



OFFICE OF THE DISTRICT ATTORNEY

Milwaukee County

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TO: District Attorney Michael Graveley
Corporation Counsel Joseph Cardamone

FROM: Matthew Westphal, Assistant District Attorney

RE: Kenosha County Special Prosecution Request

DATE: September 21, 2022

INTRODUCTION

The Milwaukee County District Attorney's Office (MCDAO) received a request from the Kenosha County District Attorney's Office to act as special prosecutor in reviewing a matter regarding Kenosha County Sheriff David Beth. The request follows a preliminary investigation by Independent Counsel, von Briesen & Roper, s.c.. In particular, that referral alleges that Sheriff Beth misused County funds by authorizing "stipend" payments to employees of the Sheriff's Department. This investigation was reviewed for charges involving Misconduct in Public Office, as well as a preliminary determination on whether violations of the Kenosha County Municipal Code occurred.

This memorandum lays forth a discussion of the factual basis for the charges and a legal assessment of whether there exists sufficient evidence to believe a crime was committed and, if so, whether it could be proven beyond a reasonable doubt.

FACTS

In 2021, the Kenosha County Sheriff's Department was struggling with retaining and attracting qualified personnel, in particular to manage and operate its correctional facilities. That staffing shortage was exacerbated by the COVID-19 pandemic, as well as actions in other counties increasing the compensation levels for similar employees. As a result of the staffing shortages, Kenosha County's 2022 Budget increased the page grade for multiple different categories of correctional personnel. However, the pay increase was not applied to Admission and Release Specialists (ARS) or the Support Operations Manager (SOM).

At a County Board meeting on December 7, 2021, Sheriff Beth raised the issue of the ARS's not being provided increased pay grade. The following day, Sheriff Beth emailed the Kenosha County Director of Finance, among other individuals, to again flag the concern of ARS's not being provided raises in the budget process.

In January of 2022, meetings amongst the Sheriff's command staff looked for ideas to address the issue of retention of ARSs. During these meetings, Sheriff Beth decided that ARS should be provided a "stipend" to supplement the pay of ARSs until potential pay increases could be addressed in the 2023 county budget. According to Sheriff Beth, this "stipend" would consider of each ARS being paid for two additional hours per week at the one and one-half times regular rate.

These hours were not actually worked by the employees. Sheriff Beth believed he could authorize these “stipends” as he had money remaining in his budget due to understaffing in the Sheriff’s Department.

After approving the “stipends,” Sheriff Beth allowed his command staff to determine how the stipend would be processed. A unique code was entered into the time-management system to reflect the “stipend” payments. As a result, Kenosha County paid a total of \$21,736.95 in “stipends” to the ARSs for work that was not completed.

In addition to the ARSs, Sheriff Beth approval a “stipend” for the SOM. This approval occurred following a meeting between the SOM, Sheriff Beth, and Chief Deputy Marc Levin, where the SOM presented his case for a higher pay. As a result of the meeting, Sheriff Beth approved the SOM received a monthly “stipend,” amounting to eight hours paid at one and one-half times the regular pay. As with the ARS’s, this was pay for work not completed. As a result, Kenosha County paid out 32 hours for time that was never worked.

On April 11, 2022, an anonymous letter was received by the Kenosha County Director of Human Resources, containing substantially the above allegations. As a result of that letter, Kenosha County Corporation Counsel engaged the von Briesen law firm to conduct an independent investigation. Upon completion of that investigation, a referral was made to this office.

ANALYSIS

I. There is insufficient evidence to establish that any crime was committed by Sheriff Beth.

To establish criminal liability for Sheriff Beth, every element of a criminal offense must be proven beyond a reasonable doubt. If the evidence fails to support any element of a proposed charge, then the charge necessarily fails. This review focused on potential charges relating to Misconduct in Public Office under Wis. Stat. § 946.12.¹

a. Misconduct in Public Officer (Excess of Lawful Authority)

The first charge reviewed related to Misconduct in Public Office (Excess of Lawful Authority), under § 946.12(2). This version relates to doing an act in excess of the officials lawful authority. To prove this version of Misconduct, the State must prove the following elements beyond a reasonable doubt:

1. At the time of the alleged offense, the defendant was a public officer.
2. The defendant, in their capacity as a public officer (description of conduct).
3. The conduct was in excess of their lawful authority or conduct they were forbidden by law to engage in their official capacity.
4. The defendant knew the conduct was in excess of their lawful authority or that they were forbidden by law to engage in that conduct.

¹ Charges relating to Theft by Employee, Wis. Stat. §943.20(1)(b), were also considered. However, there is no evidence that Sheriff Beth ever had possession or custody of money or personally interacted with it in any way. As such, charges relating to theft would not be available.

WIJI-CRIMINAL 1731. In analyzing this offense, each element must be considered and must be each element must be considered and proven beyond a reasonable doubt. There can be no dispute as to the first element. The sheriff is a constitutionally elected position and thus is a public officer.² Nor can there be dispute as to the second element. Sheriff Beth approved payments of “stipends” in his role of retaining jail employees and maintaining and operating the jail.

Here, the primary considerations are whether that conduct was in excess of Sheriff Beth’s lawful authority and whether he knew it was in excess of his authority. The sheriff’s authority is both statutory and constitutional. *See* WIS. STAT. § 59.27 and also *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 39, 301 Wis. 2d 266, 732 N.W.2d 828. Including amongst those powers are to maintain and operate the jail. The Kenosha County Employee Handbook explicitly authorizes the issuance of stipends and wage adjustments for employee retention. As such, the issuance of stipends was not outside the realm of the sheriff’s lawful authority. However, those stipends could only be approved if the appropriate procedure was followed. Here, Sheriff Beth did not follow the appropriate procedures. He did not make a proposal to the Human Resources Director, did not receive a fiscal analysis, did not receive approval from the Director of Finance, and did not receive approval from the County Executive. Sheriff Beth unilaterally made the decision on “stipends.” Based on that, it is likely the State could establish that Sheriff Beth acted in excess of his lawful authority.

The final element revolves around whether Sheriff Beth knew his conduct was in excess of his lawful authority. In this investigation, there is no evidence demonstrating Sheriff Beth knew of the correct procedure to issue “stipends.” His statements were that he believed he could unilaterally authorize these “stipends” due to being under budget and because they were similar to other extra compensation payments. He denied any knowledge of the relevant Kenosha County protocol for issuing stipends to employees. Further, no individual interviewed by the Independent Counsel raised any concerns regarding the issuance of these “stipends,” nor did anyone question whether the Sheriff had the authority to authorize them. This supports the reasonableness of Sheriff Beth’s lack of knowledge. Based on these facts, the State would be unable to establish beyond a reasonable doubt that Sheriff Beth had knowledge his conduct was in excess of his lawful authority.

As all four elements of Misconduct in Public Office (Excess of Authority) under Wisconsin Statute § 946.12(2) cannot be proven beyond a reasonable doubt, charges would be inappropriate.

b. Misconduct in Public Office (Dishonest Advantage)

The MCDAO also reviewed a charge of Misconduct in Public Office, in relation to Wis. Stat. § 946.12(3). This version of Misconduct relates to gaining a dishonest advantage through exercise of a discretionary power. To prove this form of Misconduct, the State must prove the following elements beyond a reasonable doubt:

² “A ‘public official’ is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.” WIS. STAT. §939.22(30). Sheriffs are elected officers under the Wisconsin Constitution. *See* WI CONS. ART. VI, sec. 4.

1. At the time of the alleged offense, the defendant was a public officer.
2. The defendant, in their capacity as a public employee, exercised a discretionary power of their office.
3. The defendant exercised a discretionary power in a manner inconsistent with the duties of their office or the rights of others.
4. The defendant exercised discretionary power with intent to obtain a dishonest advantage for themselves or others.

WIS JI-CRIMINAL 1732. As stated above, there is no dispute as to the first element. The second element asks whether the Sheriff exercised a discretionary power of office. As discussed above, the powers of the Sheriff include maintenance and operation of the jail. Employee retention is a necessary function of maintaining and operating the jail. There is no individual mandated way to exercise such power; the exercise of the power must be tailored to the individual jail situation. As such, in authorizing "stipends," Sheriff Beth was exercising a discretionary power of office.

The next element relates to whether this power was exercised in a manner inconsistent with the duties of office or the rights of others. As noted above, the Sheriff's statutory and constitutional duty is to maintain and operate the jail. In doing so, he is obligated to ensure adequate staffing at the jail. Providing additional payments to retain employees is not inconsistent with the maintenance and operation of the jail. However, the sheriff is required to comply with the Municipal Code of Kenosha County. *See* MUNICIPAL CODE OF KENOSHA COUNTY 20.03-1. As part of that Code, Sheriff Beth was required to uphold and carry out the laws of the state and the county and to faithfully discharge the duties of office. *Id.* By failing to follow the protocols for stipends as laid out in the Kenosha County Employee Handbook, Sheriff Beth was failing to carry out the laws of the county and failing to faithfully discharge his duties. As such, the State would likely be able to establish that Sheriff Beth exercised a discretionary power in a manner inconsistent with the duties of his office.

As to the fourth evidence, there is no evidence of any dishonest advantage Sheriff Beth intended to obtain for himself or others. As a result of authorizing these stipends, Sheriff Beth was not personally enriched. He received no funds himself. He receive no additional considerations or benefits. As such, he received no dishonest advantage as a result of the exercise of his power. As to whether he exercised the power with intent to obtain a dishonest advantage for others, there is no evidence to support that. The statements from all involved were that the "stipends" were authorized to provide additional pay to ARSs and the SOM to ensure employee retention and satisfaction. These "stipends" were only approved after all other sheriff's office employees received wage increases. The advantage being sought was to retain employees and ensure appropriate compensation. There is no evidence that the advantage conferred was dishonest. As such, there is insufficient evidence to establish the fourth element of Misconduct.

As all four elements of Misconduct in Public Office (Dishonest Advantage) under Wisconsin Statute § 946.12(3) cannot be proven beyond a reasonable doubt, charges would be inappropriate.

c. Misconduct in Public Officer (False Entry)

The MCDAO also reviewed a charge of Misconduct in relation to Wis. Stat. § 946.12(4). This version of Misconduct relates to making a false entry in a record. To prove this form of Misconduct, the State must prove the following elements beyond a reasonable doubt:

1. At the time of the alleged offense, the defendant was a public officer.
2. The defendant, in his capacity as a public officer, made an entry in a record book.
3. The entry was false in a material respect.
4. The defendant intentionally falsified the entry in a material respect.

WIJI-CRIMINAL 1733. As described above, there is no dispute as to the first element. There would be issues surrounding proof for the second element. In this investigation, the entry into the record book would be the entry of time into the payroll system. Sheriff Beth did not make any of those entries. The argument would be that he instructed another to make sure entries and thus was party to their entries. Whether or not that argument would be successful need not be addressed, however, as there is a lack of evidence to establish that the entry was false. In entering the “stipends” into the payroll system, a brand new code was created, ARSX. This was specifically created because the office manager did *not* want a code that would inaccurately reflect the “stipend” payments as overtime. As such, it cannot be said the entry was false. The entry was meant to designate a stipend payment. That is what it did. This version of Misconduct looks to whether the entries themselves are false, not to whether the information they reflect was appropriately authorized. Since it cannot be proven the entry was false, element four fails as well, because there is no evidence to establish the Sheriff Beth intentionally engaged in any falsification. As such, since all four elements cannot be proven beyond a reasonable doubt, charges would not be appropriate.

d. Remaining Variations of Misconduct in Public Office.

This referral was also reviewed under subsections (1) and (5). These versions of Misconduct can be quickly disposed of and do not need significant analysis. Under (1), the employee must fail to perform a mandatory duty. WIS. STAT. §946.12(1). Here, there is no allegations of a failure or refusal to act by Sheriff Beth. Under (5), the employee must solicit or accept something of value for the performance of their duties. WIS. STAT. §946.12(5). There are no allegations that Sheriff Beth received anything as a result of the “stipends” he authorized. As such, no charges under subsections (1) or (5) would be appropriate.

II. Municipal Code Ethics Violations

Independent Counsel also conducted an analysis of whether Sheriff Beth violated the Municipal Code of Kenosha County. In particular, Independent Counsel reviewed the Standards of Conduct enumerated in 20.04-1 of the Municipal Code. In particular, two provisions are relevant. Under 20.04-1(4)(m), “[n]o county employee or official shall intentionally engage in submitting any falsified claim including time cards or in preparing or presenting any false information or record or misrepresentation” Under 20.04-1(4)(n), “[n]o county official or employee shall misuse or misappropriate any county funds or property”

As to these municipal code violations, the MCDAO declines to prosecute. Under 20.04-1(m), the State would need to prove that Sheriff Beth *intentionally* submitted falsified documents. (emphasis

added). In this instance, Sheriff Beth did not intentionally falsify documents. He approved “stipend” payments and allowed his office staff to determine how it should be processed in the time system. It was ultimately processed with a new payroll code, which was intended to represent the “stipend” payment. There was no attempted subterfuge involved; everything was aware the code represented the “stipend.” As such, there was no false documents submitted.

Under 20.04-1(4)(n), the State would need to prove that Sheriff Beth misused or misappropriated county funds. A prosecution here could turn about the distinction between the way the funds were *received* and the way they were *used*. As to use, the funds were used to pay additional “stipends” to sheriff employees. The use of stipends is an approved expenditure to purposes including employee retention. *See* 2021 KENOSHA COUNTY EMPLOYEE HANDBOOK at 37-38. It is the way the funds were *received* that raises concerns. The funds were received based on Sheriff Beth’s unilateral determine that they should be provided. This is not consistent with the Employee Handbook procedure. As such, the funds were *used* for an appropriate expenditure; it was the manner Sheriff Beth acquired them that was wrong. A violation of 20.04-1(4)(n) potentially occurred due to the incorrect manner in which Sheriff Beth acquired the funds. However, since the funds were ultimately used for an appropriate expenditure and since there are no allegations that Sheriff Beth was personally enriched, the MCDAO would decline to prosecute these ethical violations.

III. Even if a crime were committed, Sheriff Beth could raise the defense of Privilege under Wisconsin Statute § 939.45(3).

This memorandum has determined that there is insufficient evidence to establish a crime was committed. However, even if a crime were committed, in assessing the viability of a prosecution, potential defenses to criminal liability must also be addressed. In this case, the defense of Privilege under § 939.45(3) would be relevant. To be clear, this provides a defense to criminal liability and thus would be an affirmative defense that were only raised after a determination a crime was committed. This analysis has determined that there is insufficient evidence to believe a crime was committed and thus the defense of Privilege would not need to be raised. This section is included in the interests of providing a full analysis of the potential for conviction if criminal charges were issued.

Where an individual’s conduct is privileged, even if otherwise criminal, that privilege is a defense to prosecution based on that conduct. WIS. STAT. § 939.45. Among other circumstances, an individual can claim the defense of privilege, “[w]hen the actor’s conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office.” WIS. STAT. § 939.45(3). “The statutory privilege defense was intended to protect a public officer who, but for the defense provided in sec. 939.45, would be guilty of a crime if he or she were acting as a private citizen, and whose unlawful conduct has ‘sufficient value to society so that it ought not subject the actor to criminal liability.’” *State v. Stoehr*, 134 Wis. 2d 66, 85-86, 396 N.W.2d 177 (1986).

To establish a defense of privilege, the defendant must put forth evidence in support of the privilege. The following two elements must be shown:

1. The defendant acted in good faith.
2. The defendant's conduct was an apparently authorized and reasonable fulfillment of the duties of a public office.

See WI JI-CRIMINAL 870, and WIS. STAT. §939.45(3). The State must then prove beyond a reasonable doubt that the defendant did not act lawfully within the scope of privilege. WI JI-CRIMINAL 870.

In these circumstances, it appears likely that the defense of Privilege would be a valid defense to any charges revolving around Sheriff Beth's approval of "stipends" and that the State would be unable to prove beyond a reasonable doubt that he did not act lawfully within the scope of that privilege. The first element of Privilege is good faith. "'Good faith' means that the defendant believed that [his] conduct was an authorized and reasonable fulfillment of [his] duties" WI JI-Criminal 870. Here, there is no evidence that Sheriff Beth approved the "stipends" for any nefarious purpose. The only evidence presented supports the position that Sheriff Beth approved the "stipends" to aid in retention of employees and to provide a better compensation.

Further, Sheriff Beth stated that he believed he could authorize such "stipends" as he had money remaining in his budget due to understaffing and that they were similar to extra compensation for field training officers (FTOs).³ Both of these interpretations are incorrect. Being under budget did not provide Sheriff Beth with the unilateral authority to provide additional pay to employees. These "stipends" were also not the equivalent of FTO pay, as the FTOs were actually doing work, i.e. drafting field reports. The "stipends" issued by Sheriff Beth were pay for no additional work. While these were not correct interpretations of his authority, they do go to whether Sheriff Beth was acting in good faith. These explanations demonstrate that he was acting under the belief that his conduct was authorized and were a reasonable fulfillment of his duties, i.e. to ensure retention of qualified staffing for the jail. As such, the State would be unable to establish that Sheriff Beth was not acting in good faith.

The second element the State would be required to disprove is that the conduct was an apparently authorized and reasonable fulfillment of the duties of public office. Wisconsin Statute § 59.27 denotes the statutory duties of the Sheriff. In particular, the Sheriff is required to "[t]ake the charge and custody of the jail maintained by the county and the persons in the jail" WIS. STAT. §59.27(1). Further, the Sheriff has certain constitutional powers where that are "immemorial, principal, and important duties . . . that are peculiar to the office of sheriff and that characterize and distinguish the office." See *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 39, 301 Wis. 2d 266, 732 N.W.2d 828. Those powers include "the operation of the jail, attendance on the courts, maintaining law and order, and preserving the peace." See *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 9, 370 Wis. 2d 644, 883 N.W.2d 154 (citing *Kocken*, 2007 WI 72, ¶¶ 52-57). As such, a duty of the Sheriff is to maintain and operate the jail.

A reasonable interpretation of that duty is that it is necessary to ensure adequate and qualified staffing of the jail to maintain and operate it. In this instance, Sheriff Beth was attempting to supplement the pay of ARS and SOM employees via authorizing payments for work not completed.

³ Historically, FTOs received time and a half pay when drafting field-training observation reports, even though not working overtime.

Such a wage adjustment is allowed under the Kenosha County Employee Handbook if the appropriate proceeds are followed. According to the 2021 Kenosha County Employee Handbook:

The Kenosha County Budget authorizes expenditures of up to \$100,000 for wage adjustments and stipends deemed necessary for purposes including but not limited to employee retention, special assignments, in-range market adjustments, etc. Proposals for adjustments must be made to the Human Resources Director by the Department Director. The proposal includes operations justification for the recommended increase. Fiscal analysis and sign-off is required by the Department Director of Finance and Administration before presentation for approval to the County Executive.

Providing “stipends” to employees to ensure retention of staff is arguably a reasonable fulfillment of the duties of public office. Sheriff Beth did not follow the correct procedures to receive such “stipends” for employees. However, while failing to follow procedures, he was providing such “stipends” in a manner and purpose that was contemplated in the Employee Handbook. As such, the State would be unable to establish that Sheriff Beth’s conduct was not apparently authorized and not a reasonable fulfillment of the duties of public office.⁴ Based on this, even if it were determined a crime was committed, Sheriff Beth would be entitled to assert the defense of privilege.

IV. Sanctions

This memorandum specifically addresses whether Sheriff Beth committed violations of the Criminal Code of Wisconsin and/or the Municipal Code of Kenosha County and, if so, whether there is prosecutorial merit to any violations. The question of whether Kenosha County should impose some administrative or civil sanctions against Sheriff Beth is beyond the purview of this memorandum. That is a determination to be among the Kenosha County Board, County Executive, and Corporation Counsel.

CONCLUSION

In early 2022, Sheriff Beth authorized “stipends” to sheriff ARSs and the SOM. These “stipends” were not issued following the required procedures and thus were not authorized in that manner. However, these “stipends” were done with the intent to retain qualified employees; there was no personal enrichment by Sheriff Beth. While engaging in these “stipends” in the incorrect manner, Sheriff Beth was attempting to exercise his statutory and constitutional duty to maintain and operate the jail. His actions lacked knowledge that they were beyond his authority and intent to exceed that authority. For all the reasons stated in this memorandum, the evidence does not support the issuance of any criminal charges.

⁴ There was an additional potential avenue for the Sheriff to issue such “stipends.” The Kenosha County Sheriff’s Department Custody Policy Manual 1001.1 establish the Inmate Welfare/Commissary Fund, with a purpose to “provide commissary and education programs for the benefit of the inmate population.” Section 1001.4 gives the Sheriff the authority to authorize expenditures from the inmate commissary fund for the benefit and operation of the Sheriff’s Department. While providing a potential avenue to issue these “stipends,” Sheriff Beth did not cite this provision as authority to provide them. There is no evidence as to the amount of funds in the Commissary Fund, whether there was sufficient funds to cover the “stipends,” or whether there was any historical use of the Fund for personnel stipends or payments. As such, there is insufficient evidence to opine on whether the use of the Fund would provide authority for Sheriff Beth to authorize “stipends.”