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MEMORANDUM

TO: KNOX COUNTY COMMISSION

FROM: JESSICA JERNIGAN-JOHNSON, DEPUTY LAW DIRECTOR JJJ

DATE: APRIL 16, 2021

RE: 287(g) CONTRACT

The Knox County Sheriff's Office (KCSO) entered into a Memorandum of Agreement (MOA) with the Department of Homeland Security through U.S. Immigration and Customs Enforcement (ICE) on May 8, 2020 which permits KCSO to perform certain immigration enforcement functions. Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Pub. L. No. 107-297 and 8 U.S.C. § 1103(c) (1996), authorizes the Secretary of the Department of Homeland Security to enter into written agreements with a state, any political subdivision of a state, or directly with local law enforcement agencies so that qualified personnel can perform these functions. Specifically, 8 U.S.C. § 1103(c) states "The Commissioner may enter into cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws." *Id.* The Secretary has delegated this authority to ICE.

It has been suggested by some editorial writers that the MOA was entered into illegally because it was not brought before the County Commission for approval. However, Tennessee Code Annotated Section 7-68-105, which was passed in 2018, specifically provides that law enforcement entities can enter into agreements with the appropriate federal agency under 1357(g):

(a) All law enforcement agencies and officials are authorized, in accordance with 8 U.S.C. § 1357(g)(10) to communicate with the appropriate federal officials regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States or otherwise to cooperate with the appropriate federal official in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

(b) A law enforcement agency may negotiate the terms of a memorandum of agreement between the law enforcement agency and the appropriate federal official in 8 U.S.C. § 1357(g), concerning the enforcement of federal

immigration laws. Any memorandum of agreement negotiated pursuant to 8 U.S.C. § 1357(g) must:

(1) Be entered into in accordance with federal law;
(2) Require that each officer employed by a law enforcement agency be trained in accordance with the memorandum of agreement between the law enforcement agency and the appropriate federal official concerning the law enforcement officer's role in enforcing federal immigration laws, in accordance with 8 U.S.C. § 1357(g); and
(3) Allow for the enforcement of federal immigration laws to the full extent permitted under federal law.

Notably, T.C.A. § 7-68-105(b) does not require the law enforcement agency to obtain approval from either the state or the county before entering into such an agreement. The statute does require the law enforcement agency to submit notice of the agreement to the governor, the office of the lieutenant governor, and the speaker of the house of representatives, but that is the only requirement. T.C.A. § 7-68-105(c). This has been accomplished.

There is another state law which some have suggested requires commission approval for such an agreement. Tennessee Code Annotated § 50-1-101, passed in 2007, states that "the chief law enforcement of the county *upon approval by the governing legislative body*, may enter into a written agreement . . . concerning the enforcement of federal immigration laws, detention and removals, and investigations in the municipality or county." T.C.A. § 50-1-101(a).

However, two canons of statutory construction refute this argument. First, to the extent that the two statutes are in conflict, "well-settled principles of statutory construction make it clear that the most recently enacted statute repeals by implication any irreconcilable provisions of the former act." *Brown v. Jordan*, 563 S.W.3d 196, 202 (Tenn. 2018). Thus, if one statute does indeed require approval and one does not, the most recent statute prevails. Here, T.C.A. § 7-68-105 prevails, because it was passed in 2018. Even if the statutes do not conflict, § 7-68-105 would still prevail, because it specifically addresses the procedure law enforcement agencies must follow when entering into agreements with DHS and ICE under §1357(g) while § 50-1-101 addresses any contract related to federal immigration laws entered into between law enforcement and DHS. "As a matter of statutory construction, a specific statutory provision . . . will control over a more general statutory provision." *Washington v. Robertson County*, 29 S.W.3d 466, 475 (Tenn. 2000). Because T.C.A. § 7-68-105 more specifically addresses the agreement at issue, its provisions control as a matter of law.

It has also been argued that even if state law did not require commission approval for the MOA, the County Charter does. However, any requirement for such approval would be preempted under the Supremacy Clause, Article 6, par. 2 of the United States Constitution. The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). As the United States Supreme Court has explained, "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders." *Id.* at 401-02. "States may not enter, in any respect, an area that the Federal Government has reserved for itself." *Id.* at 402. The federal government has granted DHS the power to enter into agreements such as this one with local law

enforcement agencies without state approval. *See* 8 U.S.C. § 1103(c). Any state statutory provision requiring commission approval for a contract related to immigration enforcement under federal law, when the federal law has no such requirement, is preempted under the Supremacy Clause of the United States Constitution.

Finally, it has been suggested by some editorial writers that the MOA constitutes a "contract for services" which would require commission approval. In *Cotham v. Yeager*, 607 S.W.3d 820 (Tenn. Ct. App. 2019), the Tennessee Court of Appeals described a service contract as one that "would involve the county as purchaser and the service provider as vendor" and where "the vendor would furnish specified services to the county in return for payment out of county funds." *Id.* at 827. In *Cotham*, the Court concluded that a contract between a telecommunications provider who provided telephone services to the Anderson County Jail and the County was not a service contract for the purposes of the Purchasing Act, because it did not require the expenditure of county funds. *Id.* at 827-28. While this question arises in a different context, it is clear that the County is not expending any funds under the MOA. Therefore, this agreement is not a "contract for services."

In conclusion, state law clearly establishes that law enforcement did not need commission approval to enter into the MOA. To the extent that there may be a conflicting statutory provision, that provision is preempted by federal law. In addition, the MOA does not meet the definition of a "contract for services" that requires commission approval.

JJJ/kfc