

Introduction to Preliminary Response to the Charge from the BoS on ICE Detainers

Approved by the Commission for Diversity, Inclusion and Community Relations 2/15/17

On May 18, 2012, the Brookline Police Department enacted Special Order #2012-6, addressing Secure Communities, a federal program created to identify undocumented immigrants in the custody of local law enforcement agencies throughout the nation. Under the program, an immigration officer could issue a detainer when they had reason to believe that a person was a removable immigrant, fell within an enumerated priority, and was convicted or charged with certain criminal offenses.

Secure Communities was replaced by the Priority Enforcement Program in 2015. This program only sought out removable immigrants who were convicted of specifically enumerated crimes, intentionally participated in criminal gang activity, or posed a danger to national security. By many measures, the program was less aggressive than Secure Communities and narrowed the number of immigrants that would be targeted for removal because of their engaging in certain criminal activity or posing a threat to national security.

The Trump Administration, through Executive Order, ended the Priority Enforcement Program on January 25, 2017, and reinstated Secure Communities. Thus, the number of immigrants who will be targeted for removal has now increased. Notwithstanding the brief termination of Secure Communities, it is now the policy of the Department of Homeland Security.

The Board of Selectmen (BoS) has requested that the Town's Commission on Diversity, Inclusion, and Community Relations (CDICR) review and recommend any changes it believes are warranted, to the Brookline Police Department's policies as they relate to responding to varying types of assistance by U.S. Immigration and Customs Enforcement (ICE). The BOS has specifically asked the Commission to focus on the current policy concerning the Department's interactions with immigrants and refugees. The Commission has designated a Working Group, comprised of members of both the Commission, Town Department Employees, and one member of the public.

At the outset, the Commission's Working Group observes that the BoS has not asked the Commission to review the Town's status as a "Sanctuary City" or further define what that phrase means. Thus, the Working Group does not address these issues. Additionally, the Working Group is aware of only a single policy as it relates to requests for assistance by ICE; Special Order #2012-6. "Special Orders are temporary orders issued by the Chief of Police and/or Superintendent, outlining instructions covering particular situations. Special orders are automatically cancelled when their objective is achieved." See, Brookline Police Rules and Regulations, Procedures 2(B). Whether the order remains in effect, or the extent that it is actually enforced, is unclear. Given that the Working Group's task is

to make recommendations to the BoS for a policy going forward, the answer to this question is not germane to the Working Group's analysis.

As the Working Group learns of additional policies, or the absence of necessary policies, additional research, discussion, and recommendations will be made. For now, given the Executive Order, the Working Group will only address Special Order #2012-6.

Special Order #2012-6 provides that when ICE sends the Department an immigration detainer for a person in custody of the Department, the person shall remain in the custody of the Department until ICE assumes custody, or until a forty-eight hour period, not including weekends or holidays, has expired. The policy further directs the Commanding Officer on duty to notify ICE of the immigrant's status as well as the date, time, and location of their district court arraignment. The policy provides that notice of the detainer shall be provided to the receiving court officer and prosecutor "to prevent any unauthorized releases." "[I]n rare incidences, based on the severity of the crime should telephone requests for information be made through ICE Field Offices."

Since this policy was enacted, there have been numerous developments in the law regarding the legality of state law enforcement agencies detaining an immigrant based on an ICE detainer only. Most recently, in our own Commonwealth, Justice Spina (ret) of the Supreme Judicial Court (SJC), on an emergency petition, ordered that "the trial court is without authority to hold [an immigrant], or otherwise to order him held, on a civil I.C.E. detainer." Attachment, A. Santos Moscoso v. A Justice of the East Boston Division of the Boston Municipal Court, SJ-2016-0168 (Supreme Judicial Court for Suffolk County, May 26, 2016).

In Moscoso the Petitioner argued that the "practice of Massachusetts criminal courts and local law enforcement authorities honoring requests to detain persons for federal immigration authorities" violated those persons' right under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights to be free from unreasonable seizures, and their right to due process under the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. Attachment, B. The order of the Justice Spina is not binding law, however it is persuasive authority that members of the Working Group have been told is followed by some trial courts. Notwithstanding the fact that the order is not binding legal authority, the Working Group finds the reasoning in the Petitioner's pleading, Attachment B, which was adopted by Justice Spina, to be sound and recommend that the Department's policy coincide with the order.

The Working Group is aware this issue will be presented to the full bench of the SJC soon. Thus, our Commonwealth's highest court will render a final and legally binding ruling on the legality of a Massachusetts law enforcement agency detaining an immigrant based on an ICE detainer only. For that reason, the Working Group makes this policy recommendation with the caveat that it may revisit the policy after the SJC issues its opinion on the matter.