7-29-21

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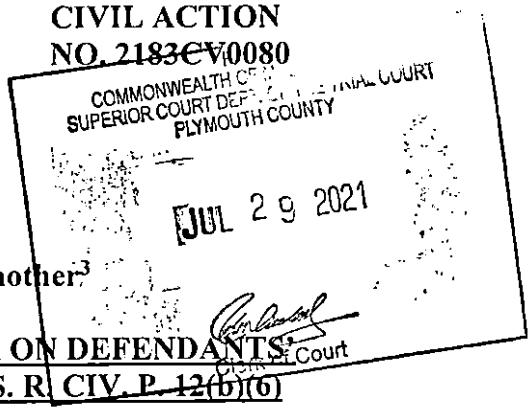
COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2183CV0080



JUAN COFIELD & others[1]

vs.

JOSEPH MCDONALD, JR.[2] & another[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(6)

The plaintiffs, Juan Cofield and twenty-eight "taxable inhabitants of the Commonwealth" (together, "petitioners"), brought a Petition for Declaratory and Injunctive Relief Pursuant to G. L. c. 29, § 63, against the Plymouth County Sheriff's Office ("PCSO") and Plymouth County Sheriff Joseph McDonald ("Sheriff McDonald") (together, "defendants"). The petitioners seek a declaration that an agreement entered into by PCSO and the federal government relating to federal civil immigration enforcement is unlawful. The defendants now move to dismiss the petition for failure to state a claim upon which relief can be granted, pursuant to Mass. R. Civ. P. 12(b)(6). The court conducted a hearing on the motion on June 10, 2021. For the reasons stated herein, the defendants' Motion to Dismiss is **DENIED**.

BACKGROUND

In their Petition for Declaratory and Injunctive Relief Pursuant to G. L. c. 29, § 63, the petitioners allege the following:

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[1] Petitioners are twenty-eight taxable inhabitants of the Commonwealth, not more than six of whom are from any one county.

[2] In his official capacity as Plymouth County Sheriff

[3] Plymouth County Sheriff's Office

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On June 8, 2020, Sheriff McDonald, on behalf of PCSO, signed a Memorandum of Agreement "between U.S. Immigration and Customs Enforcement ("ICE") . . . and Plymouth County Sheriff's Department[.]" ("287(g) agreement").[4] The agreement purports to grant certain members of the Sheriff's Department the power to engage in federal civil immigration enforcement activities, including the arrest, interrogation, and transportation of immigrants, pursuant to Section 287(g) of the Immigration and Nationality Act ("INA").[5]

Per the 287(g) agreement, "ICE delegates to nominated, trained, certified and authorized [law enforcement agency] personnel the authority to perform certain immigration enforcement functions as specified herein." It further cites Section 287(g) of the INA as the authority for federal officials to enter into the agreement, stating that provision "authorizes the Secretary of [the Department of Homeland Security] to enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer." The 287(g) agreement further calls for PCSO to designate staff members to engage in specific immigration enforcement activities once they meet certain training and certification requirements. These immigration enforcement activities include authority to: "interrogate any person detained in the participating law enforcement agency's detention center

[4] The petitioners allege that PCSO has entered into similar, although not entirely identical, 287(g) agreements since 2017. In this motion, the court examines only the 287(g) agreement executed on June 8, 2020.

[5] The INA is codified at 8 U.S.C. § 1357(g).

> "Section 1357(g) generally concerns situations in which State and local officers can perform functions of a Federal immigration officer. Section 1357(g)(1) provides specifically that States and their political subdivisions may enter into written agreements with the Federal government that allow State or local officers to perform functions of an immigration officer 'at the expense of the State or political subdivision and to the extent consistent with State and local law.' Such agreements are commonly referred to as '287(g) agreements,' referring to the section of the act that authorizes them, § 287(g), which is codified in 8 U.S.C. § 1357(g)."

See *Lunn* v. *Commonwealth*, 477 Mass. 517, 534 (2017), citing 8 U.S.C. § 1357(g).

who the officer believes to be an alien about his or her right to be or remain in the United States"; "serve and execute warrants of arrest for immigration violations . . . on designated aliens in [the law enforcement agency's] jail/correctional facilities"; "serve warrants of removal . . . on designated aliens in [the law enforcement agency's] jail/correctional facilities"; and "detain and transport . . . arrested aliens subject to removal to ICE-approved detention facilities." The costs of enforcing the 287(g) agreement are split between ICE and PCSO. Per the provisions of the 287(g) agreement, PCSO would expend funds in the form of salaries, benefits, and overtime expenses for officers performing duties under the agreement. Further, under the 287(g) agreement, PCSO is responsible for providing related travel expenses, administrative supplies required for normal office operations, and necessary security equipment, such as handcuffs and leg restraints.

On February 3, 2021, the petitioners filed the Petition for Declaratory and Injunctive Relief Pursuant to G. L. c. 29, § 63. They assert that the 287(g) agreement is void because Sheriff McDonald and PCSO do not have the authority under the state constitution, statute, or common law to enter into such agreement. They further argue that the authority granted to PCSO to enforce federal civil immigration law violates Massachusetts common law. On April 23, 2021, the defendants moved to dismiss the petition, arguing the petitioners lack standing to bring the petition pursuant to G. L. c. 29, § 63. The defendants further argue that the 287(g) agreement is not contrary to Massachusetts law. The court conducted a hearing on the motion on June 10, 2021.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the court accepts as true the well-pleaded factual allegations and reasonable inferences drawn therefrom. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004). The court does not accept "legal conclusions cast in the form of factual allegations." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 633 (2008). In other words, the plaintiff must plead "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief[.]" *Id.* at 636, quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

II. Standing Pursuant to G. L. c. 29, § 63

The defendants move to dismiss, arguing that the petitioners are merely individual taxpayers without a pecuniary interest and thus lack standing to maintain their lawsuit. "There is no general jurisdiction in equity in this commonwealth 'to entertain a suit by individual taxpayers to restrain cities and towns from carrying out invalid contracts, and performing other similar wrongful acts.'" *Fuller* v. *Trustees of Deerfield Academy & Dickinson High Sch.*, 252 Mass. 258, 259 (1925), quoting *Steele* v. *Municipal Signal Co.*, 160 Mass. 36, 38 (1893). However, Massachusetts has various taxpayer statutes that provide authority for taxpayers to challenge government spending. The taxpayer statutes in Massachusetts therefor serve as "a vehicle whereby concerned taxpayers may enforce laws relating to the expenditure of their tax money by local officials." *Edwards* v. *Boston*, 408 Mass. 643, 646 (1990). Such petition by taxpayers "may be maintained only when it is brought within the provisions of the statute." *Richards* v. *Treasurer & Recr. Gen.*, 319 Mass. 672, 675 (1946).

Here, the petitioners' claim is brought pursuant to G. L. c. 29, § 63 ("Section 63"), which provides in pertinent part that:

> "[i]f a department, commission, board, officer, employer or agent of the commonwealth **is about to expend money or incur obligations purporting to bind the commonwealth for any purpose or in any manner other than that for and in which such department**, commission, board, officer, employee, or agent **has the legal and constitutional right and power to expend money or incur obligations,** the supreme judicial or **superior court may**, upon the petition of not less than 24 taxable inhabitants of the commonwealth, not more than 6 of whom shall be from any 1 county, determine the same in equity, and may, before the final determination of the cause, **restrain the unlawful exercise or abuse of such right and power**" (emphasis added).

The Supreme Judicial Court ("SJC") has stated that Section 63 is to be given "a somewhat liberal construction" to achieve its intended purpose of preventing potentially illegal expenditures. *Sears* v. *Treasurer & Receiver Gen.*, 327 Mass. 310, 319 (1951) (concluding further, "[w]e are not inclined to search minutely for purely technical and unsubstantiated objections").

Here, the petitioners purport to be twenty-four taxable inhabitants, not more than six of whom are from any one county within the Commonwealth.[6] Further, the petitioners allege that they are challenging prospective expenditures of PCSO that the 287(g) agreement requires, including costs related to salary, benefits and overtimes expenses of officers performing duties per the agreement, as well as administrative and security supply costs. In applying the "liberal construction" that this court must confer to Section 63, the petition filed reflects the requisite number of petitioners from the requisite number of counties. Further, the petitioners allege that they are challenging future PCSO spending under the 287(g) agreement. Thus far, the petitioners have met their burden under the statute. See *Colo* v. *Treasurer & Receiver Gen.*, 378 Mass. 550,

[6] The statute does not require the petitioners to reside in a specific county, which the defendants acknowledged at the hearing on the motion.

554 n.7 (1979) (conferring standing, pursuant to G. L. c. 29, § 63, to taxpayers challenging minimal compensation provided to congressional chaplains who lead prayers before session).

III. Scope of 287(g) Agreement

The issue then becomes whether the petitioners have sufficiently pleaded that PCSO does not have the "legal and constitutional right and power to expend money and incur obligations" under the 287(g) agreement. G. L. c. 29, § 63. The petitioners argue that the defendants' authority to enter into such agreements with the federal government is limited and that, in executing the 287(g) agreement, the defendants' actions are ultra vires and have violated existing state law. The defendants argue that the petitioners have not shown that they have violated a specific provision of state law, and that the cases to which petitioners cite are distinguishable.

The petitioners rely on *Souza* v. *Sheriff of Bristol Cty.*, 455 Mass. 573 (2010) for the proposition that sheriffs have only those powers affirmatively granted them by state law. See *Souza*, 455 Mass. at 579-580 (noting "[a]s a general rule the powers, duties, rights and responsibilities of a sheriff as jailer are prescribed by statute, and as his powers and duties, rights and liabilities, are thus circumscribed by the legislative enactments of the particular jurisdictions[.]"), quoting 1 W. H. Anderson, *Sheriffs, Coroners and Constables* § 266 (1941). In *Souza*, the SJC rejected the Bristol County Sheriff's argument that his power to impose certain fees on inmates, including for haircuts, medical care, GED fees, and general cost of care, derived from "his common-law duties to operate and administer the county correctional facilities." *Id.* at 577. The Court further rejected the sheriff's argument that he was authorized to impose several of the fees because "nothing in the statutory scheme proscribe[d] them." *Id.* at 584.

The defendants argue that *Souza* is distinguishable from the instant case because, there, the Legislature had "fully regulated a subject (fees chargeable by sheriffs) by statute," and thus

the additional charges imposed by the sheriff exceeded his authority, in part because the Legislature had "occupied the field." *Id.* at 583-584 (concluding only the Massachusetts Commissioner of Correction could establish haircut fees for inmates in county jails pursuant to G. L. c. 124, § 1(r)). Like *Souza*, however, this case "involves an action taken by the sheriff . . . and does not involve an action that was expressly authorized by regulation." *Id.* at. 588. Indeed, the SJC in *Souza* addressed several of the arguments defendants assert here, including whether a sheriff is authorized to act merely because there is no statute prohibiting the action. See discussion *supra*; see also *Souza*, 455 Mass. at 584.

Even were the holding of *Souza* as narrow as the defendants argue, the petitioners have identified relevant statutes that establish the legislatively delineated powers of the sheriff to arrest and detain people within the Commonwealth. See, e.g., G. L. c. 37, §§ 1-26 (granting specific powers to sheriffs); G. L. c. 126, § 16 (providing, in part, that "[t]he sheriff shall have custody and control of the jails in his county, and . . . of the houses of correction therein, and of all prisoners committed thereto"); *Souza*, 455 Mass. at 580-581, citing G. L. c. 37, § 1 and c. 126, § 16 ("Under the current statutory scheme, jails and houses of correction are county correctional institutions; custody and control over jails and houses of correction lies with each county's elected sheriff."). The defendants' argument does not effectively refute the petitioners' assertion that the current statutory scheme outlining the defendants' powers to arrest and detain neither explicitly nor implicitly includes the authority to enter 287(g) agreements.

The petitioners additionally rely on *Lunn* v. *Commonwealth*, 477 Mass. 517 (2017) for the proposition that State officials, absent statutory or common-law authority, cannot conduct civil immigration arrests. In *Lunn*, the SJC considered the legality of trial court officers' detention of an undocumented immigrant on a federal civil immigration detainer after state

criminal charges against the detainee were dismissed in state court. The SJC acknowledged that the facts of the case did not involve a 287(g) agreement and declined to express any view as to "whether the detention of an individual pursuant to a Federal civil immigration detainer by a Massachusetts officer who is operating under such an agreement would be lawful." *Lunn*, 477 Mass. at 534-535 n.26. The SJC did note, however, that "[c]onspicuously absent from our common law is any authority (in the absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters." *Id.* at 530-531. In discussing 8 U.S.C. § 1357(g), which contains provision § 287(g) at issue in this case, the SJC stated that "[n]othing in the legislative history [of § 1357(g)] . . . suggests that § 1357(g)(10) constitutes an affirmative grant of immigration arrest authority to States." *Id.* at 536 n.27. Although the facts of *Lunn* do not themselves involve 287(g) agreements, the tenor of the SJC's overall commentary regarding § 1357(g) and the interplay between Federal and State officials lends some support to the petitioners' contention that, absent an affirmative grant of authority by state statute or common law, State officials may not exercise the authority of Federal immigration officials.

Given the SJC's broader holding in *Souza*, the lack of explicit statutory authority granting the powers exercised by the defendants in the instant case to enter 278(g) agreements, and the SJC's discussion in *Lunn*, the court finds that the petitioners have, at this stage of the proceedings, plausibly alleged a claim entitling them to relief pursuant to Mass. R. Civ. P. 12(b)(6).

ORDER

For the reasons stated herein, the defendants' Motion to Dismiss is **DENIED**.

/s/ Daniel J. O'Shea_
Daniel J. O'Shea
Justice of the Superior Court

DATED: July 29, 2021