

VOLUME NO. 34

Opinion No. 41

COUNTIES - General fund, passport fees; COUNTY CLERKS OF COURT - Fees, passports; FEES - County clerk of court, passports; FEES - County issuance of passports not included. Sections 25-201 and 25-203, R.C.M. 1947; 22 U.S.C. § 214; 22 C.F.R. § 51.21.

HELD: County clerks of court may personally retain the fees collected for issuance of passports.

April 20, 1972

Mr. Harold Hanser
Yellowstone County Attorney
Office of the County Attorney
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion concerning the disposition of fees for passports which are collected by county clerks of court. From your letter I am given to understand that the practice of the Yellowstone County clerk of court is to retain a two-dollar (\$2.00) fee for issuance of

passports and that the clerk does not remit said fee to the county treasurer for credit to the county general fund. Your question then may be phrased as follows:

Whether the county clerk of court must remit fees collected by him for issuance of passports to the county treasurer for deposit in the county general fund?

As you noted in your correspondence concerning this matter, sections 25-201 and 25-203, Revised Codes of Montana, 1947, are the pertinent code provisions. Section 25-201, *supra*, states:

“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 section 25-203 of this code and shall be credited to the general fund of the county.” (Emphasis supplied)

Section 25-203, *supra*, then provides:

“All salaried officers of the several counties must charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, all the fees now or hereafter allowed by law, paid or chargeable in all cases, except as provided in section 93-8627; provided, however, that nothing in this section shall be held to apply to the compensation received by the sheriff as mileage while in the performance of official duties, or for the board of prisoners or other persons while in his custody.”

In 22 **Opinions of the Attorney General**, no. 85, then Attorney General R. V. Bottomly, in interpreting section 4864, R.C.M. 1935 (now section 25-201, *supra*), stated:

“This section is again a limitation on the salary that can be received by an employee from the county employing him, and designating these certain monies collected by him to be county monies and not a part of his personal salary. This cannot be construed as being a limitation on the employee’s receiving compensation for employment outside of and in addition to his official employment for the county, **as the limitation is specifically limited to compensation for official duties performed.**” (Emphasis supplied)

In **Anderson v. Hinman**, 138 Mont. 397, 357 P.2d 895, the Montana Supreme Court, in dealing with similar restrictions imposed upon the

clerk of the supreme court, ruled as to whether the clerk could retain certain fees for furnishing copies of the opinions of the supreme court.

“The Clerk of the Supreme Court is paid a salary under Section 25-501, R.C.M. 1947, which is to compensate him ‘for all services required of him or *which may hereafter devolve upon him by law.*’ (section 25-501.1). This does not preclude him from receiving compensation for services he may provide which are not required by law. The general rule of law is stated in 67 C.J.S., Officers, p. 326, Sec. 88:

*****an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration.’**

“This question, again involving the Clerk of the Supreme Court and the West Publishing Company, in an identical fact situation, was before the Supreme Court of Texas in 1946 in the case of Moore v. Sheppard, 144 Tex. 537, 192 S.W.2d 559. The court summed up the situation in this manner; (sic)

‘The indebtedness referred to, and which presents the sole issue here, consists of money received by petitioners for furnishing uncertified and unofficial copies of opinions of their respective courts. It is undisputed that such money was received and was not deposited in the State Treasury, but was retained by petitioners individually. The precise issue is, therefore, whether the petitioners must account to the State Treasurer for the sums of money they have collected for uncertified, unofficial copies of opinions.’

“There being no statutory duty requiring petitioners to furnish uncertified unofficial copies of opinions of the Courts of Civil Appeals, no statute fixing any fees for such services, and no valid statute requiring that money received therefor be deposited in the State Treasury, there is no debt owing by petitioners to the State. Since petitioners are not required to account to the State Treasurer, under the existing statutes, for such receipts, they cannot be required to execute an affidavit that such funds have been deposited in the State Treasury as a condition for the delivery of their monthly salary warrants . . .”(Emphasis supplied)

My review of the Revised Codes of Montana, 1947, does not indicate any provisions therein dealing with the issuance of passports. On

the contrary, the issuance of passports is reserved to the federal authorities under 22 U.S.C. 211a, et seq. Specifically, 22 U.S.C. § 214 provides in part:

“There shall be collected and paid into the Treasury of the United States quarterly a fee of \$2 for executing each application for a passport and \$10 for each passport issued: Provided, **That nothing herein contained 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 of \$2** or to transfer to the Postal Service the execution fee of \$2 for each application accepted by that Service . . .” (Emphasis supplied)

The execution of passport applications is provided for in 22 C.F.R. §51.21, which states in part:

“(a) First-time applicants. A person who has never been issued a passport in his own name shall appear in person, verify his application by oath or affirmation **before a person authorized to administer oaths, and remit the established fees.**

“(b) Persons authorized and empowered by the Secretary to administer oaths. The following persons are hereby authorized and empowered by the Secretary to administer oaths for passport purposes:

- (1) A passport agent.
- (2) A clerk of any Federal court.
- (3) **A clerk of any State court of record** or a judge or clerk of any probate court.
- (4) A postal clerk . . .” (Emphasis supplied)

The issuance of passports, then, is within the jurisdiction of the federal government, and all authorizations, duties, powers, and regulations are established pursuant to federal authority.

There being no statutory duty imposed upon the clerks of court concerning the issuance of passports, it is not a duty of their office for which they are regularly compensated. All duties concerning passports are controlled by federal law, and the compensation for the performance of these duties is likewise provided for by the collection and retention of the two-dollar fee. (22 U.S.C. § 214.)

THEREFORE, IT IS MY OPINION that the two-dollar 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.

Very truly yours,

ROBERT L. WOODAHL
Attorney General