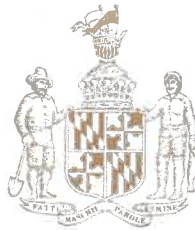


BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

January 9, 2020

The Honorable Ronald N. Young
Maryland General Assembly
301 James Senate Office Bldg.
Annapolis, Maryland 21401

The Honorable Karen Lewis Young
Maryland General Assembly
416 House Office Bldg.
Annapolis, Maryland 21401

Dear Senator Young and Delegate Young:

As follow up to my letter of advice to you dated November 18, 2019, you asked for additional advice about the authority of the Frederick County Sheriff's Office ("FCSO") to enter into a 287(g) agreement with the U.S. Immigration and Customs Enforcement agency ("ICE"). As I did in my November 18 letter, I list your questions below separately, along with my answer.

Follow up Question 1:

"After reviewing the Dotson case regarding county responsibility for the detention center operations, is Frederick County authorizing the sheriff's 287(g) program which operates solely out of the Frederick County Detention Center?"

In your letter leading up to this question, you cite *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991), as authority for your assertion that "Frederick County may have delegated its authority and responsibility for operation of the Frederick County Detention Centre to the sheriff, but by Dotson analysis, remains and is responsible for the operations of the Detention Center." You also cite the county attorney's letter and materials from the self-insurance entity established by Maryland's counties and municipalities discussing legal representation of sheriffs. Your question, however, is premised on the conclusion that Frederick County "delegated" its authority to the sheriff and is responsible for the *operations* of the detention center. As I mentioned in my November 18 letter, in the absence of a State statute, a sheriff has duties

derived by common law. *Soper v. Montgomery County*, 294 Md. 331, 337 (1982). The Court of Appeals has indicated that a common law power of a sheriff is keeping of the jail, *Beasley v. Rideout*, 94 Md. 641, 650 (1902). Thus, the authority to operate the detention center belongs to the sheriff under common law unless the General Assembly alters the common law. As a result, responsibility for operating the detention center is not the county's to delegate.

The General Assembly has granted statutory authority to some counties to assume direct control over county jails. Counties that have adopted home rule may assume responsibility for the operation of local jails through the Express Powers Act. Local Gov't Article, § 10-304(c) (authorizing charter and code counties to "establish and maintain local correctional or detention facilities and juvenile facilities" and to "regulate all individuals confined"). In addition, charter counties may additionally provide, by resolution or law, for "the appointment of a qualified individual as managing official of the local correctional facility" Correctional Services Article, § 11-201(b). Accordingly, as authorized under State law, Frederick County could take on the operations of the detention center but has not done so. Thus, the FCSO runs the county adult detention center. Nevertheless, State law still makes the county responsible for the *funding* of the detention center. Although the county finances the detention center's operations, day-to-day management is the responsibility of the sheriff, a State constitutional officer.

Financial liability for actions of sheriffs has been apportioned in State statutes. See State Finance and Procurement, § 9-108 and State Gov't Article, §§ 12-405 and 12-501. At the same time, when determining whether a Maryland sheriff is entitled to immunity as a State official, courts have looked to the type of claim asserted. See *Dotson*, 937 F.2d at 934 (holding that sheriff was not entitled to Eleventh Amendment immunity for a § 1983 civil rights claim); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360 (D. Md. 2011) (finding that county not liable under the respondeat superior doctrine for sheriff's violation of the ADA and Rehabilitation Act); *Kronk v. Carroll Co.*, 2012 WL 245059 (D. Md. 2012) (noting that when a sheriff is acting as director of local detention center, the sheriff is a State official entitled to immunity for Family Medical Leave Act claim).

Regardless, the Attorney General has previously advised that "although detention center employees are subject to County personnel rules, they remain employees of the Sheriff, subject to the Sheriff's authority and direction." 85 *Opinions of the Attorney General* 338, 341 (2000).

[I]n the absence of any controlling statute and so long as the detention center remains under the control of the Sheriff, the County Commissioners may not require the Sheriff, a State constitutional officer, to cooperate with a consultant selected by the County Commissioners to train correctional officers on matters exclusively within the Sheriff's authority. To conclude otherwise could allow the County Commissioners to directly abridge the functions and duties of the Sheriff.

Id. at 346. See also *Santos v. Frederick County Board of Comm'ners*, 346 F. Supp. 3d 785, 796 (D. Md. 2018) (ruling that the sheriff's participation in a 287(g) program "is applicable only to FCSO... He does not have the law enforcement authority to enter into and decide how to implement a 1357(g) agreement for the entire state, *only for Frederick County*") (emphasis added).

In summary, nothing in the *Dotson* case changes my view that (1) the county did not "authorize" the sheriff's participation in the 287(g) program by approving a budget that includes funding to pay the expenses of the sheriff's office participation in the program or by not taking over the operations of the detention center and (2) the sheriff does not need authorization from the county to participate in the program.

Follow up Question 2:

"How is the 287(g) program consistent with Maryland State law (a) in a Dillon Rule analysis and (b) as Maryland law does not specifically authorize state or local enforcement of federal immigration law and ICE cooperation (though it does specifically authorize fire and rescue entity cooperation with federal government)?"

In your letter, you place great emphasis on a law review article, which does not discuss Maryland law specific to the sheriff's constitutional and common law powers. Moreover, the article does not cite one court opinion invalidating any 287(g) entered into by a sheriff. Further, application of Dillon's Rule would not invalidate a 287(g) agreement that a Maryland sheriff entered into with ICE. Dillon's Rule stands for the proposition that municipal home rule does not grant absolute autonomy to municipalities.

[A] *municipal corporation... can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment*

of the declared objects and purposes of the [municipal] corporation, - not simply convenient, but indispensable.

Hardy v. Housing Management Co., 293 Md. 394, 396-97 (1982) (quoting 1 J. Dillon, *Municipal Corporations* § 237) (emphasis in original).

The Court of Appeals has confirmed that sheriffs and deputy sheriffs are officials and employees of the State, not the counties. *Rucker v. Harford Co.*, 316 Md. 275 (1989). Thus, as recognized by the federal court in the *Santos* case, a sheriff has the power to enter into a 287(g) agreement.

Close inquiry finds Sheriff Jenkins as the final policymaker for Frederick County over the “particular issue” in question—Frederick County’s participation in the 8 U.S.C. § 1357(g) program. Sheriff Jenkins, on behalf of FCSO, chose to enter FCSO into the immigration enforcement agreement with the federal government... Sheriff Jenkins did not enter the state of Maryland into a 1357(g) agreement; he entered FCSO into an agreement. Under the organization of the 1357(g) program, the agreement with FCSO must then have been between ICE and a political subdivision of a State. FCSO itself is not a political subdivision of Maryland—instead, Frederick County is a political subdivision under which FCSO operates. *Critically, as a practical matter, Sheriff Jenkins had the power to enter Frederick County into this agreement.*

346 F. Supp. 3d at 795 (emphasis added).¹

You also asked whether because the General Assembly enacted a law that authorizes defined fire, rescue, and emergency medical service entities to enter into agreements “with the federal government ... to provide fire fighting or rescue activities on property under the jurisdiction of the United States,”

¹ The sheriffs in Harford and Cecil Counties both have entered into 287(g) agreements. Like in Frederick County, the sheriffs in those counties operate the detention center and there is no county police department. By contrast, Anne Arundel County operates the detention center and has a county police department. The previous county executive entered into a 287(g) agreement, which was cancelled by the current county executive. If Frederick County operated the detention center and had its own police department, the sheriff would not be the primary law enforcement agency in the county, and thus, in that case would not have authority to commit the county to the ICE agreement in my view.

means that if the legislature "intended that local law enforcement agency have the authority to enter into a Mutual Aid Agreement with the federal government" for immigration enforcement, "presumably it would have provided or should have provided authority similar to that provision." Public Safety Article ("PS"), § 7-104.

I do not believe the legislature intended to prohibit law enforcement agencies from entering into 287(g) agreements. First, similar to the Mutual Aid Agreements allowed under Criminal Procedure Article, § 2-105, the agreements set out in PS § 7-104 authorize those named entities to engage in fire fighting and rescue activities on federal property, a physical area outside the jurisdiction of those entities. Moreover, the agreements must be "in accordance to" the limitations and requirements specified in PS § 7-104(b) and (c). By its nature, a 287(g) agreement entered into by a sheriff is limited to the county in which the sheriff has jurisdiction. Second, rather than simply authorizing agreements under PS § 7-104, the statute can be seen as limiting those agreements and imposing specified requirements. As I mentioned in my November 18 letter to you, I believe that the General Assembly may impose limitations and requirements governing 287(g) agreements, consistent with federal law, as well as clarifying responsibility for the sheriff's liabilities. That the General Assembly has not done so does not, in my view, indicate any legislative intent to prohibit such agreements.

Miscellaneous questions related to *Gonzalez v. ICE* (C.D. Cal. 2019)

Finally, your letter discussed *Gonzalez v. ICE*, 2019 WL 4734579 (C.D. Cal. Sept. 27, 2019), which the court explained involves a category of ICE detainer that "authorizes ICE to remove an individual based solely on biometric confirmation of the individual's identity and a review of multiple federal databases which may provide information on a person's immigration status." *Id.* at *1. The court issued a permanent injunction

enjoining ICE from issuing detainers to state and local law enforcement agencies in states where there is no explicit state statute authorizing civil immigration arrests on detainers and enjoining ICE from issuing detainers to Probable Cause Subclass members based solely on database searches that rely upon information from sources that lack sufficient indicia of reliability for a probable cause determination for removal.

Id. at *22. The injunction applies to all ICE detainers issued out of the Central District of California.

In its decision imposing the injunction, the court among other things held that "ICE violates the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not expressly authorize civil immigration arrests in state statute." You asked whether Maryland has "an explicit statute authorizing civil immigration arrests based on detainers." Maryland does not have a statute expressly authorizing civil immigration arrests based on detainers. At the same time, I believe that the court in *Gonzalez* was reiterating that a 287(g) agreement cannot grant a state or local law enforcement official authority beyond what that state law would provide. A state retains control over its law enforcement.

With regard to ICE retainer requests (i.e., ICE warrants), the Office of the Attorney General ("OAG") has consistently advised that a law enforcement agency may not detain any individual beyond the State law release date unless there is a judicial warrant or probable cause that the subject has committed a crime. Additionally, "the underlying infraction for which the warrants are issued—being in the country illegally—is typically a *civil* infraction, which cannot justify a State-law arrest." Maryland Attorney General's Office, *Local Enforcement of Federal Immigration Law: Legal Guidance for Maryland State and Local Law Enforcement Officials*, (December 2018), Appendix at A-2. Therefore, the guidance from the OAG seems to be consistent with the court's holding in the *Gonzalez* case.² Nevertheless, I will pass along to my colleagues in the Baltimore Office your request to amend the OAG Guidance and for additional guidance. The role in this office is to advise legislators and legislative staff.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly

² The context of the *Gonzalez* case is also relevant—the court found the ICE warrants at issue did not establish probable cause of a criminal violation, thus could not establish the probable cause necessary under California law to detain individuals.