

LETTER OPINION
99-L-132

December 30, 1999

Ms. Kristi Pettit
Assistant City Prosecutor
City of Grand Forks
PO Box 5299
Grand Forks, ND 58206-5299

Dear Ms. Pettit:

Thank you for your letter presenting several questions concerning the authority of a municipal judge to issue a search warrant.

Based upon my review of statutory and administrative code provisions, as reflected in the discussion below, it is my opinion that a municipal judge has authority to issue a search warrant as a "state magistrate" within that judge's territorial jurisdiction when the judge has been appointed a magistrate by the presiding judge of the district court pursuant to N.D.C.C. § 27-05-31.

North Dakota Rule of Criminal Procedure 41(a) authorizes a search warrant to be issued by a "state or federal magistrate acting within or for the territorial jurisdiction wherein the property or person sought is located or from which it has been removed."

Although the term "state magistrate" is not defined by state statutory or administrative law, the term "magistrate" is used extensively throughout the North Dakota Rules of Criminal Procedure. See N.D.R. Crim. P. 3, 4, 5, and 5.1. The term "magistrate" is defined in N.D.C.C. § 29-01-13(5) as an officer authorized by law to issue a warrant for the arrest of a person charged with a crime or public offense. In addition, North Dakota statutory provisions, which predate the adoption of the North Dakota Rules of Criminal Procedure, have made reference to the duties and responsibilities of magistrates and their place within the North Dakota judicial system. See generally, N.D.C.C. § 29-01-14 (Who are magistrates), N.D.C.C. ch. 29-05 (Complaint and Warrant of Arrest), N.D.C.C. § 29-06-06 (Hearing before magistrates by foreign officers), and N.D.C.C. § 29-06-25 (Procedure against person arrested without warrant). It is reasonable to conclude that a "state magistrate" in N.D.R. Crim. P. 41(a) is a "magistrate" as defined and granted authority to act as such under North Dakota statutory law. As used in Rule 41(a), the term "state magistrate" only distinguishes magistrates under state law from magistrates who derive their power and authority from federal law.

N.D.C.C. § 29-01-14 describes persons who are magistrates under North Dakota law. This section provides:

The following officers are magistrates:

1. The judges of the supreme court, with authority to act as such throughout the state.
2. The judges of the district courts, with authority to act as such throughout the judicial districts for which they respectively are elected.
3. As limited by law directing the place of exercising their jurisdiction and authority, magistrates appointed by the presiding judge of a judicial district, municipal judges, and small claims court referees who are licensed to practice law and authorized by the presiding judge of the judicial district in case of an emergency, each with authority to act as magistrate throughout the county or the city for which the magistrate is elected or appointed.

Magistrates recognized under state law are:

1. judges of the Supreme Court;
2. judges of the District Courts;
3. magistrates appointed by the presiding judge of a judicial district;
4. municipal judges; and
5. small claims court referees who are licensed to practice law and authorized by the presiding judge of the district in case of an emergency.

If N.D.C.C. § 29-01-14 were the only statutory provision addressing magistrates, the fact that a person was a municipal judge would, in itself, authorize that municipal judge to act as a magistrate under state law. However, N.D.C.C. § 29-01-15 sets the subject-matter jurisdictional boundaries of a municipal judge. That section provides:

Any municipal judge may:

1. Act as committing magistrate; provided, that this subsection does not apply to municipal judges who are not attorneys currently licensed under chapter 27-11.

2. Hear, try, and determine misdemeanors and infractions when jurisdiction has been conferred by the Constitution of North Dakota and this and other laws.
3. Adjudge and impose the punishment prescribed by law, upon conviction, in all cases within his jurisdiction to hear, try, and determine.
4. Grant temporary protection orders under the particular circumstances and for the limited duration set forth in section 14-07.1-08.

A small claims court referee authorized pursuant to subsection 3 of section 29-01-14 may act as a committing magistrate. A magistrate appointed by the presiding judge of the judicial district has the authority to act to the extent allowed by rules promulgated by the supreme court.

N.D.C.C. § 29-01-15 does not explicitly authorize a municipal judge to issue a search warrant.¹ Rather, a municipal judge has jurisdiction to act as a committing magistrate, and to hear, try, and determine misdemeanors and infractions, adjudge and impose punishment prescribed by law in all cases within the court's jurisdiction, and to grant temporary protection orders pursuant to N.D.C.C. § 14-07.1-08. The term "committing magistrate" was explained in State v. Sadowski, 331 N.W.2d 274, 276 (N.D. 1983), as a "limiting term and generally refers to a judicial officer who is empowered to preside over preliminary hearings in which the accused can either be discharged or bound over for trial and to accept bail and release the accused upon such acceptance."

Although N.D.C.C. § 29-01-14 appears to authorize a municipal judge to act as a "state magistrate," N.D.C.C. § 29-01-15 limits that authority by not specifically granting the power to a municipal judge to issue a search warrant.

Cities are agencies of this state and have only the powers expressly conferred upon them by the legislative branch of government or which may be necessarily implied from the powers expressly granted. Roeders v. City of Washburn, 298 N.W.2d 779 (N.D. 1980).² However,

¹ As noted above, the statutory definition of a magistrate for title 29 set out in N.D.C.C. § 29-01-13(5) only references the authority to issue an arrest warrant, not a search warrant.

² Although Grand Forks is a home rule city, state law does not explicitly authorize home rule cities to empower municipal judges to issue search warrants. See N.D.C.C. § 40-05.1-06(5).

it is presumed that the Legislative Assembly, when enacting a statute, intended a just and reasonable result and that the result be feasible of execution. N.D.C.C. § 1-02-38. Statutory provisions should be construed to effect their objectives. Eastburn v. C.J.A., 473 N.W.2d 439 (N.D. 1991); N.D.C.C. § 1-02-01.

The last sentence of N.D.C.C. § 29-01-15 authorizes a magistrate appointed by the presiding judge of the judicial district to exercise those powers and duties to the extent allowed by rules promulgated by the Supreme Court. N.D.C.C. § 27-05-31 permits the presiding judge of a judicial district to appoint, subject to rules adopted by the Supreme Court, any qualified person to serve as a magistrate. N.D. Sup. Ct. Admin. R. 20 sets forth qualifications, duties, and procedures relating to the appointment of magistrates pursuant to N.D.C.C. § 27-05-31. N.D. Sup. Ct. Admin. R. 20, section 5, sets forth the delegable duties of a magistrate which includes the issuance of search warrants pursuant to N.D.C.C. § 29-29-01 and N.D.R. Crim. P. 41 and the issuance of administrative search warrants pursuant to N.D.C.C. § 29-29.1-01.

Although N.D.C.C. § 29-01-15 limits the subject matter jurisdiction of a municipal judge, that subject matter jurisdiction could be extended by the presiding judge of the judicial district to include the authority to issue search warrants by appointment of a municipal judge as a magistrate pursuant to N.D.C.C. § 27-05-31. A presiding district judge could appoint "any qualified person" to be a magistrate, even a person who might also happen to be a municipal judge. Id. That authority would be present regardless of whether the last sentence of N.D.C.C. § 29-01-15 had been enacted as a part of that statutory provision.

A municipal judge may act as a "magistrate" and perform those duties as authorized by N.D.C.C. § 29-01-15 (which do not include the power to issue search warrants) or as specifically provided by state law without appointment or involvement of the presiding district judge. However, should the municipal judge desire to exercise duties beyond those specifically authorized by statute, that municipal judge would assume those additional duties only upon a presiding district judge appointment as an N.D.C.C. § 27-05-31 magistrate subject to the provisions of N.D. Sup. Ct. Admin. R. 20.

If a municipal judge has the authority to issue search warrants or administrative search warrants based upon an appointment as a "magistrate" by the presiding district judge pursuant to N.D.C.C. § 27-05-31, the municipal judge is not acting as a municipal judge when performing those duties but, rather, as a "state magistrate" pursuant to the powers and authority granted by the appointment. The municipal judge would hold two separate positions: one as a municipal judge possessing those powers and authority granted by the

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Legislature and, the second, as a "state magistrate" appointed pursuant to N.D.C.C. § 27-05-31 and possessing those powers and authority granted by the presiding judge of the district court and N.D. Sup. Ct. Admin. R. 20. A municipal judge may perform that person's official duties, as a municipal judge, without appointment pursuant to N.D.C.C. § 27-05-31. However, any extension of those duties requires either further legislative action³ or appointment as a magistrate by the presiding judge of the district court.

If a municipal judge has been appointed as an N.D.C.C. § 27-05-31 magistrate by the presiding judge of the district court, that municipal judge will be subject to territorial jurisdiction limitations to act only throughout the city or county for which the magistrate is elected or appointed (N.D.C.C. § 29-01-14(3)) or in the geographical jurisdiction within the judicial district as assigned by presiding district judge (N.D. Sup. Ct. Admin. R. 20, section 6).

You have also inquired whether a municipal judge may issue search warrants for "all crimes within the territorial jurisdiction or only B misdemeanors."

Under N.D.R. Crim. P. 41(a) the authority to issue a search warrant is limited to the state magistrate acting "within or for the territorial jurisdiction wherein the property or persons sought is located or from which it has been removed." Id. It is the situs of the premises or persons to be searched or the location of the property which will determine authority of a state magistrate to issue a search warrant. A state magistrate may not, pursuant to N.D.R. Crim. P. 41(a), issue a search warrant for the search of premises or persons or the seizure of property beyond that magistrate's territorial jurisdiction.

Sincerely,

Heidi Heitkamp
Attorney General

rpb/vkk

³ Since a municipal judge already possesses the power of a committing magistrate with the authority to issue arrest warrants, hold preliminary hearings and set bail under N.D.C.C. § 29-01-15 it seems to make little sense to exclude the power to determine if probable cause exists to issue a search warrant. However, that would require a legislative change.