OPINION
70-102

May 14, 1970(OPINION)

Mr. Robert L. Striebel
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RE: Counties - County Judges - Fees for Certified Copies

This is in reply to your letters dated April 24, 1970, and May 8, 1970, with regard to fees to be charged by the County Judge for certified copies furnished upon request to interested parties.

We are enclosing herewith a copy of an opinion dated April 21, 1969, written by this office and addressed to the Judge of the County Court of Increased Jurisdiction of Burleigh County, with regard to this general subject. While obviously some of the statutes involved in that opinion relating to such fees in the County Court of Increased Jurisdiction differ from those applying to the County Judge where jurisdiction has not been increased, we do feel some interesting parallels can be drawn between the two situations.

We note your reference to the decision of our Supreme Court in County of Sargent v. Sweetman, 29 N.D. 256, 150 N.W. 876. The opinion in that case was filed as of January 9, 1915. The statutory enactment of a county judge's salary immediately preceding that decision, Chapter 218 of the 1911 Session Laws, make no reference to fees. The statutory re-enactment of county judge's salary at Chapter 112, Section 5 of the 1915 Session Laws, provided in part:

> "All moneys received as fees, of every nature, kind and description in his official capacity, or commission, and compensation for services on boards created by law, shall be paid by the County Judge at the end of each month into the general fund of the county."

The statutory re-enactment of the provision for county judge's salary in Section 3 of Chapter 108 of the 1929 Session Laws makes no reference to fees. Our Supreme Court in Dickey County v. Austin, 61 N.D. 309, 237 N.W. 831, opinion filed August 1, 1931, considered the Sweetman case heretofore cited and held:

> "If this question was here for the first time the decision might be the other way, but it is not here for the first time. The decision in the Sweetman Case has been the law for a great many years, and while the legislature has passed legislation relating to the salary of the county judge it has passed none requiring the county judge to make certified copies of records and to charge a fee therefor."

By initiated measure appearing at Pages 497 through 499 of the 1933 Session Laws, entitled "COUNTY OFFICERS' SALARY REDUCTION", it was provided in part of Section 8 thereof, as follows:

> "Section 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."

The remainder of the measure, in effect, did set a reduced salary for the various officers, including the county judge. If further information as to the intention of the people in adopting this measure is of interest, we note that the note before the body of the measure indicates that it is to, among other things, provide "for payment of all fees to the county."

Section 11-10-14 of the North Dakota Century Code contains the next revision of the language with regard to turning fees into the county 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."

Later revisions of the statutory provisions with regard to the county judge's salary do not have a specific re-enactment of the provision with regard to turning fees into the county.

There is a statutory provision for a clerk of the county court who does have the power concurrently with the judge to certify and sign as clerk and affix the seal of the Court to a transcript or exemplification of any record of the Court, (Section 27-07-25), which has remained virtually unchanged since 1895. While Chapter 27-07 does have provisions for filing fees, there is not provision therein for fees for certified copies. Also, there is no provision, such as section 27-08-13 of the North Dakota Century Code, with regard to the clerk of court of the county court of increased jurisdiction performing substantially the same duties in the same manner as the clerk of district court from whence the fee provision considered in the opinion enclosed herewith is implied. Actually we find no statutory provision specifying a fee for the certification of copies by the clerk of county court where such county court does not have increased jurisdiction, though obviously the county court would have authority by virtue of his office to make such certifications.

On this basis, the situation is not so clear with regard to the county judge as opposed to the county court of increased jurisdiction on the basis of statutory fees for the services in the case of the county court of increased jurisdiction. We note also that as of the time of the decision of our Supreme Court in the Sweetman and Austin cases, cited supra, there was no such provision as is now contained in Section 11-10-14 of the North Dakota Century Code or as was contained in Chapter 112, Section 5 of the 1915 Session Laws.

At this point we think it advisable to consider the reasoning of our Supreme Court in Sargent County v. Sweetman, as stated at Pages 261 and 262 of the North Dakota Reporter:

> "We are equally clear that amounts charged and collected by such officer for furnishing certified copies of records in his office may also be retained by him. It is not contended that there is any statute requiring such county judge to make and certify copies of such records, nor is there any statute prescribing any fee for such service. This being true, the act of furnishing such certified copies is not an official act exacted of him by law, but is a mere voluntary labor performed outside of his official duties and for the accommodation merely of persons desiring such copies. In other words, in furnishing such copies he acts in his individual rather than in his official capacity. It is true he makes the certificate by virtue of his official position, but he does nothing more than any other official might do who has power to certify to the correctness of copies made by him. We think respondent's counsel is entirely correct in their contention that the making and furnishing of such copies of records not being any part of his legal duties for which his salary is his compensation, he was at liberty to make any contract he saw fit in the way of compensation for such service, to be paid by the person employing him, and that such compensation belongs to him individually, and not to the county. * * *."

Numerous cases from other jurisdictions are cited in support of this premise. We note also in this case our Supreme Court's determination that the heretofore quoted provision of the 1915 Session Laws was still in effect as of that date and, on this basis, determined that marriage license fees must be turned in to the county.

Comparing the provision of the 1915 Session Laws with the current provision of Section 11-10-14, the substantial difference would appear to be the addition in said Section 11-10-14 of the provisions that "* * * The salaries fixed by this chapter shall be full compensation for all county officials, deputies, clerks, and assistants, respectively * * *", and the provision 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." The first provision of this current statute seems to be in accordance with the reasoning in the Sweetman and Austin cases, supra, though this does appear to be the first instance where the phrase, "full compensation", appears in our law. The latter quoted provision of the current statute would not necessarily retain the amount allowed in the reasoning of the Sweetman and Austin cases insofar as it does seem to be the primary premise of those cases that the amount received for making certified copies is not a "fee" under the then existent statutory provisions.

At this point we are constrained to wonder whether technological progress is of importance in arriving at a correct solution to this problem. Unquestionably, at the time of these cases the current proliferation of Thermofax, Xerox, etc., could not have been conceived by the average individual. At the current time, we would assume that most counties do make the copies to be certified by one of these modern processes. While unquestionably preparation of a copy at the current moment does involve "labor" and the costs of the maintenance of the machinery therefor, we assume that preparation of a copy does not, in most instances, involve the tedious labor or amount of time devolving personally on the county judge as it did in the time of the Sweetman and Austin cases. While the Sweetman case does consider the fact that the certificate is made by virtue of the official capacity of the judge, stating in part: "It is true he makes the certificate by virtue of his official position, but he does nothing more than any other official might do who has power to certify to the correctness of copies made by him.", is does appear to place very little importance on this function in the determination of the fee.

While we do not have a decision of our Supreme Court on the question you present under current legislation and technological situation, in view of these changes it is very possible that a different result would obtain. However, the Sweetman case still is the existing precedent, on which basis we would assume that the county judge is entitled to make appropriate charges and retain for the value of his labor or actual overhead costs he incurs in making the copy, though as in the Sweetman case it seems doubtful that a substantial charge could be made and retained by the county judge for the certification of the copy other than is charged and retained by any other official certifying to the correctness of a copy.

At this point we should also consider the provisions of Section 44-04-17 (first adopted as Section 1, Ch. 292, 1949 Session Laws) as follows:

> "VARIOUS OFFICERS' RESTRICTIONS - PENALTY. No public officer, member of any board, bureau or commission, nor any employee or appointee thereof, shall use his office or position for the purpose of effecting the sale or purchase of any equipment, merchandise or service for which he will benefit financially. Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and removal from office."

On this basis we would further assume that any part of the charge made representing overhead or expenses paid by the county, such as office space, secretarial help, office machines (such as typewriters, filing equipment), copying machines (Xerox, Termofax, etc), stationery, postage, etc., should probably be turned into the county.

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