

VOLUME NO. 38

OPINION NO. 80

COURTS, CITY - Town council designation of city judge;
JUDGES - City judge selection by town council;
JUSTICES OF THE PEACE - Town council designation to act as
city judge;
MUNICIPAL CORPORATIONS - City judge selection by town
council;
MONTANA CODE ANNOTATED - Sections 3-11-101, 3-11-102, 3-11-
103, 3-11-205, 7-1-4111, 7-4-4101(1)(c), 7-4-4101(2), 7-4-
4102(1)(c), 7-4-4102(2), 7-4-4102(3), 7-4-4103(1), 7-4-
4103(3)(c);
1975 MONTANA LAWS - Chapter 420, section 1;
OPINIONS OF ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 42
(1977); 37 Op. Att'y Gen. No. 62 (1977).
1972 MONTANA CONSTITUTION - Article XI, section 4(2).

HELD: A town may not select a city judge who is not a
justice of the peace. The city judge for the town
must be a justice of the peace of the county in
which the town is situated and must be designated
by the town council to act as city judge.

2 May 1980

Joseph E. Mudd, Esq.
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Dear Mr. Mudd:

You have asked for my opinion on the following question:

May a town select a city judge who is not a justice of
the peace?

In my opinion a town does not have the power to select a
city judge who is not a justice of the peace.

Section 3-11-101, MCA, establishes a city court in each city or town in the state. The city court has concurrent jurisdiction with the justice's court over certain misdemeanors, applications for search warrants, and complaints charging the commission of a felony. § 3-11-102, MCA. In addition, the city court has exclusive jurisdiction over violations of city or town ordinances, certain actions involving the city or town where the amount in controversy does not exceed \$300, and actions for the collection of a city or town license fee. § 3-11-103, MCA. See generally 37 Op. Att'y Gen. No. 42 (1977); and 37 Op. Att'y Gen. No. 62 (1977).

The manner of selecting a city judge depends on the classification of the incorporated municipality for which he or she is judge, which in turn depends on the population of that municipal corporation. A municipal corporation with a population of 10,000 or more is a city of the first class; one with a population between 5,000 and 10,000 is a city of the second class; one with a population between 1,000 and 5,000 is a city of the third class; and one with a population between 300 and 1,000 is a town. § 7-1-4111, MCA. Included as an officer of a city of the first, second, or third class is the city judge. §§ 7-4-4101 (1)(c) and 7-4-4102(1)(c), MCA. In a city of the first or second class, the city judge must be elected. §§ 7-4-4101(2) and 7-4-4102(2), MCA. In a city of the third class, the governing body of the city may by ordinance determine whether the office of city judge shall be filled by appointment by the governing body or by election. § 7-4-4102(3), MCA.

The question you have asked, however, concerns towns. The statutes concerning the selection of a city judge for a town stand in stark contrast to those have discussed concerning cities. Section 7-4-4103(1), MCA, provides that the officers of a town consist of a mayor and two aldermen from each ward. No mention is made of a city judge.

Section 7-4-4103(3)(c), MCA, authorizes the mayor, with the advice and consent of the council, to appoint "any other officers necessary to carry out the provisions of...title [7]," concerning local government. The standard to be used in construing this provision is set forth in article XI, section 4(2) of the Montana Constitution, which states: "The powers of incorporated cities and towns and counties shall be liberally construed." Even under that standard, I find that section 7-4-4103(3)(c), MCA, cannot be construed to authorize the appointment of a city judge in a town. If

the provisions concerning city courts were contained in Title 7, then the constitutional rule of liberal construction would require that section 7-4-4103(3)(c), MCA, be interpreted to authorize the appointment of a city judge. But even the rule of liberal construction does not allow me to ignore the limitation of that subsection to "officers necessary to carry out the provisions of...title [7]." My research has revealed no provision of Title 7 that requires the appointment of a city judge by a town in order to implement it. Title 7 relates chiefly to the executive, legislative, and administrative powers of local governments, while the establishment of city courts is governed by Title 3. Therefore a town is not authorized to appoint a city judge by section 7-4-4103(3)(c), MCA.

Instead, the law provides:

In a town, the council may designate a justice of the peace of the county in which the town is situated to act as city judge and may by ordinance fix the compensation for his services. The justice of the peace so designated may act as city judge in all cases arising out of violations of ordinances in which the town is a party. If the justice of the peace must travel from his place of residence to hold court, he shall be paid his actual and necessary travel expenses...by the town in which the court is held.

§ 3-11-205, MCA. See also Grant v. Williams, 54 Mont. 246, 253, 169 P. 286, 287 (1917); and State ex rel. Streit v. Justice Court, 45 Mont. 375, 380, 123 P. 405, 406 (1912).

Prior to 1975, this statute stated that "[t]he justices of the peace so designated must act as a police judge in all cases arising out of a violation of ordinances where the town is a party." (Emphasis added.) See § 11-727, R.C.M. 1947; 1975 Mont. Laws, ch. 420, § 1. It has been argued that the change from "must" to "may" authorizes a town to appoint a city judge who is not a justice of the peace. However, that change simply provides a designated justice of the peace with some discretion in the performance of his or her duty as city judge for a town, where formerly the duty was mandatory. Cf. State ex rel. McCabe v. District Court, 106 Mont. 272, 277-79, 76 P.2d 634, 637 (1938). The statute does not authorize the appointment of a city judge who is not a justice of the peace.

THEREFORE, IT IS MY OPINION:

A town may not select a city judge who is not a justice of the peace. The city judge for the town must be a justice of the peace of the county in which the town is situated and must be designated by the town council to act as city judge.

Very truly yours,

MIKE GREELY
Attorney General