

Appeal No. 2005AP2742

Cir. Ct. No. 2004CV1170

**WISCONSIN COURT OF APPEALS
DISTRICT III**

DENNIS KOCKEN,

PLAINTIFF-RESPONDENT,

V.

**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO AND
BROWN COUNTY MENTAL HEALTH CENTER
EMPLOYEES, LOCAL 1901, AFSCME, AFL-CIO,**

DEFENDANTS-APPELLANTS.

FILED

AUG 15, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Cane, C.J., Hoover, P.J., and Peterson, J.

We certify this appeal to the Wisconsin Supreme Court to determine whether a sheriff's constitutionally protected powers and duties relating to the management of the jail and custody of the prisoners includes the right to privatize the feeding of jail inmates, even though the County's collective bargaining agreement would be violated by that decision.

Brown County sheriff, Dennis Kocken, proposed that food preparation for inmates be handled by a combination of inmate and subcontracted labor. He entered into a preliminary agreement with Aramark, a private food service company, to oversee providing food for jail inmates and to supervise the inmates who work in the kitchen. Kocken contends that this change will result in fiscal savings to the County, making work for otherwise idle inmates, reducing jail

overcrowding by providing an opportunity for earned good-time credit for the inmates and promoting prisoner reintegration into the community. As a result of this change, some jail staff will lose their jobs unless they are hired by Aramark.

When Kocken refused to bargain the decision to privatize these functions, the Union brought a complaint before the Wisconsin Employment Relations Commission alleging a prohibited practice under WIS. STAT. § 111.70(3)(a) (2003-04). Kocken sought and received a declaratory judgment that his constitutionally protected authority to operate the jail trumps the collective bargaining agreement. The court issued an injunction prohibiting the Union from prosecuting the action before the WERC.¹ The Union appeals.

The Wisconsin Constitution does not delineate the powers and duties of the sheriff. However, the sheriff may not be deprived of the duties and powers appertaining to his office by having them transferred to some officer not chosen by the electors.

By virtue of his office ... and as part and parcel of the duties from time immemorial belonging to it by law, the sheriff of the county has custody of the common jail and of the prisoners therein; and it is no more competent for the legislature to take from the sheriff that duty and commit it to another officer, than it is to deprive the sheriff of the right to execute writs and processes, or the duty of conserving the public peace. ... But there can be no doubt that the framers of the constitution had reference to the office with those generally recognized legal duties and functions belonging to it in this country.... Among those duties, one of the most characteristic and well acknowledged was the duty of the common jail and of the prisoners therein.

¹ In addition to challenging the ruling on the sheriff's constitutional powers, the union also argues that the injunction should not have been granted because the sheriff would not suffer any legally cognizable irreparable harm if the WERC proceedings continued.

State ex rel. Kennedy v. Brunst, 26 Wis. 412, 413-14 (1870). Sheriffs have the powers and prerogatives that the office had under common law. See *Manitowoc Cty. v. Local 986B, Manitowoc County*, 168 Wis. 2d 819, 824, 484 N.W.2d 534 (1992). The constitutional prerogatives of the sheriff are those “immemorial principal and important duties ... that characterized and distinguished the office of sheriff at common law.” *Id.* Immemorial, principal and important duties of the sheriff at common law are constitutionally protected regardless of whether the duties themselves are unique to the office. *Id.*

Applying these principles, the courts have ruled that the legislature cannot give charge of the jail to an inspector. *State ex rel. Kennedy*, 26 Wis. 2d 412. The sheriff retains the right to select who among his deputies should act as a court officer, depending on the exact duties of the court officer. *Wisconsin Prof. Police Ass’n v. Dane County*, 106 Wis. 2d 303, 313, 316 N.W.2d 656 (1982). The sheriff has the right to enlist services of the U.S. Marshal for interstate conveyance of prisoners, notwithstanding the collective bargaining agreement. *Wisconsin Prof. Police Ass’n v. Dane County*, 149 Wis. 2d 699, 712, 439 N.W.2d 625 (Ct. App. 1989). The sheriff has the right to create a temporary mutual aid unit to address a special emergency and cannot be limited by the collective bargaining agreement. See *Washington County v. Washington County Deputy Sheriff’s Ass’n*, 192 Wis. 2d 728, 741, 531 N.W.2d 468 (Ct. App. 1995). The sheriff also has the right to assign a specially qualified deputy to fill a unique undercover position, although the legislature could still regulate administrative and executive duties, and collective bargaining can still control wages, hours and conditions of employment. *Manitowoc County*, 168 Wis. 2d 819.

On the other hand, the sheriff did not possess the power to retain private legal counsel or incur other expenses chargeable to the county even though

they were related to holding a prisoner. *McDonald v. Milwaukee County Bd. of Supervisors*, 41 Wis. 642, 645 (1887). The sheriff is subject to civil service limitations in the hiring and discharge of employees. *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 482, 177 N.W.2d 781 (1920), and internal management and administrative duties, while important, fall within the mundane and commonplace duties not preserved at common law. *Heitkemper v. Wirsing*, 194 Wis. 2d 182, 193, 533 N.W.2d 770 (1995). The common law right of the sheriff to appoint deputies was an administrative power that did not give “character and distinction” to the office, and therefore, it did not fall within the ambit of his or her constitutional powers and could be modified by legislation. *Brown County Sheriff’s Dept. v. Employees’ Ass’n*, 194 Wis. 2d 265, 273-74, 533 N.W.2d 766 (1995).

The attorney general has opined that maintaining the jail and the custody of prisoners were among the most important duties of a sheriff, a distinctive constitutional feature of the office from time immemorial, which not even the legislature is competent to take away or transfer. 77 Op. Att’y Gen. 94 (1988). Absent statutory authority to do so, neither the county board nor a sheriff can privatize a jail function. *Id.* The attorney general also opined that the legislature could not deprive the sheriff of his or her authority to choose who would provide food service for prisoners. 40 Op. Att’y Gen. 140 (1951).

The Union characterizes the decision on who will feed prisoners as an ancillary aspect of jail management. Focusing on the specific task of feeding prisoners, the Union argues that the sheriff’s historical functions cannot be eliminated or altogether transferred to another officer of county government, but legislation may define and delineate the sheriff’s powers. The feeding of jail inmates is a shared, statutory power; *see* WIS. STAT. §§ 59.27(1); 302.36-37, and

the sheriff may not unilaterally privatize that function. The hiring and firing of jail personnel does not fall within the ambit of the sheriff's constitutional power.

Focusing on the sheriff's broader powers to maintain the jail and care for prisoners, the sheriff argues that the feeding of prisoners and its attendant security, morale and rehabilitation concerns are the exclusive historical province of the sheriff. Collective bargaining agreements cannot be used to abridge the sheriff's constitutional powers. The sheriff alone is constitutionally mandated to make the choice as to how the jail will be organized and run, including the food preparation and delivery system. The sheriff, in effect, retains this authority by privatizing the food service function and choosing the organization that will feed the inmates.

We submit that it is appropriate for the Wisconsin Supreme Court to determine the limits of a sheriff's power to privatize food service in the jail. The trend toward privatization of governmental functions suggests that this issue will become increasingly prominent. Aramark alone provides food service for numerous Wisconsin jails. In this instance, the sheriff and the county board appear to agree on the privatization. In other instances, the sheriff and the board might not agree. Resolution of the issues in this case may provide guidance for other cases where the sheriff's constitutionally protected powers would be exercised over the county board's objection. This case provides an opportunity to clarify whether the feeding of prisoners is a matter solely left to the sheriff's control and, if so, whether that means he or she is free to privatize the function, or whether privatization itself constitutes an impermissible assignment of the sheriff's duties, particularly when the plan includes private supervision of inmate labor.

