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OAG—6—09

Ms. Jo-Ann Millhouse
Corporation Counsel
Grant County
130 West Maple Street
Lancaster, WI 53813

Dear Ms. Millhouse:

¶ 1. As a law enforcement agency, your sheriff's department has the ability to fingerprint individuals. You state that the sheriff would like to charge a fee for, or recover costs associated with, fingerprinting persons who are arrested or taken into custody and to charge a fee for or recover costs associated with fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 2. You request my legal opinion concerning two questions, which I have reworded as follows:

1. Are there circumstances in which a sheriff is statutorily authorized to charge a fee for, or to recover costs associated with, fingerprinting persons who are arrested or taken into custody?

¶ 3. In my opinion, the answer is no.

2. Are there circumstances in which a sheriff is statutorily authorized to charge a fee for, or to recover costs associated with, fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment?

¶ 4. In my opinion, the answer is no. If the sheriff's department does fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of any statutorily-authorized fee charged by the county agency to the sheriff's department in order to defray some or all of the costs that are incurred by the sheriff's department.

ANALYSIS

¶ 5. Your first question is whether there are circumstances in which a sheriff is statutorily authorized to charge a fee for, or recover costs associated with, fingerprinting persons who are arrested or taken into custody. Wisconsin Stat. § 165.84(1) requires fingerprinting of certain persons who have been arrested or have been taken into custody for felonies, misdemeanors, certain ordinance violations, and in various other circumstances. *See* Wis. Stat. § 165.83(2)(a).

¶ 6. As public officials, sheriffs “take their offices *cum onere*, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services or by their official salaries.” 68 Op. Att’y Gen. 223, 225 (1979). Wisconsin Stat. § 59.32(1) provides that “[t]he sheriff shall collect the fees prescribed in s. 814.70[.]” Wisconsin Stat. § 814.70 enumerates those items for which the sheriff can charge fees in connection with the performance of his official duties. The express mention of only certain items in a statute impliedly excludes all other items that are not mentioned in the statute. *See, e.g., State v. James P.*, 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95. *See* 70 Op. Att’y Gen. 17, 18 (1981) (citing *Appleton v. ILHR Department*, 67 Wis. 2d 162, 172-73, 226 N.W.2d 497 (1975)). Because fingerprinting is not one of the items that is mentioned in Wis. Stat. § 814.70, fingerprinting persons that have been arrested or taken into custody is not an item for which the sheriff may charge a fee.

¶ 7. In addition, Wis. Stat. § 59.32(4) provides:

EXCESSIVE FEES. No sheriff, undersheriff or deputy shall directly or indirectly ask, demand or receive for any services or acts to be performed by that officer in the discharge of any of that officer’s official duties any greater fees than are allowed by law; and for the violation of any of the provisions of this subsection every such officer shall be liable in treble damages to the party aggrieved and shall forfeit not less than \$25 nor more than \$250.¹

Although the supreme court has not addressed whether the “greater fees than are allowed by law” language contained in Wis. Stat. § 59.32(4) refers to the kinds of items for which fees can be charged, Wis. Stat. § 59.32(4) is a further indication that the ability of the sheriff to charge fees is strictly limited by the provisions of Wis. Stat. § 814.70. Wisconsin Stat. § 814.70 does not authorize the sheriff to charge a fee for fingerprinting persons that have been arrested or taken

¹A prior statute, Wis. Stat. ch. 129, sec. 2955 (1913), provided: “No judge, justice, sheriff or other officer whatever, or other person to whom any fees or other compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service than such as shall be allowed by the laws of this state.”

into custody. The sheriff therefore may not charge any fee in such circumstances. Because the sheriff may not charge any fee for fingerprinting a person who has been arrested or taken into custody, costs associated with fingerprinting also are not recoverable as taxable disbursements in criminal proceedings or forfeiture actions. *See State v. Dismuke*, 2001 WI 75, ¶ 22, 244 Wis. 2d 457, 628 N.W.2d 791.

¶ 8. Your second question is whether there are circumstances in which a sheriff is statutorily authorized to charge a fee for, or recover costs associated with, fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment. Fingerprinting is either mandatory or can be required in connection with various occupations or forms of employment, including but not limited to court-appointed special advocates, Wis. Stat. § 48.07(5)(b)2.; certain kinship care and long-term kinship care relatives, Wis. Stat. § 48.57(3p)(d); certain caregivers, non-client residents, or persons under eighteen years of age who are caregivers at day care centers, Wis. Stat. § 48.685(2)(bm); certain foster home licensees, Wis. Stat. § 48.685(2)(c)1.; certain adult caregivers, Wis. Stat. § 50.065(2)(bm); certain employees of the Department of Transportation who are involved in issuing operator's licenses or identification cards, Wis. Stat. § 110.09(1)(a) and (b); certain applicants for teacher's licenses, Wis. Stat. § 118.19(10)(c); certain persons engaged in providing pupil transportation services, Wis. Stat. § 121.555(3)(b); certain school bus operators, Wis. Stat. § 343.12(6)(b); all persons seeking private detective licenses or private security permits and certain persons seeking other forms of professional licensure, Wis. Stat. § 440.03(13)(c); designated representatives of wholesale distributors of prescription drugs, Wis. Stat. § 450.071(3)(c)9.; racetrack operators and certain persons connected with racetrack operators, Wis. Stat. § 562.05(7)(b) and (bg); lottery vendors, Wis. Stat. § 565.25(4); and Indian gaming employees and vendors, Wis. Stat. § 569.04(2). *See also* Wis. Admin. Code § Game 13.05(6) and (7).

¶ 9. Wisconsin Stat. § 165.82(1)(ar) authorizes the Department of Justice to charge a \$15 fee “[f]or each fingerprint card record check requested by a governmental agency or nonprofit organization[.]” No other state or local agency is statutorily authorized to charge such a fee.

¶ 10. My understanding from the limited information provided is that the sheriff would like to charge a fee for providing fingerprint cards and placing fingerprints on those cards before the cards are submitted to the Department of Justice to perform a record check. It appears from the materials submitted that some private firms or agencies offer such services and charge for them.

¶ 11. “A county or a county officer has only such power as is conferred by statute, either expressly or by clear implication.” OAG 1-03 (October 2, 2003), at 2. For the reasons indicated in response to your first question, a sheriff cannot impose a charge for fingerprinting persons who

need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.²

¶ 12. I will also address whether the county itself or certain county agencies may impose such a charge. A county has only those powers expressly granted or impliedly authorized by statute. *See St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). *See also County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770. Insofar as relevant to your inquiry, the substantive powers of counties are enumerated primarily in Wis. Stat. § 59.01 and Wis. Stat. ch. 59, subch. V. Those statutes do not expressly or impliedly authorize counties to charge fees for fingerprinting persons solely as the result of the fact that such persons need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.

¶ 13. There are circumstances in which a county agency does mandate that a person be fingerprinted. Wisconsin Stat. § 48.57(3p)(j) provides that “[a] county department or, in a county having a population of 500,000 or more, the department may charge a fee for conducting a background investigation under this subsection. The fee may not exceed the reasonable cost of conducting the investigation.” Wisconsin Stat. § 48.685(8) similarly provides:

The department, the department of health services, a county department, a child welfare agency, or a school board may charge a fee for obtaining the information required under sub. (2)(am) or (3)(a) or for providing information to an entity to enable the entity to comply with sub. (2)(b)1. or (3)(b). The fee may not exceed the reasonable cost of obtaining the information.

The “county department” referred to in Wis. Stat. § 48.57(3p)(j) and in Wis. Stat. § 48.685(8) is the county department of social services or the county department of human services. *See* Wis. Stat. § 48.02(2d).³

¶ 14. As part of a background investigation under Wis. Stat. § 48.57(3p)(j), a county department that “determines that the person’s employment, licensing or state court records provide a reasonable basis for further investigation . . . shall require the person to be fingerprinted

²There is no statutory requirement that the sheriff provide fingerprint cards to such persons or that the sheriff fingerprint persons for submission to the Department of Justice for a record check for such purposes.

³In contrast, Wis. Stat. § 50.065(8) provides that “[t]he department may charge a fee for obtaining the information required under sub. (2)(am) or (3)(a) or for providing information to an entity to enable the entity to comply with sub. (2)(b) or (3)(b).” “Department” means the Department of Children and Families. *See* Wis. Stat. § 48.02(4). Wisconsin Stat. § 50.065(8) does not include a county department.

on 2 fingerprint cards, each bearing a complete set of the person's fingerprints."⁴ Wis. Stat. § 48.57(3p)(d). Similarly, in providing the kinds of information referred to in Wis. Stat. § 48.685(8), a county department "may require the person to be fingerprinted on 2 fingerprint cards, each bearing a complete set of the person's fingerprints." Wis. Stat. § 48.685(2)(bm).⁵

¶ 15. A background investigation under Wis. Stat. § 48.57(3p)(j) may require the submission of fingerprint cards. The items of information referred to in Wis. Stat. § 48.685(8) may also include the submission of fingerprint cards. In cases where a county agency requires fingerprint cards to be submitted, the sheriff's department may do the actual fingerprinting. Wisconsin Stat. § 48.57(3p)(j) authorizes a county department to charge a reasonable fee for the cost of the entire investigation. Wisconsin Stat. § 48.685(8) authorizes a county department to charge a reasonable fee for the cost of submitting all statutorily-required information. No fee may exceed the reasonable cost of obtaining the information. A component of the fee that is charged by the county agency under these statutes may include the reasonable costs of fingerprinting. If the sheriff's department does the fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of the fee to the sheriff's department to defray some or all of the costs involved.

CONCLUSION

¶ 16. I therefore conclude that there are no circumstances in which a sheriff is statutorily authorized to charge a fee for or to recover costs associated with fingerprinting persons that are arrested or taken into custody or for fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment. If the sheriff's department does fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of any statutorily-authorized fee charged by

⁴The introductory clause of Wis. Stat. § 48.57(3p)(d) cross references Wis. Stat. § 48.57(3p)(b) and (c), under which a county department may be required to conduct a background investigation. A determination to require the submission of fingerprints is a part of the investigation.

⁵The introductory clause in Wis. Stat. § 48.685(2)(bm) cross references Wis. Stat. § 48.685(2)(am) and (b)1. Wisconsin Stat. § 48.685(2)(c)1. cross references 42 U.S.C. § 16962(b) (2006). 42 U.S.C. § 16962(d) (2006) provides that "the States may charge any applicable fee for the [fingerprint] checks."

Ms. Jo-Ann Millhouse
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the county agency to the sheriff's department in order to defray some or all of the costs that are incurred by the sheriff's department.

Sincerely,

J.B. Van Hollen
Attorney General

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