



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG-1-09

Mr. Brian W. Blanchard
District Attorney
Dane County
215 South Hamilton Street, #3000
Madison, WI 53703-3297

Dear Mr. Blanchard:

In your letter dated November 18, 2008, you indicate that Dane County has recently established a revolving bail fund. You state that there has been no judicial action by any Dane County Circuit Court Judge or Judges directing or approving the use of such a fund.

BACKGROUND

Your letter indicates that the revolving bail fund is funded by the county. The fund is a line item in the budget of the Dane County Sheriff. Monies are lent by the Dane County Sheriff's Office from the fund to persons who have been booked into the Dane County Jail. Funds are lent to persons who lack the financial resources with which to post bail in connection with certain offenses for which the Uniform Bail Schedule sets bail at \$250 or less. Your letter suggests that the vast majority of these offenses are misdemeanors.

In order to be eligible to receive monies from the revolving bail fund, the person cannot be subject to any outside holds, warrants, or commitments; cannot have been arrested for domestic abuse of any kind; cannot have been booked into the jail for any municipal ordinance violation; cannot have failed to appear in court or have been subject to a bench warrant during the preceding five years; cannot have tested positive for any amount of alcohol; and cannot be incapacitated by any drug. The person must also possess valid identification, such as a current driver's license. If the person meets these criteria, he or she must sign a promissory note payable to the county and must also execute an assignment of bail directing the clerk of court to return the amount loaned from the revolving bail fund to the county once the conditions of the indigent person's bail are satisfied. At the time the funds are loaned, there has been no court appearance, no appearance before a judge or court commissioner, and no involvement by the prosecutor or by defense counsel. I have been unable to locate a Dane County Ordinance establishing a revolving bail fund. See <http://countyofdane.com/unified/information/ordinances.aspx>; <http://danedocs.countyofdane.com/webdocs/pdf/ordinances/ord0y.pdf> (last visited 3/31/2009).

QUESTION PRESENTED AND BRIEF ANSWER

You ask, in effect, whether a county or a county sheriff possesses statutory authority to use county funds to establish a revolving bail fund for the purpose of allowing persons to post bail for certain kinds of offenses for which they are booked into the county jail.

In my opinion, the answer is no.

PRINCIPAL STATUTORY PROVISIONS AND JUDICIAL ORDERS INVOLVED

I. STATUTORY AUTHORITY OF THE SHERIFF.

Wisconsin Stat. § 59.27 provides in part:

Sheriff; duties. The sheriff of a county shall do all of the following:

(1) Take the charge and custody of the jail maintained by the county and the persons in the jail, and keep the persons in the jail personally or by a deputy or jailer.

(2) Keep a true and exact register of all prisoners committed to any jail under the sheriff's charge, in a book for that purpose, which shall contain the names of all persons who are committed to any such jail, their residence, the time when committed and cause of commitment, and the authority by which they were committed; and if for a criminal offense, a description of the person; and when any prisoner is liberated, state the time when and the authority by which the prisoner was liberated; and if any person escapes, state the particulars of the time and manner of such escape.

II. UNIFORM BAIL SCHEDULE.

Wisconsin Stat. § 969.065 provides:

Judicial conference; bail alternatives. The judicial conference shall develop guidelines for cash bail for persons accused of misdemeanors which the supreme court shall adopt by rule. The guidelines shall relate primarily to individuals. The guidelines may be revised from time to time under this section.

The Uniform Misdemeanor Bail Schedule, adopted by order of the Wisconsin Supreme Court on October 29, 2007,¹ provides in part:

Preamble for Forfeiture and Misdemeanor Bail Schedules

- I. All persons arrested for a violation of a state or municipal ordinance shall be released from custody without a cash bond if they:
 - Have a valid Wisconsin driver's license or can show sufficient evidence of ties to the community; or
 - The arresting officer is otherwise satisfied that the accused will make future court appearances.
- II. All persons arrested for a misdemeanor, including a misdemeanor traffic offense, shall be released from custody without a cash bond unless any of the following exist:
 - The accused does not have proper identification.
 - The accused appears to represent a danger of harm to himself or herself, another person or property.
 - The accused cannot show sufficient evidence of ties to the community.
 - The accused has previously failed to appear in court or failed to respond to a citation.
 - Arrest or further detention is necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.
- III. All persons not released pursuant to I and II for a forfeiture, misdemeanor or misdemeanor traffic offense shall be released upon compliance with the state deposit or misdemeanor bail schedule unless bail is otherwise set by the court.
- IV. These guidelines do not supersede specific statutorily mandated detention.

¹The current Uniform Misdemeanor Bail Schedule addresses the individual circumstances of the person arrested. See *Demmith v. Wisconsin Judicial Conference*, 166 Wis. 2d 649, 480 N.W.2d 502 (1992).

ANALYSIS

“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. *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.

The substantive powers of counties are enumerated primarily in Wis. Stat. § 59.01 and Wis. Stat. ch. 59, subch. V. I have located no statute that expressly or impliedly authorizes a county to loan county funds to persons booked into the county jail.

The sheriff does have “charge and custody of the jail[.]” Wis. Stat. § 59.27(1). In exercising that authority, the sheriff must keep a record of “when any prisoner is liberated” and “state the time when and the authority by which the prisoner was liberated[.]” Wis. Stat. § 59.27(2). Nothing in this language or in any other provision of Wis. Stat. § 59.27 expressly authorizes the sheriff to loan county funds to persons booked into the county jail.

The exercise of statutory powers cannot be freely or readily implied. *Compare Madison Metropolitan Sch. Dist. v. DPI*, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995). Statutes ordinarily are strictly construed to preclude the exercise of power that is not expressly granted. *See Browne v. Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978). Any reasonable doubt concerning the existence of an implied statutory power should be resolved against its existence. *Madison Metropolitan*, 199 Wis. 2d at 13. *See, e.g.* 77 Op. Att’y Gen. 94, 95 (1988), concluding that the sheriff could not contract with a private firm to maintain the care and custody of prisoners in the county jail because “the power or discretion to so contract is not presently reposed in him by statute, expressly or by implication[.]”

Other statutory provisions negate the existence of any implied power on the part of the sheriff under Wis. Stat. § 59.27(1) and (2) to establish a revolving bail fund. “[T]he legislature and judiciary exercis[e] shared power over bail.” *Demmith*, 166 Wis.2d at 663. Although the Legislature has authorized the sheriff to accept bail under Wis. Stat. § 969.07, in doing so the sheriff performs a purely “ministerial function[.]” 63 Op. Att’y Gen. 241, 243 (1974). *See also* 8A Am. Jur. 2d *Bail* § 9 (2009); 8 C.J.S. *Bail* § 72 (2008). The judiciary has acted pursuant to Wis. Stat. § 969.065, which provides: “The judicial conference shall develop guidelines for cash bail for persons accused of misdemeanors which the supreme court shall adopt by rule.” The judicial conference and the supreme court have not authorized the sheriff to exercise discretion in determining which persons booked into the county jail should be able to post bail. *Cf.* 63 Op. Att’y Gen. at 244-45. There is no language in Wis. Stat. § 59.27(1) and (2) impliedly granting the sheriff the power or authority to deviate from the provisions of Wis. Stat. § 969.07

Mr. Brian W. Blanchard
Page 5

or Wis. Stat. § 969.065. I find no statutory authority for a county or a sheriff to establish a revolving bail fund with public funds or to operate such a fund in the manner you describe.²

CONCLUSION

I therefore conclude that neither a county nor a county sheriff possesses statutory authority to use county funds to establish a revolving bail fund for the purpose of allowing persons to post bail for certain kinds of offenses for which they are booked into the county jail.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla

²Your concern that the county or the sheriff may be acting as a surety, contrary to Wis. Stat. § 969.12(2), would be valid if there are situations in which the county posts an appearance bond with the court. Wisconsin Stat. § 969.12(2) requires that “[a] surety under this chapter shall be a natural person[.]” Where monies are lent directly to the person who then posts cash bail, neither the county nor the sheriff acts as a surety. *See* Wis. Stat. § 969.02(2), which refers to a “deposit of cash in lieu of sureties[.]” *See also* Wis. Stat. § 969.13(3) and (4).