

LETTER OPINION
93-L-252

September 8, 1993

Dwight F. Kalash
Grand Forks City Prosecutor
P.O. Box 1713
Grand Forks, ND 58206-1713

Dear Mr. Kalash:

Thank you for your letter requesting an opinion regarding arrests for assault pursuant to N.D.C.C. ?? 14-07.1-11 and 29-06-15. As you point out, N.D.C.C. ? 29-06-15 authorizes a law enforcement officer to arrest without a warrant for an assault involving domestic violence pursuant to section 14-07.1-11. N.D.C.C. ? 14-07.1-11 authorizes an officer to make a warrantless arrest of a person who has assaulted that person's family or household member.

You question whether the arrest contemplated by these statutes is for a violation of the assault provisions contained in N.D.C.C. ch. 12.1-17 or, conversely, whether the arrest may be made for violation of a simple assault ordinance of the city. You also ask whether the immunity set forth in N.D.C.C. ? 14-07.1-11(2) protects officers making an arrest for violating a simple assault ordinance.

At common law, a peace officer was limited in making warrantless arrests to misdemeanors and felonies committed in the officer's presence or for felonies not committed in the officer's presence, as long as reasonable grounds or probable cause existed for making the arrest. See generally, 1 J. Stephen, A History of the Criminal Law of England, 193 (1883).

North Dakota has generally followed the common law approach by authorizing warrantless arrests for all crimes committed in the officer's presence as well as for felonies not committed in the officer's presence. See generally, N.D.C.C. ? 29-06-15(1)(a-e). Many states, including North Dakota, have created statutory exceptions to the common law rule for certain misdemeanors not occurring in the officer's presence. The domestic violence assault and the offense of driving under the influence are examples of such statutory exceptions which have been adopted in our state. N.D.C.C.

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? 29-06-15(f) and (g).

The domestic violence assault exception was created in 1983 and initially codified as N.D.C.C. ? 14-07.1-06(2), which then read as follows:

Penalty for violation of a protection order - Arrest without warrant. Whenever a protection order is granted pursuant to section 14-07.1-02 or 14-07.1-03 and the respondent or person to be restrained has been served a copy of the order, a violation of the order shall be a class A misdemeanor and also constitute criminal contempt of court subject to penalties therefor. A peace officer may arrest any person without a warrant if the officer has probable cause to believe that:

1. . . .

2. The person within the preceding four hours has assaulted his or her spouse, other family member, former spouse, or any person with whom the person resides, although the assault did not take place in the presence of the peace officer. A peace officer may not arrest a person pursuant to this subsection without first observing that there has been recent physical injury to, or impairment of physical condition of, the alleged victim.

According to testimony offered before the Senate Judiciary Committee in support of this exception, the benefits of the warrantless arrest in domestic violence cases would be:

- 1) To buy time for the victim immediately after an assault without her having to press charges.
- 2) To acknowledge that domestic assaults are serious crimes even though they are not witnessed.
- 3) To reduce repeat calls to police departments by providing immediate intervention.
- 4) To provide the opportunity to present options to battering victims, including the initiation of the Protection Order.

Hearing on S. 2084 Before House Comm. on the Judiciary 48th Leg.,
May 7, 1983 (Testimony of Bonnie Palacek). Ms. Bonnie Palacek further stated the bill "would specifically insure protection from

liability for false arrest if the officer acted in good faith on probable cause." Id.

As originally introduced, Senate Bill 2084 would have given officers authority to arrest without a warrant when the officer had probable cause to believe a person within the preceding four hours had "physically abused" his spouse or other person with whom he resided. The bill was amended to substitute the word "assaulted" for "physically abused." Unfortunately, there is no explanation for this amendment in the legislative history.

The word "assault" is not defined in the North Dakota Century Code but is the subject of three statutes, N.D.C.C. ? 12.1-17-01 (Simple Assault), ? 12.1-17-01.1 (Assault), and ? 12.1-17-02 (Aggravated Assault). These statutes set forth the elements for the respective crimes but do not define "assault."

At common law, "assault" was defined as "[a]n intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt, if not prevented." Black's Law Dictionary 147 (4th ed. 1968) (emphasis added). An assault, at common law, included the threat to strike another as well as the act of striking another. It is evident from the language of N.D.C.C. ? 14-07.1-11(1)(b), formerly 14-07.1-06(2), that the Legislature did not intend the common law definition to be used by officers in cases involving domestic violence. N.D.C.C. ? 14-07.1-11(1)(b)¹ as enacted in 1989 provided as follows:

Arrest without a warrant.

1. A law enforcement officer may arrest a person without a warrant if:

¹ As amended by the 1993 Legislative Assembly, N.D.C.C. ? 14-07.1-11(1)(b) now reads:

From the time the officer determines there is probable cause to arrest for an assault of a family or household member as defined in section 14-07.1-01, the officer has four hours in which to make a warrantless arrest, whether or not the assault took place in the presence of the officer. After four hours has elapsed, the officer must secure an arrest warrant before making an arrest. A law enforcement officer may not arrest a person pursuant to this subdivision without first observing that there has been recent physical injury to, or impairment of physical condition of, the alleged victim. (emphasis added).

. . .

b. The officer has probable cause to believe the person, within four hours of the ascertainment of probable cause, has assaulted that person's family or household member as defined in section 14-07.1-01, although the assault did not take place in the presence of the officer. A law enforcement officer may not arrest a person pursuant to this subdivision without first observing that there has been recent physical injury to, or impairment of physical condition of, the alleged victim. (emphasis added.)

While the Legislature obviously intended that the assault mentioned in N.D.C.C. ? 14-07.1-11(1)(b) involve physical injury or impairment of physical condition, no reference was made to N.D.C.C. ch. 12.1-17. Similarly, the language used in N.D.C.C. ? 29-06-15(1)(g) refers to "an assault involving domestic violence" with no reference to N.D.C.C. ch. 12.1-17.

In 1963, the Attorney General was asked whether a city policeman could make a warrantless arrest for the violation of a city ordinance committed in the officer's presence. Then Attorney General Helgi Johanneson concluded that the term "public offense" as mentioned in N.D.C.C. ? 29-06-15(1) included violations of city ordinances as well as violations of state statutes.

While, as indicated in your letter, Section 29-06-15 of the North Dakota Century Code seems to apply to arrests made under state law, it is clear from the decision of our Supreme Court in *Kist v. Butts*, 71 N.D. 436, 1 N.W.2d 612, that Section 40-11-11 provides alternative methods of commencing actions for the violations of city ordinances . . . and supports the proposition that Section 29-06-15 may be relied on for authority to a peace officer to arrest without a warrant where a public offense is committed or attempted in his presence, said offense being the violation of a city ordinance.

Letter from Attorney General Helgi J. Johanneson to Rolla City Attorney Howard Stormon (May 15, 1963) (copy attached). Similarly, in a letter opinion to you dated March 19, 1980, then Attorney General Allen Olson noted, "although the term 'offense' is not defined in Chapter 29-06, it is defined in Section 12.1-01-04 to mean 'conduct for which a term of imprisonment or a fine is authorized by statute after conviction.' As state traffic laws and city traffic ordinances provide for imprisonment or fine upon conviction of prohibited conduct, it is clear that such laws and ordinances do constitute an offense." Letter from Attorney General Allen Olson to Dwight F. Kalash (March 19, 1980) (copy attached).

Consistent with the opinions of former Attorneys General Johanneson and Olson, I conclude that "assault" as mentioned in N.D.C.C. ? 14-07.1-11(1)(b) includes conduct prohibited by a city ordinance on

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simple assault.

I am mindful of N.D.C.C. ? 40-11-11 which states: "In all actions for the violation of an ordinance, the first process shall be a summons, but a warrant for the arrest of the offender shall be issued upon the sworn complaint of any person that an ordinance has been violated and the person making the complaint has reasonable grounds to believe the person charged is guilty of such violation."

Strict application of this language to a domestic violence case would seemingly require the victim to swear out a complaint before an officer could arrest the alleged perpetrator.

However, the language of N.D.C.C. ? 14-07.1-11(1)(b) is specific as to a particular kind of conduct which may result in a warrantless arrest. It must be assaultive conduct which causes physical injury or impairment of physical condition. Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions. However, if the conflict between the two provisions is irreconcilable, the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail. N.D.C.C. ? 1-02-27

The language now embodied in N.D.C.C. ? 14-07.1-11(1)(b) was initially adopted by the Legislature in 1983. N.D.C.C. ? 40-11-11 was last amended in 1943.

I conclude, therefore, that an arrest for assault under N.D.C.C. ? 14-07.1-11(1)(b) may be made for violating N.D.C.C. ch. 12.1-17 or a city ordinance prohibiting assault so long as the conduct involves physical injury or impairment of physical condition.

Having concluded that a warrantless arrest for violating a city ordinance prohibiting assault is permissible under N.D.C.C. ? 14-07.1-11(1)(b), it is my opinion that the immunity set forth in ? 14-07.1-11(2) applies to an officer making such an arrest.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosures