# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13110

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KELLIE PEARSON AND THE LAW OFFICES OF MARK BOOKER
PLAINTIFFS

V.

THOMAS M. HODGSON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF BRISTOL COUNTY, AND SECURUS TECHNOLOGIES, INC.
DEFENDANTS

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ON CERTIFICATION FROM THE FEDERAL DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
C.A. NO. 18-CV-11130-IT

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**BRIEF OF DEFENDANT**
**THOMAS M. HODGSON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF BRISTOL COUNTY**

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June 22, 2021

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**Statutes**



**Other Authorities**

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue certified to this Court by the United States District Court for the District of Massachusetts is:

Did the Massachusetts Legislature, through the provisions of 2009 Mass. Legis. Serv. Ch. 61 (S.B. 2119) §§ 12(a), 12(c), 15, or M. G. L. ch. 127 § 3, taken separately or together, authorize the Bristol County Sheriff's Office to raise revenues for the Office of the Sheriff through inmate calling service contracts?

## STATEMENT OF THE CASE

Plaintiffs filed this case in Suffolk Superior Court against Defendants Sheriff Thomas M. Hodgson ("Sheriff Hodgson") and Securus Technologies, Inc. ("Securus"). (J.A. 39.) Securus removed it to the United States District Court for the District of Massachusetts on May 30, 2018, under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). (J.A. 27.)

Defendants moved to dismiss the complaint on July 20, 2018. (J.A. 68.) The U.S. District Court granted in part and denied in part Defendants' motions. (J.A. 191.) As to Sheriff Hodgson, the court dismissed claims against him in his individual capacity and

dismissed monetary claims against him in his individual capacity and official capacity. (J.A. 196.) The court also dismissed Plaintiffs' claim for conversion against Securus. (J.A. 205.)

In July 2019, Sheriff Hodgson moved for judgment on the pleadings on the remaining Counts (Counts I and II) against him, which sought declaratory and injunctive relief, and Securus moved for judgment on the pleadings on remaining Count VI (the Chapter 93A claim) against it seeking monetary and injunctive relief. (J.A. 274, 630.) Plaintiffs opposed Defendants' motions for judgment on the pleadings, except that they voluntarily withdrew their claims for injunctive relief against Sheriff Hodgson. (J.A. 1089 at Plfs.' Reply to Defs.' Opp. To Plafs.' Mot. for Class Cert. at 9).) Plaintiffs also filed a motion for partial summary judgment. (J.A. 646.)

Sheriff Hodgson's motion for judgment on the pleadings argued that the 2009 Act Transferring County Sheriffs to the Commonwealth ("2009 Act") authorized the BCSO to raise revenues for the Office of the Sheriff through inmate calling service ("ICS") contracts. (J.A. 286-291; Add. 96 (2009 Act).).) Securus joined Sheriff Hodgson's argument that his

conduct was authorized and moved for judgment on the pleadings in its favor on the Chapter 93A claim asserted against it. (J.A. 630-31.)

Before the hearing on these motions, the court instructed the parties to address the relevance of a statute that had not been addressed in the parties' briefs, G.L. c. 127 § 3. (J.A. 1154) On June 22, 2020, the court allowed Defendants' Motions for Judgment on the Pleadings based in part on its analysis of the application of G.L. c. 127 § 3. (Add. 44, J.A. 1155.)

On July 20, 2020, Plaintiffs moved to alter or amend the court's order on the grounds that the court misconstrued G.L. c. 127 § 3 or, in the alternative, to certify questions of law to this Court. (J.A. 1173.) On March 31, 2021, the court vacated its June 22, 2020 Memorandum and Order and Judgment on Defendants' motions for judgment on the pleadings. (Add. 61, J.A. 1326.) The court determined that its decision was outside the adversarial issues presented by the parties and that the issues should be analyzed and addressed with the benefit of the adversarial process. (Add. 64, J.A. 1329.) The court also

certified the question of Massachusetts law currently before this Court. (Add. 67, J.A. 1332.)

## STATEMENT OF FACTS

### BSCO Procurement Process

In May 2011, pursuant to its "Policy Governing the Procurement of Commodities and/or Services" ("Sheriffs' Procurement Policy"), the Bristol County Sheriff's Office ("BCSO") solicited bids through a Request for Response ("RFR") for a Coinless Inmate and Public Telephone System for use in correctional facilities under the jurisdiction of the Bristol County Sheriff. (J.A. 523 (Sheriffs' Procurement Policy); (J.A. 44, 46(Compl. ¶¶ 19, 28); J.A. 238 (Def. Hodgson Ans. at ¶ 19); J.A. 321 (BCSO 2011 RFR for Coinless Inmate and Public Telephone System).) The Sheriffs' Procurement Policy "is promulgated under the authority of M.G.L. c. 34B, § 12, Chapter 61 of the Acts of 2009, M.G.L. c. 7, § 22, M.G.L. c. 30, § 51, M.G.L. c. 30, § 52" and tracks the uniform procurement rules and standards promulgated by the Commonwealth's Executive Office for Administration and Finance. (J.A. 524 (Sheriffs' Procurement Policy at 2); s*ee* Add. 81 (801 CMR 21.00 *et seq.*).) It was reviewed and accepted by the Office of the Comptroller of the Commonwealth

and the Operation Services Division, which manages statewide contracts for the Commonwealth. (Add. 137, J.A. 438 (Report of the Special Commission Relative to the Reorganization or Consolidation of Sheriffs' Offices, 2013 Bill Text MA S.B. 1865 (July 11, 2013) ("Report of the Special Commission") (Sept. 23, 2013) at 17-18).)

The Sheriffs' Procurement Policy requires the BCSO to use a competitive bidding process for procurement. (J.A. 532-33, 535-36 (Sheriffs' Procurement Policy at 10-11, 13-14).) The goal of the competitive bidding process is to obtain the "best value" for the Sheriff's office. (J.A. 528 (*Id.* at 6.) "Best value" is a term-of-art, defined as the "result of common sense Procurement decision-making consistent with the [Commonwealth's procurement principles], which are to balance and support the achievement of: required outcomes, best quality economic value, timely performance, minimizing the burdens on administrative resources, expediting simple or routine purchases, flexibility in developing alternative Procurement and business relationships, encouraging competition, encouraging the continuing participation of quality Contractors and supporting Sheriff's Office

Procurement planning and implementation." (J.A. 525 (*Id.* at 3).) Once a bid is selected, the BCSO is required to execute the Commonwealth's Standard Contract Form, which incorporates the Commonwealth's standard Terms and Conditions, both of which are formal state forms administered by the Commonwealth's Office of the Comptroller. (J.A. 535-36 (*Id.* at 13-14).)

**The BCSO's Operative Contract with Securus**

After evaluating the responses to its RFR for ICS, the BCSO selected Securus's bid and signed a contract with Securus for a Coinless Inmate and Public Telephone System ("Contract"). (J.A. 46 (Compl. ¶¶ 31-32); J.A. 238 (Def. Hodgson Ans. at ¶ 22); J.A. 427 (Contract).) The Sheriff signed the Contract as an "Authorizing Signatory for the Commonwealth" on behalf of the BCSO. (J.A. 427 (Contract at 1).) Under the Contract, Securus agreed:

> To provide a Coinless Inmate & Public Telephone System for The Bristol County Sheriff's Office for the terms of five (5) years with an option for an additional four (4) year contracts and the discretion of BCSO to renew. Securus Technologies will pay BCSO a commission rate of 48% using the formula stated in the RFP Cost and Commission Proposal plus they will provide annual funding for two on-site administrators of $130,000.00 to be paid in a lump sum or monthly payments and provide $75,000.00 annual for Technology that will be paid

> in monthly installments. The RFP proposal and the Cost and commission Proposal are part of this contract.

(J.A. 427 (*Id.* at 1); J.A. 46 (Compl. ¶¶ 31-34).)

In October 2015, Securus and the BCSO amended the Contract. (J.A. 48-49 (Compl. ¶¶ 41-44).) The amendment provided that (1) Securus would cease paying monthly commissions to the BCSO (generally called "site commissions"); (2) Securus would pay the BCSO a lump-sum payment of $820,000.00; and (3) the BCSO would renew the Contract for an additional four-year term until June 30, 2020. (*Id*.)

Inmate calls are paid for by the recipients of the calls. (J.A. 1176 (Plfs.' Mot. To Alter or Amend Order of Judgment at 4); J.A. 1200 (Transcript from Hearing on Motions on June 11, 2020 at 7:3-5).) Call recipients have an option to receive collect calls from inmates or to establish an account with Securus that will be charged for the cost of ICS calls they receive. (J.A. 358 (BCSO 2011 RFR for Coinless Inmate and Public Telephone System at §§ 6.1.179, 6.1.181-182).) Before the current payment system was established and since at least the 1990s or earlier, all ICS calls were collect calls, paid for by the

recipient of the call. (*See* Add. 78 (103 CMR 482.07(3)(a) (1994).)

## SUMMARY OF THE ARGUMENT

The plain language of the 2009 Act authorizes BCSO and other covered Sheriffs to execute contracts for ICS and to retain funds from those contracts. The legislative history of the 2009 Act also aligns with the plain language interpretation that the 2009 Act authorizes the BCSO to execute contracts for ICS and to retain the revenue generated from such contracts. Consistent with the plain language of the statute and its legislative history, state governmental bodies have interpreted the 2009 Act to authorize the BCSO to contract for ICS and retain revenue from such contracts since the 2009 Act became effective. (pp. 14-19).

The 2009 Act confirmed existing authority for covered Sheriffs to retain revenue from site commissions in a manner consistent with the overall legislative purpose and framework. Moreover, to the extent there may have been ambiguity about whether such authority existed before 2009, there can be no doubt that the express authority conveyed through the

plain language of the 2009 Act was effective when the Agreement was executed in 2011 and since. (pp. 19-35).

The 2009 Act, standing alone, is enough to confer authority to Sheriff Hodgson to collect the ICS revenue under the 2009 Act, and Section 3 of G. L. c. 127, while consistent with the 2009 Act, is inapplicable here because that statute applies to revenue generated by sales of good or services to inmates, such as through the commissary. Inmate calls, however, are not paid for by inmates. They are sold to the recipients of calls and revenue generated by the BCSO from ICS is paid by Securus, not by inmates. (pp. 35-38).

Finally, to the extent that Plaintiffs seek reform in connection with ICS, those efforts are properly addressed through the legislative process. (pp. 38-41).

## ARGUMENT

### I. The 2009 Act Authorizes the BCSO (and Other Sheriffs) to Execute Contracts for ICS and to Retain Funds from ICS Contracts

In 2009, the Massachusetts Legislature enacted the 2009 Act, on an emergency basis, to transfer governmental responsibilities from Bristol and other counties to the Commonwealth. (Add. 96, J.A. 297 (2009

Act).) The Act is an uncodified session law. Session laws that are not codified into the Massachusetts General Laws are called "special acts," and typically include matters affecting a particular city or town.[1] This Court and the Appeals Court have repeatedly noted that special acts have the full force and effect of law, even when a special act potentially conflicts with a general law. *See, e.g.*, *Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.,* 461 Mass. 366, 374 (2012) (when an irreconcilable conflict arises between a special act and a later enacted general law, the special act will generally prevail over the general law); *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981) ("the provisions of a special act generally prevail over conflicting provisions of a subsequently enacted general law, absent a clear legislative intent to the contrary.").[2]

As part of the transfer of power, the 2009 Act provided that certain responsibilities would remain

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[1] *See* https://malegislature.gov/Laws/SessionLaws.

[2] The federal court in Massachusetts has had other occasions to apply the 2009 Act in other situations and had done so consistently. *See, e.g.*, Add. 248 (*Doan v. Bergeron*, No. 15-cv-11725-IT, 2016 WL 5346935, at *5 (D. Mass. Sept. 23, 2016) (citing the

with the county Sheriffs' offices. Modeled after the earlier statute abolishing the county form of government in other Commonwealth counties, this legislative act expressly provided that the Sheriffs retain the powers that are complained of here, including the authority of the BCSO to generate and retain revenue in connection with its effort to procure ICS.

Specifically, Section 15 of the 2009 Act provides that the "sheriff shall retain administrative and operational control over the office of the sheriff, the jail, and house of correction." (Add. 108 (2009 Act § 15); *see also* Add. 73 (G.L. c. 34B § 12).) (the "sheriff shall retain administrative and operational control over the office of the sheriff, the jail, and house of correction [and s]aid administrative and

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Act and holding that "Bristol County Sheriff's Office is a state agency" and its employees are entitled to sovereign immunity)); Add. 236 (*Denson v. Gelb*, No. CV 14-14317-DPW, 2015 WL 4271481, at *7 (D. Mass. July 13, 2015) (citing the Act in its reasoning that the Suffolk County Sheriff's Department is controlled directly by the Commonwealth of Massachusetts)); Add. 257 (*Greene v. Cabral*, No. CV 12-11685-DPW, 2015 WL 4270173, at *3 (D. Mass. July 13, 2015) (finding that under the Act, "the Suffolk County Sheriff's Department … is directly controlled by the Commonwealth of Massachusetts and all employees of the Department are employees of the Commonwealth")).

operation control shall include, but not be limited to, the *procurement of supplies, services and equipment*." (emphasis added)).

Section 12(a) provides that, "revenues of the office of sheriff in … Bristol … for … inmate telephone [services] … shall remain with the office of the sheriff." (Add. 105 (2009 Act § 12(a).) (emphasis added).) Section 12(c) explicitly allows Sheriffs to retain future revenues, stating that "any sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county." (Add. 106 (*Id.* at § 12(c).)

The 2009 Act also includes a mechanism for reporting and accountability to the Legislature on sources of revenue. Section 12(b) requires that each Sheriff report to the Legislature on its efforts to maximize and maintain revenues, including future revenue:

> [I]n in order to encourage innovation and enterprise, each sheriff's office shall annually confer with the house and senate committees on ways and means regarding that sheriff's efforts to maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state and local governments and other

such accounts and regarding which revenues shall remain with the sheriff's office.

(Add. 105 (*Id.* at § 12(b).)

At least seven other Sheriffs in Massachusetts counties apply the 2009 Act the same way as Bristol County. According to the nonprofit Prison Policy Initiative, correctional facilities in Franklin County, Berkshire County, Essex County, Barnstable County, Dukes County, Worcester County, and Suffolk County, receive site commissions or accept revenues from ICS that result in telephone rates comparable to those charged in Bristol County.[3]

In *Souza v. Sheriff of Bristol County*, this Court held that the scope of a Sheriff's authority is defined by statute. There, the Legislature did not expressly authorize the Sheriff to impose fees for cost of care, medical care, haircuts, and GED testing. *See Souza v. Sheriff of Bristol Cty.*, 455 Mass. 573,

[3] For example, a 15-minute telephone call in Hampshire County costs $3.15, while in Berkshire County costs$3.15 for in-state calls and $3.75 for interstate calls. (J.A. 1340 (Prison Policy Initiative, Massachusetts Prison Policy and Jail Phone Rates Background Sheet (Mar. 2021) available at https://www.prisonpolicy.org/scans/mass_contracts/ma_prison_and_jail_phone_rates_fact_sheet.pdf. A 2019 version of the Prison Policy fact sheet was cited in Defendant Hodgson's Memorandum in Support of his Motion for Judgment on the pleadings. (*See* J.A. 284.)

586 (2010) ("Had the Legislature intended to authorize the sheriff to impose the challenged fees, it would have said so expressly as it had done with other fees such as fees for service of process".)[4] But here, the Legislature *has* expressly authorized the fees at issue—both specifically and broadly. The 2009 Act is the Legislature's statement that it, in fact, intended that county Sheriffs have authority to collect site commissions derived from inmate calling.

## II. Legislative History Supports the Plain Language Reading That the 2009 Act Authorizes the BCSO to Contract for and Retain Revenues from ICS

### A. The Legislature Intended the Sheriff to Have Authority to Contract for ICS and Retain Associated Revenues

Because the plain language of the 2009 Act is unambiguous, this Court need not consider its

[4] Importantly, *Souza* does not analyze the 2009 Act because it reviews policies in place prior to the 2009 Act. In addition, this Court indicated in *Souza* that express authorization can be conferred through both specific and broad legislative authority. *See Souza,* 455 Mass. at 587 (explaining that this Court is "guided by the familiar standard that, when the Legislature vests an agency with 'broad authority to effectuate the purposes of an act, the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'") (*quoting Ciampi v. Commissioner of Correction*, 452 Mass. 162 (2008), *quoting Levy v. Board of Registration & Discipline in Med.*, 378 Mass. 519 (1979) (internal quotations omitted).).

legislative history. *See 135 Wells Ave., LLC v. Hous. Appeals Comm.,* 478 Mass. 346, 354 (2017) ("In interpreting a statute, we begin with its plain language, as the best indication of legislative intent."). Even so, the legislative history of the 2009 Act aligns with the interpretation that the Legislature intended the Sheriff to have authority to contract for ICS. Indeed, that legislative history establishes that the express carve-out for ICS revenue in the 2009 Act resulted from express legislative deliberation and careful drafting.

Until 1997, Sheriffs' offices were part of the county government. (Add. 137, J.A. 445 (Report of the Special Commission) Beginning in July 1997, largely because of fiscal concerns, the Legislature began abolishing certain county governments and transferring their powers to the Commonwealth. (*See* Add. 72 (G. L. c. 34B § 1).) (abolishing Middlesex county and transferring its powers to the Commonwealth as of July 11, 1997). As part of the county abolition, the Legislature carved out certain powers that Sheriffs in abolished counties retained, including "administrative and operational control over the office of the sheriff, the jail, and house of correction," which

included “procurement of supplies, services and equipment.” (Add. 73 (G. L. c. 34B § 12).)

Initially, Bristol County was not one of the abolished counties, and the BCSO continued to operate within its county government after Chapter 34B was first enacted. (Add. 144, J.A. 445 (Report of the Special Commission).) Like Sheriffs in the other non-abolished counties, the BCSO’s budget was funded by state appropriations, a contribution from the county, and a statutorily mandated percentage of revenue derived from the collection of deed excise taxes. (*See id.*).) The Legislature, however, believed that the “funding mechanism for Sheriffs in non-abolished counties was historically problematic,” it “became acutely so when, starting in late 2007, commercial and residential real estate sales began to drop.” (*Id.*)

On January 23, 2008, Massachusetts Governor Deval Patrick wrote to the State Senate and House asking for their consideration of a bill entitled “An Act Transferring County Sheriffs to the Commonwealth” (“2008 Bill”). (J.A. 762 (Letter from Gov. Patrick to State Senate and State House of Representatives (Jan. 23, 2008)).) The letter proposes legislation, known then as House No. 4498, that would have caused the

Sheriffs' offices in those counties that had not been abolished in 2003 to become state agencies. (*Id*.) The Governor described the proposed 2008 Bill's purpose to "provide more stable and predictable budgeting for the transferred sheriffs' offices" by "bringing them onto state payroll and accounting systems" and by making employees eligible for the State's "Group Insurance Commission." (*Id*.) The letter notes that the proposed 2008 Bill would "not abolish the remaining seven county governments." (*Id.*)

Section 1 of the proposed 2008 Bill itself stated that "[a]ll functions, duties, responsibilities, property and employees of Sheriffs in Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth and Suffolk counties are hereby transferred to the Commonwealth under this chapter, as if the governments of those counties had been abolished under this chapter, as of July 1, 2008." (J.A. 794 (*Id*. at § 1).) The 2008 Bill also stated that "[n]otwithstanding any general or special law to the contrary, and except for all counties the governments of which have been abolished by Chapter 34B or other law, all revenues received with respect to programs, functions or

activities of the office of the sheriff shall be paid to the state treasurer." (J.A. 767 (*Id.* at § 5).)

The 2008 Bill did not specifically reference the retention of any funds in Bristol County, including, but not limited to, funds from telephone charges. Instead, it proposed a complete transfer of the seven Sheriffs' offices consistent with the Sheriffs' offices of the previously abolished counties.

The 2008 Bill did not pass the Legislature. But during that year, the funding mechanism for Sheriffs in non-abolished counties worsened, as the decline in commercial and residential real estate sales that began in 2007, accelerated precipitously by the end of 2008. (Add. 144, J.A. 445 (Report of the Special Commission).) The 2008 financial crisis dramatically reduced the county Sheriffs' budgets, and the Sheriffs' offices in the unabolished counties were facing huge deficits. (*See id.*)

On January 28, 2009, Governor Patrick again wrote to the State Senate and House asking for their consideration of a bill with the same title as the bill proposed in 2008 ("2009 Bill"). (J.A. 768 (Letter from Deval Patrick to State Senate and State House of Representatives (Jan. 28, 2009).) This time, the

legislation was revised and, according to Governor Patrick, the "legislation results from extensive discussion with the seven county sheriffs and others, following similar legislation that I filed last year." (*Id.*)

Unlike the proposed 2008 Bill, the 2009 Bill did not have language calling for the treatment of these seven Sheriffs as if their county governments had been abolished.[5] Rather, the 2009 Bill included new, additional provisions, including Section 12, providing that "revenues … for … inmate telephone … shall remain with the office of sheriff," that "encourage innovation and enterprise," that require "each sheriff's office [to] annually confer with the house and senate committees on ways and means regarding each sheriff's efforts to maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state and local governments and other such

[5] The Massachusetts Senate first introduced the 2009 Act as Senate Bill 2119 on July 28, 2009. (Add. 96 (2009 Mass. Senate Bill No. 2119, Mass. 186th Gen. Court (July 28, 2009)).) Both the House and Senate passed the bill on July 29, 2009. (Add. 129 (MA H.R. Jour., July 29, 2009).); (Add. 119) MA S. Jour., July 29, 2009.).)

accounts … which revenues shall remain with the sheriff's office," and that provide that "[a]ny sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county." (J.A. 777-78 (*Id*. at lines 146-59).)

While the 2008 Bill would have performed a complete transfer of all authority and authorizations for funding from the seven Sheriffs' offices to the Commonwealth, the 2009 Bill, which was enacted and became the 2009 Act, emerged from a different legislative intent which allowed for the Sheriffs to retain authority in certain areas, including revenues from inmate telephone service.

Moreover, the Legislature has been well-aware that the Sheriffs' Offices were receiving site commissions for ICS. In April 2010, for example, the Auditor of the Commonwealth issued a report, finding:

> As stated in Chapter 61, Section 12, of the Acts of 2009, civil process, inmate telephone, commissary funds, and other revenue derived apart from the State Treasury that addresses the needs of the citizens within each county shall remain with the Sheriff's Offices. The Sheriff's Offices control and maintain significant and diverse funds that are not being transferred to the Commonwealth.

(J.A. 570 (Independent State Auditor's Report on the January 1, 2010 Transfer of County Sheriff's Offices to the Commonwealth in Accordance with Chapter 61 of the Acts of 2009, No. 2010-8024-14S (Apr. 30, 2010) at 29).)

In September 2013, the Senate issued a report of the Special Commission relative to the reorganization or consolidation of Sheriffs' offices under the 2009 Act. (Add. 137, J.A. 439 (Report of the Special Commission).)[6] In its report, the Special Commission acknowledged that "[p]rior audits disclosed that Sheriffs' Office received commissions on inmate telephone services" and the Special Commission "looked to DOC policies and procedures concerning telephone commissions [that revealed] the DOC returns all telephone commission[s] to the General Fund of the Commonwealth[.]" (Add. 179-80, J.A. 480-81 (*Id.*).) Sheriffs disclosed to the Special Commission that ICS "revenue helps to sustain the Sheriffs' budgets," and the Commission "[r]ecogniz[ed] that telephone commissions are an important revenue source for Sheriffs." (Add. 180, J.A. 481 (*Id*.).) The Special

[6] S.B. 1865 was not signed into law.

Commission compared the Sheriffs' procedures for maintaining ICS commissions to the DOC's policy and procedures for maintaining ICS commissions. (*See* Add. 179-80, J.A. 480-81 (*Id.*).)

The legislative history confirms that the Legislature was aware that BCSO and the other Sheriff's offices subject to the 2009 Act were retaining site commissions (as Plaintiffs have admitted[7]) and that they intended the BCSO and the other covered sheriffs' offices to have the authority to collect and retain ICS revenue.

### B. The 2009 Act Has Been Interpreted by State Governmental Bodies to Authorize the BCSO to Retain Revenue from Inmate Telephone Charges

Since its enactment, state governmental entities have interpreted the 2009 Act to include authorization for the BCSO and other covered Sheriffs' offices to retain the revenue associated with ICS. Legislators have proposed legislative amendments to regulate or restrict the authority to collect and retain site commissions, confirming their view that such authority

[7] Plaintiffs correctly conceded that "the Legislature knew that Sheriffs were receiving telephone revenue" in their Motion to Alter Judgment. (J.A. 1185-86 (Motion to Alter or Amend Order of Judgment at 13-14).)

existed and would require further legislative action to be revoked or restricted.

Legislation was considered in the State House during the 2019-2020 session that proposed to change the effect of the 2009 Act to regulate inmate telephone charges and revenue. (Add. 221 (Senate Bill No. 1430, “An Act relative to inmate telephone call rates,” presented by Mark C. Montigny (filed Jan. 18, 2019)); Add. 224 (House Bill No. 3452, “An Act relative to telephone services for inmates in all correctional and other penal institutions in the Commonwealth,” presented by Chynah Tyler (filed Jan. 18, 2019).) These Bills would have added a new section to Chapter 127 of the Massachusetts General Laws, which apply to each Sheriff’s office in the Commonwealth, including the BCSO. The Bills would provide, among other things, that “county houses of correction” would need to “negotiate contracts for local and long distance telephone service on the basis of offering the lowest cost to end consumers,” and would prohibit acceptance of “commissions, services, salary or rent payments, or goods from the providers of prisoner telephone service, other than telephones and associated hardware required for installation,

upkeep and function of the prisoner telephone system." (Add. 222, 226 (*Id.*).) Had the legislature not permitted the contracting for telephone service and collection of commissions, there would be no need for the legislature to consider these limitations. And because the Legislature has *not* enacted any of these proposed amendments, the BCSO retains the authority that the Legislature explicitly carved out under the 2009 Act.

A 2019 state audit of the BCSO also confirmed that the contract between BCSO and Securus is properly authorized under state law. In February 2019, the Auditor of the Commonwealth released the state audit of the BCSO for the period from July 1, 2015 through December 31, 2017. (J.A. 796 (Commonwealth of Massachusetts Office of the State Auditor, Official Audit Report—Bristol County Sheriff's Office, for the period July 1, 2015 through December 31, 2017 (Feb. 13, 2019).) The Audit Report states that the scope of audit included a determination of whether the BCSO "properly administer[ed] its revenue and its contracting process for goods and services," and specifically stated that the auditor reviewed BCSO's inmate telephone contract as one of the sample

contracts selected for review. (J.A. 803, 806 (*Id.* at 4, 6.) The Audit Report included no findings that the inmate telephone contract with Securus exceeded the BCSO's contracting authority or that the revenue was handled improperly.

### C. The 2009 Act Confirmed Existing Authority and Expressly Intended That Authority to Apply after the Transfer

In the federal district court, Plaintiffs argued that the 2009 Act was "never intended to confer new authority to sheriffs' offices to impose additional financial charges." (J.A. 662 (Pls. Mem. Supp. Motion for Partial Summ. Judgmt. at 15).) Plaintiffs miss the point. The 2009 Act carved out areas of existing authority that would be retained and even maximized and innovated, including revenues collected from ICS specifically. Where, as here, the Legislature seeks to clarify or confirm prior authority in the face of potential confusion or ambiguity (such as that potentially created by the transfer of the Sheriff's offices in 2009), this Court has held that it is "appropriate for us to respect the [legislative] expression concerning the earlier enacted statutory amendments." *Briggs v. Com.*, 429 Mass. 241, 256 (1999).

This is not a case in which, as Plaintiffs argued, Defendants are advocating using "the views of a subsequent [Legislature] [as] a hazardous basis for inferring the intent of an earlier one." *Massachusetts Com. Against Discrimination v. Liberty Mut. Ins. Co.*, 371 Mass. 186, 194 (1976) (*quoting United States v. Price*, 361 U.S. 304, 313 (1960)). Nor is it a case in which Defendants are advocating a reading which would amount to an implied repeal, as Plaintiff has identified no prior statute prohibiting the Sheriffs from collecting site commissions. *George v. Nat'l Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017) (presumption against implied repeal applies "[w]here two statutes appear to be in conflict").

The evidence shows that the Legislature had the present intent to authorize the BCSO and the other covered Sheriffs to collect and retain site commissions after the transfer. Whatever assumptions the Legislature may have had about prior legislative sources of authority on this point, it clearly expressed its intent to convey that authority through the plain language of the 2009 Act. Although Plaintiffs suggest that this authority was not affirmatively conveyed before the 2009 Act, they do

not identify any specific statutory prohibitions that would be so inconsistent or "repugnant" with the 2009 Act as to be impliedly repealed. *Commonwealth v. Hayes*, 372 Mass. 505, 511 (1977).

Moreover, the 2009 Act differentiates between authority that is "transferred" and that which is "retain[ed]," specifically choosing not to "transfer" the authority to contract for and retain the telephone revenue to the Commonwealth but retaining that authority with the Sheriff. *See McQuarrie v. Balch*, 362 Mass. 151, 152 (1972) ("An intent to pass an ineffective statute is not to be imputed to the Legislature.").

### D. The Sheriff's Authority under the 2009 Act Is Effective Regardless of Whether It Also Existed Prior to 2009

Even if the Legislature had assumed that it had already conveyed this authority when it passed the 2009 Act and had been mistaken in that assumption, that does not undermine its clear intent to confirm and make explicit that authority as to BCSO and the other Sheriffs subject to the 2009 Act. The Court need not agree with Defendants, or the District Court, that the Sheriff was authorized before 2009 to hold that

the challenged conduct was authorized under the 2009 Act.

In its Memorandum and Order granting Defendants' Motions on the Pleadings, the federal district court identified another potential source of authority predating the 2009 Act, which the parties had not relied on or briefed. (Add. 55-58, J.A. 1166-15 (Mem. & Order dated June 22, 2020 at 12-15).) The federal court read the 2009 Act "in harmony" with Section 3 of G.L. c. 127, which provides that "[a]ny monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent." (Add. 55 (*Id.*); *see* Add. 75 (G. L. c. 127 § 3).)

The federal court concluded that "at the time the 2009 Session Law was enacted, the Massachusetts Legislature was aware that superintendents of correctional facilities, including the seven county Sheriffs, were generating revenue from inmate telephone calls and canteen purchases, and it was the Legislature's intent to have such revenues 'remain with the office of the sheriff' for these seven

sheriffs' offices." Add. 55-56 (Mem. & Order dated June 22, 2020 at 12-13).)

As addressed below, the federal court erred in relying on Section 3 of Chapter 127 to reach the conclusion that the conduct at issue was authorized. Even so, this error was harmless because the court's conclusion that the Legislature intended for the covered Sheriffs to keep collecting and retaining revenues from inmate calls is independently supported by the plain language of the 2009 Act itself, as well as the legislative history and statutory framework. This clear expression of intent is enough to resolve the question of whether the Sheriff's conduct was authorized.

It is possible that the Legislature considered there could be some ambiguity around this issue in light of the transfer, and as the federal court implied, acted to resolve that ambiguity. (*See* Add. 57 (*Id.*) ("The 2009 Session Law effectively answered that question by making apparent that as to revenue derived from telephone and commissary accounts, the Legislature knew of the revenue and that, until the Legislature further amends the statutory scheme, the revenue would remain with the offices of the county

sheriffs.") Whatever ambiguity may have existed before 2009 was resolved when the 2009 Act explicitly vested authority in BCSO and the other Sheriffs subject to the 2009 Act to collect and retain commissions going forward.

### III. G. L. c. 127 § 3 Does Not Apply Here Because Revenue to the BCSO from ICS is Not Generated by the Sale of Goods or Services to Inmates

In both state and county correctional facilities, the superintendent or jailer is the custodian of an inmate's money and property. *See* Add. 75 (G. L. c. 127, § 3).) ("They shall keep a record of all money or other property found in possession of prisoners committed to such institutions, and shall be responsible to the commonwealth for the safe keeping and delivery of said property to said prisoners or their order on their discharge or at any time before."). In 1962, the Legislature recognized that these funds could generate income and added the provision that "[a]ny interest accruing as a result of the deposit of such money may, by agreement with the prisoners concerned, be expended for the general welfare of all the inmates at the discretion of the superintendent." (Add. 93 (1962 Mass. Legis. Serv. ch. 569).) In 1994, the Legislature recognized a new

source of revenue relating to these funds, amending the statute to provide that "[a]ny monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent." (Add. 94-95 (1994 Mass. Legis. Serv. ch. 60, § 125).) (emphasis added).[8]

In its Memorandum & Order, since vacated, the federal court read the 2009 Act in harmony with G. L. c. 127 § 3, interpreting Section 12(a) of the 2009 Act ("revenue … for … inmate telephone and commissary funds") to include both the interest on these funds and "revenue generated by the sale or purchase of goods [at the commissary] or [telephone] services to persons in the correctional facilities," described in G.L. c. 127 § 3. (Add. 55, J.A. 12 (Mem. & Order dated

[8] The corresponding regulation provides, in relevant part, that "any monies derived from interest earned upon the deposit of such moneys and revenue generated by the sale or purchase of goods or services to persons in county correctional facilities may be expended for the general welfare of all the inmates at the direction of the Sheriff/facility administrator." (Add. 80 (103 C.M.R. § 911.08(2).)

June 22, 2020 at 12).) (bracketed language inserted by U.S. District Court).)

Although the purpose and intent of G. L. c. 127 § 3 is consistent with the 2009 Act, the language of that statute does not directly apply to ICS. Section 3 applies to sales "to" persons in the correctional facilities. Add. 75 (G.L. c. 127 § 3 (emphasis added)). But telephone calls made by persons in Bristol County correctional facilities are paid for by the recipients of the calls. J.A. 1176 (Plfs.' Mot. To Alter or Amend Order of Judgement at 4); J.A. 1200 (Transcript from Hearing on Motions on June 11, 2020 at 7:3-5).) And thus, revenue from site commissions for ICS was generated by sales "to" telephone call recipients, not "to persons in the correctional facilities."

The same was true when G. L. c. 127 § 3 was amended by the Legislature in 1994. At that time, Department of Corrections regulations required that all inmate calls be one-way collect calls, paid for by the call recipient. (*See* Add. 78 (103 CMR 482.07(3)(a) (1994)).) ("All inmate calls shall be one-way collect calls only, utilizing an automated operator.").); *see also Cacicio v. Sec'y of Pub. Safety*, 422 Mass. 764,

767 (1996) (“Inmates are limited to one-way collect calls.”). These regulations apply to Sheriff-run county correctional facilities. *See Com. v. Ennis*, 439 Mass. 64, 65, 678-79 (2003).

Similarly, BCSO revenue generated from technology and administrative fees that the BCSO formerly received and by the technology and administrative support that it currently may receive are not covered by G. L. c. 127 § 3 for the same reason. These are payments made by Securus and reflect revenue to the BCSO generated under the Contract between Securus and BCSO, not from the sale of services to inmates themselves.

## IV. Plaintiff’s Claims Are Properly Addressed through Legislation, Not Litigation

Plaintiffs are using this litigation to further their argument that inmate telephone charges cause “financial strain” that allegedly (i) harms prisoners and their families, (ii) makes prisoner re-entry into the community more difficult, and (iii) makes legal representation more costly. (J.A. 39, 41 (Compl. ¶¶ 1, 6).) The legislative and regulatory processes, not this Court, are the appropriate venues to assess the validity of these concerns, and if valid, to address

them in whole or in part.[9] Plaintiffs are raising *policy* questions better resolved through exposure to the democratic process of deliberation by elected legislators.

At the federal level, rates for inmate telephone calls have been addressed through regulatory action. As the Complaint cites, the Federal Communications Commission adopted a rule in 2016 that set rate caps for ICS nationwide at 21 cents per minute for debit/prepaid calls and 25 cents per minute for collect calls. (J.A. 44-45 (Compl. ¶¶ 36-40).) The rates were stayed related to intrastate calls by court order, but remain in place on a national level for interstate long-distance calls from prisons. (*See* J.A. 45 (Compl. ¶ 40, *citing* Order, *Securus Techs. v. FCC*, No. 16-1321 (D.C. Cir. 2016).)

At the state level, at least seven states have eliminated site commissions for ICS, not through

[9] The Legislature is the only appropriate decisionmaker to determine who should bear the burden of costly Inmate Calling Systems. The operating costs involved with ICS are very high. ICS calls require "millions of dollars of infrastructure," as well as costly hardware servers for call recording storage, among other unique features. (J.A. 1338-39 (Excerpt from the Deposition of Joshua Conklin at 67:11-69:15).)

judicial action, but by legislative or regulatory acts. (J.A. 46 (*Id.* ¶ 26)).[10] Indeed, in 2019, the National Consumer Law Center ("NCLC"), which represents Plaintiffs in this matter, advocated before the Connecticut General Assembly for a legislative solution to address the same policy concerns plaintiffs raise here.[11] And here in Massachusetts, the Legislature is considering three bills—two proposed in the state Senate and the other in the state House of Representatives—that address issues raised by plaintiffs here. (*See* Add. 228 (Senate Bill No. 1559, "An Act relative to inmate telephone call rates," presented by Cynthia Stone Creem (filed Feb. 8, 2021)); Add. 230 (Senate Bill No. 1609, "An Act relative to inmate telephone call rates," presented by Mark C. Montigny (filed Feb. 19, 2021); Add. 232 (House Bill No. 3452, "An Act relative to telephone services for inmates in all correctional and other

[10] The Complaint identifies California, Michigan, Nebraska, New Mexico, New York, Rhode Island, and South Carolina as states that have adopted prohibitions.

[11] J.A. 625 (Written Testimony of Brian Highsmith Before the Judiciary Committee of the Connecticut General Assembly, 2019 Regular Session (Mar. 25, 2019); *available at* https://www.nclc.org/images/testimony-hb6714-ct-gen-assembly.pdf.)

penal institutions in the Commonwealth," presented by Chynah Tyler (filed Feb. 18, 2021).)[12]

Plaintiffs have a right to pursue the policy agenda underlying their Complaint. But this Court is not the appropriate venue and these claims are not the appropriate vehicle to obtain the change in public policy that they desire.

**CONCLUSION**

For these reasons, Defendant Sheriff Thomas M. Hodgson respectfully requests that this Court find that the Legislature, through the provisions of 2009 Mass. Legis. Serv. Ch. 61 (S.B. 2119), authorized the BCSO to raise revenues for the Office of the Sheriff through inmate calling service contracts.

Respectfully submitted,

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[12] The proposed legislation would, among other actions, require that state and local agencies charged with the operation and management of state prisons, local jails, and juvenile detention centers provide voice communication service to inmates and call recipients for free.

# ADDENDUM

**ADDENDUM**
**TABLE OF CONTENTS**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| KELLIE PEARSON, ROGER BURRELL, BRIAN GIVENS, and THE LAW OFFICES OF MARK BOOKER, on behalf of themselves and those similarly situated, | * | |
| Plaintiffs, | * | |
| v. | * | Civil Action No. 18-cv-11130-IT |
| THOMAS M. HODGSON, individually and his official capacity as Sheriff of Bristol County, and SECURUS TECHNOLOGIES, INC., | * | |
| Defendants. | * | |

MEMORANDUM & ORDER

June 22, 2020

TALWANI, D.J.

Plaintiffs allege that Thomas Hodgson, the Sheriff of Bristol County, Massachusetts ("Sheriff Hodgson" or "Sheriff"), has acted outside of the authority granted to him by the Massachusetts Legislature by procuring an inmate calling service that was deployed, in part, to raise revenues for the office of the Sheriff. Plaintiffs have also brought suit against Securus Technologies, Inc. ("Securus"), the inmate calling service vendor, alleging that Securus engaged in unfair and deceptive practices under Massachusetts law. Pending before the court are Defendants' Motions for Judgment on the Pleadings [#61], [#65] and Plaintiffs' Motion for Partial Summary Judgment on Count I [#70] and Motion for Class Certification [#76].

The lynchpin of Plaintiffs' claims—set forth in Count I as a claim for declaratory judgment—is that Sheriff Hodgson used the inmate calling contract with Securus to generate

revenues in violation of Massachusetts law as set forth by the Massachusetts Supreme Judicial Court ("SJC") in Souza v. Sheriff of Bristol Cty., 455 Mass. 573 (2010). Defendants argue that the Massachusetts Legislature *has*, in fact, authorized inmate calling as a source of revenue in a 2009 Session Law. Plaintiffs counter that Defendants are misinterpreting and overextending the 2009 law and that the Legislature never endorsed the Sheriff's practices. The parties agree that the question of law underlying these motions—whether the Sheriff may collect revenue from inmate calling services—is ripe for resolution. For the reasons set forth below, the court concludes that the Massachusetts Legislature authorized the county sheriffs' use of inmate calling to generate revenue. Accordingly, Defendants' Motions for Judgment on the Pleadings [#61], [#65] are ALLOWED, and Plaintiffs' Motion for Partial Summary Judgment on Count I [#70] and Motion for Class Certification [#76] are DENIED.

## I. PROCEDURAL BACKGROUND

Plaintiffs filed this action in Massachusetts Superior Court. See Compl. [#1-1]. Plaintiffs sought both injunctive and monetary relief on behalf of themselves as well as on behalf of a class of plaintiffs similarly situated. Id. ¶¶ 52–63; id. ¶¶ 64–72. Securus timely removed the case to this court pursuant to the jurisdiction provided by the Class Action Fairness Act. See Not. of Removal ¶ 9 [#1].

The complaint alleged six causes of action. Compl. ¶¶ 73–101 [#1-1]. Counts I through IV are brought against Sheriff Hodgson. Count I seeks a declaratory judgment that the revenues generated from the Sheriff's inmate calling service contracts with Securus are contrary to Massachusetts law as set forth by the SJC in Souza. Compl. ¶¶ 73–75. Count II seeks a declaratory judgment that, to the extent Plaintiffs were charged amounts that went to the Sheriff as commissions, the Sheriff was charging unlawful taxes or fees. Id. ¶¶ 76–78. Count III alleges

that the Sheriff engaged in *ultra vires* taxation for which it does not have statutory authority in violation of Part I, Article XXIII of the Massachusetts Constitution. Id. ¶¶ 79–85. Count IV alleges that, in the alternative to Count III, the Sheriff extracted unlawful fees from Plaintiffs beyond its statutory authority in violation of Mass. Gen. Laws ch. 126, § 29. Id. ¶¶ 86–93.

Counts V and VI are brought against Securus. Count V alleges that Securus committed the tort of conversion by taking the class members' money through coercion and without legal authority to do so. Id. ¶¶ 91–93. Count VI alleges that Securus engaged in unfair and deceptive trade practices in violation of Mass. Gen. Laws ch. 93A, § 2. Id. ¶¶ 94–101.

Both Sheriff Hodgson and Securus moved to dismiss all claims. See Hodgson Mot. [#26]; Securus Mot. [#28]. The court found that the alleged conduct fell outside of the Sheriff's authority, consistent with the SJC's holding in Souza that the Sheriff could not impose fees without the Legislature's approval where he had not identified legislative authority that authorized the collection of commissions. See Mem. & Order [#45]. Accordingly, the court denied these motions except as to Plaintiffs' claim against Securus for conversion and, on Plaintiffs' stipulation, claims for monetary relief against Sheriff Hodgson in both his individual and official capacity. See id. 6, 20. This left Counts I and II, to the extent they sought declaratory relief against Sheriff Hodgson, and Count VI—the ch. 93A claim seeking monetary and injunctive relief from Securus. Defendants answered, see Answers [#49], [#50], and discovery commenced. See Scheduling Order [#53].

Several months into discovery, Defendants filed the present Motions for Judgment on the Pleadings [#61], [#65]. These motions cite legislation from 2009 concerning the Sheriff's authority to collect revenues from inmate telephone systems that was not previously before the court. Plaintiffs, in turn, filed a Motion for Partial Summary Judgment on Count I [#70], seeking

a declaratory judgment that the revenues the Sheriff generated from Securus's contract with Bristol County are contrary to Massachusetts law. Plaintiffs also filed their Motion for Class Certification [#76].

## II. STANDARD OF REVIEW

Defendants move for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper 'only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment.'" Zipperer v. Raytheon Co., 493 F.3d 50, 53 (1st Cir. 2007) (citing Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 54 (1st Cir. 2006)). Accordingly, the court must view the facts contained in the pleadings "in the light most favorable to the nonmovant and draw all reasonable inferences in his favor." Id. In this way, a motion for a judgment on the pleadings "is treated much like a Rule 12(b)(6) motion to dismiss" except for that a motion under Rule 12(c) is filed after the close of pleadings and implicates the pleadings as a whole. Harper v. Melendez, No. CV 18-12137-FDS, 2019 WL 6307201, at *1 (D. Mass. Nov. 22, 2019) (citing Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008); Aponte–Torres v. Univ. of P.R., 445 F.3d 50, 54–55 (1st Cir. 2006)). The court also takes into consideration "documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." Haley v. City of Bos., 657 F.3d 39, 46 (1st Cir. 2011).

On Plaintiffs' Motion for Partial Summary Judgment on Count I, the court must construe the record "in the light most favorable to the non-movant and resolv[e] all reasonable inferences in that party's favor." Prescott v. Higgins, 538 F.3d 32, 39 (1st Cir. 2008); see also Fed. R. Civ. P. 56. ("Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7–8 (1st Cir. 1990) (internal quotation marks and citation omitted). "To defeat a motion for summary judgment, the evidence offered by the adverse party cannot be merely colorable or speculative . . . [it] must be significantly probative of specific facts." Thompson v. Coca-Cola Co., 522 F.3d 168, 175 (1st Cir. 2008) (internal quotation omitted). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Rossy v. Roche Prods., Inc., 880 F.2d 621, 623–24 (1st Cir. 1989).

## III. FACTUAL BACKGROUND[1]

In May 2011, Sheriff Hodgson solicited bids for an inmate calling service at several of Bristol County's correctional facilities through a Request for Responses ("RFR"). Compl. ¶ 28 [#1-1]; Hodgson Answer ¶ 28 [#50]. The RFR required each bidder to include in its bid "commissions" that the bidder would pay to the Sheriff based on gross revenues that the bidder received from operating the inmate calling service, including both "collect and direct dial (debit) modes." RFR §§ 5.1.20–5.1.21 [#62-2].

On August 8, 2011, the Sheriff awarded Securus a five-year contract to serve as the vendor for the Bristol County Correctional Facilities' inmate calling service. The contract provided that the Sheriff would receive annual funding for two on-site administrator positions at $65,000 each, a $75,000 annual technology fee, and "commission" in the amount of 48% of Securus's gross revenues from the inmate calling service. Compl. ¶¶ 31, 34 [#1-1]. Between August 2011 and June 2013, Securus paid the Sheriff an aggregate of $1,172,748.76. Id. ¶ 35.

[1] The court resolves this case on the pleadings by taking the well-pled allegations as true. However, as the parties noted at the hearing on these motions, there is no material factual dispute that is relevant to the motions at bar.

On October 21, 2015, the Sheriff and Securus entered into a new contract for a four-year term. The new contract discontinued commissions paid to the Sheriff based on revenue but continued to fund the on-site administrator positions and annual technology fee. Furthermore, the new contract provided that these amounts would be paid by Securus through a one-time upfront payment of $820,000 instead of $205,000 annually over the course of the four-year contract.[2] Id. ¶¶ 41–44.

## IV. DISCUSSION

### A. Cross-Motions on Count I (Declaratory Judgment)

Count I of Plaintiffs' complaint seeks a declaration that the manner in which the Sheriff has contracted with Securus to provide for inmate calling in county jails is prohibited by Massachusetts law. Hodgson's motion argues that, through the 2009 Session Law, "the Massachusetts Legislature expressly authorized the [Sheriff], along with other Massachusetts sheriffs' offices, to engage in the specific acts and practices that plaintiffs now allege were outside the scope of their authority." Def. Hodgson Mem. 1 [#62]. Plaintiffs' motion for partial summary judgment, in turn, argues that the 2009 Session Law does not change the conclusion reached by the court on the motion to dismiss that the alleged conduct fell outside of the Sheriff's authority. To resolve this issue, the court first reviews the Sheriff's authority, as provided in Souza, and then turns to the 2009 Session Law.

[2] In the Complaint, Plaintiffs alleged that this lump sum payment was a roundabout way of continuing to pay the Sheriff commissions. Compl. ¶ 46 [#1-1]. Plaintiffs retracted this allegation during oral argument and stated that they were no longer claiming that the Sheriff was continuing to collect commissions from the inmate telephone system. Nevertheless, Plaintiffs maintain that there is still an ongoing dispute requiring declaratory relief because, Plaintiffs allege, the Sheriff's policy of charging inmates *any* amount of money if not authorized by the Legislature is unlawful.

*1. The Limits of the Sheriffs' Authority as Set Forth in Souza*

In Massachusetts, correctional facilities are operated both by the state, through the Massachusetts Department of Corrections, and by elected county sheriffs.[3] The Massachusetts Legislature has enacted laws, codified for the most part in Title XVIII of Part I of the General Laws, which provide the statutory scheme for these facilities. In general, they provide that superintendents, appointed by the commissioner of the Department of Corrections, have custody and control over inmates in state prisons. Mass. Gen. Laws ch. 125, §§ 1, 14. Custody and control of inmates in county facilities rests with each county's elected sheriff, as "jailer, superintendent or keeper." Mass. Gen. Laws ch. 126, § 16. Souza challenged the authority of an elected sheriff in this role.

Souza arose from a claim filed against Sheriff Hodgson in July 2002. In that case, the plaintiffs challenged Sheriff Hodgson's imposition of two different types of fees on inmates: a daily, five dollar "cost of care" fee that was assessed to all inmates "for administrative services rendered and to assist in defraying the costs of incarceration," and various fee-for-service charges for medical care, haircut services, and GED testing. See Souza, 455 Mass. at 575. Judgment was entered for the plaintiffs in 2008. Souza v. Hodgson, No. BR-CV-2002-00870, 2008 WL 6085022 (Mass. Super. June 12, 2008). The Sheriff appealed to the Massachusetts Appeals Court, Souza v. Hodgson, No. 2008-P-1873 (Mass. App. Ct.), and the SJC transferred the case to itself on its own initiative. Souza v. Sheriff of Bristol Cty., 455 Mass. 573 (2010).

In finding that the Sheriff did not have the authority to charge the challenged fees, the SJC rejected the Sheriff's argument that he had an inherent right under the common law to charge fees to inmates. Id. at 577–80. Instead, the SJC found that "the powers, duties, rights, and

[3] As a general matter, *prisons* are operated by the state while *jails* and *houses of correction* are county facilities. Souza v. Sheriff of Bristol Cty., 455 Mass. 573, 580 (2010).

liabilities of a sheriff as a jailer are prescribed by statute, and his powers, duties, rights and liabilities are thus circumscribed by the legislative enactments of the particular jurisdiction." Id. at 580 (quoting 1 W.H. Anderson, Sheriffs, Coroners, and Constables § 42, ¶ 266 (1941)).

Consistent with the SJC's determination that the Sheriff's authority is not inherent, but rather is created and bounded by statute, the SJC ruled that the Sheriff exceeded his authority when he acted beyond the parameters of the Legislature's statutory scheme. Id. at 584 ("A government agency or officer does not have authority to issue regulations, promulgate rules, or, as in the instant case, create programs that conflict with or exceed the authority of the enabling statutes") (citing Massachusetts Hosp. Ass'n v. Department of Med. Sec., 412 Mass. 340, 342 (1992)). For example, by charging inmates GED testing fees the Sheriff had contravened the Legislature, since the Legislature had deemed that inmates should have free access to GED testing. Id. at 586. Similarly, the SJC ruled that the Legislature made it so that only the commissioner of the Department of Corrections had the authority to establish medical care fees and thus the Sheriff was not free to charge his own. Id. at 587–88. And, as for the cost-of-care fees that were used to recoup or offset the costs associated with incarcerating inmates, the SJC found that the Legislature intended that inmates contribute to such expenses only where the inmate is earning income in connection with a work-release program. Id. at 585–86. Given this broader statutory framework crafted by the Legislature, the SJC concluded that "[h]ad the Legislature intended to authorize the sheriff to impose the challenged fees, it would have said so expressly as it had done with other fees, such as fees for service of process, and as it had done by authorizing particular deductions from inmate funds." Id. at 586. As a result, the fees were charged "in the absence of specific legislative authority" and were "invalid." Id.

*2. The 2009 Session Law*

All sheriffs' offices in the commonwealth were originally part of county government. That changed between 1997 and 2000 when the Massachusetts Legislature transferred seven of the fourteen sheriffs' offices to the commonwealth as part of the abolishment of their respective county governments. When Souza was filed in 2002, the remaining seven sheriffs' offices, including Bristol County's, were still operating within the county governments.

While Souza was making its way through the courts, this changed. As explained in the 2013 Report of the Special Commission on the Consolidation of Sheriffs' Offices 6–8 [#62-4], new legislation was precipitated by a shortfall towards the end of 2007 and 2008 in county revenues from Deed Excise Taxes used to cover sheriffs offices' expenses in seven counties. A version of this legislation was introduced in January 2008, but was not enacted. Hodgson's Additional Undisputed Facts ¶¶ 12–13 and Exh. B [#80]. A revised version of the bill, S.B. 2119, with the same title but including various changes, including the addition of Section 12, discussed below, was introduced in January 2009. Id. at ¶¶ 14–15 and Exh. C.

The final version, "An Act Transferring County Sheriffs to the Commonwealth" (the "2009 Session Law" or "Act"), including additional language in Section 22, also discussed below, was enacted on August 6, 2009, as "an emergency law, necessary for the immediate preservation of the public convenience." 2009 Mass. Legis. Serv. ch. 61. Some, but not all, sections were codified in the Massachusetts General Laws.[4]

[4] Some background regarding terminology may be helpful here. According to the Massachusetts Legislature's website, all bills that become laws are assigned chapter numbers based on the chronological order in which the bill was adopted. The chapters are referred to as "session laws" and are annually reported in a publication called the Acts and Resolves of Massachusetts. See https://malegislature.gov/Laws/SessionLaws. Some Session Laws are codified into the Massachusetts General Laws, as set forth in Mass. Gen. Laws ch. 3 § 51. "As a general matter, uncodified provisions of an act express the Legislature's view on some aspect of its operation; they are not the source of the substantive provisions of the law. Uncodified provisions may, for

Sections 3–5 of the 2009 Session Law transferred the offices, duties, and authority of the Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth, and Suffolk county sheriffs to the commonwealth. 2009 Session Law § 3–5 [#62-1]. This included "operation and management of the county jail and house of correction." Id. § 4. Section 1 of the 2009 Session Law amended an existing general law to account for the commonwealth paying salaries of the sheriffs, and Section 2 amended an existing law to create a Deeds Excise Fund from certain funds collected in the county of a transferred sheriff to satisfy unfunded county pension liabilities and other benefits, with other amounts to be transferred to the Commonwealth's General Fund. Id. §1–2. The Session Law provided further "all valid liabilities and debts of the office of the transferred sheriff" and "all assets of the office of a transferred sheriff . . . shall become assets of the commonwealth, except as otherwise provided in this act." Id. § 6. Included in this conveyance were all rights, title, and interest in "all correctional facilities," "all leases and contracts," and "county correctional funds and other sources of income and revenue, to the credit of the office of a transferred sheriff on June 30, 2009." Id. § 7, 9, 11.

Section 12(a) of the 2009 Session Law provided that "[n]otwithstanding any general or special law to the contrary . . . revenues of the office of sheriff [of the affected counties] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff." Section 12(b) provided that "notwithstanding any general or special law to the contrary, in order to

example, address when the legislation will take effect, state if it will have retroactive effect, and provide mechanisms for handling special situations during the transition period between the date of enactment and the effective date of the new statute." Chin v. Merriot, 470 Mass. 527, 532 (2015). It is not apparent why the portion of the Session Law on which Defendants rely, § 12(a), was not codified so that it could be easily accessed by the public. Nonetheless, the legal force of a Session Law is not necessarily augmented or reduced based on whether the Session Law is codified into the General Laws. See Com. v. Laltaprasad, 475 Mass. 692, 700 n.12 (2016) ("we did not intend to suggest . . . that uncodified provisions cannot or by definition do not serve as a source of substantive law").

encourage innovation and enterprise, each sheriff's office shall annually confer with the house and senate committees on ways and means regarding that sheriff's efforts to maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state and local governments and other such accounts and regarding which revenues shall remain with the sheriff's office." Section 12(c) provided that "[a]ny sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county."

Section 22 provided for the creation of a special commission to make an investigation and study relative to reorganization and consolidation of sheriff's offices and to make formal recommendations, including best management practices addressing "the current use of civil process funds, including the amount of civil process funds collected by each county sheriff and the actual disposition of said funds currently, and, in the event of consolidation, realignment, elimination or reorganization [of sheriffs' offices], the collection and use of civil process fees in the future." Id. § 22(4).

*4. Does the 2009 Session Law Authorize County Sheriffs to Generate Revenue Using Inmate Calling Service Systems?*

The court now turns to the question posed by the pending motions: Did the 2009 Session Law provide the Sheriff with authority to generate revenue from inmate calling services? For the reasons set forth below, the court concludes that the 2009 Session Law confirmed the Legislatures' grant of authority to Sheriffs to derive revenue in this way, and that the Sheriff therefore did not act outside his authority.

The critical question is the meaning of § 12(a)'s provision that "revenues of the office of sheriff [of the affected counties] for civil process, inmate telephone and commissary funds shall remain with the office of sheriff." The court does not find the reference to "revenue . . . for . . .

inmate telephone and commissary funds" plain on its face. The court reads this provision, however, in harmony with another provision relating to inmate funds. In both state and county correctional facilities, the superintendent or jailer is required to be the custodian of an inmate's money and property. See Mass. Gen. Laws. ch. 127, § 3. In 1962, the Legislature recognized that these funds could generate income, and added the provision that "[a]ny interest accruing as a result of the deposit of such money may, by agreement with the prisoners concerned, be expended for the general welfare of all the inmates at the discretion of the superintendent." 1962 Mass. Legis. Serv. ch. 569; see Mass. Gen. Laws. ch. 127, § 3 (1962–1994). In 1994, the Legislature recognized a further source of revenue relating to these funds, amending the statute to provide that "[a]ny monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent." 1994 Mass. Legis. Serv. ch. 60, § 125 (emphasis added); see Mass. Gen. Laws. ch. 127, § 3 (1994).[5] The court reads Section 12(a) of the 2009 Legislation in harmony with Mass. Gen. Laws. ch. 127 § 3, understanding "revenue . . . for . . . inmate telephone and commissary funds" to include both the interest on these inmate funds and "revenue generated by the sale or purchase of goods [at the commissary] or [telephone] services to persons in the correctional facilities." In other words, at the time the 2009 Session Law was enacted, the Massachusetts Legislature was aware that superintendents of correctional facilities, including the seven county sheriffs, were generating revenue from inmate telephone calls and canteen

[5] The corresponding regulation provides, in relevant part, that "any monies derived from interest earned upon the deposit of such moneys and revenue generated by the sale or purchase of goods or services to persons in county correctional facilities may be expended for the general welfare of all the inmates at the direction of the Sheriff/facility administrator." 103 Code Mass. Regs. § 911.08(2).

purchases, and it was the Legislature's intent to have such revenues "remain with the office of the sheriff" for these seven sheriffs' offices. 2009 Session Law § 12(a) [#62-1].

Plaintiffs present several contrary arguments. See Pls.' Mem. 10–19 [#71]. Plaintiffs argue first that the relevant portions of the 2009 Session Law are no more than "accounting instructions" setting forth how revenues from commissions should be handled during the one-time transfer of sheriffs' offices from the counties to the commonwealth. Pls.' Mem. 10–11 [#71]. Plaintiffs contend that "Section 12(a) states that revenues a sheriff obtains from 'inmate telephone and commissary funds shall remain with the office of the sheriff' *during the transition*" and that "any funds previously collected should 'remain' with the sheriff *during the one-time transfer*." Pls.' Mem. 11 [#71] (emphasis added). The qualifiers "during the transition" and "during the one-time transfer" do not appear in the statute, and Plaintiffs' construction would require the court to conclude that the Legislature also intended that the sheriffs' civil process revenues would also only remain with the sheriff "during the one-time transfer." This interpretation is explicitly contradicted by Section 22 of the Act, which establishes a commission tasked with studying possible ongoing operations of the sheriffs' offices, including "the amount of civil process funds collected by each county sheriff and the actual disposition of said funds currently and, in the event of consolidation, realignment, elimination or reorganization, the collection and use of civil process fees in the future." 2009 Session Law § 22(4) [#62–1]. Where the Legislature made apparent that the sheriffs' offices would continue to collect and use civil process funds after the 2009 consolidation in Section 22, the court cannot contort the language of Section 12 to say the opposite.

Plaintiffs' second and third argument are that the Legislature cannot grant authority by "vague implication" but must use language that constitutes an "express authorization," and that

the court should not read Section 12(a) in isolation, but rather should consider the confines of the cited provision and the broader purposes of the Act. Pls.' Mem. 12-13, 15–17 [#71]. Specifically, Plaintiffs argue that the 2009 Session Law does not use explicit language authorizing the revenue and was carefully crafted so as to *not* provide the county sheriffs any new authority, and thus the court should similarly constrain its reading of Section 12(a) so as to not grant the county sheriffs new authority. As noted earlier, however, in 1994 the Legislature authorized correctional facility superintendents to generate revenue from the sale of goods and services to inmates. Whether this provision included authority to generate revenue from inmate telephone services or canteen is not readily apparent and would require the court to engage in the same analysis the SJC performed in Souza: would charging inmates for telephone and canteen services frustrate the Legislature's broader statutory scheme? The 2009 Session Law effectively answered that question by making apparent that as to revenue derived from telephone and commissary accounts, the Legislature knew of the revenue and that, until the Legislature further amends the statutory scheme, the revenue would remain with the offices of the county sheriffs.

Fourth, Plaintiffs argue that Defendants' interpretation of the 2009 Session Law "make[s] no sense" insofar as it would authorize the sheriffs of these seven counties to charge telephone fees while failing to address the authority of sheriffs of the previously transferred counties to do the same. Pls.' Mem. 17–18 [#71]. Plaintiffs' argument is not persuasive considering that the 2009 Session Law was directed specifically towards these seven sheriffs' offices and, presumably, arose from negotiations between these seven sheriffs' offices and the Legislature.[6]

[6] The more interesting question may be the status of any revenue generated from inmates at facilities in the previously transferred counties or from inmates at state facilities. If this court is correct that the authority to generate revenue from inmate calls derives in part from Mass. Gen. Laws ch. 127, § 3, that same statute would limit the use of such revenue to "the general welfare of all the inmates at the discretion of the superintendent." However, a regulation adopted shortly

Fifth, Plaintiffs argue that Defendants' interpretation of the 2009 Session Law would have the effect of sanctioning the fees found invalid by the SJC in Souza, since Section 12(c) of the Act provides that "any sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county." Id. at 18–19 (citing 2009 Session Law § 12(c)). Plaintiffs argue that, since the cost-of-care fees challenged in Souza were implemented before 2009, Section 12(c) of the 2009 Session Law would, under Defendants' interpretation, authorize them. Id.

But there is no conflict between the 2009 Session Law and Souza. Section 12(c) does not speak to generating revenue from inmates (the issue addressed in Mass. Gen. Laws ch. 127, § 3, and the reference to inmate telephone and commissary accounts in Section 12(a) of the 2009 Session Law), but of other (legal) sources of revenue funding the needs of the county's citizens generally. Instead, it is Section 12(a)—*not* 12(c)—that removes any ambiguity as to whether collecting revenue through inmate telephone and canteen sales is consistent with the Legislature's statutory scheme. Since Section 12(a) only references revenues from civil process, inmate telephone, and commissary, it cannot be used as authorization for the fees at issue in Souza, which concerned cost-of-care, medical care, haircut services, and GED testing. 455 Mass. at 574. Indeed, in this way, the 2009 Session Law affirms the SJC's conclusion in Souza, since the fees challenged in Souza are not enumerated in section 12(a).[7]

after the 2009 Session law was enacted provides, as to state-operated facilities, that "[a]ll commissions received that are derived from inmate shall be returned to the General Fund of the Commonwealth . . . . on a monthly basis." 103 Code Mass. Regs. § 482.06; 1136 Mass. Reg. 53 (Aug. 7, 2009). However, this question and the validity of that regulation are not before the court.

[7] The court recognizes that fees for haircuts, medical care, and GED testing could be considered "revenue generated by the sale or purchase of goods or services to persons in the correctional facilities" under Mass. Gen. Laws. ch. 127, § 3. But in contrast to the Legislative silence regarding inmate telephone calls and commissary accounts (other than in the 2009 Act), the

Accordingly, the court concludes that the revenues challenged in this petition are collected under authority granted to the county sheriffs by the Massachusetts Legislature, and thus Counts I and II, which request a declaratory judgment that the fees are unlawful, are subject to entry of judgment on the pleadings in favor of Defendants.

B. Count VI Against Securus and Motion for Class Certification

Throughout this litigation, Plaintiffs have rooted their argument that Securus is liable under ch. 93A solely on the allegation that Securus entered into an arrangement with the Sheriff to provide kickbacks in contravention of state law. As Plaintiffs allege in their complaint, Securus engaged in unfair and deceptive acts by: "charging and collecting money" from Plaintiffs "in order to make unlawful payments to the [Sheriff];" by "taking Plaintiffs' funds through coercion and without legal authority;" and, by "[u]sing funds derived from the telephone calls [to] pay 'commissions' and prearranged lump-sum payments to the [Sheriff] in violation of Massachusetts statutes and regulations." Compl.¶ 97 [#1-1]. Then, at the hearing on Defendants' motions to dismiss, Plaintiffs' reasserted that their allegations did not arise out of the rates Securus charged, but that Securus facilitated the Sheriffs' violation of state law by paying the Sheriff unlawful commissions. See, e.g., Tr. Hr'g on Mot. Dismiss 57:18–22 [#43] ("Securus is benefitting from a contract by helping the Bristol County Sheriff's Office circumvent Massachusetts law and facilitating what the county lacks the authority to do on its own. We wouldn't be here today if Securus had instead kept all the money for itself.") Finally, Plaintiffs' Opposition [#69] to Securus's motion for judgment on the pleadings and Plaintiffs' arguments at

Legislature had enacted statutory provisions relating to haircuts, medical care, and GED testing critical to Souza's analysis. See Souza, 455 Mass. at 583 (citing Mass. Gen. Laws ch. 124, § 1(r) (haircut fee); Mass. Gen. Laws ch. 127, § 92A (GED fees); Mass. Gen. Laws ch. 124, § 1(t) (medical care)).

the hearing continued to eschew any other basis for Securus's liability under ch. 93A. Accordingly, in light of the court's determination on Count I that the generation of revenue from inmate telephone was within the county sheriffs' authority, Securus is entitled to judgment on the pleadings. Plaintiffs' Motion for Class Certification [#76], which only requests certification of a class as to Count VI against Securus, is consequently denied.

## V. CONCLUSION

Plaintiffs' concern that the Sheriff is generating revenue through charges paid by inmates' families and attorneys for phone service is timely as our communities consider how the criminal justice system may best achieve its stated goals. However, these policy questions are for the Legislature not the court. The court is tasked instead with determining the legal question of whether the Massachusetts Legislature granted the Sheriffs authority to generate revenues from inmate telephone services. On that question, the court finds that the Legislature has granted the Sheriff that authority and, accordingly, the claims brought against him and Securus must be dismissed. Thus, Sheriff Hodgson's Motion for Judgment on the Pleadings [#61] and Securus's Motion for Judgment on the Pleadings [#65] are ALLOWED. Plaintiffs' Motion for Partial Summary Judgment on Count I [#70] and Motion for Class Certification [#76] are DENIED.

IT IS SO ORDERED.

Date: June 22, 2020

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| KELLIE PEARSON, ROGER BURRELL, BRIAN GIVENS, and THE LAW OFFICES OF MARK BOOKER, on behalf of themselves and those similarly situated, | * | |
| Plaintiffs, | * | |
| v. | * | Civil Action No. 18-cv-11130-IT |
| THOMAS M. HODGSON, individually and his official capacity as Sheriff of Bristol County, and SECURUS TECHNOLOGIES, INC., | * | |
| Defendants. | * | |

MEMORANDUM & ORDER VACATING JUDGMENT
AND GRANTING REQUEST TO CERTIFY QUESTION TO THE
MASSACHUSETTS SUPREME JUDICIAL COURT

March 31, 2021

TALWANI, D.J.

Plaintiffs to this action sought declaratory relief stating that Thomas Hodgson, the Sheriff of Bristol County, Massachusetts ("Sheriff Hodgson" or "Sheriff"), violated Massachusetts law when he procured an inmate calling system to raise revenues for the office of the Sheriff. Plaintiffs also alleged that the vendor of the inmate calling system, Securus Technologies Inc. ("Securus"), engaged in unfair and deceptive practices in violation of Massachusetts' consumer protection laws, Mass. Gen. Laws ch. 93A. In a Memorandum and Order [#114], the court granted Defendants' motions for judgment on the pleadings. In so ruling, the court found that two different provisions of Massachusetts law—an uncodified section of a 2009 Session Law and Mass. Gen Laws. Ch. 127, § 3—provided the necessary legislative authority for the inmate

calling system used by Sheriff Hodgson. Importantly, the court found that neither statute was necessarily plain on its face and instead the court read the two provisions together to find that the Legislature knew that county sheriffs were using inmate calling systems to generate revenues and approved this practice. See Mem. & Order 14 [#114]. Accordingly, the court entered judgment in favor of Defendants. See Judgment [#115].

However, the court's finding that one of those two statutes, Mass. Gen. Laws ch. 127, § 3, was critical for interpreting the meaning of the 2009 Session Law was not an argument advanced by either party. Indeed, no party cited to, or relied upon, that statute in their briefs. And, at oral argument, despite the court's inquiry, see Elec. Order [#111], neither side agreed that the statute was relevant to the question presented. Nevertheless, the court's Memorandum and Order [#114] concluded that the statute was critical for understanding the broader statutory scheme and for contextualizing the 2009 Session Law.

Now before the court is Plaintiffs' Motion to Alter or Amend the Judgment and Certify the Question of Law to the Massachusetts Supreme Judicial Court [#118]. Plaintiffs argue that the court's analysis of ch. 127, § 3 ("the statute") was factually and legally flawed. Namely, Plaintiffs contend, inter alia, that (1) the statute only applies to the revenues generated from goods and services sold *to inmates* whereas the inmate calling system at question did not charge inmates, but instead charged those receiving the calls; (2) the statute is inapplicable to the commission-based contract between the Sheriff and Securus; (3) the court interpreted the statute in a manner inconsistent with the Supreme Judicial Court's interpretation of the same provision; (4) the court failed to interpret the statute in the context of other provisions contained in the enacting statute; (5) the statute did not intrinsically provide the sheriffs with any authority to sell goods and services to inmates; (6) the court's interpretation of the statute was in conflict with the

2009 Session Law; (7) the court's interpretation of the statute was inconsistent with the Massachusetts Department of Correction's interpretation of the same statute; and (8) the statute should be read only to apply to the sale of goods and services by prisoners to other prisoners. Pls.' Mot. Amend Judgment 4–16 [#118].

Defendants do not wrestle with the merits of Plaintiffs' arguments, but contend instead that the court addressed and rejected these points in its Memorandum and Order [#114] and must first conclude that the June 2020 Memorandum and Order constitutes a "manifest error of law"[1] before granting reconsideration. Hodgson Opp'n 3 [#119] (citing Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 7 (1st Cir. 2005)); see also Securus Opp'n [#120]. However, the court's authority to set aside a judgment under Rule 59(e) is not as constrained as Defendants contend. Relief under Rule 59(e) constitutes "an extraordinary remedy which should be used sparingly," Palmer v. Champion Mortg., 465 F.3d 24, 30 (1st Cir. 2006) (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995)), but "[s]ince specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion." 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (3d ed.). Indeed, in Venegas-Hernandez v. Sonolux Recs., the First Circuit recognized, and held, that, absent new evidence, trial judges are not strictly constrained to setting aside a judgment only where there has been a manifest error of law. 370 F.3d 183, 195 (1st Cir. 2004). In that case, the First Circuit upheld the district court's decision to grant a Rule 59(e) motion where "the peculiar context" of that case resulted in an initial ruling in which "the

[1] A manifest error is an "error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Manifest Error, Black's Law Dictionary (11th ed. 2019). See also Venegas-Hernandez v. Sonolux Recs., 370 F.3d 183, 195 (1st Cir. 2004) (citing Black's Law Dictionary for the definition of "manifest error of law" in the context of a Rule 59(e) motion).

issue was never fairly presented" to the court. Id. Consistent with the First Circuit's ruling in Venegas-Hernandez, courts within and without this district have explicitly recognized that a Rule 59(e) motion is proper "where the Court has made a decision outside the adversarial issues presented to the Court by the parties." Rivera v. Melendez, 291 F.R.D. 21, 23 (D.P.R. 2013) (quoting Dugdale, Inc. v. Alcatel–Lucent USA, Inc., et al., 2011 WL 3298504 (S.D. Ind., August 11, 2011)); see also Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983) (same); Intermec Techs. Corp. v. Palm Inc., 830 F. Supp. 2d 1, 4 (D. Del. 2011) (same). This basis for Rule 59(e) relief makes good sense as it ensures that parties have an opportunity to be heard, while still "balanc[ing] the need for finality with the need for justice." Venegas-Hernandez, 370 F.3d at 190.

Here, the court reached a decision outside the adversarial issues presented by the parties. The court relied extensively on ch. 127, § 3, despite no party having briefed the proper construction and relevance of that statute. Now that Plaintiffs have articulated their contrary argument, the court concludes that these issues should be analyzed and addressed with the benefit of the adversarial process for justice to be done. Accordingly, the court sets aside the June 22, 2020 Memorandum and Order [#114] and Judgment [#115].[2]

[2] Plaintiff's Rule 59(e) motion was filed five minutes after 6:00 p.m. on the 28th day following the entry of judgment. Sheriff Hodgson asserts that the motion is therefore untimely and may not be considered. See Hodgson Opp'n 11 [#119]. Sheriff Hodgson is correct that under Fed. R. Civ. P. 6(a)(2), the court may not extend the 28-day deadline for motions brought under Rule 59(e). See also Banister v. Davis, 140 S. Ct. 1698, 1700 (2020) ("Federal Rule of Civil Procedure 59(e) allows a litigant to file a motion to alter or amend a district court's judgment within 28 days from the entry of judgment, with no possibility of an extension"). Sheriff Hodgson is also correct that this district's Local Rule 5.4(d) requires electronic submissions to be filed by 6:00 p.m. But under Fed. R. Civ. P. 6(a)(4)(A), the last day for filing is midnight in the court's time zone "[u]nless a different time is set by a statute, local rule or court order" (emphasis added), and under Local Rule 5.4(a) the 6:00 p.m. deadline applies "[u]nless . . . otherwise ordered by the court." Accordingly, the court is authorized to extend the 6:00 p.m. filing deadline up until midnight on the 28th day. In light of the specific circumstances present here, the court orders the

The court next turns to Plaintiffs' request that the court certify the determinative question of law presented by Defendants' Motions for Judgment on the Pleadings [#61], [#65] and Plaintiffs' Motion for Partial Summary Judgment on Count I [#70] to the Massachusetts Supreme Judicial Court ("SJC"). Plaintiffs argue that the requirements for certification under the SJC's rules are met and that other considerations militate strongly in favor of certification. The court agrees.

This court may certify questions to the SJC where there are questions of law that: (1) "may be determinative of the cause then pending in the certifying court," and (2) are not subject to "controlling precedent" from the decisions of the SJC. SJC Rule 1:03(2). Both elements are met here.

As to the first element, the question of law presented—whether the Sheriff may collect revenue using inmate calling services—is the central question presented by this case. Although Securus argues that resolution of this issue is not necessary for its defense because Securus has an additional argument as to why the ch. 93A claim fails, Securus does not dispute that the issue is central to Plaintiffs' claims as to Sheriff Hodgson and that a resolution adverse to Plaintiffs would also resolve all claims against Securus. See Mem. & Order 16 [#114] (discussing how Plaintiffs did not challenge Securus' practices on grounds that would stand alone from Plaintiffs' claim that the Sheriff was acting outside of his legislative authority). Indeed, Securus' lead argument in its Memorandum in Support of Motion for Judgment on the Pleadings [#66] is the alleged legality of the Sheriff's collection of revenue from inmate calling services.

6:00 p.m. deadline provided by Local Rule 5.4(d) set aside, nunc pro tunc, and finds Plaintiffs' motion to have been timely filed.

As to the second element, the court finds that there is no "controlling precedent" from decisions of the SJC. The First Circuit has interpreted the "no controlling precedent" element to "to prevent certification in cases when 'the course the state court would take is reasonably clear.'" Shaulis v. Nordstrom, Inc., 865 F.3d 1, 6 n.3 (1st Cir. 2017) (quoting Easthampton Sav. Bank v. City of Springfield, 736 F.3d 46, 50 (1st Cir. 2013)). Although Plaintiffs have argued throughout that this case is controlled by Souza v. Sheriff of Bristol County, 455 Mass. 573 (2010), the court and the parties have struggled with this question throughout the course of this litigation.

In addition, the court finds that the specific question presented by this case not only meets the requirements for certification, but also *should be* certified considering the overwhelming local interest and the principles of federalism at play. The dispositive motions focused on an uncodified session law enacted in connection with the transfer of county sheriffs to the Commonwealth, a law of such local interest that counsel for neither party had even noted the existence of the law in connection with Defendants' motions to dismiss.

Furthermore, Plaintiffs filed this action in state court and asserted only state claims. See Compl. [#1-1]. Defendants asserted that this court held jurisdiction to this action under the Class Action Fairness Act ("CAFA") since the action was pleaded as a class action with an amount in controversy greater than $5,000,000, while also meeting CAFA's minimal diversity requirement because Securus was a citizen of a different State than at least one member of the class of plaintiffs. See Notice of Removal [#1] (citing 28 U.S.C. § 1332(d)(2)). Given the nature of the claims here, and the local nature of the dispute, the federal interests in this action, even in light of CAFA, are minimal. In contrast, the state interests are substantial. At bottom, this is a case about the powers that have or have not been delegated to the county sheriffs by the state Legislature.

As the First Circuit wrote in Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, where cases involve the authority of state actors under state law, the dispute becomes "a matter of peculiarly state and local concern." 40 F.3d 18, 24 (1st Cir. 1994). As was true there and is equally true here "[w]here possible, state courts should rule in the first instance on the scope of local governmental authority." Id.

Defendants argue finally that certification is improper since Plaintiffs only sought certification after receiving an adverse ruling. See Hodgson Opp'n 10 [#119]; Securus Opp'n 5 [#120]. Defendants are correct that, as a general matter, "[t]he practice of requesting certification after an adverse judgment has been entered should be discouraged." Securus Opp'n 5 [#120] (quoting Bos. Car Co. v. Acura Auto. Div., Am. Honda Motor Co., 971 F.2d 811, 817 n.3 (1st Cir. 1992) (quoting Perkins v. Clark Equipment Co., 823 F.2d 207, 210 (8th Cir. 1987))). However, the court has concluded that the adverse ruling and judgment must be set aside independent of the certification question, and therefore this concern is no longer present.

For the reasons set forth above, the court will, by separate order, certify the following question of Massachusetts law to the SJC:

> Did the Massachusetts Legislature, through the provisions of 2009 Mass. Legis. Serv. Ch. 61 (S.B. 2119) §§ 12(a), 12(c), 15, or M. G. L. ch. 127, § 3, taken separately or together, authorize the Bristol County Sheriff's Office to raise revenues for the Office of the Sheriff through inmate calling service contracts?

IT IS SO ORDERED.

Date: March 31, 2021

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|---|---|---|
| KELLIE PEARSON, ROGER BURRELL, BRIAN GIVENS, and THE LAW OFFICES OF MARK BOOKER, on behalf of themselves and those similarly situated, | * | |
| Plaintiffs, | * | |
| v. | * | Civil Action No. 18-cv-11130-IT |
| THOMAS M. HODGSON, individually and in his official capacity as Sheriff of Bristol County, and SECURUS TECHNOLOGIES, INC., | * | |
| Defendants. | * | |

ORDER CERTIFYING QUESTION TO
MASSACHUSETTS SUPREME JUDICIAL COURT
April 8, 2021

TALWANI, D.J.

For the reasons set forth in the court's March 31, 2021 Memorandum and Order [#122], the following question of Massachusetts law is HEREBY CERTIFIED to the Massachusetts Supreme Judicial Court pursuant to S.J.C. Rule 1:03:

> Did the Massachusetts Legislature, through the provisions of 2009 Mass. Legis. Serv. Ch. 61 (S.B. 2119) §§ 12(a), 12(c), 15, or M. G. L. ch. 127, § 3, taken separately or together, authorize the Bristol County Sheriff's Office to raise revenues for the Office of the Sheriff through inmate calling service contracts?

Mem. & Order 7 [#122].

The controversy in which the question arose is Plaintiffs' challenge to the Bristol County Sheriff's Office's use of inmate calling services to generate revenue. Complaint [#1-1].[1] The

[1] The action was filed as a putative class action in the Suffolk Superior Court but was removed to this court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

parties agreed for the purposes of Defendants Thomas M. Hodgson ("Sheriff Hodgson") and Securus Technologies, Inc.'s ("Securus") Motions for Judgment on the Pleadings [#61], [#65], and Plaintiffs' Motion for Partial Summary Judgment [#70], that there was no material factual dispute relevant to the dispositive issue. Taking Plaintiffs' well-pled allegations as true, the relevant factual background is as follows:

> In May 2011, Sheriff Hodgson solicited bids for an inmate calling service at several of Bristol County's correctional facilities through a Request for Responses ("RFR"). Compl. ¶ 28 [#1-1]; Hodgson Answer ¶ 28 [#50]. The RFR required each bidder to include in its bid "commissions" that the bidder would pay to the Sheriff based on gross revenues that the bidder received from operating the inmate calling service, including both "collect and direct dial (debit) modes." RFR §§ 5.1.20–5.1.21 [#62-2].
>
> On August 8, 2011, the Sheriff awarded Securus a five-year contract to serve as the vendor for the Bristol County Correctional Facilities' inmate calling service. The contract provided that the Sheriff would receive annual funding for two on-site administrator positions at $65,000 each, a $75,000 annual technology fee, and "commission" in the amount of 48% of Securus's gross revenues from the inmate calling service. Compl. ¶¶ 31, 34 [#1-1]. Between August 2011 and June 2013, Securus paid the Sheriff an aggregate of $1,172,748.76. Id. ¶ 35.
>
> On October 21, 2015, the Sheriff and Securus entered into a new contract for a four-year term. The new contract discontinued commissions paid to the Sheriff based on revenue but continued to fund the on-site administrator positions and annual technology fee. Furthermore, the new contract provided that these amounts would be paid by Securus through a one-time upfront payment of $820,000 instead of $205,000 annually over the course of the four-year contract. Id. ¶¶ 41–44.[2]

The court previously granted Sheriff Hodgson's and Securus's Motions for Judgment on the Pleadings [#61], [#65], and denied Plaintiffs' Motion for Partial Summary Judgment on

[2] In the Complaint, Plaintiffs alleged that this lump sum payment was a roundabout way of continuing to pay the Sheriff commissions. See Compl. ¶ 46 [#1-1]. Plaintiffs retracted this allegation during the oral argument on the cross-motions and agreed that the 2015 contract no longer had the Sheriff continuing to collect commissions either in form, or in substance. Nevertheless, Plaintiffs continue to assert that the 2015 contract remains problematic since the Sheriff's policy of charging *any* amount of money for phone calls is unlawful absent Legislative authority. See Mem. & Order 6 n.2 [#114].

Count I [#70], finding that the Massachusetts Legislature had authorized Sheriff Hodgson to use inmate calling services to generate revenue. See Mem. & Order [#114]. The court subsequently vacated this ruling, however, and determined that the question of law presented by the parties' cross motions should be certified to the Massachusetts Supreme Judicial Court for adjudication. See Mem. & Order [#122].

In accordance with S.J.C. Rule 1:03, § 4, the Clerk of this court is directed to forward to the Massachusetts Supreme Judicial Court, under the official seal of this court, a copy of this certification order, a copy of the docket, and copies of the documents listed in Appendix A.

The court welcomes any additional observations about relevant Massachusetts law that the Supreme Judicial Court may wish to offer. This case is STAYED pending a response to the certified question.

IT IS SO ORDERED.

Date: April 8, 2021

/s/ Indira Talwani
United States District Judge

Appendix A: Documents to be Forwarded to Massachusetts Supreme Judicial Court

- Notice of Removal [#1]
- Complaint [#1-1]
- State Court Record [#14]
- Sheriff Hodgson's Motion to Dismiss [#26] and Memorandum in Support [#27]
- Securus's Motion to Dismiss [#28] and Memorandum in Support [#29] (attachment excluded)
- Plaintiffs' Memorandum in Opposition [#34] to Sheriff Hodgson's Motion to Dismiss
- Plaintiffs' Memorandum in Opposition [#35] to Securus's Motion to Dismiss
- Securus's Reply [#40] to Plaintiffs' Opposition
- Sheriff Hodgson's Reply [#41] to Plaintiffs' Opposition
- Transcript of October 23, 2018 Motion Hearing [#43]
- December 20, 2018 Memorandum and Order [#45]
- Securus's Answer [#49]
- Sheriff Hodgson's Answer [#50]
- Sheriff Hodgson's Motion for Judgment on the Pleadings [#61], Memorandum in Support [#62], and attached exhibits [#62-1] – [#62-9]
- Securus' Motion for Judgment on the Pleadings [#65] and Memorandum in Support [#66]
- Plaintiffs' Consolidated Memorandum in Opposition [#69] to Defendants' Motions for Judgment on the Pleadings
- Plaintiffs' Motion for Partial Summary Judgment [#70], Memorandum in Support [#71], and Statement of Facts [#72]
- Sheriff Hodgson's Opposition to Motion for Partial Summary Judgment [#79] and Counter Statement of Material Facts [#80] and attached exhibits [#80-1] – [#80-6]
- Sheriff Hodgson's Reply [#81] on Motion for Judgment on the Pleadings
- Securus's Reply [#82] on Motion for Judgment on the Pleadings
- Plaintiffs' Reply [#84] on Motion for Partial Summary Judgment
- Transcript of June 11, 2020 Motion Hearing [#116]
- June 22, 2020 Memorandum and Order [#114], since vacated by March 31, 2021 Memorandum and Order [#122]
- June 22, 2020 Judgment [#115], since vacated by March 31, 2021 Memorandum and Order [#122]
- Plaintiffs' Motion to Alter or Amend Judgment [#118]
- Sheriff Hodgson's Opposition [#119]
- Securus's Opposition [#120]
- March 31, 2021 Memorandum and Order [#122]

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VI. Counties and County Officers (Ch. 34-38)
Chapter 34B. Abolition of County Government (Refs & Annos)

M.G.L.A. 34B § 1

# § 1. Transfer date for abolished counties

Currentness

The government of each of the following counties, in this chapter called an "abolished county" is hereby abolished as of the following date, in this chapter called the "transfer date", or on such earlier date 30 days after the commissioner of revenue certifies in writing that the county has failed to make a required payment on an outstanding bond or note: (a) Middlesex county, as of July 11, 1997; (b) Hampden and Worcester counties, as of July 1, 1998; (c) Hampshire county, as of January 1, 1999; provided, however, that all functions, duties and responsibilities for the operation and management of the jail, house of correction and registry of deeds of Hampshire county and all duties and responsibilities for operation and management of property occupied primarily by the sheriff, registry of deeds and the trial courts in Hampshire county are hereby transferred to the commonwealth, effective September 1, 1998, subject to the provisions of this chapter; (d) Essex county as of July 1, 1999; and (e) Berkshire county on July 1, 2000, but all functions, duties and responsibilities for the operation and management of the registries of deeds of Suffolk and Berkshire counties and all duties and responsibilities for the operation and management of property occupied primarily by the registries of deeds in Berkshire and Suffolk counties are hereby transferred to the commonwealth, effective on July 1, 1999, subject to the provisions of this chapter.

**Credits**
Added by St.1999, c. 127, § 53.

M.G.L.A. 34B § 1, MA ST 34B § 1
Current through Chapter 8 of the 2021 1st Annual Session

**End of Document**

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VI. Counties and County Officers (Ch. 34-38)
Chapter 34B. Abolition of County Government (Refs & Annos)

M.G.L.A. 34B § 12

# § 12. Sheriffs of abolished counties

Currentness

Notwithstanding the provisions of any general or special law to the contrary, the sheriff of an abolished county, including Franklin county, in office immediately before the transfer date, and, in Hampshire county, on September 1, 1998 shall become an employee of the commonwealth with salary to be paid by the commonwealth. The sheriff shall remain an elected official under the provisions of section 159 of chapter 54. Said sheriff shall operate pursuant to the provisions of chapter 37. Such sheriff shall retain administrative and operational control over the office of the sheriff, the jail, and the house of correction as of the transfer date. Said administrative and operational control shall include, but not be limited to, the procurement of supplies, services and equipment.

**Credits**
Added by St.1999, c. 127, § 53.

M.G.L.A. 34B § 12, MA ST 34B § 12
Current through Chapter 8 of the 2021 1st Annual Session

**End of Document**

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VI. Counties and County Officers (Ch. 34-38)
Chapter 34B. Abolition of County Government (Refs & Annos)

M.G.L.A. 34B § 15

# § 15. Statutory rights of employees of abolished counties

Currentness

All officers and employees of an abolished county or of Hampshire county or of the Suffolk and Berkshire counties' registries of deeds transferred to the service of the commonwealth or a regional retirement system shall be transferred without impairment of seniority, retirement or other statutory rights of employees, without reduction in compensation or salary grade and without change in union representation, except as otherwise provided in this chapter. Any collective bargaining agreement in effect for such transferred employees immediately before the transfer date shall continue as if the employees had not been so transferred, until the expiration date of such collective bargaining agreement. Nothing in this section shall be construed to confer upon any employee any right not held immediately prior to the date of said transfer, or to prohibit any reduction of salary or grade, transfer, reassignment, suspension, discharge, layoff or abolition of position not prohibited prior to such date.

**Credits**
Added by St.1999, c. 127, § 53.

M.G.L.A. 34B § 15, MA ST 34B § 15
Current through Chapter 8 of the 2021 1st Annual Session

**End of Document**

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVIII. Prisons, Imprisonment, Paroles and Pardons (Ch. 124-127)
Chapter 127. Officers and Inmates of Penal and Reformatory Institutions. Paroles and Pardons (Refs & Annos)

M.G.L.A. 127 § 3

# § 3. Money and property of prisoners; records; custody and return; transmission to court; interest on deposits

Currentness

They shall keep a record of all money or other property found in possession of prisoners committed to such institutions, and shall be responsible to the commonwealth for the safe keeping and delivery of said property to said prisoners or their order on their discharge or at any time before. The superintendents of correctional institutions of the commonwealth and the superintendents and keepers of jails, houses of correction and of all other penal or reformatory institutions shall, upon receipt of an outstanding victim and witness assessment, transmit to the court any part or all of the monies earned or received by any inmate and held by the correctional facility, except monies derived from interest earned upon said deposits and revenues generated by the sale or purchase of goods or services to persons in correctional facilities, to satisfy the victim witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B. Any monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent.

**Credits**
Amended by St.1962, c. 569; St.1994, c. 60, § 125; St.1996, c. 450, § 171.

Notes of Decisions (5)

M.G.L.A. 127 § 3, MA ST 127 § 3
Current through Chapter 8 of the 2021 1st Annual Session

**End of Document**

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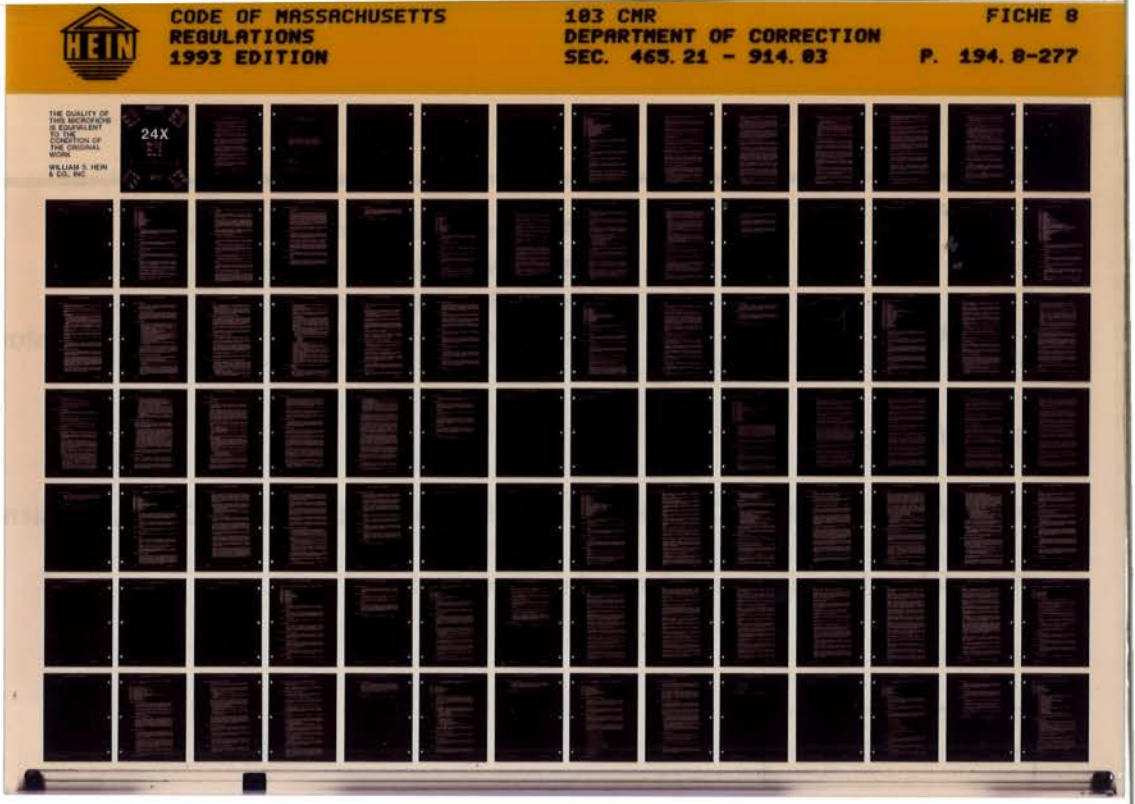
CODE OF MASSACHUSETTS
REGULATIONS
1993 EDITION
103 CMR
DEPARTMENT OF CORRECTION
SEC. 465.21 - 914.03
FICHE 8
P. 194.8-277
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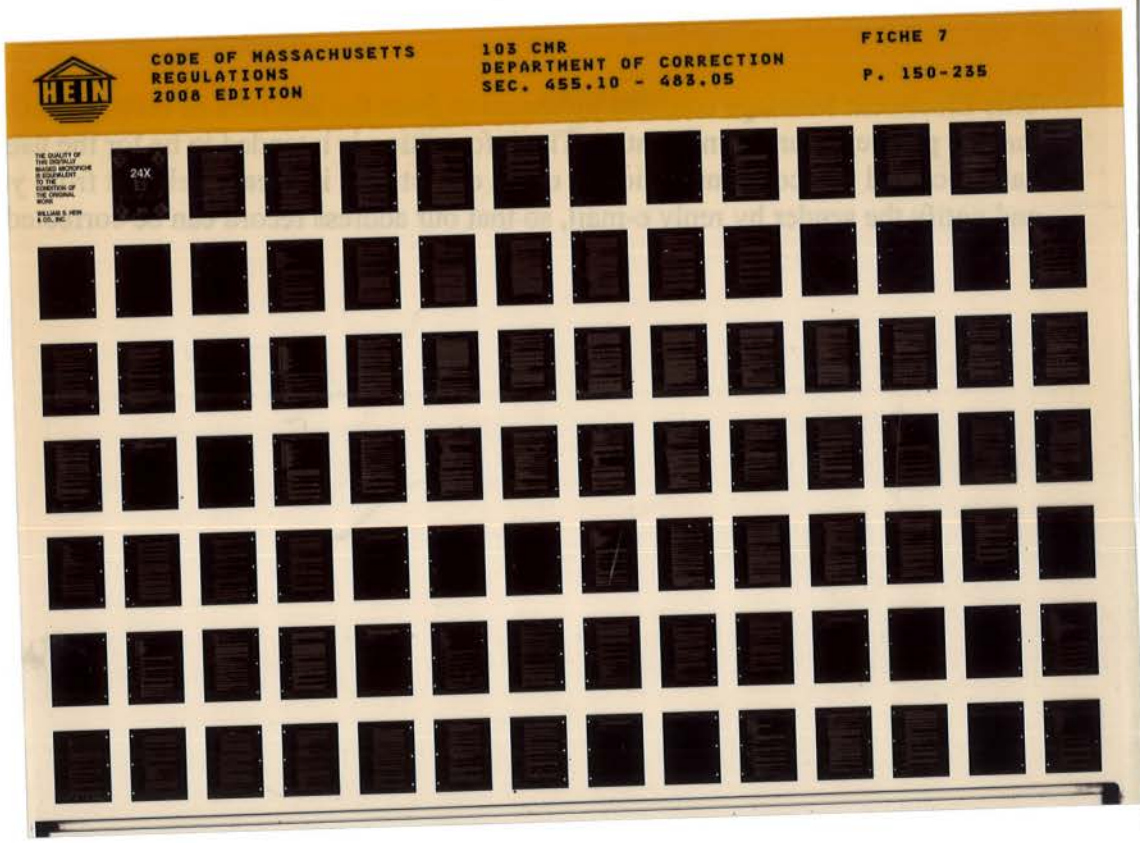
CODE OF MASSACHUSETTS
REGULATIONS
2008 EDITION
103 CMR
DEPARTMENT OF CORRECTION
SEC. 455.10 - 483.05
FICHE 7
P. 150-235
24X

482.06: continued

as they have been construed or may be construed in decisions that are binding in the Federal District Court for the District of Massachusetts or in the state courts of Massachusetts.

482.07: Institution Procedures for Inmate Telephone Access and Use

(1) General - Each Superintendent shall develop procedures to ensure that inmates have access to telephones. Access should be regulated in such a manner as to provide for the orderly and safe use of telephones by inmates.

(2) Inmate Telephone Use - Each Superintendent shall make arrangements to have an adequate number of inmate telephones available for inmate use. Except for installation charges, the institution shall not be liable for telephone charges resulting from the improper use of inmate telephones. Institution business telephones should not be used for inmate telephone contact except in unusual situations and then only with the permission of the Superintendent or his/her designee. Outgoing telephone calls only will be allowed, subject to the conditions authorized by this regulation.

(3) Suspension of Inmate Telephone Use - Inmate telephone use may be suspended by the Superintendent or his/her designee when, in the Superintendent's opinion, inmate telephone use presents a threat to the institution's security. Telephone calls to courts and attorneys shall not be suspended .

482.08: Inmate Telephone Use for Court or Attorney Contact

Telephone calls initiated for the express purpose of contacting a court or an attorney shall be allowed to inmates.

482.09: Telephone Access and Use for Special Status Inmates

(1) Disciplinary Isolation - Inmates confined in disciplinary isolation or placed in disciplinary awaiting action status shall not have access to a telephone, except to directly contact a court or an attorney, unless authorized by the Superintendent or his/her designee.

(2) Administrative Segregation and Administrative Segregation Awaiting Action Status - Institution policy shall provide for the manner and extent of telephone access for inmates confined in administrative segregation and administrative segregation awaiting action status.

(3) Protective Custody and Protective Custody Awaiting Action Status Institution policy shall provide for the manner and extent of telephone access for inmates confined in protective custody or protective custody awaiting action status.

(4) Special Status - Special status inmates may be permitted to make emergency telephone calls (calls not covered by 103 CMR 482.08) upon the approval of the Superintendent.

482.10: Telephone Monitoring

(1) Privacy - When it is necessary for facility staff to assist inmates in making telephone connections, efforts should be made to insure the privacy of the inmate's conversation.

(2) Telephone Monitoring - Monitoring of inmate telephone calls shall be subject to posted notice. Institution policy shall provide for the manner and extent of telephone monitoring.

482.11: Responsible Staff

The Superintendent of each institution shall be responsible for implementing and monitoring these regulations.

482.06: continued

(6) Special Status Inmates - Inmates in disciplinary isolation, administrative segregation, protective custody, a departmental disciplinary unit, department segregation unit or inmates on awaiting action status.

(7) Superintendent - The chief administrative officer of a correctional institution.

(8) Telephone Monitoring - The monitoring and/or recording of the telephone conversations of an inmate.

482.07: Institution Procedures for Inmate Telephone Access and Use

(1) General - Each superintendent shall develop procedures to insure that inmates have access to telephones. Access should be regulated in such a manner as to provide for the orderly and safe use of telephones by inmates.

(2) Inmate Telephone Use - Each superintendent shall make arrangements to have an adequate number of inmate telephones available for inmate use. Except for installation charges, the institution shall not be liable for telephone charges resulting from the improper use of inmate telephones. Institution business telephones should not be used for inmate telephone contact except in unusual situations and then only with the permission of the superintendent or his designee. Outgoing telephone calls only will be allowed, subject to the conditions authorized by 103 CMR 482.00.

(3) Inmate Telephone Restrictions.

(a) All inmate calls shall be one-way collect calls only, utilizing an automated operator.

(b) Direct dialed calls, three way or conference calling and calls to 411, 800, 900, 550, 976 or other multiple long distance carriers are prohibited.

(c) Inmates may be allowed a total of 15 telephone numbers authorized for use in conjunction with the inmates PIN. Five of these numbers shall be reserved for attorney telephone numbers.

(d) All inmate telephone calls, except calls to pre-authorized attorney telephone numbers are subject to telephone monitoring.

(e) All inmate telephone calls are subject to duration limits, or other restrictions such as authorized calling hours as determined by procedures developed by the Superintendent of each facility.

(f) All inmate telephone calls require posit call acceptance by the called party prior to the call being connected. The telephone system shall use a pre-recorded name to announce who the call is from.

(g) All inmate telephone calls shall contain a pre-recorded announcement identifying that the collect call is originating from an inmate at a Massachusetts Department of Correction (institution) and indicate that the call is subject to being recorded and that any attempt to access a three party line or conference call will cause the system to immediately disconnect the call.

(h) An inmate's telephone privileges, except for attorney telephone calls may be suspended or curtailed either pending disciplinary action, administrative action or as part of a disciplinary sanction.

(4) Suspension of Inmate Telephone Use - Inmate telephone use may be suspended by the Superintendent or his designee when, in the Superintendent's opinion, inmate telephone use presents a threat to the institution's security. Telephone calls to courts and attorneys shall not be suspended.

482.08: Inmate Telephone Use for Court or Attorney Contact

Telephone calls to pre-authorized attorney numbers shall not be suspended or curtailed except in an institutional emergency. Telephone calls to pre-authorized attorney numbers shall not be subject to telephone monitoring or recording.

Code of Massachusetts Regulations
Title 103: Department of Correction
Chapter 911.00: County Correctional Facilities—Budget and Fiscal Management (Refs & Annos)

103 CMR 911.08

# 911.08: Inmate Funds

Currentness

Written policy and procedure regarding inmate funds shall be established and include the following:

(1) Upon receipt of an outstanding victim and witness assessment from a court, the Sheriff/facility administrator shall transmit to the court any part or all of the monies earned or received by the inmate and held by the county correctional facility, except monies derived from interest earned upon such deposits.

(2) Any monies derived from interest earned upon the deposit of such monies and revenue generated by the sale or purchase of goods or services to persons in county correctional facilities may be expended for the general welfare of all the inmates at the discretion of the Sheriff/facility administrator.

(3) When transactions between inmates are permitted, staff approval shall be necessary for such transactions.

The Massachusetts Administrative Code titles are current through Register No. 1444, dated May 28, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 103, § 911.08, 103 MA ADC 911.08

**End of Document**

# 801 CMR 21.00: PROCUREMENT OF COMMODITIES OR SERVICES, INCLUDING HUMAN AND SOCIAL SERVICES

Section



## 21.01: Purpose, Application and Authority

(1) Purpose. The purpose of 801 CMR 21.00 is to provide all Departments with uniform rules and standards governing the Procurement of Commodities or Services, or both, including Human and Social Services for Clients. Procurements will be considered in the best interests, or the Best Value, to a Department and the State when a Procurement supports and balances the following Procurement Principles: the achievement of required outcomes, generates the best quality economic value, is performed timely, minimizes the burden on administrative resources, expedites simple or routine purchases, allows flexibility in developing alternative Procurement and business relationships, encourages competition, encourages the continuing participation of quality Contractors and supports State and Department Procurement planning and implementation.

(2) Application.

(a) Unless otherwise provided by law and excluding procurements for legal services, 801 CMR 21.00 shall apply to all Procurements of Commodities or Services, or both, by any Executive Office, Department, Agency, Office, Division, Board, Commission or Institution within the Executive Branch. 801 CMR 21.00 will not apply to the Legislative Branch, Judicial Branch, Constitutional Offices, Elected Offices, Public Institutions of Higher Education, the Military Division and Independent Public Authorities, although the use of 801 CMR 21.00 by these entities is encouraged. 801 CMR 21.00 will not apply to interdepartmental services or transactions between two or more State Departments (815 CMR 6.00) or to grants and subsidies (815 CMR 2.00). The Executive Office for Administration and Finance (ANF) or the Operational Services Division (OSD) will interpret 801 CMR 21.00 and may take whatever actions necessary to carry out the purposes of 801 CMR 21.00. No Department shall incur any obligation for, or authorize payments for, any Commodities or Services except in accordance with 801 CMR 21.00. ANF, OSD and the Office of the Comptroller (CTR) may issue additional policies, procedures and Contract forms to be used by Departments to carry out the purposes of 801 CMR 21.00. OSD, through its Division of Purchased Services, may issue policies, procedures and Contract forms to be used by Departments for the procurement of Human and Social Services for Clients.

(b) Pursuant to M.G.L. c. 30, § 65, 801 CMR 21.00 shall apply to all Procurements for legal services by any Officer, Department, Agency, Board or Commission serving under the Governor, including Public Institutions of Higher Education, or within one of the Executive Offices headed by a Secretary appointed by the Governor. OSD, in consultation with the Governor's Chief Legal Counsel and the Office of the Attorney General, shall develop policies and procedures regarding the competitive procurement of outside legal services, pursuant to M.G.L. c. 30, § 65. Such policies and procedures shall include an initial determination by the Governor's Chief Legal Counsel that the legal services can not be provided by a state employee before the procurement or engagement of outside legal services. The Incidental Purchase Competitive Procurement Exception in 801 CMR 21.05(1) shall not apply to the procurement of outside legal services.

(3) Authority. 801 CMR 21.00 is promulgated under the authority of M.G.L. c. 7, §§ 4, 4A and 22; M.G.L. c. 29, §§ 27B, 29A, 29B and 29F; M.G.L. c. 30, §§ 51, 52 and 65; St. 1993, c. 110, § 274, as amended; and Executive Orders 279 and 350.

21.02: Definitions

Acquisition Method. The method of procuring a Commodity or Service, or both. Acquisition methods include outright purchase, license, lease-purchase, lease, rental, fee-for-service or other methods authorized by law and implemented in accordance with policies and procedures issued by ANF, OSD and CTR.

Authorized Signatory. An individual authorized in writing to execute Contracts or other agreements or commitments on behalf of a Department or Contractor.

Available Funding. Operating appropriations, capital appropriations, trust funds or federal grant funds which have been appropriated or authorized for the purposes of a Contract.

Best Value. The result of common sense Procurement decision-making consistent with the State's Procurement Principles, which are to balance and support the achievement of: required outcomes, best quality economic value, timely performance, minimizing the burdens on administrative resources, expediting simple or routine purchases, flexibility in developing alternative Procurement and business relationships, encouraging competition, encouraging the continuing participation of quality Contractors and supporting State and Department Procurement planning and implementation.

Bidder. An individual or organization proposing to enter into a Contract to provide a Commodity or Service, or both, to or for a Department or the State.

Client. An individual, group of individuals, the family or other person(s) who provides support to such individuals and who is eligible for or receiving Human and Social Services. Also referred to as "consumer".

Commodities. An article of trade, goods, products, supplies or information technology resources, including automated data processing and telecommunications hardware, software and systems.

Commonwealth Terms and Conditions. Documents, jointly issued by ANF, OSD and CTR, that must be executed by all Contractors that enter into Contracts with the State.

Consultant Contract. A Contract for consultant services pursuant to M.G.L. c. 29, § 29A.

Contract. A legally enforceable agreement between a Contractor and a Department. ANF, OSD and CTR shall jointly issue Commonwealth Terms and Conditions, a Standard Contract Form and other forms or documentation that Departments shall use to document the Procurement of Commodities or Services, or both.

Contract Employee. An individual Contractor whose Contract performance was classified, prior to the Contractor's selection, as work to be performed under the direct supervision and control of the Department, and not work as an independent Contractor, pursuant to the federal Internal Revenue Service (IRS) SS-8 process.

Contractor. An individual or organization which enters into a Contract with a Department or the State to provide Commodities or Services, or both.

Department. Any Executive Office, Department, Agency, Office, Division, Board, Commission or Institution within the Executive Branch excluding the Legislative Branch, Judicial Branch, Constitutional Offices, Elected Offices, Public Institutions of Higher Education, the Military Division and Independent Public Authorities.

Designee. A State employee who has been delegated authority in writing to act on behalf of a Department Head or other Department officer in their official capacity.

Duration. The authorized total period of performance of a Contract under 801 CMR 21.00, which includes the initial duration of a Contract, either less than one fiscal year, a single fiscal year or multiple fiscal years, and any options to renew beyond the initial duration of the Contract.

21.02: continued

Environmentally Preferable Products and Services. Commodities or Services that are less detrimental to the environment and human health than competing Commodities or Services serving the same purpose. Includes Commodities or Services that minimize waste, use recycled materials, conserve energy or water, or reduce the consumption or disposal of toxic materials.

Execution. The distinct, verifiable signature or symbol of an authorized signatory of a Contractor or a Department which, when affixed to a document, is legally binding. If the signature is affixed through electronic means, the action of signing must be accomplished consistent with information processing standards established by CTR or by law.

Executive Office for Administration and Finance (ANF). The Executive Office established by M.G.L. c. 7.

Governor's Chief Legal Counsel. The attorney, appointed by the Governor, who serves as the chief legal advisor to the Governor and who is responsible for the approval of outside legal services pursuant to M.G.L. c. 30, § 65.

Human and Social Services. Services provided by a Contractor to assist, maintain or improve the personal, mental or physical well-being of Clients. This may include, but is not limited to, social, habilitative, rehabilitative, mental health, mental retardation, special education, vocational, employment and training and elder services.

Independent Contractor. An individual or organization under Contract with a Department where the Contractor's work is not performed under the direct supervision and control of a Department.

Office of the Attorney General. The Constitutional Office, headed by the Attorney General and established pursuant to M.G.L. c. 12.

Office of the Comptroller (CTR). The Department established pursuant to M.G.L. c. 7A.

Operational Services Division (OSD). The Department within the Executive Office for Administration and Finance established pursuant to M.G.L. c. 7, § 4A to regulate and oversee the Procurement of Commodities or Services in the State. OSD includes the Division of Purchased Services established by St. 1993, c. 110, § 274, as amended.

Procurement. The acquisition of Commodities or Services, or both, which may be made through an outright purchase, license, lease-purchase, lease, rental, fee-for-service or other method approved by OSD or authorized by law.

Procuring Department. A Department authorized to procure Commodities or Services, or both, for the Department or on behalf of multiple Departments. OSD shall be the primary Procuring Department for Statewide Contracts and may designate another Department to act as the Procuring Department for a Statewide Contract.

Recycled Products. Goods containing materials which have been diverted from the solid waste stream including post-consumer materials and materials or by-products generated in industrial processes or which have been wholly or partially remanufactured.

Request for Response (RFR). The mechanism used to communicate Procurement specifications and to request Responses or interest from potential Bidders. An RFR may also be referred to as a "solicitation".

Response. A Response from a Bidder to a Request for Response (RFR) under a competitive Procurement. A Response shall include submissions commonly referred to as "bids", "quotes" or "proposals".

Secretariat. Any Executive Office established by M.G.L. chs. 6A and 7, including any Department, Agency, Office, Division, Board, Commission or Institution within such Executive Offices.

21.02: continued

Selected Bidder. A Bidder that has been selected to negotiate a Contract with a Procuring Department.

Services. The furnishing of time, labor, effort or specialized skills by a Contractor. Services shall include operational, professional, maintenance and repair, non-professional, consultant and Human and Social Services, as well as any other services identified in policies and procedures issued by ANF, OSD and CTR.

Standard Contract Form. A Contract form, jointly issued by ANF, OSD and CTR, that Departments shall use for the Procurement of Commodities or Services, or both, which incorporates by reference a Commonwealth Terms and Conditions.

State. The Commonwealth of Massachusetts.

Statewide Contract. A Contract procured on behalf of all Departments for specified Commodities or Services, or both, which may be used by any Department or other entities authorized by OSD.

Suspension. The halt of Contract performance due to the lack of Available Funding, a breach of Contract, inadequate performance, an unanticipated emergency or other circumstances determined by a Department to warrant a pause in Contract performance. A suspension may continue until lifted by the Department, if the reason for the suspension has been alleviated, or Contract performance may be terminated.

21.03: Requests for Information or Interest (RFI)

A Procuring Department may gather information to assist in the development of a potential Procurement by inviting other Departments, potential Bidders or other interested parties to provide technical and business advice concerning industry standards, practice, general cost or price structures or other information which is relevant to the type of Commodities or Services, or both, that a Procuring Department seeks to procure.

21.04: Statewide Contracts

OSD shall be the primary Procuring Department for Statewide Contracts unless OSD designates another Department to act as the Procuring Department for a Statewide Contract. OSD shall establish Statewide Contracts for Commodities or Services, or both, which shall be available to Departments and other entities authorized by OSD. Departments shall acquire Commodities or Services, or both, from available Statewide Contracts in accordance with policies and procedures issued by ANF, OSD and CTR.

21.05: Competitive Procurement Exceptions

A Procuring Department shall be authorized to procure Commodities or Services, or both, without a competitive Procurement under the following exceptions, and in accordance with policies and procedures issued by ANF, OSD and CTR. Any questions as to the existence of an exception under 801 CMR 21.05 shall be determined by ANF or OSD. All other provisions of 801 CMR 21.00 shall apply.

(1) Incidental Purchases. A one-time purchase, or multiple purchases, with a total dollar value that does not exceed the minimum amount established by law, ANF or OSD.

(2) Exemption from Competitive Procurement. A general law, special law or other existing legal obligation that specifically exempts or prohibits a Procuring Department or a specific Contract from being competitively procured or specifically names a particular Contractor(s) to be awarded a Contract.

21.05: continued

(3) Emergency Contract. An emergency Contract shall be appropriate whenever a Procuring Department Head determines that an unforeseen crisis or incident has arisen which requires or mandates the immediate acquisition of Commodities or Services, or both, to avoid substantial harm to the functioning of government or the provision of necessary or mandated services or whenever the health, welfare or safety of Clients or other persons or serious damage to property is threatened. The Contract shall be effective only for the period necessary to cure the emergency or in accordance with policies and procedures issued by ANF, OSD and CTR. Each Secretariat may establish a policy for administering emergency Contracts.

(4) Collective Purchasing. The acquisition of Commodities or Services, or both, by one or more Departments from existing Contracts that have been established by or are proposed by federal agencies, other States or any other public entity. Prior to any acquisitions by Departments under 801 CMR 21.05(4), OSD shall confirm or identify which Contracts may be used by Departments and any other requirements for these Contracts.

NON-TEXT PAGE

21.05: continued

(5) Interim Contracts. An Interim Contract may be used to prevent a lapse of Contract performance in the following circumstances:

(a) Termination or Suspension of Current Contractor. An Interim Contract may be executed whenever an existing Contract has been or will be terminated or suspended for any reason or whenever a Contractor is unable to complete full performance under a Contract. An Interim Contract may be offered to the Bidder that offered the next Best Value Response under the original Procurement and under the same terms and prices offered in that Bidder's original Response. The duration of an Interim Contract shall be limited to the remaining time available under the duration stated in the original RFR, including any options to renew. If the Department is unable to negotiate a Contract with any of the original Bidders who submitted Responses, in their original rank order according to Best Value, and under the same terms as offered in their original Response, the Department will be required to conduct a new competitive Procurement.

(b) Delayed Competitive Procurement. An Interim Contract may be executed with a current Contractor(s) when a new competitive Procurement has been commenced, but due to an unanticipated delay, has not been completed prior to the end of the duration available under the current Contract, as specified in that Contract's original RFR. An Interim Contract may be used to extend the current Contract(s), under the same terms and conditions, only for the period necessary to complete the competitive Procurement, including the execution of new Contracts.

(6) Contract Employees. A Department requiring the performance of an Individual Contractor, where the planned Contract performance has been classified, prior to the Contractor's selection, as work of a Contract Employee and not that of an Independent Contractor, may select an individual for that Contract using a recruitment process similar to the process the Department uses to select employees, rather than using the Request for Response process under 801 CMR 21.06.

21.06: Competitive Procurement Standards

All acquisitions of Commodities or Services, or both, must be competitively procured unless the acquisition qualifies as an exception under 801 CMR 21.05. A Procuring Department shall be responsible for conducting a Procurement for single or multiple Contracts for Commodities or Services, or both, in accordance with 801 CMR 21.00 and policies and procedures issued by ANF, OSD and CTR. The policies and procedures shall address, but shall not be limited to, the following Procurement standards:

(1) Procurement File. A Procuring Department shall maintain a paper or electronic Procurement file for each Procurement of Commodities or Services, or both. The file shall contain the original, copies or the file location of the RFR and data or other information relevant to the Procurement and selection of a Contractor, the executed Contract form(s), correspondence with the Contractor and any applicable approvals or justifications.

(2) Duration. The duration of any Contract procured or executed under 801 CMR 21.00 shall include the initial duration of a Contract, either less than one fiscal year, a single fiscal year or multiple fiscal years, and any options to renew beyond the initial duration of the Contract. The duration established for a Contract shall be the period determined by the Procuring Department to be reasonably necessary to obtain the required Commodities or Services, or both, at the Best Value for the Procuring Department and the State and shall be subject to Available Funding for the Contract, as follows:

(a) The duration of any Contract funded with an annual operating appropriation (account type 01) account(s) is subject to the appropriation by the Legislature, in each fiscal year of the Contract, of sufficient funds for the purposes of the Contract.

(b) The duration of any Contract funded with an annual retained revenue appropriation (account type 01) account(s) is subject to the appropriation by the Legislature, in each fiscal year of the Contract, and receipt of sufficient revenues for the purposes of the Contract.

(c) The duration of any Contract funded with a trust account(s) (account type 03) is subject to the availability, or anticipated availability through authorized revenues, of sufficient funds for the purposes of the Contract. Payments are contingent upon the receipt of sufficient trust revenues to support payments under the Contract.

21.06: continued

(d) The duration of any Contract funded with a federal grant appropriation (account type 04) account(s) is subject to approval by the federal government and appropriation by the Legislature, in each fiscal year of the Contract, of sufficient funds for the purposes of the Contract.

(e) The initial duration of any Contract funded with a capital appropriation (account type 02) account(s) is limited to the fiscal years in which sufficient funds are appropriated by the Legislature for the purposes of the Contract, provided that any options to renew which extend beyond the original authorization of funding of the capital account(s) funding the Contract is subject to the extension, by the Legislature, of the authorization of funding or a separate appropriation, in each additional fiscal year of the Contract, with sufficient funds for the purposes of the Contract.

(f) If the appropriation, authorization or Available Funding ceases for a Contract, for any reason, a Contract shall be deemed under Suspension and Contract performance must halt. A Contractor shall not be entitled to compensation for any performance provided during the period of Contract Suspension. A Department may lift the Suspension if Available Funding is received. In the absence of foreseeable Available Funding, a Department may terminate the Contract.

(3) Scope of Contract Participants. A Procuring Department may draft a Request for Response (RFR) for specified Commodities or Services, or both, to include an option for additional Departments to purchase under the same terms of the RFR and may require Bidders to provide Responses specifying their ability to provide the specified Commodities or Services, or both, to other Departments in addition to the Procuring Department and the rates that will be used for the additional business given to the Contractor.

(4) Request for Responses (RFR).

(a) An RFR shall be used to solicit and select Responses from qualified Bidders under a competitive Procurement. The goal of all RFRs shall be to obtain the Best Value of Commodities or Services, or both, for the State. An RFR may include attributes of any of the methods of competitive Procurement formerly referred to as a request for proposals, request for qualifications or quotes, invitation for bids or good business practices.

(b) The Procuring Department shall draft an RFR which it deems appropriate, efficient and cost effective for the type of Procurement required, in accordance with policies and procedures issued by ANF, OSD and CTR. These policies and procedures may include total Contract value thresholds, minimum Procurement requirements and legal or regulatory restrictions, including limitations on the purchasing of certain types of restricted Commodities or Services or from certain restricted Bidders, and requirements and allowable preferences for purchasing of certain types of Commodities and Services.

(c) An RFR shall include the Acquisition Method to be used; whether single or multiple Contractors are sought; whether additional Departments will have access to the Procurement as outlined in 801 CMR 21.06(3); the anticipated duration of the Contract including anticipated renewal options; the available funding or anticipated compensation for the Contract, if relevant; detailed specifications or the anticipated goals or outcomes to be accomplished by the Procurement; instructions for submission of Responses; and a deadline date for submission of Responses.

(d) RFRs may be used to establish criteria which prospective Bidders must satisfy in order to be placed on a list of qualified Contractors. These criteria may include, but are not limited to, technical expertise, experience, quality of performance, location, availability of Commodities and Services, rates, prices, catalogs of Commodities or Services, or both, or other criteria relevant to a particular Procurement.

21.06: continued

(e) Recycled and Environmentally Preferable Products and Services. OSD, in cooperation with relevant environmental departments, shall periodically establish policies and procedures that promote, to the greatest extent feasible, the statewide procurement and use of recycled products and environmentally preferable products and services (EPPs), and the reporting thereof, by Procuring Departments and Contractors. These policies and procedures shall include, but not be limited to, designating EPPs and establishing minimum standards specifications for their procurement and use. RFRs may provide for additional points for any RFR Response in which a Bidder offers to provide EPPs as part of Contract performance, and for any RFR Reponse in which a Bidder offers to utilize EPPs or implement environmentally preferable practices as part of the performance of its business.

(f) Any Response to an RFR submitted by a Bidder shall be considered a firm offer and shall remain effective unconditionally for a minimum of 90 days unless a longer period is specified in an RFR, or unless extended by the Department upon prior notice to Bidders.

(5) Identification of Bidders or Public Notice. A Procuring Department shall be responsible for identifying Bidders capable and willing to provide the Procuring Department and the State with the Best Value of Commodities or Services, or both. A Procuring Department shall identify potential Bidders through public notice, newspaper or electronic advertisements or other methods identified by ANF or OSD as appropriate for a particular Procurement, or as required by law.

(6) Procurement Amendments. A Procuring Department may, at any time prior to the execution of a Contract, and without penalty, amend a Procurement or change the Procurement requirements, scope, budget or Procurement schedule upon notice to Bidders.

(7) Procurement Cancellation. A Procuring Department may for any reason, and at any time prior to the execution of a Contract, and without penalty, notify Bidders of a cancellation of a Procurement and the rejection of all Responses.

(8) Corrections or Clarifications to a Submitted Response. A Procuring Department shall determine whether to allow a correction of minor informalities in a Response. Minor informalities are matters of form rather than substance and include clerical errors or minimal or insignificant mistakes that can be corrected without prejudice to other Bidders. A Procuring Department may, upon written request of a Bidder, allow a correction of a minor informality in a Response which is clearly evident, such as a typographical error, transposition error or arithmetical error where the correct answer is obvious, or if the mistake is discovered by the Procuring Department, the Procuring Department may note the correction on the Response. If a Procuring Department requires a clarification of any particular section of a Response the Department must provide all Bidders that submitted Responses with the same notice and opportunity for clarification of the identified section in the Response. Clarifications are explanations of what is stated in a Response and may not be used as an opportunity to submit supplemental information or a change to a Response, unless the Department specifically requests these submissions or changes as part of the clarification of all Responses. No correction or clarification of Response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other Bidders or to fair competition shall be permitted.

(9) References. A Procuring Department shall have the right to request references at any time during the Procurement process and at any time during the period of Contract performance. A Procuring Department may verify any references included in a Bidder's Response and conduct any other reference or credit checks as the Procuring Department deems appropriate. The Procuring Department may consider any written references, including documentation of performance records of a Bidder on file at the Procuring Department or solicited from any other Department or entity, documentation of reference checks or other documentation solicited by or submitted to the Procuring Department during the Procurement process.

21.06: continued

(10) Disqualification. A Procuring Department shall disqualify any Response that the Department determines to be unresponsive, including, but not limited to:

(a) Responses which are received after the deadline for submission specified in an RFR.

(b) Responses that fail to meet, address or comply with material requirements in an RFR, including instructions for submission, content or format.

(c) Responses which indicate collusion or unfair trade practices by one or more Bidders agreeing to act in a manner intended to avoid or frustrate any of the provisions of 801 CMR 21.00 or any other law or regulation.

(d) Responses submitted by a Bidder, or which identify a subcontractor, currently subject to any State or federal debarment order or determination. If the identified subcontractor is replaceable without a material effect on the Bidder's Response, the Bidder may be given the opportunity to select another subcontractor prior to execution of the Contract.

(11) Best and Final Offer, Evaluation of Responses and Selection of Bidder(s). The following options shall be available to a Department even if these options have not been included as part of an RFR:

(a) Best and Final Offer. At any time after submission of Responses and prior to the final selection of Bidders for Contract negotiation or execution, a Procuring Department shall have the option to provide Bidders with an opportunity to provide a Best and Final Offer and may limit the number of Bidders selected for this option.

(b) Evaluation of Responses and Selection of Bidder(s). A Department shall have the authority to evaluate Reponses and select a Bidder(s) that it determines has offered the Best Value Response to the goals and performance requirements outlined in the RFR.

(12) Notification of Selected Bidders. A Procuring Department shall determine the timing and method of notifying Bidders of the Bidder(s) selected for Contract negotiation or the Contractor(s) that has executed a Contract. Notice may be limited to those Bidders who submitted Responses to an RFR.

(13) Press Conferences or News Release Restrictions. No Bidder shall make any press conference, news releases or announcements concerning its selection or non-selection for a Contract prior to the Procuring Department's public release of said information or prior to the written approval of the Procuring Department.

(14) Debriefing. An RFR may contain the opportunity for non-successful Bidders to request a debriefing to be conducted after Contract execution with Selected Bidder(s). Debriefings are designed to identify the weak areas of a Bidder's Response and suggest improvements for future Procurements. Comparisons with other Responses will not be made during a debriefing. If an RFR is silent as to an opportunity for a debriefing, the Procuring Department shall have the option to grant or deny a debriefing and may limit the number of debriefings granted.

(15) Dispute Resolution Procedures for Human and Social Service Procurements. OSD may issue policies and procedures for conducting debriefings and appeals for Human and Social Service Procurements.

(16) Decisions made pursuant to the provisions of 801 CMR 21.00 are not subject to the provisions of M.G.L. c. 30A, §§ 10 and 11.

21.07: Contract Negotiation, Execution and Effective Start Date

(1) Contract and Contract Amendment Negotiation. The Department may negotiate with Selected Bidder(s) prior to execution of a Contract, and with Contractors after a Contract has been executed, as follows:

(a) The language of the RFR shall determine what elements of Contract performance or cost, within the scope of the original RFR and a Bidder's or Contractor's Response, may be negotiated. If the RFR is silent as to what can be negotiated, the Procuring Department and a Selected Bidder or Contractor may negotiate only the details of performance identified within the scope of the original RFR and the Bidder's or Contractor's Response, and may not increase or change the scope of performance or costs.

21.07: continued

(b) The Department and a Selected Bidder or Contractor may negotiate additional language which clarifies their understanding of, but does not change, the language of the Contract or Contract performance identified within the scope of the original RFR and the Bidder's or Contractor's Response.

(c) Notwithstanding 801 CMR 21.07(1)(a), the Department and a Selected Bidder or Contractor may negotiate a change in any element of Contract performance or cost, identified in the original RFR or the Bidder's or Contractor's Response, which results in lower costs or in a more cost effective or better value than was presented in the Bidder's or Contractor's originally selected Best Value Response.

(2) Contract Execution.

(a) The identification of a Selected Bidder(s) shall create no contractual obligation on the Procuring Department or the State. Performance may not begin, until a Contract is properly executed. The execution of a Contract is conditioned upon the Procuring Department's acceptance of a Selected Bidder's Response excluding any clauses or sections that are stricken by the Department as unacceptable and including any additional negotiated language as authorized under 801 CMR 21.07(1).

(b) Commonwealth Terms and Conditions. An authorized signatory of a Bidder must execute a Commonwealth Terms and Conditions, which is executed only once and must be filed as prescribed by CTR. A Commonwealth Terms and Conditions will be incorporated by reference into and shall apply to any Contract for Commodities or Services, or both, that is executed by the Bidder and any Department of the State.

(c) Standard Contract Form. An authorized signatory of the Contractor and the Department must execute a Standard Contract Form for Procurements under 801 CMR 21.00 in accordance with policies and procedures issued by ANF, OSD and CTR. The Contract shall incorporate by reference a Commonwealth Terms and Conditions and will include the RFR, the Bidder's Response, excluding any clauses or sections that are stricken by the Department as unacceptable and including any additional negotiated language as authorized under 801 CMR 21.07(1). Contracts must be filed as prescribed by CTR.

(d) A Selected Bidder's Response shall be disqualified if the Procuring Department determines that the Bidder:

1. is intentionally or unreasonably delaying the timely execution of a Commonwealth Terms and Conditions or the Standard Contract Form or is unable to execute timely even for reasonable delays;
2. conditions execution of a Commonwealth Terms and Conditions or the Standard Contract Form upon the Procuring Department's acceptance of additional material or amended Contract terms and conditions, or specifies that the Bidder's Response is "non-negotiable", "all-or-nothing" or that there can be "no substitutions";
3. negotiates in bad faith;
4. refuses to execute a Commonwealth Terms and Conditions or the Standard Contract Form;
5. demands that the Department execute the Bidder's Contract form instead of a Commonwealth Terms and Conditions or the Standard Contract Form; or
6. is unable to reach final agreement on contractual terms with the Department within a reasonable time as determined by the Department.

(e) If a Selected Bidder's Response is disqualified, for any reason, the Procuring Department may negotiate a Contract with the next Best Value qualified Bidder(s).

(3) Contract Effective Start Date. Notwithstanding verbal representations by the parties, or an earlier start date listed in the Standard Contract Form, the effective start date of a Contract shall be the latest of the following dates:

(a) the date the Standard Contract Form has been executed by an Authorized Signatory of the Contractor;

(b) the date the Standard Contract Form has been executed by an Authorized Signatory of the Procuring Department;

(c) the date of Secretariat or other approval(s) required by law or regulation, including approval of legal services contracts by the Governor's Chief Legal Counsel and, for litigation services, by the Office of the Attorney General; or

(d) a later date specified in the Standard Contract Form.

21.08: Contract Funding and Compensation

(1) The Contractor shall only be compensated for performance delivered to and accepted by the Department in accordance with the specific terms and conditions of a properly executed Contract. All Contract payments are subject to Available Funding, as described in 801 CMR 21.06(2), and shall be subject to automated intercept pursuant to M.G.L. c. 7A, § 3 and 815 CMR 9.00. Contract payments for Human and Social Services are also subject to the provisions of 808 CMR 1.00. A Department shall be under no legal obligation to compensate a Contractor, or to obtain additional funding for any performance, costs or other commitments which are made outside of the scope of a Contract.

(2) Emergency and Exceptional Circumstances. Notwithstanding 801 CMR 21.07(2)(a) and (3) and 801 CMR 21.08(1), compensation for performance commenced prior to the contract effective start date shall be allowable in unanticipated, rare emergency or exceptional circumstances for the period from the date of the occurrence of such circumstance until a Contract is executed, which shall be documented by the Department as part of the Procurement File in accordance with policies and procedures issued by ANF, OSD and CTR.

(3) Payments cannot be issued until a properly executed Contract, with all requisite approvals, has been filed as prescribed by the CTR.

21.09: Quality Assurance

ANF, OSD, and CTR shall establish policies and procedures for conducting reviews of Department compliance with 801 CMR 21.00 and quality of Contractor performance.

21.10: Integration

801 CMR 21.00 shall be interpreted consistent with, and Procuring Departments shall comply with, state or federal general or special laws, regulations, executive orders and other authorities mandating additional requirements related to the procurement of Commodities and Services, including policies and procedures issued by ANF, OSD and CTR.

21.11: Severability

If any provision of 801 CMR 21.00 is declared or found to be illegal, unenforceable or void, then Departments, Bidders and Contractors shall be relieved of all obligations under that provision only, and all other provisions of 801 CMR 21.00 shall remain in full force and effect.

REGULATORY AUTHORITY

801 CMR 21.00: M.G.L. c. 7, §§ 4, 4A and 22; c. 29, §§ 27B, 29A, 29B and 29F; M.G.L. c. 30, §§ 51, 52 and 65; St. 1993, c. 110 § 274 and Executive Orders 279 and 350.

of paying debts of said corporation, and the city is not authorized to extend further financial aid to said corporation. The city, by vote of its board of aldermen, and said corporation, by vote of its board of governors, are authorized to contract for the repayment for the aid extended hereunder without interest by credits against charges for hospitalization of indigent residents or otherwise.

SECTION 4. Said chapter 142 is hereby further amended by inserting after section 4 the following section: —

*Section 4A.* Any property, real or personal, which is owned by Chelsea Memorial Hospital at the time when new hospital facilities are completed and which is then no longer needed by the corporation in carrying out its purposes, may be sold by said corporation, and the proceeds shall be held or used for the purposes of the trust provided for in section one.

SECTION 5. Section 1 of chapter 670 of the acts of 1958, as amended by section 4 of chapter 142 of the acts of 1960, is hereby further amended by striking out the first sentence and inserting in place thereof the following sentence: — For the purpose of aiding Chelsea Memorial Hospital to construct, originally equip and furnish a hospital building or buildings or an addition or additions to a hospital building or buildings, the city of Chelsea may borrow from time to time within a period of ten years from the passage of this act such sums as may be necessary, not exceeding, in the aggregate, one hundred and ninety thousand dollars, and may issue bonds or notes therefor which shall bear on their face the words "Chelsea Memorial Hospital Loan, Act of 1958".

SECTION 6. This act shall take effect upon its passage.

*Approved June 19, 1962.*

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**Chap. 569.** AN ACT PROVIDING FOR THE DISPOSITION OF CERTAIN FUNDS OF INMATES IN PENAL INSTITUTIONS.

*Whereas,* The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith for the expenditure of certain available funds for the general welfare of inmates of penal institutions, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

*Be it enacted, etc., as follows:*

Section 3 of chapter 127 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following sentence: — Any interest accruing as a result of the deposit of such money may, by agreement with the prisoners concerned, be expended for the general welfare of all the inmates at the discretion of the superintendent.

*Approved June 19, 1962.*

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**Chap. 570.** AN ACT AUTHORIZING THE TOWN OF LEXINGTON TO APPROPRIATE MONEY TO COMPENSATE SUBDIVIDERS FOR CONSTRUCTING WAYS OR SERVICES TO GREATER WIDTH OR SIZE THAN WOULD BE REQUIRED TO SERVE A SUBDIVISION ALONE.

*Be it enacted, etc., as follows:*

SECTION 1. The town of Lexington may at any town meeting appropriate money to be expended by the board of selectmen for reimbursing subdividers for part of the cost of constructing ways or installing mu-

Notwithstanding the premium contribution requirements established by this section, no enrollee shall be exempt from the copayment requirements established herein or by the department. Said copayments shall be designed to encourage the cost-effective and cost conscious use of said services.

The department shall promulgate regulations necessary to implement the requirements of this section in consultation with the department of public health, the department of public welfare, and the division of medical assistance. The department shall assist said agencies to maximize federal financial participation for state expenditures made on behalf of program enrollees.

The department shall report quarterly to the house and senate committees on ways and means and to the joint committee on health care on enrollment demographics, claims expenditures and the annualized costs of said program. The department shall file notice with said committees and the secretaries of the executive office of administration and finance and health and human services not less than thirty days before modifying program benefits and eligibility standards that are intended to ensure that program costs are limited to the funds appropriated therefor.

The program established by this section shall not give rise to enforceable legal rights in any party or an enforceable entitlement to the services funded herein and nothing stated herein shall be construed as giving rise to such enforceable legal rights or such enforceable entitlement.

**SECTION 122.** Section 39 of chapter 121B of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by adding the following paragraph:-

The secretary of communities and development shall issue regulations requiring that in any state-funded project which contains units for both elderly persons of low income and handicapped persons of low income, the number of units occupied by non-elderly persons shall not exceed ten percent of the total number of units. Said secretary shall develop and implement said regulations in a manner consistent with relevant federal laws.

**SECTION 123.** Section 16 of chapter 123B of the General Laws, as so appearing, is hereby amended by inserting after the word "person", in line 8, the second time it appears, the words: —, or from the parent of an adult with a disability or disabilities.

**SECTION 124.** Said section 16 of said chapter 123B, as so appearing, is hereby further amended by inserting after the word "circumstances" in line 12, the words:— ; and provided, further, that all charges recovered from the parent of an adult child with a disability or disabilities, shall be recovered in accordance with procedures developed as set forth in section one hundred and forty-two of chapter one hundred and fifty of the acts of nineteen hundred and ninety.

**SECTION 125.** Section 3 of chapter 127 of the General Laws, as so appearing, is hereby amended by striking out the second sentence and inserting in place thereof the following two sentences: — The superintendents of correctional institutions of the commonwealth and the superintendents and keepers of jails, houses of correction and of all

other penal or reformatory institutions shall, upon receipt of an outstanding victim and witness assessment, transmit to the court any part or all of the monies earned or received by any inmate and held by the correctional facility, except monies derived from interest earned upon said deposits and revenues generated by the sale or purchase of goods or services to persons in correctional facilities, to satisfy the victim witness assessment ordered by a court pursuant to section eight of chapter two hundred fifty-eight B. Any monies derived from interest earned upon the deposit of such money and revenue generated by the sale or purchase of goods or services to persons in the correctional facilities may be expended for the general welfare of all the inmates at the discretion of the superintendent.

**SECTION 126.** The second paragraph of section 48A of said chapter 127, as so appearing, is hereby amended by inserting after the first sentence the following sentence:—The superintendent shall also expend any part or all of such money of any inmate to satisfy the victim and witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B.

**SECTION 127.** The third paragraph of section 86F of said chapter 127 of the General Laws, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: — First, an amount necessary to satisfy the victim and witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B; second, an amount determined by the sheriff for substantial reimbursement to the county for providing food, lodging and clothing for such inmate; third, the actual and necessary food, travel and other expenses of such inmate when released for employment under the program; fourth, the amount ordered by any court for support of such inmate's spouse or children; fifth, the amount arrived at with public welfare departments; sixth, sums voluntarily agreed to for family allotments and for personal necessities while confined.

**SECTION 128.** Said second paragraph of said section 48A of said chapter 127, as so appearing, is hereby further amended by adding the following sentence:— The superintendent shall also expend any part or all of such money of any inmate to satisfy the victim and witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B.

**SECTION 129.** Chapter 127 of the General Laws is hereby amended by striking out section 87, as so appearing, and inserting in place thereof the following section:—

Section 87. (a) Every inmate of a correctional institution or any other penal institution in the commonwealth shall be allowed to send mail to the President or Vice President of the United States, a member of the Congress of the United States, the Attorney General of the United States, the director or any agent of the Federal Bureau of Investigation, any judge, attorney, clerk, probation officer, or parole officer the United States or of the commonwealth, the governor of the commonwealth, a member of the general court of the commonwealth, the attorney general of the commonwealth, the commissioner of public safety, the commissioner or any deputy commissioner of correction, and the superintendent of the institution in which the inmate is confined. A locked letter box shall be placed in each

# Acts (2009)

# Chapter 61

AN ACT TRANSFERRING COUNTY SHERIFFS TO THE COMMONWEALTH.

*Whereas,* the deferred operation of this act would tend to defeat its purpose, which is to transfer forthwith county sheriffs to the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

**SECTION 1.** Section 17 of chapter 37 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out the second and third paragraphs and inserting in place thereof the following paragraph:-

The sheriffs of the counties of Barnstable, Bristol, Norfolk, Plymouth and Suffolk and of the former counties of Berkshire, Essex, Franklin, Hampden, Hampshire, Middlesex and Worcester shall each receive a salary of $123,209. The sheriff of the county of Dukes shall receive a salary of $97,271. The sheriff of the county of Nantucket shall receive a salary of $71,332.

**SECTION 2.** Chapter 64D of the General Laws is hereby amended by striking out sections 11 to 13, inclusive, as so appearing, and inserting in place thereof the following 2 sections:-

Section 11. Except for Barnstable and Suffolk counties, there shall be established upon the books of each county of a transferred sheriff, the government of which county has not been abolished by chapter 34B or other law, a fund, maintained separate and apart from all other funds and accounts of each county, to be known as the Deeds Excise Fund.

Notwithstanding any general or special law to the contrary, except for Barnstable and Suffolk counties, on the first day of each month, 10.625 per cent of the taxes collected in the county of a transferred sheriff under this chapter shall be transmitted to the Deeds Excise Fund for each county; provided, however, that in any county in which its minimum obligation, established by the secretary of administration and finance in 2009, is insufficient in any given fiscal year to satisfy the unfunded county pension liabilities and other benefit liabilities of retired employees of the sheriff's office as determined by the secretary of administration and finance in consultation with appropriate county officials and county treasurers, beginning in fiscal year 2011, the county shall retain 13.625 per cent of the taxes collected in such county and transferred to the Deeds Excise Fund to satisfy the unfunded county pension liabilities and other benefit liabilities of retired employees of the sheriff's office until the minimum obligation is sufficient or until such county has paid such unfunded pension liability in full; and provided further, that once such liabilities are satisfied, the following month and each month thereafter, 10.625 per

cent of such taxes collected shall be retained by such county; provided, however, that an additional 30.552 per cent of said taxes collected in Nantucket county shall be transmitted to the Deeds Excise Fund on the first day of each month for said county through June 1, 2029; and provided further that if in a fiscal year the dollar amount that equals 30.552 per cent of said taxes collected in Nantucket county exceeds $250,000, the amount in excess shall be transmitted to the General Fund. The remaining percentage of taxes collected under this chapter, including all taxes collected under this chapter in Barnstable and Suffolk counties and all counties the government of which has been abolished by chapter 34B or other law, but not including the additional excise authorized in section 2 of chapter 163 of the acts of 1988, shall be transmitted to and retained by the General Fund in accordance with section 10.

Section 12. (a) Notwithstanding any general or special law to the contrary, of the amounts deposited in the Deeds Excise Fund for each county from revenues collected pursuant to this chapter: (1) not more than 60 per cent of the deposits shall be disbursed and expended for meeting the costs of the operation and maintenance of the county; and (2) not less than 40 per cent shall be disbursed and expended for the automation, modernization and operation of the registries of deeds.

(b) Notwithstanding any general or special law to the contrary, with respect to funds appropriated for the purposes designated in clause (2) of subsection (a) and which are not dedicated to the Deeds Excise Fund in each county under section 11, the county budget shall provide a continuing amount of expenditure of not less than 102.5 per cent of

the amount expended for that purpose in the preceding fiscal year.

**SECTION 3.** Notwithstanding any general or special law to the contrary, the offices of the Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth, and Suffolk county sheriffs are hereby transferred to the commonwealth as provided in this act.

**SECTION 4.** Notwithstanding any general or special law to the contrary, all functions, duties and responsibilities of the office of a transferred sheriff pursuant to this act including, but not limited to, the operation and management of the county jail and house of correction and any other statutorily authorized functions of that office, are hereby transferred from the county to the commonwealth.

**SECTION 5.** Notwithstanding any general or special law to the contrary, the government of Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth and Suffolk counties, except the office of county sheriff, shall retain all existing authority, functions and activities for all purposes including, but not limited to, the purposes established in chapters 34, 34A, 35 and 36 of the General Laws or as otherwise authorized by this act. This act shall not affect the existing county boundaries.

**SECTION 6.** Notwithstanding any general or special law to the contrary, all valid liabilities and debts of the office of a transferred sheriff, which are in force on the effective date of this act, shall be obligations of the commonwealth as of that date, except as may be otherwise provided in this act. All assets of the office of a transferred

sheriff on the effective date of this act shall become assets of the commonwealth, except as otherwise provided in this act.

**SECTION 7.** (a) Notwithstanding any general or special law to the contrary, all rights, title and interest in real and personal property, including those real properties improved upon through construction overseen by the division of capital asset management and maintenance and paid with commonwealth funds and which are controlled by the office of a transferred sheriff on the effective date of this act including, without limitation, all correctional facilities and other buildings and improvements, the land on which they are situated and any fixtures, wind turbines, antennae, communication towers and associated structures and other communication devices located thereon or appurtenant thereto shall be transferred to the commonwealth, except as otherwise provided in this act. This transfer of all buildings, lands, facilities, fixtures and improvements shall be subject to chapter 7 of the General Laws and the jurisdiction of the commissioner of capital asset management and maintenance as provided therein, except as otherwise provided in this act. The commonwealth shall take all necessary steps to ensure continued access, availability and service to any assets transferred to the commonwealth under this subsection to a local or regional organization that currently uses such assets.

(b) Notwithstanding any general or special law to the contrary, if a transferred sheriff occupies part of a building or structure owned by a county, the county shall lease that part of the building or structure to the commonwealth under reasonable terms determined by the

commissioner of capital asset management and maintenance.

(c) Notwithstanding any general or special law to the contrary, the transfer under this section shall be effective and shall bind all persons, with or without notice, without any further action or documentation. Without derogating from the foregoing, the commissioner of capital asset management and maintenance may, from time to time, execute and record and file for registration with any registry of deeds or the land court, a certificate confirming the commonwealth's ownership of any interest in real property formerly controlled by the office of a transferred sheriff pursuant to this section.

(d) This section shall not apply to the land and buildings shown as Parcel C on a Plan of Land in Braintree, Mass, dated October 2, 1997, prepared by County of Norfolk Engineering Dept., 649 High Street, Dedham, filed at the Norfolk county registry of deeds in plan book 454, page 128.

(e) Notwithstanding any provision of this section or sections 40E to 40I, inclusive, of chapter 7 of the General Laws to the contrary, in the event that the Dukes County jail and house of correction located at 149 Main Street in the town of Edgartown ceases to be used for public safety purposes and the commissioner of capital asset management and maintenance intends to sell said property, Dukes County shall hold the right of first refusal to purchase said property for nominal consideration, and shall hold such first refusal option for the first 60 days after receipt of the commissioner’s notice of intent to sell said property, and upon the non-acceptance by Dukes County of any such

offer, said property shall then be offered for sale by the commissioner pursuant to the provisions of said sections 40E to 40I, inclusive, of said chapter 7.

(f) This section shall not apply to the former Barnstable county house of correction located at the Barnstable County Complex on state highway route 6A in the town of Barnstable.

(g) This section shall only apply to that portion of the land on which the Plymouth county correctional facility, Plymouth county sheriff's garage and Plymouth county sheriff's offices are situated, including all parking areas, access roads and walkways and any other areas necessary to the use of such buildings, but excluding any open areas, the exact boundaries of which shall be determined by a land survey and plan by the commissioner of capital asset management and maintenance. Such land is part of the premises located at 24 Long Pond road in the town of Plymouth, consisting of 32.747 acres and described in Exhibit A to the lease agreement between Plymouth county and the Plymouth county sheriff which is recorded in the Plymouth county registry of deeds at book 10978, pages 233 and 234. These premises shall continue to be subject to the access easement described in said Exhibit A in said registry of deeds at book 10978, page 232.

**SECTION 8.** Notwithstanding any general or special law to the contrary, once the commonwealth has refinanced any outstanding bonds of the Plymouth County Correctional Facility Corporation, said corporation shall be dissolved and its assets shall be transferred to the

commonwealth; provided, however, that prior to said dissolution, the commonwealth shall transfer from the reserve fund created pursuant to the trust agreement executed on February 16, 1999 between the Plymouth County Correctional Facility Corporation and the State Street Bank and Trust Company to the county any balance remaining in the reserve fund to which the county is entitled pursuant to section 3.5 of said trust agreement. The criminal detention facility constructed pursuant to chapter 425 of the acts of 1991 shall be transferred to the commonwealth. The revenue held by the corporation in the Repair and Replacement and Capital Improvement Accounts shall be transferred to the Plymouth sheriff's Facility Maintenance Trust Account. The Plymouth sheriff shall make expenditures from this account only for the maintenance, repair and replacement of the sheriff's facilities subject to approval by the commissioner of capital asset management and maintenance.

**SECTION 9.** Notwithstanding any general or special law to the contrary, all leases and contracts of the office of a transferred sheriff which are in force on the effective date of this act shall be obligations of the commonwealth and the commonwealth may exercise all rights and enjoy all interests conferred upon the county by those leases and contracts except as may be otherwise provided in this act.

**SECTION 10.** Notwithstanding any general or special law to the contrary, beginning in fiscal year 2010 and thereafter until terminated, Barnstable, Bristol, Dukes, Nantucket, Norfolk, and Plymouth counties shall appropriate and pay to their respective county retirement boards, and any other entities due payments, amounts equal

to the minimum obligations to fund from their own revenues in fiscal year 2009 the operations of the office of the sheriff for the purpose of covering the unfunded county pension liabilities and other benefit liabilities of the retired sheriff's office employees that remain in the county retirement systems, as determined by the actuary of the public employee retirement administration commission. Pursuant to section 20 of chapter 59 of the General Laws, the state treasurer shall assess the city of Boston and remit to the State-Boston retirement system an amount equal to the minimum obligation of Suffolk county to fund from its own revenues in fiscal year 2009 the operations of the office of the sheriff. The secretary of administration and finance shall establish a plan for county governments to pay off these unfunded county pension liabilities and shall establish an amortization schedule to accomplish this task. These payments shall remain in effect for the duration of that amortization schedule, which shall not exceed the funding schedule established by the respective county retirement board. If the unfunded pension liability of retirees exceeds any county’s minimum obligation to fund operations from its own revenues as set forth in this section, the retirement system for such county may extend its pension funding schedule to the extent necessary to eliminate that excess unfunded pension liability. In the case of any such county, when the county has paid such unfunded pension liabilities in full, or the county has completed the amortization schedule as established under this section, whichever occurs first, the county’s obligation to make payments of its minimum obligations to fund its sheriff’s office operations, as determined under this section, shall terminate.

**SECTION 11.** Notwithstanding any general or special law to the contrary, any funds including, but not limited to, county correctional funds and other sources of income and revenue, to the credit of the office of a transferred sheriff on June 30, 2009, shall be paid to the state treasurer, but the county treasurer may pay appropriate fiscal year 2009 sheriff's department obligations after June 30, 2009. Payment of obligations to be charged to the sheriff's fiscal year 2009 budget as approved by the county government finance review board shall be within that budget or shall be approved by the secretary of administration and finance.

**SECTION 12.** (a) Notwithstanding any general or special law to the contrary and except for all counties the governments of which have been abolished by chapter 34B of the General Laws or other law, revenues of the office of sheriff in Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth and Suffolk counties for civil process, inmate telephone and commissary funds shall remain with the office of sheriff.

(b) Notwithstanding any general or special law to the contrary, in order to encourage innovation and enterprise, each sheriff's office shall annually confer with the house and senate committees on ways and means regarding that sheriff's efforts to maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state and local governments and other such accounts and regarding which revenues shall remain with the sheriff's office.

(c) Any sheriff who has developed a revenue source derived apart from the state treasury may retain that funding to address the needs of the citizens within that county.

(d) Any unencumbered carry-forward deeds excise or other funds to the credit of the sheriff on June 30, 2009 shall be paid to the state treasurer.

(e) Notwithstanding any general or special law or county charter to the contrary, regional services and contracts for such services including, but not limited to, regional communications centers and law enforcement support, shall continue until expired, terminated or revoked under the terms of the agreement or contract for such services.

**SECTION 13.** (a) Notwithstanding any general or special law to the contrary, all employees of the office of a transferred sheriff, including those who, on the effective date of this act, hold permanent appointment in positions classified under chapter 31 of the General Laws or those who have tenure in their positions by reason of section 9A of chapter 30 of the General Laws or do not hold such tenure, are hereby transferred to that transferred sheriff as employees of the commonwealth, without interruption of service within the meaning of said section 9A of said chapter 30 or said chapter 31 and without reduction in compensation or salary grade.

(b) Notwithstanding any general or special law to the contrary, employees of the office of a transferred sheriff shall continue to retain

their right to collectively bargain pursuant to chapter 150E of the General Laws and shall be considered sheriff's office employees for the purposes of said chapter 150E.

(c) Notwithstanding any general or special law to the contrary, all petitions, requests, investigations and other proceedings duly brought before the office of a transferred sheriff or duly begun by that sheriff and pending on the effective date of this act, shall continue unabated and remain in force, but shall be assumed and completed by the office of a transferred sheriff.

(d) Notwithstanding any general or special law to the contrary, all orders, rules and regulations duly made and all approvals duly granted by a transferred sheriff which are in force on the effective date of this act shall continue in force and shall thereafter be enforced until superseded, revised, rescinded or canceled in accordance with law by that sheriff.

(e) Notwithstanding any general or special law to the contrary, all books, papers, records, documents and equipment which on the effective date of this act are in the custody of a transferred sheriff shall be transferred to that sheriff.

(f) Notwithstanding any general or special law to the contrary, all duly existing contracts, leases and obligations of a transferred sheriff shall continue in effect. An existing right or remedy of any character shall not be lost or affected by this act.

**SECTION 14.** The rights of all employees of each office of a transferred sheriff shall continue to be governed by the terms of collective bargaining agreements, as applicable. If a collective bargaining agreement has expired on the transfer date, the terms and conditions of such agreement shall remain in effect until a successor agreement is ratified and funded. Notwithstanding the provisions of chapter 150E of the General Laws or any other general or special law or regulation to the contrary, employees of the office of a transferred sheriff, without a collective bargaining agreement in effect on the transfer date, shall not be transferred to the state retirement system until November 1, 2010 or until a successor agreement is ratified and funded whichever occurs first.

**SECTION 15.** Notwithstanding any general or special law to the contrary, a transferred sheriff in office on the effective date of this act shall become an employee of the commonwealth with salary to be paid by the commonwealth. The sheriff shall remain an elected official for the purposes of section 159 of chapter 54 of the General Laws. The sheriff shall operate pursuant to chapter 37 of the General Laws. The sheriff shall retain administrative and operational control over the office of the sheriff, the jail, the house of correction and any other occupied buildings controlled by a transferred sheriff upon the effective date of this act. The sheriff and sheriff's office shall retain and operate under all established common law power and authority consistent with chapters 126 and 127 of the General Laws and any other relevant General Laws.

**SECTION 16.** Notwithstanding any general or special law to the

contrary, a transferred sheriff shall be considered an "employer" as defined in section 1 of chapter 150E of the General Laws for the purposes of said chapter 150E. The sheriff shall also have power and authority as employer in all matters including, but not limited to, hiring, firing, promotion, discipline, work-related injuries and internal organization of the department.

**SECTION 17.** (a) Notwithstanding any general or special law or rule or regulation to the contrary, the sheriff, special sheriff, deputies, jailers, superintendents, deputy superintendents, assistant deputy superintendants, keepers, officers, assistants and other employees of the office of a transferred sheriff, employed on the effective date of this act in the discharge of their responsibilities set forth in section 24 of chapter 37 of the General Laws and section 16 of chapter 126 of the General Laws shall be transferred to the commonwealth with no impairment of employment rights held on the effective date of this act, without interruption of service, without impairment of seniority, retirement or other rights of employees, without reduction in compensation or salary grade and without change in union representation. Any collective bargaining agreement in effect on the effective date of this act shall continue in effect and the terms and conditions of employment therein shall continue as if the employees had not been so transferred. Nothing in this section shall confer upon any employee any right not held on the effective date of this act or prohibit any reduction of salary, grade, transfer, reassignment, suspension, discharge, layoff or abolition of position not prohibited before the effective date of this act. Such employees shall not be considered new employees for salary, wage, tax, health insurance,

Medicare or any other federal or state purposes, but shall retain their existing start and hiring date, seniority and any other relevant employment status through the transfer.

(b) Notwithstanding any general or special law to the contrary, all demands, notices, citations, writs and precepts given by a sheriff, special sheriff, deputy, jailer, superintendent, deputy superintendent, assistant deputy superintendent, keeper, officer, assistant or other employee of the office of a transferred sheriff, as the case may be, on or before the effective date of this act shall be valid and effective for all purposes unless otherwise revoked, suspended, rescinded, canceled or terminated.

(c) Notwithstanding any general or special law to the contrary, any enforcement activity imposed by a sheriff or special sheriff or by any deputies, jailers, superintendents, deputy superintendents, assistant deputy superintendents, keepers, officers, assistants or other employees of the office of a transferred sheriff before the effective date of this act shall be valid, effective and continuing in force according to the terms thereof for all purposes unless superseded, revised, rescinded or canceled.

(d) Notwithstanding any general or special law to the contrary, all petitions, hearings appeals, suits and other proceedings duly brought against and all petitions, hearings, appeals, suits, prosecutions and other legal proceedings begun by a sheriff, special sheriff, deputy, jailer, superintendent, deputy superintendent, assistant deputy superintendent, keeper, officer, assistant or the employee of the office

of a transferred sheriff, as the case may be, which are pending on the effective date of this act, shall continue unabated and remain in force notwithstanding the passage of this act.

(e) Notwithstanding any general or special law to the contrary, all records maintained by a sheriff or special sheriff or by any deputies, jailers, superintendents, deputy superintendents, assistant deputy superintendents, keepers, officers, assistants and other employees of the office of a transferred sheriff on the effective date of this act shall continue to enjoy the same status in a court or administrative proceeding, whether pending on that date or commenced thereafter, as they would have enjoyed in the absence of the passage of this act.

**SECTION 18.** Notwithstanding any general or special law to the contrary, all officers and employees of the office of a transferred sheriff transferred to the service of the commonwealth shall be transferred with no impairment of seniority, retirement or other rights of employees, without reduction in compensation or salary grade and without change in union representation, except as otherwise provided in this act. Any collective bargaining agreement in effect for transferred employees on the effective date of this act shall continue as if the employees had not been so transferred until the expiration date of the collective bargaining agreement. Nothing in this section shall confer upon any employee any right not held on the effective date of this act prohibit any reduction of salary, grade, transfer, reassignment, suspension, discharge, layoff or abolition of position not prohibited before that date.

**SECTION 19.** (a) Notwithstanding any general or special law to the contrary, employees or retired employees of the office of a transferred sheriff and the surviving spouses of retired employees of the office of a transferred sheriff who are eligible for group insurance coverage as provided in chapter 32B of the General Laws or who are insured under said chapter 32B, shall have that eligibility and coverage transferred to the group insurance commission and those employees shall cease to be eligible or insured under said chapter 32B; provided, however, that, notwithstanding the provisions of chapter 150E of the General Laws or any other law or regulation to the contrary, employees, retired employees and the surviving spouses of retired employees of the office of a transferred sheriff without a collective bargaining agreement in effect shall not be transferred to the group insurance commission until November 1, 2010 or until a successor collective bargaining agreement is ratified and funded whichever occurs first. These employees shall not be considered to be new employees. The group insurance commission shall provide uninterrupted coverage for group life and accidental death and dismemberment insurance and group general or blanket insurance providing hospital, surgical, medical, dental and other health insurance benefits to the extent authorized under chapter 32A of the General Laws. Employees who were covered by a collective bargaining agreement on the effective date of this act shall continue to receive the group insurance benefits required by their respective collective bargaining agreements until a successor agreement is ratified and funded.

(b) Notwithstanding any general or special law to the contrary, the human resources division of the executive office for administration

and finance shall assume the obligations of the office of a transferred sheriff to employees who become state employees and who are covered under a health and welfare trust fund agreement established under section 15 of chapter 32B of the General Laws pursuant to a collective bargaining agreement until the expiration date of the collective bargaining agreement.

(c) Notwithstanding any general or special law to the contrary, the group insurance commission shall evaluate, in consultation with appropriate county officials and county treasurers, the value of any monies in a claims trust fund established pursuant to section 3A of said chapter 32B that would otherwise have been reserved for claims made by employees of a transferred sheriff. Any monies therein shall be transferred to the group insurance commission on the effective date of this act; provided, however, that no monies shall be transferred if such transfer violates an agreement entered into by a governmental subdivision with an insurance provider pursuant to said chapter 32B.

**SECTION 20.** Notwithstanding chapter 32 of the General Laws or any other general or special law to the contrary, the retirement system in the county of a transferred sheriff shall continue pursuant to this section and shall be managed by the retirement board as provided in this section. Employees of a transferred sheriff who retired on or before the effective date of this act shall be members of the county retirement system, which shall pay the cost of benefits annually to such retired county employees and their survivors. The annuity savings funds of the employees of transferred sheriffs who become state employees pursuant to this act shall be transferred from that

county retirement system to the state retirement system, which shall thereafter be responsible for those employees, subject to the laws applicable to employees whose transfer from 1 governmental unit to another results in the transfer from 1 retirement system to another, except for paragraph (c) of subdivision (8) of section 3 of said chapter 32. The value of the annuity savings funds shall be determined based on valuations on the effective date of the transfer. All other provisions governing the retirement systems of the counties of Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth and Suffolk shall remain in effect.

**SECTION 21.** Notwithstanding any general or special law to the contrary, county commissioners, county sheriffs, county treasurers, county retirement systems, the State-Boston retirement system and all executive branch agencies and officers shall cooperate with the secretary of administration and finance in effecting the orderly transfer of the county sheriffs to the commonwealth. The secretary may establish working groups as considered appropriate to assist in the implementation of the transfer.

**SECTION 22.** Notwithstanding any general or special law to the contrary, there shall be a special commission to consist of 9 members: 1 of whom shall be a member of the Massachusetts Sheriffs Association; 2 of whom shall be appointed by the speaker of the house of representatives; 1 of whom shall be appointed by the minority leader of the house of representatives; 2 of whom shall be appointed by the president of the senate; 1 of whom shall be appointed by the minority leader of the senate; and 2 of whom shall be appointed by the

governor for the purpose of making an investigation and study relative to the reorganization or consolidation of sheriffs' offices, to make formal recommendations regarding such reorganization or consolidation and to recommend legislation, if any, to effectuate such recommendations relating to the reorganization, consolidation, operation, administration, regulation, governance and finances of sheriffs' offices.

The chairman of the commission shall be selected by its members. Section 2A of chapter 4 of the General Laws shall not apply to the commission. So long as a member of the commission discloses, in writing, to the state ethics commission any financial interest as described in sections 6, 7 or 23 of chapter 268A of the General Laws which may affect the member's work on the commission, the member shall not be deemed to have violated said sections 6, 7 or 23 of said chapter 268A. Five members of the commission shall constitute a quorum and a majority of all members present and voting shall be required for any action voted by the commission including, but not limited to, voting on formal recommendations or recommended legislation.

The commission, as part of its review, analysis and study and in making such recommendations regarding the reorganization, consolidation, operation, administration, regulation, governance and finances of sheriffs' offices, shall focus on and consider the following issues, proposals and impacts:
(1) the possible consolidation, elimination or realignment of certain sheriffs' offices and the potential cost savings and other efficiencies

that may be achieved by eliminating, consolidating and realigning certain sheriffs' offices to achieve pay parity;
(2) any constitutional, statutory or regulatory changes or amendments that may be required in order to effectuate any such consolidation or reorganization;
(3) the reallocation of duties and responsibilities of sheriffs' offices as a consequence of any such consolidation or reorganization;
(4) the best management practices including, but not limited to, administrative procedures, payroll systems, software updates, sheriff's ability to negotiate cost effective contracts and the current use of civil process funds, including the amount of civil process funds collected by each county sheriff and the actual disposition of said funds currently, and, in the event of consolidation, realignment, elimination or reorganization, the collection and use of civil process fees in the future;
(5) the consideration of any other issues, studies, proposals or impacts that, in the judgment of the commission, may be relevant, pertinent or material to the study, analysis and review of the commission; and
(6) The need for appropriate placements and services for female detainees and prisoners, including pre-release services, job placement services, family connection services, and re-entry opportunities; provided, however, the review shall consider the need and present adequacy of placement of female prisoners and detainees in each country; and provided further, that all departments, divisions, commissions, public bodies, authorities, boards, bureaus or agencies of the commonwealth shall cooperate with the commission for the purpose of providing information or professional expertise and skill relevant to the responsibilities of the commission subject to

considerations of privilege or the public records law.

The commission shall submit a copy of a final report of its findings resulting from its study, review, analysis and consideration, including legislative recommendations, if any, to the governor, president of the senate, speaker of the house of representatives, the chairs of the house and senate committees on ways and means and the chairs of the joint committee on state administration and regulatory oversight and the clerks of the senate and house of representatives not later than December 31, 2010.

**SECTION 23.** Not less than 90 days after the effective date of this act, a sheriff transferred under this act shall provide to the secretary of administration and finance a detailed inventory of all property in the sheriff's possession which shall include, but not be limited to, vehicles, weapons, office supplies and other equipment.

**SECTION 24.** Notwithstanding section 7 of chapter 268A of the General Laws a state employee from the office of a transferred sheriff may have a financial interest in a contract made by a state agency, if such financial interest exists on the effective date of this act.

**SECTION 25.** Notwithstanding any general or special law to the contrary, the department of the state auditor shall conduct an independent audit of the total assets, liabilities and potential litigation of each sheriff's office transferred under this act; provided, however, that any audit undertaken under this section shall include an audit of any accounts, programs, activities, functions and inventory of all

property of a sheriff's office. The state auditor shall file a report with the secretary of administration and finance and the chairs of the house and senate committees on ways and means not later than April 30, 2010 which shall include, but not be limited to: (i) a summary of the findings under each audit; and (ii) the cost of each audit.

**SECTION 26.** Section 19 shall take effect on February 1, 2010. Section 21 shall take effect upon its passage. The remainder of this act shall take effect on January 1, 2010.

*Approved August 6, 2009.*

# UNCORRECTED PROOF OF THE JOURNAL OF THE SENATE.

**JOURNAL OF THE SENATE.**

*Wednesday, July 29, 2009.*

Met according to adjournment at three o'clock P.M. (Mr. Rosenberg in the Chair).

*Reports of a Committee*

By Mr. Morrissey, for the committee on Consumer Protection and Professional Licensure, on petition, a Bill relative to home improvement contractor registration (Senate, No. 111) ;
By the same Senator, for the same committee, on petition, a Bill clarifying the requirements for licensing as a real estate broker or salesperson (Senate, No. 121) ;
By the same Senator, for the same committee, on petition, a Bill prohibiting the sale of lottery tickets on credit (Senate, No. 157);
By the same Senator, for the same committee (on House, No. 325), a Bill to update public charities law (Senate, No. 2117);
By the same Senator, for the same committee, on petition (accompanied by bill Senate, No. 112), a Bill relative to flea market vendors (Senate, No. 2118);
**Severally read and, under Senate Rule 27, referred to the committee on Ways and Means.**

**PAPERS FROM THE HOUSE**.

A Bill adopting the federal secure and fair enforcement of mortgage licensing act of 2008 (House, No. 4178,- on House, No. 4127**),-- was read and, under Senate Rule 27, referred to the committee on Ways and Means.**

*Reports*

Of the House committee on Ways and Means, asking to be discharged from further consideration
Of the petition (accompanied by bill, Senate, No. 747) of Robert A. O'Leary for legislation relative to Martha's Vineyard Hospital,-- **and recommending that the same be referred to the committee on State Administration and Regulatory Oversight;**
Of the petition (accompanied by bill, House, No. 174) of Michael J. Rodrigues and others for legislation to further regulate the Registration Board of Social Workers,-- **and recommending that the same be referred to the committee on Consumer Protection and Professional Licensure;**
**Were severally considered forthwith, under Senate Rule 36, and accepted, in concurrence.**

*Recess.*

There being no objection, at one minute past three o'clock P.M., the Chair (Mr. Rosenberg) declared a recess subject to the call of the Chair, and, at twenty-eight minutes past four o'clock P.M., the Senate reassembled, the President in the Chair

The President, members, guests and employees then recited the pledge of allegiance to the flag.

*Communications.*

There being no objection the Clerk read the following communications:

COMMONWEALTH OF MASSACHUSETTS
SENATE MAJORITY LEADER
STATE HOUSE, BOSTON 02133-1053

*July 29, 2009*

William Welch, *Clerk*
Massachusetts State Senate
State House, Room 334
Boston, MA 02133

Dear Mr. Clerk:

I was unable to vote on several matters during Senate deliberations on July 28, 2009. Had I been present, I would have voted in support of the following:

- Overriding Governor Patrick's veto in line item 1790-0000
- Overriding Governor Patrick's veto in line item 7004-0101
- Senate No. 1469, An Act Establishing Disability History Month
- Overriding Governor Patrick's veto in line item 1100-1100
- Overriding Governor Patrick's veto in line item 1201-0100
- Overriding Governor Patrick's veto in line item 4800-0015
- Overriding Governor Patrick's veto in line item 7010-0033
- Overriding Governor Patrick's veto in line item 8400-0001
- Overriding Governor Patrick's veto in line item 8900-0001
- Overriding Governor Patrick's veto in line item 8910-0102
- Overriding Governor Patrick's veto in line item 8910-0105
- Overriding Governor Patrick's veto in line item 8910-1017
- Overriding Governor Patrick's veto in line item 8910-0108
- Overriding Governor Patrick's veto in line item 8910-0110
- Overriding Governor Patrick's veto in line item 8910-0145
- Overriding Governor Patrick's veto in line item 8910-0619
- Overriding Governor Patrick's veto in line item 4510-0108
- Overriding Governor Patrick's veto in line item 4190-0100
- Overriding Governor Patrick's veto in line item 4180-0100

I respectfully request that a copy of this letter be printed in the Senate Journal as part of the official record for July 28, 2009. Thank you in advance for your attention to this important matter.

*Sincerely,*
Frederick E. Berry
*Majority Leader*

**On motion of Mr. Galluccio, the above communication was ordered printed in the Journal of the Senate**.

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SENATE
STATE HOUSE, BOSTON 02133-1053

*July 29, 2009*

Mr. William F. Welch
*Clerk of the Senate*
State House, Room 335
Boston, MA 02133

Dear Mr. Clerk:

During the formal sessions held on Friday, July 17, 2009, Tuesday, July 21, 2009, I was absent from the chamber serving in my capacity as a member of the Special Senate Committee to the Annual Meeting of the National Conference of State Legislatures. Consequently, I was not recorded on several roll call votes. Had I been present, I would have voted in the following manner:

Friday, July 17, 2009
**H 4141 –** Commonwealth Transportation Fund – Yes

Tuesday, July 21, 2009
**H 4140** – Criminal History for Wall Climbing Instructors – Yes
**S 998** – Mixed Martial Arts – Yes
**H 2097** – Affordable Housing – Yes
**S 2109** – Cape Cod Electricity – Yes

I respectfully request that a copy of this letter be printed in the Journal of the Senate. Thank you in advance for your assistance.

*Sincerely,*
RICHARD T. MOORE
*State Senator*
*Worcester & Norfolk District*

**On motion of Mr. Rosenberg, the above communication was ordered printed in the Journal of the Senate**.

*Report of a Committee of Conference.*

Mr. Joyce, for the committee of conference, to whom was referred the matters of difference between the two branches with reference to the House amendment to the Senate Bill transferring county sheriffs to the Commonwealth (Senate, No. 2045, printed as amended) (*amended by the House* by striking out all after the enacting clause and inserting in place thereof the text of House document numbered 1153, printed as amended; and by inserting before the enacting clause the following emergency preamble: "*Whereas*, the deferred operation of this act would tend to defeat its purpose, which is to transfer forthwith county sheriffs to the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience"), reported, a "Bill transferring county sheriffs to the Commonwealth" (Senate, No. 2119).
Pending the question on accepting the report of the conference committee, there being no objection, the Clerk read the following communication relative to the conference committee report:

Dear Mr. Clerk,

As the House and Senate chairs of the conference committee on "An Act transferring county sheriffs to the Commonwealth" we have conferred with the House and Senate Counsel and have authorized a technical change to section 19 to correctly place an effective date. Thank you for your attention to this matter.

Senator Brian Joyce, *Chair*
Representative Stephen Walsh, *Chair*

**On motion of Mr. Joyce, the above communication was ordered printed in the Journal of the Senate.**

The above mentioned changes were then added to the official report of the committee of conference and were included in the text of Senate, No. 2119, when it was accepted in both branches.
After remarks, the question on accepting the report of the committee of conference was determined by a call of the yeas and nays, at twenty-one minutes before five o'clock P.M., on motion of Mr. O'Leary, as follows, to wit *(yeas 37 — nays 0)* **[Yeas and Nays No. 124]**:

INSERT RC "124"

**The yeas and nays having been completed at seventeen minutes before five o'clock P.M., the report (Senate, No. 2119) was accepted.**
**Sent to the House for concurrence.**

**PAPER FROM THE HOUSE**

A Bill adopting the federal secure and fair enforcement for mortgage licensing act of 2008 (House, No. 4178,- on House, No. 4127),- **was read.**

**There being no objection, the rules were suspended, on motion of Mr. Donnelly, and the bill was read a second time, ordered to a third reading, and, after remarks, was read a third time and passed to be engrossed, in concurrence.**

*Report of a Committee.*

By Mr. Panagiotakos, for the committee on Ways and Means, that the House Bill relative to the disposition of property in the town of Westborough (House, No. 3147),**— ought to pass, with an amendment** by inserting the following 2 new sections:- "SECTION 2A. The first sentence of section 6 of said chapter 660 is hereby amended by striking out, in line 6, the words 'nursery and' and inserting in place, thereof the following words:- 'nursery, a municipal firing range or'.
SECTION 2B. The commissioner of capital asset management and maintenance may execute and deliver to the town of Westborough such amended deed, in accordance with section 6 of chapter 660 of the acts of 1987, or other document as the commissioner deems reasonable and appropriate to effect the purposes of section 2A."
**There being no objection, the rules were suspended, on motion of Mr. Eldridge, and the bill was read a second time and was amended, as recommended by the committee on Ways and Means.**
**The bill, as amended, was then ordered to a third reading and, after remarks was read a third time and passed to be engrossed, in concurrence, with the amendment.**
**Sent to the House for concurrence in the amendment.**

*Matter Taken Out of the Notice Section of the Calendar.*

There being no objection, the following matter was taken out of the Notice Section of the Calendar, and considered as follows:

The House Bill authorizing the town of Nantucket to convey or otherwise dispose of a parcel of land on Muskeget Island in the town of Nantucket (House, No. 4134) (**its title having been changed by the committee on Bills in the Third Reading**),- **was read a third time.**
**After remarks, and pending the question on passing the bill to be engrossed, Mr. O'Leary moved that the bill be amended** in section 1, by striking out the words ", a government body of the commonwealth or a non-profit organization whose mission is to conserve natural resources or otherwise dispose of".
**After further remarks, the amendment was adopted.**
**The bill, as amended, was then passed to be engrossed, in concurrence, with the amendment.**
**Sent to the House for concurrence in the amendment.**

*Report of a Committee.*

By Mr. Panagiotakos, for the committee on Ways and Means, that the Senate Bill establishing a sick leave bank for Theodore S. Bielecki, an employee of the Department of Correction (Senate, No. 2110),**— ought to pass.**
**There being no objection, the rules were suspended, on motion of Mr. Petruccelli, and the bill was read a second time, ordered to a third reading, read a third time and passed to be engrossed.**
**Sent to the House for concurrence.**

**PAPERS FROM THE HOUSE**
*Emergency Preambles Adopted.*

An engrossed Bill providing for the issuance of certain veterans' plates by the registrar of motor vehicles (see House, No. 4144, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 8 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill prohibiting health care facilities from charging for certain services (see House, No. 4145, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 3 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill authorizing the transfer of certain funds within the trial court (see House, No. 4148), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 9 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill providing for the transfer of certain funds to the General Fund (see House, No. 4150, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 6 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill relative to the District Local Technical Assistance Fund (see House, No. 4151, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 6 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill relative to the Massachusetts Life Sciences Investment Fund (see House, No. 4152), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 5 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill relative to development in the towns of Monson and Templeton (see House, No. 4153, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 5 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill establishing a regionalization advisory commission (see House, No. 4154, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 5 to 0.
**The bill was signed by the President and sent to the House for enactment.**

*Engrossed Bills.*

The following engrossed bills (the first of which originated in the Senate), having been certified by the Senate Clerk to be rightly and truly prepared for final passage, were severally passed to be enacted and were signed by the President and laid before the Governor for his approbation, to wit:
Establishing a sick leave bank for Kathleen Ginn, an employee of the Department of Developmental Services (see Senate, No. 2089);
Establishing a sick leave bank for Mary F. Keeler, an employee of the Trial Court (see House, No. 1138);
Establishing a sick leave bank for Gayle Tickel, an employee of the Department of Correction (see House, No. 1155, amended); and
Further regulating a certain license for the sale of all alcoholic beverages not to be drunk on the premises in the town of Dracut (see House, No. 3800).

An engrossed Bill providing for reporting dates for capital gains revenue and transferring certain funds (see House, No. 4142, amended) (which originated in the House), **having been certified by the Senate Clerk to be rightly and truly prepared for final passage, was passed to be re-enacted and signed by the President and again laid before the Governor for his approbation.**

*Petition.*

On motion of Mr. Richard T. Moore, Senate Rule 20 and Joint Rule 12 were suspended on the petition, presented by Mr. Hart, (accompanied by bill) of John A. Hart, Jr. for legislation to establish a sick leave bank for Ellen Starck, an employee of the Massachusetts Parole Board,— **and the same was referred to the committee on Public Service.**
**Sent to the House for concurrence.**

*Orders of the Day.*

The Orders of the Day were considered as follows:

*Bills*
Establishing a town manager form of government for the town of Hanover (House, No. 1123);
Authorizing the city of Attleboro to continue the employment of Ronald M. Churchill (House, No. 1884); and

Establishing the position of municipal hearing officer in the town of Southbridge (House, No. 4116);
**Were severally read a second time and ordered to a third reading.**

The House Bill authorizing the city of Gardner to convey certain park land (House, No.612),- was read a third time.
Pending the question on passing the bill to be engrossed, Ms. Flanagan moved that the bill be amended in section 2, by striking out, in lines 24 to 27, inclusive, the words " and (2) Said dwelling units shall be sold or leased by the Greater Gardner Community Development Corporation to individuals who: reside in the city of Gardner; have parents or siblings who reside in the city of Gardner; or work in the city of Gardner" and inserting in place thereof the following 2 clauses:-
"(2) The dwelling units shall be sold or leased by the Greater Gardner Community Development Corporation to individuals who: reside in the city of Gardner; have parents or siblings who reside in the city of Gardner; or work in the city of Gardner; and
(3) As a condition of the conveyance, the city of Gardner shall transfer a parcel of land under the care, custody, management and control of the board of selectmen and dedicated for general municipal purposes to the conservation commission or park commission and such parcel shall be dedicated for conservation or park purposes. If no suitable parcel can be transferred to the conservation commission, the city shall acquire a parcel of land or a conservation restriction upon private or public land as defined at section 31 of chapter 184 of the General Laws. Such land shall be dedicated or restricted to conservation or park purposes and under the jurisdiction of the conservation commission or park commission. The parcel dedicated pursuant to this section, shall be of equal or greater size and value for conservation or park purposes when compared to the parcel described in section 1. If the land conveyed ceases to be used for the purposes described in section 1, the land shall revert to the city of Gardner for public park purposes."
**The amendment was adopted.**
**The bill, as amended, was then passed to be engrossed, in concurrence, with the amendment.**
**Sent to the House for concurrence in the amendment.**

The House Bill relative to public utility companies (House, No. 4126, amended),- was considered, the main question being on passing the bill to be engrossed.
**After debate, the question on passing the bill to be engrossed was determined by a call of the yeas and nays,** at a quarter past five o'clock P.M. on the motion of Mr. Tarr as follows, to wit *(yeas 37 – nays 0)* **[Yeas and Nays No. 125]:**

**INSERT ROLL CALL "125"**

**The yeas and nays having been completed at nineteen minutes past five o'clock P.M., the bill was passed to be engrossed, in concurrence, with the amendments previously adopted by the Senate.**
**Sent to the House for concurrence in the amendments.**

*Recess.*

There being no objection, at twenty-three minutes past five o'clock P.M., the President declared a recess subject to the call of the Chair; and, at twenty-one minutes past seven o'clock P.M., the Senate reassembled, the President in the Chair.

**At** twenty-one minutes past seven o'clock P.M**, Mr. Tisei doubted the presence of a quorum; and, a count of the Senate determined that a quorum was not present.**
**Subsequently, at twenty-nine minutes before eight o'clock P.M., the President declared that a quorum was present.**

*Report of a Committee.*

By Mr. Panagiotakos, for the committee on Ways and Means, on House, No. 4181, in part, a "Bill transferring county sheriffs to the Commonwealth" (Senate, No. 2121).
**The bill was read. There being no objection, the rules were suspended, on motion of Mr. Petruccelli, and the bill was read a second time, ordered to a third reading and, after remarks, was read a third time and passed to be engrossed.**
**Sent to the House for concurrence.**

**PAPERS FROM THE HOUSE**
*Emergency Preambles Adopted.*

An engrossed Bill transferring county sheriffs to the Commonwealth (see Senate, No. 2119), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 14 to 0.
**The bill was signed by the President and sent to the House for enactment.**

An engrossed Bill adopting the federal secure and fair enforcement for Mortgage Licensing Act of 2008 (see House, No. 4178), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of

the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 13 to 0.
**The bill was signed by the President and sent to the House for enactment.**

*Engrossed Bills.*

The following engrossed bills (all of which originated in the House), having been certified by the Senate Clerk to be rightly and truly prepared for final passage, were severally passed to be re-enacted and were signed by the President and again laid before the Governor for his approbation, to wit:

Providing for the issuance of certain veterans' plates by the registrar of motor vehicles (see House, No. 4144, amended);
Prohibiting health care facilities from charging for certain services (see House, No. 4145, amended);
Authorizing the transfer of certain funds within the trial court (see House, No. 4148);
Providing for the transfer of certain funds to the General Fund (see House, No. 4150, amended).
Relative to the District Local Technical Assistance Fund (see House, No. 4151, amended);
Relative to the Massachusetts Life Sciences Investment Fund (see House, No. 4152);
Relative to development in the towns of Monson and Templeton (see House, No. 4153, amended); and
Establishing a regionalization advisory commission (see House, No. 4154, amended).

*Report of a Committee.*

By Mr. Panagiotakos, for the committee on Ways and Means, that the House Bill making appropriations for the fiscal year 2010 to provide for supplementing certain existing appropriations and for certain other activities and projects (on the residue of House, No. 4181),-- ought to pass with an amendment by inserting the following section:-
"SECTION __. The department of correction shall not suspend, terminate, reduce services or otherwise divert clients of the Massachusetts alcohol and substance abuse center until such time as the department files a displacement plan for the center's clients to the house and senate committee on ways and means, the joint committee on public safety and homeland security and the joint committee on mental health and substance abuse; provided, however, that if such a plan shall be filed, the plan shall not take effect sooner than 90 days from the date that such plan has been filed with said committees."; in paragraph (h) of section 29 by striking out the words "secretary of education" and inserting in place thereof the following words:- "president of the university of Massachusetts"; and by inserting the following section:-
"SECTION ____. Section 2 of chapter 27 of the acts of 2009 is hereby amended in item 1233-2350 by striking the figure "$936,376,140" and inserting in place thereof the following figure:- "$936,437,803".
**There being no objection, the rules were suspended, on motion of Mr. O'Leary, and the bill was read a second time.**

*Suspension of Senate Rule 38A.*

There being no objection, during consideration of the matter, Ms. Menard moved that Senate Rule 38A be suspended to allow the Senate to continue in session beyond the hour of eight o'clock P.M.; and the same Senator requested unanimous consent that the rules be suspended without a call of the yeas and nays. The motion was considered forthwith, and it was adopted

Pending the question on adoption of the amendment recommended by the committee on Ways and Means, Messrs. Tisei, Tarr, Knapik and Brown moved that the bill be amended by inserting at the end thereof the following sections: -
"**SECTION 1.** Notwithstanding any general or special law to the contrary, for the days of August 1, 2009 and August 2, 2009, an excise shall not be imposed upon nonbusiness sales at retail of tangible personal property, as defined in section 1 of chapter 64H of the General Laws. For the purposes of this act, tangible personal property shall not include telecommunications, tobacco products subject to the excise imposed by chapter 64C of the General Laws, gas, steam, electricity, motor vehicles, motorboats, meals or a single item the price of which is in excess of $2,500.
**SECTION 2.** Notwithstanding any general or special law to the contrary, for the days of August 1, 2009, and August 2, 2009, a vendor shall not add to the sales price or collect from a nonbusiness purchaser an excise upon sales at retail of tangible personal property, as defined in section 1 of chapter 64H of the General Laws. The commissioner of revenue shall not require a vendor to collect and pay excise upon sales at retail of tangible personal property purchased on August 1, 2009 and August 2, 2009. An excise erroneously or improperly collected during the days of August 1, 2009, and August 2, 2009, shall be remitted to the department of revenue. This section shall not apply to the sale of telecommunications, tobacco products subject to the excise imposed by chapter 64C of the General Laws, gas, steam, electricity, motor vehicles, motorboats, meals or a single item the price of which is in excess of $2,500.
**SECTION 3.** Reporting requirements imposed upon vendors of tangible personal property, by law or by regulation, including, but not limited to, the requirements for filing returns required by chapter 62C of the General Laws, shall remain in effect for sales for the days of August 1, 2009, and August 2, 2009.
**SECTION 4.** On or before December 31, 2009, the commissioner of revenue shall certify to the comptroller the amount of sales tax forgone, as well as new revenue raised from personal and corporate income taxes and other sources, pursuant to this act. The commissioner shall file a report with the joint committee on revenue and the house and senate committees on ways and means detailing by fund the amounts under general and special laws governing the distribution of revenues under chapter 64H of the General Laws which would have been deposited in each fund, without this act.

**SECTION 5.** The commissioner of revenue shall issue instructions or forms, or promulgate rules or regulations, necessary for the implementation of this act."
Mr. Brewer arose to a point of order which, being stated, was that the amendment was beyond the scope of the bill before the Senate insofar as it would come under the definition of a "money bill" which must be initiated by the House.
The President stated that the point of order was well taken and that "The Massachusetts Constitution says: "All money bills shall originate in the House of Representatives . . . .", and therefore the amendment is out of order.
Mr. Tisei doubted the ruling of the Chair; and this motion was seconded by Mr. Knapik.
After debate, the question on whether the ruling of the Chair would stand was determined by a call of the yeas and nays, at eleven minutes past eight o'clock P.M., on motion of Mr. Tisei, as follows, to wit *(yeas 32 — nays 5)* **[Yeas and Nays No. 126]:**

Insert Roll Call "126"

The yeas and nays having been completed at a quarter past eight o'clock P.M., the ruling of the Chair stood and the amendment was laid aside.

Messrs. Tisei, Tarr, Knapik, Hedlund and Brown moved that the bill be amended by inserting at the end thereof the following section: -
"SECTION X. Chapter 118E of the General Laws, as most recently amended by chapter 451 of the Acts of 2008, is hereby amended by adding the following new section:-
Section 63. The Executive Office of Health and Human Services shall discontinue membership in the Mass Health fee-for-service program and primary care clinician plan, and shall begin enrolling all members, meeting eligibility requirements as established pursuant to applicable federal and state law and regulation, into a Medicaid managed care organization that has contracted with the commonwealth to deliver such managed care services, in accordance with the enrollment and assignment processes for other eligible categories and at the appropriate levels of premium."
"SECTION X. Any savings associated with the expanded use of Medicaid managed care organization shall be utilized to assist in the health care coverage of those persons extended coverage by section 32 of this act."
After debate, the question on adoption of the amendment was determined by a call of the yeas and nays, at twenty-three minutes before nine o'clock P.M., on motion of Mr. Knapik, as follows, to wit (yeas 5 — nays 31) **[Yeas and Nays No. 127]**:

Insert Roll Call "127"

The yeas and nays having been completed at twenty minutes before nine o'clock P.M., the amendment was *rejected*.

Mr. Tarr moved that the bill be amended by adding at the end the following additional section:-
"SECTION XX. Notwithstanding any law to the contrary, the registrar of motor vehicles shall develop and promulgate a plan to ensure full accessibility to all registry branch services to citizens residing in the region commonly known as the "North Shore" prior to the closure of the branch office currently located in the city of Beverly."
**The amendment was *rejected*.**

**There being no objection, the following matters were considered, as follows:**

**PAPERS FROM THE HOUSE**
*Engrossed Bills.*

The following engrossed bills (the first of which originated in the Senate), having been certified by the Senate Clerk to be rightly and truly prepared for final passage, were severally passed to be enacted and were signed by the President and laid before the Governor for his approbation, to wit:
Transferring county sheriffs to the Commonwealth (see Senate, No. 2119); and
Adopting the federal secure and fair enforcement for Mortgage Licensing Act of 2008 (see House, No. 4178).

*Emergency Preamble Adopted.*

An engrossed Bill relative to the disposition of property in the town of Westborough (see House, No. 3147, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted in concurrence, by a vote of 6 to 0.
**The bill was signed by the President and sent to the House for enactment.**

*Unfinished Business.*

The House Bill making appropriations for the fiscal year 2010 to provide for supplementing certain existing appropriations and for certain other activities and projects (on the residue of House, No. 4181),-- was further considered, the main question being on adoption of the Ways and Means amendment.
Messrs. Tarr, Tisei, Knapik, Hedlund, and Brown moved that the bill be amended by adding at the end the following additional

section:-
"SECTION XX. Section 23 of Chapter 64H is hereby repealed."
After debate, the question on adoption of the amendment was determined by a call of the yeas and nays, at thirteen minutes past nine o'clock P.M., on motion of Mr. Tarr, as follows, to wit (yeas 11 — nays 25) **[Yeas and Nays No. 128]**:

Insert Roll Call "128"

The yeas and nays having been completed at seventeen minutes past nine o'clock P.M., the amendment was *rejected*.

Messrs. Tarr, Tisei, and Brown moved that the bill be amended by adding at the end the following additional section:-
"SECTION XX. Notwithstanding any general or special law to the contrary, the registrar of motor vehicles shall not close any existing branch office unless and until a plan is produced and implemented to provide effective access to all services to those citizens which will be affected by such closure. In developing such plan, the registrar shall consider all available options and resources, including but not limited to the renegotiation of rental contracts, utilization of any available municipal, state or other spaces in the public sector, and innovative partnerships with public agencies or private entities. Such plan shall be submitted to the clerks of the house and senate before the any such branch closures."
After remarks, the question on adoption of the amendment was determined by a call of the yeas and nays, at twenty-two minutes past nine o'clock P.M., on motion of Mr. Tarr, as follows, to wit (yeas 8 — nays 28) **[Yeas and Nays No. 129]**:

Insert Roll Call "129"

The yeas and nays having been completed at twenty-five minutes past nine o'clock P.M., the amendment was *rejected*.
**The Ways and Means amendment was then adopted.**
**The bill was then ordered to a third reading and read a third time.**
**After remarks,** The question on passing the bill, as amended, to be engrossed was determined by a call of the yeas and nays at twenty minutes before ten o'clock P.M., on motion of Mr. Panagiotakos, as follows, to wit *(yeas 31 — nays 5)* **[Yeas and Nays No. 130]:**

Insert Roll call "130"

**The yeas and nays having been completed at seventeen minutes before ten o'clock P.M., the bill was passed to be engrossed, in concurrence, with the amendment.**
**Sent to the House for concurrence in the amendment.**

**PAPERS FROM THE HOUSE**
*Engrossed Bill—Land Taking for Conservation Etc.*

Mr. Rosenberg in the Chair, an engrossed Bill relative to the disposition of property in the town of Westborough (see House, No. 3147, amended) (which originated in the House), having been certified by the Senate Clerk to be rightly and truly prepared for final passage,-- was put upon its final passage; and, this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution, the question on passing it to be enacted was determined by a call of the yeas and nays, at sixteen minutes before ten o'clock P.M., as follows, to wit *(yeas 36 – nays 0)* **[Yeas and Nays No. 131]:**

INSERT ROLL CALL [131]

**The yeas and nays having been completed at fourteen minutes before ten o'clock P.M., the bill was passed to be enacted, two thirds of the members present having agreed to pass the same, and it was signed by the Acting President (Mr. Rosenberg) (having been appointed by the President, under authority conferred by Senate Rule 4, to perform the duties of the Chair) and laid before the Governor for his approbation.**

An engrossed Bill authorizing the town of Nantucket to convey or otherwise dispose of a parcel of land on Muskeget Island in the town of Nantucket (see House, No. 4134, amended) (which originated in the House), having been certified by the Senate Clerk to be rightly and truly prepared for final passage,-- was put upon its final passage; and, this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution, the question on passing it to be enacted was determined by a call of the yeas and nays, at thirteen minutes before ten o'clock P.M., as follows, to wit *(yeas 36 – nays 0)* **[Yeas and Nays No. 132]:**

INSERT ROLL CALL [131]

**The yeas and nays having been completed at eleven minutes before ten o'clock P.M., the bill was passed to be enacted, two thirds of the members present having agreed to pass the same, and it was signed by the Acting President (Mr. Rosenberg) and laid before the Governor for his approbation.**

*Recess.*

There being no objection, at ten minutes before ten o'clock P.M., the Chair (Mr. Rosenberg) declared a recess subject to the call of the Chair; and, at twenty-two minutes past eleven o'clock P.M., the Senate reassembled, Ms. Chang-Díaz in the Chair (having been appointed by the President, under authority conferred by Senate Rule 4, to perform the duties of the Chair).

**PAPERS FROM THE HOUSE**

*Emergency Preamble Adopted; Engrossed Bill Enacted*

An engrossed Bill making appropriations for the fiscal year 2010 to provide for supplementing certain existing appropriations and for certain other activities and projects (see House, No. 4181, amended), having been certified by the Senate Clerk to be rightly and truly prepared for final passage and containing an emergency preamble,-- **was laid before the Senate; and, a separate vote being taken in accordance with the requirements of Article LXVII of the Amendments to the Constitution, the preamble was adopted, in concurrence, by a vote of 2 to 0.**
**The bill was signed by the Acting President (Ms. Chang-Díaz) and sent to the House for enactment.**
**Subsequently, the bill, which originated in the House, came from the House with the endorsement that it had been enacted in that branch.**
**The Senate then passed the bill to be enacted; and it was signed by the Acting President (Ms. Chang-Díaz) and laid before the Governor for his approbation.**

*Order Adopted.*

On motion of Mr. Tarr,—

*Ordered,* That when the Senate adjourns today, it adjourn to meet again tomorrow at eleven o'clock A.M., and that the Clerk be directed to dispense with the printing of a calendar.

*Adjournment in Memory of Patrick A. Dunlavey*

The Senator from Worcester, Hampden, Hampshire and Franklin, Mr. Brewer, and the Senator from Worcester and Norfolk, Mr. Richard T. Moore, requested that when the Senate adjourns today, it adjourn in memory of Patrick A. Dunlavey of Templeton.

Patrick A. Dunlavey of Templeton passed away on July 26th at the age of 80. Mr. Dunlavey was a former police chief in Templeton for seven years and a selectman in the town for nearly twenty one years. As a local activist, Mr. Dunlavey was in his second term as cemetery commissioner and served on the community improvement committee and the town Skateboard Park Committee. Mr. Dunlavey was also active in senior citizen and veteran's issues as he himself was an Air Force Korean War veteran. Mr. Dunlavey will be missed by family and friends for his charming smile and genuine desire to make the world a better place.

Accordingly, as a mark of respect to the memory of Patrick A. Dunlavey, at a half past eleven o'clock P.M., on motion of Mr. Tarr, the Senate adjourned to meet again tomorrow at eleven o'clock A.M.

Wednesday, July 29, 2009.

Met according to adjournment at eleven o'clock A.M., with Mr. Donato of Medford in the Chair (having been appointed by the Speaker, under authority conferred by Rule 5, to perform the duties of the Chair).

Prayer was offered by the Reverend Robert F. Quinn, C.S.P., Chaplain of the House, as follows:

Prayer.

Almighty God, we are gathered in Your presence for this morning's formal session as we call upon You in prayer for guidance and direction. We believe that You and Your assistance enable us to address issues in a reasoned, fair, objective and ethical manner. Your presence, values and guiding principles remind us that we come together to promote the best interests of our communities and the well-being and dignity of each individual person. In this era of uneasy political and economic issues, we look to You, as elected leaders, for the wisdom to reason clearly, to listen patiently and to act prudently as we propose legislation and administrative actions. With renewed courage and hope, may we face the challenges of this and every day with confidence, hope and goodwill towards all.

Grant Your blessing to the Speaker, the members and employees of this House and their families. Amen.

Pledge of allegiance.

At the request of the Chair (Mr. Donato), the members, guests and employees joined with him in reciting the pledge of allegiance to the flag.

*Silent Prayers.*

U.S. Marine Corporal Nicholas George Xiarhos.

At the request of Messrs. Atsalis of Barnstable and Turner of Dennis, the members, guests and employees stood in a moment of silent prayer in respect to the memory of U.S. Marine Corporal Nicholas George Xiarhos. Corporal Xiarhos was killed by a roadside bomb on Thursday, July 23, 2009 in the Garmsir District of Afghanistan.

Mary Bridget McInerney Zona.

At the request of Representatives Callahan of Sutton and Polito of Shrewsbury, the members, guests and employees stood in a moment of silent prayer in respect to the memory of Mary Bridget McInerney Zona of Shrewsbury. Mary died on July 23, 2009. Mary was a renowned champion Irish step dancer and founding director of the McInerney School of Irish Step Dance.

Edward Emmet Newman.

At the request of Ms. Hogan of Stow, the members, guests and employees stood in a moment of silent prayer in respect to the memory of Edward Emmet Newman, an extraordinary public servant and community member. Edward served as Stow Town Moderator for fourteen years.

Attorney James F. Linnehan.

At the request of Messrs. Nangle of Lowell, Golden of Lowell, Muphy of Lowell and Costello of Newburyport, the members, guests and employees stood in a moment of silent prayer in respect to the

memory of Attorney James F. Linnehan of Lowell. James was a veteran of World War II and also served as Assistant Attorney General for the Commonwealth.

Ellen Ruberto.

At the request of Messrs. Speranzo of Pittsfield, Bosley of North Adams, Guyer of Dalton and Pignatelli of Lenox, the members, guests and employees stood in a moment of silent prayer in respect to the memory of Ellen Ruberto, beloved wife of Pittsfield Mayor James Ruberto.

John "Jack" Medeiros.

At the request of Messrs. Sullivan of Fall River and Aguiar of Fall River, the members, guests and employees stood in a moment of silent prayer in respect to the memory of John "Jack" Medeiros. Jack served as a city councilor in Fall River for twenty-six years and was a lifelong resident of the city of Fall River.

*Statement Concerning Representative Coakley-Rivera.*

A statement of Mr. Vallee of Franklin concerning Ms. Coakley-Rivera of Springfield was spread upon the records of the House, as follows:

Statement concerning Representative Coakley-Rivera of Springfield.

MR. SPEAKER: I would like to call to the attention of the House the fact that one of our colleagues, Representative Coakley-Rivera of Springfield, will not be present in the House Chamber for today's sitting due to illness. Her missing of roll calls today is due entirely to the reason stated.

*Statement Concerning Representative Creedon of Brockton.*

A statement of Mr. Vallee of Franklin concerning Mrs. Creedon of Brockton was spread upon the records of the House, as follows:

Statement concerning Representative Creedon of Brockton.

MR. SPEAKER: I would like to call to the attention of the House the fact that one of our colleagues, Representative Creedon of Brockton, will not be present in the House Chamber for today's sitting due to personal reasons. Her missing of roll calls today is due entirely to the reason stated.

*Statement Concerning Representative Kafka of Sharon.*

A statement of Mr. Vallee of Franklin concerning Mr. Kafka of Stoughton was spread upon the records of the House, as follows:

Statement concerning Representative Kafka of Sharon.

MR. SPEAKER: I would like to call to the attention of the House the fact that one of our colleagues, Representative Kafka of Stoughton, will not be present in the House Chamber for a portion of today's sitting due to a long standing family obligation. His missing of roll calls today is due entirely to the reason stated.

*Statement Concerning Representative Spellane of Worcester.*

A statement of Mr. Vallee of Franklin concerning Mr. Spellane of Worcester was spread upon the records of the House, as follows:

Statement concerning Representative Spellane of Worcester.

MR. SPEAKER: I would like to call to the attention of the House the fact that one of our colleagues, Representative Spellane of Worcester, will not be present in the House Chamber for today's sitting due to a long standing family obligation. His missing of roll calls today is due entirely to the reason stated.



*Petitions.*

New Bedford,— Nucleo Sportignuista Club.

Mr. Cabral of New Bedford presented a petition (accompanied by bill, House, No. 4183) of Antonio F. D. Cabral (with the approval of the mayor and city council) relative to the Nucleo Sportignuista Club of New Bedford; and the same was referred to the committee on Consumer Protection and Professional Licensure.

Petitions severally were presented and referred as follows:

Motor vehices,— purchasing.

By Ms. Richardson of Framingham, petition (subject to Joint Rule 12) of Pam Richardson relative to the right of recission for the purchase of new motor vehicles.

Susan Harper,— sick leave bank.

By Mr. Ross of Wrentham, petition (subject to Joint Rule 12) of Richard J. Ross and Scott P. Brown relative to establishing a sick leave bank for Susan Harper, an employee of the Department of Developmental Services.

Severally, under Rule 24, to the committee on Rules.

Antonio Bell,— sick leave bank.

Mr. Swan of Springfield presented a petition (subject to Joint Rule 12) of Benjamin Swan for legislation to establish a sick leave bank for Antonio Bell, an employee of the Executive Office of Health and Human Services; and the same was referred, under Rule 24, to the committees on Rules.

Mr. Binienda of Worcester, for the committee on Rules and the committees on Rules of the two branches, acting concurrently, then reported recommending that Joint Rule 12 be suspended. Under suspension of the rules, on motion of Mrs. Poirier of North Attleborough, the report was considered forthwith. Joint Rule 12 then was suspended; and the petition (accompanied by bill) was referred to the committee on Public Service. Sent to the Senate for concurrence.

*Papers from the Senate.*

Disability history month.

A Bill establishing disability history month (Senate, No. 1469) (on a petition), passed to be engrossed by the Senate, was read; and it was referred, under Rule 7A, to the committee on Steering, Policy and Scheduling.

*Reports of Committees.*

By Mr. Binienda of the Worcester, for the committee on Rules and the committees on Rules of the two branches, acting concurrently, that Joint Rule 12 be suspended on the following petitions:

Registered nurses,— insurance.

Petition (accompanied by bill) of David Paul Linsky for legislation to require insurance coverage for registered nurse first assistant services in insurance policies and health service contracts issued in the Commonwealth. To the committee on Financial Services.

Medicaid payments.

Petition (accompanied by bill) of William Smitty Pignatelli and Benjamin B. Downing relative to Medicaid payments to critical access hospitals. To the committee on Health Care Financing.

Police logs.

Petition (accompanied by bill) of Christopher J. Donelan and Stephen M. Brewer relative to privacy of certain daily police logs; and

Great grandparents,— visitation rights.

Petition (accompanied by bill) of Elizabeth A. Poirier for legislation to provide visitation rights for great grandparents;

Severally to the committee on the Judiciary.

Under suspension of the rules, on motion of Mrs. Poirier of North Attleborough, the reports were considered forthwith. Joint Rule 12 then was suspended, in each instance. Severally sent to the Senate for concurrence.

Revere,—tenure.

By Mr. Kafka of Stoughton, for the committee on Steering, Policy and Scheduling, that Bill repealing the tenure of the city clerk, city collector and city engineer of the city of Revere (House, No. 3708) be scheduled for consideration by the House.

Under suspension of Rule 7A, on motion of Ms. Reinstein of Revere, the bill was read a second time forthwith; and it was ordered to a third reading.

Brookline,—taxi licenses.

By Mr. Kafka of Stoughton, for the committee on Steering, Policy and Scheduling, that Bill amending Chapter 317 of the Acts of 1974 (as amended on May 19, 2006) to allow the Town of Brookline, through its Board of Selectmen, to sell taxi licenses (House, No. 3712) be scheduled for consideration by the House.

Under suspension of Rule 7A, on motion of Mr. Smizik of Brookline, the bill was read a second time forthwith; and it was ordered to a third reading.

*Orders of the Day.*

Second reading bills.

House bills

Authorizing the abatement of certain property tax assessments in the town of Lexington (House, No. 1135);

Relative to the concurrent jurisdiction over the former Devens Military Base (House, No. 1996);

Authorizing the town of Fairhaven to assess as a betterment to those affected properties, the costs incurred by the town to provide design and construction data to the Federal Emergency Management Agency in order to credit the Fairhaven portion of the New Bedford Hurricane Barrier with protection of certain areas of the town of Fairhaven from flood hazard (House, No. 3473);

Establishing the Center Pond Restoration and Protection District in the town of Becket (House, No. 3701);

To establish the Sherwood Forest Lake District (House, No. 3702);

Authorizing the town of Natick to lease certain property (House, No. 3705); and

Authorizing the city of Melrose to establish traffic safety zones (House, No. 4055);

Severally were read a second time; and they were ordered to a third reading.

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Nantucket,—land.

The House Bill authorizing the conveyance of certain parcels of land in the town of Nantucket (House, No. 3816) (its title having been changed by the committee on Bills in the Third Reading), reported by said committee to be correctly drawn, was read a third time.

Pending the question on passing the bill to be engrossed, Mr. Madden of Nantucket moved to amend it by substitution of a bill with the same title (House, No. 4182), which was read.

The amendment was adopted; and the substituted bill was passed to be engrossed. Sent to the Senate for concurrence.



*Recess.*

Recess.

At ten minutes after eleven o'clock A.M., on motion of Mr. Peterson of Grafton (Mr. Donato of Medford being in the Chair), the House recessed until half past twelve o'clock; and at twenty-five minutes before one o'clock, the House was called to order with Mr. Donato in the Chair.

*Quorum.*

Quorum.

Mr. Jones of North Reading thereupon asked for a count of the House to ascertain the presence of a quorum.

Recess.

The Chair (Mr. Donato), having determined a quorum was not present, at twenty-three minutes before one o'clock declared a recess, under Rule 82, until one o'clock P.M.; and at a quarter after one o'clock the House was called to order with Mr. Petrolati of Ludlow in the Chair.

Quorum.

A quorum not having been attained, the Chair (Mr. Petrolati) directed the Sergeant-at-Arms to secure the presence of a quorum.

Quorum,—yea and nay No. 202.

Subsequently a roll call was taken for the purpose of ascertaining the presence of a quorum; and on the roll call 148 members were recorded as being in attendance.

**[See Yea and Nay No. 202 in Supplement.]**

Therefore a quorum was present.

*Emergency Measures.*

Veterans' registration plates.

The engrossed Bill providing for the issuance of certain veterans' plates by the Registrar of Motor Vehicles (see House, No. 4144, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 37 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, in its amended form; and it was signed by the acting Speaker and sent to the Senate.

Health care facilities,—charges.

The engrossed Bill prohibiting health care facilities from charging for certain services (see House, No. 4145, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 32 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, in its amended form; and it was signed by the acting Speaker and sent to the Senate.

Trial Court,—transfer funds.

The engrossed Bill authorizing the transfer of certain funds within the Trial Court (see House, No. 4148), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 27 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, without amendment; and it was signed by the acting Speaker and sent to the Senate.

General fund,—transfer funds.

The engrossed Bill providing for the transfer of certain funds to the general fund (see House, No. 4150, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 50 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, in its amended form; and it was signed by the acting Speaker and sent to the Senate.

District local technical assistance fund.

The engrossed Bill relative to the district local technical assistance fund (see House, No. 4151, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 34 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted; and it was signed by the acting Speaker and sent to the Senate.

Life sciences investment fund.

The engrossed Bill relative to the Massachusetts life sciences investment fund (see House, No. 4152), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 39 to 0. Sent to the Senate for concurrence.



Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted without amendment; and it was signed by the acting Speaker and sent to the Senate.

Monson and Templeton,—development.

The engrossed Bill relative to development in the towns of Monson and Templeton (see House, No. 4153, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 39 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, in its amended form; and it was signed by the acting Speaker and sent to the Senate.

Regionalization advisory commission.

The engrossed Bill establishing a regionalization advisory commission (see House, No. 4154, amended), which had been returned by His Excellency the Governor with recommendation of amendment, having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 39 to 0. Sent to the Senate for concurrence.

Bill re-enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be re-enacted, in its amended form; and it was signed by the acting Speaker and sent to the Senate.

*Engrossed Bill.*

Bill enacted.

The engrossed Bill further regulating a certain license for the sale of all alcoholic beverages not to be drunk on the premises in the town of Dracut (see House, No. 3800) (which originated in the House), having been certified by the Clerk to be rightly and truly prepared for final passage, was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

*Recess.*

Recess.

At ten minutes after two o'clock P.M., on motion of Mr. Kujawski of Webster (Mr. Petrolati of Ludlow being in the Chair), the House recessed until a quarter after three o'clock P.M.; and at seven minutes before four o'clock, the House was called to order with Mr. Vallee of Franklin in the Chair.

*Quorum.*

Quorum.

Mr. Peterson of Grafton thereupon asked for a count of the House to ascertain if a quorum was present. The Chair (Mr. Vallee), having determined that a quorum was not in attendance, then directed the Sergeant-at-Arms to secure the presence of a quorum.

Quorum,— yea and nay No. 203.

Subsequently a roll call was taken for the purpose of ascertaining the presence of a quorum; and on the roll call 152 members were recorded as being in attendance.

**[See Yea and Nay No. 203 in Supplement.]**

Therefore a quorum was present.

*Reports of Committees.*

Supplementary appropriations.

By Mr. Murphy of Burlington, for the committee on Ways and Means, on House, No. 4155, reported, in part, a Bill making appropriations for the fiscal year 2010 to provide for supplementing certain existing appropriations and for certain other activities and projects (House, No. 4181) [Cost: $38,599,973.00]. Read; and referred, under Rule 7A, to the committee on Steering, Policy and Scheduling.

Under suspension of the rules, on motion of the same member, the bill was read a second time forthwith; and it was ordered to a third reading.

Subsequently under suspension of the rules, on motion of Mr. Murphy of Burlington, the bill (having been reported by the committee on Bills in the Third Reading to be correctly drawn) was read a third time.

Pending the question on passing the bill to be engrossed, Mr. Peterson of Grafton moved that further consideration thereof be postponed, until Monday, September 21, and specially assigned to the hour of one o'clock P.M.

Motion to postpone negatived,— yea and nay No. 204.

After debate on the motion to postpone, the sense of the House was taken by yeas and nays, at the request of Mr. Jones of North Reading; and on the roll call 25 members voted in the affirmative and 129 in the negative.

**[See Yea and Nay No. 204 in Supplement.]**

Therefore the motion to postpone was negatived.

Mr. Rogers of Norwood then moved to amend the bill in section 2, in item 0330-0300, by striking out the figures "3,350,000" and inserting in place thereof the figures "5,763,063"; in item 0330-3337, by striking out the figures "950,000" and inserting in place thereof the figures "1,892,192"; in item 0333-0002, by striking out the figures "500,000" and inserting in place thereof the figures "702,478"; in item 0335-0001, by striking out the figures "150,000" and inserting in place thereof the figures "310,109" [A]; and in item 0339-1003, by striking out the figures "300,000" and inserting in place thereof the figures '788,786'." The further amendment was adopted.

The amendments, as amended, then were rejected.



Ms. Callahan of Sutton then moved to amend the bill in section 2 by striking out item 7007-0951; and after remarks the amendment was rejected.

The same member then moved to amend the bill in section 2, in item 7007-0951, by striking out the figures "2,500,000" and inserting in place thereof the figures "1,500,000"; and the amendment was rejected.

Ms. Callahan then moved to amend the bill by inserting after section 33 the following section:

"SECTION 33A. Section 7, Chapter 92B of the General Laws as so appearing, is hereby amended by inserting the following sentence at the end thereof:— The corporation shall provide the house of representatives and the senate with a comprehensive plan indicating complete phased withdrawal of public financing no later than October 31, 2009.".

Quorum.

Pending the question on adoption of the amendment, the same member asked for a count of the House to ascertain if a quorum was present. A count showed that 71 members were in attendance. The Chair (Mr. Vallee of Franklin) then directed the Sergeant-at-Arms to secure the presence of a quorum.

Quorum,— yea and nay No. 205.

Subsequently a roll call was taken for the purpose of ascertaining the presence of a quorum; and on the roll call 151 members were recorded as being in attendance.

**[See Yea and Nay No. 205 in Supplement.]**

Therefore a quorum was present.

After remarks the amendment was rejected.

Ms. Callahan then moved to amend the bill in section 32 by adding the following two sentences: "The secretary of administration and finance, in consultation with the Commonwealth Health Insurance Connector Authority shall submit to the house of representatives and the senate a comprehensive report detailing efficiencies and cost saving measures associated with changes to program coverage for such populations and provide comparative analysis of program benefits in relation to other insurance programs offered by the Commonwealth Health Insurance Connector Authority. This report shall be due by no later than October 31, 2009."; and after remarks the amendment was rejected.

Mr. Hill of Ipswich then moved to amend the bill by inserting after section 33 the following section:

"SECTION 33A. Notwithstanding any general or special law to the contrary, the registry of motor vehicles shall promulgate and adopt a plan to ensure full accessibility to all registry branch service for citizens residing in the region of the Commonwealth, commonly known as the 'North Shore Region' located within Essex county, prior to the closure of the branch office currently located in the city of Beverly.".

The amendment was rejected.

Mr. Welch of West Springfield then moved to amend the bill in section 2 by inserting after item 7000-9401 the following item:

"7002-0500 ..... $202,534";

by inserting after section 11 the following two sections:

Supplementary appropriations.

"SECTION 11A. Section 6K of said chapter 221 of the General Laws, as so appearing, is hereby amended by striking out, in line 1, the words 'justices of the superior court' and inserting in place thereof the following words:— clerk of courts for the county of Hampden.

SECTION 11B. Section 6L of said chapter 221, as so appearing, is hereby amended by striking out, in line 1, the words 'justices of the superior court' and inserting in place thereof the following words:— clerk of courts for the county of Hampden."; by inserting after section 20 the following section:

"SECTION 20A. Item 7070-0065 of said section 2 of said chapter 27 is hereby amended by striking out the words '; provided, that all scholarship programs receiving funding through this item shall follow the same guidelines as detailed in item 7070-0065 in section 2 of chapter 182 of the acts of 2008' "; and by inserting after section 23 (as published) the following section:

"SECTION 22A. Said section 2 of said chapter 27 is hereby amended by striking item 8910-2222 and inserting in place thereof the following item:—

| | | |
|---|---|---|
| 8910-2222 | For the Hampden sheriff's department which may expend for the operation of the department an amount not to exceed $1,500,000 from federal inmate reimbursements; provided, that $312,000 from the reimbursements shall not be available for expenditure and shall be deposited into the General Fund before the retention by the department of any of these reimbursements; and provided further, that notwithstanding any general or special law to the contrary, for the purpose of accommodating timing discrepancies between the receipt of retained revenues and related expenditures, the department may incur expenses and the comptroller may certify for payment amounts not to exceed the lower of this authorization or the most recent revenue estimate as reported in the state accounting system ..... | $1,500,000"; |

The amendments were adopted.

Bill passed to be engrossed,— yea and nay No. 206.

On the question on passing the bill, as amended, to be engrossed, the sense of the House was taken by yeas and nays at the request of Mr. Jones of North Reading; and on the roll call 126 members voted in the affirmative and 27 in the negative.

**[See Yea and Nay No. 206 in Supplement.]**

Therefore the bill (House, No. 4181, amended) was passed to be engrossed. Sent to the Senate for concurrence.

Subsequently the bill came from the Senate with the endorsement that it had been passed to be engrossed, in concurrence, with amendments in section 30 (as published), in line 583, striking out the words "secretary of education" and inserting in place thereof the words "president of the university of Massachusetts"; by inserting the following section:

"SECTION 14A. Section 2 of chapter 27 of the acts of 2009 is hereby amended in item 1233-2350 by striking out the figure '936,376,140' and inserting in place thereof the following figure:— 936,437,803."; and by inserting after section 33 (as published) the following section:

"SECTION32A. The department of correction shall not suspend, terminate, reduce services or otherwise divert clients of the Massachusetts alcohol and substance abuse center until such time as the department files a displacement plan for the center's clients to the house and senate committee on ways and means, the joint committee on public safety and homeland security and the joint committee on mental health and substance abuse; provided, however, that if such a plan shall be filed, the plan shall not take effect sooner than 90 days from the date that such plan has been filed with said committees.".

Under suspension of Rule 35, on motion of Mr. Murphy of Burlington, the amendments (reported by the committee on Bills in the Third Reading to be correctly drawn) were considered forthwith; and they were adopted, in concurrence.

*Papers from the Senate.*

County sheriffs.

A report of the committee of conference on the disagreeing votes of the two branches, with reference to the House amendments (striking out all after the enacting clause and inserting in place thereof the text contained in House document numbered 1153; and by inserting before the enacting clause the following emergency preamble:

"*Whereas*, The deferred operation of this act would tend to defeat its purpose, which is to transfer forthwith county sheriffs to the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.") of the Senate Bill transferring county sheriffs to the Commonwealth (Senate, No. 2045), recommending the passage of a Bill transferring county sheriffs to the Commonwealth (Senate, No. 2119), came from the Senate with the endorsement that it have been accepted by said branch [a communication was also received from the Senate, identifying a technical correction to section 19 of the bill that was not in the printed copy].

Under suspension of the rules, on motion of Mr. Walsh of Lynn, the report of the committee of conference was considered forthwith.

Committee of conference report accepted,— yea and nay No. 207.

After debate on the question on acceptance of the report, in concurrence, the sense of the House was taken by yeas and nays, at the request of the same member; and on the roll call 152 members voted in the affirmative and 2 in the negative.

**[See Yea and Nay No. 207 in Supplement.]**

Therefore the report of the committee of report was accepted, in concurrence.

*Recess.*

Recess.

At ten minutes after six o'clock P.M., on motion of Mr. Rogers of Norwood (Mr. Vallee of Franklin being in the Chair), the House recessed until a quarter after seven o'clock P.M.; and at half past seven o'clock, the House was called to order with Mr. Donato in the Chair.

*Papers from the Senate.*

Westborough,— property.

The House Bill relative to the disposition of property in the town of Westborough (House, No. 3147) came from the Senate passed to be engrossed, in concurrence, with amendments inserting after section 2 (as changed by the committee on Bills in the Third Reading) the following two sections:

"SECTION 2A. The first sentence of section 6 of said chapter 660 is hereby amended by striking out, in line 6, the words 'nursery and' and inserting in place, thereof the following words:— 'nursery, a municipal firing range or'.

SECTION 2B. The commissioner of capital asset management and maintenance may execute and deliver to the town of Westborough such amended deed, in accordance with section 6 of chapter 660 of the acts of 1987, or other document as the commissioner deems reasonable and appropriate to effect the purposes of section 2A.".

Under suspension of Rule 35, on motion of Mr. Peterson of Grafton, the amendments (reported by the committee on Bills in the Third Reading to be correctly drawn) were considered forthwith; and they were adopted, in concurrence.

Nantucket,— Muskeget Island.

The House Bill authorizing the town of Nantucket to convey or otherwise dispose of a parcel of land on Muskeget Island in the town of Nantucket (House, No. 4134) came from the Senate passed to be engrossed, in concurrence, with an amendment in section 1, in lines 3 and 4, by striking out the words ", a government body of the commonwealth or a non-profit organization whose mission is to conserve natural resources or otherwise dispose.".

Under suspension of Rule 35, on motion of Mr. Madden of Nantucket, the amendment (reported by the committee on Bills in the Third Reading to be correctly drawn) was considered forthwith; and it was adopted, in concurrence.

*Emergency Measures.*

County sheriffs.

The engrossed Bill transferring county sheriffs to the Commonwealth (see Senate, No. 2119), having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 13 to 0. Sent to the Senate for concurrence.

Bill enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the Senate) was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

Mortgage licensing.

The engrossed Bill adopting the federal secure and fair enforcement for mortgage licensing act of 2008 (see House, No. 4178), having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.



A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 17 to 0. Sent to the Senate for concurrence.

Bill enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

*Recess.*

Recess.

At twenty-two minutes after eight o'clock P.M., on motion of Mr. Jones of North Reading (Mr. Donato of Medford being in the Chair), the House recessed until five minutes before nine o'clock P.M.; and at that time the House was called to order with Mr. Donato in the Chair.

*Suspension of Rule 1A.*

Suspension of Rule 1A.

The Chair (Mr. Donato of Medford) then placed before the House the question on suspension of Rule 1A in order that the House might continue to meet beyond the hour of nine o'clock P.M.

Rule 1A suspended,— yea and nay No. 208.

On the question on suspension of Rule 1A, the sense of the House was taken by yeas and nays, as required under the provisions of said rule; and on the roll 131 members voted in the affirmative and 20 in the negative.

**[See Yea and Nay No. 208 in Supplement.]**

Therefore Rule 1A was suspended.

*Engrossed Bill — Land Taking.*

Nantucket,— Muskeget Island.

The engrossed Bill authorizing the town of Nantucket to convey or otherwise dispose of a parcel of land on Muskeget Island in the town of Nantucket (see House, No. 4134, amended) (which originated in the House), having been certified by the Clerk to be rightly and truly prepared for final passage, was put upon its final passage.

Bill enacted (land taking),— yea and nay No. 209.

On the question on passing the bill to be enacted, the sense of the House was taken by yeas and nays (this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution); and on the roll call 150 members voted in the affirmative and 0 in the negative.

**[See Yea and Nay No. 209 in Supplement.]**

Therefore the bill was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

*Emergency Measures.*

Belchertown,— property.

The engrossed Bill relative to the disposition of property in the town of Belchertown (see House, No. 3147, amended), having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

Belchertown,—property.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 80 to 0. Sent to the Senate for concurrence.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was put upon its final passage.

Bill enacted (land taking),—yea and nay No. 210.

On the question on passing the bill to be enacted, the sense of the House was taken by yeas and nays (this being a bill providing for the taking of land or other easements used for conservation purposes, etc., as defined by Article XCVII of the Amendments to the Constitution); and on the roll call 151 members voted in the affirmative and 0 in the negative.

**[See Yea and Nay No. 210 in Supplement.]**

Therefore the bill was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

Supplementary appropriations.

The engrossed a Bill making appropriations for the fiscal year 2010 to provide for supplementing certain existing appropriations and for certain other activities and projects (see House, No. 4181, amended), having been certified by the Clerk to be rightly and truly prepared for final passage, was considered, the question being on adopting the emergency preamble.

A separate vote was taken, as required by the provisions of Article XLVIII (as amended by Article LXVII) of the Amendments to the Constitution; and the preamble was adopted, by a vote of 4 to 0. Sent to the Senate for concurrence.

Bill enacted.

Subsequently, the Senate having concurred in adoption of the emergency preamble, the bill (which originated in the House) was passed to be enacted; and it was signed by the acting Speaker and sent to the Senate.

*Order.*

On motion of Mr. DeLeo of Winthrop,—

Next sitting.

*Ordered*, That when the House adjourns today, it adjourn to meet tomorrow at eleven o'clock A.M.

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At twenty seven minutes after eleven o'clock P.M., on motion of Mr. Peterson of Grafton (Mr. Donato of Medford being in the Chair), the House adjourned, to meet the following day at eleven o'clock A.M., in an Informal Session.

# SENATE . . . . . No. 1865

The Commonwealth of Massachusetts

**REPORT**

**OF THE**

**SPECIAL COMMISSION**

**RELATIVE TO THE REORGANIZATION**

**OR**

**CONSOLIDATION OF SHERIFFS' OFFICES**

SUBMITTING ITS FINDINGS AND RECOMMENDATIONS

(under the provisions of section 22 of Chapter 61 of the Acts of 2009,

as amended by section 27 of Chapter 36 of the Acts of 2013)

July 11, 2013

The Commonwealth of Massachusetts
MASSACHUSETTS SENATE

SENATOR MICHAEL O. MOORE
*Second Worcester District*
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*Chairman*
HIGHER EDUCATION
*Vice Chairman*
PUBLIC SAFETY &
HOMELAND SECURITY

SENATE WAYS AND MEANS
POST AUDIT & OVERSIGHT

July 11, 2013

William F. Welch, Senate Clerk
Office of the Clerk of the Senate
State House, Room 335
Boston, MA 02133

To the Clerk of the Senate:

Attached please find a copy of the final report approved by the Sheriff's Commission (pursuant to Section 22 of Chapter 61 of the Acts of 2009, as amended by Section 27 of Chapter 36 of the Acts of 2013).

Sincerely,

Michael O. Moore
Chairman of the Sheriff's Commission

**Table of Contents**

## Executive Summary

Section 22 of Chapter 61 of the Acts of 2009, *An Act Transferring County Sheriffs to the Commonwealth*, mandated the creation of a Special Commission to investigate and study many aspects of the Sheriffs' Offices[1] and make recommendations "relating to the reorganization, consolidation, operation, administration, regulation, governance and finances of the Sheriffs' Offices".[2]

More specifically, among the broad areas that the Commission was directed to consider were the possible consolidation, elimination or realignment of certain Sheriffs' Offices; the best management practices concerning administrative procedures, and the use of civil process funds as well as the placements and services for female detainees and prisoners.

In undertaking this wide encompassing directive, and based on the information collected, the Commission recognizes that the correctional mission of the Sheriffs' Offices differs from the mission of the Department of Corrections (the DOC). The populations they serve overlap, but are not exactly the same and the Sheriffs are more connected to the communities in which they operate than the DOC. In addition, because the Sheriffs are elected and historically operated as county departments, they have traditionally enjoyed a measure of autonomy in fashioning their programs and running their departments.

In making its recommendations, the Commission does not intend to change the mission of the Sheriffs' Offices or to eliminate the Sheriffs' autonomy. While the Commission's recommendations do include some that, we hope, will result in a greater uniformity in standards and procedures across Sheriffs' departments, the intent of the recommendations is not to reduce

[1] See Appendix A for a historical overview of the Office of the Sheriff.
[2] See Appendix B for full text of Section 22.

the Sheriffs role or input, rather it is to achieve goals that are important across state government and to ensure that the interests of staff, inmates, and the public are all well served. The overarching goals that the Commission is trying to achieve include: to increase transparency, to institute mechanisms for accountability and oversight, to identify and implement standards that reflect best practices, to promote efficiency, effectiveness and integrity in management and operations, to maximize use of limited taxpayer and staff resources, and to maintain public safety and security.

**Commission Process**

Beginning on February 9, 2011, the Commission[3] held numerous meetings throughout 2011 and 2012. As part of its process and in order to fulfill the Commission's charge, the members surveyed the Sheriffs' Offices on various aspects of the Sheriffs' operations; heard presentations from several speakers[4]; invited the Sheriffs and other policymakers to attend Commission meetings; researched best practices throughout the corrections system; sought input from state agencies; and toured the Suffolk County House of Corrections, the Middlesex County Jail in Cambridge, the Middlesex County Cambridge Civil Process Office, and the Essex County Women in Transition Center.

Based on its analysis, the Commission presents the following recommendations. It is important to note that the Commission's recommendations were developed with the understanding that these recommendations can only be implemented subject to the availability of additional resources. In no way should these recommendations be understood as a commitment from the Legislature or the Administration to provide funding in order to implement them,

[3] See Appendix C for a list of the Commission members.
[4] See Appendix D for a list of presenters.

particularly given the continued fiscal reality faced by the Commonwealth. All recommendations will need to be considered among all other demands facing the state budget.

## GOVERNANCE

### Consolidation and Elimination

There are fourteen Sheriffs in the Commonwealth which are independently elected by the residents of the county where they serve. With the exception of the Nantucket County Sheriff's Office, which performs first responder law enforcement duties and operates a lock-up, all Sheriffs' Offices in Massachusetts operate a county jail and a county house of correction. County jails are maximum security facilities that hold pre-trial detainees. Persons charged with a crime, who have been arraigned and have had a bail imposed that they cannot post, are held in custody at a county jail until such time as they are released on their own recognizance, can post the bail or the case is resolved. Pre-trial detainees may be held for a few hours or for several years. Whenever an offender held on bail at a county jail has previously served time in state prison on unrelated charges, that offender can be transported to state prison to await trial. These are so-called "52As" named after the section of Chapter 276 of the Massachusetts General Laws that permits this practice. Sheriffs frequently transfer eligible offenders to the DOC to reduce jail overcrowding[5].

County houses of correction hold inmates who have been sentenced to imprisonment following conviction for any misdemeanor that carries such a penalty and/or certain kinds of

[5] For example, the Suffolk County Sheriff's Office is the 16th largest in the United States. In addition to approximately 875 pre-trial detainees held in its facilities, it averages an additional 250 pre-trial 52As or detainees awaiting trial in state prison facilities.

felonies. These felonies are known as "concurrent jurisdiction" felonies because they carry sentences of up to two and one-half years in the house of correction or five years in state prison. The maximum sentence that can be imposed to a county house of correction on any single count of a criminal complaint is two and one-half years[6]. House of correction inmates are sentenced almost exclusively from the Commonwealth's District Courts. On rare occasions, an offender who is indicted and convicted in the Superior Court may receive a house of correction sentence. With the exception of those convicted of charges that carry a minimum mandatory term of imprisonment, inmates sentenced to the house of correction are eligible for parole upon completing half of the imposed term of incarceration.

Collectively, an average of 17,000 inmates and pre-trial detainees are held in Sheriffs' facilities each year. Sheriffs are responsible for the transportation of inmates and pre-trial detainees to court, state prisons, other Sheriff's facilities, hospitals, work sites and half-way houses throughout the Commonwealth. Although juveniles are not held in their facilities, six Sheriff's Offices are also responsible for transporting juveniles to court and they are required to be transported separately from adult inmates and pretrial detainees. It is reported that Sheriffs' Deputies make in excess of 200,000 transportation trips yearly.

Sheriff's Offices operate within a paramilitary security structure. There is a clear chain of command: Sheriff, Superintendent, Assistant Superintendent, Assistant Deputy Superintendent, Captain, Lieutenant, Sergeant, Corporal and Officer. Operations within all facilities are governed by the Code of Massachusetts Regulations (CMRs), specifically those regulations that fall under 103 CMR 900.

[6] An offender can be sentenced to consecutive terms of up to 2.5 years upon conviction of multiple charges.

From their creation in the 1600s to 1997, all Sheriffs' Offices were part of county government. When some county governments were abolished in 1997[7], seven of the fourteen Sheriff's Offices were transferred from the county system to the state system[8]. Six of the remaining Sheriff's Offices – Barnstable, Bristol, Dukes, Norfolk, Plymouth and Suffolk – continued to operate within the infrastructure of county government. These Sheriffs' budgets were comprised of three main funding streams: an appropriation from the state, a Maintenance of Effort contribution (MOE) from the county and a statutorily mandated percentage of revenue derived from the collection of deeds excise taxes[9]. Oversight of the County Sheriffs' budgets was vested in the statutorily created County Government Finance Review Board (CGFRB). The state's appropriation to these Sheriffs was lumped into a "county pool" and distributed through the CGFRB. Sheriffs submitted yearly spending plans to the CGFRB in the same manner as the previously transferred Sheriffs submitted their yearly spending plans to the Secretary for Administration and Finance (A&F).

The funding mechanism for Sheriffs in non-abolished counties was historically problematic and became acutely so when, starting in late 2007, commercial and residential real estate sales began to drop, slowly at first and then precipitously by the end of 2008. Projections of the amount of deeds excise tax revenues Sheriffs could anticipate helping to fund their budgets were based on revenues from previous years. Due to shortfalls in local deeds revenues from levels assumed in the state's annual operating budget, it was typically the case that Sheriffs would need additional resources later in the fiscal year in order to operate their facilities and related services for a full year.

[7] Chapter 34B of the Massachusetts General Laws.
[8] The Franklin Sheriff's Department was the first to transition (July 1 1997), followed by Middlesex (July 11, 1997), Worcester and Hampden (July 1, 1998), Hampshire (January 1, 1999), Essex (July 1, 1999) and Berkshire (July 1, 2000).
[9] The Nantucket County Sheriff's Office did not receive an appropriation from the state or an MOE contribution from the county. Its budget was derived solely from deeds excise taxes and civil process fees.

These funds were typically not annualized in the proceeding operating budget adopted each year by July. This pattern has created cyclical challenges for several Sheriffs' offices, which face the pressure of costs increases to operate their facilities and services with uncertainty in their funding levels. The problem reached critical mass when the nation's economy collapsed, the Commonwealth faced huge deficits and County Sheriffs' budgets saw additional reductions between 13% and 26% between FY08 and FY11.

Among other goals and in an effort to address this problem comprehensively, A&F filed legislation to transfer - without abolishing any of the remaining counties - all funding of the County Sheriffs' operations to the state represented by individual line-items. A primary goal of the transfer was to eliminate the structural deficit and provide the Sheriffs with a known funding amount at the beginning of the fiscal year.

As part of this transition, all functions, duties and responsibilities of the office of the Sheriff were transferred from the county to the Commonwealth along with all funds, property, records, equipment and inventory, except revenues from civil process and inmate telephone and commissary funds. Sheriffs retain administrative and operational control over the Office of the Sheriff, jails, houses of correction and any other occupied buildings controlled by the Sheriff. They also retain all common law powers and statutory powers, authority and responsibilities pursuant to the Massachusetts General Laws. In addition, Sheriffs are "employer[s]" as defined in section 1 of Chapter 150E of the General Laws and have power and authority as employer in all matters including, but not limited to, hiring, firing, promotion, discipline, work-related injuries and internal organization of the department.

As of January 1, 2012, all 14 Sheriffs' Offices are functioning as state agencies. By placing all the Sheriffs under the same state accounting system and transferring all the employees to the state's health care system, run by the Group Insurance Commission, and the state's

pension system, there was a considerable cost savings to the state as well as increased transparency and oversight over Sheriff-related expenses, revenue and personnel.

The Commission discussed recommending a structure similar to that of the District Attorney's Offices. Under this system, there are only 11 District Attorneys since the District Attorney for the Cape and the Islands represents Barnstable, Dukes and Nantucket Counties and the Northwestern District Attorney represents both Franklin and Hampshire Counties. The Commission noted that the work of a Sheriffs' Office and a District Attorney's Office are vastly different, both practically and in terms of statutory mandate. Sheriffs' Offices house, feed, clothe, educate, transport and provide medical and mental health care, substance abuse treatment and re-entry programs to tens of thousands of pre-trial detainees and sentenced inmates - all within the regulations and strict security confines of the multiple facilities they operate. As discussed in further detail elsewhere in this report, Sheriffs also provide mutual aid to other law enforcement, regional services to their cities and towns and community services that are either not transferrable or would suffer if consolidated.

While the Commission members recognize that there is always a need to look at efficiencies through consolidating services and how best to use limited resources, the Commission voted against [10]consolidating any of the 14 Sheriff's Offices at this time.

**Realignment**

As elected officials with county wide jurisdiction, the Sheriffs are independent state officials who are not subject to the jurisdiction of the Executive Office of Public Safety and

[10] See Appendix E for votes taken by the Commission.

Security (EOPSS) and are independent from the DOC. The Commission considered the efficacy of recommending alignment between the county jail and house of corrections system along with the state prison system under the guidance and direction of EOPSS. There was consensus among the Commission members that this would not be appropriate and the Sheriffs should retain autonomy over the day to day operations of their facilities. Sheriffs, like District Attorneys, Secretaries of States, the Auditor and the Treasurer, are elected officials and not part of the Executive Branch. However, in order to establish uniformity, continuity and accountability in the state's correctional system, all members supported a system whereby EOPSS and the Massachusetts Sheriffs' Association would work together to set the policies and guidelines for the DOC as well as the individual Sheriff's offices.

The Commission acknowledges that there is continual state oversight over the Sheriffs' operations in that all facilities are governed by the Code of Massachusetts Regulations (CMRs) and the jails and houses of correction are audited twice a year by the DOC to monitor compliance with certain aspects of the CMRs. Each fiscal year, all Sheriffs' Offices submit spending plans to the Governor's Office through A&F. These plans are required to be updated and resubmitted when there are changes to funding made by A&F or the Legislature. All Sheriffs' Offices that operate jails and houses of correction are audited, twice yearly by the DOC, to monitor compliance with between 47 and 49 separate CMR standards. Over the course of a 4-year cycle, Sheriffs' Offices are audited for compliance with 193 separate CMR standards. All Sheriffs' Office medical facilities are audited annually by the state Department of Public Health (DPH) and all medical departments within Sheriffs' Offices are accredited by the National Commission on Correctional Health Care (NCCHC) or the American Correctional

Association (ACA).[11] Sheriffs' Offices whose facilities hold federal detainees for Immigration and Customs Enforcement (ICE) are audited twice monthly by an on-site auditor and annually by a third-party auditor contracted by ICE. The on-site auditor is also audited annually by an ICE audit supervisor.

While the Commission voted against recommending that the jails and houses of corrections be merged with the state prison system under the EOPSS/Executive Branch Management Structure, it continued to discuss ways in which to improve the coordination and communication between all sectors of the criminal justice system. To this end, the Commission recommends[12] establishing a Corrections Advisory Board with the aim of improving coordination across the criminal justice system and establishing best practices in all aspects of corrections. The Advisory Board is strictly advisory in nature, and has no regulatory or enforcement powers. Its role, as its name suggests, is to recommend improvements based on its ongoing review of the corrections system. The Board would report its proposals to the Administration and the Legislature biannually before the end of each two-year legislative session so that if legislation is needed to implement any of the Board's recommendations, it may be considered. The Advisory Board would be made up of representatives from the full continuum of the corrections system and its stackholders, including EOPSS, the Parole Board, the DOC, the Probation Department, the Sheriffs as well as experts in the areas of government accounting practices and auditing, ex-offender rehabilitation, reintegration, mental health, and substance abuse.

[11] The Dukes County Sheriff's Office does not have an on-site infirmary. All medical services are provided off-site by accredited facilities.
[12] See Appendix E for votes taken by the Commission.

**Evidence-Based Risk and Needs Assessments**

The Commission recognizes the importance of effective re-entry programs in reducing recidivism. There are numerous evidence-based risk and needs assessment (RNA) instruments available to criminal justice agencies that work both to predict an offender's risk for reoffending and to match the appropriate supervision and treatment to the offender's risk level. The DOC uses a fairly complex RNA tool; one that reflects the specific challenges they face in housing more dangerous populations for significantly longer periods of time. At this time, there is not one RNA assessment tool utilized uniformly by all the Sheriffs, but all Sheriff's Offices utilize RNA tools. As a practical matter, Sheriffs' Offices and the DOC routinely move pre-trial detainees and inmates between facilities pursuant to writs of habeas corpus, for safety and security and to alleviate overcrowding with no apparent conflict. That fact notwithstanding and in light of ongoing collaborations between the DOC and Sheriff's Offices regarding "step-downs" of pre-release the DOC inmates to county correctional facilities, a uniform risk-needs assessment tool is desirable.

In 2011, another Special Commission[13] was created by Outside Section 189 of Chapter 68 of the Acts of 2011 to study the Commonwealth's criminal justice system (the Criminal Justice Commission) in its entirety. The membership of this Criminal Justice Commission includes representatives from all sectors of the state's criminal justice system as well as members of several bar associations, and individuals with experience working with offenders and legislators. The charge of the Criminal Justice Commission is to examine areas such as the prisoner classification systems; sentencing guidelines; the probation and parole system; the operations of the Sheriffs' Offices; cost-effective health care; recidivism and overcrowding; and reintegration. The Criminal Justice Commission's report will include recommendations for

[13] See Appendix F for full text of Outside Section 189 of Chapter 68 of the Acts of 2011.

legislation "to reduce recidivism, improve overall public safety outcomes, provide alternatives for drug addicted and mentally ill defendants, increase communication and cooperation among public safety entities, reduce overcrowding of facilities, increase reliance upon evidence-based criminal justice methods, improve the collection and reporting of data on adults and juveniles, contain correction costs and otherwise increase efficiencies within the state's public safety entities".

Since the Criminal Justice Commission is charged with examining the full continuum of the criminal justice system and is tasked to come up with recommendations to benefit the entire system, the Sheriff's Commission, which shares members with the Criminal Justice Commission, opted not to make any specific recommendations on this issue.

**Jail Management Systems**

While it is not by choice, there is currently no uniform jail management system utilized by all of the Sheriff's Offices. The Sheriffs have sought a single system for many years, but a lack of funding and difficulties encountered in the development of SIRS have prevented this from happening. Sheriffs who wanted or needed updated jail management systems either sought an appropriate product through the competitive bid process or attempted to update and customize the product they already had. Currently, three Sheriffs use SIRS (Sheriffs Information Reporting System), six use IMATS (Inmate Management and Tracking System), one uses "Lock and Track" and the remaining Sheriffs use an internal customized jail management system. As a practical matter, these systems do not conflict with one another and there have been no reported inmate tracking or information-sharing problems between the Sheriff's Offices.

For the past 2 years, the MSA Subcommittee on Jail Management Systems - headed by Dukes County Sheriff Michael McCormack and staffed with IT representatives from each Sheriff's Office - have been working with EOPSS' Undersecretary of Forensic Science and Technology Curt Wood. They assessed the needs of each Sheriff's Office in an effort to gather business and functional requirements for a comprehensive Sheriff's inmate information management system. A solicitation to procure a Sheriff's Inmate Management System (SIMS) was conducted and a contract with a vendor to deliver the new system is pending. It is expected the development project will begin early 2013**.** The Sheriffs have also implemented a program developed by the Western Massachusetts Sheriffs that is now being used by all Sheriffs' Offices and the DOC which allows for the sharing of inmate data at all of the Massachusetts correctional facilities. The system, called MIDNet, will complement and enhance the system developed with EOPSS in that it will allow these agencies work more cooperatively and allow other public safety partners like police departments, District Attorneys and the Department of Probation access to information as long as they are properly authorized.

Having reviewed the Corrections Master Plan (CMP) released in January of 2012, the Commission discussed the need for continuity in the Commonwealth's correctional system. The Commission recommends[14] that the applicable agencies of the Commonwealth continue implementation of the Integrated Criminal Justice Information System (ICJIS) and include in the ICJIS the following: finger print-based records available to correctional, parole, and community corrections; telemedicine applications; electronic medical records of prisoners; the infrastructure with which to conduct video arraignments and video visitations; inmate kiosks where inmates can manage their inmate accounts, maintain their inmate plan, choose visitation times; other services that would reduce staff's time; and including a transportation database.

[14] See Appendix E for votes taken by the Commission.

The Commission also recognizes the challenges in correctional facilities to track inmates when they move from one part of the facility to another and how moving from a manual paper system to an electronic tracking system could help to ensure the safety of both staff and inmates. The Commission requests that the Executive Office of Public Safety (EOPSS) determine the feasibility and cost of adding an inmate tracking module to the Inmate Management System (IMS), which would allow staff at prisons and houses of correction to electronically monitor movement of prisoners within institutions in real time. EOPSS is specifically requested to consider and compare the advantages and disadvantages of using radio-frequency identification (RFID), bar codes and scanners, or biometric identification of prisoners with the tracking module.

**Re-Entry and the Office of Community Corrections**

In addition to offering a full range of educational, substance abuse treatment, parenting, community service and arts-focused programs, the Sheriff reported to the Commission that they focus heavily on re-entry - the 6-8 month period just prior to an inmate's scheduled release - as a way to reduce recidivism and increase public safety. It is clear from both the Sheriffs and the DOC that good re-entry programs are vital. They also agree that re-entry begins at intake with the average length of stay at county facilities at less than a year[15]. Starting at the jail intake process, the Sheriffs focus on providing pre-trial detainees and inmates with immediate access to programs that will help with their re-integration into the community, and on connecting inmates to community-based organizations that will continue to work with the inmate upon their release.

[15] House of correction inmates are eligible for parole upon completing half of their sentences.

The Office of Community Corrections is a division of the Probation Department. It was established by statute in 1996 as a part of a larger Commonwealth effort to address sentencing issues and prison overcrowding. The OCC serves probationers, parolees and inmates in pre-release through a system of intermediate sentencing sanctions ranging from Global Positioning System (GPS), electronic monitoring to drug testing to day reporting and services that include job training, substance abuse treatment and high school equivalency programs. It is specifically designed to provide "intensive supervision for chronic substance abusers with significant criminal histories".

Eight Sheriffs' Offices[16] currently contract with the Office of Community Corrections, while the remaining Sheriffs have created their own or adopted other programs. Sheriff's Offices offer a wide range of re-entry programs, many of them content-tailored to specific populations and the risk they present to re-offend. There are a number of factors that determine how a re-entry program will be configured and what specific services it will provide. The size of inmate population and how it breaks down demographically are important. Program partners who can provide effective, sustainable, local services are critical to the Sheriffs' efforts to reduce recidivism by providing a more stable transition from incarceration to community.

The Sheriffs' Offices reported that over the last decade they have cultivated innumerable relationships with not-for-profit human and social service providers in each of their counties and have collaborated with them to develop programs and secure funding for them through state and federal grants. Sheriff's Offices can work exclusively with the Office of Community Corrections to provide re-entry services or they can create or adopt re-entry programs on their own or both. Eight Sheriffs' Offices currently have Inter-agency Service Agreements (ISAs) with the Office of Community Corrections to provide some or all of their re-entry programming. The existence

[16] Dukes, Essex, Franklin, Hampden, Hampshire, Middlesex, Norfolk and Worcester.

or absence of such agreements does not prevent the Sheriffs from creating and implementing their own re-entry programs, particularly ones that target populations not served by OCC, such as female and high risk offenders. Currently, four Sheriffs' Offices have gender-specific re-entry programs for female offenders[17]. Four Sheriffs' Offices have programs that target high risk offenders[18]and five Sheriffs' Offices offer vocational training, certificate programs and job readiness[19].

With this in mind, the Commission discussed ways to avoid duplication in the system by having all partners in the criminal justice system collaborate. To explore this option further, Ronald Corbett, Jr., the Acting Commissioner of Probation, came before the Commission to share his experiences with the Office of Community Corrections (OCC) since his appointment on January 21, 2011. Since the model for OCC [20]was put in place over 10 years ago, the Acting Commissioner discussed ways that the Probation Department is re-examining the model for relevancy and effectiveness so that necessary adjustments may be made in order to realize the full potential of the centers. He also shared his goal of working to link OCC facilities with all the correctional partners. In order to continue to build stronger partnerships, the Acting Commissioner reported that the Probation Department's relationship with the DOC and the Sheriffs continues to be a great focus of attention and new experiments are being explored to strengthen the re-entry coordination at both the state and county level.

For example, the Acting Commissioner explained that the Department was conducting surveys on needed changes that would increase the level of participation in OCC and interest by

[17] Bristol, Essex, Hampden and Suffolk
[18] Hampden, Norfolk, Plymouth and Suffolk
[19] Bristol, Essex, Middlesex, Norfolk and Suffolk
[20] There are currently 21 OCC centers operating across the Commonwealth, with one center in Worcester County which is a juvenile center.

the courts and other partners. With over 85,000 people under supervision, he felt that there are plenty of supervision responsibilities that OCC centers can do. Since OCC programs are highly structured, the centers can play an important role not only stepping down inmates, but also in jail diversion and reducing overcrowding. Since the Acting Commissioner came before the Commission, due to a variety of focused efforts, the decline in enrollments in OCC centers has been reversed and there has been a 17% increase in referrals to the centers.

The Acting Commissioner also felt that there should be a more systematic approach to re-entry due to the number of inmates terminating their sentences with "from and after" terms of probations post incarceration. Since more judges are giving sentences that have jail time in addition to probation time, there is a need to re-engineer the system to be able to respond to these cases, especially because it causes inmates to often have dual supervision of both parole and probation. This often causes unintended consequences, such as conflicting schedules that prevent the person being supervised from meeting their obligations concerning employment, job training or child care. He felt that a greater number of inmates coming out of prisons and jails could be referred to OCC, so the system should be re-examined to determine how best to coordinate release planning with OCC in mind.

In order to further the Acting Commissioner's goal, the Commission recommends[21] strengthening the OCC legislative language[22] by mandating that OCC work with the Sheriffs, the DOC and the parole board on better program coordination in order to develop a broad based re-entry system for the full continuum of the Commonwealth's criminal justice system.

[21] See Appendix E for votes taken by the Commission.
[22] M.G.L. Section 2 of Chapter 211F.

**Human Resources Management**

The Commission reviewed information from the Sheriffs regarding their staff recruitment, hiring, firing, promotion, training, and pay practices. The Commission also invited representatives from the Commonwealth's Human Resources Division (HRD), which provides human resources support to the executive agencies, and other state agencies, to give information to the Commission on its practices and expertise. HRD has experience working with the DOC, State Police, and other public safety personnel.

The Sheriff's Office operate independently of each other with regard to human resources issues. Because they are elected officials, the Sheriffs historically have retained autonomy in their hiring practices, although HRD will consult with individual Sheriffs regarding economic terms and related items, which are generally consistent with Executive branch bargaining units. The Sheriffs' Offices are not part of the civil service system and they do not have identical programs or practices in the area of human resources. While all Sheriffs do maintain and use specific hiring standards that included a written application and exam, in-person interviews, fitness and background checks[23], they reported using a variety of hiring qualifications,

[23] Sheriffs uniformly impose the following 10 criteria for hiring:
1. a written application;
2. a written examination;
3. a fitness test that meets state and national standards
4. a minimum of a high school diploma or GED;
5. an in-person interview;
6. a background check;
7. a criminal record check;
8. United States citizenship;
9. possession of an valid driver's license; and
10. completion of a certified officer training academy.

In addition to the above, some Sheriffs also:
1. require or prefer candidates to have an Associates' Degree and/or military experience;
2. administer psychological/personality testing;
3. have a minimum age of 19 instead of 21; and
4. require a pre-employment drug test

preferences, and testing instruments for the same or similar positions.. For example, baseline educational qualifications for new hire correctional officers differs among the Sheriff's Offices, some require college education and others do not. Some recognize military service as a significant preference, others do not[24]. In addition, not all Sheriffs conduct psychological tests on recruits and among those that do, the testing instruments that offices use vary. Similarly, there is not uniformity among the 14 offices regarding recruitment methods, job posting, promotion standards, or training requirements. Finally, because of understandable differences in cost of living based on geography and historical differences in collective bargaining agreements and budgetary appropriations, there is not pay parity across offices for individuals who are performing the same or similar functions. The Commission noted that there is also significant disparity in pay, education incentive bonuses and so-called longevity payments between corrections officers who work in Sheriffs' Officers and those who work for the DOC.

According to HRD representatives, HRD has established screening processes that go beyond a written test, for certain agencies and job titles, including the State Police and the DOC. These testing and screening processes establish an initial pool of candidates for the agency, either regionally or statewide. Once the pool is established, HRD ceases its involvement. The hiring agency continues the process by interviewing candidates, implementing additional performance, ethical, or other assessments as necessary, and conducting background checks. All testing systems are developed in consultation with the hiring agency to ensure that

[24] In writing and in their appearances before the Commission, the Sheriffs explained that not all Sheriffs' Offices could afford to require psychological/personality testing due to the expense of hiring an outside consultant to administer it. While all Sheriffs state or follow a preference for college degrees or military service, some Sheriffs do not require it because they would miss the opportunity to hire good candidates who simply cannot afford to go to college or have chosen not to enlist in the military.

qualifications and assessments are appropriate for the positions being filled and to ensure that the test or screening process incorporates specific skill needs or preferences. Systems can be developed for use at both the initial hiring stage and at promotion, with different screening tools used at each stage. For example, for a promotion assessment, candidates could be evaluated on their assessment and resolution of scenarios to give insight into their supervisory or management style. Consultants would be used to develop scenarios in coordination with the hiring agency. So far, agency feedback to HRD on these systems has been positive.

HRD identified a number of potential benefits from using structured HR screening tools. The first of these benefits is that the hiring process is transparent and that decisions are based on principles of merit. Another identified benefit is that the screening tools can be defended in court. During development of the tool, HRD assumes that there may be challenges to the test by applicants and therefore uses modern validated exam science that can be defended by experts in the field. Another benefit is that testing centers can be mobile and so that tests can be held at a high school or similar facility at locations across the state. In addition, if there are similar jobs across the Sheriff's Offices that are routinely filled, there could be value, in both quality and efficiency, to identifying and implementing best practices in this area.

The Commission also reviewed information showing that there were upwards of 800 job titles/classifications at the Sheriff's Offices. In contrast, the DOC has approximately 130 job titles/classifications and is managed by HRD. Although it was apparent that some of the differences between the job titles or classifications were simply matters of administrative error in spelling or other minor differences, it was difficult for the Commission to determine whether there were distinctions between very similar titles that justified differences in grade or pay. The Commission also did not request information on the justifications, including legitimate cost of living justifications based on geography or collective bargaining agreements, for pay differentials

among employees across Sheriff's Offices or between Sheriff's Offices and the DOC for the same or similar positions.

While the Commission did not hear reports of specific problems with the Sheriffs' hiring practices, and HRD has not assessed current practices, Commission members expressed that there was a pressing need to identify and implement best practices in human resources management. That sense of urgency came from the Commission's obligation to try to ensure transparency, implementation of best practices, a level of uniformity around job titles/clarification, pay parity for similar positions across Sheriff's Departments. Commission members also expressed concerns about potential challenges to hiring, firing and promotion decisions given the variety of procedures that the Sheriffs currently employ.

Given the Commission's overarching goals of increasing transparency, accountability and oversight, maintaining efficiency, effectiveness and integrity, and maximizing resources and public and staff safety, the Commission recommended additional work in the area of human resources management. The Commission specifically recommends[25] that the Massachusetts HRD conduct, in consultation with the Sheriffs and the Massachusetts Sheriffs Association (MSA), a comprehensive assessment of current Sheriff offices human resources policies and practices, including but not limited to, standardizing job titles and classification, job posting, minimum testing requirements and other employment practices that will lead to statewide standards for classification, recruitment, promotion, compensation and professional standards for all fourteen Sheriffs' offices.[26]

To accomplish this goal, the Commission recommends that the House and Senate Committees on Ways and Means increase line items 1750-0100 and 8910-7100 to reflect this

[25] See Appendix E for votes taken by the Commission.
[26] The Commission does not insist that the assessment review of all the practices of all 14 Sheriffs but recommends that the review include a sufficiently representative sample with a variety of practices and procedure.

policy directive based on an estimate of costs from HRD. Finally, the Commission recommends that HRD issue a report of its assessment within one year of the appropriation of funds under recommendation, and that HRD send its report to the Chairs of the Joint Committee on State Administration and Regulatory Oversight, the Chairs of House and Senate Ways and Means, the House and Senate Clerks, the Chairs of the Joint Committee on Public Safety, and the Secretaries of A&F and EOPSS.

The Commission recognizes that the recommended assessment will take significant time, effort and financial resources, and that some issues, such as pay disparity, may be particularly difficult to resolve. However, given its mandate, the Commission believes that it is essential to review these human resources management issues.

With regard to training and staff development, the Sheriffs are subject to state regulation, which can be found at 103 C.M.R 915.00. The regulations require each Sheriff to develop and implement guidelines for training and staff development. The Massachusetts Sheriffs' Association also convenes an Education and Training Committee (MSAETC) to coordinate training efforts for the Sheriffs' Offices. The mission of MSAETC is to support the Sheriffs by fostering a collaborative effort from all counties to unify training standards for all disciplines. MSAETC utilizes accredited training resources. MSAETC also is committed to providing education and training equitably to all Sheriffs' Offices regardless of their geographic location or size. Some Sheriffs operate their own training academies while others must rely on the training curriculum and facilities of other agencies or departments. Despite strong work in this area, Commission members did raise concerns about the uniformity of training across the Commonwealth and what that meant both for employees, inmates, and taxpayers. There was a particular concern about Deputy Sheriff training because some Deputies carry firearms and

perform law enforcement duties as part of their routine work, while others do so only intermittently.

A review of this issue yielded the following information. Sheriffs deputize large numbers of outside law enforcement personnel – state, local and federal – throughout the Commonwealth. Only the State Police have jurisdiction to make arrests anywhere in the Commonwealth except federal land. All other federal and local police, including college and university police must be granted jurisdiction to conduct investigations and make arrests outside of their designated boundaries. Sheriffs also deputize their own officers for corrections-related work, such as transportation of inmates and supervision of inmate work crews; and law enforcement work, like joint first responder initiatives, task forces and traffic details. They also deputize all civil process servers. Certain civil process servers work in civil process enforcement where they are involved in front-line law enforcement such as accompanying utility company representatives to residential and commercial properties for shut-offs, handling evictions for properly bonded landlords and making capias arrests. Sheriffs require that all Deputy Sheriffs engaged in the performance of law enforcement duties complete the Intermittent Reserve Police Academy Training or its equivalent if the same is offered in their own academies by certified training instructors.

In 2008, the Massachusetts Legislature created the Special Commission on Massachusetts Police Training (SCMPT). The SCMPT was charged with examining the feasibility of creating a statewide law enforcement training program to coordinate municipal law enforcement training, as well as the feasibility of creating more efficient law enforcement facilities, staffing instruction, and preparedness. The SCMPT was also tasked with studying and making recommendations relative to the training provided to law enforcement officers in handling incidents involving persons with mental illness. The SCMPT included representatives from law

enforcement agencies that were not municipal entities, such as campus and environmental police, and a representative of the Massachusetts Sheriffs. The SCMPT did an extensive review of training programs for law enforcement, not just municipal law enforcement, and identified specific strengths and weaknesses in the systems.

In July 2010, the SCMPT issued a report with a recommendation that the Commonwealth develop, implement, support, and adequately fund a statewide Peace Officers Standards and Training (POST) system. The Commission endorses the findings and recommendations of the SCMPT in this area and voted to recommend[27] that Massachusetts Deputy Sheriffs who perform police work be included and mandated to participate in any POST system created as a result of the SCMPT's report.

**Civil Process**

From the earliest times and as codified in Section 11 of Chapter 37 of the Massachusetts General Laws[28], Sheriffs have been required to serve and enforce civil process. Service of process is defined as "delivery of a writ, summons or other legal process or notice." There are two kinds of civil deputies. Enforcement deputies have arrest and other powers that include, but are not limited to, the execution of capiases, orders of eviction and other actions in equity. They are usually paid either on an hourly or salaried basis. Enforcement situations can be volatile, so these deputies are generally uniformed, carry firearms and are required by the Sheriffs' Offices to complete Reserve Intermittent Academy training or its equivalent. Non-enforcement deputies, who serve subpoenas and civil complaints and other legal notices that comprise the bulk of civil

[27] See Appendix E for votes taken by the Commission.
[28] The statute is silent as to how civil process operations should be configured.

process work, generally are paid on a per diem or "per piece" basis rather than on an hourly or salaried basis.

Over time, ten of the fourteen Sheriffs' Offices have absorbed civil process operations into their budgets. The remaining four Sheriffs' Offices run their civil operations differently, and with the exception of the Chief Civil Deputy in Suffolk County, none of the employees are state employees. In Suffolk County, civil process work is performed through an unincorporated business entity[29] while in Hampden County, it is performed through a "political subdivision" of the Sheriff's Office. In both counties, all Civil Process Division expenses are paid from civil process fees; the entity is the employer and withholds payments for taxes, Social Security, and Medicare, but not federal unemployment taxes because it is an entity of state government. These employees do not pay into any municipal, county or state pension fund. Though these employees are not technically state employees, both the employees and the Sheriffs consider these workers to be employees of the Sheriff's Office because the Sheriff's Department runs the entity[30]. In Barnstable, civil process work is performed through an independent for-profit operation. The Sheriff appoints the Civil Deputies, but all salary and operational costs are covered by the Civil Process Office. The Sheriff does not provide any funding to the Civil Process Division nor does the Civil Process Office contribute any funding to the Barnstable County Sheriff's Office. Civil Process office employees are paid by the Civil Process operation and do not pay into any state, county or municipal pension fund. All Civil Process employee benefits are paid by the Civil Process Office. Any profit from the Civil Process Office is put back into the operation of the Civil Process Office. In Worcester County, civil process work is

[29] The unincorporated business entity is run by the Sheriff's Office and the day to day operations are overseen by a state employee, who is a salaried deputy.

[30] For purposes of civil liability for actions of deputies and administrative staff, these employees are also considered employees of the Suffolk and Hampden County Sheriff's Offices, because they operate the offices to accomplish their mandated obligations to serve process. It is unclear whether contract or other liability of the entity also rests with the Sheriffs' offices.

performed through independent non-profits where the individuals who perform these duties are employees of the non-profit which withholds taxes, Social Security, and Medicare. These employees do not pay into any municipal, county or state pension fund or derive any benefit there from. These employees and the Sheriffs do not consider these workers to be employees of the Sheriff and are not treated as such because the Sheriff does not run the operation. In large counties like Bristol, Essex and Middlesex, there are multiple civil process office locations.

State law sets the fee that the process server is authorized to collect depending on the type of process being served.[31] In 2003, the Legislature amended this law through Chapter 369 of the Acts of 2003 by increasing the fees and mandating that twenty-five percent of the increased fees go to the state treasury. This requirement applies regardless of whether the Civil Process Division is operated by the Sheriff or another business entity. Since the statute was amended, Sheriffs' Offices have contributed over $16,965,139.53 dollars to the General Fund. Sheriffs' Offices that do collect civil process fees, deposit these funds in local bank accounts that are not part of the state accounting system. The funds are not reported on the Massachusetts Management and Accounting and Reporting System (MMARS) but are generally segregated from other funds. While these accounts are not subject to the control or oversight of the Comptroller's office, they are subject to internal controls, including audits performed by the Auditor's Office and independent audits from outside entities. The Sheriffs provided reports to the Commission on the balances in their civil process accounts. The amounts ranged from a deficit to a substantial surplus. However, these balances reflected only a snapshot of the accounts at the time the information was requested and were not a true reflection of the status of the year's end.

[31] Massachusetts General Laws, chapter 262, section 8(a) establishes the fees of Sheriffs, Deputy Sheriffs and constables for civil process, including, for example, $20 for service of an original summons, trustee process, or subpoena; $30 for service of an original summons and complaint for divorce; $10 for the service of a writ of replevin for seizure of property; $10 for serving a venire or notice to jurors for attendance upon any court; and $20 for summoning witnesses.

The Auditor's office stressed that, as a result of its regular transfer audits, its greatest concern was about the status of civil process operations. The Auditor recommended that there be a division within each Sheriff's Office devoted to civil process operations and suggested that it could create financial and legal liabilities to do otherwise. To the extent that it is more efficient and cost effective for civil process functions to be outsourced, the operation should be procured through a fair and open bidding process. While the Auditor did not suggest any mismanagement, it believes these divisions should be managed by state employees and funding and fees should be accounted for like other state agencies. The Auditor anticipates cost savings over time with such a reform since there will be no Social Security, independent auditing, and bookkeeping costs. There was consensus that implementation of the Auditor's suggestions would require increased funding, at least initially.

Reform and standardization of the civil process system has been a priority for the Massachusetts Sheriffs Association, through its Civil Process Subcommittee. For this reason, in every session since at least 1998, the Sheriffs have filed a bill intended to reform the Civil Process system – *An Act relative to civil process reform.*[32] This bill reflects the Sheriffs' desire for consistency and clarity as well as their frustration with longstanding rules and regulations that conflict with one another.

Considering all the information it gathered and the Commission members' concerns, the Commission makes a number of recommendations related to reform of civil process. The Commission further determined that it would both update and redraft *An Act relative to civil process reform*[33] and, to the extent appropriate, the draft would incorporate the recommendations. It should be noted that in writing this redraft, the Commission consulted the

[32] In the 2011-2012 session, *An Act relative to civil process reform,* House Bill 2824.

[33] See Appendix I for a copy of the redrafted bill.

MSA, Auditor, Comptroller, PERAC, and GIC. Although it was a product of much discussion with these organizations and incorporates some of their suggestions, the Commission suggests that it be further reviewed to ensure that there are not unforeseen conflicts with existing Massachusetts General Laws and that official comment be obtained from these and other relevant agencies as part of the normal legislative process.

The Commission's revisions to *An Act relative to civil process reform* focus on bringing all civil process functions under state control and oversight. The bill directs the Sheriffs to eliminate independent outside entities and to perform civil process duties through a division run through each office. This restriction, however, should not preclude a civil process division from putting a service contract out to bid under a fair and transparent procurement process under state law and should not eliminate the Sheriffs' ability to pay process servers by commission. The Commission intends for employees who are transferred or hired into any civil process division affected by the bill to have access to any pension and creditable service rights allowable under law for previous civil process work.

The bill also focuses on increasing accountability and transparency in the collection, recording, and expenditure of civil process fees so that all accounts and accounting practices related to civil process comply with state finance law and state practices. For clarity, the bill also explicitly restricts expenditures of the revenues received from the Civil Process division to spending on activities that the Sheriffs are statutorily authorized to perform. In addition, the Commission also recommends that each Sheriff's Office develop policies and procedures related to civil process accounts that are approved by A&F and the Comptroller as recommended by the State Auditor's Office or other relevant entity. These policies and procedures should be referenced in each Sheriff's Office Internal Control Plan (ICP).

Finally, in order to ensure that the Legislature has appropriate information regarding civil process revenues and expenditures, the Commission also recommends that, if revenues collected through a particular Sheriff's civil process account will not be sufficient to cover the cost of its civil process operation, that the Sheriff notify House and Senate Ways and Means and A&F 30 days prior to a projected deficiency.

**Health Care**

The costs for all inmate and pre-trial detainee medical and mental health care are borne by the Sheriffs' budgets, even if that inmate or pre-trial detainee has private or public health insurance coverage. This population presents with extensive medical and mental health problems that stem largely from substance abuse/addiction, psychological and physical trauma, high-risk behavior while not in custody and a lack of medical attention to these issues over lengthy periods of time. Chronic illnesses requiring daily medication, like diabetes, hypertension, hepatitis and asthma and addiction-driven problems that require visits to specialists and in-patient hospitalization like arthritis and kidney disease are widespread.

The Sheriffs reported that county jails essentially function as emergency rooms every day as detainees are brought in from courthouses throughout the state to be booked into Sheriffs' facilities. Many are in active detoxification from alcohol and various drug addictions while many others are in active mental health decompensation from stress, trauma, recent cessation of medication or other factors. They present a significant risk of self-harm or harm to others; their medication and other needs must be triaged quickly and managed effectively regardless of the overall volume of detainees for intake. Sheriffs' medical staffs are the primary care providers for the majority of those incarcerated because all Sheriff's Offices are required to perform a medical and mental health care intake on everyone in their custody. The most consistent medical records

in existence for many inmates and pre-trial detainees are kept by the medical care providers in jails and houses of correction.

The Sheriffs estimate that approximately 42% of the inmates in their care suffer from some form of mental illness, however mild[34]. Approximately 26% of those have severe mental health issues that require psychotropic medication[35]. It was noted that the cost to provide appropriate treatment and psychotropic medications for these inmates is very high, ranging from hundreds of thousands of dollars per year in Berkshire, Norfolk and Plymouth counties, to close to a million in Hampden County to over a million in Suffolk County.

While two Sheriff's Offices utilize a medical vender secured through the state's bidding process to provide inmate and pre-trial detainee health care, the other Sheriff's Offices use a hybrid model where staff physicians, nurses and medical assistants are employees of the Sheriff's Offices, while vendors are used for specialized medical services, such as dental. The Sheriffs felt that most cost reductions can come from the way contracts with the health care provider are written. Sheriffs also try to address as many health care issues as possible within their infirmaries due to the high cost of transporting inmates to hospitals where two correctional officers must travel with and remain with the inmate throughout the duration of his or her stay for security. For example, where budgets allow or contract specifications require, Sheriffs have secured x-ray and dialysis machines in order to provide treatment on-site.

The Commission recognizes that inmate health care costs are not easily reduced since the state has a constitutional obligation to meet the medical standard of care[36]. The Commission also recognizes that one or two very ill inmates create significant unanticipated costs for the

34 These approximate percentages are based on information collected from respective risk assessments/classification tools and specific mental health assessments, diagnoses and pharmacy needs.
35 The estimated numbers include inmates and pre-trial detainees with both dual diagnoses (addiction and some form of mental illness, including organic brain disorders resulting from addiction) and mental illness only diagnosis.
36 The U.S. Supreme Court recognized a prisoner's Eighth Amendment right to adequate medical care in 1976 in the case of Estelle v. Gamble.

Sheriffs. In addition, if the Sheriffs do not timely address an inmate's medical or mental health issues, the cost to the taxpayers will increase if more costly treatments and surgeries are required at a later date or lawsuits are filed.

While there not has been an effort by all of the Sheriffs to contract with one health care vendor, several Sheriffs do share the same vendor. When asked about the possibility of all 14 Sheriffs contracting with one vendor, the Sheriffs from the outer counties expressed concerns about the staffing and other challenges that might arise if one vendor was responsible for placing providers in all 14 Sheriffs' Offices. It was the consensus amongst the Sheriffs that it was unlikely that one vendor could supply adequate medical care to all the Sheriffs across the state.

In order to explore other options to reduce state inmate health care costs, the Commission discussed ways to seek federal Medicaid reimbursements for inmate health care services. It is understood that under most circumstances, Section 1905(a)(A) of the Social Security Act prohibits the federal government from reimbursing states for inmate health care costs[37]. This Medicaid coverage policy does not render otherwise eligible inmates ineligible for Medicaid upon incarceration, but simply specifies the cost of medical services provided within a state correctional facility is not eligible for reimbursement. In contrast, federal reimbursement is available for an inmate's health care expenses if a Medicaid eligible inmate is an inpatient of a medical institution. The Commission recommends that the Executive Office of Health and Human Services (EOHHS) and the Legislature pursue a Medicaid waiver amendment and related changes in state and federal law and regulation to permit federal reimbursement of inmate health costs, including, but not limited to mental health care and drug and alcohol dependency treatment.

[37] Letter from Department of Health and Human Services to State Medicaid Directors dated April 10, 1998. Subject: Medicaid Coverage for Inmates of Public institutions.

Currently, the Sheriffs' Offices do not have a uniform policy to require hospitals or other medical services providers to bill Medicaid for eligible inmate health care costs for those inmates who require hospitalization within the first 30 days of their incarcerations nor do they routinely seek such reimbursement. In order to secure the maximum amount of federal reimbursement available to the state, the Commission recommends that the Sheriffs work with the hospitals and other medical service providers to ensure that MassHealth is billed for any Medicaid eligible inmate health expenses for when the inmates is treated as an inpatient in a medical institution. While this would result in a savings to the state, it should be noted that this change would shift the costs from the Sheriffs' budgets to another state agency, MassHealth, which would be able to share the total expense with the federal government. While this would represent a savings to the Sheriffs, the MassHealth budget would increase. It would be important to fully develop an accounting process that accurately monitors and reports the amount of incremental health care spending annually at MassHealth related to this cost shift."

Since there is uncertainty amongst the Sheriffs as to when Medicaid reimbursement is available and when it is not, the Commission recommends that a clarification is needed from the Office of Medicaid to ensure that the maximum amount of federal reimbursement is sought. For example, some Sheriff's Offices bill MassHealth for the first 30 days of a pre-trial inmate's incarceration while other Offices do not. Many inmates are already enrolled in or are eligible to enroll in MassHealth before being incarcerated. The Commission recognizes the importance of maintaining a continuum of post-release care which requires the need to ensure that inmates are on MassHealth upon release. Therefore, the Commission also recommends that guidance be sought from the EOHHS to establish how the Sheriffs can best work with MassHealth on maintaining eligibility for inmates and ensuring that inmate's cases are placed on "suspension status" during their incarceration so that coverage can automatically resume upon their release.

After receiving such guidance, the Commission recommends that the Sheriffs develop uniform policies and procedures to maximize the Commonwealth's reimbursement for eligible services to the maximum extent possible.

The Sheriffs noted that for inmates with psychiatric issues, a successful re-entry involves ensuring post-release access to appropriate community-based treatment services and medications. As previously noted, the costs associated with mental health services are significant. With this in mind, the Commission recommends seeking guidance from CMS on how best the Sheriffs can work with MassHealth on determining possible eligibility for reimbursement for services for inmates diagnosed with mental health disabilities. Lastly, the Commission recommends that the Sheriffs work with EOHHS and DPH to develop a comprehensive and mandatory mental health and drug and alcohol dependency testing protocol for all incoming inmates to determine the range of services necessary to treat each inmate.

**State Office of Pharmacy Services (SOPS)**

SOPS provides pharmacy services for many of the state's public health care institutions, including hospitals, prisons, development centers, and long-term care centers. Since the program services inpatient facilities, SOPS can negotiate directly with drug manufacturers with the goal of providing the lowest reasonable cost for medications.

The Fiscal Year 2010 Budget (Chapter 27 of the Acts of 2009) included language in the Sheriffs' Department's line items to require that all the Sheriff's Department's pharmacy services must be provided through SOPS[38]. From the information provided to the Commission

[38] The language mandating the use of SOP by the Sheriffs was vetoed by the Governor, but overridden by the Legislature.

by the individual Sheriff's Offices, after the transition to SOPS, some Sheriffs did see a savings after the transition, while others saw cost increases or only marginal savings.

In September of 2009, the Governor disapproved line-item language requiring the Sheriffs to use SOPS that was included in the legislation funding the seven Sheriffs that were transferred from county government to the state system[39]. In his message, the Governor stated: "Based on the experience of the Sheriffs themselves, most of whom have strenuously objected to this requirement, the mandated use of the State Office of Pharmacy Services (SOPS) may increase rather than reduce costs at a time when they can least afford it within their appropriations. Although SOPS should be considered an option, the Sheriffs, in their judgment, should be free to select the most efficient and cost effective pharmacy service to meet their individual department's needs."[40]

All but three of the Sheriff's Offices that operate jails and houses of correction have transitioned to SOPS. The Dukes County Sheriff's Office has not transitioned because SOPS cannot provide pharmacy services to Martha's Vineyard in a timely and cost effective manner. The Suffolk County and Worcester County Sheriff's Offices have not transitioned to SOPS because SOPS has been unable to show that they can provide medication just as efficiently as their current systems, but at less cost. Both estimate their post-transition cost increases will be between the Bristol and Essex County figures. Of the Sheriff's Offices which have transitioned their pharmacy services, some report significant cost increases, while others report significant savings.

[39] An Act Relative to Sheriffs, S.B. 2121, 187th Gen. Ct., Reg. Sess. (Mass. 2009).
[40] Message from His Excellency the Governor returning pursuant to Section 5 of Article LXIII of the Amendments to the Constitution with his disapproval of certain language in certain items contained in the engrossed bill relative to Sheriffs, S.B. 2164, 187th Gen. Ct., Reg. Sess. (Mass. 2009), filed September 29, 2009.

It should be noted that SOPS charges an administrative fee for using its services that is assessed to the Sheriff's Offices as a "chargeback." This fee is considerable and reduces the net savings to the Sheriffs for using SOPS. Moreover, the Sheriff's Offices purchase their medication using the same state contract as SOPS. Because SOPS services exclusively inpatient facilities, it is able to obtain lower prices on certain medications since they are allowed to negotiate directly with drug manufacturers and act as a mailing house for the facilities they serve. The Commission sees no reason why the Sheriff's Offices, which actually do operate infirmaries, could not jointly file for the same status to achieve the same discounts as SOPS.

The Commission recognizes that there may be savings achieved by some Sheriffs by participating in SOPS. However, the Commission recommends[41], as the Governor did, that participation in SOPS should not be mandatory and that the Sheriffs' Office be allowed to select the pharmacy service that best fit the medical needs of their populations using an open and transparent bidding process.

**Female Detainees and Inmates**

Female Offenders present with unique challenges and face institutional barriers that distinguish them from their male counterparts. They experience "higher rates of mental health disorders than their male counterparts, histories of physical abuse, psychological stress associated with separation from children, and higher risk than their male counterparts for experiencing co-occurring mental illness and substance use disorders, the needs of women offenders are extensive.[42]"

[41] See Appendix E for votes taken by the Commission.
[42] Massachusetts Division of Capital Assess Management, Corrections Master Plan, Final Report, December 2011, Page 77.

Currently, MCI-Framingham is the only DOC facility in the state that houses females who are awaiting trial and have been sentenced. The facility holds more than half of the approximately 1,322 women[43] incarcerated in the Commonwealth. This population includes those awaiting trial, those held on the detainers pending probation surrender, pre-trial detainees, civil commitments, federal detainees, as well as county, fugitives from justice, and state sentenced offenders. In recent years, the population of incarcerated women has grown and the use of MCI-Framingham as a multi-jurisdictional facility has resulted in significant overcrowding. The Awaiting Trial Units at MCI-Framingham, which houses both pre-trial and civilly committed females, are historically the most overcrowded in the DOC, operating at over 300% of design/rated capacity.[44]

There are currently 6 Sheriffs that have the ability to house sentenced female offenders[45] and provide effective re-entry programs for them. One unique model established in Essex County – The Women in Transition (W.I.T.) pre-release program in Salisbury -- offers a way for county-sentenced female offenders to still benefit from re-entry programs closer to their communities. While sentenced county female offenders are initially placed at MCI-Framingham, eligible non-violent inmates are reclassified and may serve out their sentence at W.I.T. The program houses up to 24 female inmates in-house and another 26, who are electronically supervised, reside in a sober residential housing community. In an effort to assist them in obtaining the necessary skills and resources they will need to successfully transition back to their communities, program components include individual and group counseling, education and/or vocational training, work release and community service.

[43] Massachusetts Division of Capital Asset Management, Corrections Master Plan, Final Report, December 2011.
[44] Based on data included in Quarterly Report on the Status of Prison Overcrowding, 2011 and 2012, submitted by DOC to be in Compliance with Chapter 799 Section 21 of the Acts of 1985.
[45] Barnstable, Berkshire, Bristol, Hampden and Nantucket (Note: Females from Nantucket County who are sentenced to serve a term of imprisonment in a House of Correction are transported to Barnstable County Correctional Facility in Bourne) house females at the house of corrections. Franklin County houses pre-trial females.

The Commission recognizes that the lack of local facilities for placement of female detainees and inmates is a long standing problem across the state's criminal justice system. There have been several reports and studies[46] that have focused solely on the female offender population and consistently, the major recommendation has been to return county female inmates to serve their time in their county of residence. Because an estimated 65% of the female offender population are mothers with minor children, locating female inmates and detainees closer to home, provides an opportunity for better parenting and places less of a strain on family relationships. In addition, there is a higher likelihood of successful re-entry and reduced recidivism with increased access to employment opportunities and work release programs, as well as connections to appropriate housing, counseling and treatment options in their community.

The Commission recognized that the construction of a stand-alone facility in 7 counties is cost prohibitive and not a practical use of limited funding. Over two years ago, the Sheriffs began discussions with the DOC about creating regional facilities for female offenders and a "step-down" system whereby even state prison inmates might spend their pre-release months in Sheriffs' facilities participating in their re-entry programs. In Suffolk County, the Sheriff's Office, Division of Capital Asset Management and Maintenance (DCAMM) and a contracted architectural firm worked closely together for over 18 months on a feasibility study for a model program facility that would house sentenced women from Suffolk, Norfolk and Middlesex counties as well as state prison inmates in pre-release.

These ideas have been incorporated into the Corrections Master Plan (CMP) as a current avenue to address the over-crowing at MCI-Framingham and to bring woman closer to their families and communities. At the March 24, 2011 Commission meeting, DCAMM presented a

[46] Most notably, the Commonwealth of Massachusetts Governor's Commission on Corrections Reform, Major Recommendation #13, Dedicated External Female Offender Review, August 1, 2005.

brief overview of the CMP, which was released after a comprehensive multi-year process involving the DOC, the Sheriffs, A&F, DCAMM and EOPSS. The CMP envisions the DOC and Sheriffs' facilities as distinct components of a single system that can work together to reduce overcrowding and recidivism; maximize existing resources; and create a more integrated, efficient and cost-effective system.

As the incarcerated women population has grown, some Sheriff departments could not provide the segregated facilities required to house relatively small numbers of women in each county. As a result, many county-sentenced and pretrial women were sent to MCI-Framingham where combined populations could take advantage of special programs. In fact, Section 16 of Chapter 125 of the Massachusetts General Laws includes provisions to house the county-sentenced and pretrial women in Framingham. While this solved several problems when implemented, the population has now grown and outpaced MCI Framingham's capacity, compromising its mission to rehabilitate serious offenders. To demonstrate this point, only 37.5% of the women currently held in Framingham have DOC sentences or are the legitimate responsibility of the DOC.

An excellent example of this taking shape is the agreement entered into by EOPSS, A&F and the Hampden County Sheriff's Office to expand the Western Massachusetts Regional Women's Correctional Center (WMRWCC). That agreement provided for the expansion of the WMRWCC providing it with an additional 126 beds, which will be used to house both sentenced and pretrial women who are sentenced to the Worcester, Hampshire or Franklin County Houses of Correction and who would otherwise be held in DOC custody at either MCI Framingham or Southern Middlesex Correctional Center. This regional center allows women prisoners to take advantage of an extraordinary compilation of gender specific programming and resources while being held closer to their communities. Transportation costs also may be reduced.

Using the Hampden County structure as a model, the Commission recommends that the various Sheriff's Offices, together and individually, and the DOC, the MSA, and the individual Sheriff's Offices work together to establish regional women's correctional centers that will provide opportunities for female prisoners to participate in effective re-entry and appropriate mental health and substance abuse programs. Further, in light of the specific treatment and family needs of many non-violent female offenders, the Commission recommends[47] that the criminal courts make themselves aware of the availability of the range of alternatives to incarceration and to utilize those alternatives where appropriate.

**Multi-Jurisdictional Facilities**

Sheriffs and their Deputies have been providing regional public safety services to their cities and towns for decades. Six of the 14 Sheriff's Offices provide regional 911 intake or emergency dispatch services or both. The Bristol County Sheriff's Office provides a "C-Med" service that links ambulances in the field with hospitals. The Worcester County Sheriff's Office provides reverse 911 services to enrolled cities and towns. Eleven of the 14 Sheriff's Offices provide regional law enforcement services and mutual aid to their local police departments. The Nantucket Sheriff's Office performs first responder duties alongside the Nantucket Police Department and operates a lock-up for pre-arraignment detainees. This mutual aid is also rendered to state and federal law enforcement and includes Sheriffs' Gang Units, Drug Units, mobile crime scene services, mobile command units, regional law enforcement councils, elder protection services (TRIADs), K-9 teams for narcotics detection, lost persons and apprehension of fleeing suspects and assistance in other active crime investigations. The Barnstable and

[47] See Appendix E for votes taken by the Commission.

Plymouth Sheriff's Offices operate their own Bureaus of Criminal Investigations (BCIs.) These regional services save the Commonwealth's cities and towns millions of dollars a year and are actually a form of local aid provided by the Sheriffs that they otherwise would not receive.

Finding that "regionalization can achieve efficiencies by eliminating duplicative services, creating program sizes that can operate more cost-effectively, and creating flexibility in the system to handle fluctuations in the incarcerated population"[48], the CMP recommends regionalization in the correctional system by proposing 4 regions based on geography. The proposed facilities will be utilized by multiple Sheriffs and the DOC. The Commission discussed the governance issues that will arise in implementing the CMP. To this end, the Commission recommends that the MSA establish a Multi-Jurisdictional Facility Subcommittee to address management and governance practices of new and existing multi-jurisdictional facilities. In addition, the Commission recommends that the Administration establish a working group that consists of representatives from EOPSS, DCAMM, A&F, the DOC and the MSA to facilitate development of management and governance practices for new and existing multi-jurisdictional facilities.

**Recommendations from the Office of the State Auditor**

After the transfer of the remaining Sheriff's Offices to the state system was completed, the Office of the State Auditor (OSA) was required to conduct a transition audit of these Sheriff's Offices, which included Barnstable, Bristol, Norfolk, Plymouth, Suffolk, Nantucket,

[48] Ibid., p. 7.

and Dukes Counties. This audit report[49] included several recommendations for the Commission to consider.

Meals for Employees of the Sheriff's Offices

Under current state law[50], state employees are prohibited from receiving free meals at state expense. During the audits, it was noted some Sheriff's Offices had informal policies and or longstanding provisions in collective bargaining agreements that allowed employees to receive meal benefits. The reasons for these policies include ensuring adequate post coverage on all shifts, foreclosing opportunities to introduce contraband into facilities and ensuring adequate staffing in the event of an emergency, especially where remote facility locations would require staff to travel some distance to find an eatery. The Auditor's Office agreed that it may be beneficial to offer free meals to employees at the facility and recommended that the statute be amended to include an exception so long as the Sheriffs adopt uniform policies and clarify meal pricing. The Commission understands, from a public safety and collective bargaining standpoint, that it may be appropriate to have employees on site for meals and recommends[51] that the General Laws be amended to exempt Sheriffs' Offices from Section 3 of Chapter 7 of the Massachusetts General Laws.

Telephone Commissions

Prior audits disclosed that Sheriffs' Office received commissions on inmate telephone services and that these funds were deposited into commissary, canteen, or inmates benefit accounts. Since it was unclear where the funds should be deposited due to the conflicting state

[49] Independent State Auditor's Report on the January 2, 2010 Transfer of County Sheriff's Offices to the Commonwealth in Accordance with Chapter 61 of the Acts of 2009.
[50] Massachusetts General Law, Chapter 7, Section 3B
[51] See Appendix E for votes taken by the Commission.

statutes, as a comparison, the Auditor's Office looked to DOC policies and procedures[52] concerning telephone commissions. It was determined that the DOC returns all telephone commission to the General Fund of the Commonwealth, except for revenues for international collect calls which are remitted to the inmate benefit fund. Since telephone commissions are a revenue source of the Commonwealth, the Auditor's Office recommended that there be a consistent policy for the use and deposit of telephone commissions across the state correctional system that all state agencies should follow.

In considering the Auditor's recommendation for consistency with regard to the telephone commission, the Sheriffs stated that this revenue helps to sustain the Sheriffs' budgets. Recognizing that telephone commissions are an important revenue source for the Sheriffs, the Commission does recommend having all telephone commissions be remitted into the General Fund of the Commonwealth, but makes recommendations regarding accounting practices for these types of retained revenues.

Accounts

The Auditor's Office noted that the Sheriffs' Offices maintained several types of accounts including inmate canteen, inmate accounts, fines, commissary, work detail, civil process, federal grants, witness fees, substance abuse and immigrant detainee accounts. After the transfer to the Commonwealth, the Sheriffs' Offices were responsible for placing information on these accounts in MMARS (Massachusetts Management Accounting and Reporting System). The Auditor's office noted in the April audit that some of the Sheriff's Offices accounts were still being maintained "off line" and not recorded and reported in MMARS. The Sheriffs noted that the fact that the accounts were not being kept on the MMARS system does

[52] 103 Code of Massachusetts Regulations 482.07(6)

not mean the funds were unaccounted for. Sheriffs continued to report these accounts to A&F as they always had, which is how the state knew they existed in the first place.

To ensure transparency, the Commission recommends[53] that all revenues from the Sheriffs' Offices be deposited in some fund approved by the State Treasurer, with a preference for use of local banks, and that these revenues be allocated to a retained revenue account so that the funds will be accounted for, reported and recorded on MMARS.

**Procurement**

Level II Departments, including Executive Branch and Non-Executive Branch Departments, are required to conduct competitive procurements consistent with state laws[54], regulations, policies and procedures. All Sheriffs' Offices have adopted a uniform procurement policy[55], which was reviewed and accepted by the Office of the Comptroller and the Operational Services Division. The policy sets up a purchasing process, but allows flexibility to allow for purchasing items outside the system when it makes the best fiscal or operational sense, particularly when it is an incidental purchase or if there is an emergency need.

The information submitted by the individual Sheriff's Offices indicated that most Sheriffs purchase items such as food, paper products, cleaning supplies, inmate clothing, linens, in bulk in order to take advantage of volume discounts whenever possible. A vast majority of the Sheriffs noted that they purchase items through state contracts whenever the price is shown to be cost effective.

[53] See Appendix E for votes taken by the Commission.
[54] M.G.L. Ch. 30, Sec. 51, M.G.L. Ch. 30, Sec. 52 and M.G.L. Ch. 7, Sec. 22, M.G.L. Ch. 7A and Ch. 29
[55] Policy Governing the Procurement of Commodities and/or Services, dated November 19, 2010

To further encourage efficiencies and cost savings, the Commission recommends that the MSA and A&F establish a detailed uniform reporting of Sheriffs' Office funds expended in the procurement of food, vehicles, fuel, mattresses, linens, inmate uniforms, and cleaning supplies for the fiscal year following the issuance of this Commission report. After the data is received, the Commission further recommends that A&F analyze it to determine the efficacy of creating a centralized purchasing program and the feasibility of joining bulk purchasing initiatives in cities, counties or other entities such as the "Boston Buying Power" program.

**Recommendations**

The Commission urges the adoption of these recommended policies in order to further the goals of increased transparency, oversight, and efficiency as well as the maximization of limited taxpayer and staff resources.

In summary, the Commission recommends that the following actions be taken:

- Encourage the applicable agencies of the Commonwealth to continue implementation of the Integrated Criminal Justice Information System (ICJIS) and include in the ICJIS the following: finger print-based records available to correctional, parole, and community corrections; telemedicine applications; electronic medical records of prisoners; the infrastructure with which to conduct video arraignments and video visitations; inmate kiosks where inmates can manage their inmate accounts, maintain their inmate plan, choose visitation times; other services that would reduce staff's time; and including a transportation database.

- Request that EOPSS determine the feasibility and cost of adding an inmate tracking module to the Inmate Management System (IMS), which would allow staff at prisons and houses of correction to electronically monitor movement of prisoners within institutions in real time.

- Provide funding for the Massachusetts HRD to conduct, in consultation with the Sheriffs and the MSA, a comprehensive assessment of and issue a report on the current Sheriff

Offices human resources policies and practices, including but not limited to, standardizing job title and classification, job posting, minimum testing requirements and other employment practices that will lead to statewide standards for classification, recruitment, promotion, compensation and professional standards for all fourteen Sheriffs' offices.

- Request that the Commonwealth's EOHHS seek guidance and clarification from the Federal Department of Health and Human Services - Centers for Medicare & Medicaid Services (CMS) on Medicaid reimbursement for inmates to ensure that the maximum amount of federal reimbursement is sought.

- Encourage the MSA to establish a multi-jurisdictional subcommittee to address management and governance practices of new and existing multi-jurisdictional facilities.

- Encourage the Administration to establish a working group that consists of EOPSS, DCAMM, A&F, the DOC and representation from the MSA subcommittee to facilitate development of management and governance practices for new and existing multi-jurisdictional facilities.

- Support the various Sheriff's Offices and the DOC in the development of effective management of female prisoners by working together to establish regional women's correctional centers and to coordinate and enhance opportunities for female prisoners to participate in local pre-release and post-release/stabilization (re-entry) and appropriate mental health and substance abuse programs.

- Educate the criminal courts on the range of alternatives to incarceration and encourage the utilization of those alternatives where appropriate.

- Encourage the Auditor, in coordination with the Commonwealth's EOHHS and the MSA, to perform a performance audit on the mental health screening processes currently in place for all jails and houses of correction, the types of services offered and used prior to persons being transitioned to these facilities, the range of services in these facilities and comparisons with national and clinical best practices.

In addition, the Commission recommends the following legislative actions be taken:

- File the redrafted civil process bill in order to reform and standardize the civil process system.

- File legislation to strengthen the OCC legislative language to promote better program coordination by allowing, for example, pre-trial diversion.

- File legislation to allow Sheriffs to offer meals to employees at the jails.

- File legislation to establish a Corrections Advisory Board with the aim of improving coordination across the criminal justice system and establishing best practices in all aspects of corrections operations.

- File legislation to include and mandate that Massachusetts Deputy Sheriffs who perform police work participate in any POST system created as a result of the SCMPT's report.

- Oppose any budget language that requires mandatory participation in SOPS.

While the charge of the Commission is to make recommendations concerning the Sheriffs' Offices, with a $1.2 billion budget in Fiscal Year 2012 for the Commonwealth's correctional system, including the Sheriffs, the DOC, Parole and the Probation Department, there is an urgent need to ensure that all state agencies involved in the correctional system, as well as outside partners, work cooperatively. The Commission members look forward to working with the Sheriffs, the Legislature, state agencies and community-based partners to implement these changes concerning the Sheriffs' Offices, but also to promote changes to form a more seamless and unified criminal justice system.

# Appendix A: Historical Overview of the Office of Sheriff

The Office of Sheriff[56] is one of the oldest known to law and from the earliest times he has been the Chief Officer for the preservation of the Peace within his county."[57] Although there is evidence that the first "Shire Reeve" served in 890 A.D., the Office of Sheriff was formally regulated in England during the 13th century. Twenty-seven of the Magna Carta's 63 clauses directly concern Sheriffs or their Offices. Collectively, these clauses formalized and cemented the Sheriff's role in England's governance [58]

Both the executive nature of the position and many of its duties and responsibilities were subsequently exported to America by the colonists. Chief among these were the duty to keep the peace, make arrests, operate jails and serve process. [59] In addition to the unique power of *posse comitatus*, or deputation[60], Sheriffs throughout the United States retain these powers today.

Prior to 1651, Sheriffs were appointed by the Governors of their states. That year, county commissioners in Virginia's Northampton County interpreted a recently passed law as giving citizens the power to elect their Sheriffs.[61] Commensurate with the colonies' insistence on self-governance and especially following the American Revolution, the law was consistently interpreted or created to call for the election of Sheriffs.

[56] "The Office of Sheriff" is the proper way to refer to the duties responsibilities of the Sheriff and the Sheriff's Deputies. See, Shrievalty Association of England Millennial Celebration of the Office of High Sheriff (1992); See also, Black's Law Dictionary (distinguishing the inherent powers and duty to exercise public trust of an Office from a Department, which is a branch or division of governmental administration.)
[57] 3 OP. Atty. Gen. 488 (1912) responding to the question whether "The Sheriff of Essex County could be required to establish patrols and police guards in the city of Lawrence to take the place of and perform the duties of regular city police, the latter being unable to preserve the peace."
[58] The Sheriff: The Man and His Office, Irene Gladwin, Gollancz (1974). See also, The Law of Sheriffs and Constables, Jafee, Samuel H., Boston 1935.
[59] The American Sheriff, by David R. Struckhoff, Justice Research Institute (1994)
[60] See M.G.L. Ch. 37, sec. 3.
[61] Ibid.

Currently, 47 of the 50 states have Sheriffs. Of those, 46 states elect their Sheriffs. Of the 3,063 Sheriffs currently in office all, but one, are elected by the citizens of the jurisdictions they serve.[62] Historically and still today, Sheriffs are unique in law enforcement because they are the only officials that are elected. Sheriffs' Offices account for 31% of all law enforcement personnel and 24% of all sworn law enforcement personnel in the United States.[63]

In Massachusetts, the Office of Sheriff was established before the Commonwealth's Constitution was drafted. Its pre-existence is acknowledged by reference generally in Article 8 and more specifically Article 19, which called for the election of Sheriffs and was ratified in 1855.[64] Until 1855, Sheriffs were appointed by the Governor and could only be removed for "mal-administration" by impeachment in both Houses of the Legislature.[65]

[62] Ibid. See also, Bureau of Justice Statistics Census of State and Local Law Enforcement, United States Department of Justice Office of Justice Programs (2008) and The National Sheriffs' Association. Alaska, Hawaii and Connecticut do not have Sheriffs. Rhode Island has an Executive High Sheriff, who heads a statewide law enforcement agency under the Department of Administration.

[63] Bureau of Justice Statistics Census of State and Local Law Enforcement Agencies, United States Department of Justice Office of Justice Programs (2008)

[64] See Constitution of the Commonwealth of Massachusetts (1780), Articles of Amendment.

[65] Digest of Laws Relating to the Offices and Duties of Sheriff, Coroner and Constable, Backus, Joseph, Esq., New York (1812), citing St. M.I. 154, March 12, 1804. (Sheriffs could also be removed by the Governor or Governor's Council for" non-payment of executions issued against his goods and chattels" if a creditor complained to them directly.)

# Appendix B: Section 22 of Chapter 61 of the Acts of 2009

Notwithstanding any general or special law to the contrary, there shall be a special commission to consist of 9 members: 1 of whom shall be a member of the Massachusetts Sheriffs Association; 2 of whom shall be appointed by the speaker of the house of representatives; 1 of whom shall be appointed by the minority leader of the house of representatives; 2 of whom shall be appointed by the president of the senate; 1 of whom shall be appointed by the minority leader of the senate; and 2 of whom shall be appointed by the governor for the purpose of making an investigation and study relative to the reorganization or consolidation of sheriffs' offices, to make formal recommendations regarding such reorganization or consolidation and to recommend legislation, if any, to effectuate such recommendations relating to the reorganization, consolidation, operation, administration, regulation, governance and finances of sheriffs' offices.

The chairman of the commission shall be selected by its members. Section 2A of chapter 4 of the General Laws shall not apply to the commission. So long as a member of the commission discloses, in writing, to the state ethics commission any financial interest as described in sections 6, 7 or 23 of chapter 268A of the General Laws which may affect the member's work on the commission, the member shall not be deemed to have violated said sections 6, 7 or 23 of said chapter 268A. Five members of the commission shall constitute a quorum and a majority of all members present and voting shall be required for any action voted by the commission including, but not limited to, voting on formal recommendations or recommended legislation.

The commission, as part of its review, analysis and study and in making such recommendations regarding the reorganization, consolidation, operation, administration, regulation, governance and finances of sheriffs' offices, shall focus on and consider the following issues, proposals and impacts:

(1) the possible consolidation, elimination or realignment of certain sheriffs' offices and the potential cost savings and other efficiencies that may be achieved by eliminating, consolidating and realigning certain sheriffs' offices to achieve pay parity;

(2) any constitutional, statutory or regulatory changes or amendments that may be required in order to effectuate any such consolidation or reorganization;

(3) the reallocation of duties and responsibilities of sheriffs' offices as a consequence of any such consolidation or reorganization;

(4) the best management practices including, but not limited to, administrative procedures, payroll systems, software updates, Sheriff's ability to negotiate cost effective contracts and the current use of civil process funds, including the amount of civil process funds collected by each county sheriff and the actual disposition of said funds currently, and, in the event of consolidation, realignment, elimination or reorganization, the collection and use of civil process fees in the future;

(5) the consideration of any other issues, studies, proposals or impacts that, in the judgment of the commission, may be relevant, pertinent or material to the study, analysis and review of the commission; and

(6) The need for appropriate placements and services for female detainees and prisoners, including pre-release services, job placement services, family connection services, and re-entry opportunities; provided, however, the review shall consider the need and present adequacy of placement of female prisoners and detainees in each country; and provided further, that all departments, divisions, commissions, public bodies, authorities, boards, bureaus or agencies of the commonwealth shall cooperate with the commission for the purpose of providing information or professional expertise and skill relevant to the responsibilities of the commission subject to considerations of privilege or the public records law.

The commission shall submit a copy of a final report of its findings resulting from its study, review, analysis and consideration, including legislative recommendations, if any, to the governor, president of the senate, speaker of the house of representatives, the chairs of the house and senate committees on ways and means and the chairs of the joint committee on state administration and regulatory oversight and the clerks of the senate and house of representatives not later than December 31, 2010.

# Appendix C: Members of the Sheriff's Commission

**Michael O. Moore** (Chairman), State Senator for Second Worcester District

**Andrea Cabral**, Suffolk County Sheriff

**Kenneth J. Donnelly**, State Senator for Fourth Middlesex District

(Senator Donnelly was appointed in May of 2011 as a replacement for Senator Brian Joyce.)

**Michael Esmond**, Budget Director, Executive Office for Administration and Finance

(Michael Esmond was appointed in July of 2011 as a replacement for Palak Shah, who moved out of state.)

**Peter V. Kocot**, State Representative for First Hampshire District

(Representative Kocot was appointed in March of 2011 as a replacement for Representative Steven Walsh)

**Sandra McCroom**, Undersecretary of Criminal Justice, Executive Office of Public Safety and Security

**Harold P. Naughton, Jr**., State Representative for Twelfth Worcester District

(Representative Naughton was appointed in May of 2011 as a replacement for Representative Michael Costello. The representative was deployed to Afghanistan at the end of October and, therefore, was unable to attend subsequent meetings)

**Richard J. Ross**, State Senator for Bristol and Middlesex District

**David T. Vieira**, State Representatives for Third Barnstable District

# Appendix D: List of Presenters

**Martin J. Benison**, Comptroller of the Commonwealth and **Kathy Sheppard**, Deputy Comptroller

**Ronald Corbett, Jr**., Commissioner of Probation

**Paul Dietl**, Chief Human Resources Officer and **George Bibilos**, HRD/Deputy Director, Organizational Development Group

**Kay Khan,** State Representative from Eleventh Middlesex District

**Elizabeth Minnis** and **Selena Goldberg**, Division of Capital Asset Management and Maintenance

**John Parsons**, Deputy Auditor for Audit Operations, and **Howard Olsher**, Director of State Audits, Office of the State Auditor

# Appendix E: Votes Taken by Commission

CONSOLIDATION

(1) Does the Commission recommend consolidating some of the counties and eliminating some of the Sheriff's Offices?

**Vote**: 2 Yes (Senator Michael Moore and Senator Kenneth Donnelly); 4 No (Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral); 1 Abstain (Undersecretary Sandra McCroom)

(2) Does the Commission recommend eliminating the Duke and Nantucket Sheriffs and consolidating these areas with the Barnstable County Sheriff, which is currently the model for the District Attorney that represents the Cape and the Islands?

**Vote** to amend recommendation (2) by also consolidating Franklin and Hampshire county if Duke and Nantucket are considered for consolidation: 2 Yes (Senator Michael Moore, Representative David Vieira); 4 No (Senator Richard Ross, Representative Peter Kocot, Sheriff Andrea Cabral, Senator Kenneth Donnelly); 1 Abstain (Undersecretary Sandra McCroom)

**Vote** on recommendation (2): 0 Yes; 6 No (Senator Michael Moore, Representative David Vieira, Senator Richard Ross, Representative Peter Kocot, Sheriff Andrea Cabral, Senator Kenneth Donnelly); 1 Abstain (Undersecretary Sandra McCroom)

REALIGNMENT

(1) Does the Commission recommend establishing a county jail and house of corrections system under the Secretary of the Executive Office of Public Safety and Security?

**Vote**: 3 Yes (Senator Kenneth Donnelly, Senator Michael Moore, Senator Richard Ross); 3 No (Sheriff Andrea Cabral, Representative Peter Kocot, Representative David Vieira); 1 Abstain (Undersecretary Sandra McCroom)

CIVIL PROCESS

(1) Does the Commission recommend: (a) eliminating all independent outside entities in order to bring all civil process functions as a division of the Sheriff's offices; (b) with the approval and oversight of the Office of Administration and Finance and House and Senate Ways and Means, establishing a retained revenue account or some other appropriate mechanism that is in compliance with applicable laws, rules and regulations for all civil process fees to be deposited; (c) requiring that all civil process fees are reported and recorded in MMARS and have policies and procedures, once developed and approved by the Auditor and the Office of Administration and Finance, referenced in the Internal Control Plan (ICP) for each Sheriff's Office; (d) prohibiting salaries for individuals conducting civil process functions to be expended from individual Sheriff's line items, but have all staff be paid out of the civil service account; (e) establishing a process with the approval of the Auditor's office to provide for open bid contracting of civil process servers and services; (f) requiring that if revenues collected through the civil process account will not be sufficient to cover costs, the House and Senate Ways and Means and A & F will be notified 30 days prior to a projected deficiency; (g) directing the Office of Administration and Finance and House and Senate Ways and Means to establish a surplus revenue percentage for the Sheriffs to retain each fiscal year from the revenues received from the operation of the Civil Process division; and (h) the adoption of expenditure restrictions for the revenues received from the operation of the Civil Process division.

**Vote** to update the pending civil process legislation so that it reflects the proposed recommendations, with the exception of proposal (d), with a final vote to be taken on the final redrafted legislation when it is complete: 6 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral); 0 No; 1 Abstain (Undersecretary Sandra McCroom)

**Vote** on redrafted civil process legislation: 6 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative Peter Kocot, Representative David Vieira, Budget Director Michael Esmond, Undersecretary Sandra McCroom)

HEALTH CARE AND MENTAL HEALTH CONTRACTS

(1) Does the Commission recommend, as the Governor did, repealing the mandatory use of SOPS to allow Sheriffs to use an open and transparent bidding process to select the pharmacy service that meets their needs?

**Vote**: 4 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative David Vieira, Sheriff Andrea Cabral); 0 No; 1 Abstain (Undersecretary Sandra McCroom)

(1) Does the Commission recommend requiring hospitals or other medical service providers to bill MassHealth for any Medicaid eligible inmate's health care expenses for when he/she is an inpatient in the medical institution?

(2) Does the Commission recommend seeking guidance from the Commonwealth's Executive Office of Health and Human Services from the Federal Department of Health and Human Services - Centers for Medicare & Medicaid Services (CMS) on (a) when Medicaid reimbursement for a newly incarcerated inmate is technically suspended so that Sheriffs can bill up to this cut off date; (b) if inmates on house arrest may receive Medicaid reimbursement and (c) on how best the Sheriffs can work with MassHealth on determining eligibility for inmates and on ensuring that inmate's cases are placed on suspension status during their incarceration and report such guidance to sheriffs?

(3) Does the Commission recommend seeking guidance through the Commonwealth's Executive Office of Health and Human Services from the Federal Department of Health and Human Services - Centers for Medicare & Medicaid Services (CMS) on how best the Sheriffs can work with MassHealth on determining eligibility for reimbursement of services for inmates diagnosed Mental Health disabilities and report such guidance to sheriffs?

**Vote** on questions (1), (2) and (3): 5 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative David Vieira, Sheriff Andrea Cabral, Undersecretary Sandra McCroom); 0 No; 0 Abstain

<u>HIRING, PROMOTIONS AND PAY DISPARITIES</u>

(1) Does the Commission recommend the motion offered by Representative Kocot and Michael Esmond, Senator Donnelly to adopt the following amended recommendations?:

(a) The Special Commission directs the Massachusetts HRD office to conduct, in consultation with the Sheriffs and Massachusetts Sheriffs Association (MSA), a

comprehensive assessment for all Sheriff's offices human resources policies and practices, including but not limited to, standardizing job title and classification, job posting, minimum testing requirements and other employment practices that will lead to statewide standards for classification, recruitment, promotion, compensation and professional standards for all fourteen sheriffs' offices.

(b) That HRD issue a report of its assessment by April 30, 2013. A copy of the HRD assessment report shall be sent to the Chairs of the Joint Committee on State Administration and Regulatory Oversight, the Chairs of House and Senate Ways and Means, the House and Senate Clerks, the Chairs of the Joint Committee on Public Safety, and the Secretaries of Administration and Finance, and Public Safety and Security. The report shall be directed to the Joint Committee on State Administration and Regulatory Oversight for legislative action.

(c) The Special Commission recommends to the House and Senate Committees on Ways and Means that line items 1750-0100 and 8910-7100 be increased to reflect this policy directive,

(d) Moved that the final report of said Commission recommend that the Commonwealth should pursue federal reimbursement for medical services for those housed by or served through the programs of the fourteen Sheriffs and shall further recommend these proposals to other special commissions and committees that are reviewing the criminal justice system, provided that any effort will take into account both costs and savings to the Commonwealth and develop a methodology to appropriately allocate them.

**Vote** on paragraphs (a) through (c): 4 Yes (Undersecretary McCroom, Representative David Vieira, Senator Kenneth Donnelly, Senator Michael Moore), 1 no (Sheriff Andrea Cabral)

**Vote** on paragraph (d): 5 Yes (Undersecretary McCroom, Representative David Vieira, Senator Kenneth Donnelly, Senator Michael Moore, Sheriff Andrea Cabral)

ADVISORY BOARD

(1) Does the Commission recommend the establishment of a corrections advisory board to provide independent advice to the Commonwealth's corrections providers, including the Sheriffs, for the purpose of improving coordination efforts between and among the Sheriffs, the Department of Corrections, the courts and community corrections programs and indentifying and establishing best practices.

**Vote**: 5 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative Kocot, Representative David Vieira, Sheriff Andrea Cabral); 0 No; 2 Abstained (Undersecretary McCroom, Budget Director Michael Esmond)

TRAINING

(1) Does the Commission endorse the findings and recommendations of the SCMPT in this area and recommend that Massachusetts Deputy Sheriffs who perform police work be included and mandated to participate in any POST system created as a result of the SCMPT's report.

**Vote**: Yes (Undersecretary McCroom, Budget Director Esmond, Senator Moore, Senator Donnelly, Representative Kocot, Representative Vieira, and Sheriff Cabral).

RISK ASSESSMENT AND JAIL MANAGEMENT SYSTEMS

(1) Does the Commission recommend that the applicable agencies of the Commonwealth continue implementation of Massachusetts Integrated Criminal Justice Information System (ICJIS) and include in ICJIS the following: finger print-based records available to correctional, parole, and community corrections; telemedicine applications; electronic medical records of prisoners; the infrastructure with which to conduct video arraignments and video visitations; inmate kiosks where inmates can manage their inmate accounts, maintain their inmate plan, choose visitation times; other services that would reduce staff's time; and including a transportation database.

**Vote:** 7 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral, Undersecretary Sandra McCroom, Senator Richard Ross); 0 No

RE-ENTRY AND THE OFFICE OF COMMUNITY CORRECTIONS

(1) Does the Commission recommend strengthening the OCC legislative language by mandating that OCC work with the Sheriffs, the DOC and the parole board on program coordination in order to develop a broad based re-entry system for the full continuum of the Commonwealth's criminal justice system?

**Vote**: 7 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral, Undersecretary Sandra McCroom); 0 No; 0 Abstain

FEMALE DETAINEES AND PRISONERS

(1) Does the Special Commission recommend that the various Sheriff's Offices, together and individually, and the Department of Correction cooperate in the development of effective management of female prisoners by working together to establish Regional Women's Correctional Centers and to coordinate and enhance opportunities for female prisoners to participate in local pre-release and post-release/stabilization (re-entry) and appropriate mental health and substance abuse programs? Further, in light of specific treatment and family needs of many non-violent female offenders, the Special Commission recommends that the criminal courts make themselves aware of the availability of the range of alternatives to incarceration and to utilize those alternatives where appropriate.

**Vote:** 7 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral, Undersecretary Sandra McCroom).

REGIONAL PUBLIC SAFETY SERVICES

(1) Does the Commission recommend allowing the Sheriffs to maintain current regional services?

**Vote**: 5 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative David Vieira, Sheriff Andrea Cabral, Senator Richard Ross); 1 Abstain (Undersecretary Sandra McCroom)

FISCAL MANAGEMENT WITH AUDITOR'S RECOMMENDATIONS:

(1) Does the Commission recommend requiring that all telephone commissions go to the General Fund as the DOC does?

**Vote**: 6 No (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral); 0 Yes; 1 Abstain (Undersecretary Sandra McCroom)

(2) Does the Commission recommend that all revenues be deposited in some fund approved by the State Treasurer or in a retained revenue account, with a preference for use of local banks, so that the funds will be accounted for, reported and recorded on MMARS?

**Vote** with amendment to have a preference for approved accounts with local banks: 5 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira); 1 No (Sheriff Andrea Cabral); 1 Abstain (Undersecretary Sandra McCroom)

(3) Does the Commission recommend amending the current law to allow for meals recognizing the public safety need to have employees stay on site?

**Vote**: 6 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Senator Richard Ross, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral); 0 No; 1 Abstain (Undersecretary Sandra McCroom)

FINAL VOTE ON THE REPORT

**Vote**: 7 Yes (Senator Michael Moore, Senator Kenneth Donnelly, Representative Peter Kocot, Representative David Vieira, Sheriff Andrea Cabral, Undersecretary Sandra McCroom and Budget Director Michael Esmond)

# Appendix F: Section 189 of Chapter 68 of the Acts of 2011

There shall be a special commission to study the commonwealth's criminal justice system, to consist of: the secretary of public safety and security, who shall serve as the chair; the attorney general or a designee; the chief justice of the supreme judicial court or a designee; the president of the Massachusetts Sheriffs Association or a designee; the president of the Massachusetts District Attorneys Association or a designee; the chief counsel of the committee for public counsel services or a designee; a representative from the Massachusetts Bar Association; a representative from the Boston Bar Association; a representative from the Massachusetts Association of Criminal Defense Lawyers; 3 members of the house of representatives, 1 of whom shall be appointed by the minority leader; 3 members of the senate, 1 of whom shall be appointed by the minority leader; and 3 persons to be appointed by the governor, 1 of whom shall have experience in mental health and substance abuse and addiction treatment, 1 of whom shall have experience in providing services or supervision for offenders, and 1 of whom shall have experience in juvenile justice.

In reviewing the commonwealth's criminal justice system, the commission shall examine a variety of areas including, but not limited to: the prisoner classification systems, mandatory minimum sentences, sentencing guidelines, the provision of cost-effective corrections' healthcare, the probation system, the parole system, the operations of the sheriffs' offices, overcrowding in prisons and houses of correction, recidivism rates, the treatment of juveniles within the criminal justice system, the role that mental health and substance abuse issues play, and best practices for reintegrating prisoners into the community.

The commission shall investigate the feasibility of developing an application for technical assistance from nationally recognized criminal justice reform programs with a data driven approach in order to develop bipartisan legislation that would reduce corrections spending and utilize the savings to reduce crime, strengthen public safety and fund other budget priorities; provided, however, that the commission shall give priority in applying for technical assistance to that which comes at no cost to the commonwealth.

The commission shall have access to information related to both adults and juveniles including, but not limited to, crime, arrest, conviction, jail, prison and probation and parole supervision data provided by state and local agencies. As necessary, the commission shall: (i) meet with other affected stakeholders; (ii) partner with nongovernmental organizations that have expertise that can benefit the commission; and (iii) create advisory subgroups that include affected stakeholders as necessary.

The commission shall convene its first official meeting on or before September 1, 2011. The commission shall submit to the house and senate committees on ways and means, the joint committee on the judiciary, the joint committee on public safety and homeland security and the

secretary of administration and finance quarterly reports that include the dates of its meetings, meeting participants not named to the commission and whether it has identified, applied for or been selected for any federal or other funds.

The commission shall issue a report on or before March 31, 2012, which shall include recommendations for legislation to reduce recidivism, improve overall public safety outcomes, provide alternatives for drug addicted and mentally ill defendants, increase communication and cooperation among public safety entities, reduce overcrowding of facilities, increase reliance upon evidence-based criminal justice methods, improve the collection and reporting of data on adults and juveniles, contain correction costs and otherwise increase efficiencies within the state's public safety entities.

# Appendix G: List of Resources and Submitted Materials

**Budget and Financing**

Administration and Finance, Payroll data and state accounting codes for Sheriffs Offices.

Massachusetts Sheriffs' Association, Massachusetts Sheriff's Budget Appropriations FY 09 – FY 12.

Massachusetts Sheriffs' Association, Letter for Senate Ways and Means (April 7, 2011).

**Civil Process**

Commonwealth of Massachusetts Civil Process Review Project prepared by Caroline Shinkle, MIT for Representative Vieira (October 12, 2011).

Comments on Civil Process Legislation, Letter from Martin J. Benison, Comptroller of the Commonwealth (December 22, 2011).

Responses to Civil Process Questions from the 14 Sheriffs .

Comments on Civil Process Legislation, Letter from John W. Parsons, Esq, Deputy Auditor for Audit Operations, Auditor of the Commonwealth (January 10, 2012).

Civil Process Redraft, Compilation of Comments from PERAC, Comptroller, Auditor and GIC (May 2, 2012).

**Department of Corrections**

Department of Corrections, Responses to questions posed by the Commission on issues pm interaction between the DOC and Sheriffs, summary of last inspections of Sheriffs, average length of stay by DOC inmates and how DOC handles fees.

Department of Corrections, Salaries.

**Female Prisoners**

Essex County Sheriff's Department, Women in Transition Minimum/Pre-Release Facility, Annual Report, Calendar Year 2010.

Essex County Correctional Facility & Sheriff's Department, Women in Transition, Inmate Handbook (October 2011).

Division of Capital Asset Management and Maintenance, brief summary of Corrections Master Plan (January 25, 2012).

Sheriffs Commission Meeting, Mental Health Care of Inmates, Submitted by Kay Khan (April 5, 2012).

Essex County Sheriff's Office, Commission on Accreditation for Corrections, Standard Compliance Reaccreditation Audit.

**Health Care**

Administration and Finance, Questions on Medical and Mental Health Contracts.

Barnstable County Sheriff's Department, FY 2011 Projected Savings Using Sops.

Massachusetts Sheriffs' Association, follow up to September 8, 2011 Commission meeting, responses to questions on MassHealth; Virtual Gateway Workshop, Standard of Inmate Care; and Civil Process.

**Hiring, Staffing and Training**

Essex County Sheriff's Department, document on staffing recruitment and selection process.

Special Commission on Massachusetts Police Training: Results and Recommendations of the Special Commission on Massachusetts Police Training (July 2010)

Massachusetts Sheriffs' Association, MSA Salary Comparison for Uniformed Personnel under CBAs.

Massachusetts Sheriffs' Association, Collective Bargaining Agreement Status Summary (September 8, 2011).

Massachusetts Sheriffs' Association, Staffing Charts from each of the Sheriff's offices.

Massachusetts Sheriffs' Association, Education and Training Committee Report (March 10, 2011).

Massachusetts Sheriffs' Association, MSA Collective Bargaining Report by County (March 2011).

**Office of Community Corrections**

Office of Community Corrections, Responses to 3 Questions posed on the number of OCC centers, cost per center for males and female participants.

**Overview Information on Sheriff's Offices**

Massachusetts Sheriffs' Association, An Overview of Sheriffs' Offices in the Commonwealth.

Massachusetts Sheriffs' Association, Office of the Sheriffs State by State Elections Information.

Massachusetts Sheriffs' Association Chart of Responses from Sheriffs – Part I on Office of Community Corrections, 911 services; investigation services; risk assessment tools and jail management systems; hiring; training of staff.

Massachusetts Sheriffs' Association Chart of Responses from Sheriffs – Part II on collective bargaining; health care and mental health; purchase of drugs; bulk purchases; inmate population; gang units; and office's under court decree.

Responses from Sheriffs – Follow Up Questions - Part III on Office of Community Corrections; appointment of deputy sheriffs; medical and mental health services; SOPS, group purchasing; regional programs, benefits of uniformity; cost per inmate, polices of inmate fees and commissary, position caps, and staffing.

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**Sheriff's Offices Transfer to the Commonwealth**

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# Appendix H: Language Approved by the Commission

**Advisory Board**

The Special Commission recommends that there shall be a corrections advisory board, hereinafter called the board, to provide independent advice to the commonwealth's corrections providers, including the sheriffs, for the purpose of (1) improving coordination efforts between and among the sheriffs, the department of corrections, the courts and community corrections programs, and (2) indentifying and establishing best practices in all aspects of corrections operations, including but not limited to, accounting, human resources, care and custody of inmates, special inmate populations, civil process, community corrections, health and mental health care management, inmate rehabilitation and re-entry, capital, master and strategic planning, inmate tracking and transportation, and procurement.

The board shall consist of the following persons: the secretary of public safety and security, the chair of the parole board, the commissioner of correction, the commissioner of probation, the secretary of administration and finance, the president of the Massachusetts Sheriffs' Association, or their designees, each of whom shall serve ex-officio, 9 persons to be appointed by the governor for a term of three years, 1 of whom shall have experience in the areas of workforce development and ex-offender rehabilitation, 1 of whom shall have experience in the area of reintegration and rehabilitation of female ex-offenders, 1 of whom shall have experience in treating people with mental illness and substance abuse, 1 of whom shall have experience in government accounting practices, 1 of whom shall have experience in human resources management, 1 of whom shall have experience in independent auditing, 1 of whom shall be a representative of organized labor, 2 persons to be appointed by the president of the Massachusetts Sheriffs' Association, and 2 persons to be appointed by the chief justice of the supreme judicial court. Upon the expiration of the term of any appointed member, the member's successor shall be appointed in a like manner for a term of 3 years. Irregular vacancies shall be filled by appointment to an unexpired term. Ten members shall constitute a quorum and all appointees and ex-officio members shall be voting members. The board shall annually elect a chair from among its members and shall be supported by the executive office of administration and finance. The provisions of chapter 268A shall apply to all board members.

The chairman shall hold meetings at least quarterly, one of which shall be an annual meeting, and shall notify all board members and sheriffs of the time and place of all meetings. Special meetings may be called at any time by a majority of the board members and shall be called by the chairman upon written application of eight or more members. Members of the board shall receive no compensation, but shall receive their expenses actually and necessarily incurred in the discharge of their duties.

The sheriffs and any other interested parties shall have the opportunity to address the board during its meetings and to provide written information to the board for its consideration.

The board shall make a report, on or before 60 days of the end of each two-year legislative session, and file a copy thereof with the governor, the clerks of the house of representatives and of the senate, senate and house committees on ways and means, the joint committees on public safety, judiciary, and state administration and regulatory oversight.

**Female Prisoners**

The Special Commission recommends that the various Sheriff's Offices, together and individually, and the Department of Correction cooperate in the development of effective management of female prisoners by working together to establish Regional Women's Correctional Centers and to coordinate and enhance opportunities for female prisoners to participate in local pre-release and post-release/stabilization (re-entry) and appropriate mental health and substance abuse programs. Further, in light of specific treatment and family needs of many non-violent female offenders, the Special Commission recommends that the criminal courts make themselves aware of the availability of the range of alternatives to incarceration and to utilize those alternatives where appropriate.

**Inmate Tracking**

The Special Commission requests that the Executive Office of Public Safety (EOPSS) and determine the feasibility and cost of adding an inmate tracking module to the Inmate Management System (IMS), which would allow staff at prisons and houses of correction to electronically monitor movement of prisoners within institutions in real time. EOPSS is specifically requested to consider and compare the advantages and disadvantages of using radio-frequency identification (RFID), bar codes and scanners, or biometric identification of prisoners with the tracking module.

**Mental Health Services**

The Special Commission directs the Auditor, in coordination with Executive Office of Health and Human Services and the Massachusetts Sheriffs Association (MSA), to perform a performance audit on the mental health screening processes currently in place for all jails and houses of correction, the types of services offered and used prior to persons being transitioned to

these facilities, the range of services in these facilities and comparisons with national and clinical best practices. The Auditor shall provide the findings of said performance audit, including estimate costs for attaining national and best practice levels of services, to the MSA and the House and Senate Committees on Ways and Means no later than October 1, 2013.

**Multi-Jurisdictional Facilities**

The Special Commission recommends that the Massachusetts Sheriffs' Association (MSA) establish a multi-jurisdictional subcommittee to address management and governance practices of new and existing multi-jurisdictional facilities.

The Special Commissions recommends that the administration establish a working group that consists of EOPSS, DCAMM, ANF, the DOC and representation from the MSA subcommittee to facilitate development of management and governance practices for new and existing multi-jurisdictional facilities.

**Office Management Policies and Practices**

(1) The Special Commission directs the Massachusetts HRD office to conduct, in consultation with the Sheriffs and Massachusetts Sheriffs Association (MSA), a comprehensive assessment for all sheriff's offices management policies and practices, including but not limited to, standardizing job title and classification, job posting, minimum testing requirements and other employment practices that will lead to statewide standards for classification, recruitment, promotion, compensation and professional standards for all fourteen sheriffs' offices.

(2) That HRD issue a report of its assessment by April 30, 2013 and that implementation of the standards shall begin no later than September 1, 2013. A copy of the HRD assessment report shall be sent to the Chairs Joint Committee on State Administration and Regulatory Oversight, the Chairs of House and Senate Ways and Means, the House and Senate Clerks, the Chairs of the Joint Committee on Public Safety, and the Secretaries of Administration and Finance, and Public Safety and Security.

(3) The Special Commission recommends to the House and Senate Committees on Ways and Means that line item 1750-0100 be increased to reflect this policy directive,

(4) Moved that the final report of said commission recommend that the Commonwealth should pursue federal reimbursement for medical services for those housed by or served through the programs of the fourteen sheriffs and shall further recommend these proposals to other special commissions and committees that are reviewing the criminal

justice system, provided that any effort will take into account both costs and savings to the Commonwealth and develop a methodology to appropriately allocate them.

**Risk Assessments and Jail Management Systems**

The Special Commission recommends that the applicable agencies of the Commonwealth continue implementation of ICJIS and include in ICJIS the following: finger print-based records available to correctional, parole, and community corrections; telemedicine applications; electronic medical records of prisoners; the infrastructure with which to conduct video arraignments and video visitations; inmate kiosks where inmates can manage their inmate accounts, maintain their inmate plan, choose visitation times; other services that would reduce staff's time; and including a transportation database.

# Appendix I: Redrafted Civil Process Legislation

**An Act to reform sheriff civil process operations.**

SECTION 1. Section 1 of chapter 32 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by inserting, in line 259, at the end of the definition "Employee", the following text:-

""Employee", as applied to persons whose regular compensation is paid from an account established by the sheriff's civil process office pursuant to section 22 of Chapter 37 of this act for the sheriff's civil process office and shall mean any person who is appointed by the sheriff as a deputy sheriff or employee of the sheriff's civil process office who is engaged in duties which require that his time be devoted to the service of the sheriff's civil process office in each year during the ordinary working hours of regular and permanent employees, and who is regularly and permanently employed in such service and receives a salary, hourly wage or regular compensation for assigned civil process duties as determined by each Sheriff."

SECTION 2. Section 3 of said chapter 32 , as so appearing , is hereby amended by inserting, in line 300, after the words "county correction facilities," the following: -

"and any deputy engaged in civil process enforcement activities that involve the acts of arrest, eviction or seizure of property, who is regularly assigned to such enforcement duties for more than 20 hours per week, and who is defined by section 3A of chapter 37 as a full-time employee of the Sheriff."

SECTION 3. Section 3 of said chapter 32, as so appearing, is hereby amended by inserting after subparagraph (a) the following paragraph: --

(b) any deputy sheriff or employee of the sheriff's civil process office, including any deputy sheriff or employee of the process office that has been transferred to the Commonwealth, who is now a member or becomes a member of a system applicable to any governmental unit shall be given credit in such system for any service rendered by depositing in the annuity savings fund of such system such sums and under such conditions as are set forth under said section, provided that said member was eligible for membership in a retirement system based on his or her civil process duties for the period for which creditable service is being granted.

SECTION 3. Section 2 of chapter 32A, as so appearing, is amended by inserting, in line 15, after the words "cooperative extension service of Suffolk county," the following: -

"the offices of the sheriffs,"

SECTION 4. Chapter 37 is hereby amended by inserting after section 3 the following sections: —

Section 3A. Sheriff's Civil Process Office.

(A) Each sheriff shall establish a civil process office within the sheriff's department and shall assign deputies appointed pursuant to section 3 who, along with the sheriff, shall serve and execute within their counties, including within the political boundaries of the previously abolished county governments, and where the Commonwealth is a party or interested, all precepts lawfully issued to them, and all other process required by law to be served by an officer pursuant to section 11 of chapter 37. The civil process office established within the sheriff's department shall be the exclusive entity performing sheriff's civil process duties under section 11 of chapter 37. A deputy assigned to serve process may do so in cases in which a county, city, town, parish, religious society, fire or other district is a party or interested, although he is an inhabitant or member thereof. The sheriff may also appoint employees to work in the sheriff's civil process office. All

deputies and employees of the process office shall serve at the will and the pleasure of the sheriff. Any deputy who ceases to be assigned to or to perform civil process duties, either as an employee or as a contracted deputized process server, shall be decommissioned as a deputy as provided by law and shall immediately return all equipment and property issued to him by the sheriffs' department.

(B) Deputies and other employees of the process office, who are salaried or hourly employees and who devote 20 or more hours per week to assigned duties, shall be state employees for the purposes of Chapters 32, 32A, 150E, 152, 258, 268A, and 268B, and shall be compensated in accordance with this subsection and subsection (C) of this section.

(C) Subject to the following limitations, the sheriff shall have power and authority as employer in all matters related to civil process deputies and employees including, but not limited to, hiring, firing, promotion, discipline, work-related injuries and internal organization of the department:-

1. No sheriff, deputy or employee shall serve process for anyone except the Sheriff.

2. The sheriff or an assigned deputy, or contracted deputized process server may serve process outside regular business hours.

3. Sheriffs and non-commission full-time deputies and employees may receive only a salary or hourly wage, and shall at no time receive a commission, or any portion of any fee, for service of process no matter when the service is performed.

4. Except for contracted deputized process servers, sheriffs, deputy sheriffs and employees who are part-time shall not be paid a commission or any portion of any fee, for service of process performed during hours for which the sheriff, deputy or employee is being

compensated by federal, state, county or municipal funds;

5. The annual salary, cumulative hourly wage, commissions, or the cumulative portion of any fees for service of process, of any individual deputy, employee, or contracted deputized process server shall not exceed the annual salary of the sheriff; and

(D) In addition to any other training and certification required by law, any deputy sheriff who perform civil process duties, including but not limited to enforcement duties, shall be sworn and shall complete a civil process officers certification program, pursuant to a policy and curriculum that shall be adopted and approved by the Massachusetts Sheriffs Association and the Massachusetts Deputy Sheriffs Association. The civil process officers certification program shall include training and orientation on all requirements of lawful service of process and shall be conducted jointly by the Massachusetts Sheriffs Association and the Massachusetts Deputy Sheriffs Association. Deputy sheriffs shall begin the civil process officers certification program within 30 days after receiving appointment or being assigned civil process duties, and shall be re-certified annually after completing the program.

(E) All full time deputy sheriffs and employees of the sheriff's civil process office, including those deputy sheriffs and employees of the sheriff's civil process office who have been transferred to the commonwealth, and who completed a one year probationary period of full time employment, will be granted under this subsection, without impairment, full benefits for vacation and sick time earned from their original commencement of employment in the sheriff's civil process office, but not to exceed those of regular state employees.

Section 3B. Property Rights of Sheriffs, Deputy Sheriff and Employees.

No sheriff, deputy or employee, nor any other individual or entity shall have or acquire any legal right whatsoever to the tangible or intangible property of the civil process office, nor any

revenue derived from fees collected from the service of process of any proceeds from the sale of the property within the process office, other than compensation as determined under this chapter.

Except as otherwise provided in this chapter, all fees derived from service of process shall be used solely for the operation of the sheriff's civil process office. All tangible and intangible property shall belong to the state and shall be under the sole possession and control of the sheriff.

SECTION 5. Chapter 37 is further amended by striking out section 11 and inserting in place thereof the following section:-

Section 11. Recording of Process.

(A) The Massachusetts Sheriffs Association, shall establish a system by which all process fees are reported and recorded and shall develop and adopt policies and procedures, to be approved by the comptroller and the office of administration and finance which shall be referenced in an internal control plan kept by each sheriff's office. Information about each request for process to be served that is received by the sheriff's civil process office shall be reported and recorded in the system within 30 days of when the information becomes available, and shall include but not be limited to the following information for each piece of process to be served: --

(a) the title of the action, including court name and docket number;

(b) the date the process was issued or required to be served;

(c) the type of process;

(d) the name and address of the person requesting that process be served;

(e) the name and address of the person or location upon which service is to be made;

(f) the fee charged;

(g) the date of billing to collect the fee;

(h) the date of fee collected;

(i) the date service was made;

(j) the manner of service;

(k) the amount of commission paid, if any ; and

(l) the name of the person performing service, and if different, the name of the person or entity to whom the commission was paid.

(B) A summary of the information contained in subsection (A) of this section shall be compiled and reported in writing to the comptroller and the office of administration and finance by the sheriff annually no later than September 30th.

(C) Administrative costs associated with the recording of information prescribed under subsection (A) of this section, and prepared under subsection (B) of this section, including expenditures for personnel or the purchase of equipment required to perform the recording of information, may be paid from the civil process account or any other account established for the operation of the sheriff's office.

(D) In addition to the requirements of subsection (A) of this section, annual reports filed pursuant to subsection (B) of this section shall include, but not be limited to, completed, itemized schedules of the following information pertaining to the service of process:

(a) assets, including cash, deposits, accounts receivable, and the value of the property and equipment;

(b) liabilities, including accounts payable, client escrow deposits, capital lease obligations, and all other debts;

(c) income derived from the service of process and otherwise;

(d) expenses paid, including payroll, commissions, and all other expenses; and

(e) any surplus from the sheriff's civil process account that has been transferred to an account as authorized by law.

SECTION 6. Section 14 of chapter 37, as appearing in the 2010 Official Edition , is hereby amended by striking out, in lines 1 and 2, the words "They may execute precepts in their hands at the time of their removal from office; and,".

SECTION 7. Chapter 37 is further amended by inserting after section 14 the following new section: -

Section 14 A. Return of Writs and Precepts after removal.

Upon the removal of a deputy sheriff by the sheriff, the removed deputy shall immediately return to the sheriff's civil process office all process and other documents received or in his possession, along with any fees collected. If a deputy or former deputy fails to comply with the terms of this section, the sheriff shall institute legal proceedings to enforce the terms of this section or any other section herein.

SECTION 8. Chapter 37 is further amended by striking section 22 in its entirety and inserting in place thereof the following section: -

Section 22. Accounting of fees; disposition of funds.

Each sheriff shall keep an account of all fees and money received from any source by virtue of

his office on the state's accounting system as prescribed by the state comptroller.

SECTION 9. Chapter 37 is further amended by inserting after section 22 the following section: —

Section 23. Fees from Process Office.

(A) Notwithstanding the provisions of section 22 of this chapter or the provisions of chapter 35, all fees and other revenues collected by the process office shall be revenue of the Commonwealth as defined by chapter 29. All fees and revenues shall be deposited in bank accounts and accounted for on the books and records of the Commonwealth in accordance with policies and procedures of the state treasurer and comptroller. The civil process accounts shall be kept separate from any other account, shall continue without further appropriation, and shall be used only for the operation of the process office or for activities that the sheriffs are statutorily authorized to perform. . Expenditures shall be authorized by the sheriff in accordance with state guidelines without further appropriation. Any balance in the account at the close of the fiscal year shall be retained in the account and made available in the subsequent fiscal year

(B) Payroll and all other bills of the civil process office shall be paid from the process account. However, after all civil process revenue has been expended for payroll and other bills of the civil process office, a sheriff may use funding from a fiscal year budgetary appropriation to pay payroll and all other civil process expenses.

(C) Notwithstanding the provisions of subsection (A), contributions from paychecks issued to deputy sheriffs and employees of the sheriff's civil process office who are members in service of the state retirement system, shall be deducted and forwarded to the state treasurer. The amounts deducted shall be determined in accordance with the provisions of Chapter 32 and any other rules and regulations promulgated there under.

(D) Notwithstanding the provisions of subsection (A), premiums from paychecks of deputy sheriffs and employees of the sheriff's civil process office who are insured under Chapter 32A shall be deducted and forwarded to the state treasurer. The amounts deducted shall be determined in accordance with the provisions of those chapters and any other rules and regulations promulgated there under.

(E) Annually, on or before the 75th day after the close of the fiscal year, the sheriff shall render a sworn statement of account to the state treasurer, to the office of administration and finance and the house and senate committees on ways and means.

(F) Notwithstanding the provisions of subsection (A), no funds held in any civil process account shall be used either for payment of liability expenses incurred by the sheriff's civil process office pursuant to chapter 258, or for payments to employees pursuant to chapter 152. Any judgment, settlement or attorney's fees incurred as a result of litigation concerning the process office shall be paid in accordance with chapter 258, in the same manner as any other claim, judgment, settlement, or attorney's fees paid by the sheriff's office.

(G) If the sheriff projects that revenues collected from civil process fees will not be sufficient to cover costs, then 30 days in advance of the projected deficiency, the sheriff shall notify the house and senate committees on ways and means and the office of administration and finance in writing of the projected deficiency and the reasons for it.

SECTION 10. Chapter 126 is hereby amended by inserting after section 18A the following section: —

Section 18B. Injuries to Deputy Sheriffs and Employees of Sheriff's Civil Process Office.

Whenever a a deputy sheriff or other employee of a sheriff's civil process office who, due

to no fault of his own, while in the performance of duty, receives bodily injury from an act of violence by a person connected with the proceeding for which service of process was attempted or served, and who is incapacitated for duty because of the injury sustained, shall be paid, in addition to benefits paid under chapter 152, the difference between the weekly cash benefits to which he is entitled under chapter 152 and his regular salary. Any absence from work due to the injury shall not be charged against the employee's available sick leave credits, even if the absence is for less than 8 calendar days. This section does not apply to injuries sustained during work for which a deputy or employee is being paid commission.

All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be the deputy or employee's regular compensation. If a person or entity is liable for monetary damages for an injury of a deputy sheriff or other employee of a sheriff's civil process for which he is compensated under this section, the deputy, employee, or sheriff's department that is paying compensation under this section, may proceed to enforce the liability of such person or entity in any court of competent jurisdiction. Any sum recovered shall be for the benefit of the sheriff's department that is paying such compensation, unless the sum is greater than the compensation paid to the injured person, in which case the excess shall be retained by or paid to the injured person. For the purposes of this section, "excess" shall mean the amount by which the total sum received as damages for the injury, exclusive of interest and costs, exceeds the amount paid under this section as compensation to the injured person. The party bringing the action shall be entitled to any costs recovered by him. Any interest received in the action shall be apportioned between the sheriff's department and the injured person in proportion to the amounts received by them respectively, inclusive of interest and costs. The expense of any attorney's fees shall be divided between the

sheriff's department and the injured person in proportion to the amounts received by them respectively.

Any person or entity, who injures a deputy sheriff or other employee of a sheriff's civil process office who is compensated under this section for the injury, shall be liable in tort to the sheriff's department that is paying the injured person, for all costs, in excess of the amount of compensation paid, that are incurred by the sheriff's department to replace the injured person.

SECTION 11. Said chapter 262, as so appearing, is hereby amended by striking out section 8A and inserting in place thereof the following section;-

Section 8A. Annual accounts of deputy sheriffs and constables

Each constable shall annually, on or before the 15th day of April, file with the county treasurer an account signed by him under the penalties of perjury of all fees and money received by him under the provisions of section 8 for the service of civil process. If 2 or more constables share such fees and money between themselves, they may file a joint account provided that each sings the account under the penalties of perjury.

Each deputy sheriff shall annually, on or before 30 days after the close of the fiscal year, file with the sheriff and with the state treasurer an account signed by him under the penalties of perjury of all fees and money received by him under the provisions of section 8 for the service of civil process. If 2 or more deputy sheriffs share such fees and money between them they may file a joint account, provided that each shall sign the account under the penalties of perjury.

On a schedule determined by the sheriff, but at least quarterly, each deputy sheriff who serves process shall file a written report to the sheriff of all the process they have served. The

written report shall be in a form approved by the sheriff and shall contain all the information contained in section 11 of chapter 37. The written report shall be made under the pains and penalties of perjury.

SECTION12. The provisions of this act shall take effect January 1, 2013.

SENATE DOCKET, NO. 1741 FILED ON: 1/18/2019

# SENATE . . . . . No. 1430

## The Commonwealth of Massachusetts

PRESENTED BY:

***Mark C. Montigny***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to inmate telephone call rates.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | |
|---|---|---|
| *Mark C. Montigny* | *Second Bristol and Plymouth* | |
| *William N. Brownsberger* | *Second Suffolk and Middlesex* | |
| *Denise Provost* | *27th Middlesex* | *1/29/2019* |
| *Antonio F. D. Cabral* | *13th Bristol* | *1/30/2019* |
| *Daniel J. Hunt* | *13th Suffolk* | *1/30/2019* |
| *Sal N. DiDomenico* | *Middlesex and Suffolk* | *1/31/2019* |
| *Mike Connolly* | *26th Middlesex* | *1/31/2019* |
| *Mary S. Keefe* | *15th Worcester* | *1/31/2019* |
| *Lindsay N. Sabadosa* | *1st Hampshire* | *2/1/2019* |
| *Joseph A. Boncore* | *First Suffolk and Middlesex* | *2/1/2019* |
| *Thomas M. Stanley* | *9th Middlesex* | *2/1/2019* |
| *Harriette L. Chandler* | *First Worcester* | *2/1/2019* |
| *Nika C. Elugardo* | *15th Suffolk* | *2/4/2019* |
| *Joanne M. Comerford* | *Hampshire, Franklin and Worcester* | *2/5/2019* |
| *James B. Eldridge* | *Middlesex and Worcester* | *2/8/2019* |
| *Christopher Hendricks* | *11th Bristol* | *2/20/2019* |
| *Michael D. Brady* | *Second Plymouth and Bristol* | *4/22/2019* |

SENATE DOCKET, NO. 1741 FILED ON: 1/18/2019

# SENATE . . . . . No. 1430

By Mr. Montigny, a petition (accompanied by bill, Senate, No. 1430) of Mark C. Montigny, William N. Brownsberger, Denise Provost, Antonio F. D. Cabral and other members of the General Court for legislation relative to inmate telephone calls. Public Safety and Homeland Security.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *1336* OF 2017-2018.]

## The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court**
**(2019-2020)**

An Act relative to inmate telephone call rates.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 127 of General Laws is hereby amended by adding the following section:-

Section 87A. The department of correction and county houses of correction shall negotiate contracts for local and long distance telephone service on the basis of offering the lowest cost to end consumers. The commonwealth, the department of correction and the county houses of correction shall not accept commissions, services, salary or rent payments, or goods from the providers of prisoner telephone service, other than telephones and associated hardware required for installation, upkeep and function of the prisoner telephone system. The department of correction shall negotiate its future contracts to give the county houses of correction the option

to join the contract under the same terms. The commonwealth, the department of correction and the county houses of correction shall negotiate contracts for telephone service separately from that of other services.

HOUSE DOCKET, NO. 3024 FILED ON: 1/18/2019

# HOUSE . . . . . No. 3452

## The Commonwealth of Massachusetts

PRESENTED BY:

***Chynah Tyler***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to telephone service for inmates in all correctional and other penal institutions in the Commonwealth.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: |
|---|---|
| *Chynah Tyler* | *7th Suffolk* |
| *Bud L. Williams* | *11th Hampden* |
| *Ruth B. Balser* | *12th Middlesex* |
| *Joseph A. Boncore* | *First Suffolk and Middlesex* |
| *Antonio F. D. Cabral* | *13th Bristol* |
| *Harriette L. Chandler* | *First Worcester* |
| *Mike Connolly* | *26th Middlesex* |
| *Julian Cyr* | *Cape and Islands* |
| *Marjorie C. Decker* | *25th Middlesex* |
| *Mindy Domb* | *3rd Hampshire* |
| *Michelle M. DuBois* | *10th Plymouth* |
| *James B. Eldridge* | *Middlesex and Worcester* |
| *Nika C. Elugardo* | *15th Suffolk* |
| *Tricia Farley-Bouvier* | *3rd Berkshire* |
| *Dylan A. Fernandes* | *Barnstable, Dukes and Nantucket* |
| *Carole A. Fiola* | *6th Bristol* |
| *Carmine Lawrence Gentile* | *13th Middlesex* |

| | |
|---|---|
| *Carlos González* | *10th Hampden* |
| *Tami L. Gouveia* | *14th Middlesex* |
| *Jonathan Hecht* | *29th Middlesex* |
| *Natalie M. Higgins* | *4th Worcester* |
| *Russell E. Holmes* | *6th Suffolk* |
| *Daniel J. Hunt* | *13th Suffolk* |
| *Patricia D. Jehlen* | *Second Middlesex* |
| *Mary S. Keefe* | *15th Worcester* |
| *Kay Khan* | *11th Middlesex* |
| *Jason M. Lewis* | *Fifth Middlesex* |
| *Elizabeth A. Malia* | *11th Suffolk* |
| *Christopher M. Markey* | *9th Bristol* |
| *Liz Miranda* | *5th Suffolk* |
| *Denise Provost* | *27th Middlesex* |
| *David M. Rogers* | *24th Middlesex* |
| *Lindsay N. Sabadosa* | *1st Hampshire* |
| *Paul A. Schmid, III* | *8th Bristol* |
| *Thomas M. Stanley* | *9th Middlesex* |
| *William M. Straus* | *10th Bristol* |
| *José F. Tosado* | *9th Hampden* |
| *Aaron Vega* | *5th Hampden* |
| *Tommy Vitolo* | *15th Norfolk* |

HOUSE DOCKET, NO. 3024 FILED ON: 1/18/2019

# HOUSE . . . . . No. 3452

By Ms. Tyler of Boston, a petition (accompanied by bill, House, No. 3452) of Chynah Tyler and others relative to telephone service for inmates in correctional institutions. The Judiciary.

## The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court**
**(2019-2020)**

An Act relative to telephone service for inmates in all correctional and other penal institutions in the Commonwealth.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 127 of General Laws is hereby amended by adding the following section:-

Section 87A. The department of correction and county houses of correction shall negotiate contracts for local and long distance telephone service on the basis of offering the lowest cost to end consumers. The commonwealth, the department of correction and the county houses of correction shall not accept commissions, services, salary or rent payments, or goods from the providers of prisoner telephone service, other than telephones and associated hardware required for installation, upkeep and function of the prisoner telephone system. The department of correction shall negotiate its future contracts to give the county houses of correction the option to join the contract under the same terms. The commonwealth, the department of correction and

the county houses of correction shall negotiate contracts for telephone service separately from that of other services.

SENATE DOCKET, NO. 800 FILED ON: 2/8/2021

# SENATE . . . . . No. 1559

## The Commonwealth of Massachusetts

PRESENTED BY:

***Cynthia Stone Creem***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to inmate telephone calls.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | |
|---|---|---|
| *Cynthia Stone Creem* | *First Middlesex and Norfolk* | |
| *Joanne M. Comerford* | *Hampshire, Franklin and Worcester* | *2/10/2021* |
| *Thomas M. Stanley* | *9th Middlesex* | *2/22/2021* |
| *Jack Patrick Lewis* | *7th Middlesex* | *2/23/2021* |
| *Jason M. Lewis* | *Fifth Middlesex* | *2/24/2021* |
| *Tami L. Gouveia* | *14th Middlesex* | *2/25/2021* |
| *David Henry Argosky LeBoeuf* | *17th Worcester* | *3/2/2021* |
| *Erika Uyterhoeven* | *27th Middlesex* | *3/2/2021* |
| *Michael J. Barrett* | *Third Middlesex* | *3/2/2021* |
| *Patricia D. Jehlen* | *Second Middlesex* | *3/19/2021* |
| *Maria Duaime Robinson* | *6th Middlesex* | *4/5/2021* |
| *Sonia Chang-Diaz* | *Second Suffolk* | *4/5/2021* |
| *Sal N. DiDomenico* | *Middlesex and Suffolk* | *4/6/2021* |
| *Adam G. Hinds* | *Berkshire, Hampshire, Franklin and Hampden* | *4/26/2021* |
| *James B. Eldridge* | *Middlesex and Worcester* | *5/24/2021* |
| *Antonio F. D. Cabral* | *13th Bristol* | *5/24/2021* |

SENATE DOCKET, NO. 800 FILED ON: 2/8/2021

# SENATE . . . . . No. 1559

By Ms. Creem, a petition (accompanied by bill, Senate, No. 1559) of Cynthia Stone Creem, Joanne M. Comerford, Thomas M. Stanley, Jack Patrick Lewis and other members of the General Court for legislation relative to inmate telephone calls. Public Safety and Homeland Security.

## The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court**
**(2021-2022)**

An Act relative to inmate telephone calls.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 127 of the General Laws is hereby amended by inserting after section 87 the following section:-

Section 87A. State and local agencies charged with the operation and management of state prisons, local jails, and juvenile detention centers shall provide persons in their custody and confined in a correctional or detention facility with voice communication service free of charge. Communications shall be maximized to the extent possible. Nothing in this section shall abrogate existing law preserving in-person contact visits. Such state and local agencies may supplement voice communication service with other communication services, including, but not limited to, video communication and electronic mail services. To the extent that such voice communication service or any other communication service is provided, each such service shall be provided free of charge to the person initiating and the person receiving the communication.

SENATE DOCKET, NO. 2291 FILED ON: 2/19/2021

# SENATE . . . . . No. 1609

## The Commonwealth of Massachusetts

PRESENTED BY:

***Mark C. Montigny***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to inmate telephone call rates.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | |
|---|---|---|
| *Mark C. Montigny* | *Second Bristol and Plymouth* | |
| *Christopher Hendricks* | *11th Bristol* | *2/26/2021* |
| *Antonio F. D. Cabral* | *13th Bristol* | *5/20/2021* |

SENATE DOCKET, NO. 2291 FILED ON: 2/19/2021

# SENATE . . . . . No. 1609

By Mr. Montigny, a petition (accompanied by bill, Senate, No. 1609) of Mark C. Montigny and Christopher Hendricks for legislation relative to inmate telephone calls. Public Safety and Homeland Security.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *1430* OF 2019-2020.]

## The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court**
**(2021-2022)**

An Act relative to inmate telephone call rates.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Chapter 127 of the General Laws is hereby amended by inserting after section 87 the following section:-

Section 87A. Subject to appropriation, every inmate of a correctional institution or any other penal institution in the commonwealth shall be provided the ability to make domestic telephone calls at no cost to the inmate or the receiving party.

HOUSE DOCKET, NO. 3024 FILED ON: 1/18/2019

# HOUSE . . . . . No. 3452

## The Commonwealth of Massachusetts

PRESENTED BY:

***Chynah Tyler***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to telephone service for inmates in all correctional and other penal institutions in the Commonwealth.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: | DATE ADDED: |
|---|---|---|
| *Chynah Tyler* | *7th Suffolk* | *1/18/2019* |
| *Bud L. Williams* | *11th Hampden* | *1/28/2019* |
| *Ruth B. Balser* | *12th Middlesex* | *1/31/2019* |
| *Joseph A. Boncore* | *First Suffolk and Middlesex* | *2/1/2019* |
| *Antonio F. D. Cabral* | *13th Bristol* | *1/30/2019* |
| *Harriette L. Chandler* | *First Worcester* | *2/1/2019* |
| *Mike Connolly* | *26th Middlesex* | *1/30/2019* |
| *Julian Cyr* | *Cape and Islands* | *2/1/2019* |
| *Marjorie C. Decker* | *25th Middlesex* | *1/30/2019* |
| *Mindy Domb* | *3rd Hampshire* | *1/30/2019* |
| *Michelle M. DuBois* | *10th Plymouth* | *1/30/2019* |
| *James B. Eldridge* | *Middlesex and Worcester* | *2/1/2019* |
| *Nika C. Elugardo* | *15th Suffolk* | *2/2/2019* |
| *Tricia Farley-Bouvier* | *3rd Berkshire* | *2/1/2019* |
| *Dylan A. Fernandes* | *Barnstable, Dukes and Nantucket* | *1/31/2019* |
| *Carole A. Fiola* | *6th Bristol* | *2/1/2019* |
| *Carmine Lawrence Gentile* | *13th Middlesex* | *2/1/2019* |

| | | |
|---|---|---|
| *Carlos González* | *10th Hampden* | *2/1/2019* |
| *Tami L. Gouveia* | *14th Middlesex* | *2/1/2019* |
| *Jonathan Hecht* | *29th Middlesex* | *1/31/2019* |
| *Natalie M. Higgins* | *4th Worcester* | *2/1/2019* |
| *Russell E. Holmes* | *6th Suffolk* | *2/1/2019* |
| *Daniel J. Hunt* | *13th Suffolk* | *2/1/2019* |
| *Patricia D. Jehlen* | *Second Middlesex* | *1/31/2019* |
| *Mary S. Keefe* | *15th Worcester* | *1/31/2019* |
| *Kay Khan* | *11th Middlesex* | *1/30/2019* |
| *Jason M. Lewis* | *Fifth Middlesex* | *2/1/2019* |
| *Elizabeth A. Malia* | *11th Suffolk* | *2/1/2019* |
| *Christopher M. Markey* | *9th Bristol* | *1/29/2019* |
| *Liz Miranda* | *5th Suffolk* | *1/30/2019* |
| *Denise Provost* | *27th Middlesex* | *1/29/2019* |
| *David M. Rogers* | *24th Middlesex* | *1/30/2019* |
| *Lindsay N. Sabadosa* | *1st Hampshire* | *1/29/2019* |
| *Paul A. Schmid, III* | *8th Bristol* | *1/31/2019* |
| *Thomas M. Stanley* | *9th Middlesex* | *2/1/2019* |
| *William M. Straus* | *10th Bristol* | *1/30/2019* |
| *José F. Tosado* | *9th Hampden* | *1/25/2019* |
| *Aaron Vega* | *5th Hampden* | *1/31/2019* |
| *Tommy Vitolo* | *15th Norfolk* | *1/30/2019* |

HOUSE DOCKET, NO. 3024 FILED ON: 1/18/2019

# HOUSE . . . . . No. 3452

By Ms. Tyler of Boston, a petition (accompanied by bill, House, No. 3452) of Chynah Tyler and others relative to telephone service for inmates in correctional institutions. The Judiciary.

## The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court**
**(2019-2020)**

An Act relative to telephone service for inmates in all correctional and other penal institutions in the Commonwealth.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 127 of General Laws is hereby amended by adding the following section:-

Section 87A. The department of correction and county houses of correction shall negotiate contracts for local and long distance telephone service on the basis of offering the lowest cost to end consumers. The commonwealth, the department of correction and the county houses of correction shall not accept commissions, services, salary or rent payments, or goods from the providers of prisoner telephone service, other than telephones and associated hardware required for installation, upkeep and function of the prisoner telephone system. The department of correction shall negotiate its future contracts to give the county houses of correction the option to join the contract under the same terms. The commonwealth, the department of correction and

the county houses of correction shall negotiate contracts for telephone service separately from that of other services.

2015 WL 4271481
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

MacArthur DENSON, Plaintiff,

v.

Bruce GELB, Defendant.

CIVIL ACTION NO. 14–14317–DPW

|

Signed July 13, 2015

**Attorneys and Law Firms**

MacArthur Denson, Shirley, MA, pro se.

Richard C. McFarland, Commonwealth of Massachusetts, Department of Correction, Boston, MA, for Defendant.

*MEMORANDUM AND ORDER*

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

***1** Plaintiff MacArthur Denson is currently incarcerated at the Souza Baranowski Correctional Center ("SBCC") in Shirley, Massachusetts. Denson alleges that Bruce Gelb, the Superintendent of SBCC, is responsible for SBCC's policies for removing prisoners from their religious diets and that these policies and their implementation violate his statutory and constitutional rights.

## I. BACKGROUND

Denson filed his initial complaint pro se on December 12, 2014 against Gelb in his official and individual capacities. He also moved for appointment of counsel, and I denied that motion without prejudice. Gelb has filed a motion to dismiss on grounds of insufficient service of process and failure to state a claim. Denson has now renewed his motion to appoint counsel and he has also moved to amend his complaint, but he has not provided a proposed amended complaint indicating precisely how he would amend the complaint. He requests that I stay a decision on the motion to amend and the motion to dismiss until I determine whether to appoint counsel.[1]

The complaint as it now stands alleges that the "Standard Operating Procedures" ("SOP") that govern removal of prisoners from their religious diets are unconstitutional. Denson does not explicitly state in the complaint that he is a practicing Muslim, but he alleges that he received and was properly entitled to a halal diet and he mentions observance of Ramadan and religious fasts. He does not state when he was first put on a halal diet, but the complaint alleges that he was removed from the halal diet first temporarily and then permanently. Denson alleges that the SOP calls for the removal of a prisoner from an approved religious diet for failing to access their special meal, or for accessing the general menu, three times within a thirty day period, even if the general menu is the same as the halal menu for a particular day. Compl. ¶ 7, 13. A first removal is for sixty days, after which a prisoner may reapply for the religious diet. *Id.* ¶ 8. A prisoner removed twice within a twelve-month period is permanently removed from the religious diet. *Id.* ¶ 9. The SOP does not distinguish between prisoners who do not access their meal due to illness or religious fasting, and Denson alleges that he suffers from a chronic illness and routinely observes religious fasts. *Id.* ¶ 11–12.

Denson also includes various allegations about his own removal from the religious diet list. He alleges that on one occasion he was temporarily removed from the halal diet for not signing for his requested diet from the kitchen during a period when he was being housed in a restrictive housing unit that did not permit prisoners to access the kitchen. *Id.* ¶¶ 16–24. Denson was later permanently removed from his religious diet on February 20, 2013. *Id.* ¶ 29. He contests the circumstances that led to his removal. *Id.* ¶¶ 31–36.

***2** Denson alleges that most prisoners receiving a halal diet have been removed from that religious diet due to the SOPs, but he does not explicitly tie this to the content of the SOP and any particularly harsh effect on Muslim prisoners. *Id.* ¶¶ 37–38. Denson alleges that as a result of his own removal from the religious diet, he has had to spend thousands of dollars at the institutional canteen to supplement his diet, *id.* ¶ 40, and that at one point Gelb allowed the imposition of a sixty-day loss of canteen sanction, which resulted in Denson's having to eat food inconsistent with his faith, *id.* ¶ 41. Denson challenges the process by which the removal is effected as well as the SOPs themselves in that they do not take into account the reason a prisoner did not access the special diet. *Id.* ¶¶ 15, 43.

Denson asserts violations of (1) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq., (2)

  

the First Amendment to the United States Constitution, (3) Equal Protection and (4) Due Process under the Fourteenth Amendment of the United States Constitution, as well as similar claims under the Massachusetts Declaration of Rights, including deprivation of (5) religious freedom, (6) equal protection, (7) and due process, (8) the right to worship under Mass. Gen. Laws c. 127 § 88m (9) Department of Corrections regulations and policies, and (10) civil rights under the Massachusetts Civil Rights Acts, Mass. Gen. Laws c. 12, § 11(H) and (I). Denson seeks injunctive relief, including an order requiring Gelb to provide Denson with a halal diet and preventing Gelb from suspending or permanently removing Denson from his religious diet, various forms of compensation and restitution, punitive damages, costs, and attorneys fees.[2]

## II. ANALYSIS

### *A. Motion to Dismiss and Motion to Amend*

I will permit Denson to amend his complaint and instruct the Pro Se Staff Attorneys Office to make efforts to secure counsel for Denson in doing so.

Denson has not submitted a proposed amended complaint, so I am not in a position to analyze closely the viability of any claims that might be included in an amended complaint. I observe, however, that where it is apparent that even an amended complaint necessarily would fail to state a claim upon which relief could be granted, then the amendment would be futile. *See Glassman v. Computervision Corp.,* 90 F.3d 617, 623 (1st Cir.1996). In reviewing for futility, a court will apply the same standard of legal sufficiency as I would apply to a Rule 12(b)(6) motion. *Id.* Therefore, although I deem Gelb's motion to dismiss moot in light of the prospects for a future amendment of the complaint, I will still consider whether any of the arguments in the motion to dismiss are meritorious and would necessarily apply to an amended complaint. In this connection, I direct the parties' attention to a Memorandum and Order I have issued today, *Greene v. Cabral,* Civ. Action No. 12–11685 (D.Mass. July 13, 2015), dealing at greater length with issues similar to those presented in this case. A copy of the *Greene* Memorandum and Order is attached hereto as Exhibit A.

One argument made by Gelb in the motion to dismiss is that certain of the allegations against Gelb must be dismissed due to sovereign immunity under the Eleventh Amendment of the United States Constitution. Briefly stated, sovereign immunity bars all claims for damages against states, and this includes claims against state employees acting in their official capacities. *See generally Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72 (1996). A more extensive discussion of sovereign immunity in the context of prison litigation can be found in Section III of the *Greene* Memorandum and Order. Under this doctrine, all claims under state law against unconsenting states, including an employee of the state acting in his or her official capacity, must be dismissed and claims for damages under federal law against unconsenting states must also be dismissed. *Id.* Gelb, as superintendent of a state correctional institution, is undisputedly a state employee. Therefore, Denson's claims against Gelb in his official capacity for damages under federal law and for all relief under state law do not state a claim upon which relief may be granted and any future amendment seeking to do so would be futile.

***3** I further note some skepticism, based on the current complaint, that Denson will be able to amend the complaint in such a way as to avoid dismissal under the doctrine of qualified immunity of all claims for damages against Gelb in his individual capacity. I briefly note here that qualified immunity requires a two-part inquiry, including whether a constitutional violation is alleged and whether that violated right was "clearly established." *See Ford v. Bender,* 768 F.3d 15, 23 (1st Cir.2014). The principles are covered in Section V of the attached Memorandum and Order in *Greene*. It seems unlikely that claims on the current theory of denial of a religious diet due to claimed disciplinary infractions would be considered a violation of a clearly established right, particularly since this is a claim that appears to be the subject of an emerging circuit split. *Compare Kuperman v. Warden,* 2009 WL 4042760 (D.N.H. Nov. 20, 2009)(*Kuperman II* ) (finding claims of inmate denied kosher food for a dietary violation to be moot due to modifications of religious diet policy, but noting the possibility that even the modified policy could be a substantial burden on religious exercise) and *Kuperman v. N.H. Dep't of Corr.,* 2007 WL 1200092 (D.N.H. Apr. 18, 2007)(*Kuperman I* ) (recommending a preliminary injunction where an inmate was denied a kosher diet as a penalty for occasions where he was alleged to have eaten non-kosher food) with *Daly v. Davis,* 2009 WL 773880 (7th Cir. Mar. 25, 2009)(holding that a prison's program that removes prisoners from religious diets for failure to comply with the religious diets does not substantially burden exercise of religion). Denson and his counsel, if one is secured, will nonetheless have the opportunity to reformulate his complaint to address the issue of qualified immunity in further briefing.

***B. Appointment of Counsel***

Denson has sought appointment of counsel to assist him in prosecuting his case. Civil plaintiffs do not have a constitutional right to appointed counsel. *DesRosiers v. Moran,* 949 F.2d 15, 23 (1st Cir.1991). The statutory authority that permits courts to "request an attorney to represent any person unable to afford counsel," 18 U.S.C. § 1915(e)(1), is discretionary. *King v. Greenblatt,* 149 F.3d 9, 14 (1st Cir.1998). A district court is only "compelled to invoke the statute," and the First Circuit will only find reversible error in denying appointment of counsel, if "exceptional circumstances were present such that a denial of counsel was likely to result in fundamental unfairness impinging on [plaintiffs'] due process rights." *Id.* (quoting *DesRosiers,* 949 F.2d at 23).

After reviewing the current complaint, particularly in light of my parallel review in *Greene,* I am satisfied that some of Denson's claims, particularly the claims for prospective relief under federal law, may have significance. The issue of when an institution is permitted to withdraw religious diets presents an open question.[3] The First Circuit has not addressed this issue, and as Judge LaPlante has observed, it is an issue that has been slowly percolating through other circuits. *See Kuperman II,* 2009 WL 4042760, *6 ("A circuit split is brewing on this very issue," referencing the decisions in *Lovelace v. Lee,* 472 F.3d 174 (4th Cir.2006) and *Brown–El v. Harris,* 26 F.3d 68, 69–70 (8th Cir.1994)). While Denson has limned his claims to the best of his ability to this point, the potential merit of this relatively novel and important legal issue would best be developed by trained counsel. Consequently, I will direct the Pro Se Staff Attorneys Office to take all reasonable steps to secure counsel for the plaintiff in this matter.

**III. CONCLUSION**

***4** For these reasons, it is hereby ORDERED that:

1. Plaintiff's Renewed Motion to Appoint Counsel (Doc. No. 24) is GRANTED to the extent that the Pro Se Staff Attorneys Office is directed to take all reasonable steps to secure counsel for Denson, Plaintiff's Supplemental Motion for Appointment of Counsel (Doc. No. 26) is MOOT;

2. Plaintiff's Motion to Amend Complaint (Doc. No. 25) and Plaintiff's Supplemental Motion to Amend Complaint (Doc. No. 29) are DENIED without prejudice to renewal once counsel is appointed;

3. Plaintiff's Motion to Stay (Doc. No. 25) until resolution of the Motion to Appoint Counsel is GRANTED to the extent that the Pro Se Staff Attorneys Office will submit a status report on or before September 30, 2015, indicating whether counsel has been found to represent the plaintiff; if such counsel is identified, the stay shall be lifted and the Clerk shall promptly set the matter for a scheduling conference;

4. Plaintiff's Motion to Stay Ruling on Defendant's Motion to Dismiss (Doc. No. 27) is MOOT;

5. Defendant's Motion to Dismiss (Doc. No. 22) is MOOT in light of the prospect of renewal of a motion to amend the complaint if and when counsel is secured for plaintiff.

6. Plaintiff's motions for a temporary restraining order (Doc. Nos. 5 & 15) and to waive a bond (Doc. No. 17) are DENIED.

Attachment

**EXHIBIT A**

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

TIMOTHY GREENE, Plaintiff,

v.

ANDREA CABRAL, ET AL., Defendants.

CIVIL ACTION NO. 12–11685–DPW

*MEMORANDUM AND ORDER*

July 13, 2015

Plaintiff Timothy Greene is a practicing Orthodox Jew who was incarcerated in the custody of the Suffolk County

Sheriff's Department ("the Department") from May 2011 to October 2012 and from February 2013 to an unidentified date prior to the hearing in this matter. Greene contends that during these periods he was denied calorically adequate kosher food as well as access to religious services. The remaining defendants[1] are individuals who he claims were responsible for his care and custody during the periods of his incarceration. Greene seeks damages and prospective injunctive and declaratory relief. Defendants move to dismiss the complaint.

## I. BACKGROUND

Greene is a convert to Judaism and practices as an Orthodox Jew. Compl. ¶ 10. He alleges that his sincerely held religious beliefs require him to maintain a kosher diet, meaning a diet consistent with Jewish law. *Id.* ¶ 12. Greene informed the Department that he needed kosher meals, and he was placed on a list of inmates who receive kosher meals. *Id.* ¶ 15. The complaint does not allege when that request was made or when he was placed on the list. The Department does not provide a kosher breakfast option for inmates, *id.* ¶ 22, instead serving the same meal, prepared with non-kosher utensils, to all inmates, *id.* ¶ 21. The Department occasionally opened otherwise kosher meals with non-kosher utensils, exposing the food to contaminants, *id.* ¶ 25, and intermingled kosher and non-kosher food on the same trays in a way that violates the rules of a kosher diet. *Id.* ¶ 27.

***5** The Department served meals that purported to be kosher twice a day during the period of Greene's incarceration. *Id.* ¶ 29. These two meals combined typically contained approximately six hundred or fewer calories. *Id.* ¶ 30. Greene saved wrappers from some of these meals, and he alleges that on one day he was served two meals totaling only five hundred calories for the entire day. *Id.* ¶ 31. On another day he was provided with two meals totaling only seven hundred and ten calories. *Id.* ¶ 32. He has provided copies of the labels from those two days as an exhibit to the complaint. When he complained about his lack of access to calorically adequate kosher food, he was told to eat the non-kosher food or to go hungry. *Id.* ¶ 34.

Greene also alleges that the Suffolk County House of Correction ("the HOC") severely limited his access to religious services. There are no regularly held services for Jewish people in custody at the HOC, *id.* ¶ 36, nor are there nondenominational services, *id.* ¶ 36. Greene was told that rabbis were not offered to inmates, *id.* ¶37. Non–Jewish inmates in the custody of the department, however, do have access to religious services. *Id.* ¶ 42.

Greene has alleged violations of federal and state law against numerous administrative defendants. These defendants are Andrea Cabral, the former Sheriff of Suffolk County, sued in her individual capacity; Steven Tompkins, the current Sheriff of Suffolk County, sued in his individual and official capacities; Gerard Horgan, the former Superintendent of the Suffolk County House of Correction, sued in his individual capacity; Yolanda Smith, the current Superintendent of the Suffolk County House of Correction, sued in her individual and official capacities; and Anne Nee, the Director of Social Services, sued in her individual and official capacities. Greene initially brought this action *pro se* but never served the defendants. On January 15, 2013, he began to be represented by counsel. Greene filed a first amended complaint on February 26, 2013, and properly served the defendants. At that time, Greene also dismissed the Suffolk County Sheriff's Department as a defendant. Defendants moved to dismiss and Greene moved to further amend the complaint. He filed a Second Amended Complaint in December 2013.

Greene alleges that he filed grievances on June 18, 21, and 24, 2012, as well as on April 19, 2013, about the food he was provided. *Id.* ¶¶ 56, 57, 58, 60, 62. After filing one of the grievances, he was told to contact Director Nee, which he did. She did not resolve his complaint. *Id.* ¶¶ 58, 59. On June 16, 2013, he filed a grievance concerning lack of access to nondenominational or Jewish religious services. Id. ¶ 63. The response he received suggested that Greene contact an outside rabbi or synagogue to set up a special visit, but Greene does not have a rabbi he could ask to see him. *Id.* ¶ 63, 64. He followed up with people recommended in the grievance denials, but received no remedy. *Id.* ¶ 65.

In the Second Amended Complaint, Greene presents a theory of supervisory liability against each of the defendants based on each defendant's role in implementing practices, programs, or policies that Greene claims caused the violations he alleges. For former Sheriff Cabral and current Sheriff Tompkins, Greene alleges that each is or was responsible for "overseeing the operation and conditions of the correctional institutions in Suffolk County" and is or was "responsible for promulgating and implementing practices and policies" and ensuring the enforcement of the law. *Id.* ¶¶ 86, 88. He claims that each knew or should have known that Jewish inmates lack access

to kosher meals, religious services and religious materials. *Id.* ¶¶ 87, 88.

***6** Former Superintendent Horgan and current Superintendent Smith are alleged to be or to have been "[r]esponsible for supervision and daily operations of the Suffolk County House of Correction" as well as for "promulgating and implementing practices and policies, providing proper training to correctional staff" and ensuring enforcement of the law. *Id.* ¶¶ 89, 90. Greene alleges that both knew or should have known that Jewish inmates lacked access to kosher meals, religious services, and materials, in violation of the law, *id.,* adding that former Superintendent Horgan knew that this was "by Department policy and practice," *id.* ¶ 89, and that Superintendent Smith knew this "[d]ue to her involvement with training, and promulgation of the practices and procedures of the Suffolk County House of Correction," *id.* ¶ 90.

Director Nee is alleged to be responsible for "supervision and daily operation of religious services within the Suffolk County House of Correction." *Id.* ¶ 91. She knew or should have known that Jewish inmates lacked access to calorically adequate kosher meals and religious services in violation of the law "[d]ue to her involvement and implementation of the religious practices and procedures of the Suffolk County House of Correction, and her direct contact with Mr. Greene during the grievance process." *Id.*

Greene further states that the defendants "have each been involved in or are aware of the creation, training, oversight and implementation of the Department's religious programs" including religious services, materials, and diets, and the fact that the diet provided pursuant to these programs "only sometimes complies with the rules of Kashrut and Jewish inmates' sincerely held beliefs." *Id.* ¶ 102. He claims that the defendants "were aware of the risk to Mr. Greene's health and safety and deliberately disregarded that risk" by failing to provide him with sufficient caloric intake. *Id.* ¶ 104. At another point in the complaint, Greene claims that defendants "were each involved in training, and each oversaw or implemented policies, or were aware of the implementation of policies, that provided inmates requiring a Kosher diet[ ] only two meals a day. Further, Defendants have trained and overseen both the unit officers, chaplains, and kitchen lieutenant, and created the policies that these subordinates enforce, when they have resorted to coercive tactics to force Mr. Greene to go without food or to abandon his sincerely held religious beliefs." *Id.* ¶ 112.

Greene asserts claims in six counts: for (1) violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq, against defendants Tompkins, Smith and Nee in their official capacities; for violations of 42 U.S.C. § 1983 against all defendants based on infringements of (2) the right to freedom of religion in the First and Fourteenth Amendments to the United States Constitution, (3) the right to equal protection in the Fourteenth Amendment to the United states Constitution, and (4) the right to be free from cruel and unusual punishment under the Fourteenth Amendment to the United States Constitution; and for violations of state civil rights against all defendants under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, based on infringements of (5) the right to religious freedom and (6) the right to be free from cruel and unusual punishment. Defendants now move to dismiss the Second Amended Complaint for failure to state a claim upon which relief may be granted, asserting variously sovereign immunity, qualified immunity, and inadequate pleading.

## II. LEGAL STANDARD

In resolving a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, I treat as true all non-conclusory factual allegations in the complaint, while identifying and disregarding statements in the complaint that offer "legal conclusions" or "threadbare recitals of the elements of a cause of action." *Ocasio–Hernandez v. Fortuno–Burset,* 640 F.3d 1, 12 (1st Cir.2011)(quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). I do not consider the likelihood of plaintiff's success on the merits. *Id.* If I am able to draw a reasonable inference that defendants are liable for the alleged misconduct, then the claim is plausible and I must deny the motion to dismiss. *Id.*

## III. SOVEREIGN IMMUNITY

***7** Sovereign immunity under the Eleventh Amendment of the United States Constitution protects states from suit in federal court unless the state waives immunity. "The Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72 (1996). Sovereign immunity from suits authorized by federal law does not extend to municipalities, it extends "only to States and arms of the State." *Northern Ins. Co. v. Chatham County,*

547 U.S. 189, 193 (2006). Despite its municipal title, the Suffolk County Sheriff's Department, which oversees the correctional facilities in Suffolk County, is controlled directly by the Commonwealth of Massachusetts and all employees of the Department are employees of the Commonwealth. Mass. St.2009, c. 61, §§ 3, 13 (effective January 1, 2010) (transferring Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth, and Suffolk Sheriffs and their employees to the Commonwealth, "... all employees of the office of a transferred sheriff ... are hereby transferred to that transferred sheriff as employees of the commonwealth."). Massachusetts Sheriff's Departments are therefore considered arms of the state and are entitled to sovereign immunity. *See Jeffrey Gallo, et al. v. Essex County Sheriff's Dept.,* 2011 WL 1155385 at *3 (D.Mass. March 24, 2011).

Greene has asserted federal and state law claims against Tomkins, Smith, and Nee in their official capacities as employees of the state. He does not contest that sovereign immunity bars official capacity claims against state officials for punitive and compensatory damages. Such claims, including those under RLUIPA, must be dismissed. *See Sossamon v. Texas,* 131 S.Ct. 1651, 1659 (2011) (noting that states do not waive sovereign immunity by accepting funding under RLUIPA).

Greene also, however, advances claims for prospective relief, including declaratory relief and an injunction. These types of claims survive the assertion of sovereign immunity pursuant to *Ex Parte Young,* 209 U.S. 123 (1908). Where a plaintiff seeks "prospective injunctive relief" rather than a retroactive award, the Eleventh Amendment does not present an obstacle. *See Id.*, *Edelman v. Jordan,* 415 U.S. 651, 677 (1974).

The force of the Eleventh Amendment is even more potent when faced with state-law claims against state officials. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984). Thus, the prospective relief exceptions outlined in *Young* and *Edelman* do not apply to claims against state officials based on state law, such as those presented in Counts 5 and 6, to the extent they raise official capacity claims. *Id.* (The doctrinal basis for *Young* and *Edelman* disappears where plaintiffs allege violations of state law because a "federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law.")

## IV. PROSPECTIVE RELIEF UNDER FEDERAL LAW

I next consider whether injunctive or declaratory relief, the type of prospective relief permitted against states under *Young,* 209 U.S. 123, may be appropriate in this case. Greene requests declaratory and injunctive relief in his Second Amended Complaint, *c.f. Mitchell v. Massachusetts Dept. of Correction,* 190 F.Supp.2d 204 (D.Mass.2002)(finding that *Young* does not apply because the plaintiff did not request prospective relief). While Greene properly has requested this relief, I must consider whether Greene's request for these forms of relief is moot. The parties have not included any argument about mootness in their memoranda.

Greene states in his complaint that he has been in the custody of the Suffolk County Sheriff's Department from May 2011 to October 2012 and from February 2013 to the present. Greene does not admit in his complaint that the violations of which he complains have ceased. *C.f. Seaver v. Manduco,* 178 F.Supp.2d 30, 36 (D.Mass.2002)(finding that injunctive relief would be inappropriate given plaintiff's admission that the violation was in the past and was not ongoing). Instead, he alleges that the violations spanned his earlier and current periods of incarceration, that the violations happen "routinely," *id.* ¶ 1, and that the violations continue, *id.* ¶ 95, 101, 107, 112.

***8** At oral argument on the motion to dismiss, I inquired whether Greene remained in custody, and his counsel informed me that he has been released. While Greene's release is not documented in the complaint, the parties agree that he is not currently in the custody of the Department. Based on undisputed representations from counsel, representations that could "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" if there were any purported disagreement about the underlying facts, I take judicial notice of the fact that Greene is not currently in the custody of the Department. *See* Fed.R.Evid. 201.

Because Greene is no longer in the custody of the Department, the request for prospective relief is moot under governing First Circuit law. *See Ford v. Bender,* 768 F.3d 15, 29 (1st Cir.2014)("A prisoner's challenge to prison conditions or policies is generally rendered moot by his transfer or release.") Greene mentions in passing in his memorandum his entitlement to prospective relief because he is "subject to future incarceration by the Defendants," but he does

not expand on this argument in the context of mootness. This seems to be a reference to the general exception to the mootness doctrine for conduct that is capable of repetition yet evading review. *Id.* at 30. A future risk of reincarceration is typically not viewed as demonstrating a reasonable probability of recurrence. *Id.* ("we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury")(quoting *Honig v. Doe,* 484 U.S. 305, 320 (1988)). Greene has presented no other information from which I can conclude that there is a reasonable probability of recurrence within the legal framework laid out by the First Circuit.[2]

## V. QUALIFIED IMMUNITY

Qualified immunity is an affirmative defense for which the defendants bear the burden of proof. *DiMarco–Zappa v. Cabanillas,* 238 F.3d 25, 35 (1st Cir.2001). It limits government officials' exposure to liability for damages in their individual capacities, but does not shield them from prospective relief. *Ryder v. United States,* 515 U.S. 177, 185 (1995). The question whether qualified immunity is appropriate should be "resolved at the earliest possible stage in litigation," because it is designed to give government officials protection from the entire litigation process, not merely from liability, if immunity is appropriate. *Maldonado v. Fontanes,* 568 F.3d 263, 268 (1st Cir.2009). At the motion to dismiss stage, any assessment of qualified immunity requires me to evaluate the sufficiency of the defense on the face of the plaintiff's pleadings. *Id.*

***9** Qualified immunity requires a two-part inquiry: whether the allegations make out a constitutional violation, and whether the violated right was clearly established at the time of the offending conduct. *Ford,* 768 F.3d at 23. The "clearly established" inquiry, in turn, considers the clarity of the law at the time of the alleged violation and whether a reasonable defendant would understand that his or her conduct violated the plaintiff's constitutional rights. *Id.*

Greene contends that, as a preliminary matter, the defendants have not established that their actions were in the scope of a "discretionary function." Defendants cite two cases from Georgia federal district courts that note that the defendants had not shown that they were engaged in a discretionary function, and consequently could not invoke qualified immunity. *See Street v. City of Bloomingdale,* 2007 WL 1752469, at *4 (S.D. Ga. June 15, 2007); *Reed v. Okereke,* 2006 WL 2444068, at *19 (N.D.Ga. Aug. 22, 2006). The argument from the negative pregnant is that if that showing were made, qualified immunity may have been available. While the Eleventh Circuit regularly analyzes in detail whether an official is acting within the official's discretionary authority as a prerequisite to a qualified immunity analysis, *see, e.g., Lumley v. City of Dade City, Fla.,* 327 F.3d 1186 (11th Cir.2003) ("To receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."), courts elsewhere, and in the First Circuit in particular, typically spend little time on this element. The First Circuit has held that "[g]enerally, prison officials and officers are included in the category of those whose positions qualify them for such immunity." *Brown v. Ponte,* 842 F.2d 16, 18 (1st Cir.1988)(*per curiam* )(citing *Procunier v. Navarette,* 434 U.S. 555, 561(1978)).

Each of the defendants here was alleged by the plaintiff to be involved in making high-level determinations about the practices and policies of the Suffolk Department of Correction or Suffolk House of Correction and their misconduct is alleged to be the creation or implementation of an improper practice or policy. Greene's efforts to undercut the claim of qualified immunity based on a non-discretionary function fails.

Defendants do not challenge in any particularized manner the conclusion that their conduct as alleged amounts to a constitutional violation. Even their conclusory language, "Defendants contend that the action they took in response to Plaintiff's numerous complaints, grievances and requests did not violate the Plaintiff's constitutional rights," seemingly misses the point. Greene's primary theory is that the Defendants are liable for creating and implementing the policies that led to his being deprived of calorically adequate kosher food and Jewish religious services, not that they themselves were directly involved in the violations or the remedial process. While Greene has an additional factual hook for his claims against Nee based on his filing a grievance to her directly, the focus of this action is not the response to Greene's complaints but rather the policies that he claims led to his being provided calorically inadequate kosher food and being denied access to religious services.

It is clearly established that a prisoner must have "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to

conventional religious precepts." *Cruz v. Beto,* 405 U.S. 319, 322 (1972). Multiple federal and state laws provide protection for inmates' free exercise of their religion. For example, RLUIPA prohibits prisons that receive federal funds from imposing a "substantial burden" and an inmate's religious exercise in the absence of the prison's demonstration that the imposition of such a burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1(a). Massachusetts law similarly requires that "an inmate of any prison or other place of confinement shall not be denied the free exercise of his religious belief and the liberty of worshipping God according to the dictates of his conscience in a place where he is confined." Mass. Gen. Laws c. 127 § 88.

***10** In addition to identifying general rights that touch on freedom of religious practice for inmates, I must consider whether the specific rights Greene alleges were violated were clearly established and "determine whether an alleged right was established with sufficient particularity that a reasonable official could anticipate that his actions would violate that right." *Borucki v. Ryan,* 827 F.2d 836, 838 (1st Cir.1987). Concerning the claim that the kosher food provided to Greene was calorically inadequate, the First Circuit noted in 2013, that "it has been held that 'a prisoner's religious dietary practice [will be found to be] substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition.' " *LeBaron v. Spencer,* 527 Fed.Appx. 25, 30 (1st Cir.2013)(quoting *Nelson v. Miller,* 570 F.3d 868, 879 (7th Cir.2009).[3]

Rights of inmates are evaluated while considering the burden on the prison and giving "due deference to the experience and expertise of prison and jail administrators." *Spratt v. Rhode Island Dept. of Corrections,* 482 F.3d 33, 39 (1st Cir.2007)(quoting *Cutter v. Wilkinson,* 544 U.S. 709, 717 (2005)). On the face of the pleadings as they stand now, the defendants have not argued or made a showing that the rights that Greene claims were violated were not clearly established. Of course as the case moves forward, additional facts about the scope and nature of the alleged violations could lead to a different conclusion.

Defendants next argue that even if the rights were clearly established, the action they took in response to Greene's complaints and requests did not violate Greene's constitutional rights. They do not provide any support for this argument, however, other than their claims that Greene does not allege that they (other than defendant Nee) were aware of the violations, and that any response was reasonable. While Nee is the only defendant that Greene claims was directly aware of at least some of the violations, this action is not predicated on a theory that the defendants were actually aware that Greene in particular was being deprived of kosher food, sufficient caloric intake, and religious materials and services. Instead, Greene alleges that each of the defendants was aware of and implemented policies and practices that they knew or should have known led to Jewish inmates being denied calorically adequate kosher food and access to religious services. The policies and practices are what Greene claims to be the defendants' violations here, not their roles in his own deprivation.

***11** As for defendant Nee, Greene has alleged that she did not in any way remedy the violation of which he complained. Greene therefore adequately alleges knowledge, individualized for Nee and based on policies and practices for all of the defendants, that could be the foundation for a finding of a constitutional violation, and the complaint does not provide any grounds for the defendants' arguments that their responses to the existence of a violative policy or to Greene's individual situation were reasonable.

Aside from challenging the lack of knowledge, defendants also attempt to argue that at the motion to dismiss stage I can assume that the only alleged violations occurred during the six-day period in June 2012 plus on the one occasion in April 2013 that Greene filed formal grievances and that I must assume that on the other dates the food and access to religious services was not a problem. They further argue that I must assume that the responses to the grievances were satisfactory because Greene did not file follow-up grievances. These arguments neglect the essential fact that at the motion to dismiss stage, I must "accept the well-pleaded facts in the operative complaint as true, construing them in the light most favorable to ... the nonmoving party." *Lydon v. Local 103, Intern. Broth. Of Elec. Workers,* 770 F.3d 48, 50 (1st Cir.2014). I accept Greene's allegations as true and view them in the light most favorable to him. Consequently, contrary to the defendants' arguments here, I must accept that "[i]n the two meals a day that [the Department] does provide, the Department regularly fails to comply with Kosher requirements," Compl. ¶ 24, and other allegations by Greene that the violations were regular and ongoing. The lack of additional grievances does not indicate that the grievances were resolved.

At this stage, taking the plaintiff's well-pled allegations as true, I find that constitutional violations have been alleged adequately and the violations alleged are clearly established.

## VI. RLUIPA AND INDIVIDUAL CAPACITY CLAIMS

The Department contends that RLUIPA applies only to defendants acting in their official capacities, and because sovereign immunity bars such claims, as discussed above, there is no viable RLUIPA claim against defendants. The First Circuit has not addressed the issue whether RLUIPA can reach actions against individuals acting in their individual, rather than official, capacities. The Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits, however, have taken the view that FLUIPA does not allow for personal capacity claims for monetary damages. *See, e.g., Sharp v. Johnson,* 669 F.3d 144, 154 (3d Cir.2012) (collecting cases from other circuits sharing this view).

Greene does not contest this argument, and in fact his RLUIPA claims in the complaint are directed only against defendants Tompkins, Smith and Nee in their official capacities. He seeks only prospective relief under this count. Compl. ¶ 84. Therefore, I note that while the RLUIPA claims would not be dismissed on this ground because claims for official capacity prospective relief survive the sovereign immunity challenge, the RLUIPA claims must be dismissed because the prospective relief requested in this case is moot, *see* Section IV *supra*.

## VII. INDIVIDUAL CAPACITY CLAIMS

The individual capacity claims that Greene asserts against Cabral, Tompkins, Horgan, Smith, and Nee require that each of the defendants be held liable on the basis of that defendant's own actions. *See Leavitt v. Correctional Medical Services, Ind.,* 645 F.3d 484, 502 (1st Cir.2011). A defendant may not be held individually liable on a *respondeat superior* or other supervisory theory alone; rather, the plaintiff must show that the defendant had a direct connection to the misconduct. "In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal,* 556 U.S. at 677.

***12** For a supervisor to be held liable for a supervisee's conduct, liability must be premised on the supervisor's "own acts or omissions." *Whitfield v. Melendez–Rivera,* 431 F.3d 1, 14 (1st Cir.2005). This does not require direct involvement in misconduct, but it does require an "affirmative link" between the supervisor's actions and the alleged violation. "Absent direct participation, a supervisor may only be held liable where (1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was '*affirmatively link[ed]* ' to the behavior in the sense that it could be characterized as 'supervisory encouragement, condonation or acquiescence' or 'gross negligence ... amounting to deliberate indifference.' " *Id.* (quoting *Hegarty v. Somerset County,* 53 F.3d 1367, 1379–80 (1st Cir.1995)).

Liability may be appropriate under limited circumstances where the training and supervision of employees led to a civil rights deprivation even if a supervisor was not directly involved in or even aware of a specific violation. Liability is appropriate in such circumstances only where a supervisor shows "deliberate indifference" to the "possibility that deficient performance of the task eventually may contribute to a civil rights deprivation." *Camilo–Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir.1999). Deliberate indifference requires that "a prison official subjectively must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Burrell v. Hampshire County,* 307 F.3d 1, 7 (1st Cir.2002). Supervisory liability under a theory of deliberate indifference can be found "only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights." *Maldonado,* 568 F.3d at 275. Prison officials "cannot be deliberately indifferent if they responded reasonably to the risk, even if the harm ultimately was not avoided." *Burrell,* 307 F.3d at 7.

Defendants argue that Greene has failed adequately to allege facts in his complaint to make out a claim of deliberate indifference, noting what they claim are insufficient allegations concerning notice and active involvement by each of the defendants. This argument, however, appears to rest on the defendants' misunderstanding of Greene's allegations. Greene does not allege that the defendants themselves were directly involved in the claimed violations; instead, he roots his claims against the defendants in allegations that each was involved in creating and implementing the policies and practices at the Department and the HOC and that each knew or should have known that the policies and practices

concerning food and religious services for Jewish inmates were unlawful. In these circumstances, Greene need not allege that the defendants knew of or participated in the particular deprivations of which Greene complains, because a supervisor, "removed from the perpetration of the rights-violating behavior [ ] may be liable under section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another." *Camilo–Robles,* 151 F.3d at 7.

The fact that each of the defendants had supervisory roles and were involved in policies and programming would be insufficient to support supervisory liability in this case if the alleged violations were committed by other officers in violation of the policies and programs because there is no allegation that the defendants (other than perhaps Nee) were aware of any deviation from policy or practice. Here, however, Greene alleges that the misconduct occurred in compliance with the practice, policy, and programs implemented by the defendants. This language is clearest in relation to Superintendent Horgan, because Greene claims that Horgan was aware that the deprivations of calorically adequate kosher food and access to religious programming occurred "by Department policy and practice." Compl. ¶ 89. For all defendants, however, Greene makes the general allegation it is the "Defendants' implementation and oversight of policies that deprived Mr. Greene ... of sufficient caloric intake." *Id.* ¶ 103. *See also id.* ¶ 112 (noting that the subordinates are enforcing policies when they force Greene to go without food or abandon his sincerely held religious beliefs). At other times, however, Greene appears to claim in more general terms that the defendants' involvement in the highest levels of policy and program decisions for the Department and the HOC meant that they knew or should have known of other violations occurring under their watch. These latter allegations are not enough on their own, but other allegations connecting the violations to the policies and programs created and enforced by the defendants are sufficient to make out a claim for supervisory liability.

***13** A supervisor is liable only when he or she demonstrates deliberate indifference. Greene alleges facts that could make out deliberate indifference. Deliberate indifference requires knowledge of facts from which an official could draw an inference that a substantial risk of serious harm exists. *Ramirez–Lluveras v. Rivera–Merced,* 759 F.3d 10, 20 (1st Cir.2014). In the complaint, Greene claims significant weight loss and other medical and psychological consequences, which could fairly make out a grave risk of harm from caloric deprivation, and he claims that defendants knew of the policies and practices because they actually created and enforced them.

The question remains, however, whether alleging unnamed policies and practices that violated Greene's rights is too conclusory an allegation to survive a motion to dismiss. Allegations that are conclusory are not entitled to an assumption of truth. *Iqbal,* 556 U.S. at 681. In *Sanchez v. Pereira–Castillo,* 590 F.3d 31 (1st Cir.2009), the First Circuit rejected claims against administrative defendants in a case where officers pressured an inmate to receive unnecessary exploratory surgery to search for contraband. The court upheld claims against officers directly involved, but dismissed a § 1983 supervisory liability claim pursuant to *Iqbal* against higher-up administrative defendants, finding that the complaint merely "[p]arrot[ed] our standard for supervisory liability in the context of Section 1983 ... [alleging] that the administrative defendants were 'responsible for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff' and that 'they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff's federally protected rights.' " *Id.* at 49. The Court held that language to be conclusory and that it should not be given credence. *Id.* The sole claim in *Sanchez* that was more specific was that one of the officers who was directly involved and was particularly pushy toward medical staff was following directives and regulations designed and implemented by the administrative defendants. *Id.* The only regulations described in the complaint were a strip search and x-ray regulation, and the court held that the claim that the surgery resulted from those policies was implausible. *Id.* at 49–50.

Here, Greene does not specify the policies, programs, and practices that the defendants implemented and oversaw. He does, however, claim not only that the policies and programs permitted the violations to occur but that the violations occurred through compliance with those policies and programs. The First Circuit rejected the allegations in *Sanchez* based on the implausible fit between the named policies and the harm that resulted, not based on the fact that a supervisor is not properly held accountable under § 1983 where an employee commits a violation acting pursuant to a directive or regulation created and implemented by supervisors. Here, given the absence of a specifically identified policy or program that led to the violations, I do not

have the information necessary to measure the fit between the policy or program alleged and the violations.

At this very early stage in the case, I conclude that it would be improvident for me to dismiss the complaint based on the fact that Greene has not specified the policy. The general theory of supervisory liability based on unlawful policies and practices created and enforced by supervisory defendants is a valid one that states a claim for relief. Unlike in *Sanchez,* there is no reason apparent on the face of the complaint to discount the connection alleged by Greene between the policies and the alleged violations of his rights.

***14** Nonetheless, Greene's failure to name the specific policies and practices that underlay his claims make the allegations border precariously on the conclusory. I therefore conclude that the proper course of action in this case is to move this case as efficiently as possible to summary judgment. A schedule for doing so will be outlined below.

## VIII. MASSACHUSETTS CIVIL RIGHTS ACT

The allegations against the defendants under the Massachusetts Civil Rights Act, Mass. Gen. Laws c. 12 § 11H & I, in their official capacities are barred by sovereign immunity, as discussed above, *see* Section III *supra,* and are excluded by the statute itself since the Commonwealth is not a "person" within the meaning of the MCRA. *See Kelley v. LaForce,* 288 F.3d 1, 11 n.9 (1st Cir.2002). The claims for prospective relief are subject to dismissal as moot. *See* Section IV *supra.*

## IX. CONCLUSION

For the reasons set forth more fully above, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED in part and DENIED in part, in that:

1. All claims for prospective relief are dismissed as moot;
2. Official capacity claims for damages under federal law in Counts I, II, III, and IV, are hereby dismissed; and
3. Official capacity claims for damages under state law in Counts V and VI are hereby dismissed.

Defendants are ordered to file a motion for summary judgment by September 11, 2015. Plaintiff's response may include an affidavit or declaration detailing any discovery necessary to respond to the motion for summary judgment, *see* Fed.R.Civ.P. 56(d), but should in any event respond to defendants' motion for summary judgment on the merits.

### All Citations

Not Reported in Fed. Supp., 2015 WL 4271481

Footnotes

1 Denson has outlined in broad terms in his most recent filing (Doc. No. 29) the numerous areas in which an amended complaint would be modified to survive a motion to dismiss. In an earlier filing (Doc. No. 27), Denson notes the "complexities of the case" and that the task of amending properly is "beyond his ability," explaining why he filed a motion for the appointment of counsel and requesting a stay on the motion to amend until the motion for appointment of counsel could be resolved.

2 Denson has also filed motions for a temporary restraining order (Doc. Nos. 5 & 15) and a motion to waive a bond (Doc. No. 17). Given the plaintiff's self-acknowledged unfamiliarity with legal procedure, these motions are not adequately supported and will be denied. Whether counsel, if and when secured, will seek to renew motions of this type in a fully supported form remains to be seen.

3 The only decisions within this circuit that have addressed a similar situation are *Kuperman II,* 2009 WL 4042760, and *Kuperman I,* 2007 WL 1200092, which held that denial of religious diet to a prisoner who has a sincere religious belief that the diet is necessary to his practice of religion because of a failure to comply completely with an unyielding administrative policy concerning religious diets is a constitutional violation (although *Kuperman II* dismissed the claim as moot due to a change in the religious diet policy). The mootness of the *Kuperman* litigation notwithstanding, I must note that Magistrate Judge Muirhead in *Kuperman I,* 2007 WL 1200092 at *4 developed a helpful analogy in the context of prisoners who are denied religious diets despite no finding of insincerity, noting, "If a diabetic inmate were placed on a medically appropriate diet, and was then caught purchasing a candy bar from the canteen, the prison would not be justified in removing the

  

inmate from his medical diet and forcing him to eat a high sugar diet for six months for the violation," although other discipline may be both appropriate and sufficient.

1 This case was initially captioned *Greene v. Suffolk County Sheriff Department,* but the Department was terminated as a party on February 27, 2013.

2 The defendants also argue that Greene is barred from suing the defendants in their official capacities because § 1983 claims lie only against "persons" and "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989). While this argument provides an additional reason to dismiss the official capacity allegations for compensatory and punitive damages, it does not provide an additional reason to dismiss any claim for prospective relief. The Supreme Court in *Will* went on to clarify that "[o]f course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state." *Id.* at n. 10 (quoting *Kentucky v. Graham,* 473 U.S. 159, 167, n.14 (1985)).

3 There may be a stronger argument that the claims related to cruel and unusual punishment are not based on clearly established rights given uncertainty in the law about whether caloric deprivation related to religious observance is the same as caloric deprivation generally, the latter being a clear Eighth Amendment violation, *Farmer v. Brennan,* 511 U.S. 825, 832–33 (1994). *Compare Campbell v. Cornell Corr. of Rhode Island, Inc.,* 564 F.Supp.2d 99, 102–03 (D.R.I.2008)(holding that a claim that an inmate was denied food that was consistent with his religious belief was distinct from a claim of inadequate quantity of food or inadequate nutritional value and therefore does not state a claim under the Eighth Amendment) *with Hall v. Sutton,* 2012 WL 407244 (S.D.Ill. Feb. 8, 2012)(holding that a claim that a Muslim inmate was only provided with 1000 calories worth of food before sunrise and after sunset during Ramadan could be sufficient to satisfy the objective prong of the Eighth Amendment, drawing no distinction between deprivation of calories generally and those based on religious observance) *and with Florer v. Bales–Johnson,* 752 F.Supp.2d 1185, 1200 (W.D.Wash.2010) aff'd 473 Fed.Appx. 651 (9th Cir.2012)(Eighth amendment requires nutrition adequate to maintain health, Kosher menu need not meet USDA nutritional guidelines as those recommendations are not constitutional requirements on their own, drawing no distinction between nutritional deprivation for purposes of religious observance and for other reasons).

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Kim Anh Thi DOAN, Plaintiff-Petitioner,

v.

Suzanne BERGERON, et al,

Defendants-Respondents.

Civil Action No. 15-cv-11725-IT

|

Signed 09/23/2016

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MEMORANDUM & ORDER

TALWANI, United States District Judge

***1** Kim Anh Thi Doan was detained by Immigration and Customs Enforcement ("ICE") and held at the Bristol County House of Correction, under the stewardship of the Bristol County Sheriff's Office. Her First Amended Complaint [#77] alleges that the mental health care she received while detained was constitutionally inadequate, and that the defendants involuntarily medicated Doan and failed to protect her from involuntary medication and inadequate treatment.[1]

The defendants have all moved to dismiss the complaint. For the reasons set forth herein, Thomas M. Hodgson's and Judith Borges' Motion to Dismiss Plaintiff's First Amended Complaint [#79] is ALLOWED IN PART and DENIED IN PART, Bristol County's Motion to Dismiss or in the Alternative for Judgment on the Pleadings [#120] is ALLOWED, and Sean Gallagher's Motion to Dismiss Plaintiff's First Amended Complaint [#132] motion is ALLOWED IN PART and DENIED IN PART.

I. Facts as Alleged in the Amended Complaint

*a. Background*

Doan was born in Vietnam in 1971. First Am. Compl. ¶ 24. She came to the United States as a lawful permanent resident on September 5, 1995. Id. ¶ 25. In 1998, she was charged in Connecticut with murder. Id., Ex. A at 1. After a number of medical evaluations, Doan was found to " 'suffer[ ] from various mental disorders' and [to have] committed the offense while suffering from resultant 'extreme emotional distress.' " Id., Ex. A at 2. Connecticut downgraded the charge from murder to first degree manslaughter, and in 2001 she was found competent to enter a plea of *nolo contendere* to this charge. Id., Ex. A at 2. Doan was sentenced to seventeen years in prison. Id. ¶ 42; Ex. A at 2.

*b. ICE's Notice to Appear and Subsequent Detention of Doan*

On January 31, 2013, ICE served Doan with a Notice to Appear, which charged her with removability based on her conviction for an aggravated felony, crime of violence, and crime of moral turpitude for which the term of imprisonment was at least one year. Id., Ex. A at 2.

On January 8, 2014, when Doan completed her criminal sentence in Connecticut, she was transferred to ICE custody. Id. ¶ 44. Doan remained in ICE custody for approximately 22 months, first with the Bristol County House of Correction until October 20, 2015 and then with the Strafford County Department of Corrections in New Hampshire. Notice Transfer [#72].[2]

*c. The Arrangement for Detention and Medical Services for Immigration Detainees*

In September of 2007, ICE entered into an Intergovernmental Service Agreement with the Bristol County Sheriff's Office, whereby the Bristol County Sheriff's Office agreed to provide

detention and on-site medical services for immigration detainees held by ICE. See First Am. Compl. ¶ 132; Ex. F.

***2** On December 6, 2009, Bristol County, with signatories from both the Bristol County Sheriff's Office and the Bristol County Commissioners, entered into a contract with Correctional Psychiatric Services ("CPS") for CPS to provide medical services to inmates and detainees held by the Bristol County Sheriff's Office. Id. ¶¶ 15, 141; Ex. H. The agreement, in its preamble, stated that the Sheriff's office had "an obligation to provide necessary comprehensive medical services to ... detentioners ... of the County of Bristol's correctional institutions." Id., Ex. H. at 1.

The agreement authorized the Bristol County Sheriff's Office to conduct performance audits of CPS, monitor CPS employee licensure, and generally set "rules and regulations" governing CPS's conduct. Id., Ex. H. at 3, 6. The original contract was for a term expiring in 2012. Id., Ex. H. The contract authorized the Bristol County Sheriff's Office to extend the agreement for one-year terms, Id., and both parties agree that the contract has been extended each year.

*d. Doan's Medical Care*

Doan alleges that she still suffers from severe mental illness and disabling intellectual deficits, see, e.g., First Am. Compl. ¶¶ 164-170, and that while in ICE custody at the Bristol County House of Correction, she received constitutionally inadequate psychiatric care at the hands of CPS. Id. ¶ 207. Specifically, Doan alleges that CPS administered to Doan two psychiatric medications, Haldol and Cogentin, even though Doan was incapable of providing informed consent to receive psychiatric medications and no court has authorized the administration of medications to Doan involuntarily. Id. ¶¶ 171, 173-74, 177-78, 181. Doan further alleges that CPS failed to independently assess whether Haldol and Cogentin were appropriate for Doan's specific condition and failed to provide any other treatment to Doan, such as individual and group therapy. Id. ¶¶ 175, 188.

Hodgson, as Sheriff for Bristol County, was responsible for the operation of the Bristol County House of Correction. First Am. Compl. ¶¶ 11. Doan alleges that Hodgson was aware of Doan's severe mental illness and cognitive impairments. Id. ¶ 206. Further, Doan alleges that Hodgson acted with "deliberate indifference" to the conditions of Doan's confinement and "failed to take steps to protect her from the serious harm for which she [was] at risk." Id. ¶¶ 213, 214, 229, 230.

Borges, as the Director of Medical Services for the Bristol County Sheriff's Office, was responsible for the Bristol County House of Correction's medical and psychiatric care. Id. ¶ 14. She had the "ultimate decision-making authority with regard to [Doan's] medical treatment" while Doan was detained. Id. Doan alleges that Borges was aware of Doan's severe mental illness and cognitive impairments and that Borges acted with "deliberate indifference" to the conditions of Doan's confinement and "failed to take steps to protect her from the serious harm for which she [was] at risk." Id. ¶ 230. Doan also alleges that Borges affirmatively denied requests for additional care. Specifically, in January 2015, Borges responded to a request from an attorney at Prisoners' Legal Services for a psychiatric examination. Id. ¶¶ 122-24; Ex. D, E. Borges did not permit this psychiatric examination, explaining that a request for a psychiatric examination must be submitted to and approved by ICE. Id., Ex. E. In the response, Borges further stated that the "onsite mental health department" at the Bristol County House of Correction was "solely responsible for treatment, care, and all clinical decisions regarding those in our custody." Id. ¶ 125; Ex. E.

***3** Sean Gallagher is the Director of the Field Office for ICE's Boston Area. Doan alleges that Gallagher was "aware of the conditions of [Doan's] confinement, her lack of adequate medical care, and the administration of antipsychotic medication without her informed consent or a court order." First. Am. Compl. ¶ 189. Gallagher allegedly had the authority to reconsider the conditions of Doan's custody by releasing Doan to a psychiatric facility to ensure that she received adequate care, but he refused to do so despite being aware of Doan's inadequate treatment. Id. ¶¶ 82, 190.

## II. Discussion

*a. Motion to Dismiss Standard*

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient facts "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In resolving such a motion, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The court, however, need not accept the plaintiff's legal conclusions as

true. Id. "Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678.

*b. Bristol County*

Doan brings a claim under 42 U.S.C. § 1983 for failure to train and supervise, and inadequate screening against Bristol County. First Am. Compl. Count VI.[3] Bristol County moves to dismiss Count VI on various grounds. One is persuasive —that the obligations of the Bristol County Sheriff's Office and those of Bristol County related to the Sheriff's Office's functions were transferred to the Commonwealth of Massachusetts.

Under Chapter 61 of the Acts of 2009, the "offices of the ... Bristol ... county sheriff [was] transferred to the [C]ommonwealth" of Massachusetts, effective January 1, 2010. St. 2009 ch. 61, §§ 3, 26. The Act further determined that all "functions, duties and responsibilities of the office of a transferred sheriff... including, but not limited to, the operation and management of the county jail and house of correction ... are hereby transferred from the county to the Commonwealth." Id. § 4. The Act also provided that "all... contracts of the office of a transferred sheriff" and "all valid liabilities ... of the office of a transferred sheriff" "shall be obligations of the [C]ommonwealth." Id. §§ 6, 9. By the Act, Bristol County argues, at the time Doan was housed in the Bristol County House of Correction (2014-2015), Bristol County no longer had responsibility for the obligations and contracts of the Bristol County Sheriff's Office.

Doan argues that only the contracts with the Sheriff's Office were transferred, and that the contract enlisting the services of CPS at the Bristol County House of Correction was explicitly between CPS and *Bristol County.* This argument is unavailing. As the contract itself shows, the signatures of the Bristol County Commissioners were pro forma; the responsibilities of monitoring CPS lay with the Bristol County Sheriff's Office, see, e.g., First. Am. Compl. Ex. H at 1, 3, 6 [#77-8], as the Bristol County Sheriff's Office was responsible for administering the medical treatment provided at the Bristol County House of Correction. The monitoring of CPS was thus one such "responsibilit[y] of the office of" the Sheriff of Bristol County that was transferred to the state. St. 2009 ch. 61, § 4 (specifically noting that responsibility of the operation of the house of correction was transferred to the state).

***4** The failure to train and supervise Count against Bristol County must be dismissed.

*c. Borges and Hodgson*

Doan brings the following counts against Defendants Hodgson and Borges: a claim under 42 U.S.C § 1983 for failure to provide adequate medical care (Count II); a claim under 42 U.S.C. § 1983 for involuntary medication (Count III); a claim under 42 U.S.C. § 1983 for failure to protect (Count IV); and a claim under the Massachusetts Declaration of Rights (Count VII).

Borges and Hodges move to dismiss the counts against them on the ground that Doan failed to state a claim for deliberate indifference. This argument fails. Doan has adequately pled Hodgson's and Borges' deliberate indifference.[4]

Immigration detainees' constitutional claims status is akin to that of pretrial detainees. See, e.g., Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000). "Pretrial detainees are protected under the ... Due Process Clause rather than the Eight Amendment; however, the standard to be applied is the same as that used in Eight Amendment cases." Burrell v. Hampshire Ctv., 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979)). Under the Eight Amendment standard, a detainee must prove that defendants' withholding of "essential health care ... amounted to 'deliberate indifference to a serious medical need.' " DesRosiers v. Moran, 949 F.2d 15, 18 (1st Cir. 1991) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). Mere "substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment" is "insufficient to prove a constitutional violation." Ruiz-Rosa v. Rullan, 485 F.3d 150, 156 (1st Cir. 2007). Instead, deliberate indifference may be established "by decisions about medical care made recklessly with 'actual knowledge of impending harm, easily preventable.' " Id. (quoting Feeney v. Corr. Med. Servs., Inc., 464 F.3d 158, 162 (1st Cir. 2006)).

Doan has alleged such "actual knowledge" of harm to her sufficient to show deliberate indifference. Ruiz-Rosa, 548 F.3d at 156. She states that both Borges and Hodgson were aware that Doan was being involuntarily medicated and given inadequate medical care, that they could have ameliorated the

alleged constitutional violations, but that they failed to. See First Am. Compl. ¶¶ 11, 14, 122-124, 207, 213, 223-224, 230.

Borges argues that Doan has failed to plead a claim against her because Doan fails to allege that Borges directed, obstructed, or otherwise denied Doan medical care, and that the mere allegation that Borges was told about Doan's medical care is insufficient. Doan, however, alleges more. Doan asserts that Doan did not take action based on Doan's request for a psychiatric evaluation. See First Am. Compl. ¶ 124. Doan alleges further that Borges, who had the "ultimate decision-making authority with regard to [Doan's] medical treatment," see id. ¶ 14, was told about the inadequacies of Doan's treatment and refused to take any action to remedy the treatment. See Farmer v. Brennan, 511 U.S. 825, 837 (1994) (prisoner official can be found liable where the "official knows of and disregards an excessive risk to inmate health or safety"). Borges' apparent delegation of medical care duties to CPS is immaterial at this stage, as Doan alleges (and the contract between the Sheriff's Office and CPS shows) that Borges still had ultimate authority to influence Doan's medical treatment—for example, through monitoring of CPS. Borges' reliance on Newbrough v. Piedmont Regional Jail Authority, 822 F. Supp. 2d 558 (E.D. Va. 2011), is misplaced. In Newbrough, the court held that the plaintiff failed to plead deliberate indifference against a jail superintendent because the plaintiff did not sufficiently allege that the superintendent—an official with no medical training—knew that the plaintiff's medical condition was serious, when he was told only that the plaintiff was experiencing back pain and hypertension. Id. at 581. Here, Doan alleges that Borges was made aware in detail about the seriousness of Doan's medical condition and the inadequacy of Doan's treatment. See First Am. Compl. ¶ 123. Doan has sufficiently pled deliberate indifference against Borges.

***5** Hodgson argues that Doan has made only conclusory allegations as to Hodgson's involvement, and that there are no allegations that Hodgson obstructed, directed, or otherwise denied Doan's medical care. But, Doan does allege that Hodgson was made aware about Doan's serious medical condition, and that Hodgson did nothing to alleviate that even though Hodgson was ultimately responsible for all of the operations of the Bristol County House of Correction, where Doan was held. Id. ¶ 11, 230.

Hodgson's reliance on Sanchez v. Pereira-Castillo, 590 F.3d 31, 49-50 (1st Cir. 2009), is misplaced. In that case, the First Circuit affirmed the dismissal of a deliberate indifference claim against a prison superintendent and other high-level prison officials because the plaintiff brought forth only bald legal conclusions against those defendants. There, the plaintiff alleged only that those defendants were deliberately indifferent just because they had responsibility "for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff" and failed to do so. Id. at 49. Here, however, Doan alleges not just Hodgson's responsibility for assuring Doan's adequate medical care, but also that he *knew* about Doan's condition and the absence of adequate care and did nothing to remedy that.

Borges and Hodgson move in the alternative to dismiss damages claims against them in their official capacities on Eleventh Amendment immunity grounds. They argue that Doan cannot maintain such claims against them because they are now employees of the Commonwealth of Massachusetts, and are therefore immune from suit in their official capacities.

The Eleventh Amendment of the United States Constitution is recognized as a bar to suits in federal courts against a state, its departments, and its agencies, unless the state has consented to suit or Congress has overridden the state's immunity. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). A suit against a state official in his or her official capacity is "in fact a suit against a State." Pennhurst, 465 U.S. at 102. Suits against a state or state officials in their official capacities for damages are barred. See Kentucky v. Graham, 473 U.S. 159, 165-67 (1985).

As recounted above, Chapter 61 of the Acts of 2009 transferred the "office[ ] of the ... Bristol... county sheriff [ ] ... to the [C]ommonwealth" of Massachusetts and stated that all functions and responsibilities of the Sheriff's Office were transferred to the Commonwealth of Massachusetts. Id. §§ 3, 4. The Act further provided that "all employees of the office of a transferred sheriff [were] transferred to that transferred sheriff as employees of the [C]ommonwealth." Id. § 3. Because of such language, it "is well established that 'modern Massachusetts Sheriff's Departments [are] arms of the state entitled to sovereign immunity.' " Latimore v. Suffolk Cty. House of Corr., No. 14-13378-MBB, 2015 WL 7737327, at *4 (D. Mass. Dec. 1, 2015) (quoting Gallo v. Essex Cty. Sheriff's Dep't, No. 10-10260-DPW, 2011 WL 1155385, at *3 (D. Mass. Mar. 24, 2011)). Thus, "[d]espite its municipal title," the Bristol County Sheriff's Office "is controlled directly by the Commonwealth of Massachusetts and all employees ...

are employees of the Commonwealth." Id. (quoting Greene v. Cabral, No. 12-11685-DPW, 2015 WL 4270173, at *3 (D. Mass. July 13, 2015)).[5] Accordingly, the Bristol County Sheriff's Office is a state agency, and Hodgson and Borges are state officials, entitled to the sovereign immunity that the Commonwealth of Massachusetts enjoys.[6]

***6** Doan argues that, under Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & Caribbean Cardiovascular Center Corp., 322 F.3d 56, 68 (1st Cir. 2003), the Bristol County Sheriff's Office is not an "arm of the state" entitled to share in the Commonwealth's sovereign immunity. Fresenius describes three types of *separate entities* where courts have used the "arm of the state" analysis: political subdivisions (for example, cities or counties), entities established by two or more states by compact and approved by Congress, and special purpose public corporations established at the behest of the state. Id. at 61. Here, however, the Bristol County Sheriff's Office is not a "separate entity."

But, even if the Fresenius analysis applies, the Bristol County Sheriff's Office would still be an "arm of the state." The First Circuit's "arm of the state" analysis focuses as a threshold issue on "whether the state has indicated an intention—either explicitly by statute or implicitly by structure of the entity—that the entity share the state's sovereign immunity." Irizarry-Mora v. Univ. of P.R., 647 F.3d 9, 12 (1st Cir. 2011) (quoting Redondo Constr. Corp. v. P.R. Highway & Trans. Auth., 357 F.3d 124, 126 (1st Cir. 2004)). Here, through Chapter 61 of the Acts of 2009, the Commonwealth of Massachusetts has explicitly intended that the Bristol County Sheriff's Office Share in the Commonwealth's sovereign immunity.[7]

Accordingly, the claims against Hodgson and Borges in their official capacities must be dismissed, but the claims against them for damages in their individual capacities remain.[8]

*d. Gallagher*

Doan brings two counts against Defendant Gallagher in his individual capacity: Count V—a claim under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), for failure to provide adequate medical care, failure to protect, and involuntary medication; and Count VII—a claim under the Massachusetts Declaration of Rights.[9]

***7** Gallagher moves to dismiss Count V on two grounds; first, that he is protected by qualified immunity, and second, that Doan failed to state a Bivens claim against him. The allegations against Gallagher are scant but sufficient at this stage.

A qualified immunity analysis is two-fold: the court must first decide whether the facts, taken in light most favorable to the plaintiff, "make out a violation of a constitutional right," and then decide "whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." Pearson v. Callahan, 555 U.S. 223, 232 (2009). The second step of the analysis involves considering "both whether the contours of the constitutional right were sufficiently clear at the time of the alleged conduct and also whether, under the particular facts of the case, a reasonable officer would have understood that his behavior violated that clearly established right." Sanchez, 590 F.3d at 52-53.

As to the first part of the analysis, Doan may allege a violation of her constitutional rights by showing that Gallagher exhibited "deliberate indifference" to her "serious medical needs." Estelle, 429 U.S. at 104. Deliberate indifference "defines a narrow band of conduct in this setting." Feeney, 464 F.3d at 162. The medical care provided must have been "so inadequate as to shock the conscience." Id. (quoting Torraco v. Maloney, 923 F.2d 231, 235 (1st Cir. 1991)). Mere substandard treatment, "even to the point of malpractice," mere "disagreement on the appropriate course of treatment[,]" and inadvertent failure to provide medical care do not qualify as deliberate indifference. Id. (quoting Layne v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981) and Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980)).

Doan has made a sufficient allegation. She alleges that Gallagher knew that CPS defendants and the Bristol County Sheriff's Office defendants—to whom he had entrusted the care of detainees such as Doan—were violating Doan's right to be free from involuntary medication, exhibiting deliberate indifference to Doan's serious mental health needs, and were failing to protect Doan. First Am. Compl. ¶¶ 189-90. The complaint further alleges that, despite Gallagher's knowledge of these constitutional violations, he failed to reconsider Doan's custody arrangements even though he had the authority to do so. Id. ¶ 82. Taking these facts as true, Gallagher's "inaction" may amount "to a reckless or callous indifference" to Doan's constitutional rights. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989).

Gallagher argues that he, a non-medical professional, entrusted Doan's medical care by contract (through the Bristol County Sheriff's Office) to CPS, and that CPS—which employed medically trained doctors, nurses, and counselors—made a reasoned medical judgment, to administer Haldol and Cogentin without including therapy in that treatment. Gallagher's Mem. Supp. Mot. Dismiss Pl.'s First Am. Compl. [#133] (citing First Am. Compl. ¶¶ 141, 173-175, 177, 188). Accordingly, Gallagher argues, his trusting trained medical professionals to make reasonable medical decisions cannot amount to action that "shock[s] the conscience." Feeney, 464 F.3d at 162 (quoting Torraco, 923 F.2d at 235). He also avers that Doan is merely disagreeing over CPS's course of her treatment, which in itself cannot amount to a constitutional violation. See, e.g., Sires v. Berman, 834 F.2d 9, 12 (1st Cir. 1987) (where the "dispute concerns not the absence of help, but the choice of a certain course of treatment," a court "will not second guess the doctors.").

***8** Doan's allegations are more than a disagreement over a course of treatment. She has alleged that the CPS defendants—with Gallagher's knowledge—"sedated [Doan] with Haldol" even though she was unable to give informed consent to that treatment. First Am. Compl. ¶ 130. Gallagher's knowledge of and failure to remedy the administration of psychiatric medications without Doan's informed consent could amount to deliberate indifference.

Gallagher then argues that, even if Doan had made out a violation of her constitutional rights, the rights were not sufficiently clear that a reasonable officer in his position would have understood that his actions violated her rights. Specifically, he states that a reasonable officer in his position would have been entitled to rely on the medical judgment of CPS.

A constitutional right is "clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if 'a general constitutional rule already identified in the decisional law applies with obvious clarity' to the specific conduct." Jennings v. Jones, 499 F.3d 2, 16 (1st Cir. 2007) (alteration omitted) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997)).

When a plaintiff seeks to hold liable a defendant based on his supervisory role over others who allegedly violated the plaintiff's constitutional rights,

> the 'clearly established' prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. In other words, for a supervisor to be liable there must be a bifurcated 'clearly established' inquiry—one branch probing the underlying violation, and the other probing the supervisor's potential liability.
>
> Camilo-Robles v. Hoyos, 151 F.3d 1, 16 (1st Cir. 1998).

As to the first step of the "clearly established" inquiry, the violations of Gallagher's subordinates—CPS and the Bristol County Sheriff's Office defendants—were violations of clearly established constitutional rights.

Doan's right to be free from involuntary medication—implicated by the allegations that CPS defendants gave Doan Haldol even though she was incapable of giving informed consent and they did not have a court order to do so, First. Am. Compl. ¶ 178—was clearly established, as the Supreme Court has stated that prisoners "possess[ ] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." Washington v. Harper, 494 U.S. 210, 221 (1990). Doan's right to be free from harm—implicated by Gallagher's failure to protect Doan from the involuntary medication of Haldol—was also clearly established in Supreme Court case law. See Farmer v. Brennan, 511 U.S. 825, 847 (a constitutional violation of failure to prevent harm if defendant knows that inmate faces substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it).

As to the second step of the analysis, it was clearly established that a supervisor would be liable for the violations of his subordinates in this context, where Gallagher was alleged to have known about the constitutional violations. A supervisor can be liable for the actions of his subordinates if he or she "is on notice" to "ongoing violations" and "fails to take corrective action." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994); see also Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985) (acknowledging that officials responsible for overseeing provision of medical care in prison can be liable for subordinate's failure to provide adequate medical care). Here, Doan has alleged that Gallagher was aware of the ongoing constitutional violations that she was suffering, had the power to alleviate those violations by relocating Doan, but failed to take corrective action.

***9** Gallagher relies on cases from other circuits holding that non-medical jail or prison officials such as Gallagher are entitled to rely on the expertise of medical personnel. See Arnett v. Webster, 658 F.3d 742, 755 (7th Cir. 2011) (stating that "if a prisoner is under the care of medical experts, a non-medical prison official will generally be justified in believing that the prisoner is in capable hands"); Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (same). However, "non-medical officials can be chargeable with ... deliberate indifference where they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner." Arnett, 658 F.3d at 755. This is what Doan alleges; that Gallagher knew that CPS was involuntarily medicating Doan and failed to take any corrective action.

Accordingly, Gallagher is not entitled to qualified immunity at this stage of the litigation.

Gallagher also argues that Doan has failed to make a cognizable claim against him under Bivens. Specifically, he states that Doan is making out a vicarious liability argument, which is not permissible under Bivens. See Iqbal, 556 U.S. at 676; Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000) (noting that vicarious liability "is not a viable theory of Bivens liability"). Doan, however, is not making such a claim. Instead, her claim is one of supervisory liability. A supervisory claim is viable as a Bivens claim, but only if liability is premised on the supervisor's "own acts or omissions." Whitfield v. Melendez-Rivera, 431 F.3d 1, 14 (1st Cir. 2005). With such a claim, a plaintiff must show that the supervisor's "action or inaction was 'affirmatively linked' to the constitutional violation caused by the subordinate." Ruiz Rivera, 209 F.3d at 28-29 (quoting Aponte Matos v. Toledo Davila, 135 F.3d 182, 192 (1st Cir. 1998)). In other words, the supervisor's behavior must be able to be characterized as "supervisory encouragement, condonation, or acquiescence or gross negligence ... amounting to deliberate indifference." Whitfield, 431 F.3d at 14 (internal quotation marks omitted).

Here, as Doan alleges, Gallagher knew of the unconstitutional conditions to which Doan was subjected, and though he had power to relocate Doan from the institution that was responsible for these conditions, he failed to do so, allowing the unconstitutional conditions to continue. Such facts as stated plausibly make out claim that Gallagher was deliberately indifferent to the constitutional violations against Doan by CPS.

Accordingly, at this stage, Doan has pled enough so as to survive a motion to dismiss Count V against Gallagher in his individual capacity.

Gallagher also moves to dismiss Count VII—a claim under the Massachusetts Declaration of Rights—on the ground that a federal official cannot be held liable for violations of a state constitution. The sole remedy for damages against the United States for the negligent or wrongful act of a federal employee is a claim under the Federal Tort Claims Act, except for civil actions against federal employees for a violation of (i) the United States Constitution or (ii) a federal statute which authorizes suits against individual federal employees. See 28 U.S.C. § 2679(b) ("The remedy against the United States provided by [the FTCA]...is *exclusive* of any other civil action or proceeding...by reason of the same subject matter") (emphasis added). A claim under a state constitution such as the Massachusetts Declaration of Rights does not fall into either exception.[10]

***10** The parties cite no cases that discuss whether a federal official may be sued in his individual capacity under the Massachusetts Declaration of Rights. Courts have held that federal officials cannot be individually liable under other states' constitutions. See Shoman v. U.S. Customs & Border Prot., C.A. No. 07-994, 2008 WL 203384, at *5 (W.D. Pa. Jan. 24, 2008) ("[W]hile [plaintiff] may pursue a Bivens action against [government employees] in their individual capacities, he may not sue these Defendants in their individual capacities for alleged violations of the Pennsylvania Constitution"); Chin v. Wilhelm, 291 F. Supp. 2d 400, 405 (D. Md. 2003) ("It does not appear, however, that a plaintiff may sue a federal officer in his individual capacity for alleged violations of a state constitution."); Hightower v. United States, 205 F. Supp. 2d 146, 148 (S.D.N.Y. 2002) ("Although the complaint indicates that plaintiff's constitutional claims purport to be brought under ... the New York State Constitution, they are properly construed as Bivens claims for violations of the United States Constitution, because the defendants are all employees acting under federal law."). Accordingly, Count VII against Gallagher must be dismissed.

## III. Conclusion

For the reasons stated above, Bristol County's Motion to Dismiss or in the Alternative for Judgment on the Pleadings [#120] is ALLOWED. Thomas M. Hodgson's and Judith Borges' Motion to Dismiss Plaintiff's First Amended

Complaint [#79] is ALLOWED IN PART and DENIED IN PART. Any damages claims against Hodgson and Borges in their official capacities are dismissed, but claims against them in their individual capacities are not dismissed. Sean Gallagher's Motion to Dismiss Plaintiff's First Amended Complaint [#132] is ALLOWED IN PART and DENIED IN PART. Specifically, Count VII against Gallagher in both his individual and official capacities and Count V against Gallagher in his official capacity are dismissed, but Count V against Gallagher in his individual capacity is not dismissed.

IT IS SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 5346935

Footnotes

1 The First Amended Complaint also included a habeas corpus count alleging that Doan was being unlawfully detained. Doan is no longer in ICE custody and the court dismissed this count as moot. Order Mot. Dismiss Pl.'s Habeas Pet. [#198].

2 On December 4, 2015, pursuant to the court's Temporary Restraining Order and Preliminary Injunction, Doan was transferred to the custody of the Connecticut Department of Mental Health and Additional Services ("CDMHAS"). Mem. & TRO [#107] & Mem. & Prelim. Inj. Order [#143].

3 Doan voluntarily dismissed without prejudice Count X against Bristol County. Notice Dismissal Count X [#152].

4 Doan argues that the "deliberate indifference" standard is irrelevant for Count III, involuntary medication. See Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); Riggins v. Nevada, 504 U.S. 127, 133-137 (1992) (applying Harper to pretrial detainee context and discussing the "liberty interest in freedom from unwanted antipsychotic drugs"). Since the court is not dismissing the claims against Borges and Hodgson for failure to plead "deliberate indifference," the court does not reach this issue.

5 To be sure, the cited cases holding that Massachusetts Sheriff's Offices are state agencies arise in the context of counties that have been fully abolished. Bristol has not been abolished. Nevertheless, Chapter 61 of the Acts of 2009 transferring the Bristol County Sheriff's Office to the Commonwealth was no less explicit than acts abolishing counties in stating that the functions of the Sheriff's Office were given over to the state. Compare St. 2009 ch. 61 § 4 (All "functions, duties and responsibilities of the office of a transferred sheriff... including, but not limited to, the operation and management of the county jail and house of correction ... are hereby transferred form the county to the [C]ommonwealth") with Mass. Gen. Laws. ch. 34B (abolished county's "functions, duties and responsibilities ... including, but not limited to, the operation and management of the county jail and house of corrections ... [are] transferred ... to the [C]ommonwealth."). That Bristol County is not an abolished county does not change the analysis about whether the Commonwealth intended the Bristol County Sheriff's Office to be a state agency.

6 Because the Bristol County Sheriff's Office is a state agency and not an agency of Bristol County, that counties are not entitled to sovereign immunity, see Jinks v. Richland Cty., S.C., 538 U.S. 456, 466 (2003), is immaterial.

7 Doan argues that the language in Chapter 61 of the Acts of 2009 § 13(f) stating that an "existing right or remedy of any character shall not be lost by this act" requires the court to find that the Commonwealth could not have been expanding its sovereign immunity to cover the Bristol County Sheriff's Office. A waiver of immunity is given effect, however, "only where stated by the most express language or by such overwhelming implication from the text" as will "leave no room for any other reasonable construction." Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990). Here, the Act includes no express waiver of sovereign immunity and the language can reasonably be construed to apply to rights that could be claimed at the time of the transfer, such as a claim against the County for actions taken before duties were transferred to the Commonwealth on January 1, 2010.

8 Hodgson and Borges also move to dismiss on the ground that Doan's complaint failed to allege that a guardian or representative has been designated to bring a suit on Doan's behalf. See Fed. R. Civ. P. 17. The court, however, has appointed a guardian for Doan. Order [#12].

9 Any claims against Gallagher in his official capacity for injunctive relief are moot because Doan is no longer in his custody. See Ford v. Bender, 768 F.3d 15, 29 (1st Cir. 2014) (holding that plaintiff's release from custody mooted her claims for relief). Accordingly, to the extent that any claims are pled against Gallagher in his official capacity for injunctive relief, they are dismissed—albeit without prejudice to Doan's refiling those claims should she be returned to Gallagher's custody). Any claims against Gallagher for damages in his official capacity are dismissed based on the United States' sovereign immunity. See Kozera v. Spirito, 723 F.2d 1003, 1007 (1st Cir. 1983).

10 Moreover, a claim against Gallagher in his official capacity must be dismissed because there has been no showing that the United States waived sovereign immunity as to state constitutional claims. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. King, 395 U.S. 1, 4 (1969)) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' ").

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United States District Court, D. Massachusetts.

Timothy GREENE, Plaintiff,

v.

Andrea CABRAL, et al., Defendants.

CIVIL ACTION NO. 12–11685–DPW

|

Signed July 13, 2015

**Attorneys and Law Firms**

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Christopher G. Perillo, Suffolk County Sheriff's Department, Boston, MA, for Defendants.

*MEMORANDUM AND ORDER*

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Timothy Greene is a practicing Orthodox Jew who was incarcerated in the custody of the Suffolk County Sheriff's Department ("the Department") from May 2011 to October 2012 and from February 2013 to an unidentified date prior to the hearing in this matter. Greene contends that during these periods he was denied calorically adequate kosher food as well as access to religious services. The remaining defendants[1] are individuals who he claims were responsible for his care and custody during the periods of his incarceration. Greene seeks damages and prospective injunctive and declaratory relief. Defendants move to dismiss the complaint.

## I. BACKGROUND

Greene is a convert to Judaism and practices as an Orthodox Jew. Compl. ¶ 10. He alleges that his sincerely held religious beliefs require him to maintain a kosher diet, meaning a diet consistent with Jewish law. *Id.* ¶ 12. Greene informed the Department that he needed kosher meals, and he was placed on a list of inmates who receive kosher meals. *Id.* ¶ 15. The complaint does not allege when that request was made or when he was placed on the list. The Department does not provide a kosher breakfast option for inmates, *id.* ¶ 22, instead serving the same meal, prepared with non-kosher utensils, to all inmates, *id.* ¶ 21. The Department occasionally opened otherwise kosher meals with non-kosher utensils, exposing the food to contaminants, *id.* ¶ 25, and intermingled kosher and non-kosher food on the same trays in a way that violates the rules of a kosher diet. *Id.* ¶ 27.

The Department served meals that purported to be kosher twice a day during the period of Greene's incarceration. *Id.* ¶ 29. These two meals combined typically contained approximately six hundred or fewer calories. *Id.* ¶ 30. Greene saved wrappers from some of these meals, and he alleges that on one day he was served two meals totaling only five hundred calories for the entire day. *Id.* ¶ 31. On another day he was provided with two meals totaling only seven hundred and ten calories. *Id.* ¶ 32. He has provided copies of the labels from those two days as an exhibit to the complaint. When he complained about his lack of access to calorically adequate kosher food, he was told to eat the non-kosher food or to go hungry. *Id.* ¶ 34.

Greene also alleges that the Suffolk County House of Correction ("the HOC") severely limited his access to religious services. There are no regularly held services for Jewish people in custody at the HOC, *id.* ¶ 36, nor are there nondenominational services, *id.* ¶ 36. Greene was told that rabbis were not offered to inmates, *id.* ¶ 37. Non–Jewish inmates in the custody of the department, however, do have access to religious services. *Id.* ¶ 42.

Greene has alleged violations of federal and state law against numerous administrative defendants. These defendants are Andrea Cabral, the former Sheriff of Suffolk County, sued in her individual capacity; Steven Tompkins, the current Sheriff of Suffolk County, sued in his individual and official capacities; Gerard Horgan, the former Superintendent of the Suffolk County House of Correction, sued in his individual capacity; Yolanda Smith, the current Superintendent of the Suffolk County House of Correction, sued in her individual and official capacities; and Anne Nee, the Director of Social Services, sued in her individual and official capacities. Greene initially brought this action *pro se* but never served the defendants. On January 15, 2013, he began to be represented by counsel. Greene filed a first amended complaint on February 26, 2013, and properly served the defendants. At that time, Greene also dismissed the Suffolk County Sheriff's Department as a defendant. Defendants moved to dismiss and

  

Greene moved to further amend the complaint. He filed a Second Amended Complaint in December 2013.

***2** Greene alleges that he filed grievances on June 18, 21, and 24, 2012, as well as on April 19, 2013, about the food he was provided. *Id.* ¶¶ 56, 57, 58, 60, 62. After filing one of the grievances, he was told to contact Director Nee, which he did. She did not resolve his complaint. *Id.* ¶¶ 58, 59. On June 16, 2013, he filed a grievance concerning lack of access to non-denominational or Jewish religious services. Id. ¶ 63. The response he received suggested that Greene contact an outside rabbi or synagogue to set up a special visit, but Greene does not have a rabbi he could ask to see him. *Id.* ¶ 63, 64. He followed up with people recommended in the grievance denials, but received no remedy. *Id.* ¶ 65.

In the Second Amended Complaint, Greene presents a theory of supervisory liability against each of the defendants based on each defendant's role in implementing practices, programs, or policies that Greene claims caused the violations he alleges. For former Sheriff Cabral and current Sheriff Tompkins, Greene alleges that each is or was responsible for "overseeing the operation and conditions of the correctional institutions in Suffolk County" and is or was "responsible for promulgating and implementing practices and policies" and ensuring the enforcement of the law. *Id.* ¶¶ 86, 88. He claims that each knew or should have known that Jewish inmates lack access to kosher meals, religious services and religious materials. *Id.* ¶¶ 87, 88.

Former Superintendent Horgan and current Superintendent Smith are alleged to be or to have been "[r]esponsible for supervision and daily operations of the Suffolk County House of Correction" as well as for "promulgating and implementing practices and policies, providing proper training to correctional staff" and ensuring enforcement of the law. *Id.* ¶¶ 89, 90. Greene alleges that both knew or should have known that Jewish inmates lacked access to kosher meals, religious services, and materials, in violation of the law, *id.,* adding that former Superintendent Horgan knew that this was "by Department policy and practice," *id.* ¶ 89, and that Superintendent Smith knew this "[d]ue to her involvement with training, and promulgation of the practices and procedures of the Suffolk County House of Correction," *id.* ¶ 90.

Director Nee is alleged to be responsible for "supervision and daily operation of religious services within the Suffolk County House of Correction." *Id.* ¶ 91. She knew or should have known that Jewish inmates lacked access to calorically adequate kosher meals and religious services in violation of the law "[d]ue to her involvement and implementation of the religious practices and procedures of the Suffolk County House of Correction, and her direct contact with Mr. Greene during the grievance process." *Id.*

Greene further states that the defendants "have each been involved in or are aware of the creation, training, oversight and implementation of the Department's religious programs" including religious services, materials, and diets, and the fact that the diet provided pursuant to these programs "only sometimes complies with the rules of Kashrut and Jewish inmates' sincerely held beliefs." *Id.* ¶ 102. He claims that the defendants "were aware of the risk to Mr. Greene's health and safety and deliberately disregarded that risk" by failing to provide him with sufficient caloric intake. *Id.* ¶ 104. At another point in the complaint, Greene claims that defendants "were each involved in training, and each oversaw or implemented policies, or were aware of the implementation of policies, that provided inmates requiring a Kosher diet[ ] only two meals a day. Further, Defendants have trained and overseen both the unit officers, chaplains, and kitchen lieutenant, and created the policies that these subordinates enforce, when they have resorted to coercive tactics to force Mr. Greene to go without food or to abandon his sincerely held religious beliefs." *Id.* ¶ 112.

***3** Greene asserts claims in six counts: for (1) violations of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq, against defendants Tompkins, Smith and Nee in their official capacities; for violations of 42 U.S.C. § 1983 against all defendants based on infringements of (2) the right to freedom of religion in the First and Fourteenth Amendments to the United States Constitution, (3) the right to equal protection in the Fourteenth Amendment to the United states Constitution, and (4) the right to be free from cruel and unusual punishment under the Fourteenth Amendment to the United States Constitution; and for violations of state civil rights against all defendants under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, based on infringements of (5) the right to religious freedom and (6) the right to be free from cruel and unusual punishment. Defendants now move to dismiss the Second Amended Complaint for failure to state a claim upon which relief may be granted, asserting variously sovereign immunity, qualified immunity, and inadequate pleading.

## II. LEGAL STANDARD

In resolving a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, I treat as true all non-conclusory factual allegations in the complaint, while identifying and disregarding statements in the complaint that offer "legal conclusions" or "threadbare recitals of the elements of a cause of action." *Ocasio–Hernandez v. Fortuno–Burset,* 640 F.3d 1, 12 (1st Cir.2011)(quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). I do not consider the likelihood of plaintiff's success on the merits. *Id.* If I am able to draw a reasonable inference that defendants are liable for the alleged misconduct, then the claim is plausible and I must deny the motion to dismiss. *Id.*

## III. SOVEREIGN IMMUNITY

Sovereign immunity under the Eleventh Amendment of the United States Constitution protects states from suit in federal court unless the state waives immunity. "The Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72 (1996). Sovereign immunity from suits authorized by federal law does not extend to municipalities, it extends "only to States and arms of the State." *Northern Ins. Co. v. Chatham County,* 547 U.S. 189, 193 (2006). Despite its municipal title, the Suffolk County Sheriff's Department, which oversees the correctional facilities in Suffolk County, is controlled directly by the Commonwealth of Massachusetts and all employees of the Department are employees of the Commonwealth. Mass. St.2009, c. 61, §§ 3, 13 (effective January 1, 2010) (transferring Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth, and Suffolk Sheriffs and their employees to the Commonwealth, "... all employees of the office of a transferred sheriff ... are hereby transferred to that transferred sheriff as employees of the commonwealth."). Massachusetts Sheriff's Departments are therefore considered arms of the state and are entitled to sovereign immunity. *See Jeffrey Gallo, et al. v. Essex County Sheriff's Dept.,* 2011 WL 1155385 at *3 (D.Mass. March 24, 2011).

Greene has asserted federal and state law claims against Tomkins, Smith, and Nee in their official capacities as employees of the state. He does not contest that sovereign immunity bars official capacity claims against state officials for punitive and compensatory damages. Such claims, including those under RLUIPA, must be dismissed. *See Sossamon v. Texas,* 131 S.Ct. 1651, 1659 (2011) (noting that states do not waive sovereign immunity by accepting funding under RLUIPA).

Greene also, however, advances claims for prospective relief, including declaratory relief and an injunction. These types of claims survive the assertion of sovereign immunity pursuant to *Ex Parte Young,* 209 U.S. 123 (1908). Where a plaintiff seeks "prospective injunctive relief" rather than a retroactive award, the Eleventh Amendment does not present an obstacle. *See Id., Edelman v. Jordan,* 415 U.S. 651, 677 (1974).

***4** The force of the Eleventh Amendment is even more potent when faced with state-law claims against state officials. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984). Thus, the prospective relief exceptions outlined in *Young* and *Edelman* do not apply to claims against state officials based on state law, such as those presented in Counts 5 and 6, to the extent they raise official capacity claims. *Id.* (The doctrinal basis for *Young* and *Edelman* disappears where plaintiffs allege violations of state law because a "federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law.")

## IV. PROSPECTIVE RELIEF UNDER FEDERAL LAW

I next consider whether injunctive or declaratory relief, the type of prospective relief permitted against states under *Young,* 209 U.S. 123, may be appropriate in this case. Greene requests declaratory and injunctive relief in his Second Amended Complaint, *c.f. Mitchell v. Massachusetts Dept. of Correction,* 190 F.Supp.2d 204 (D.Mass.2002)(finding that *Young* does not apply because the plaintiff did not request prospective relief). While Greene properly has requested this relief, I must consider whether Greene's request for these forms of relief is moot. The parties have not included any argument about mootness in their memoranda.

Greene states in his complaint that he has been in the custody of the Suffolk County Sheriff's Department from May 2011 to October 2012 and from February 2013 to the present. Greene does not admit in his complaint that the violations of which he complains have ceased. *C.f. Seaver v. Manduco,*

178 F.Supp.2d 30, 36 (D.Mass.2002)(finding that injunctive relief would be inappropriate given plaintiff's admission that the violation was in the past and was not ongoing). Instead, he alleges that the violations spanned his earlier and current periods of incarceration, that the violations happen "routinely," *id.* ¶ 1, and that the violations continue, *id.* ¶ 95, 101, 107, 112.

At oral argument on the motion to dismiss, I inquired whether Greene remained in custody, and his counsel informed me that he has been released. While Greene's release is not documented in the complaint, the parties agree that he is not currently in the custody of the Department. Based on undisputed representations from counsel, representations that could "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" if there were any purported disagreement about the underlying facts, I take judicial notice of the fact that Greene is not currently in the custody of the Department. *See* Fed.R.Evid. 201.

Because Greene is no longer in the custody of the Department, the request for prospective relief is moot under governing First Circuit law. *See Ford v. Bender,* 768 F.3d 15, 29 (1st Cir.2014)("A prisoner's challenge to prison conditions or policies is generally rendered moot by his transfer or release.") Greene mentions in passing in his memorandum his entitlement to prospective relief because he is "subject to future incarceration by the Defendants," but he does not expand on this argument in the context of mootness. This seems to be a reference to the general exception to the mootness doctrine for conduct that is capable of repetition yet evading review. *Id.* at 30. A future risk of reincarceration is typically not viewed as demonstrating a reasonable probability of recurrence. *Id.* ("we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury")(quoting *Honig v. Doe,* 484 U.S. 305, 320 (1988)). Greene has presented no other information from which I can conclude that there is a reasonable probability of recurrence within the legal framework laid out by the First Circuit.[2]

## V. QUALIFIED IMMUNITY

***5** Qualified immunity is an affirmative defense for which the defendants bear the burden of proof. *DiMarco–Zappa v. Cabanillas,* 238 F.3d 25, 35 (1st Cir.2001). It limits government officials' exposure to liability for damages in their individual capacities, but does not shield them from prospective relief. *Ryder v. United States,* 515 U.S. 177, 185 (1995). The question whether qualified immunity is appropriate should be "resolved at the earliest possible stage in litigation," because it is designed to give government officials protection from the entire litigation process, not merely from liability, if immunity is appropriate. *Maldonado v. Fontanes,* 568 F.3d 263, 268 (1st Cir.2009). At the motion to dismiss stage, any assessment of qualified immunity requires me to evaluate the sufficiency of the defense on the face of the plaintiff's pleadings. *Id.*

Qualified immunity requires a two-part inquiry: whether the allegations make out a constitutional violation, and whether the violated right was clearly established at the time of the offending conduct. *Ford,* 768 F.3d at 23. The "clearly established" inquiry, in turn, considers the clarity of the law at the time of the alleged violation and whether a reasonable defendant would understand that his or her conduct violated the plaintiff's constitutional rights. *Id.*

Greene contends that, as a preliminary matter, the defendants have not established that their actions were in the scope of a "discretionary function." Defendants cite two cases from Georgia federal district courts that note that the defendants had not shown that they were engaged in a discretionary function, and consequently could not invoke qualified immunity. *See Street v. City of Bloomingdale,* 2007 WL 1752469, at *4 (S.D. Ga. June 15, 2007); *Reed v. Okereke,* 2006 WL 2444068, at *19 (N.D.Ga. Aug. 22, 2006). The argument from the negative pregnant is that if that showing were made, qualified immunity may have been available. While the Eleventh Circuit regularly analyzes in detail whether an official is acting within the official's discretionary authority as a prerequisite to a qualified immunity analysis, *see, e.g., Lumley v. City of Dade City, Fla.,* 327 F.3d 1186 (11th Cir.2003) ("To receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred."), courts elsewhere, and in the First Circuit in particular, typically spend little time on this element. The First Circuit has held that "[g]enerally, prison officials and officers are included in the category of those whose positions qualify them for such immunity." *Brown v. Ponte,* 842 F.2d 16, 18 (1st Cir.1988)(*per curiam* )(citing *Procunier v.Navarette,* 434 U.S. 555, 561(1978)).

Each of the defendants here was alleged by the plaintiff to be involved in making high-level determinations about the

practices and policies of the Suffolk Department of Correction or Suffolk House of Correction and their misconduct is alleged to be the creation or implementation of an improper practice or policy. Greene's efforts to undercut the claim of qualified immunity based on a non-discretionary function fails.

Defendants do not challenge in any particularized manner the conclusion that their conduct as alleged amounts to a constitutional violation. Even their conclusory language, "Defendants contend that the action they took in response to Plaintiff's numerous complaints, grievances and requests did not violate the Plaintiff's constitutional rights," seemingly misses the point. Greene's primary theory is that the Defendants are liable for creating and implementing the policies that led to his being deprived of calorically adequate kosher food and Jewish religious services, not that they themselves were directly involved in the violations or the remedial process. While Greene has an additional factual hook for his claims against Nee based on his filing a grievance to her directly, the focus of this action is not the response to Greene's complaints but rather the policies that he claims led to his being provided calorically inadequate kosher food and being denied access to religious services.

***6** It is clearly established that a prisoner must have "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *Cruz v. Beto,* 405 U.S. 319, 322 (1972). Multiple federal and state laws provide protection for inmates' free exercise of their religion. For example, RLUIPA prohibits prisons that receive federal funds from imposing a "substantial burden" and an inmate's religious exercise in the absence of the prison's demonstration that the imposition of such a burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1(a). Massachusetts law similarly requires that "an inmate of any prison or other place of confinement shall not be denied the free exercise of his religious belief and the liberty of worshipping God according to the dictates of his conscience in a place where he is confined." Mass. Gen. Laws c. 127 § 88.

In addition to identifying general rights that touch on freedom of religious practice for inmates, I must consider whether the specific rights Greene alleges were violated were clearly established and "determine whether an alleged right was established with sufficient particularity that a reasonable official could anticipate that his actions would violate that right." *Borucki v. Ryan,* 827 F.2d 836, 838 (1st Cir.1987). Concerning the claim that the kosher food provided to Greene was calorically inadequate, the First Circuit noted in 2013, that "it has been held that 'a prisoner's religious dietary practice [will be found to be] substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition.' " *LeBaron v. Spencer,* 527 Fed.Appx. 25, 30 (1st Cir.2013)(quoting *Nelson v. Miller,* 570 F.3d 868, 879 (7th Cir.2009).[3]

Rights of inmates are evaluated while considering the burden on the prison and giving "due deference to the experience and expertise of prison and jail administrators." *Spratt v. Rhode Island Dept. of Corrections,* 482 F.3d 33, 39 (1st Cir.2007)(quoting *Cutter v. Wilkinson,* 544 U.S. 709, 717 (2005)). On the face of the pleadings as they stand now, the defendants have not argued or made a showing that the rights that Greene claims were violated were not clearly established. Of course as the case moves forward, additional facts about the scope and nature of the alleged violations could lead to a different conclusion.

***7** Defendants next argue that even if the rights were clearly established, the action they took in response to Greene's complaints and requests did not violate Greene's constitutional rights. They do not provide any support for this argument, however, other than their claims that Greene does not allege that they (other than defendant Nee) were aware of the violations, and that any response was reasonable. While Nee is the only defendant that Greene claims was directly aware of at least some of the violations, this action is not predicated on a theory that the defendants were actually aware that Greene in particular was being deprived of kosher food, sufficient caloric intake, and religious materials and services. Instead, Greene alleges that each of the defendants was aware of and implemented policies and practices that they knew or should have known led to Jewish inmates being denied calorically adequate kosher food and access to religious services. The policies and practices are what Greene claims to be the defendants' violations here, not their roles in his own deprivation.

As for defendant Nee, Greene has alleged that she did not in any way remedy the violation of which he complained. Greene therefore adequately alleges knowledge, individualized for Nee and based on policies and practices for all of the defendants, that could be the foundation for a finding of a constitutional violation, and the complaint does

not provide any grounds for the defendants' arguments that their responses to the existence of a violative policy or to Greene's individual situation were reasonable.

Aside from challenging the lack of knowledge, defendants also attempt to argue that at the motion to dismiss stage I can assume that the only alleged violations occurred during the six-day period in June 2012 plus on the one occasion in April 2013 that Greene filed formal grievances and that I must assume that on the other dates the food and access to religious services was not a problem. They further argue that I must assume that the responses to the grievances were satisfactory because Greene did not file follow-up grievances. These arguments neglect the essential fact that at the motion to dismiss stage, I must "accept the well-pleaded facts in the operative complaint as true, construing them in the light most favorable to ... the nonmoving party." *Lydon v. Local 103, Intern. Broth. Of Elec. Workers,* 770 F.3d 48, 50 (1st Cir.2014). I accept Greene's allegations as true and view them in the light most favorable to him. Consequently, contrary to the defendants' arguments here, I must accept that "[i]n the two meals a day that [the Department] does provide, the Department regularly fails to comply with Kosher requirements," Compl. ¶ 24, and other allegations by Greene that the violations were regular and ongoing. The lack of additional grievances does not indicate that the grievances were resolved.

At this stage, taking the plaintiff's well-pled allegations as true, I find that constitutional violations have been alleged adequately and the violations alleged are clearly established.

## VI. RLUIPA AND INDIVIDUAL CAPACITY CLAIMS

The Department contends that RLUIPA applies only to defendants acting in their official capacities, and because sovereign immunity bars such claims, as discussed above, there is no viable RLUIPA claim against defendants. The First Circuit has not addressed the issue whether RLUIPA can reach actions against individuals acting in their individual, rather than official, capacities. The Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits, however, have taken the view that FLUIPA does not allow for personal capacity claims for monetary damages. *See, e.g., Sharp v. Johnson,* 669 F.3d 144, 154 (3d Cir.2012) (collecting cases from other circuits sharing this view).

Greene does not contest this argument, and in fact his RLUIPA claims in the complaint are directed only against defendants Tompkins, Smith and Nee in their official capacities. He seeks only prospective relief under this count. Compl. ¶ 84. Therefore, I note that while the RLUIPA claims would not be dismissed on this ground because claims for official capacity prospective relief survive the sovereign immunity challenge, the RLUIPA claims must be dismissed because the prospective relief requested in this case is moot, *see* Section IV *supra.*

## VII. INDIVIDUAL CAPACITY CLAIMS

***8** The individual capacity claims that Greene asserts against Cabral, Tompkins, Horgan, Smith, and Nee require that each of the defendants be held liable on the basis of that defendant's own actions. *See Leavitt v. Correctional Medical Services, Ind.,* 645 F.3d 484, 502 (1st Cir.2011). A defendant may not be held individually liable on a *respondeat superior* or other supervisory theory alone; rather, the plaintiff must show that the defendant had a direct connection to the misconduct. "In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal,* 556 U.S. at 677.

For a supervisor to be held liable for a supervisee's conduct, liability must be premised on the supervisor's "own acts or omissions." *Whitfield v. Melendez–Rivera,* 431 F.3d 1, 14 (1st Cir.2005). This does not require direct involvement in misconduct, but it does require an "affirmative link" between the supervisor's actions and the alleged violation. "Absent direct participation, a supervisor may only be held liable where (1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was '*affirmatively link[ed]* ' to the behavior in the sense that it could be characterized as 'supervisory encouragement, condonation or acquiescence' or 'gross negligence ... amounting to deliberate indifference.' " *Id.* (quoting *Hegarty v. Somerset County,* 53 F.3d 1367, 1379–80 (1st Cir.1995)).

Liability may be appropriate under limited circumstances where the training and supervision of employees led to a civil rights deprivation even if a supervisor was not directly involved in or even aware of a specific violation. Liability

is appropriate in such circumstances only where a supervisor shows "deliberate indifference" to the "possibility that deficient performance of the task eventually may contribute to a civil rights deprivation." *Camilo–Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir.1999). Deliberate indifference requires that "a prison official subjectively must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Burrell v. Hampshire County,* 307 F.3d 1, 7 (1st Cir.2002). Supervisory liability under a theory of deliberate indifference can be found "only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights." *Maldonado,* 568 F.3d at 275. Prison officials "cannot be deliberately indifferent if they responded reasonably to the risk, even if the harm ultimately was not avoided." *Burrell,* 307 F.3d at 7.

Defendants argue that Greene has failed adequately to allege facts in his complaint to make out a claim of deliberate indifference, noting what they claim are insufficient allegations concerning notice and active involvement by each of the defendants. This argument, however, appears to rest on the defendants' misunderstanding of Greene's allegations. Greene does not allege that the defendants themselves were directly involved in the claimed violations; instead, he roots his claims against the defendants in allegations that each was involved in creating and implementing the policies and practices at the Department and the HOC and that each knew or should have known that the policies and practices concerning food and religious services for Jewish inmates were unlawful. In these circumstances, Greene need not allege that the defendants knew of or participated in the particular deprivations of which Greene complains, because a supervisor, "removed from the perpetration of the rights-violating behavior [ ] may be liable under section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another." *Camilo–Robles,* 151 F.3d at 7.

***9** The fact that each of the defendants had supervisory roles and were involved in policies and programming would be insufficient to support supervisory liability in this case if the alleged violations were committed by other officers in violation of the policies and programs because there is no allegation that the defendants (other than perhaps Nee) were aware of any deviation from policy or practice. Here, however, Greene alleges that the misconduct occurred in compliance with the practice, policy, and programs implemented by the defendants. This language is clearest in relation to Superintendent Horgan, because Greene claims that Horgan was aware that the deprivations of calorically adequate kosher food and access to religious programming occurred "by Department policy and practice." Compl. ¶ 89. For all defendants, however, Greene makes the general allegation it is the "Defendants' implementation and oversight of policies that deprived Mr. Greene ... of sufficient caloric intake." *Id.* ¶ 103. *See also id.* ¶ 112 (noting that the subordinates are enforcing policies when they force Greene to go without food or abandon his sincerely held religious beliefs). At other times, however, Greene appears to claim in more general terms that the defendants' involvement in the highest levels of policy and program decisions for the Department and the HOC meant that they knew or should have known of other violations occurring under their watch. These latter allegations are not enough on their own, but other allegations connecting the violations to the policies and programs created and enforced by the defendants are sufficient to make out a claim for supervisory liability.

A supervisor is liable only when he or she demonstrates deliberate indifference. Greene alleges facts that could make out deliberate indifference. Deliberate indifference requires knowledge of facts from which an official could draw an inference that a substantial risk of serious harm exists. *Ramirez–Lluveras v. Rivera–Merced,* 759 F.3d 10, 20 (1st Cir.2014). In the complaint, Greene claims significant weight loss and other medical and psychological consequences, which could fairly make out a grave risk of harm from caloric deprivation, and he claims that defendants knew of the policies and practices because they actually created and enforced them.

The question remains, however, whether alleging unnamed policies and practices that violated Greene's rights is too conclusory an allegation to survive a motion to dismiss. Allegations that are conclusory are not entitled to an assumption of truth. *Iqbal,* 556 U.S. at 681. In *Sanchez v. Pereira–Castillo,* 590 F.3d 31 (1st Cir.2009), the First Circuit rejected claims against administrative defendants in a case where officers pressured an inmate to receive unnecessary exploratory surgery to search for contraband. The court upheld claims against officers directly involved, but dismissed a § 1983 supervisory liability claim pursuant to *Iqbal* against higher-up administrative defendants, finding that the complaint merely "[p]arrot[ed] our standard for supervisory liability in the context of Section 1983 ... [alleging] that the administrative defendants were 'responsible for ensuring that the correctional officers under

their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff' and that 'they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff's federally protected rights.' " *Id.* at 49. The Court held that language to be conclusory and that it should not be given credence. *Id.* The sole claim in *Sanchez* that was more specific was that one of the officers who was directly involved and was particularly pushy toward medical staff was following directives and regulations designed and implemented by the administrative defendants. *Id.* The only regulations described in the complaint were a strip search and x-ray regulation, and the court held that the claim that the surgery resulted from those policies was implausible. *Id.* at 49–50.

Here, Greene does not specify the policies, programs, and practices that the defendants implemented and oversaw. He does, however, claim not only that the policies and programs permitted the violations to occur but that the violations occurred through compliance with those policies and programs. The First Circuit rejected the allegations in *Sanchez* based on the implausible fit between the named policies and the harm that resulted, not based on the fact that a supervisor is not properly held accountable under § 1983 where an employee commits a violation acting pursuant to a directive or regulation created and implemented by supervisors. Here, given the absence of a specifically identified policy or program that led to the violations, I do not have the information necessary to measure the fit between the policy or program alleged and the violations.

***10** At this very early stage in the case, I conclude that it would be improvident for me to dismiss the complaint based on the fact that Greene has not specified the policy. The general theory of supervisory liability based on unlawful policies and practices created and enforced by supervisory defendants is a valid one that states a claim for relief. Unlike in *Sanchez,* there is no reason apparent on the face of the complaint to discount the connection alleged by Greene between the policies and the alleged violations of his rights.

Nonetheless, Greene's failure to name the specific policies and practices that underlay his claims make the allegations border precariously on the conclusory. I therefore conclude that the proper course of action in this case is to move this case as efficiently as possible to summary judgment. A schedule for doing so will be outlined below.

## VIII. MASSACHUSETTS CIVIL RIGHTS ACT

The allegations against the defendants under the Massachusetts Civil Rights Act, Mass. Gen. Laws c. 12 § 11H & I, in their official capacities are barred by sovereign immunity, as discussed above, *see* Section III *supra,* and are excluded by the statute itself since the Commonwealth is not a "person" within the meaning of the MCRA. *See Kelley v. LaForce,* 288 F.3d 1, 11 n.9 (1st Cir.2002). The claims for prospective relief are subject to dismissal as moot. *See* Section IV *supra.*

## IX. CONCLUSION

For the reasons set forth more fully above, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED in part and DENIED in part, in that:

1. All claims for prospective relief are dismissed as moot;
2. Official capacity claims for damages under federal law in Counts I, II, III, and IV, are hereby dismissed; and
3. Official capacity claims for damages under state law in Counts V and VI are hereby dismissed.

Defendants are ordered to file a motion for summary judgment by September 11, 2015. Plaintiff's response may include an affidavit or declaration detailing any discovery necessary to respond to the motion for summary judgment, *see* Fed.R.Civ.P. 56(d), but should in any event respond to defendants' motion for summary judgment on the merits.

### All Citations

Not Reported in Fed. Supp., 2015 WL 4270173

Footnotes

1 This case was initially captioned *Greene v. Suffolk County Sheriff Department,* but the Department was terminated as a party on February 27, 2013.

2 The defendants also argue that Greene is barred from suing the defendants in their official capacities because § 1983 claims lie only against "persons" and "neither a State nor its officials acting in their official capacities are 'persons' under §

1983." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989). While this argument provides an additional reason to dismiss the official capacity allegations for compensatory and punitive damages, it does not provide an additional reason to dismiss any claim for prospective relief. The Supreme Court in *Will* went on to clarify that "[o]f course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state." *Id.* at n. 10 (quoting *Kentucky v. Graham,* 473 U.S. 159, 167, n.14 (1985)).

3 There may be a stronger argument that the claims related to cruel and unusual punishment are not based on clearly established rights given uncertainty in the law about whether caloric deprivation related to religious observance is the same as caloric deprivation generally, the latter being a clear Eighth Amendment violation, *Farmer v. Brennan,* 511 U.S. 825, 832–33 (1994). *Compare Campbell v. Cornell Corr. of Rhode Island, Inc.,* 564 F.Supp.2d 99, 102–03 (D.R.I.2008)(holding that a claim that an inmate was denied food that was consistent with his religious belief was distinct from a claim of inadequate quantity of food or inadequate nutritional value and therefore does not state a claim under the Eighth Amendment) *with Hall v. Sutton,* 2012 WL 407244 (S.D.Ill. Feb. 8, 2012)(holding that a claim that a Muslim inmate was only provided with 1000 calories worth of food before sunrise and after sunset during Ramadan could be sufficient to satisfy the objective prong of the Eighth Amendment, drawing no distinction between deprivation of calories generally and those based on religious observance) *and with Florer v. Bales–Johnson,* 752 F.Supp.2d 1185, 1200 (W.D.Wash.2010) aff'd 473 Fed.Appx. 651 (9th Cir.2012)(Eighth amendment requires nutrition adequate to maintain health, Kosher menu need not meet USDA nutritional guidelines as those recommendations are not constitutional requirements on their own, drawing no distinction between nutritional deprivation for purposes of religious observance and for other reasons).

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27 Mass.L.Rptr. 357
Only the Westlaw citation is currently available.



Superior Court of Massachusetts,
Suffolk County.

William B. LaPAGE, Plaintiff
v.
Kathleen M. DENNEHY, et al., Defendants.

No. SUCV2006-03090E.
|
Sept. 9, 2010.

***MEMORANDUM AND ORDER ON THE DEFENDANTS' MOTION TO DISMISS***

D. LLOYD MacDONALD, Justice.

***1** Before the Court is the defendants' motion to dismiss. The plaintiff is an inmate in the Department of Correction serving a life sentence for second degree murder. The central allegations of the complaint are that the defendants in their official and individual capacities unlawfully and unconstitutionally deprived the plaintiff of certain items of his personal property, namely, an electric guitar, related equipment and several books. In the complaint the cumulative value of the items is alleged to have been $1,714.71. The complaint recites the plaintiff's having pursued and exhausted his administrative (grievance) remedies, and the defendants acknowledge that the plaintiff complied with the presentment requirements of the Massachusetts Tort Claims Act, G.L. c. 258, § 4 (the "Tort Claims Act" or the "Act"). The defendants are the Commonwealth, the (former) Commissioner of the Department of Correction, the Superintendent of MCI Shirley and the Property Officer at MCI Shirley.

The defendants' motion is ***ALLOWED*** in part and ***DENIED*** in part as to the both the state and federal claims. The Court's reasons are as follows:

*State Law Claims*

1. *The individual defendants' negligence-based claims.* As noted, the plaintiff made proper presentment to the Commonwealth pursuant to the Tort Claims Act. The Tort Claims Act waives sovereign immunity "for injury or loss of property." It subjects "public employers" to liability "in the same manner and to the same extent as a private individual under like circumstances." G.L. c. 258, § 2. However, the Act further provides, "no ... public employee shall be liable for any injury or loss of property ... caused by his negligent or wrongful act or omission while acting within the scope of his office or employment...." According to an objective reading of the complaint, the individual defendants were all acting within the scope of their office or employment. Therefore, they are immune from suit for negligence, and so much of the complaint as alleges negligence by the individual defendants is dismissed.

2. *Intentional tort claims against the individual defendants.* However, the Act does not bar claims against state employees in their individual capacities for intentional torts. *Spring v. Geriatric Authority of Holyoke,* 394 Mass. 274, 286 n. 9, 475 N.E.2d 727 (1985). In the defendants' memorandum accompanying their motion, they acknowledge "a generous reading of the complaint could lead to an inference that [the plaintiff] alleges an intentional tort." Accordingly, the motion is denied as to the intentional tort claims against the individual defendants.

3. *Negligence-based claims against the Commonwealth.* The claims against the Commonwealth as the individual defendants' "public employer" are dismissed. That is because the general waiver of sovereign immunity accomplished by the Tort Claims Act is subject to a carve-out of liability for claims arising from law enforcement officers' actions with regard to the "detention of any goods or merchandise." G.L. c. 258, § 10(d). As a result, the Commonwealth's sovereign immunity remains in place as to such property-based claims. "General Laws c. 258, § 10(d), operates as a broad grant of immunity from claims originating from the 'lawful detention of any goods or merchandise by any law enforcement officer .' " *Vining v. Commonwealth,* 63 Mass.App.Ct. 690, 695, 828 N.E.2d 576 (2005). This immunity provision is to be construed

"expansively." *Id.* at 694, 828 N.E.2d 576. As the *Vining* court found with respect to complaint before it, "[t]he plaintiff's suit [here] is such a claim." *Id.*[1]

***2** *4. Intentional tort claims against the Commonwealth.* The Commonwealth is also immune from intentional tort liability resting on a respondeat superior theory. Under the Tort Claims Act liability extends only to ordinary and gross negligence, *McNamara v. Honeyman,* 406 Mass. 43, 46, 546 N.E.2d 139 (1989), or to wanton and reckless conduct, *Molinaro v. Northbridge,* 419 Mass. 278, 279, 643 N.E.2d 1043 (1995). Intentional conduct is outside the Act. G.L. c. 258, § 10: "The provisions of sections one to eight, inclusive, shall not apply to: ... (c) any claim arising out of an intentional tort...."

5. State Civil Rights Claims. The Commonwealth's Civil Rights Act, G.L. c. 12, §§ 11H and 11I, requires that the actionable interference with the subject civil rights be by "threats, intimidation or coercion." To prevail, "the plaintiff must prove that the defendant[ ] used 'threats, intimidation or coercion' to interfere with, or attempt to interfere with, rights secured by the Constitution or laws of the United States or the Commonwealth of Massachusetts." *Brum v. Dartmouth,* 428 Mass. 684, 707-708, 704 N.E.2d 1147 (1999). "A 'threat' is 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm.' *Planned Parenthood League of Mass., Inc. v. Blake,* 417 Mass. 467, 474, 631 N.E.2d 985, cert. denied, 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 122 (1994).... 'Intimidation' involves putting one 'in fear for the purpose of compelling or deterring conduct.' *Id.* 'Coercion' is the application to another of force 'to constrain him to do against his will something he would not otherwise have done.' *Id.,* quoting *Deas v. Dempsey,* 403 Mass. 468, 471, 530 N.E.2d 1239 (1988)." *Kennie v. Natural Resource Dep't of Dennis,* 451 Mass. 754, 763, 889 N.E.2d 936 (2008), as quoted in *Mancuso v. Mass. Interstate Athletic Assoc., Inc.* 453 Mass. 116, 131, 900 N.E.2d 518 (2009). The complaint does not allege this kind of conduct. Accordingly, to the extent that the claims are based on the state civil rights statute, they are dismissed.[2]

Federal Civil Rights Claims

*1. Federally protected interest.* The SJC has repeatedly noted a federally protected constitutional interest in correctional inmates' property. Prison inmates 'may not be deprived of life, liberty, or property without due process of law.' *Wolf v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)....We assume without deciding that, in the Commonwealth, prisoners have a statutorily protected property interest in the funds in their [personal property] entitling them to due process protection. See G.L. c. 127, § 3 ('[The department] shall keep a record of all money or other property found in possession of prisoners ... and shall be responsible for the safekeeping and delivery [of property when the prisoners are discharged]'). *Ciampi v. Comm'r of Correction,* 452 Mass. 162, 170, 892 N.E.2d 270 (2008) (brackets in original). See also *O'Malley v. Sheriff of Worcester County,* 415 Mass. 132, 135, 612 N.E.2d 641 (1993). The statutory vehicle for the enforcement of the federal rights is 42 U.S.C. § 1983.[3]

***3** *2. Claims against the Commonwealth and the individual defendants in their official capacity.* However, the Eleventh Amendment bars federal claims for damages against the Commonwealth and its employees in their official capacities. *McNamara v. Honeyman,* 406 Mass. at 52, 546 N.E.2d 139. Further, "neither a State nor a State official acting in his official capacity is a person under 42 U.S.C. § 1983." *Id.,* citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). See also *Laubinger v. Department of Revenue,* 41 Mass.App.Ct. 598, 601-602, 672 N.E.2d 554 (1996). Accordingly, the plaintiff's claims for damages against the Commonwealth and the individual defendants in their official capacities are dismissed.

*3. Claims against the individual defendants in their personal capacities/Qualified immunity.* The individual defendants in their individual capacities enjoy qualified immunity for their conduct such that only violations of "clearly established" rights are actionable, *O'Malley,* 414 Mass. at 142, 605 N.E.2d 849. "The defendant[s] must have acted 'either outside the scope of [their] respective office[s], or if within the scope, [they] acted in an arbitrary manner, grossly abusing the lawful powers of [their] office.' " *Id.,* quoting *Scheuer v. Rhodes,* 416 U.S. 232, 235, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). See also *Ahmad v. Dept. of*

*Correction,* 446 Mass. 479, 484, 845 N.E.2d 289 (2006). However, at this stage of the litigation with only the allegations of the complaint before the Court, all reasonable inferences are to be drawn in the plaintiff's favor. *Eyal v. Helen Broadcasting Corp.,* 411 Mass. 426, 429, 583 N.E.2d 228 (1991). When read together and with the benefit of such inferences, the complaint is sufficient to "plausibly suggest [ ] an entitlement to relief." *Iannacchino v. Ford Motor Company,* 451 Mass. 623, 636, 888 N.E.2d 879 (2008). Accordingly, the plaintiff's federal claims for damages against the individual defendants in their individual capacities survive.

***ORDER***

The defendants motion to dismiss is ***ALLOWED*** except with respect to:

(a) the state law-based intentional tort claims against the individual defendants in their individual capacities,

(b) the federal 42 USC § 1983-based claims for equitable relief against the Commonwealth and the individual defendants, and

(c) the federal 42 USC § 1983-based claims against the individual defendants in their individual capacities.

**All Citations**

Not Reported in N.E.2d, 27 Mass.L.Rptr. 357, 2010 WL 3593192

Footnotes

1 The statutory obligation of officials of a "correctional institution" with respect to the "safe keeping and delivery" of inmates' property as provided in G.L. 127, § 3 does not independently create a right of action. That is because the immunity provision of G.L. c. 258, § 10(d) supercedes it. *Vining,* 63 Mass.App.Ct. at 695-696, 828 N.E.2d 576.

2 The *Mancuso* Court stressed the narrow relief under the G.L. c. 12, §§ 11H and 11I: "Although 'entitled to liberal construction of its terms,', the act 'was not intended to create, nor may it be construed to establish, a 'vast constitutional tort.' It is for this reason that '[t]he Legislature "explicitly limited the [act's] remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion.' " *Mancuso,* 453 Mass. at 131-132, 900 N.E.2d 518 (internal citations omitted).

3 The actionable federal interest here arises because of the scope of immunity of the defendants under Massachusetts law, as described above. If there were a sufficient state-based remedy available, no federal claim under § 1983 would lie. See *Parrott v. Taylor,* 451 U.S. 527, 543-544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (no federal § 1983 claim for state employees' negligent acts causing a deprivation of property where state postdeprivation remedy exists) and *Hudson v. Palmer,* 468 U.S. 517, 536, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (same rule for intentional acts by state employees).

13 Mass.L.Rptr. 138
Superior Court of Massachusetts.

Charles WELSH,

v.

DEPARTMENT OF CORRECTION et al.

No. CA004998F.
|
April 9, 2001.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

KOTTMYER.

***1** Plaintiff, Charles Welsh, and the intervenors[1] are inmates at Souza Baranowski Correctional Center ("SBCC") subject to G.L.c. 22E, § 3, which requires persons convicted of certain crimes to submit samples of their deoxyribonucleic acid ("DNA"). They seek, *inter alia,* a declaration that 103 C.M.R. 405.18 and the DNA Assessment Procedures promulgated by the defendant Department of Correction ("DOC"), relating to the determination of indigence and the assessment of costs of collecting and processing DNA samples, are invalid.

Section 4(b) of G.L.c. 22E provides that "the cost of preparing, collecting and processing a DNA sample shall be assessed against the person required to submit a DNA sample, unless such person is indigent as defined in Section 27A of Chapter 261." Plaintiff and the intervenors allege that they are indigent as defined in Section 27A, but that DOC, relying upon 103 C.M.R. § 405.18(2) and its DNA Assessment Procedures, froze their personal accounts and confiscated funds ($110) to pay DNA costs. They seek an order enjoining DOC from continuing to enforce 103 C.M.R. § 405.18(2) and its DNA Assessment Procedures.

Because the issue as to the validity of § 405.18(2) and the DNA Assessment Procedures had been previously litigated by DOC[2] and involves principally a question of law, the Court ordered the trial on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. Trial was held on March 2 and 9, 2001, and the parties submitted supplemental memoranda on March 16, 2001.

After trial, I find, for the reasons stated below, that 103 C.M.R. § 405.18 is ultra vires and void to the extent that it 1) authorizes DOC's Director of Administrative Services to define indigence for the purpose of assessing costs of collecting and processing DNA samples; and 2) authorizes the Commissioner to impound and seize funds from inmates' accounts without their consent for the purpose of paying such costs.[3]

A. The DNA Database Act

In 1997, the Legislature enacted the DNA Database Act, St.1997, c. 106, § 7, which added Chapter 22E ("the Act"). Section 3 of Chapter 22E requires persons convicted of listed offenses to submit a DNA sample to the Department of the State Police. Section 4(b) provides that persons required to submit DNA samples shall pay the costs of collecting, preparing and processing those samples, unless the person submitting the sample is indigent as defined in Section 27A of Chapter 261. In Sections 4(a), 6 and 8 respectively, the Act authorizes the director of the crime laboratory within the Department of State Police to establish 1) regulations or procedures for the collection of DNA samples; 2) regulations governing the collection, receipt, identification, storage and disposal of DNA samples; and 3) procedural rules governing the testing and analysis of DNA samples.[4] The Act does not authorize the Commissioner of the Department of Correction ("the Commissioner") to promulgate regulations.

***2** Costs of collecting and processing DNA samples are to be determined by the Secretary of Administration and Finance and costs shall be paid to the Department of the State Police. G.L.c. 22E, § 4(b). The Secretary of Administration and Finance has set the fee at $110. 801 C.M.R. § 402.520(4).

B. The DOC Regulation and DNA Collection Procedures

DOC thereafter enacted 103 C.M.R. § 405.18. Subpart (2), entitled "Other Authorized Assessments," provides:

> An inmate who is the subject of any authorized assessment, including but not limited to, the cost of preparing, collecting, and processing of DNA samples and other legislatively authorized assessments, may consent to having funds debited from his savings and personal accounts to satisfy such assessments.

Where an inmate is not "indigent" and refuses to consent to the voluntary debiting of his savings and personal accounts, the Superintendent

> may order the debiting of the inmate's savings and personal accounts for up to 1/2 of the money earned by the inmate while incarcerated and any unearned funds [or, if the inmate is serving a life sentence or is a Sexually Dangerous Person all money may be debited]. *Id.* 2(d).

Where the amount debited from an inmate's accounts is insufficient to satisfy the assessment

> the Superintendent may order the impoundment of the inmate's accounts for the remaining amount. During the period of impoundment no account funds may be expended by the inmate. *Id.* 2(e).

In subsection 2(c), the regulation directs DOC's Director of Administrative Services to establish standards for determining indigence for purposes of 103 C.M.R. § 405(18). Pursuant to that section, DOC's Director of Administrative Services promulgated "DNA Assessment Procedures." The DNA Assessment Procedures state:

> The institutional Treasurer shall denote indigent inmates which is defined pursuant to 103 C.M.R. 405.18 as one who has had less that [sic] ten dollars in his/her account for the preceding sixty days prior to the date of collection ... "Account" shall be defined hereinafter as both savings and personal accounts as well as any other accrued funds unless otherwise stated.

C. The Determination of Indigence

The DOC regulation and DNA Assessment Procedures are in conflict with the plain language of Chapter 22E which provides that the definition of indigence in Section 27A of Chapter 261 governs the determination of indigence for purposes of assessing costs under Section 4(b). The statute does not authorize the Commissioner to define indigence. The definition of indigence adopted by DOC's Director of Administrative Services excludes from the category of indigent persons inmates who are covered by the most restrictive interpretation of § 27A.

Section 27A defines the word "indigent" as follows:

> (a) a person who receives public assistance ..., or
>
> (b) a person whose income, after taxes, is one hundred twenty-five percent or less of the current poverty threshold annually established by the Community Services Administration ... or (c) a person who is unable to pay the fees and costs of the proceeding in which he is involved, or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing, but an inmate shall not be adjudged indigent pursuant to section 27C [relating to the costs of court proceedings] unless the inmate has complied with the procedures set forth in Section [29][5] and the court finds that the inmate is incapable of making payments under the plan set forth in said section [29].

***3** Clauses (a) and (b) do not apply to inmates. See, *e.g., Schmitt v. Department of Correction,* Suffolk Sup.Ct.Civ. Action No. 99-4305 & 4298 (King, J.) (Nov. 29, 1999); *Moore v. Maloney,* Suffolk Sup.Ct.Civ. Action No. 98-0019 (Lauriat, J.) (July 20, 1998); *Fruchtman v. Maloney,* Suffolk Sup.Ct. Civ. Action No. 97-6097 (Hinkle, J.) (8 Mass.L.Rptr. 288) (March 20, 1998). Section 29 applies to inmates seeking waiver of filing fees and costs in certain cases filed in court. When it adopted the definition of indigent in Section 27A for purposes of the Act, the Legislature presumably contemplated that the proviso relating to inmates in Section 27A would apply to the determination of indigence for purposes of assessing DNA costs given the obvious fact that many, if not the majority, of those required to provide samples will be incarcerated at the time the sample is taken. Under Section 29, inmates who have less than a $50 average balance in their accounts over a six-month period preceding the determination and no other resources are indigent.[6] Under the DOC definition, an inmate does not qualify as indigent unless the balance in his account was less than ten dollars for the preceding sixty days.

The Department argues that the intervenors are not indigent under subpart (c) because all necessities of life are provided by the DOC at the Commonwealth's expense. DOC's position that the necessities of life are provided to inmates is not supported by the record. The record establishes that upon arrival, a new inmate receives three complete sets of underwear, three scrub suits and footwear. Inmates also receive a jacket and knit cap during cold weather months. The footwear issued by the DOC (canvas slip-ons) is not suitable for exercise or for use outside in cold or inclement weather.[7] Inmates receive one roll of toilet paper per week. Inmates receive no other clothes and no supplies to maintain basic standards of personal hygiene unless they are indigent under the DOC standard.

Under DOC procedures,[8] inmates who qualify as indigent under the DOC standard may submit request forms to obtain replacement or additional clothes and limited supplies for maintenance of personal hygiene. The DOC standard excludes from the definition of indigent any inmate who has had more than $10 in his accounts for the previous sixty (60) days.[9] (Russo Aff. ¶ 3.) A unit manager reviews the request for clothes or supplies and does not approve it if the inmate does not qualify as indigent under the DOC standard.

If a request for clothing is approved, the inmate may receive up to six sets of underwear, six pairs of socks, three pairs of scrubs, and two pairs of the canvas footwear in a six-month period. Thermal underwear is issued only to outside workers. If a request for personal hygiene supplies is approved, the inmate may receive two bars of soap per month, two disposable razors per month, two tubes of toothpaste per month and one toothbrush per quarter. Indigent inmates may mail three personal letters per week free of charge. No inmate receives deodorant, shampoo, shaving cream, tissues, aspirin, nonprescription cold remedies or writing materials. All of these items are, of course, available for purchase in the canteen. The record thus establishes that inmates who do not qualify as indigent under the DOC standard receive some, but not all, necessary clothing free of charge and do not receive any of the supplies which are necessary to maintain a basic standard of personal hygiene. None of the intervenors qualified as indigent under the DOC standard.[10]

***4** Based on the evidence introduced at trial, I find that, at the time their DNA samples were taken, intervenors White, Britto, Perry and Federici were indigent as defined in Section 27A and therefore exempt from paying DNA costs.[11] I find that Thomas, Barrows, Hill, Pina and Allen were able to pay a portion of the DNA fee without depriving themselves of the necessities of life at the time their DNA samples were taken.

D. The Commissioner's Authority to Deduct Funds from Inmate Accounts

A survey of the statutes relating to inmate accounts establishes that where the Legislature has authorized prison officials to make deductions from inmate accounts, it has done so by statute and has specified the type of deduction and the source of funds from which authorized deductions may be taken. Equally significant, the Legislature has given the Commissioner limited authority to regulate in this area.

1. *Statutes Authorizing Deductions from Inmate Earnings and/or Accounts*[12]

Chapter 127, § 3 provides that superintendents of all Massachusetts prisons "shall keep a record of all money or other property found in possession of prisoners committed to such institutions, and shall be responsible to the commonwealth for the safe keeping and delivery of said property to said prisoners" on their discharge. Section 3 requires the superintendents "upon receipt of an outstanding victim and witness assessment, [to] transmit to the court any part or all of the monies *earned* or *received* by any inmate and held by the correctional facility." (Emphasis added.) Section 48A provides for the compensation of prisoners who perform work while incarcerated. The Commissioner is authorized to "establish a graduated scale of compensation" to be paid to the inmates and to establish, amend or annul "rules and regulations for carrying out the purposes of this Section." Compensation may not be paid directly to an inmate, but the superintendent "may expend one half of the money so earned by any inmate on behalf of the inmate *for articles for the use of the inmate* " (emphasis added).[13] Section 48A continues:

> The superintendent shall also expend any part or all of such money of any inmate to satisfy the victim witness assessment ordered by a court pursuant to G.L.c. 258B, § 8.[14] The remainder of the moneys so earned, after deducting amounts expended on behalf of the inmate as aforesaid, shall be accumulated to the credit of the inmate and shall be deposited in an interest bearing account by the superintendent as trustee in a bank approved by the state treasurer and paid to the inmate, with the accrued interest, upon his release from such institution in such instalments and at such times as may be described in such rules and regulations.
>
> Said superintendent may also expend on behalf of any inmate such further sums from the money the inmate has earned upon the inmate's written request and in circumstances of compelling need, including, but not limited to, expenses related to family illness or death, legal defense, provision of essential articles of personal use or any such circumstances of compelling need as determined by the superintendent.

***5** Section 86F relating to work release programs in houses of correction contains similar detailed provisions relating to deductions which may be taken by the sheriffs from inmates' earnings and requires that the balance "shall

be credited to the account of the inmate and shall be paid to him upon his final release." Section 86F provides in pertinent part:

> The sheriff shall deduct from the earnings [of an inmate] delivered to him the following:
>
> First, an amount necessary to satisfy the victim witness assessment ordered by a court pursuant to section eight of chapter two hundred and fifty-eight B; second, an amount determined by the sheriff for substantial reimbursement to the county for providing food, lodging and clothing for such inmate; third, the actual and necessary food, travel and other expenses of such inmate when released for employment under the program; fourth, the amount ordered by any court for support of such inmate's spouse or children; fifth, the amount arrived at with public welfare departments; sixth, sums voluntarily agreed to for family allotments and for personal necessities while confined.

Finally, G.L.c. 124, § 1(r) and (s), enacted in 2000, authorize DOC to deduct from an inmates' account fees for haircuts and medical care received by the inmate as provided in G.L.c. 127, § 48A, *i.e.,* from monies earned by an inmate.[15]

2. *Statutes Expressly Authorizing the Commissioner to Issue Regulations Relating to Deductions from Inmate Earnings/Accounts*

Section 48 of Chapter 127 requires the commissioner to establish and maintain education, training and employment programs for inmates. It authorizes the commissioner to make and promulgate rules and regulations governing programs established under Section 48 which "shall include provisions for hours, conditions of employment, wage rates ... and deductions from said wages pursuant to the provisions of Section eighty-six F." Section 86F, quoted above, lists six specific deductions which sheriffs are authorized to make from inmate earnings.

In 1996, the Legislature enacted G.L. 127, Section 16A which expressly grants the Commissioner authority to include in regulations promulgated pursuant to Section 48 (relating to authorized deductions from earnings) provision for reimbursement of certain medical expenses: "The commissioner *may include* in the rules and regulations promulgated pursuant to the provisions of Section forty-eight provisions for the reimbursement of medical expenses by persons incarcerated in department of correction pre-release facilities." (Emphasis added.)

DISCUSSION

Regulations, like statutes, are entitled to a presumption of validity. *Grocery Mfrs. of America, Inc. v. Department of Pub. Health,* 379 Mass. 70, 75 (1979). But deference does not mean abdication. *Smith v. Commissioner of Transitional Assistance,* 431 Mass. 638, 646 (2000). An administrative agency has only the powers and duties expressly conferred on it by statute and such as are reasonably necessary to carry out its mission. *Morey v. Martha's Vineyard Comm'n,* 409 Mass. 813, 818 (1991). "An agency's powers are shaped by its organic statute taken as a whole." *Greater Boston Real Estate Board v. Board of Registration of Real Estate Brokers & Salesmen,* 405 Mass. 360, 363 (1989) (citing *Commonwealth v. Cerveny,* 373 Mass. 345, 354 (1977)). An administrative board or officer has no authority to promulgate rules and regulations which conflict with relevant statutes or exceed the authority conferred by statute. *Morey, supra,* 409 Mass. at 818; *Telles v. Commissioner of Ins.,* 410 Mass. 560, 564-65 (1991). Where the Legislature has fully regulated a subject matter by statute, an agency cannot further regulate the topic by adopting a regulation which is contrary to the statute. See *Massachusetts Hospital Ass'n., Inc. v. Department of Medical Security,* 412 Mass. 340, 347 (1992).[16] "[I]n assessing whether a regulation runs counter to statute, the court interprets the words used in the statute with regard both to their literal meaning and the purpose and history of the statute within which they appear. *Smith, supra,* 431 Mass. at 649.

***6** Section 1(q) contains a general grant of authority to the Commissioner which authorizes him to

> make and promulgate necessary rules and regulations incident to the exercise of his powers and the performance of his duties including but not limited to rules and regulations regarding nutrition, sanitation, safety, discipline, recreation, religious services, communication and visiting privileges, classification, education, training, employment, care, and custody for all persons committed to correctional facilities.

For the following reasons, I find that the general grant of authority does not encompass authority for the Commissioner to promulgate regulations authorizing him to define indigence for purposes of assessing DNA costs or to deduct DNA assessment fees from inmate earnings or accounts.

First, Chapter 22E confers no such authority. Compare G.L.c. 258B, § 8.[17] Chapter 22E authorizes the director of the crime lab within the Department of the State Police to promulgate regulations. Although the Legislature expressly recognized that many persons required to provide samples would be incarcerated at the time the sample was taken and correctional officers would play a role in the collection of DNA from inmates, see § 4(a), the Act does not authorize the Commissioner to promulgate regulations concerning DNA collection or costs, to define indigence for purposes of assessing costs of collecting and processing DNA samples, or to impound and seize funds from inmate earnings and accounts to pay such costs.

Second, Chapter 22E, § 4(b) provides that the definition of indigent in G.L.c. 261, § 27A governs the determination of indigence for purposes of assessing DNA costs. The DOC standard of indigence is inconsistent with the statute.

Third, the Legislature has expressly regulated by statute the specific deductions which prison officials are authorized to make from inmate funds and identified the source of the funds from which deductions may be taken. Authorized deductions are specified in Sections 3, 48, 48A and 86F and G.L.c. 124, § 1(r) and (s). None of these statutes contains language suggesting that the description or list of authorized deductions is nonexclusive. Section 3 of chapter 127 authorizes deduction of the victim witness assessment from monies earned or received by the inmate as provided in G.L.c. 258B, § 8. Sections 48A and 86F authorize the Commissioner to make specified deductions from monies earned by the inmates. In Section 48A, the Commissioner is authorized to expend money earned by the inmate "for articles for the use of the inmate." DNA assessment fees are not "articles for the use of the inmate." The six specific deductions which Section 86F authorizes sheriffs to make from earnings do not include DNA assessment fees. Subsections (r) and (s) added to Section 1 of Chapter 124 in 2000, immediately after the general grant of authority to regulate in subsection (q), authorize DOC to deduct from an inmates' account fees for haircuts and medical care received by the inmate as provided in G.L.c. 127, § 48A, *i.e.,* from monies earned by an inmate.

***7** Fourth, the Commissioner's power to promulgate regulations relating to deductions from inmate accounts is the subject of specific grants of authority. Section 48 confers the power to issue regulations regarding inmate training and employment programs and wages therefrom, but limits such regulations to "deductions pursuant to the provisions of Section eighty-six F." In my view, Section 48 confers no authority on the Commissioner to expand by regulation the deductions from earnings authorized by Section 86F.[18] It provides no authority for the Commissioner to promulgate regulations authorizing deductions from funds received by inmates, *i.e.,* moneys not earned by inmates.

G.L.c. 127, § 16A, enacted in 1996, expressly grants the Commissioner authority to include in regulations promulgated pursuant to Section 48A (relating to authorized deductions from earnings) provision for reimbursement of certain medical expenses. If the general grant of authority in Section 1(q) of chapter 124 encompassed authority to expand on statutorily authorized deductions by regulation, this express grant of authority would be superfluous.[19]

Fifth, the existence of such implied authority is inconsistent with the statutory scheme, designed to ensure that inmate property and earnings are safeguarded, see § 3, and with the express language of Sections 3 and 48A requiring that the balance in an inmate's accounts, after the statutorily authorized deductions are taken, be paid to the inmate upon discharge. See also § 86F.

I further find that injunctive relief is warranted for the following reasons: (1) DOC is continuing to enforce the regulation and procedures notwithstanding that at least two judges of the Superior Court have ruled that the indigence provisions are in conflict with the express language of the statute; (2) the evidence presented at trial established that enforcement of the regulation is irreparably harming indigent inmates because the Commissioner is freezing their accounts and seizing their funds without authority, see, e.g. affidavit of Demond Perry[20] and testimony of Cedric White;[21] and (3) enforcement of the regulation has led to the filing of hundreds of civil cases and motions in criminal cases challenging the impoundment of accounts and seizure of funds to pay the DNA costs imposing a substantial burden on the Superior Court. See *Smith, supra,* 431 Mass. at 651-52 (propriety of granting injunctive relief against agency).

CONCLUSION

In view of the absence of any provision in the DNA Database Act granting such authority and the existence of a comprehensive statutory scheme, which encompasses an

itemization of permissible deductions from inmate earnings and accounts and express limitations on the Commissioner's authority to regulate in this area, authority to promulgate 103 C.M.R. § 405.18 and the DNA Assessment Procedures cannot be implied. The regulation and procedures are ultra vires.

ORDER FOR JUDGMENT

***8** For the reasons stated above, it is hereby *ORDERED:*

A. Judgment shall enter declaring that to the extent that it purports to authorize the Commissioner to define indigence for purposes of assessment of DNA costs and to deduct DNA costs from inmate accounts without consent, 103 C.M.R. § 405.18 is ultra vires and void.

B. Judgment shall enter declaring that Department of Correction's DNA Assessment Procedures are ultra vires and void.

C. The Department of Correction is enjoined from deducting DNA costs from wages earned by inmates or from any inmate account without consent and from freezing inmates' accounts for any reason associated with the assessment of costs of collecting and processing DNA samples in the absence of a court order[22] or legislation expressly authorizing the seizure of the funds in question.[23] Unless stayed by order of the Appeals Court, the injunction shall take effect on April 6, 2001.

D. The Department of Correction is ordered to reimburse each of the intervenors $110.[24]

**All Citations**

Not Reported in N.E.2d, 13 Mass.L.Rptr. 138, 2001 WL 717094

Footnotes

1 Cedric White, Stephen Pina, Edmund Federici, Jeffrey Britto, Demond Perry, Mark Thomas, Michael Barrows, William J. Allen and Gerald Hill.

2 At least two judges of this Court have concluded that DOC's reliance on 405.18(2) and its DNA Assessment Procedures in determining indigence for purposes of assessing DNA costs violates G .L.c. 22E, § 4(b). See *Commonwealth v. Sargent,* Memorandum of Decision and Order on Defendant's Motion to Waive DNA Assessment Fees, Middlesex Sup.Ct.Crim. No. 91-3015 (Nov. 28, 2000) (Grabau, J.) ("The definition of indigence to be employed for purposes of waiving the cost of preparing, collecting and processing a DNA sample is found in G.L.c. 261, § 27A ... [T]he legislature failed to authorize the DOC to create 'DNA Assessment Procedures' or define 'indigent' in G.L.c. 22E, § 4"); *Winters v. Maloney,* Middlesex Sup.Ct. No. 00-5098, 5361, Order on Applications for Preliminary Injunctions (December 15, 2000) (Neel, J.) ("Where the Commonwealth has failed to establish any basis upon which it may ignore the clear mandate of the statute regarding determination of indigence, the answer must be that an inmate who is indigent as defined by Section 27A may not be forced to contribute to '[t]he cost of preparing, collecting and processing a DNA sample' ").

3 The parties have not briefed and the court has not considered the validity of other deductions from inmate accounts authorized by the regulation.

4 In 1998, the director promulgated such regulations. See 515 C.M.R. §§ 1.01-1.06 (1998) (concerning the collection, submission, receipt, identification, storage and disposal of DNA samples); and 515 C.M.R. § 2.01-2.16 (1998) (concerning the testing, analysis, quality assurance, computerized storage, retrieval and dissemination of the DNA database).

5 The statute refers to § 27H, which does not exist. Section 29, which concerns indigence of inmates, was added by the same amendments that added the reference to 27H to § 27A.

6 At the time of the first payment, the inmate must have a $100 average balance.

7 Sneakers, thermal underwear and socks may be purchased in the canteen. These items are needed to go outside in the winter months. If family members send an inmate sufficient funds to purchase either a pair of sneakers or thermal underwear and socks, the inmate loses his status as indigent for sixty days.

8 The relevant procedures are attached to the Russo affidavit.

9 The Superintendent may designate an inmate as indigent if the inmate has less than in his account at the time of the request "or other circumstances [sic] as he deems appropriate." There is no evidence in the record as to the frequency with which superintendents approve exceptions from DOC's indigence standard.

  

10 Although the procedures state that an inmate whose account is frozen pursuant to the DNA Assessment Procedures will receive indigent clothes and supplies, intervenor White testified that he submitted several requests for personal hygiene supplies and several requests for clothes while his account was frozen and received no response.

11 After this suit was filed, DOC reimbursed the plaintiff Welsh the $110 taken from his account.

12 DOC cites the following statutes as authority for the promulgation of 103 C.M.R. § 405.18: G.L.c. 22E, § 4, G.L.c. 124, § 1(q), and G.L.c. 127, §§ 3, 48, 48A, 49, 96 and 162. Apart from G.L.c. 124, § 1(q), the general grant of authority, discussed *infra,* none of the cited statutes supports DOC's authority to issue a regulation defining indigence for purposes of G.L.c. 22E or authorizing the Commissioner to seize funds from inmate accounts without consent to pay DNA costs. As demonstrated in the text, nothing in Sections 3, 48 and/or 48A supports the proposition that the Commissioner has authority to enlarge upon the deductions from inmate accounts expressly authorized by statute. Section 49 concerns outside employment and contains no authorization for deduction from inmates' earnings or accounts. I assume that DOC intended to cite § 96A, not § 96 which has been repealed. Section 96A relates to the disposition of unclaimed money of former prisoners. Section 162 provides for the payment of not more than $50 from the treasury of the institution to each prisoner leaving the institution. The DOC also relies on Executive Order 399 issued on August 12, 1997. That order prohibits prisoners from raising money for political purposes.

13 In the case of certain inmates, including those serving life sentences, the superintendent “may so expend” any part or all of such money.

14 This sentence was added to the statute in 1994. In an apparent scrivener's error the same sentence is repeated at the end of the second full paragraph of § 48A.

15 Sections 29(d)(3) and (4) of G.L.c. 261 also authorize the superintendent to withdraw funds from inmate accounts for the payment of court fees, but only upon written request by the inmate.

16 Relying on *Grocery Mfrs. of America, Inc., supra,* 379 Mass. at 76, DOC argues that the fact that various sections of a statute grant the department authority to prescribe regulations in great detail on particular subjects does not limit the department's authority to deal with other matters under more general statutory guidelines. In this case, the detailed statutory authorization concerns the same subject matter as the regulation in question, namely, prison officials' authority to deduct money from inmates' earnings and accounts.

17 Chapter 258B, § 8, as amended in 1994, provides in pertinent part:

> If the person convicted is sentenced to a correctional facility in the commonwealth, the superintendent or sheriff of the facility shall deduct any part or all of the monies earned or received by any inmate and held by the correctional facility, to satisfy the victim witness assessment, and shall transmit such monies to the court monthly.

The statute also gives the victim witness assessment priority over other assessments.

18 One might argue, with respect to deductions from earnings, that the Legislature simply intended to mandate that the deductions listed in Section 86F be included in the regulations promulgated pursuant to Section 48 and did not intend to limit the Commissioner's authority to expand the list of permissible deductions. Had the Legislature so intended, however, it would likely have described the deductions as “including” those listed in Section 86F. Moreover, that interpretation is inconsistent with Sections 3, 48A and 86F which provide that, after specified deductions are taken, the balance shall be the property of and returned to the inmate on discharge.

19 If the purpose of Section 16A was to require the Commissioner to exercise a grant of authority previously given, the Legislature would have used mandatory language, instead of the permissive “may include.”

20 Perry was convicted in April of 2000. On May 5, 2000, Perry spent $277.34, on various items, including a television, leaving $4.87 in his personal account. Perry's DNA was taken on September 20, 2000. Perry was employed in the kitchen from June through August 2000. He earned $9.00 per week for six days' work. Half of that amount, $4.50, was deposited in a savings account to which Perry, who is not serving a life sentence, does not have access. From August through December 2000, Perry worked as a runner in the prison. He made $7.00 per week of which $3.50 was deposited in his savings account. In the sixty days preceding September 20, 2000, the maximum amount in Perry's personal account was $11.45. Perry's personal account was frozen on September 27, 2000. As of February 21, 2001, Perry's account was still frozen. Between September 27 and February 21, Perry could not purchase soap, deodorant, toothpaste, stamps, writing materials, clothes and other necessities. Perry submitted requests for indigent supplies, but received no response.

21 White was convicted on April 11, 2000. His DNA was taken on May 3, 2000. On that date he had $100.30 in his account at the House of Corrections which was subsequently transferred to his prison account. Apart from a Walkman purchased on September 27, 2000, which cost about $28, White used these funds to buy basic necessities after he was transferred. He has no other resources. On September 28, 2000, White's personal account was frozen. Between August, when he arrived at SBCC, and January 11, 2001, White was on a waiting list for a job. Since January 11, 2001, he has worked

in the prison library. He works six days per week and is paid $5.00, of which $2.50 is deposited in his savings account. On September 15, 2000, White's sister, a single mother with four children, sent him a gift of $60. On October 3, 2000, an uncle sent White $30. White's account remained frozen until his father, who is on a fixed income, sent him money to pay the DNA assessment fee. On February 8, 2001, DOC deducted $110 from White's account and White was able to access the remaining funds to purchase necessities from the canteen. While his account was frozen, White submitted several requests for clothes and personal hygiene supplies. He received no response.

22 There is no evidence that any court ordered the collection of DNA from the plaintiff or any intervenor or that any court ordered the payment of DNA collection costs by any of the inmates in this case. I therefore have not addressed the question whether the court has the power to authorize the seizure of funds from the account of an inmate who is not indigent for the purpose of paying DNA collection costs.

23 Should the Legislature act, it will have the opportunity to address (a) whether, as a matter of policy, the deduction should be from gifts received by an inmate from family members and friends, that enable inmates to purchase necessities which are not provided by DOC, as well as from amounts earned by inmates; and (b) the desirability of minimizing the burden and expense of judicial proceedings to determine indigence by clarifying the indigence definition as applied to inmates and establishing a procedure for administrative review of the indigence determination before suit challenging a DNA assessment is authorized. Requests for administrative review by plaintiff in this case were denied because “it's a legal matter.”

24 The Department reimbursed plaintiff Welsh after this suit was brought.

**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO RULE 16(k) OF THE**
**MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs) and;

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 with one and a half-inch margins and contains 36 total non-excluded pages prepared with Microsoft Word 2013.

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**CERTIFICATE OF SERVICE**

Pursuant to Mass. R. A. P. 13(d), I the undersigned, do hereby certify, under the penalties of perjury, that a copy of the foregoing document has been served electronically on all parties or their representatives in this action as listed below this twenty-second day of June, 2021:

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