

**LETTER OPINION
2008-L-17**

November 28, 2008

Mr. Neil Fleming
Cavalier City Attorney
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter about enforcement and prosecution of a city ordinance equivalent to N.D.C.C. § 39-08-01. You question whether the Cavalier city police may cite a person for driving while under the influence as a violation of Cavalier's municipal ordinance if the Cavalier city magistrate is not licensed to practice law in North Dakota, or whether the offense must be cited as a violation of state law.

You also asked who has the responsibility for prosecuting driving while under the influence or actual physical control offenses committed in the city of Cavalier that are violations of both N.D.C.C. § 39-08-01 and an equivalent municipal ordinance.

Based on the following, it is my opinion that if a municipality like Cavalier does not have a law trained judge or an agreement under N.D.C.C. § 40-18-06.2 to transfer municipal ordinance offenses equivalent to N.D.C.C. § 39-08-01 to a district court, the Cavalier city police should cite a person for driving while under the influence as a violation of N.D.C.C. § 39-08-01. Any violation of section 39-08-01 would then be prosecuted in the district court by the county state's attorney.

ANALYSIS

Your questions can be answered in part by examining N.D.C.C. § 40-18-01, which establishes the jurisdiction and qualifications of a municipal judge. Generally, a municipal judge has jurisdiction to hear, try, and determine offenses against the ordinances of a city.¹ In a city with a population of less than 5,000, a municipal judge need not be licensed to practice law, unless otherwise required by the city through a resolution or ordinance.²

¹ N.D.C.C. § 40-18-01(1).

² N.D.C.C. § 40-18-01(1), (2).

If a city, such as the city of Cavalier, has determined that the municipal judge is not required to be licensed to practice law in this state, N.D.C.C. § 40-18-01(4) removes the jurisdiction and authority of the municipal court to hear, try, and determine any offense that would be a violation of section 39-08-01 or equivalent ordinance.

A city may have an ordinance establishing offenses equivalent to N.D.C.C. § 39-08-01, but the ordinance cannot be enforced in the municipal court when the municipal judge is not a person licensed to practice law in the state. If, however, a city has an agreement with the governing body of the relevant county, the presiding judge of the judicial district in which the city is located, and the state court administrator, the governing body of a city may, by ordinance, transfer some or all of its municipal court cases to the district court.³ If there is no agreement, a municipal ordinance which is the equivalent of N.D.C.C. § 39-08-01 is rendered inoperative, since the establishment of a municipal court without a judge licensed to practice law divests that municipal court of jurisdiction to hear those specific offenses.⁴ Thus, there is no venue to address a violation of Cavalier's municipal ordinance.

This is a result that was known and expected by the Legislative Assembly in 1991. During the hearings on H.B. 1226 that created N.D.C.C. § 40-18-01(4), a representative of the North Dakota League of Cities testified:

Under this HB 1226 if the municipal judge is not law trained they would therefore have no jurisdiction to hear a DUI so the way I am reading this there would be no point for that city to have any city ordinance (sic) relating to DUI. If there was a violation of that type it would also be a violation of state law and they would be charged in county court.⁵

Thus, any such offense should be charged as a state law violation under section 39-08-01 and should not be charged as a municipal ordinance offense unless the city has entered into an agreement pursuant to N.D.C.C. § 40-18-06.2. A citation or complaint alleging a violation of section 39-08-01 would be filed in district court for the offense committed in the city of Cavalier.

The remaining questions set forth in your letter relate to the responsibility to prosecute N.D.C.C. § 39-08-01 offenses committed within the territorial limits of the city of Cavalier.

³ N.D.C.C. § 40-18-06.2.

⁴ See N.D.A.G. Letter to Isakson (Sept. 11, 1991) ("Pursuant to N.D.C.C. § 40-18-01(4), a municipal judge not licensed to practice law in the state of North Dakota has no jurisdiction to hear, try, or determine these first or second offenses. These offenses, however, may be charged in the [now district] court.").

⁵ Hearing on H.B. 1226 Before the House Comm. on the Judiciary, 1991 N.D. Leg. (Jan. 16) (Testimony of Jerry Hjelmstad).

Any N.D.C.C. § 39-08-01 offenses committed within the territorial jurisdiction of the city of Cavalier must be charged in the district court as a state law violation and not as a municipal ordinance violation. It is irrelevant whether a city of Cavalier police officer or a Pembina County deputy sheriff arrests or charges a person for an N.D.C.C. § 39-08-01 offense committed within the territorial boundaries of the city of Cavalier.⁶ A criminal action which cites state law would be prosecuted in the name of the State of North Dakota and not in the name of the city of Cavalier.⁷ Since the case is brought against the defendant as a violation of state law, as opposed to a municipal ordinance, it would be expected that this case would be prosecuted by the state's attorney as all other cases involving violations of N.D.C.C. § 39-08-01. The Attorney General and the state's attorneys are the only public prosecutors in cases where the state is a party to the action.⁸

Based on the foregoing, it is my opinion that if Cavalier does not have a law trained judge or an agreement under N.D.C.C. § 40-18-06.2 to transfer municipal ordinance offenses equivalent to N.D.C.C. § 39-08-01 to a district court, the Cavalier city police should cite a person for driving while under the influence as a violation of N.D.C.C. § 39-08-01. Any violation of section 39-08-01 occurring in the city would then be prosecuted in the district court by the county state's attorney.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.⁹

⁶ A city police officer has the power of a peace officer within the city limits and for a distance of 1½ miles in all directions outside the city limits. N.D.C.C. § 40-20-05. Within the city limits and for a distance of 1½ miles outside the city limits, a city of Cavalier police officer possesses the same authority to enforce state laws as the Pembina County sheriff and his deputies. No appointment of the police officer as a special deputy is required under N.D.C.C. § 11-15-02 to exercise the power of a peace officer within the city limits and for a distance of 1½ miles in all directions outside the city limits.

⁷ N.D.C.C. § 29-01-03.

⁸ State v. Stepp, 178 N.W. 951, 953 (N.D. 1920).

⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).