

VOLUME NO. 38

OPINION NO. 46

COUNTY OFFICERS AND EMPLOYEES - Clerks of court, disposition of fees for execution of passport applications;
COURTS, DISTRICT - Disposition by clerks of fees for execution of passport applications;
FEES - Disposition by court clerks of fees for execution of passport applications;
MONTANA CODE ANNOTATED - Sections 2-16-406(1), 3-2-405, 7-4-2511;
REVISED CODES OF MONTANA, 1947 - Sections 25-201, 25-203, 25-501.1, 82-505;
22 U.S.C. §§ 213, 214.

OPINIONS OF THE ATTORNEY GENERAL - 1 Op. Att'y Gen. at 397 (1906), 6 Op. Att'y Gen. at 109 (1915), 12 Op. Att'y Gen. at 118 (1927), 22 Op. Att'y Gen. No. 85 at 143 (1947), 24 Op. Att'y Gen. No. 129 at 179 (1952), 34 Op. Att'y Gen. No. 41 at 209 (1972).

HELD: County clerks of the district court may not personally retain fees for the execution of passport applications. Rather, they must pay the fees into the county treasury. Volume 34 Op. Att'y Gen. No. 41 at 209 (1972) is overruled.

23 October 1979

Robert L. Deschamps, III, Esq.
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Dear Mr. Deschamps:

You have asked my opinion on a question that I have stated as follows:

Where the county clerk of the district court uses county personnel and facilities for the execution of passport applications, may the clerk personally retain the execution fees, or must the clerk pay the fees into the county treasury?

You state that "county personnel and facilities are being used to assist the clerk of court in filling out applications, collecting fees, and mailing applications for passports." In that situation, my opinion is that the clerk must pay the collected fee into the county treasury.

As you point out, a previous attorney general held that "the ...fee collected for issuing passports may be retained by the clerks of court in the various counties of the state, and the clerks of court are not required to deposit the same with the county treasurer for deposit in the county general fund." 34 OP. ATT'Y GEN. NO. 41 at 209, 212-13 (1972). I have studied this opinion and cannot agree that it is applicable under the circumstances you have described.

The requirements for an application for a passport are given in 22 U.S.C. § 213:

Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application which shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. If the applicant has not previously been issued a United States passport, the application shall be duly verified by his oath before a person authorized and empowered by the Secretary of State to administer oaths.

Under this provision the Secretary of State has authorized and empowered "[a] clerk of any State court of record," among other persons, to administer oaths for passport purposes. 22 C.F.R. § 51.21(b)(3).

Fees for the execution and issuance of passports are authorized in 22 U.S.C. § 214:

There shall be collected and paid into the Treasury of the United States quarterly a fee of \$10 for each passport issued and a fee in an amount prescribed by the Secretary of State by regulation for executing each application for a passport. Nothing contained in this section shall be construed to limit the right of the Secretary of State by regulation...to authorize State officials to collect and retain the execution fee.

The Secretary of State has authorized state officials to collect and retain the execution fee in 22 C.F.R. § 51.61, as amended by 44 Fed. Reg. 25, 631 (1979):

Except as provided in § 51.63 [providing for exemption from payment of a passport or execution fee], ...the execution fee for a U.S. passport is \$4, which shall be remitted to the U.S. Treasury where 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.... The execution fee of \$4 shall be

paid only when an application is executed under oath or affirmation before an official designated by the Secretary for such purpose.

In Montana, therefore, clerks of the district courts are authorized to execute passport applications, and to collect the execution fee, presently set at four dollars. The question raised is how the clerk is to dispose of those fees once collected. The federal law stated above indicates that the fee need not be remitted to the United States Treasury.

Section 7-4-2511(1), MCA (section 25-203, R.C.M. 1947), states:

All salaried officers of the several counties must charge and collect for the use of their respective counties and pay into the county treasury...all the fees now or hereafter allowed by law, paid or chargeable in all cases. (Emphasis added.)

Subsection 2 (section 25-201, R.C.M. 1947) emphasizes this requirement:

No county officer shall receive for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him, but all fees, penalties, and emoluments of every kind must be collected by him for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and shall be credited to the general fund of the county. (Emphasis added.)

The issue that must be resolved to answer your question is whether the execution of a passport application by a clerk of the district court is an "official service rendered." Volume 34 Op. Att'y Gen. No. 41 at 209, 212 (1972), held that it was not an official service because it was not provided for in the Montana statutes. I disagree with that conclusion.

The fact that a state official performs a function under federal rather than state law does not necessarily mean that he or she is not rendering an official service. When the individual is permitted to perform the function solely

because of his or her official status, he or she renders an official service, regardless of whether the service is authorized by state or federal law. This issue was resolved in a number of cases dealing with a situation similar to the one you have presented--clerks of district courts collecting naturalization fees under federal laws.

In 1906, a naturalization act was passed by Congress which authorized each state court clerk "to retain one-half of the fees collected by him" under the act. Act of June 29, 1906, ch. 3592, § 13, 34 Stat. 596, 600. Many states, including Montana, interpreted this to mean that the clerks were entitled to retain those fees for their own benefit. See 1 Op. Att'y Gen. at 397 (1906). In 1914, however, the United States Supreme Court held that the act merely left the disposition of the retained one-half of the fees to "whatever disposition may be provided by the state law." Mulcrevy v. San Francisco, 231 U.S. 669, 674 (1914). The Court also approved California's conclusion that Mulcrevy, Clerk of the Superior Court of the City and County of San Francisco, was required to pay the naturalization fees he had collected into the treasury of the City and County of San Francisco. The applicable state provision was similar to section 7-4-2511(2), MCA, quoted above: "[E]very officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the City and County." 231 U.S. at 670. The United States Supreme Court said:

The provisions are complete and comprehensive and express Mulcrevy's contract with the city, the performance of which his office imposed upon him; and, of course, the fees received by him in naturalization proceedings, because he was clerk of the Superior Court, were in compensation for official acts, not personal acts.

But it is contended by plaintiffs in error that the fees having been received officially is not of importance, that nevertheless he acted as the representative of the United States in execution of the policies of the United States and being by the act of Congress invested with his powers he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to account for them to the city. The last proposition, however, does not follow

from the others, and the others are but confusing. If it be granted that he was made an agent of the National Government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was--not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury....

....Mulcrevy was elected to an office constituted...under the authority of the State. He was given a fixed salary...with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the State.

231 U.S. at 673-74 (emphasis added). The California opinion which the Supreme Court affirmed explained further:

Language could not be more explicit. It does not admit of doubt or quibble as to its meaning. "No matter from what source derived" means all the money coming into his hands by virtue of and by reason of his being such county clerk and ex officio clerk of the superior court. It was by reason of his election...and his taking office and giving his bond, and receiving a salary... that he was enabled to receive the fees for naturalization proceedings in the superior court. He received them in his official capacity. ... It was not for him to say that the services were performed under the authority of the United States, and not under the authority of the state. His bond contained the condition that he would faithfully perform all official duty that might thereafter be imposed upon him by law. The act of Congress was a law.

San Francisco v. Mulcrevy, 15 Cal. App. 11, 113 P. 339, 341-42 (1910), aff'd, 231 U.S. 669 (1914).

After Mulcrevy, the previous Montana Attorney General's opinion allowing clerks of the district court to personally retain naturalization fees was overruled. See 6 Op. Att'y Gen. at 109 (1915); 12 Op. Att'y Gen. at 118 (1927); 24 Op. Att'y Gen. No. 129 at 179 (1952).

Montana's statutes are just as explicit as the local laws in Mulcrevy and are clearly applicable to passport application execution fees. Clerks must pay into the county treasury "all the fees ... allowed by law." § 7-4-2511(1), MCA (§ 25-203, R.C.M. 1947). Fees for the execution of passport applications collected under federal statutes and regulations are fees allowed by law and must, therefore, be paid into the county treasury. "[A]ll fees...of every kind" for official services must be collected by the clerk for the sole use of the county, paid to the county treasurer, and credited to the county's general fund. § 7-4-2511(2), MCA (§ 25-201, R.C.M. 1947). Fees for the execution of passport applications, a function that a person is allowed to perform solely because he or she is a county officer, come within the meaning of "all fees of every kind."

Neither of the authorities cited in 34 Op. Att'y Gen. No. 41 at 209 (1972), persuade me that passport execution fees should be personally retained by clerks of the district courts. Volume 22 OP. ATT'Y GEN. NO. 85 at 143 (1947), holds that a city or county deputy officer may accept employment outside of and in addition to his or her official employment for the city or county, where the second job is of a nature not to interfere with the deputy's regular city or county job, and the City Council or Board of County Commissioners approves. That situation is far different from the one you have presented, where the county officer performs a job in an official capacity using county personnel and facilities.

Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960), is also inapplicable to the situation you have described. That case concerned clerks of the Montana Supreme Court, rather than the district courts. The statutes concerning the disposition of fees collected by a Clerk of the Supreme Court do not contain the explicit language found in section 7-4-2511(2), MCA (25-201, R.C.M. 1947), requiring "all fees ... of every kind" to be paid to the government. See §2-16-

406(1) and 2-405, MCA (§ 25-501.1 and 82-505, R.C.M. 1947); cf. Sarafford County v. Holmes, ___ N.H. ___, 376 A.2d 126 (1977) (holding that county registers of deeds were required to pay certain fees over to the county treasurer).

Hinman also concerned fees for a function which was not authorized or required by any law, state or federal, and which could have been as appropriately performed by any other person. The function of executing passport applications, on the other hand, devolves upon district court clerks by federal law, and may only be performed by those clerks because of their official position.

THEREFORE, IT IS MY OPINION:

County clerks of the district court may not personally retain fees for the execution of passport applications. Rather, they must pay the fees into the county treasury. Volume 34 Op. Att'y Gen. No. 41 at 209 (1972), is overruled.

Very truly yours,

MIKE GREELY
Attorney General