

OFFICE OF CORPORATION COUNSEL

COLLEEN FOLEY
Interim Corporation Counsel

PAUL D. KUGLITSCH
Deputy Corporation Counsel

TIMOTHY R. KARASKIEWICZ
MOLLY J. ZILLIG
ALAN M. POLAN
JENNIFER K. RHODES
DEWEY B. MARTIN
JAMES M. CARROLL
KATHRYN M. WEST
JULIE P. WILSON
CHRISTINE L. HANSEN
CARRIE THEIS
Assistant Corporation Counsel

Date: December 1, 2016

To: Chairman Theodore Lipscomb, Sr.

Cc: Kelly Bablitch, Chief of Staff

From: Interim Corporation Counsel Colleen Foley

Re: Investigations of Jail/House of Correction Deaths

Question: Does the Milwaukee County Board of Supervisors have authority to request external investigations of deaths at the Milwaukee County Jail or House of Correction?

Answer: State statute dictates procedure regarding deaths involving a law enforcement officer, but not a jail officer. State law also sets forth a notification procedure for the reporting of deaths in jails or houses of correction. The Board lacks authority to require external investigations of deaths in the jail by the sheriff but could do so as a policy matter for the House of Correction.

Analysis - State Process for Deaths Involving Law Enforcement Officers: 2013 Wisconsin Act 348 resulted in the enactment of Wis. Stat. § 175.47. The law establishes an investigative procedure whenever an on-or-off duty officer is involved in a custodial death. Wis. Stat. § 175.47(1)(c).

The law defines “law enforcement officers” as “any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce.” Wis. Stat. § 165.85(2)(c). The jail and House of Correction on the other hand, are staffed by correctional officers who are defined as “jail officers”¹ not “law enforcement officers”. Jail officers cannot make arrests. Wis. Stat. § 175.47 therefore does not apply to jail or House of Correction staff.

Jails and houses of correction are governed by Department of Correction (DOC) Administrative Rule 350. The chapter’s stated purpose is to “establish minimum standards for the design, construction, and operation of jails and houses of correction.” Specifically, that chapter requires that the sheriff notify the DOC’s regional detention facilities specialist within 48 hours after an inmate’s death. *See* DOC 350.10(3)a)(1). Wis. Stat. § 302.38 establishes procedures for care of inmates generally, from medical care to emergency services for crisis intervention to protocols if an inmate refuses appropriate care or treatment.

¹ “‘Jail officer’ means any person employed by any political subdivision of the state for the purpose of supervising, controlling or maintaining a jail or the persons confined in a jail. ‘Jail officer’ includes officers regardless of whether they have been sworn regarding their duties or whether they serve on a full-time basis.” Wis. Stat. 165.85(2)(bn).

Though the jail and House of Correction staff are not covered by the external investigation statute, neither are prohibited from using it as a model. Under that statute, each law enforcement agency² must have a written policy on investigations of officer-involved deaths. Wis. Stat. § 175.47(2). The policy shall require that an investigation be conducted by at least two investigators, one of whom must be the lead investigator, and neither of whom are employed by the agency that employs the involved officer. Wis. Stat. § 175.47(3)(a). The policy may allow for an internal investigation, so long as it does not interfere with the external investigation. Wis. Stat. § 175.47(4).

The external investigation must occur in an expeditious manner culminating with a report to the district attorney's (DA's) office for the county in which the death occurred. Wis. Stat. § 175.47(5)(a). If the DA determines there is no basis for prosecution, the investigators shall release the report, redacting any privileged information under Wis. Stat. § 19.35(1)(a). Wis. Stat. § 175.47(5)(b).³ The DA may also call for an inquest where a death involves unexplained or suspicious circumstances. Wis. Stat. § 979.04(1).

Analysis – Sheriff's Duties: The Wisconsin Constitution establishes the office of sheriff . . . [but] does not delineate the powers, rights, and duties of the office of sheriff." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶¶31-33, 301 Wis. 2d 266, 732 N.W.2d 828. Case law has narrowed a sheriff's constitutional powers from the common law nature of the office to only "those immemorial principal and important duties that characterized and distinguished the office." *State ex rel. Milwaukee Cnty. V. Buech*, 171 Wis. 474, 482, 177 N.W.781 (1920).

The sheriff's constitutionally protected duties include the operation of the jail, attendance on the courts, maintaining law, and preserving the peace. *Kocken* at ¶¶52-57. See also *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870) regarding the sheriff's duty to take charge of the jail and the prisoners therein. By statute, the sheriff's duties include taking charge and custody of the jail and the persons in the jail, keeping a true and exact register of all prisoners, attending on the courts, and serving or executing all processes, writs, precepts and orders. Wis. Stat. § 59.27.

In dismissing the sheriff's recent lawsuit against the county for an alleged arbitrary and unreasonable 2015 budget preventing him from hiring and appointing deputies, the Wisconsin

² "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or its political subdivision for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority." Wis. Stat. § 165.83(1)(b).

³ Family members of the decedent of an officer-involved death must also be informed of: 1) the process by which to file a complaint charging a person with a crime, if permitted by a judge; 2) the process by which he may file a complaint under the John Doe investigation proceedings, and 3) the process for an inquest under Wis. Stat. Chapter 979³. Wis. Stat. § 950.04(1v)(do).

Court of Appeals held that such acts are not constitutionally or statutorily protected powers of the sheriff and that the budget was not arbitrary or unreasonable. *Milwaukee County Deputy Sheriff's Assoc. v. Clarke*, 2016 WI App. 56, 370 Wis.2d 644, 883 N.W.2d 154. The sheriff's power may still be regulated if it is a "nondistinctive, mundane and commonplace[.], internal management and administrative [duty] of a sheriff. *Id.* at ¶9 citing *Kocken* at ¶40. Such mundane duties have included hiring and firing of personnel to provide food to inmates. *Id.* Staffing an x-ray and metal detector security screen station is another example. *Washington County v. Washington County Deputy Sheriff's Assoc.*, 2009 WI App. 116, 320 Wis. 2d 570, 772 N.W.12d 697.

Nonetheless, as stated in *Andreski v. Industrial Comm'n*, 261 Wis. 234, 240 (1952):

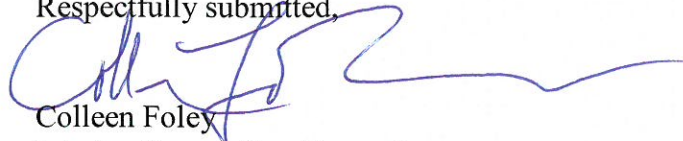
Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of this county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it.

The Board's primary role with the sheriff is to set reasonable budgetary constraints for that office. But it is the sheriff who determines how his traditional duties and functions are performed. That would include the manner of conducting an investigation of a death within the jail he operates.

In contrast, the House of Correction is operated by an appointed Superintendent who is neither a constitutional officer nor a law enforcement officer. The Board could as a policy matter require external investigations of HOC deaths by a law enforcement agency per the state statute. Triggering events could include, for example, inmate-on-inmate assault, staff use-of-force or whenever a death involves unexplained or suspicious circumstances. Indeed, that is already how the House of Correction handles such matters.

Conclusion: The state has established a procedure for investigations of deaths by "law enforcement" officers whereas the jail and House of Correction are staffed by correctional/jail officers. The statutes establish a procedure for notification of deaths in jails or houses of correction, but are silent as to how those investigations occur. Unlike the Superintendent, the sheriff has distinct statutory and constitutional duties regarding the jail's operation and is largely immune from legislative control excepting reasonable budget constraints. The Board may certainly recommend that the sheriff follow the state process for external investigations of deaths. But it cannot compel it. It could as a policy matter require that the House of Correction follow the state statute for external investigations of certain deaths at its facility.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Colleen Foley', with a long horizontal flourish extending to the right.

Colleen Foley
Interim Corporation Counsel