

VIRGINIA: IN THE SIXTEENTH JUDICIAL CIRCUIT OF THE COMMONWEALTH
IN THE CIRCUIT COURT OF CULPEPER COUNTY

MICHAEL V. MCCLARY,)
)
and)
)
CHRISTINA STOCKTON)
Plaintiffs,)
)
v.) CASE NUMBER: CL 18-1373
)
SCOTT H. JENKINS, in his official capacity)
as Sheriff of Culpeper County)
)
and)
)
)
BOARD OF SUPERVISORS OF)
CULPEPER COUNTY,)
Defendants.)

DEMURRER

Comes now before this Honorable Court, the Board of Supervisors of Culpeper County, by its counsel, County Attorney Bobbi Jo Alexis, who files this Demurrer in response to the Complaint, and requests this Honorable Court to sustain its Demurrer and dismiss the matter against it. The Board of Supervisors of Culpeper County (hereinafter referred to as the “County”) provides the following to the Court in support of its Demurrer.

The whole of the Complaint is comprised of three (3) counts. Counts I and II of the Complaint allege causes of action against only Sheriff Scott H. Jenkins (hereinafter referred to as the “Sheriff”). Count III of Complaint is the only count directed towards the County. As such, the County’s Demurrer is directed solely towards those several legal defects with regard to Count III of the Complaint.

I. Summary of Count III, as alleged

Count III (improperly) seeks declaratory judgment against the County, requesting the Court enter an order declaring County appropriation of funds to the Sheriff (*with emphasis*) **absent a condition prohibiting the use of funds to pay for salaries, costs, and expenses relating the enforcement of federal civil immigration law** to be unconstitutional, unlawful, ultra vires, and void ab initio.

II. Pertinent Foundational Law

1. Sheriffs and their deputies are *not* county employees/actors, as a matter of law, namely the Constitution of Virginia, Art. 7, Sec. 4. A county is not responsible for the actions of the local elected sheriff, who holds his office by virtue of the Constitution of Virginia, Art. 7, Sec. 4, which specifically provides that a sheriff is a constitutional officer and that his duties are regulated and defined by state statute, independent of the state and county governments. See Hilton v. Amburgey, 198 Va. 727, (1957); Carraway v. Hill, 265 Va. 20 (2003); Rashad v. Jenkins, United States District Court for the Eastern District of Virginia, Richmond Div., decided March 3, 2016, Case No. 3:15-cv-655 (2016 U.S. Dist. LEXIS 27879); Sherman v. Richmond, 543 F. Supp. 447 (E.D. Va. 2012); Chien v. Virginia, United States District Court for the Eastern District of Virginia, Richmond Division, decided March 5, 2018, Case No. 1:17-cv-677 (2018 U.S. Dist. LEXIS 36242); and Verry v. Barry, 71 Va. Cir. 318 (Fairfax Cnty. 2006). See Cited Caselaw Authorities, attached as Exhibit A.

2. Virginia sheriffs are independent constitutional officers, who are beholden neither to local governing bodies, nor to the Commonwealth, but rather only to the voters who elected them. See United States v. Gregory, United States Court of Appeals for the Fourth Circuit, decided June 8, 1994, Docket No. 93-1391 (1994 U.S. App. LEXIS 14443, 12). A county board

of supervisors does not prescribe the duties of a sheriff; it has no control over his conduct; and, it has no power to remove him from office, nor any control over the duration of his term thereof. See Roop v. Whitt, 289 Va. 274 (2015); United States v. Gregory, United States Court of Appeals for the Fourth Circuit, decided June 8, 1994, Docket No. 93-1391 (1994 U.S. App. LEXIS 14443); Weiner v. Albemarle Cty., United States District Court for the Western District of Virginia, Charlottesville Division, decided January 24, 2018, Case No. 3:17-cv-00046 (2018 U.S. Dist. LEXIS 11123); and Dunn v. Millirons, United States District Court for the Western District of Virginia, Roanoke Division, decided March 31, 2016, Case No. 7:14-cv-000429 See Exhibit A.

3. Pursuant to Va. Code Ann., Sec. 15.2-1600, the voters of each county shall elect a sheriff, as well as other officers as stated therein. The duties and compensation of such elected officers shall be prescribed by general law or special act. *Id.* Moreover, the Virginia General Assembly (*with emphasis*) directs that nothing in Title 15.2 shall be construed to authorize the governing body or the chief administrative officer of a locality (i) to designate an elected constitutional officer to exercise a power or perform a duty which the officer is not required to perform under applicable state law without the consent of such officer, nor by designation (ii) to diminish any such officer's powers or duties as provided by applicable state law including the power to organize their offices and to appoint such deputies, assistants and other individuals as are authorized by law upon the terms and conditions specified by such officers. *Id.*

4. The financial support of elected sheriffs is specifically addressed by general law and special acts, including but not limited to statutes within Title 15.2, Subtitle II, Chapter 16, Article 1 (Local Constitutional Officers, Courthouses, and Supplies), Article 3 (Sheriffs), and Article 6.1 (Compensation Board Generally) of the Code of Virginia (1950), as amended, and the actual

annual appropriations acts of the Virginia General Assembly. Within the aforementioned Articles 1, 3, and 6.1, there is a specific (procedural and substantive) process put in place by the Virginia General Assembly regarding the appropriation of financial support to the elected sheriffs that generally involve (i) the annual state appropriations acts¹; (ii) policy, management, and oversight decisions regarding state funding allocations by the Compensation Board (state entity)²; (iii) adherence by the respective localities to the policy, management, and oversight decisions of the Compensation Board, and (iv) adherence by the respective localities to any additional related provisions in the Code of Virginia in Title 15.2, Subtitle II, Chapter 16, including but not limited to Va. Code Ann., Sec. 15.2-1605.1. See Financial Support Cited Authorities, attached as Exhibit B.

5. Pursuant to Va. Code Ann., Sec. 15.2-1401, all powers granted to localities are vested in their governing bodies. Governing bodies of localities perform their necessary duties, obligations, and functions, by the adoption of ordinances, resolutions, and motions. See Va. Code Ann., Sec. 15.2-1425 and the Virginia Freedom of Information Act (VFOIA). In adopting ordinances, resolutions and motions, votes are legally required to be recorded in writing and published under VFOIA.

6. Pursuant to the Constitution of Virginia, Art. 7, Sec. 7 and Va. Code Ann., Sec. 15.2-1428, no ordinance or resolution appropriating money exceeding the sum of five hundred dollars shall be passed except by recorded affirmative vote of a majority of all members elected to the governing body, which vote shall be recorded in writing and published under VFOIA.

¹ For example, in fiscal year 2019, approximately three (3) million dollars in state monies were allocated by the Compensation Board and appropriated by the Virginia General Assembly to Culpeper County for the Sheriff's budget.

² The Compensation Board (state entity) determines the specific allocation of state funding to each of the localities in the Commonwealth for the support of the elected sheriffs.

7. Pursuant to Va. Code Ann., Secs. 15.2-2503 and -2506, the governing bodies of political subdivisions of the Commonwealth of Virginia shall prepare and approve their budgets for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality for the ensuing fiscal year. The governing bodies shall approve the budget only after a public hearing duly published at least once in a newspaper having general circulation in the locality affected. The governing bodies shall annually publish the approved budget on the locality's website, if any, or shall otherwise make the approved budgets available in hard copies, as needed to citizens for inspection.

8. Pursuant to Rule 2:202 of the Rules of the Supreme Court of Virginia and Va. Code Ann, Sec. 8.01-386, the Court shall take judicial notice of the laws of the Commonwealth of Virginia.

III. Judicial Notice

1. Pursuant to the Rule 2:203 of the Rules of the Supreme Court of Virginia and Va. Code Ann., Sec. 8.01-388, the court shall take judicial notice of the contents of all official publications of the political subdivisions of the Commonwealth that are required to be published pursuant to the laws of the Commonwealth. Please find attached Exhibit C, which exhibit includes several official publications of Culpeper County, Virginia that are required to be published pursuant to laws of the Commonwealth, which laws are referenced in herein Section A. Pertinent Foundational Law of this filing. This Court shall take judicial notice of the contents of the publications in Exhibit C. The records consist of all appropriations made by the County to the Sheriff and also the County's budget.

2. Rule 2:201 of the Rules of the Supreme Court of Virginia provides that courts may take judicial notice of factual matters not subject to reasonable dispute in that they are either (1) common knowledge, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Under the rule, judicial notice may be taken at any stage of the proceeding. Please find attached Exhibit D. Exhibit D consists of records subject to VFOIA, and that are published and made publicly available by the the Commonwealth of Virginia through its State Compensation Board. This Court may take judicial notice of these records.

IV. Other Evidentiary Considerations

1. Other than those facts for which judicial notice is taken, the Court is limited to considering the facts contained in the complaint and incorporated attachments/exhibits thereto, including all material facts, implied facts, and reasonable inferences therefrom in the light most favorable to the plaintiff; and also, factual allegations contained in documents brought into a case as a result of a motion craving oyer, as they are incorporated into the pleadings and may be used to amplify the facts alleged in a complaint when a court decides whether to sustain or overrule a demurrer. See Ward's Equip. v. New Holland N. Am., 254 Va. 379 (1997) found in Exhibit A.

2. A court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings, as initially filed as an exhibit to the complaint, or, as may be added by successful motion craving oyer. See Ward's Equip. v. New Holland N. Am., 254 Va. 379 (1997) found in Exhibit A.

3. Lastly, the court is not bound to accept conclusory allegations stated in the complaint. See Proffitt v. United States, 758 F. Supp. 342 (E.D. Va. 1990) found in Exhibit A.

V. Failure to State a Cause of Action

No Individual Cause of Action or Claim

1. A party must properly allege a personal stake in the outcome of the alleged controversy. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A. A plaintiff may institute a declaratory judgment proceeding if it has a justiciable interest in the subject matter of the proceeding. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A. The plaintiff must allege an actual controversy between the plaintiff and defendant. See id. When the ‘actual objective’ in the declaratory judgment proceeding is a determination of a disputed issue rather than an adjudication of the parties’ rights, the case is not one for declaratory judgment. See id.

2. There is no challenge here to any expenditure made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise). In fact, no challenged expenditures are particularly identified or recited within the whole Complaint, not once in all twenty (20) pages.

3. The Complaint does not set forth a justiciable controversy where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment.

No Taxpayer Status Cause of Action

4. Lawsuits based on status as a federal or state taxpayer, when no individual injury is alleged separate from the public at large, generally are inadequate to challenge laws of general application. The basis for the rule is that because taxpayers’ interests in the federal and state treasuries are shared with so many, their pecuniary interests are comparatively minute and indeterminate. See Goldman v. Landslide, 262 Va. 364 (2001) found in Exhibit A.

5. However, standing in some taxpayer challenges regarding the legality of certain local government expenditures, when no individual injury is alleged separate from the public at large, has been recognized because the alleged harm to the pecuniary interest of the taxpayers in certain instances has been established to be direct and immediate, rather than remote and minute. See. See Goldman v. Landslide, 262 Va. 364 (2001) found in Exhibit A.

6. Some of the instances mentioned above include challenges to: actual expenditures of the members of a local governing body for travel reimbursement; contracts executed by the local governing body involving actual expenditures; specific loans of money made by the governing body; etc. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

7. Most important in the line of precedent cited above, the common thread is one key element: the connection to the local government's expenditures. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A. This lawsuit is distinguishable.

7-A. Defect #1:

a. In the instant case, the Complaint includes no allegations of costs or expenditures made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise) attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his entry into a 287(g) Agreement.

b. The Plaintiffs in the case at bar seek the Court to declare and to order that when the County appropriates funds to the Sheriff it must impose a condition within the appropriations motion, resolution, and/or ordinance affirmatively prohibiting the Sheriff to use appropriated funds to pay for salaries, costs, and expenses relating to the

enforcement of federal civil immigration law. See numbered paras. 97 and 98(c) of the Complaint.

c. There is no challenge here to any expenditure made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise). In fact, no challenged expenditures are particularly identified or recited within the whole Complaint, not once in all twenty (20) pages.

d. The Complaint is instead an effort to have the Court supersede, or impose conditions upon the County different from, the Constitution of Virginia and the relevant statutes of the Commonwealth regarding appropriations generally and/or appropriations to a specific constitutional officer, merely cloaked as a purported taxpayer challenge.

e. The Plaintiffs cannot identify any constitutional provision or statute that gives them the legally enforceable right, any cause of action or claim, to have the Court compel the County to draft or enact an appropriations motion, resolution, or ordinance in the manner they request with the language they supply. The Plaintiffs have not alleged in its Complaint any facts to support any legally enforceable right, i.e., any cause of action or claim, under law.

7-B. Defect #2

a. In the instant case, the Complaint includes no allegations of costs incurred or expenditures made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise) attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his entry into a 287(g) Agreement.

b. The Complaint, in all one hundred and three (103) numbered paragraphs, lacks any allegations as to any specific costs incurred or expenditures made by the County,

much less to any specific costs incurred or expenditures made by the County attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his decision to sign an MOU that authorizes him to participate in the 287(g) program. None have been pled.

c. Any guess as to expenditures of the County in the future, if any, attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program is wholly speculative.

d. Simply put, the Plaintiffs have identified no actual County expenditure in controversy or that is being challenged. Instead, Plaintiffs seek for the County, and the Court, to infer or guess at potential amounts that someday could or may be experienced in the future by the County, if any, attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program. This we simply cannot do. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found at Exhibit A.

e. The Plaintiffs have not alleged in its Complaint any facts to support any legally enforceable right, i.e., any cause of action or claim, under law. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

7-C. Defect #3

a. It is important to take notice that the financial support of the Sheriff involves (i) substantial state appropriations, funding, and monies; (ii) allocation of state funding and monies to the County, as determined by the Compensation Board (not the County) pursuant to statute; (iii) mandated adherence by the County to the determination of

funding by, and the policy, management, and oversight decisions of, the Compensation Board. See Exhibit B.

b. In challenging the budget of/appropriations to the Sheriff, the Plaintiffs are challenging, in substantial part, state funding and state funding decisions, that are not made by the County. See Exhibit B.

c. Lawsuits based on status as a federal or state taxpayer, when no individual injury is alleged separate from the public at large, generally are inadequate to challenge laws of general application. The basis for the rule is that because taxpayers' interests in the federal and state treasuries are shared with so many, their interests are comparatively minute and indeterminate. See Goldman v. Landslide, 262 Va. 364 (2001) found in Exhibit A.

d. The Plaintiffs have not alleged in its Complaint any facts to support any legally enforceable right, i.e., any cause of action or claim, under law. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

7-D. Summary – No Taxpayer Standing

a. Earnestly yet candidly, the situation here is nothing more than a difference of opinion between two taxpayers and the Sheriff (not even the County) - and a situation which clearly is not an actual controversy with the County. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

b. The Plaintiffs' taxpayer lawsuit is no more than a hollow attack upon the County, absent any single real complaint of injury or threatened injury, improperly based upon a decision of the Sheriff (to sign an MOU that authorizes him to participate in the

287(g) program), a constitutional officer over whom the County enjoys no control or authority. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

c. In sum, as poignantly stated by the Virginia Supreme in an analogous case, zealous interest in this topic alone is not sufficient to create standing to support a cause of action or claim. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) in Exhibit A.

Va. Code Ann, Sec. 15.2-1605.1

8. The Code of Virginia (1950), as amended, states “notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the sheriff, or any of their deputies or employees, above the salary of any such officer, deputy or employee, in such amounts as it may deem expedient. In light of Va. Code Ann, Sec. 15.2-1605.1, the Plaintiffs have not alleged in its Complaint any facts to support any legally enforceable right, i.e., any cause of action or claim, under law.

VI. Motion Craving Oyer

At this time, the County contemporaneously files a Motion Craving Oyer. The County incorporates herein the matters raised and arguments presented within its Motion Craving Oyer, and respectfully requests the Court’s consideration of the Motion Craving Oyer to the extent permitted by law when making a determination on the Demurrer.

VII. Pleas in Bar

At this time, the County contemporaneously files a Pleas in Bar. The County incorporates herein the matters raised and arguments presented within its Pleas in Bar, including but not limited to the arguments addressing the Plaintiffs lack of standing and the legal defects

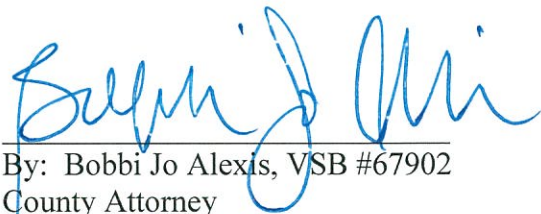
with the lawsuit as to ripeness, and respectfully requests the Court's consideration of the Pleas in Bar to the extent permitted by law when making a determination on the Demurrer.

Prayer for Relief

WHEREFORE the County prays the Court will sustain the County's Demurrer and dismiss this lawsuit against it, and award the County costs expended, attorneys' fees, and any and all other relief the Court deems just and proper.

Respectfully submitted,

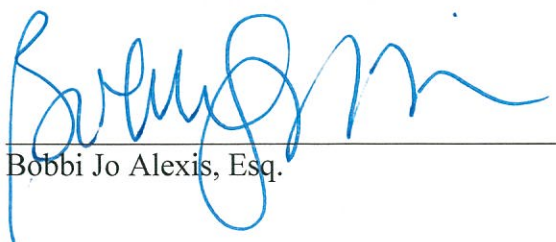
Board of Supervisors of Culpeper County



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CERTIFICATE OF SERVICE

This Demurrer is served upon Plaintiffs through their counsel of record via US first class postage prepaid directed to: Vishal Agraharkar, Esq. with the American Civil Liberties Union Foundation of Virginia at 701 E. Franklin Street, Suite 1412, Richmond, Virginia 23210 and Dale G. Mullen, Esq., Casey Lucier, Esq., Travis Gunn, Esq., Ashley Peterson, Esq. with McGuire Woods LLP at 800 East Canal Street, Richmond, Virginia 23219 on this 20th day of December 2018.



Bobbi Jo Alexis, Esq.