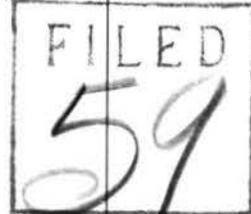


COUNTY CLERKS: Need not account to the county for fifteen cents service charge permitted by Conservation Commission.

January 6, 1940

Honorable F. Hiram McLaughlin  
Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of December 27, 1939, wherein you state as follows:

"Your office rendered to Nat W. Benton, former Prosecutor of Greene County, an opinion under date of January 28, 1938, with reference to the salary of the County Clerk of Greene County, at which time it was held that the Laws of 1933 at page 375, which was re-enacted as Laws of 1937, page 443, Section 1, fixed the salary of the County Clerk of Greene County at \$4,000 per year, and provided that said salary should be in lieu of all other salaries, fees, commissions or emoluments of whatever kind under and by reason of the terms of any statutory provisions.

The particular question involved at that time was as to whether the County Clerk of Greene County could retain any part of the fish and game license fees when such licenses were sold at his office. That opinion held that he was required to account to the County for all fish and game fees and all other fees, since he was on straight salary basis.

It now appears that the fish and game enforcement, being under the regulation

of the Conservation Commission, and the Commission reserving the right to appoint agents for the sale of licenses, whether, if the Commission should appoint the County Clerk of Greene County as its distributing agent, he could retain the 15¢ service charge permitted by the Conservation Commission, or would still have to account for such fees to the County.

This may seem an unnecessary request in view of the provisions of the 1937 act, but since under the Wild Life and Forestry Code, the County Clerk is not ipso facto the agent of the Commission by terms of the statute, but may or may not be appointed as such agent by the Conservation Commission, does the provision of 1937 act barring the Clerk from retaining any fees or emoluments "under and by reason of the terms of any statutory provisions" apply to the present situation with equal force and with the same result as it did to the situation which existed prior to the adoption of the conservation amendment, at which time the Clerk had the statutory duty of selling fish and game licenses, whereas now he is under no statutory duty in the premises, but derives his authority entirely from the fact of his appointment as such agent by the Conservation Commission?

Does he still have to account for the 15¢ service charge to the County Treasury, or may he retain this or any part of it for himself?"

The amendment to the Constitution of Missouri creating the Conservation Commission was adopted November 3, 1936, and provides as follows:

"The control, management, restoration, conservation and regulation of the

bird, fish, game, forestry, and all wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the CONSERVATION COMMISSION, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wildlife conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows: one for a term of two years or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses

incurred while actually engaged in the discharge of their official duties.

Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission.

A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employes as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employes and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment.

The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wildlife resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wildlife resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose.

The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all

existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

Pursuant to the above constitutional authority to control, manage, restore, conserve and regulate fish and game, etc., the Commission promulgated the following regulations and laws:

Section 29 provides that the distributing agent, duly authorized by the Commission, may charge and collect a fee of fifteen cents for each permit distributed:

"Permits issued by the Commission to pursue, take, transport, ship, buy, sell, store, serve, use or possess wildlife, and to use any equipment, material or facility for the taking of such wildlife, in accordance with these regulations, may be obtained by residents, non-residents, and aliens, for the purposes and under the conditions as herein set forth, upon payment, to the Commission or its authorized distributing agent, of the permit fees stipulated by these regulations. Any such distributing agent, duly authorized by the Commission, may charge and collect from the permittee for all services relating to the distribution of any such permits, an additional sum not to exceed fifteen cents (15¢) for each permit distributed. No such permits shall be duplicated without the payment of one-half ( $\frac{1}{2}$ ) of the initial permit fee herein specified. The Commission reserves the right to deny, revoke, or suspend any permit, or the renewal thereof, and to determine which type of permit may be distributed by any distributing agents; provided, that no permit shall be revoked or suspended until the holder thereof shall have been afforded a

reasonable opportunity to be heard by an authorized representative of the Commission."

Section 30 designates the clerk of the county court in each county as distributing agent, and reserves the right to designate additional distributing agents.

"The Conservation Commission hereby designates and appoints the clerk of the county court in each county and the license collector of the City of Saint Louis as distributing agents for such permits as may be stipulated by the Commission, conditioned upon the consent of their respective sureties and the faithful performance of such duties as may be delegated to such agents who shall accept, receipt for, and remit to the state treasurer at the close of each month, all moneys derived from the distribution of such permits, less and except such personal service fees as are herein specifically provided. The Commission reserves the right to designate additional distributing agents and to fix their qualifications and duties. Such agents may charge and collect the service fee of fifteen cents (15¢) and they shall accept, receipt for and remit to the Commission at its office in Jefferson City, at the close of each month all moneys derived from the distribution of such permits."

Under Section 8253, Revised Statutes of Missouri, 1929, the legislature conferred upon the county clerk the official duty of issuing hunting and fishing licenses. Now it is to be noted that the duty is not imposed upon the clerks to issue same by statute, but they are merely designated by the Conservation Commission as "distributing agents." In other words, under the broad powers granted by the people to the Conservation Commission, the latter might have designated any persons they desired to act as distributing agents.

You direct our attention to an opinion rendered by this department under date of January 28, 1938, holding that the county clerk of Greene County is on a salary basis and must account for the fish and game fees to the county treasurer, same being based on the Laws of Missouri, 1933, Section 1, page 375, re-enacted in Laws of Missouri, 1937, Section 1, page 443, which, after declaring the amount of salary to be paid the county clerk, provides that:

"Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind, under and by reason of the terms of any statutory provisions outside of this article."

You then observe that:

"\* \* the fish and game enforcement, being under the regulation of the Conservation Commission, and the Commission reserving the right to appoint agents for the sale of licenses, whether, if the Commission should appoint the county clerk of Greene County as its distributing agent, he could retain the 15¢ service charge permitted by the Conservation Commission, or would still have to account for such fees to the county."

The concluding sentence, as found in Section 1, Laws of Missouri, 1933 and 1937, supra, declares that the said salaries are in lieu of fees "of whatsoever kind under and by reason of the terms of any statutory provisions." The fees in this case for services would not be earned by virtue of any statutory provisions since the regulations and laws of the Commission are promulgated by virtue of a constitutional amendment.

46 C. J., Section 249, Page 1019, states that:

"Fees collected by officers represent the charges which the state makes for services rendered by it through its officers, and constitute a fund subject to the control of the state and to be applied as the legislature directs."

The fees collected by county clerks as distributing agents do not represent charges which the state makes for services, and the funds are not subject to the control of the state nor are they to be applied as the legislature directs.

As previously pointed out, there is no official duty upon the part of the county clerks to act as distributing agents, but they are merely designated by the Commission as such. Furthermore, under the constitutional amendment, supra, the funds are not subject to the control of the state but are subject to the control of the Commission. Again, they are not to be applied as the legislature directs, but rather as the Conservation Commission directs.

It might be argued that to permit the county clerks to retain these fees would be to permit an increase in compensation during their term of office, contrary to Article XIV, Section 8 of the Missouri Constitution. In the case of Little River Drainage District v. Lassater, 29 S. W. (2d) 716, l. c. 719, the court, in holding that the above constitutional provision does not prohibit an increase in the county officers' compensation during their terms of office for performing duties incident to their offices, said:

"Appellant contends that section 4575 authorizes an increase in the compensation of township collectors during their terms of office and hence violates section 8, of article 14, of the Missouri Constitution, which provides that 'the compensation or fees of no State, county or municipal officer shall be increased during his term of office. \* \* \*' As neither county collectors nor township collectors, in respect to their services, in collecting the taxes of drainage districts, perform any of the duties of state, county, or municipal officers, it

would seem that the fixing of their compensation for rendering such services to drainage districts is not controlled by section 8, art. 14, of the Constitution.

The constitutional inhibition only applies to compensation or fees of officers for performing duties incident to their offices, and has no application to additional duties imposed upon such officers not ordinarily incident to their offices. State ex rel. McGrath v. Walker, 97 Mo. 162, 10 S. W. 473; State ex rel. Hickory County v. Dent, 121 Mo. 162, 25 S. W. 924; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; State ex rel. Harvey v. Sheehan, 269 Mo. 421, 190 S. W. 864; State v. Zevely v. Hackmann, 300 Mo. 59, 254 S. W. 53; State ex rel. Barrett v. Boeckler Lumber Co., 302 Mo. 187, 257 S. W. 453."

It might be further argued that since no duty is imposed upon county clerks to act as distributing agents, they are prohibited from performing such services and retaining the money earned in addition to their salary.

Said argument was advanced in the case of State v. Hinshaw, 198 N. W. 634, l. c. 637, wherein the court said:

"A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source."

From the foregoing, we are of the opinion that the county clerk of Green County may retain the fifteen cents

Honorable F. Hiram McLaughlin - 10 - January 6, 1940

service charge permitted by the Conservation Commission  
and need not account for such fees to the county.

Respectfully submitted,

MAX WASSEMAN  
Assistant Attorney General

APPROVED:

W. J. BURKE  
(Acting) Attorney General

MW:VC