipal judge, are left to the discretion of the city governing body.<sup>1</sup> However, once appointed, municipal court clerks and their deputies, like independently elected district court clerks and their deputies, serve as adjuncts to the judge and are part of the judicial branch of government. See 1994 N.D. Op. Att'y Gen. 76, 78. See also Petuskey v. Cannon, 742 P.2d 1117, 1121 (Ok. 1987); Crooks v. Maynard, 732 P.2d 281, 284 (Idaho 1987); 15A Am. Jur. 2d Clerks of Court § 1 (1976); 21 C.J.S. Courts § 236 (1990). This conclusion is reinforced by the fact that the statute providing for municipal court clerks is located in the same chapter of the code in which the powers of the municipal court judge are defined.

The question presented is who supervises the municipal court clerk or deputy clerk, particularly when the city governing body has adopted a

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<sup>1</sup> The appointment of a full-time municipal court clerk for cities with a population exceeding 10,000 is strongly recommended by the North Dakota Supreme Court under Administrative Rule 30, which also strongly recommends that the clerk be paid out of funds budgeted to the municipal judge.

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home rule charter and wants to place the clerk or deputy clerk under the supervision of another city employee. In answering this question, N.D.C.C. § 40-18-06.1 must be interpreted to avoid constitutional questions if possible. Medical Arts Clinic v. Franciscan Initiatives, Inc., 531 N.W.2d 289, 301 (N.D. 1995); Kottsick v. Carlson, 241 N.W.2d. 842 (N.D. 1976).

Courts in other jurisdictions have addressed the application of the separation of powers doctrine to a court's control over a clerk or deputy clerk. The Supreme Court of Idaho has held:

The legislature cannot exercise any supervisory power over the clerk of the district court when exercising judicial functions, because the clerk is an arm of the judicial branch. The officer, when wearing a judicial hat, can only be supervised by an appropriate judicial official.

Crooks, 732 P.2d at 286. Drawing a bright line between judicial and non-judicial functions is difficult. The court in Crooks concluded that although the court cannot dictate who shall be hired or at what rate of pay, the court can set minimum qualifications for personnel performing judicial functions. Id. at 286-87. A similar result was reached by the Supreme Court of Oklahoma, which concluded:

A judge does not have the right to tell [the] deputy when to come to work, but the judge does have the right to tell [the deputy] when to be in the judge's chambers or courtroom. The judge may tell [the] deputy clerk when [the clerk's] duties are completed for the day, but not when the deputy may leave the courthouse. Furthermore, it is the duty of the clerk to furnish a judge necessary personnel when the judge deems it essential to the orderly and efficient operation of the court.

Petuskey, 742 P.2d at 1123.

These cases can be distinguished because they involved an independently elected clerk rather than a clerk appointed by a city governing body. However, both cases analyzed the supervisory authority of the judiciary over court clerks or deputies under a unified judicial system. The same application of the separation of powers doctrine applies to the circumstances described in this opinion. Therefore, I conclude that supervisory authority over the performance of judicial functions by clerks and deputy clerks belongs exclusively to the judiciary.

Applying N.D.C.C. § 40-18-06.1 in conjunction with the separation of powers doctrine, neither the municipal court judge nor the city governing body has complete control or supervisory authority over a municipal court clerk or deputy clerk. Under N.D.C.C. § 40-18-06.1 and as a matter of constitutional law, the municipal court judge has authority to assign specific duties and supervise the performance of judicial functions by clerks or deputy clerks. This authority would include determining, as a preliminary matter, whether any clerk or deputy clerk appointed by the city governing body is sufficiently qualified to perform those duties or functions. The municipal court judge can properly prohibit an unqualified person from acting as a clerk or deputy clerk. See Crooks, 732 P.2d at 287. However, this authority would not extend to choosing the specific person appointed as clerk or deputy clerk, which is a non-judicial function expressly reserved to the city governing body under N.D.C.C. § 40-18-06.1. Similarly, although Administrative Rule 30 strongly recommends that the municipal court judge be provided with a separate budget from which to pay the salary of clerks or deputy clerks, the city governing body has the express authority to establish those salaries, N.D.C.C. § 40-18-06.1, and to set vacation times. See Petuskey, 742 P.2d at 1122.

In conclusion, nothing prohibits a city governing body, including a home rule city, from formally placing a municipal court clerk or deputy under the supervision of another city employee. However, the fact that municipal clerks and deputies are part of the judicial branch of government places them under the control of the unified judicial system when performing judicial functions. Unless the North Dakota Supreme Court has issued a rule or order controlling a particular subject or issue, the source of that control is the municipal court judge. Therefore, regardless of any formal personnel system or structure, it is my opinion that when a municipal court clerk or deputy clerk is performing a judicial function on behalf of the municipal court, the separation of powers doctrine in the North Dakota Constitution places the clerk or deputy clerk under the supervision of the municipal court judge as part of the unified judicial system rather than the city governing body or a designated city employee.

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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.

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