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2003 HOUSE JUDICIARY

HB 1189

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1189

House Judiciary Committee

☐ Conference Committee

Hearing Date 1-28-03

Tape Number	Side A	Side B	Meter #
1	xx		0-25
Committee Clerk Signature <i>Al Penrose</i>			

**Minutes:** 13 members present.

**Chairman DeKrey:** We will open the hearing on HB 1189.

**Rep. Wald:** Introduced the bill.

**Robert Keogh, President of Municipal Judge's Association:** (see attached testimony)  
Support.

**Rep. Eckre:** How many municipal judges are left in ND that don't have their law degree.

**Mr. Keogh:** Not exactly, around 40.

**Rep. Eckre:** Is it mostly the smaller, rural communities where that exists.

**Mr. Keogh:** In many cities over 5,000, the judge must be law trained.

**Rep. Delmore:** In the past, was there a risk with someone alleging that they couldn't do it.

**Mr. Keogh:** Well, yes. Prior to 1999, the law was that you could. Many cities or districts now have appointed magistrates by a judge. Yes, that's why we want the bill, to make sure there

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*1/28/03*  
Date

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House Judiciary Committee  
Bill/Resolution Number HB 1189  
Hearing Date 1-28-03

aren't any questions about it. We don't want there to be a question about the validity of the search warrant to be challenged.

**Rep. Delmore:** How many municipal judges do we have that are magistrates?

**Mr. Keogh:** 50 to 60 around the state. The numbers are declining in the rural areas.

**Rep. Klemin:** On line 17, what is the definition of "to issue search warrants for an area within the jurisdiction of the municipality". How do you define the area within the jurisdiction of the municipality. By zoning.

**Mr. Keogh:** Whatever the state has used.

**Rep. Klemin:** What if you issue a search warrant for an area that is outside of the city limits, how are we going to know whether that search warrant is going to be valid outside the city limits. How do we know where the jurisdiction of the municipal court ends.

**Mr. Keogh:** I don't know, that hasn't really come up. In some areas, the municipal judge is appointed as the magistrate by the district judge and then they are covered either way. That would be a question for the prosecutor to sort out. We try not to go outside the jurisdiction.

**Rep. Eckre:** On pg 5 of your handout, it shows the territorial lines as the jurisdictional area.

**Rep. Delmore:** How many of your municipal judges have had the magistrate appointment.

**Mr. Keogh:** We haven't tracked that.

**Rep. Delmore:** Do you have to be reappointed to something like that, if the district judge makes you a magistrate, do you have to be appointed every so often, so you can have this title?

**Mr. Keogh:** We assume we have the power for search warrants.

**Rep. Onstad:** How does this affect the reservations - tribal court. Do they have jurisdiction over tribal lands.

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Hearing Date 1-28-03

**Mr. Keogh:** I don't have that problem, so I don't know.

**Chairman DeKrey:** Thank you. Anyone else wish to testify in support of HB 1189.

**Tom Goven, Municipal Court Judge for the City of Valley City:** I have been a municipal court judge since 1998. I am a current member of the Executive Board of the Association. Support. We have the authority to conduct trials and to handle all matters pertaining to the files, such as rule on the constitutionality of motor vehicle stops, probable cause to arrest, probable cause to search a person and also the admissibility of confessions or admissions. But because of this statutory glitch, we do not have the authority to issue search warrants, even for municipal ordinances. It would just seem like it is a logical connect that we should have the authority to cover those. This a broad based bill and covers just the general authority to issue search warrants. I would say that in rural areas, it may be impossible or very hard to get a hold of a district court judge at some point to issue a search warrant, thereby a municipal judge could do that for the city, thereby aiding law enforcement. Law enforcement typically for a known felony case, or that nature, they would go to the district judge first to get a search warrant. As far as education and training, it's true that a majority of our judges are not attorneys in the state, but the Supreme Court, through the state's court office, they provide annual training for us once a year. We can get the authority to issue search warrants by becoming a state magistrate through the administrative, by the presiding judge of the district, but this would give us statutory authority to be able to do that. My understanding of jurisdiction is that it covers the city plus one-half mile outside the city limits.

**Rep. Kretschmar:** Under current law in this section, when a municipal judge acts as a magistrate, it's only allowed to judges who are members of the bar.

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House Judiciary Committee  
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**Mr. Goven:** That's my understanding.

**Rep. Kretschmar:** Would a similar restriction help this law by issuing a search warrant.

**Mr. Goven:** It was the feeling of the Board, that we have so many members that are not attorneys, that they are currently appointed as magistrates and they have the authority under that appointment as the state magistrate to cover search warrants. The legislature could consider whether or not they limit it just to attorneys, if it were something other than municipal ordinances. Non-attorney judges can cover most cases, the DUI cases have to go to district court, but as far as the other types of cases, they have the authority to try, hear evidence, determine admissibility of evidence just as an attorney judge has.

**Rep. Delmore:** Are search warrants ever denied, and through this legislation, could a district judge say, no I don't want to issue a search warrant, and then they go to the municipal judge who says yes.

**Mr. Goven:** Search warrants are at times denied, I think law enforcement tries to cover all the bases. If a district judge denied it, I think law enforcement would probably not go to a municipal judge because if ultimately it was a bad search, it would be thrown out. Practically speaking, I don't think they would go from a district judge to municipal judge, because the case would most likely come up before the district judge that denied the search warrant.

**Chairman DeKrey:** Thank you. Further testimony in support of HB 1189.

**John Olson, NDSA/NDPOA:** Support. There are only 42 district judges that cover the entire state, and the municipal judges are helpful to law enforcement. The need is critical.

**Chairman DeKrey:** Thank you. Any further testimony in support? Any testimony in opposition?

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Hearing Date 1-28-03

**Christine Hogan, Executive Director of the State Bar Association:** Neutral (see attached testimony).

**Rep. Delmore:** Could training be provided especially for rural areas, or make sure these people are put under the magistrate rule.

**Ms. Hogan:** If both are in place, that would eliminate problems, there has to be a level of confidence, district judges appoint municipal judges to magistrates.

**Rep. Klemin:** If you look at section 1a, proviso at the end, that this subsection does not apply to municipal judges who are not attorneys. If that same kind of proviso were put at the end of 1e, would that take care of your concerns.

**Ms. Hogan:** Yes it would.

**Chairman DeKrey:** Thank you.

**Mr. Keogh:** We do have annual training, and the agenda for the training is prepared by a committee including ND Supreme Court staff. We have dealt with search warrants in the past. I would suggest that in the smaller communities, where a lay judge may be approached to issue a search warrant, he will certainly rely on the prosecutor attorney. We have in our bench books, which were prepared by a professor from the law school, several pages of information about search warrant, so that the judges are aware, if they read this material, they are certainly aware of the need for probable cause before issuing a search warrant.

**Rep. Klemin:** What kind of training is provided to non-law trained municipal judges or municipal judges in general, and are there continuing education requirements that they have to have.

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**Mr. Keogh:** We are required to have an annual 8 hrs of training annually. We provide alternative training if judges can't come to Bismarck. We have mentoring programs, on-the-job training.

**Chairman DeKrey:** Thank you. We will close the hearing.

(The meeting was reopened later in the same session)

**Chairman DeKrey:** What are the committee's wishes in regarding HB 1189.

**Rep. Kretschmar:** I move to amend the bill and add the language from 1a to 1e, starting with provided...

**Rep. Klemin:** Seconded.

Voice vote on the amendment, 13 yes.

**Rep. Delmore:** I move a do pass as amended.

**Rep. Klemin:** Seconded.

13 YES 0 NO 0 ABSENT

DO PASS AS AMENDED

CARRIER: Rep. Galvin

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30354.0101  
Title.0200

Adopted by the Judiciary Committee  
January 28, 2003

VR  
1/28/03

HOUSE

AMENDMENTS TO HOUSE BILL NO. 1189 JUD 1-29-03

Page 1, line 17, replace "Issue" with "If the judge is an attorney licensed under chapter 27-11.  
Issue"

Renumber accordingly

Page No. 1

30354.0101

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Date: 1/28/03  
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1189

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30354.0101 .0200

Action Taken Do Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Klemm

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemm	✓				
Rep. Kretschmar	✓				
Rep. Wrangham					

Total (Yes) 13 No 0

Absent 0

Floor Assignment Rep. Galvin

If the vote is on an amendment, briefly indicate intent:

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1/28/03  
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REPORT OF STANDING COMMITTEE (410)  
January 29, 2003 11:39 a.m.

Module No: HR-17-1242  
Carrier: Galvin  
Insert LC: 30354.0101 Title: .0200

REPORT OF STANDING COMMITTEE  
HB 1189: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS  
FOLLOWS and when so amended, recommends DO PASS (13 YEAS, 0 NAYS,  
0 ABSENT AND NOT VOTING). HB 1189 was placed on the Sixth order on the  
calendar.

Page 1, line 17, replace "issue" with "If the judge is an attorney licensed under chapter 27-11,  
issue"

Renumber accordingly

(2) DESK, (3) COMM

Page No. 1

HR-17-1242

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2003 SENATE JUDICIARY

HB 1189

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1189

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/17/03

Tape Number	Side A	Side B	Meter #
1	X		37 - End
1		X	0.0 - 5.1
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill:

**Testimony in Support of HB 1189**

Representative Frank Wald - Dickenson, Dist. 37, Introduced bill (meter 37) at the request of Judge Robert A. Keogh, President, Municipal Judge's Association. - Attachment #1. Discussed the rural areas and great distances between law trained judges. Request original bill. Discussed difference between a law trained municipal Judge and a non-law trained judge. Sen. Trenbeath gave an example (meter 40) an non law trained municipal judge has no jurisdiction to try a DUI. It would still be a municipal case but has to be tried before a law trained judge. Discussed the area's that don't have law trained judge. Discussed jurisdiction of judges.

Brian Giese - Municipal Judge, Mandan since 1987 (meter 43). Our association is in support of this legislation. In cities over 5,000 you must have a law trained judge. In smaller cities under

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Senate Judiciary Committee  
Bill/Resolution Number HB 1189  
Hearing Date 03/17/03

5,000-which we have many, it is not a requirement. Relative to our training. If this legislation passes we would have to have extensive training for these non-law degree judges. We do not want an error that may be thrown out. Discussion of what house did with the bill (meter 45).

Judge discussed his job as a "judge mentor" for non-law degree judges.

John Olson - States Attorney Association and Peace Officers Association. (meter 51) We testified in the house and the only opposition in house was State Bar Assoc..

Our position for this bill is the great need for this in the rural areas of the state. If you adopt this legislation there would be a great need for further education of those non-law trained judges.

Discussed how much power these people presently have; They hear trials; guilt or innocence, determine rules of evidence- what is appropriate to be admitted or not-this is not a large stretch for them-providing the proper education. Discussed who much more training they need and what they receive already. Discussed probable cause in regards to search warrants and confidential informants. Eighty miniciple judges with fifty being non law trained. Miniciple judges are elected.

Judge Giese stated that he has not done many search warrants and would like intensive training himself relitive to the case law and the statitory law in the area of search warrants and I am a licensed attorney. Sen. Trenbeath responded that if he wanted to become educated as an attorney, you would sit down with the books and read the case law starting with the most recient and within maybe a days time you would be up on it on your own. You have the ability to do that because you now how to do the leagal research. Right and non law-trained judges usually don't have the time and inclenation and ability to do the research. Nor the experience to read the law and understated what it is saying responded Sen. Trenbeath

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Senate Judiciary Committee  
Bill/Resolution Number HB 1189  
Hearing Date 03/17/03

Testimony Neutral to HB 1189

Christine Hogan - Executive Director State Bar Association of ND Read Testimony - Attachment  
#2.

Motion Made to DO NOT PASS HB 1189 Senator Carolyn Nelson and seconded by  
Senator Thomas L. Trenbeath

Roll Call Vote: 4 Yes. 1 No. 1 Absent

Motion Passed

Floor Assignment: Senator Thomas L. Trenbeath

Senator John T. Traynor, Chairman closed the hearing

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Date: March 17, 2003  
Roll Call Vote #: 1

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB 1189**

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO NOT PASS

Motion Made By Sen. Nelson Seconded By Sen. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman		X	Sen. Dennis Bercier	A	A
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FOUR (4) No ONE (1)

Absent ONE (1)

Floor Assignment Senator Thomas L. Trenbeath

If the vote is on an amendment, briefly indicate intent:

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**REPORT OF STANDING COMMITTEE (410)**  
March 17, 2003 5:51 p.m.

Module No: SR-47-4974  
Carrier: Trenbeath  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**  
HB 1189, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO NOT PASS** (4 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed HB 1189 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

SR-47-4974

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2003 TESTIMONY

HB 1189

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**Testimony on HB 1189**

**House Judiciary Committee**

**January 28, 2003**

**Christine Hogan  
Executive Director  
State Bar Association of North Dakota**

The State Bar Association of North Dakota represents the 1800 attorneys who are licensed to practice in North Dakota. The Association is neutral on House Bill 1189 at this time, but, because the Legislative Committee and the Board of Governors of the Association believe the bill has potential impact on the legal system, we are offering our assistance and knowledge of the subject matter in respect to the issues addressed in the bill. We have two concerns about this proposed legislation.

First, issuing a search warrant is not a ministerial function. It requires working knowledge and understanding of the a complex body of search and seizure law under the Fourth Amendment of the United States Constitution and under Article 1, section 8 of the North Dakota Constitution. Second, municipal judges do not receive training in search and seizure law and many are not law trained at all.

Giving municipal judges authority to issues search warrants would be a major change in the law and procedure. The Association is not aware of a reason to make such a change and we suggest this legislation is nether necessary nor justified.

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**DICKINSON MUNICIPAL COURT  
99 2<sup>ND</sup> STREET EAST  
DICKINSON ND 58601  
PHONE # (701) 264-7726 & 264-7770**

January 28, 2003

TO: Rep. Duane DeKrey, Chairman  
Members of House Judiciary Committee

RE: HB 1189

I would like to submit this written testimony in support of HB 1189.

I have served as Dickinson Municipal Judge for nearly 21 years. I also serve as President of the North Dakota Municipal Judge's Association, which supports this bill.

The issue of the authority of Municipal Judge's to issue search warrants has been a topic of discussion at our annual training sessions, in particular because of recent attorney general opinions. The first was written by Attorney General Heitkamp on December 30, 1999, and the more recent by Attorney General Stenehjem on January 4, 2002. Copies of both are attached.

Both opinions agree that without a legislative change, a municipal judge does not have the power to determine if probable cause exists to issue a search warrant unless the municipal judge has been appointed as a magistrate by the presiding judge of the district.

I had always assumed, prior to these opinions, that the authority of a municipal judge to issue search warrants was included among those powers already granted by the state, including those set forth in 29-01-15, NDCC. I believe that nearly all municipal judges, and perhaps district judges, thought likewise. I have during my time in office issued many search warrants at the request of city prosecutors or the state's attorney, as have I'm sure many of my colleagues. Only since these attorney general opinions has there been uncertainty about the validity of search warrants issued by municipal judges, or the authority of municipal judges to issue search warrants.

Both Attorney Generals Heitkamp and Stenehjem have clearly indicated that a legislative change is necessary to insure that municipal judge's have the authority to issue search warrants. The Municipal Judge's Association believes it is vitally imperative that municipal judge's be able to issue search warrants, particularly in this day when prompt action is often required by law enforcement agencies, and the availability of other judges may be limited. Our association asks for a favorable recommendation of this bill.

Very truly yours,

  
Robert A. Keogh  
President, Municipal Judge's Association

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2002 N.D. Op. Atty. Gen.  
2002 N.D. Op. Atty. Gen. L-03  
(Cite as: 2002 WL 46807 (N.D.A.G.))

Page 1

Office of the Attorney General  
State of North Dakota

\*1 Letter Opinion No. 2002-L-03  
January 4, 2002

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

Dear Ms. Pettit:

Thank you for your letter requesting reconsideration of a letter opinion issued to you on December 30, 1999, concerning the authority of municipal judges to issue search warrants. See 1999 N.D. Op. Att'y Gen. L-132.

I have carefully considered the argument you raised in your letter and further researched the matter. It is my opinion that there have been no material changes in the relevant law since the previous opinion was issued, and that the analysis and conclusion of that opinion were correct.

I would like to reiterate that part of the opinion in footnote 3 of the 1999 opinion that notes that "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."

You may wish to consider asking the next Legislative Assembly to amend the statute to grant authority to issue search warrants to municipal judges. If I can assist you that regard, please let me know.

Sincerely,

Wayne Stenehjem

Attorney General

2002 N.D. Op. Atty. Gen. L-03, 2002 WL 46807 (N.D.A.G.)

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1999 WL 1939469 (N.D.A.G.)  
(Cite as: 1999 WL 1939469 (N.D.A.G.))

Page 1

Office of the Attorney General  
State of North Dakota

\*1 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.

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*Danna Baller*  
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Date

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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.

\*2 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. (FN1) 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

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implied from the powers expressly granted. *Roeders v. City of Washburn*, 298 N.W.2d 779 (N.D. 1980). [FN2] However, 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.

\*3 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 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 action [FN3] or appointment as a magistrate by the presiding judge of the district court.

\*4 If a municipal judge has been appointed as an N.D.C.C. § 27-05-31 magistrate

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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

[FN1]. 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.

[FN2]. 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).

[FN3]. 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.

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*Att #1a*

**DICKINSON MUNICIPAL COURT  
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DICKINSON ND 58601  
PHONE # (701) 264-7726 & 264-7770**

*cell phone →*

March 3, 2003

Sen Jack Traynor, Chairman  
Senate Judiciary Committee  
State Capitol  
Bismarck, ND 58501

RE: HB 1189

Dear Sen. Traynor:

Because of the possibility I will not be able to attend your hearing re the above bill, which has not yet been scheduled to my knowledge, would like to submit this written testimony in support of HB 1189.

I have served as Dickinson Municipal Judge for nearly 21 years. I also serve as President of the North Dakota Municipal Judge's Association, which supports this bill.

There are approximately 80 Municipal Judge's and Alternate Municipal Judges in North Dakota. Of those, about 50 are not law trained. Current law requires that only in cities of over 5000 population the Municipal Judge must be law trained.

The authority of Municipal Judge's to issue search warrants has been a topic of discussion at our annual training sessions, in particular because of recent attorney general opinions. The first was written by Attorney General Heitkamp on December 30, 1999, and the more recent by Attorney General Stenehjem on January 4, 2002. Copies of both are attached.

Both opinions agree that without a legislative change, a municipal judge does not have the power to determine if probable cause exists to issue a search warrant unless the municipal judge has been appointed as a magistrate by the presiding judge of the district.

I had always assumed, prior to these opinions, that the authority of a municipal judge to issue search warrants was included among those powers already granted by the state, including those set forth in 29-01-15, NDCC. I believe that nearly all municipal judges, and perhaps district judges, thought likewise. I have during my time in office issued many search warrants at the request of city prosecutors or the state's attorney, as have I'm sure many of my colleagues. Only since these attorney general opinions has there been uncertainty about the validity of search warrants issued by municipal judges, or the authority of municipal judges to issue search warrants.

Both Attorney Generals Heitkamp and Stenehjem have clearly indicated that a legislative change

is necessary to insure that municipal judge's have the authority to issue search warrants. The Municipal Judge's Association believes it is vitally imperative that municipal judges be able to issue search warrants, particularly in this day when prompt action is often required by law enforcement agencies, and the availability of other judges may be limited. Our association asks for a favorable recommendation of this bill.

I would like to stress that this bill, as introduced, would permit any Municipal Judge to issue search warrants. Search warrants are to be issued only on probable cause, and our association does not believe only law trained judges are able to determine in any specific case if probable cause exists.

A "benchbook" that has been provided to Municipal Judges for years [the current version having been prepared by Professor Lockney of the UND Law School prior to Attorney General Heitkamp's opinion] indicates that lay judges were authorized to issue search warrants and provides information to assist all judges in properly issuing search warrants. While I can't point to any statistical data to support this, I think that in reality very few of the search warrants issued each year in this state have been, at any time, issued by non law trained judges. However, our association believes that option should exist.

Our association would ask that this committee restore this bill to its original wording and give it a do pass recommendation in that form.

Very truly yours,

  
Robert A. Keogh  
President, Municipal Judge's Association

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Att #2

Testimony on HB 1189

Senate Judiciary Committee

March 17, 2003

Christine Hogan  
Executive Director  
State Bar Association of North Dakota

The State Bar Association of North Dakota represents the 1800 attorneys who are licensed to practice in North Dakota. The Association is neutral on House Bill 1189 at this time, but, because the Legislative Committee and the Board of Governors of the Association believe the bill has potential impact on the legal system, we are offering our assistance and knowledge of the subject matter in respect to the issues addressed in the bill. We have two concerns about this proposed legislation.

First, issuing a search warrant is not a ministerial function. It requires working knowledge and understanding of the a complex body of search and seizure law under the Fourth Amendment of the United States Constitution and under Article 1 , section 8 of the North Dakota Constitution. Second, municipal judges do not receive training in search and seizure law and many are not law trained at all.

Giving municipal judges authority to issues search warrants would be a major change in the law and procedure. The Association is not aware of a reason to make such a change and we suggest this legislation is nether necessary nor justified.

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