

**OPINION
67-50**

March 27, 1967 (OPINION)

Mr. Rodney S. Webb

State's Attorney

Walsh County

RE: Counties - Officers - Fees and Qualifications

This is in reply to your request for an opinion of this office with regard to disposition of sheriff's fees and commission and with regard to qualifications of an assistant state's attorney.

Your first question is stated as:

1. Section 11-15-07 N.D.C.C. as amended provides for collection of 'county fees' by the sheriff of a county, section 11-15-08 N.D.C.C. provides for collection of 'sheriff's commissions.' In each instance, we would appreciate your opinion as to who retains the fees or commissions collected. It is our impression that the amendment to section 11-15-07 indicates that these fees would belong to the county. However, section 11-15-08 has not been amended and leaves your writer in a state of quandary as to advice I should give to the sheriff in this matter."

The governing statute is section 11-10-14 of the North Dakota Century Code, which provides:

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."

An opinion of this office dated February 2, 1955, found at page no. 108 of the Report of the Attorney General for July 1, 1954, to June 30, 1956, refers to section 11-15-08 of the then North Dakota Revised Code of 1943, and states in part as follows:

It is the opinion of this office that all such moneys collected by the sheriff in his official capacity must be accounted for and turned over to the county. This includes the commissions collected by the sheriff on execution sales and in all other matters where he acts in his official capacity."

You might also see in this regard an opinion of this office dated January 7, 1946, found at page no. 252 of the Report of the Attorney General for the period July 1, 1944, to June 30, 1946; opinion of this office dated March 11, 1931, found at page no. 84 of the Report of the Attorney General for the period July 1, 1930, to June 30, 1932; the decision of the Supreme Court of this state in County of Stutsman v. Wright, 41 N.D. 167, 170 N.W. 326; and the decision of the Supreme Court of this state in Dickey County v. Austin, 61 N.D. 309, 237 N.W. 831.

On such basis it is our opinion that the purpose of the additional language inserted in section 11-15-07 of the North Dakota Century Code was to clarify the statement of the existent law rather than to change the interpretation of section 11-15-08.

Your second question relates to the appointment of state senator as assistant state's attorney for your county at a stated monthly emolument. You ask whether there is any conflict in appointing this senator to such office during the time the Legislature is not in session. We see no conflict or common law incompatibility between the offices of assistant state's attorney and member of the state senate. However, Section 37 of the North Dakota Constitution provides:

No judge or clerk of any court, secretary of state, attorney general, register of deeds, sheriff or person holding any office of profit under this state, except in the militia or the office of attorney at law, notary public or justice of the peace, and no person holding any office of profit or honor under any foreign government, or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of \$300, shall hold any office in either branch of the legislative assembly or become a member thereof."

Under the provisions of Section 47 of the North Dakota Constitution, as construed by the North Dakota Supreme Court, the Senate and the House respectively of the state of North Dakota would be the sole judge of the qualifications of its members. (State ex rel. Schmeding v. District Court, 67 N.D. 196, 271 N.W. 137.) We do not find judicial precedent covering precisely the situation you outline, however, we do not believe this section would disqualify the senator from accepting the office of assistant state's attorney.

Section 39 of the North Dakota Constitution provides:

SECTION 39. No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected."

We see no problem with this section--same not being applicable under the facts you present.

Article No. 51 of the Amendments to the Constitution provides:

The Governor or an officer of this State, or any manager or executive head, or other person employed either directly or indirectly in any department, bureau, commission, institution, or industry of this State, or any member of any State board shall not appoint a member of the Legislative Assembly to any civil office or employment of any nature whatsoever, during the term for which said member of the Legislative Assembly shall have been elected. No member of the Legislative Assembly shall accept any such appointment to civil office or other employment during the term for which he was elected."

It is our opinion that the state's attorney is basically a county official, a county being a political subdivision of the state rather than the state itself, and that, therefore, this section would not disqualify the senator from accepting the office of assistant state's attorney.

HELGI JOHANNESON

Attorney General