

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION
CONFERENCE COMMITTEE ON HOUSE BILL 491

Call to Order: By SENATOR LARRY L. BAER, CHAIRMAN, on April 8,
1995, at 10:30 A.M.

ROLL CALL

Members Present:

Sen. Larry L. Baer (R)
Sen. Lorents Grosfield (R)
Sen. Fred R. Van Valkenburg (D)
Rep. Robert C. Clark (R)
Rep. Matt Brainard (R)
Rep. Joe Tropila (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Staff Attorney
Judy Feland, Secretary

Discussion: CHAIRMAN LARRY L. BAER told the committee there was some concern about the language of HB 491, as amended. He stated his desire to reach a consensus with the parties involved.

Motion: REPRESENTATIVE MATT BRAINARD MOVED TO AMEND HB 491, ON PAGE 1, LINE 13, TO STRIKE THE WORDS, "EXCEPT IN AN INCORPORATED CITY OR TOWN THAT MAINTAINS A MUNICIPAL POLICE FORCE OR AS OTHERWISE PROVIDED BY LOCAL CHARTER, ORDINANCE, OR RESOLUTION, THE".

Discussion: REPRESENTATIVE BRAINARD said the motion would strike the language which provided an exclusion which had caused some of

the conflict that had arisen over the amendments. He explained that the language had been amended in by the Senate, along with some additional language on Page 2, Lines 12-13, "the chief of police is the chief law enforcement officer within the city or town." That language was appropriate to the concept of the bill, which was basically clarifying language, he said. The bill was not intended to put one branch of law enforcement in charge of another or to change any of the duties that are described in code at the present time. He contended the intent of the bill was merely to clarify.

SENATOR FRED VAN VALKENBURG stated that he had never understood the purpose of the bill. To assist him in voting, he asked the bill's sponsor, **REPRESENTATIVE BRAINARD**, why he considered the bill necessary.

REPRESENTATIVE BRAINARD stated that some federal law, in a blanket reference to local law enforcement agencies, often refers to the, "chief law enforcement officer, shall," to encompass all the law enforcement agencies across the United States. His approach was to bring this bill to the same language. A similar bill by **REPRESENTATIVE SHEA** had been introduced in the House regarding firearms in the school yards, and he had attempted to amend in language concerning weapons. The problem was that the language had to coincide, almost word for word, to federal law so that the schools could receive their federal monies. Another bill dealt with weapons rather than firearms, which did not make

it. He restated his intention of clarification. He felt the bill would coincide with the language that the Attorney General cited in a handout distributed to the committee. (EXHIBIT 1)

CHAIRMAN BAER asked for comments from the committee on whether or not the amendment would alleviate their concerns with the bill.

Robert Jones, represented the Montana Association of Police Chiefs. Their organization and other concerned parties had met with the Sheriffs association in an attempt to resolve the situation. They saw a great number of concerns that the bill would possibly attach itself to, such as insurance problems and jurisdictional disputes. He stated their desire to work on the issues to identify the needs of both the Sheriffs and Police Chiefs for future legislation.

Barry Michelotti, representing the Montana Sheriffs and Peace Officers Association, concurred that the Chiefs Association, the Police Protective Association and the Montana Sheriffs and Peace Officers Association would like to see the bill die before it reached the House or Senate floor. If there were questions on how they could best apply law enforcement needs for the Brady Bill, he said they would like to work on language that everyone could agree upon but would not interfere with the rights of the law enforcement agencies.

Bill Ware, Police Chief Manager, City of Helena, stated that he had not been a party to the discussion between the Police Chiefs Association and Sheriffs Association, but agree with them. He felt the bill, while on the surface was not intended to make a dramatic change, would, in its application, put in implications not intended. Municipalities have a different chain of command than counties do, he contended, because they had an elected body. In some cases, they have a mayor as chief administrator, who supervises the law enforcement operation. In other cases, a city manager supervises a police chief. Where the bill would fit in that authority chain was unclear, and his group thought it would increase some liability problems in terms of interpretations of who would be liable for what, as well as who would make the decisions in the operations. He and others felt that if these issues would be examined over the next two years, it would be more beneficial to incorporate this legislation with pertinent concerns of the cities and counties, he said.

Tim Shanks, representing the Montana Police Protective Association, stated that their organization had met with the Police Chiefs and Sheriffs Associations in lengthy discussions over the past few days. He agreed with the suggestion of coming back in the next session to address the problems foreseen, and stated their opposition to the bill as it stood. He expressed relief that everyone was talking at that point and trying to resolve the issue.

John Connor, Prosecutor, Attorney General's Office, Department of Justice, said he would have to take some responsibility for the form of the bill because he provided assistance to **Mr. Kembel** and others in terms of drafting language to be included in the bill. The Attorney General did not support the position of the bill, nor did he support the position of the Police Chiefs or Sheriffs. They had taken no position at all, viewing the bill as a, "housekeeping," bill required under the terms of the Brady Law. As public servants, they acted to provide the language for the bill and amendments. In terms of the opinion of the Attorney General, he had heard some discussion that maybe the opinion supported or exempted certain aspects of the bill. It was their view that it did neither support nor oppose bill, but they did recognize as stated in # 4 of the opinions, **(EXHIBIT 1)** that, "the sheriff has the primary duty to enforce county and state laws throughout the country. If local enforcement is lacking, the sheriff must undertake such enforcement." The opinion noted that the local law enforcement agencies, other than the sheriff, in cities and towns, have the authority to enforce the law there as well and that the sheriff traditionally leaves local policing to the local officers. The opinion recognizes that when that is not available or lacking, the sheriff has the authority.

REPRESENTATIVE BRAINARD responded by explaining his ideas for application of the bill. He cited Paragraph 4, Page 5 of the opinion paper, referencing the duties of the sheriff to include, "authority extending over the entire county, and including all

municipalities and townships within that county." He felt it clearly indicated that the sheriff is considered to be the chief law enforcement officer of the county, but not in charge of a municipality, or the municipalities' officers. He stated it was law enforcement and not a chain of command. He read further into that paragraph, "while a sheriff may, in the absence of information to the contrary, assume that a local police department will do its duty in enforcing the law, the primary duty of such enforcement is the sheriff's and cannot be altered by custom." He thought the language would reinforce the concept that the sheriff, as an elected officer of the county, by all members of the county, no matter what municipality the person would live in, would be charged with the responsibility to enforce the laws under his office. It would not put him in charge of municipal personnel. If a city should disincorporate, the sheriff is left to enforce the law. County governments are the basic structure across the State of Montana, he said, recognizing some counties had city-county governments. In the future, one major city would probably not dominate some of the counties, but multiple cities with multiple police departments instead. The people outside the municipalities will still be electing a sheriff and county commissioners, and as such, the language he saw would make the sheriff the chief law enforcement officer of the counties, but whose duties would not include the management of municipal personnel. In each city and town, he said, the only requirement would be a chief of police in that capacity. There would be no requirement for a municipality to

have more officers than that one person. Should there be cutbacks in the cites, it would leave the sheriff once again in charge of that law enforcement. **REPRESENTATIVE BRAINARD** stated that the bill would not change any of the duties, which would be exactly as they are written in code at present. He recognized some insecurities across the state, as well as clashes in personalities between various agencies, there would be no way that code could address all of those problems. It was neither his intent nor desire to rewrite the duties and inter-relationships of the police departments and sheriffs offices across the state.

REPRESENTATIVE JOE TROPILA stated that this had worked well for years and generations, but upon introduction of this bill, rifts had appeared between departments all over the state. When it was amended in the Senate, the rifts grew worse. There was no need to clarify what was already working, he contended. He saw no problems in Cascade County, and noted that their law enforcement officers worked well together. There was no reason to change any of it, even by implication. He wondered if they were reading something into the bill that he could not. He encouraged the sponsor to come back the next session to address the problems of the Brady Bill, if that was the primary concern.

SENATOR VAN VALKENBURG was asked for his opinions as a prosecutor by **CHAIRMAN BAER**. He stated his concerns for over-reaching the

purpose of the bill. The purpose was to deal with federal law referencing the chief law enforcement officer as he understood it. He would agree with it if the bill was to say, "if for the purposes of that particular federal law, the chief law enforcement officer of the county was the sheriff." But if they were to say the sheriff was the chief law enforcement officer of the county, they would be creating a hierarchy of command because the city is an integral part of a county. While he agreed that the sheriff might not have the control over the personnel of the police department, it would clearly say in law that the sheriff would have authority over the investigation of crimes within city limits and the handling of incidents. He was particularly worried about hostage situations and very high profile circumstances where suddenly a sheriff would take over even though it was occurring in the city limits. He felt they had understandings at local levels on how those situations would be dealt with. He wondered if they would impose rules that would not work in some localities.

REPRESENTATIVE BRAINARD asked if the agreements were encoded or merely working agreements? He asked if they had anything in writing at the present time to stop someone with a large ego, other than force of personalities within agreements?

SENATOR VAN VALKENBURG said he did not think so, but he would still be hesitant to put in place something that would give the illusion that the legislature wanted it done.

REPRESENTATIVE ROBERT CLARK asked for comments from the various law enforcement representatives in the audience on the motion before them.

Barry Michelotti said that the Montana Sheriffs and Peace Officers Association agreed with the Chiefs and the Police Protective Agency that they would collectively recommend that the bill not be continued further. He remained steadfast in that decision.

Jerry Williams, representing the Montana Peace Protective Association, agreed with **Sheriff Michelotti.** He said they had discussed language that would be beneficial to both parties and were unable to agree. The amended form had caused much difficulty between the organizations and he repeated the request for additional time to resolve the issues. He stated their opposition to the bill in any form.

Bill Ware, Legislative Chair, Montana Association of Chiefs of Police, said he agreed with the remarks of the other associations' representatives. He said the time was running too short to attempt to solidify the bill. He asked for two years to consider an alternative.

CHAIRMAN BAER expressed his concern that while they all appeared to be against the bill in any form, they had basically a undefined problem regarding jurisdiction, and maybe concurrent

jurisdictions. There was nothing on the books to resolve the problems they had expressed concern about. He felt the bill was straightforward, but acknowledged that it had raised quite a number of ghosts in their minds. While he liked to give a bill a chance to do what it was intended to do, he was dismayed at the apparent lack of consideration among the respective positions as law enforcement officers, especially inasmuch as it was evidenced that some resolution was lacking. He stated that if they were getting along just fine without any definitive rules about their standing, he couldn't understand why they would object to a bill that would take one isolated area and try to define it.

REPRESENTATIVE BRAINARD stated that the bill had gone through the House Judiciary Committee and neither association came in as opponents or proponents during that hearing, even though it was plainly acknowledged that everyone understood the original language. Up to the March 30 Senate hearing, he had heard little or nothing. He received opposition at that time from the chiefs so the amendments were included. He restated the motion, saying there would be parity between the sheriffs and municipalities, with nearly identical wording. He did not believe it would disturb the balance of power. An omnibus piece of legislation may be required to resolve the ghosts and suspicions that had been raised.

CHAIRMAN BAER restated his disappointment that the law enforcement agencies could not reach an agreement to alleviate

their fears or try to enhance the situation with regard to specific jurisdiction. He thought it would be helpful to them to specify their duties.

REPRESENTATIVE TROPILA said in speaking with **Attorney General Joe Mazurek**, he understood that the chief law enforcement officer of a county was the county attorney. He asked **John Connor** if that was correct.

Mr. Connor explained that it would depend on the county. In Missoula County, for example, he said it had been agreed that the county attorney will act as the chief law enforcement officer for the purposes of the Brady Bill requirements. But, among the different counties, a person would get different opinions. He offered an observation from the Attorney General's office that they not do anything to exacerbate communications or working relationships between the respective law enforcement agencies. In his years in the office, he did not recognize many problems, and thought they were workable. He suggested the bill spelling out specifically what it did NOT intend, such as, "this bill is not intended to provide authority over local law enforcement agencies for purposes of personnel management, or assumption of jurisdiction."

REPRESENTATIVE TROPILA asked **Mr. Connor** if in his experience at the Attorney General's Office, the system had been working well in Montana?

John Connor replied that the system as a whole is working well. It was his job to travel around the state, working with various agencies, and he had not found problems of any significance in that regard.

REPRESENTATIVE BRAINARD stated that counties do not necessarily have to elect county attorneys. He said he understood that they could hire the services done if the duties are so light as to make that reasonable.

Mr. Connor answered that it was true of two counties: Musselshell and Golden Valley share one county attorney. He is elected in Musselshell and contracts in Golden Valley. Petroleum County hires its county attorney, he said.

REPRESENTATIVE BRAINARD asked if then by code, the counties could opt to do this if they so desire?

Mr. Connor said in those instances it occurred because no one was interested or available to run for those positions.

REPRESENTATIVE BRAINARD asked if all counties have to have an elected sheriff?

Mr. Connor replied that he believed it was so.

REPRESENTATIVE BRAINARD said he had no particular problem with a sheriff sharing duties or transferring certain jobs over to the county attorney's office to handle, particularly for paperwork or checks for the Brady bill. But in his responsibilities to the people, he had some problems in saying a county attorney, who may be contracted for under the code, was the chief law enforcement officer. He preferred an elected official of the county hold that position. He thought the people would be more comfortable with the safeguard of an elected official.

SENATOR VAN VALKENBURG responded to the inability of the police/sheriff's representatives to work something out. He had worked with all the people for a long time, in a professional capacity and in his legislative capacity. When **Chief Jones** and **Sheriff Michelotti** say, on behalf of their respective organizations, that they think they want sufficient time to work on the issues, he had confidence they would do that. While the hearings were important to them, people outside Helena don't always have the opportunity to discuss and digest the legislation. People wondered what the real purpose of this bill was, he said. He fully expected an agreement in the two years they were requesting.

CHAIRMAN BAER stated that he meant no disrespect, but only expressed his concern that the two groups should be willing and able to work together as the concerns arise. He suggested that the main issue of the bill was to define who the chief law

enforcement officer of the county was for purposes of the Brady Law.

REPRESENTATIVE BRAINARD agreed, but adding other federal legislation as well that would use the same terminology.

CHAIRMAN BAER asked if he would consider establishing that the sheriff is chief law enforcement officer in the county for the purposes of the Brady Bill only, and the chief of police would be the chief law enforcement officer in the municipality.

REPRESENTATIVE BRAINARD said he would, but did not feel they could add anything in the Conference Committee.

Valencia Lane, Staff Attorney, stated that only amendments rejected by the House could be addressed in a Conference Committee. To add the language proposed or to go outside the amendments put on in the House would have to be done in a Free Conference Committee.

CHAIRMAN BAER said the bill had been carefully discussed, and unless there were additions, he wanted to proceed on the motion by **REPRESENTATIVE BRAINARD**.

Valencia Lane asked to comment on the drafting aspects of the amendment. She helped draft the amendment for the Senate committee. The exception clause was put in to avoid a direct

conflict between the two statutes because the first statute in the bill said that the sheriff is the chief law enforcement officer for the county, which would encompass the cities. The second section said the chief of police is the chief law officer within the city or town. In her mind, that created a direct conflict between the two sections of law if an exception was not put in one or the other that said, "except as provided." It would have to be put into the sheriff's section to read, "except as provided for chiefs of police in cities and towns, the sheriff is the chief law enforcement officer." If taken out, it would create a direct conflict between the two sections of law, she said.

REPRESENTATIVE BRAINARD said he thought the exception clause caused the problems with the sheriffs when they saw it. He felt it was within the scope of the bill and the duties of the chief of police in enforcing those duties.

Vote: The **MOTION FAILED** 4-2 on a show of hands vote with **REPRESENTATIVES CLARK AND BRAINARD** voting aye; **REPRESENTATIVE TROPILA AND SENATORS BAER, LORENTS GROSFIELD, AND VAN VALKENBURG** voting no.

SENATOR GROSFIELD stated that only two options remained, a Free Conference Committee or to take no action.

CHAIRMAN BAER stated that the bill had caused quite a stir. He asked the sponsor if he would comment on the recommendations of the majority of people represented of addressing the bill in the next session.

REPRESENTATIVE BRAINARD commented that his own father had been a deputy sheriff in the Eastern U.S. and that jurisdictional problems were inherent, citing political reasons and others. He said it was not his intention to kick up a hornet's nest with people who ARE getting along. However, if it could not be said in the contract when making a business deal, he asked why it could not be said? If it could not be said to a partner or a mate, why can't you say it? If the duties and the chains of command and the way they govern themselves and the way they administrate the laws cannot be written down for the public to see and understand and be very clear, why couldn't it be done? He contended that the people are asking the same questions. He also commended their efforts to get along. He was concerned that the federal government would come in to issue edicts to them with nebulous terminology, such as "the chief law enforcement officer will do such and such." He suggested maybe the federal government should not be coming in telling them a chief law enforcement office should do anything. That would suit him fine. He offered to work with anyone in the interim to address these problems and work something out. He did not think the bill could be passed on the floor at this time. He would like to have removed the Senate amendments entirely, but did not think that

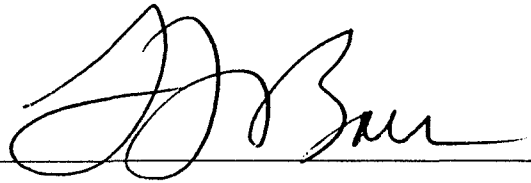
was a possibility either. He suggested that the bill rest on the table.

REPRESENTATIVE CLARK said they had seen many instances where issues were worked out satisfactorily during the interim. He saw two groups of people in this discussion that were willing to work during the interim to come up with a workable solution. He commended them for that, along with the sponsor.

CHAIRMAN BAER said that lacking further comment and in agreement with **REPRESENTATIVE CLARK**, the committee would adjourn the meeting with no action taken on this bill.

ADJOURNMENT

Adjournment: CHAIRMAN BAER adjourned the meeting at 11:03 A.M.

A handwritten signature in black ink, appearing to read "L. Baer", written over a horizontal line.

LARRY L. BAER, Chairman

A handwritten signature in black ink, appearing to read "Judy Feland", written over a horizontal line.

JUDY FELAND, Secretary

LLB/jf

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EXHIBIT 1
DATE 4-8-95
HB 491

VOLUME NO. 45

OPINION NO. 9

ARREST - Authority of police officers;
CITIES AND TOWNS - Authority to adopt ordinances prohibiting breaches of peace;
COUNTY OFFICERS AND EMPLOYEES - Sheriffs, their duties, number of deputies;
PEACE OFFICERS - Duties and authority of police officers and sheriffs;
POLICE - Arrest authority;
POLICE - Minimum number of officers in department;
POLICE DEPARTMENTS - Minimum number of officers;
SHERIFFS - Duties and authority;
SHERIFFS - Minimum number of officers in department;
MONTANA CODE ANNOTATED - Sections 7-32-2102, 7-32-2121, 7-32-4101, 7-32-4105, 7-32-4106, 7-32-4302, 45-2-101(48), 46-1-202(17), 46-6-210, 46-6-311;
MONTANA CONSTITUTION - Article XI, section 2;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 8 (1987).

- HELD: 1. Montana Code Annotated § 7-32-4302 authorizes, but does not require, a city or town to enact ordinances to prevent acts or conduct calculated to disturb the public peace.
2. A city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against public order regardless of whether the city or town has exercised its power to adopt an ordinance prohibiting breaches of the peace.
3. Each city or town must have a chief of police; no further police officers are required. Each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.
4. The sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

Ms. Vicki Knudsen
Musselshell County Attorney
One Main Street
Roundup, MT 59072

Dear Ms. Knudsen:

You have requested my opinion on four questions I have rephrased as follows:

1. Does MCA § 7-32-4302 require that a city or town council adopt an ordinance or ordinances regulating breaches of the peace?
2. Do city or town police officers have any authority to arrest persons for breach of the peace if the city or town has not adopted an ordinance or ordinances regulating breaches of the peace?
3. Is there a statutory minimum number of officers that must be maintained in either a police or sheriff's department?
4. Is the sheriff required to enforce all county and state laws everywhere within the county, without regard to city or town boundaries?

Montana Code Annotated § 7-32-4302 provides:

Within the city or town and within 3 miles of the limits thereof, the city or town council has power to prevent and punish ... fights, riots, loud noises, disorderly conduct, obscenity, and acts or conduct calculated to disturb the public peace or which are offensive to public morals.

By its plain language, MCA § 7-32-4302 gives a city or town the authority to enact ordinances to prevent acts or conduct calculated to disturb the public peace. Accord State ex rel. Moreland v. Police Court of City of Hardin, 87 Mont. 17, 22, 285 P. 178, 180 (1930). See also 42 Op. Att'y Gen. No. 8 at 22, 26 (1987). However, there is no requirement in the statute that the city or town exercise this express grant of power.

In situations where a city or town has not exercised its authority to prevent and punish such acts or conduct by enacting an ordinance pursuant to MCA § 7-32-4302, you question whether a city or town police officer has authority to arrest an individual for breach of the peace. It is my opinion that a city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against

"A peace officer may arrest a person when: ... (d) he believes on reasonable grounds that the person is committing an offense or that the person has committed an offense and the existing circumstances require his immediate arrest."

The hit and run accident in particular, as well as the reported erratic driving, clearly required Mr. McDole's immediate arrest in order to prevent his getting in additional accidents and possibly seriously injuring someone. In addition, the preservation of Mr. McDole's blood alcohol content required his immediate arrest.

(Citation omitted.) The reasoning of the Court supports my conclusion that, similarly, a city or town police officer has the authority to arrest an individual who violates state laws prohibiting breach of the peace if the arrest is made within the territorial jurisdiction of the officer and the existing circumstances require the individual's immediate arrest. MCA § 46-6-311. See also MCA § 46-6-210 (a peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when he believes on reasonable grounds that a warrant for the person's arrest has been issued).

Your second question concerns whether there is a statutory minimum number of officers that must be maintained in either a police or sheriff's department. Montana Code Annotated § 7-32-4101 requires that "[t]here shall be in every city and town of this state a police department which shall be organized, managed, and controlled as provided in this part." The statutes regarding the municipal police force also specifically refer to the chief of police, and include among the chief's duties the duty "to have charge and control of all policemen, subject to such rules as may be prescribed by ordinance." MCA § 7-32-4105 (1991). MCA § 7-32-4106(1) expressly gives the city council power to set the number of members of a police force, stating:

The city council shall have absolute and exclusive power to determine and limit the number of police officers and members to comprise the police force of any city, to reduce the number of the police force at any time, and to divide the police membership into two lists:

(a) one an active list, who are to be actually employed and receive pay while so employed; and

(b) one an eligible list, who shall not receive pay while not actually employed as an officer or member.

Reading and construing these statutes as a whole, as I must, Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981), I reach

July 21, 1993

public order regardless of whether the city or town has exercised its power to prohibit breaches of the peace by ordinance.

Montana Code Annotated § 7-32-4105 includes within the duties of the chief of police the duty "to arrest all persons guilty of a breach of the peace or for the violation of any city or town ordinance and bring them before the city judge for trial." MCA § 7-32-4105(1)(b) (1991). The language of the statute mandating that the chief arrest persons guilty of a breach of the peace or for violation of an ordinance would be redundant if his duties encompassed only arrests for breaches of the peace prohibited by city ordinance.

Additionally, it is clear that a city or town police officer is a peace officer under Montana law. MCA §§ 45-2-101(48), 46-1-202(17) (1991) ("Peace officer" means any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority"). See also Maney v. State, 49 St. Rep. 980, 842 P.2d 704 (1992) (recognizing Chinook city police officer is a peace officer).

Pursuant to MCA § 46-6-311(1):

A peace officer may arrest a person when no warrant has been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

This statute does not restrict the arrest authority of a city or town peace officer to arrests for the violation of a city ordinance. In State v. McDole, 226 Mont. 169, 734 P.2d 683, 685 (1987), a Eureka city police officer arrested McDole for driving under the influence of alcohol in violation of a state law, MCA § 61-8-401. McDole argued on appeal that his arrest was illegal because it was made outside the Eureka city limits and without an arrest warrant. He argued that because the City of Eureka could not produce an ordinance authorizing its police officers to make arrests within five miles of the city limits in accordance with MCA § 7-32-4301, the police officer was without authority to arrest him. The Court held that McDole's arrest was proper because the officer had authority to make a warrantless arrest outside his jurisdiction in his capacity as a private citizen. In the McDole opinion, the Court noted, in dicta:

There is no question that Mr. McDole's arrest would have been legal under § 46-6-401(1)(d), MCA, [now MCA § 46-6-311(1)] if that arrest had been made within the Eureka city limits. Section 46-6-401(1)(d), MCA, provides:

the same conclusion reached years ago when the Montana Supreme Court analyzed substantially similar statutes:

The office of chief of police is required to be maintained. The subordinate offices need not be. They are created to meet the needs of the city; and if out of the necessities of any given case a reduction in the number of members of the force becomes imperative, patrolmen may be relegated to the eligible list[.]

State ex rel. Dwyer v. Duncan, 49 Mont. 54, 59, 140 P. 95, 97 (1914). Each city or town must have a chief of police; no further police officers are required.

My conclusion is similar with regard to a minimum number of members required in a sheriff's department. The constitution and statutes clearly contemplate the election of a county sheriff. Mont. Const. art. XI, § 2; MCA §§ 7-4-2203, 7-4-3001, 7-32-2101 to -2145. Additionally, "[t]he sheriff, as soon as possible after he enters upon the duties of his office, must, except in counties of the seventh class, appoint some person undersheriff to hold during the pleasure of the sheriff. Such undersheriff has the same powers and duties as a deputy sheriff." MCA § 7-32-2102(1) (1991). None of the other statutes regarding the power and authority of the sheriff to organize the department require the appointment of further officers. See MCA §§ 7-32-2104 to -2145 (1991). I therefore conclude that each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.

Finally, you have requested my opinion on the issue of whether the sheriff is required to enforce all county and state laws everywhere within the county, without regard to city or town boundaries. The duties of the sheriff include the duties to preserve the peace, arrest all persons who have committed a public offense, and prevent and suppress all breaches of the peace. MCA § 7-32-2121(1), (2), and (3) (1991). The sheriff is a county officer and his authority extends over the entire county, and includes all municipalities and townships within the county. State v. Williams, 144 S.W.2d 98, 104 (Mo. 1940) (en banc); 80 C.J.S. Sheriffs and Constables § 36, at 205. Nonetheless, it is often customary for a sheriff to leave local policing to local enforcement officers. While the sheriff may, in the absence of information to the contrary, assume that a local police department will do its duty in enforcing the law, the primary duty of such enforcement is the sheriff's and cannot be altered by custom. Id.

If the sheriff has reason to believe that the police force is neglecting its duty it is his duty to inform himself. And if he knows that the police are ignoring or permitting offenses his duty to prevent and suppress

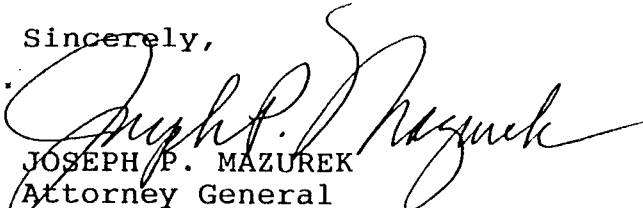
such offenses is the same as it would be if there was no municipality and no police force.

Williams, 144 S.W.2d at 105. I therefore conclude that the sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

THEREFORE, IT IS MY OPINION:

1. Montana Code Annotated § 7-32-4302 authorizes, but does not require, a city or town to enact ordinances to prevent acts or conduct calculated to disturb the public peace.
2. A city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against public order regardless of whether the city or town has exercised its power to adopt an ordinance prohibiting breaches of the peace.
3. Each city or town must have a chief of police; no further police officers are required. Each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.
4. The sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

Sincerely,


JOSEPH P. MAZUREK
Attorney General

jpm/kcs/brf