

**LETTER OPINION**  
**94-L-97**

April 12, 1994

Mr. Ronald W. McBeth  
Richland County Assistant  
State's Attorney  
Law Enforcement Center  
413 3rd Avenue North  
Wahpeton, ND 58075

Dear Mr. McBeth:

Thank you for your March 3, 1994, letter requesting a clarification of North Dakota Attorney General's Opinion 93-21. You state that the district court judge has learned that in cases in which he has ordered that a probationer not pay a monthly \$30 supervision fee, the Department of Corrections, through its Parole and Probation Division, has been requiring the probationers to perform six hours of community service in lieu of the \$30 fee even though the judge has included, as a separate condition of probation, that the probationer perform community service. You also state that the judge is now issuing orders that community service hours not be increased because of the waiver of the \$30 fee.

Specifically, you ask whether the probation officer can require defendants who are on probation to do community service even though the judge has waived the fee and ordered that the community service hours not be increased because of the fee waiver.

North Dakota Attorney General's Opinion 93-21 was primarily concerned with those probationers on active supervision at the time of the effective date of N.D.C.C. ? 54-23.3-04(16). That section states that:

The director of the department of corrections and rehabilitation has the following powers and duties:

16. To collect costs and fees from persons on correctional supervision for the supervision services, control devices, and programs as implemented by the department to assist in making community corrections an effective alternative to

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incarceration. A person on active supervision is presumed able to pay assessed fees unless the director, giving due consideration to the fiscal obligations and resources of the probationer, determines otherwise. A person with the ability to pay assessed fees who refuses to pay must be returned to the court for a judicial determination.

North Dakota Attorney General's Opinion 93-21 responded to the inquiry whether N.D.C.C. ? 58-23.3-04(16) was an ex post facto law if a supervision fee was assessed by the Department of Corrections upon persons on active supervision on the date when that statute became effective even though the probationer or parolee was not subject to a court order requiring the payment of a supervision fee. In reaching the conclusion that this section was not an ex post facto law, it was recognized that payment of a fee was not a punishment or a condition of probation but, rather, a potential civil liability of the person under supervision. Failure to pay the supervision fee could not result in a revocation of probation absent a court order requiring the payment of the fee as a specific probationary condition. The director of the Department of Corrections determines the ability of the supervised person to pay the fee and, as mentioned in the opinion, the Department has adopted a community service option in lieu of payment of the supervision fee.

The question you have presented is not addressed in North Dakota Attorney General's Opinion 93-21 which was limited to the effect of N.D.C.C. ? 54-23.2-04(16) on persons on probation at the time it was adopted. The conditions of probation are controlled by N.D.C.C. ? 12.1-32-07(2) which provides:

2. The conditions of probation must be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist the defendant to do so. The court shall provide as an explicit condition of every probation that the defendant not commit another offense during the period for which the probation remains subject to revocation. The court shall order supervision costs

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and fees of not less than thirty dollars per month unless the court makes a specific finding on record that the imposition of fees will result in an undue hardship.

The court has broad authority to determine what conditions of probation may be imposed upon the probationer. Id. Since the imposition of probationary conditions is a judicial, rather than administrative, function, any imposition of additional probation conditions or the extension of court ordered probation conditions by probation authorities may be impermissible as an improper delegation of judicial authority. See State v. Saavedra, 406 N.W.2d 667 (N.D. 1987).

In the factual situation which you have presented it appears that the court has specifically ordered that the supervision fee of N.D.C.C. ? 12.1-32-07(2) not be imposed because of a finding of undue hardship. As a condition of probation, the court did, however, impose a specific requirement that the probationer perform community service. The court did not originally order that the community service condition of probation be imposed in lieu of the \$30 supervision fee and, as you have stated in your letter to me, the judge is now specifically ordering that additional community service not be required upon the non-assessment of the \$30 supervision fee.

Imposition of additional community service as an extension of specific probationary conditions imposed pursuant to N.D.C.C. ? 12.1-32-07, even though procedurally set forth in the parole and probation policy manual, is beyond the authority of the probation officials. By requiring additional community service, probation officials, in effect, have extended the community service condition of probation as established by the court or have imposed an additional condition of probation not set by the court. In either case, based upon the factual situation you have presented, probation officials would be acting beyond the administrative authority granted to them and would be attempting to assume a judicial function. See State v. Saavedra, 406 N.W.2d at 670-72. In addition, if the probationer refused to perform the community service required by the probation officer which was in addition to that mandated as a condition of probation by the court, the refusal of a probationer to perform the additional

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community service hours would be unenforceable as a probationary condition.

It is clear that if a judge orders that no additional community service hours be performed by a probationer after the court has refused to impose the monthly supervision fee under N.D.C.C. ? 12.1-32-07(2), the probationer could not be required to perform the additional community service hours. It is also clear that, even absent such a court order, probation officials could not mandate performance of the additional community service hours under the authority of N.D.C.C. ? 12.1-32-07 since not only would such community service be unenforceable as a probationary condition but, also, such a requirement may be beyond the supervisory authority of the probation officials.

Community service, even absent a court order, could be utilized by probation officials to assist a probationer in that probationer's rehabilitation in becoming a productive member of society. A probationer may voluntarily agree to perform community service as part of this rehabilitation process. However, absent a specific court order requiring community service, a decision not to perform the community service hours may not be a valid basis upon which to revoke or modify a probation.

In addition, there may be other costs attendant to the probation which are incurred beyond the minimum \$30 supervision fee of N.D.C.C. ? 12.1-32-07. These additional costs, such as electronic monitoring of probationers, may be within those costs assessable under N.D.C.C. ? 54-23.3-04(16). However, absent an order by the court, non-payment of these costs may create only a civil liability for their non-payment and might not provide a basis for revocation of probation.

In those cases in which N.D.C.C. ? 12.1-32-07 rather than N.D.C.C. ? 54-23.3-04 applies, absent a court order requiring community service, a probationer may voluntarily participate in such a program but could not be required, by the probation official, to perform community service hours in lieu of the supervision fee mandated by N.D.C.C. ? 12.1-32-07 beyond that mandated by the court.

Sincerely,

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Heidi Heitkamp  
ATTORNEY GENERAL

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