

LETTER OPINION
2000-L-10

January 31, 2000

Mr. Jeffrey L. Sheets
Sioux County State's Attorney
PO Box L
Fort Yates, ND 58538-0529

Dear Mr. Sheets:

Thank you for your letter requesting my opinion on whether a county may appoint the elected clerk of district court to the position of register of deeds without paying that person additional compensation. I understand Sioux County has not adopted an optional form of county governance, and is therefore subject to the provisions of N.D.C.C. ch. 11-10.

Your letter does not indicate whether the county is attempting to combine these offices pursuant to N.D.C.C. ch. 11-10.2, or is merely appointing the same person who was elected as the clerk of district court to the vacant position of register of deeds pursuant to N.D.C.C. § 44-02-04. However, N.D.C.C. § 11-10.2-03(4) prohibits a county from planning to combine offices in a manner that diminishes an elected county officer's term of office or salary or redesignates the elected office as appointive during the officer's term. Since combining the two offices during the elected clerk of district court's term may violate all three of these prohibitions,¹ I assume for purposes of this letter that the offices are not being combined pursuant to N.D.C.C. ch. 11-10.2.

Appointing the same person who was elected as the clerk of district court to the position of register of deeds without formally combining the offices or increasing the person's compensation presents a substantial practical problem. N.D.C.C. § 11-10-10(2) sets out the minimum salary a county must pay a full-time elected clerk of district court. A county may pay a lower amount to a part-time elected clerk of district court. N.D.C.C. § 11-10-10(3). Further, a county has the discretion to determine the amount to be paid an appointive register of deeds. N.D.C.C. § 11-10.2-03(3)(a).

¹ By combining the offices of clerk of district court and register of deeds while an incumbent clerk of court is serving a current term, such an officer's separate term as clerk would be diminished. Also, such a combination would unlawfully redesignate the elected clerk of court office as appointive during a current elective term and, as discussed below, would have the effect of reducing the salary of the elected official by substantially increasing responsibilities of the combined office if no additional pay was contemplated.

Regardless of whether the clerk of district court is full or part-time, the amount the county pays that person "may not be reduced during the official's term of office." N.D.C.C. § 11-10-10(3). Appointing the elected clerk of district court to the position of register of deeds may substantially increase that person's duties to the county.² Doing so without increasing that person's compensation would have the practical effect of reducing the elected clerk of district court's salary, which is prohibited during that person's term in office. See id.

While "[i]n accordance with the principle that all offices are subject to change, the proper authorities may legally impose additional duties upon an officer without creating a new office or entitling the incumbent to higher compensation," the appointment of a public official to an additional office may be a different matter. See 3 Eugene McQuillin, The Law of Municipal Corporations § 12.118 (3d ed. 1990). "[A]t common law, acceptance of appointment to public office is said to be compulsory. But this is not a uniform view in this country and it has been said that 'no man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation.'" Id. at § 12.95. "Failure to take the oath of office and to present a bond for approval has been found to constitute a refusal to accept." Id. "A vacancy of office may arise if an appointee fails to timely file an oath of office." 63C Am.Jur.2d Public Officers and Employees § 116 (1997). "An office becomes vacant if the incumbent shall: . . . 6. Fail to qualify as provided by law, which includes taking the designated oath of office prescribed by law." N.D.C.C. § 44-02-01(6). Each civil officer in this state before entering the duties of office must take the prescribed oath which must be "endorsed upon the back of, or attached to . . . the appointment" N.D.C.C. § 44-01-05. Cf. N.D.C.C. § 40-13-03 (refusal by municipal officer to take oath of office also deemed a refusal to serve and also a failure to qualify for office).

Thus, an appointment of an individual to an additional county office would generally require the assent of the person appointed as would be manifested through the acts of taking and filing the oath of office and otherwise qualifying to serve. An appointee may refuse to accept the duties of an additional county office without compensation by failing to take the necessary steps to qualify for office.

Accordingly, it is my opinion that a county may not appoint the elected clerk of district court to the position of register of deeds without either paying that person additional compensation or obtaining the agreement of that person to accept the position without additional compensation.

² See, e.g., N.D.C.C. § 11-18-01 et seq.

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Sincerely,

Heidi Heitkamp
Attorney General

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