

CONFIDENTIAL LEGAL MEMORDANDUM

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Wisconsin Counties Association

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RE: County Sheriff Authority Over Personnel Matters

DATE: December 19, 2019

EXECUTIVE SUMMARY

The Association has requested an analysis of the scope of a sheriff’s authority with respect to personnel matters and whether a county’s general personnel policies apply to employees of the sheriff’s office.

The office of sheriff is created by the Wisconsin Constitution and, as such, sheriffs possess certain constitutional powers that cannot be limited by the state legislature. Because the constitution, however, does not define the powers, rights or duties that belong to the office of sheriff, courts have attempted to do so since 1870. The test developed by courts to determine the constitutional powers and duties of the sheriff is whether the power or duty gave “character and distinction” to the office of sheriff at common law. See *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 415 (1870). Mundane and commonplace duties that do not give character and distinction to the office of sheriff at common law are subject to control by the legislature.

A frequent source of confusion for counties is the power of sheriffs to control personnel matters. Several court decisions have addressed the constitutional powers of sheriffs regarding personnel issues. Courts have found that internal management and administrative duties such as hiring and termination neither gave “character” nor “distinction” to the office of sheriff. Rather, these duties fall within the mundane and common administrative duties of a sheriff which may be regulated by the legislature. Alternatively, other issues that involve personnel, such as assigning deputies to serve as court officers, have been found to be part of the sheriff’s “immemorial duties” that cannot be regulated.

As a part of our analysis we have identified the following questions to be addressed and the corresponding brief answers:

1. **Question:** Are personnel policies established by the county board applicable to county employees in the sheriff's office?

Brief Answer: Generally yes. As noted above, courts have found that internal management and administrative duties such as hiring and termination, and other personnel matters, gave neither "character" nor "distinction" to the office of sheriff. Rather, these duties fall within the mundane and common administrative duties of a sheriff which may be regulated by the legislature.

2. **Question:** Does a county administrator have authority to enforce county personnel policies throughout the sheriff's office with respect to non-appointed and non-elected personnel if the sheriff fails to enforce such policies?

Brief Answer: Yes. The county administrator is the chief administrative officer of the county and has authority to enforce every county ordinance or policy. The county administrator is charged with coordinating and directing all administrative and management functions of the county government not otherwise vested by law in other elected officials. The sheriff is not vested by law with the authority to manage and administer the county's general personnel policies and day-to-day personnel matters. Therefore, a county administrator may enforce the county's general personnel policies within the sheriff's office, including with respect to deputies and the chief deputy in counties that have transferred the undersheriff's statutory duties to a civil service position. The county administrator's authority pertains to a wide array of personnel matters that may be regulated by the county board, such as vacation time, sick time, flex time and other paid time off, and employee discipline matters. However, the sheriff retains such authority in a narrow set of circumstances pertaining to special assignments for deputies.

3. **Question:** May the sheriff institute policies or orders for personnel matters such as paid time off that supersede the county's standard policies?

Brief Answer: Generally no. Day-to-day routine scheduling requirements are deemed to be "internal management and administrative duties." While important, these duties do not give character or distinction to the office of sheriff and, therefore, are not protected. As with other personnel matters, though, the sheriff retains such authority in a narrow set of circumstances pertaining to special assignments for deputies.

4. **Question:** Does a county administrator possess the authority to terminate sheriff's deputies and/or the chief deputy in counties that have transferred the undersheriff's statutory duties to a civil service position?

Brief Answer: No. While a county administrator possesses broad authority to enforce county personnel policies, a county administrator does not possess direct authority to hire or terminate sheriff's deputies, or the civil service position of chief deputy fulfilling the duties of undersheriff because these duties are vested by law in the sheriff. However, the sheriff's authority in this regard is not absolute. For example, the county board may limit

such authority by requiring that the sheriff comply with the county's civil service system, or a collective bargaining agreement.

Alternatively, in counties that do not have a civil service system applicable to sheriff's deputies or the chief deputy, the county's grievance committee may also institute disciplinary action (including termination proceedings) with respect to sheriff's deputies and the chief deputy.

This memorandum will first present a brief overview of the applicable legal standards regarding a sheriff's authority to control personnel matters. We will then provide our legal analysis applying such standards to the questions presented above.

LEGAL STANDARDS

In 1870, the supreme court in *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (1870) acknowledged that "the constitution nowhere defines what powers, rights and duties shall attach or belong to the office of sheriff." The court concluded that the framers of the constitution intended the office of sheriff to have "those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted." *Id.* The court further explained that "part and parcel of the duties from time immemorial belonging to [the office of sheriff] by law" are constitutionally protected. *Id.* at 413-14.

The court reasoned that unless these "time immemorial" duties were constitutionally protected from interference by others, the constitutional provision securing to the people the right to choose sheriffs would become meaningless. The *Brunst* court formulated the inquiry into the sheriff's constitutional powers as a historical one, examining the nature of the office of sheriff as it existed when the constitution was adopted. In later cases, beginning with *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 482, 177 N.W. 781 (1920), the inquiry into the constitutional powers of the office of sheriff continued to focus on the historical attributes of the office, but the court limited the constitutional powers, rights, and duties of the sheriff to only those "immemorial principal and important duties that characterized and distinguished the office." *Id.* The state constitution does not, in the words of the *Buech* court, "prohibit[] any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law."

The court explained in *Heitkemper v. Wirsing*, 194 Wis. 2d 182, 189, 533 N.W.2d 770 (1995), that *Buech* "rejected any interpretations of *Brunst* which tried to include within the constitutionally protected functions of the sheriff all powers held by the sheriff at the common law. Rather, "the [*Brunst*] court indicated that the test for determining which functions were constitutionally protected was more exacting." The *Heitkemper* court explained that "internal management and administrative duties," while important, fall within the "mundane and commonplace" duties not protected by the constitution. *Heitkemper*, 194 Wis. 2d at 193.

The above cases addressing the constitutional dimensions of the office of sheriff establish the following criteria for identifying a sheriff's constitutional powers, rights, and duties: certain immemorial, principal, and important duties of the sheriff at common law that are peculiar to the

office of sheriff and that characterize and distinguish the office are constitutionally protected from legislative interference. *Kocken v. Wisconsin Council 40*, AFSCME, AFL-CIO, 2007 WI 72, ¶ 39, 301 Wis. 2d 266, 732 N.W.2d 828.

Nevertheless, the constitution does not prohibit all legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. Powers, rights, and duties of the office of sheriff that are “mundane and commonplace” “internal management and administrative” duties, even if they are ever-present aspects of the constitutional office, are not accorded constitutional status. *Heitkemper*, 194 Wis. 2d at 193. As the *Kocken* court explained: “To ignore an analysis of whether the duty at issue is mundane and commonplace and whether it is an internal management and administrative duty is to ignore or misread our case law and to risk over-constitutionalizing the powers of the office of the sheriff, in contravention of the framers' intentions.” *Kocken*, 2007 WI 72, ¶ 42.

A. Constitutionally Protected Powers of the Sheriff.

The *Kocken* court observed that the traditional constitutional analysis is easy to state but not easy to apply because many of the actions of the sheriff are in some way related to a recognized constitutional power, right, and duty of the office. *Id.* at ¶ 43. In some cases the courts have protected the office of sheriff from legislative interference; in others, the courts have not.

The operation of a jail and care of the jail inmates has been recognized as within the constitutional powers of the sheriff because the operation of the jail gives character and distinction to the office of sheriff. Thus, the court in *Brunst* struck down legislation assigning the entire operation of the jail to an officer other than the sheriff. The court held that the legislature could not take from the constitutional office of sheriff a part of the office and transfer it to another government officer who was appointed in a different manner and held a different tenure than that provided for the sheriff by the state constitution. *Brunst*, 26 Wis. at 415.

Another constitutionally protected power of the office of sheriff recognized by the courts is the sheriff's special relationship with the courts. See *Wis. Prof'l Police Ass'n v. Dane County*, 106 Wis. 2d 303, 305, 316 N.W.2d 656 (1982) (*WPPA I*). This relationship between the sheriff and the courts is “peculiar to” and “gives character and distinction to” the office of sheriff. The duties performed by the court officer designated by the sheriff are among the principal and important duties that characterize the office of sheriff, and, therefore, the sheriff may not be restricted as to whom he or she appoints to perform the functions. The court explained that only the sheriff can designate which deputies can serve as a court officer. “Attendance on the Court’ is in the same category of powers inherent in the sheriff as is running the jail. Just as ... the legislature cannot deprive the sheriff of control of the jail, neither can the legislature through a statute authorizing collective bargaining by the county board and a union deprive the sheriff of his authority to select who among his deputies shall act in his stead in attendance on the court.” *WPPA I*, 106 Wis. 2d at 313. The court focused on the “nature of the job assigned rather than the general power of job assignment.” *WPPA I*, at 312.

The Court of Appeals confirmed, and further explained, the nature of the sheriff's special relationship with the courts in *Dunn County v. WERC*, 2006 WI App 120, 293 Wis. 2d 637, 718

N.W.2d 138. The Court of Appeals held that a collective bargaining agreement cannot delegate power to the clerk of courts, with priority over the sheriff, in the scheduling, directing, and supervising of deputies serving as court security officers. *Id.*, 2006 WI App 120, ¶¶ 12–13. The court found the delegation of power interferes with the sheriff's constitutional authority in attending on the courts. *Id.* “[T]he sheriff cannot be required to delegate to another county official the directory or supervisory authority over attendance upon the court.” *Id.*, ¶ 14.

Again dealing with the sheriff's relationship to the courts, the Court of Appeals held in *Wisconsin Professional Police Ass'n/Law Enforcement Employee Relations Division v. Dane County*, 149 Wis. 2d 699, 712, 439 N.W.2d 625 (Ct.App.1989) (*WPPA II*), that the sheriff's duty “to execute court-issued arrest warrants to bring before the court a prisoner” was a cardinal and traditional responsibility of the sheriff, giving character to the office of sheriff. Accordingly, the Court of Appeals concluded that the sheriff's right to enlist the services of the U.S. Marshal for interstate conveyance of prisoners “may not be limited by a collective bargaining agreement.” *Id.*, 149 Wis. 2d at 712.

Maintaining law and order and preserving the peace have also been recognized as powers falling within the constitutional prerogative of the office of sheriff. The Court of Appeals has concluded that a sheriff has the right to create a temporary mutual aid unit consisting of various law enforcement officers to address a special emergency, despite the objection of a deputy seeking overtime opportunities under the collective bargaining agreement. The Court of Appeals explained in *Washington County v. Washington County Deputy Sheriff's Ass'n*, 192 Wis. 2d 728, 531 N.W.2d 468 (Ct.App.1995), that “[the sheriff's] assignment of municipal officers to patrol duty normally assigned to deputies was in the reasonable anticipation of a possible emergency situation during Harleyfest and, in this case, was a proper exercise of a sheriff's duty to preserve the peace” Again, the court in *Washington County* focused on the special nature of the job assigned rather than the general power of job assignment. *Kocken*, 2007 WI 72, ¶ 57.

In another case involving the same constitutional prerogative, *Manitowoc County v. Local 986B*, 168 Wis. 2d 819, 484 N.W.2d 534 (1992), the court concluded that a sheriff had the constitutional right to assign a specially qualified deputy from patrol duty to fill a unique undercover position. *Id.*, 168 Wis. 2d at 830. The court explained that “law enforcement and preserving the peace were duties which ‘gave character and distinction’ to the office of sheriff ...” and “undercover detective work is a contemporary method of the exercise of the sheriff's historical duties of maintaining law and order and preserving the peace.” *Id.* at 828, 830. The court emphasized, however, that the “legislature may still regulate the administrative and executive duties of a sheriff, and the collective bargaining agreement will still control wages, hours and conditions of employment.” *Id.* at 831. The court expressly declared that its holding about the undercover agent is narrow and limited to the facts of the case. *Id.* Again, the court in *Manitowoc County* focused on the special nature of the job assigned rather than the general power of job assignment. *Kocken*, at ¶ 57.

B. Powers Not Characteristic of the Office of Sheriff and Not Protected.

Other cases demonstrate that not all matters related to the sheriff's powers, rights, and duties to maintain law and order and to preserve the peace are constitutionally protected and within the

sheriff's unfettered discretion. In other words, even when a task is related to a sheriff's constitutional powers, rights, and duties, like maintaining law and order, the sheriff may be subject to legislative regulation in regard to performance of that duty. *Kocken*, ¶ 60. The court's reasoning has been that many tasks for which a sheriff is responsible that relate to the office's constitutional powers, rights, and duties are nondistinctive, "mundane and commonplace" "internal management and administrative" duties of a sheriff. *Id.* Such duties do not themselves take on constitutional dimensions and can be regulated by the legislature. *Id.*

For example, the constitutional prerogative of the office of sheriff to maintain law and order and preserve the peace does not encompass the power to appoint or dismiss deputies. The appointment and dismissal of deputies are non-distinctive internal management and administrative tasks, in contrast to the constitutional tasks previously described. Although at common law the sheriff had the power or authority to appoint deputies, the court has held that this power "was not a power or authority that gave character and distinction to the office." *Buech*, 171 Wis. at 482.

Thus in *Buech*, the court upheld the constitutionality of a statute providing for a civil service system that included defining and limiting the sheriff's authority to hire and discharge deputies. The supreme court reaffirmed this holding in *Heitkemper*, stating that "[w]hile internal management and administrative duties such as termination are important, they neither gave 'character' nor 'distinction' to the office of sheriff. Rather, these duties, specifically the power to dismiss, fall within the mundane and common administrative duties of a sheriff which may be regulated by the legislature." *Heitkemper*, 194 Wis. 2d at 193.

The sheriff is therefore subject to civil service requirements in the hiring and discharging of deputies. *Buech*, 171 Wis. at 482, 177 N.W. 781; see also *Brown County Sheriff's Dep't v. Brown County Sheriff's Dep't Non-Supervisory Employees Ass'n*, 194 Wis. 2d 265, 273–74, 533 N.W.2d 766 (1995). A newly elected or reelected sheriff who wishes to dismiss or not to reappoint a previously appointed deputy does not possess the constitutional authority to do so. The sheriff is instead bound by the collective bargaining agreement. *Brown County Sheriff's Dep't.*, 194 Wis. 2d at 269.

The working environment of the sheriff's office may be regulated by the legislature or may be subject to collective bargaining agreements. The Supreme Court has declared: "The legislature may still regulate the administrative and executive duties of a sheriff, and the collective bargaining agreement will still control wages, hours and conditions of employment." *Manitowoc County*, 168 Wis. 2d at 831; see also *Dunn County*, 2006 WI App 120, ¶ 23.

Likewise, the county board retains the authority to fix the number of deputy sheriffs, and the attorney general has also opined that the county board may fix the number and the compensation of all deputy sheriffs, including honorary deputies, without usurping the constitutional powers of the sheriff. *Milwaukee Deputy Sheriffs' Association v. Milwaukee County*, 2016 WI App 56, ¶ 16, 370 Wis. 2d 644, 883 N.W.2d 154; 68 Op. Att'y Gen. 334, 339 (Nov. 8, 1979). In another opinion, the attorney general explained that the administrative aspects of the office of sheriff are not constitutional in nature, emphasizing that "the constitution does not prohibit the Legislature from exercising any control of the powers, duties, functions and liabilities of a sheriff as they

existed at common law, and it may regulate many such matters, including the appointment and compensation of his deputies and other subordinates.” 77 Op. Att’y Gen. 94, 96 (Apr. 29, 1988); *see also* 68 Op. Att’y Gen. 334, 339–40 (Nov. 8, 1979).

However, the county board’s authority to fix the number of deputy sheriffs only applies to “regularly employed” deputies, which “refers to compensated deputies who are typically hired in the normal pattern of employment for a sheriff’s department as distinguished from uncompensated deputies or persons deputized for a particular act or for emergencies.” 68 Op. Att’y Gen. 334 (Nov. 8, 1979). On the contrary, the county board may not restrict the sheriff’s authority to appoint “honorary deputies” (*i.e.*, uncompensated deputies and casual or occasional limited appointments). *Id.* This is due to the sheriff’s “superior power to call upon citizens to aid him in preserving the peace or making an arrest” (*i.e.*, the power to call up a *posse comitatus*). *Id.*

Additionally, counties may eliminate the office of undersheriff and transfer all statutory duties and powers of undersheriff to the civil service position of chief deputy sheriff. OAG 25-82 (March 10, 1982). The county’s authority to do so stems from county home rule authority and the “Legislature’s commitment to county organizational autonomy.” *Id.*

In *Kocken*, the supreme court noted that just because the office of sheriff has constitutional power over the jail and care of the inmates does not mean that every aspect of the operation of the jail or every aspect of caring for the inmates, such as providing food for inmates, falls within the sheriff’s constitutional powers. *Kocken*, 2007 WI 72, ¶ 66. Rather, the focus in the constitutional inquiry is on whether the task of hiring and firing personnel to provide food to inmates gives distinction and character to the office of sheriff or whether the task is a mundane and commonplace internal management and administrative duty of the office. *Id.* Focusing on the nature of the job assigned—providing food—the court concluded that the preparation and service of food to inmates does not have a “time immemorial” nature that gives character and distinction to the office of sheriff. *Id.*, ¶ 68. Therefore the court found that the legislature can regulate the employment decisions for food service workers at the county jail, including through collective bargaining agreements negotiated with counties pursuant to Wis. Stat. § 111.70. *Id.*, ¶ 73.

The court of the appeals has also recently addressed the scope of a sheriff’s constitutional prerogative regarding attendance on courts. In *Brown County v. Sheriffs Dep’t Non-Supervisory Labor Ass’n v. Brown Cnty.*, 2009 WI App 75, 318 Wis. 2d 774, 779, 767 N.W.2d 600, 603, the Court of Appeals held that transportation of the county’s prisoners was part of the sheriff’s constitutionally protected duties. *See id.*, ¶ 8. And, in *Milwaukee Deputy Sheriff’s Ass’n v. Clarke*, 2009 WI App 123, 320 Wis. 2d 486, 772 N.W.2d 216, the court held that transporting prisoners and effectuating other orders of the county’s judges is part of the sheriff’s constitutional duty to attend upon the courts. *See id.*, ¶ 29.

However, in *Ozaukee County v. Labor Ass’n of Wis.*, 2008 WI App 174, ¶ 31, 315 Wis. 2d 102, 763 N.W.2d 140, the court found that when the sheriff is transporting prisoners from other jurisdictions as a revenue-generating operation, he is not acting within his constitutional powers because he is executing orders from jurisdictions other than his own. *Id.* Most recently, in

Washington Cnty. v. Washington Cnty. Deputy Sheriff's Ass'n, 2009 WI App 116, 320 Wis. 2d 570, 772 N.W.2d 697, the Court of Appeals found that operating the metal detector and x-ray machine at an entrance to the Washington County Justice Center is a mundane task that is done in many places by private security officers. *Id.*, at ¶ 23. They have not traditionally been the sheriff's tasks to perform. Therefore, the tasks are “internal management and administrative” duties that are subject to regulation by the legislature. *Id.*

Additionally, the Court of Appeals in *Dunn County v. WERC*, 2006 WI App 120, ¶ 23, 293 Wis. 2d 637, 718 N.W.2d 138, has explained that a sheriff's authority over assignments and duties for personnel only extends to “very specific assignments, not day-to-day routine scheduling requirements.” *Id.* For example, *Dunn County* provided that the assignment of deputies and municipal officers in a possible emergency situation is closely related to the sheriff's constitutional duty to preserve the peace. *Id.* (citing *Washington County v. Washington County Deputy Sheriff's Ass'n*, 192 Wis. 2d 728, 531 N.W.2d 468 (Ct.App.1995)). Therefore, the sheriff's authority to assign such personnel is protected. *Id.* Further, the assignment of a deputy to undercover detective work is protected because such work is a modern part of the traditional law enforcement and peace preservation duties. *Id.* (citing *Manitowoc County v. Local 986B*, 168 Wis. 2d 819, 484 N.W.2d 534 (1992)). On the contrary, routine “internal management and administrative duties” provide “neither character nor distinction to the office of sheriff and are therefore not protected.” *Id.*

C. A Sheriff Possesses Statutory Authority to Hire and Terminate Deputies.

While the sheriff's authority over general personnel matters is largely subject to regulation by the county board (and implementation and enforcement by the county administrator), the sheriff retains statutory authority to hire and terminate deputies. As discussed in Section B above, the right to hire and fire deputies is not constitutionally protected and is subject to regulation by the county board. However, Wis. Stat. § 59.26(1) vests the authority to appoint deputies (including the chief deputy) in the sheriff. Indeed, Wis. Stat. § 59.26(1) provides that “the sheriff shall *appoint* some proper person...undersheriff” and that “the sheriff may *appoint*...other deputies.” (emphasis added). Importantly, this authority does not apply to other employees and staff (*i.e.*, those employees who are not deputies).

Nonetheless, such authority may be restricted by the county board, such as by the implementation of a civil service system and by collective bargaining agreements. See Wis. Stat. § 59.22. Alternatively, a county's grievance committee, on its own initiative, may also institute disciplinary action (including termination proceedings) with respect to sheriff's deputies and the chief deputy in counties that do not have a civil service system or a collective bargaining agreement in place. Wis. Stat. § 59.26(b)1.

Furthermore, the sheriff does not have unilateral statutory authority to determine the total number of deputies to be appointed. Section 59.22, Wis. Stats., “plainly provides that a county board may [e]stablish the number of employees in any department or office including deputies

to elective officers.”¹ *Milwaukee Deputy Sheriffs' Association*, 2016 WI App 56, ¶ 16. The authority of the county board under Wis. Stat. § 59.22 prevails over the sheriff’s general authority to appoint deputies. *Id.* Consequently, the county board, and not the sheriff, has the authority to regulate the number of law enforcement officers employed by the county.

The result of this analysis is that the sheriff maintains statutory authority to hire and fire his or her deputies, but does not retain authority over wages, hours or conditions of employment; the Board retains that authority. Further, the sheriff does not have the authority to control the ultimate fate of each deputy. Put another way, the authority extends only to the decision to hire and fire and only extends to the position of deputy and chief deputy.

ANALYSIS

A. County Personnel Policies are Generally Applicable to Sheriff’s Deputies and the Sheriff’s Other Employees and Staff.

As discussed above, the duties of the sheriff are subject to legislative regulation and oversight unless constitutionally protected. Wisconsin courts have consistently held that internal management of personnel and related administrative tasks are non-distinct, mundane, and commonplace duties that do not give character and distinction to the office of sheriff at common law, and, therefore, are subject to control by the legislature. Consequently, the county board generally retains authority to regulate internal management of personnel and related administrative tasks.

Internal management and administrative tasks have been explicitly interpreted by the courts to include the following categories: the requirement to adhere to civil service requirements for hiring and firing of sheriff’s deputies,² the working environment of the sheriff’s office, the control of wages, hours, and conditions of employment,³ and to routine assignments and day-to-day scheduling requirements of the sheriff’s employees (*e.g.*, scheduling shifts, office hours, vacation time, sick time, flex time and other paid time off). This authority applies to all personnel under the sheriff’s supervision, including sheriff’s deputies, the chief deputy, jailers, and administrative support staff. A county may regulate and administer such policies either through the county’s general personnel policies or through a collective bargaining agreement, as applicable.

¹ Wis. Stat. § 59.22 provides, in relevant part, that “[e]xcept as provided in subd. 2. and par. (d), the board may do any of the following:

a. Provide, fix or change the salary or compensation of any office, board, commission, committee, position, employee or deputies to elective officers that is subject to sub. (1) without regard to the tenure of the incumbent.

b. Establish the number of employees in any department or office including deputies to elective officers.

c. Establish regulations of employment for any person paid from the county treasury.”

² *Buech*, 171 Wis. at 482; *Heitkemper*, 194 Wis. 2d at 193; *Brown County Sheriff’s Dep’t.*, 194 Wis. 2d at 269.

³ *Manitowoc County*, 168 Wis. 2d at 831; *see also Dunn County*, 2006 WI App 120, ¶ 23.

On the contrary, the sheriff retains authority over very specific assignments that are not considered day-to-day routine scheduling.⁴ This includes assignments and scheduling of deputies during emergencies and also special assignments such as undercover law enforcement work. The sheriff's powers in this regard may not be regulated by the county board because they involve the constitutionally protected duty of the sheriff to maintain law and order and to preserve the peace.

The only other matters that the county board does not have authority to regulate are with respect to those duties inherent to the office of the sheriff and that are "peculiar to" and "give[] character and distinction to" the office of sheriff. This includes the sheriff's duty to administer the county jail, attend on the court, make special assignments related to law enforcement matters and preserve the peace, and other traditional law enforcement duties. However, this does not extend to every function related to these duties. For example, operating the metal detector and x-ray machine at an entrance to a courthouse is a mundane task that is done in many places by private security officers, and, therefore has not traditionally been the sheriff's tasks to perform.⁵ Additionally, even though the sheriff's duty to administer the county jail is constitutionally protected, tasks such as food service within the jail are not protected.⁶ Therefore, these tasks constitute "internal management and administrative" duties that are subject to regulation by the legislature. *Id.*

For this reason, a case by case analysis is often necessary for tasks which are related to duties traditionally performed and retained by the sheriff in order to determine whether the related duties actually are within the sheriff's traditional constitutionally-protected sphere.

B. The County Administrator May Enforce the County Board's Personnel Policies.

In counties with a county administrator, the county administrator is authorized to enforce the county board's personnel policies that are permitted pursuant to the analysis in Section A above for the sheriff's office employees.

The county administrator is the "chief administrative officer of the county..." and "shall take care that every county ordinance...is observed, enforced and administered within his or her county if the ordinance or law is subject to enforcement by the county administrator or any other person supervised by the county administrator." Wis. Stat. § 59.18(2). Additionally, the county administrator is authorized to "[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers." Wis. Stat. § 59.18(2)(a).

This means that county administrator is the executive tasked with implementing and enforcing the county board's policies with respect to county administration, including personnel policies and collective bargaining agreements as discussed in Section A immediately above. Such

⁴ *Dunn County v. WERC*, 2006 WI App 120, ¶ 23, 293 Wis. 2d 637, 718 N.W.2d 138.

⁵ *Washington Cnty. v. Washington Cnty. Deputy Sheriff's Ass'n*, 2009 WI App 116, 320 Wis. 2d 570, 772 N.W.2d 697.

⁶ *Kocken*, 2007 WI 72, ¶ 66.

implementation may also involve the delegation of policy or rule making authority to the county administrator as this authority is also within the county board's prerogative. So long as the personnel policies are applicable to a particular employee (including the sheriff's deputies, the chief deputy, and other staff), the county administrator may generally enforce such policies. While general day-to-day supervision of the sheriff's employees will be performed by the sheriff and the sheriff's staff, the ultimate authority to enforce the county's personnel policies or the terms of a collective bargaining agreement is retained by the county administrator (as authorized by the county board).

C. The Sheriff May Not Implement and Enforce Personnel Policies Inconsistent with those Established by the County Board.

Except with respect to those areas of the sheriff's traditional authority protected by the Constitution, the sheriff may not establish policies that are inconsistent with those established by the county board. As discussed above, the county board retains exclusive authority to regulate internal management of personnel and related administrative tasks, and other mundane and commonplace duties that do not give character and distinction to the office of sheriff at common law are subject to control by the legislature. The sheriff is required to defer to the county board's regulatory authority in these areas and may only enforce the county's personnel policies as expressly authorized by the county board and the county administrator.

D. The Sheriff Retains the Authority to Hire and Fire Deputies Subject to the County's Civil Service System and/or Collective Bargaining Agreement.

Neither the county board nor the county administrator possess direct authority to hire or terminate deputy sheriffs or the chief deputy. This authority is retained by the sheriff under Wis. Stat. § 59.26.⁷ However, the sheriff does not have the authority to hire and fire deputies at will.⁸ Rather, Wis. Stat. § 59.26 provides that sheriff's deputies have tenure beyond initial appointment while they hold office on good behavior. For this reason, courts have concluded that deputies enjoy the benefits of the county's civil service protections and/or collective bargaining agreement.⁹ The sheriff's required compliance with the county's civil service system and/or collective bargaining agreement applies to all aspects of personnel management, including hiring, employee discipline, and termination. Moreover, a county's grievance committee may also institute disciplinary action (including termination proceedings) with respect to sheriff's deputies and the chief deputy in counties that do not have a civil service system or a collective bargaining agreement in place. Wis. Stat. § 59.26(b)1.

Likewise, the county board may also set the number of deputies that the sheriff may hire,¹⁰ and generally may determine the job descriptions of deputy sheriffs. The key is that the county board

⁷ Wis. Stat. § 59.26(1) provides that "the sheriff shall *appoint* some proper person...undersheriff" and Wis. Stat. § 59.26(2) provides that "...the sheriff may appoint as many other deputies as the sheriff considers proper."

⁸ *Heitkemper*, 194 Wis. 2d at 197.

⁹ *Id.*

¹⁰ *Milwaukee Deputy Sheriffs' Association*, 2016 WI App 56, ¶ 16.

may not transfer the sheriff's hiring authority with respect to deputies to another officer or employee.

Additionally, counties may eliminate the office of undersheriff and may transfer the undersheriff's statutory duties and responsibilities to a civil service position (*e.g.*, a chief deputy).¹¹ The sheriff still maintains hiring authority over the position, but such authority may be limited in the same manner as for other deputies as discussed above.

Finally, as discussed above, the sheriff does not retain authority over the sheriff's deputy's wages, hours or conditions of employment; the county board retains that authority.

CONCLUSION

County sheriffs retain authority over matters that are constitutional powers and duties of the sheriff. In order to qualify as a constitutional power or duty, the power or duty must give "character and distinction" to the office of sheriff at common law. On the contrary, mundane and commonplace duties that do not give character and distinction to the office of sheriff at common law are subject to control by the legislature. Day-to-day personnel management is generally considered to be non-distinctive internal management and administrative tasks, and, therefore, is subject to legislative control. Such personnel policies may be set by the county board and implemented and administered by the county administrator.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.

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¹¹ OAG 25-82 (March 10, 1982).