UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 16 C 10848
v.	)	
	)	Judge Sara L. Ellis
VILLAGE OF TINLEY PARK, ILLINOIS,	)	
	)	
Defendant.	)	

ORDER

The Court denies Defendant Village of Tinley Park, Illinois' motion to dismiss [12]. The Court orders the Village to answer the complaint by August 18, 2017. See Statement for details.

STATEMENT

The Government filed a complaint against the Village of Tinley Park, Illinois ("the Village") alleging violations of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq*. The Village moves to dismiss the complaint for lack of standing under Federal Rule of Civil Procedure 12(b)(1), arguing that the complaint was not authorized by the Assistant Attorney General of the Civil Rights Division ("the Assistant Attorney General") and has no force or effect under the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, *et seq*. Because the authorization of the complaint is a delegable duty that may be performed by an official other than the Assistant Attorney General, the Court finds that the Government has standing and denies the motion to dismiss.

The Government alleges that the Village engaged in a pattern or practice of unlawful discrimination and denied rights to a group of persons on the basis of race and color when, in early 2016, it refused to vote on a low-income housing development that met all of the applicable zoning requirements for approval. The Government alleges that the Village did so in response to community opposition to the development based on race and racial stereotypes of affordable housing tenants.

The Government filed its complaint on November 23, 2016, submitted by Loretta Lynch, Attorney General; Vanita Gupta, Principal Deputy Assistant Attorney General of the Civil Rights Division ("the Division"); Zachary T. Fardon, United States Attorney for the Northern District of Illinois; Sameena Shina Majeed, Chief of the Division; Timothy J. Moran, Deputy Chief of the Division; Amie S. Murphy, Trial Attorney for the Division; and Michael J. Kelly, Assistant United States Attorney for the Northern District of Illinois.

A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction has the burden of proof. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). The standard of review for a Rule 12(b)(1) motion to dismiss depends on the purpose of the motion. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009). If a defendant challenges the sufficiency of the allegations regarding subject matter jurisdiction (a facial challenge), the Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See id.*; *United Phosphorus*, 322 F.3d at 946. If, however, the defendant denies or controverts the truth of the jurisdictional allegations (a factual challenge), the Court may look beyond the pleadings and view any competent proof submitted by the parties to determine if the plaintiff has established jurisdiction by a preponderance of the evidence. *See Apex Digital*, 572 F.3d at 443–44; *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006).

The Village argues that the Government lacks standing to bring its lawsuit because the statute on which the lawsuit is based, 42 U.S.C. § 3614, and federal regulations governing the enforcement of § 3614 require that the Assistant Attorney General enforce the statute but no Assistant Attorney General was in office at the time the Government filed its complaint. Section 3614(a) states that:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

42 U.S.C. § 3614(a). The Code of Federal Regulations assigns the enforcement of § 3614 to the Assistant Attorney General, stating:

> The following functions are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Rights Division: (a) Enforcement of all Federal statutes affecting civil rights, including those pertaining to . . . housing . . . and authorization of litigation in such enforcement, including criminal prosecutions and civil actions and proceedings on behalf of the Government and appellate proceedings in all such cases.

28 C.F.R. § 0.50(a).

The Village argues that under 42 U.S.C. § 3614 and 28 C.F.R. § 0.50, the Assistant Attorney General is the only official who can conduct, handle, and supervise the enforcement of federal statutes affecting civil rights. In response, the Government argues that the duties assigned to the Assistant Attorney General under 28 C.F.R. § 0.50 are delegable and therefore,

Vanita Gupta, as Principal Deputy Assistant Attorney General, could perform those duties and authorize the complaint against the Village.

In *United States Telecom Association v. Federal Communications Commission*, the Court of Appeals for the D.C. Circuit ruled that "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." 359 F.3d 554, 565 (D.C. Cir. 2004) (citing *United States v. Giordano*, 416 U.S. 505, 512–13, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121–22, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947); *Halverson v. Slater*, 129 F.3d 180, 185–86 (D.C. Cir. 1997); *United States v. Mango*, 199 F. 3d 85, 90–91 (2d Cir. 1999); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996); *United States v. Widdowson*, 916 F.2d 587, 592 (10th Cir. 1990), *vacated on other grounds*, 502 U.S. 801, 112 S. Ct. 39, 116 L. Ed. 2d 18 (1991)).[1] In *Giordano*, the Supreme Court held that the Attorney General could not delegate to his executive assistant the authority to authorize an application for a wiretap because the wiretap statute expressly addressed and limited delegation to certain specially designated Assistant Attorney Generals and the statute's legislative history showed a clear congressional intent to limit delegation of the authority.[2] 416 U.S. at 512–13. Where a statute lacks such explicit direction regarding delegation of authority to subordinate officers, and where legislative history does not present a congressional intent to limit delegation, the authority is delegable. *See Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031–33 (Fed. Cir. 2016) (permitting delegation where there was "no legislative history or any other aspects" of the statute suggesting that delegation was impermissible).

Here, 42 U.S.C. § 3614 and 28 C.F.R. § 0.50 do not present evidence of a congressional intent to limit delegation to a subordinate federal officer. The text of the statute and of the regulation does not explicitly address and limit delegation to certain officials. Furthermore, the legislative history does not suggest a congressional intent to limit delegation of authority to subordinates. *See, e.g.*, H.R. REP. NO. 100-711 (1988); 114 CONG. REC. 2270–84, 3421–22 (1968). Therefore, the functions governed by 28 C.F.R. § 0.50 are delegable. *See United States v. Broussard*, No. 16-00036-01, Doc. 20 at 2 (W.D. La. Mar. 13, 2017) ("[T]he broad authority of the Attorney General and Assistant Attorney General to delegate to trial counsel the general functions set forth in 28 C.F.R. § 0.50 is consistent with the rationale of Fifth Circuit case law, as well as the Code of Federal Regulations, 28 C.F.R. § 0.13."); *United States v. Harris County*, No. 4:16-CV-2331, Doc. 53 at 5 n.5 (S.D. Tex. Apr. 26, 2017) ("[T]he relevant duties of the [Principal Deputy Assistant Attorney General] are delegable, and, therefore Ms. Gupta['s] actions in this case were not barred by the Federal Vacancies Reform Act of 1998.")

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[1] The Village argues that *U.S. Telecom Association* is not instructive because it does not involve an interpretation of the FVRA. However, the FVRA applies only to non-delegable functions and duties, *see infra* 4–5, and an interpretation of the FVRA is not relevant to determining whether the functions and duties assigned to the Assistant Attorney General in 28 C.F.R. § 0.50 are delegable.

[2] At the time *Giordano* was decided, the statute at issue, 18 U.S.C. § 2516, stated that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize" a wiretap application. *Giordano*, 416 U.S. at 512–13.

The Village does not point to affirmative evidence of congressional intent to make the duties assigned to the Assistant Attorney General under 28 C.F.R. § 0.50 non-delegable.[3] The Village argues that *United States v. City of Philadelphia, Pennsylvania* supports their position that the Assistant Attorney General is the only official who can conduct, handle, and supervise the enforcement of federal statutes affecting civil rights. Doc. 12 at 3 (citing *City of Philadelphia*, 838 F. Supp. 223 (E.D. Pa. 1993)). However, this argument is unavailing. In *City of Philadelphia*, the court held that a complaint filed under 42 U.S.C. § 3614 may be signed by the Assistant Attorney General instead of the Attorney General. 838 F. Supp. 223, 228 (E.D. Pa. 1993). The court did not hold that the Assistant Attorney General is the only official who may authorize an enforcement action under § 3614. As the Government correctly points out in their response, the ruling in *City of Philadelphia* reinforces that the authority to bring actions under 42 U.S.C. § 3614 is delegable.

The Village also argues that the complaint is not a valid action because Gupta's authorization of the complaint violated the FVRA and therefore has "no force or effect." Doc. 12 at 6. The FVRA allows for an "acting officer" to hold executive agency positions that require presidential appointment and Senate confirmation if such positions become vacant. If a position is vacant, the "first assistant to the office" performs "the functions and duties of the office temporarily," subject to time limitations, which allow an acting officer to serve for 210 days. 5 U.S.C. §§ 3345–46. Section 3348 of the FVRA further states that "[a]n action taken by any person who is not acting under" the provisions of the FVRA "in the performance of any function or duty of a vacant office" shall have no force or effect. 5 U.S.C. § 3348(d)(1).

Gupta was appointed the Principal Deputy Assistant Attorney General for the Division on October 19, 2014. She automatically took on the duties and authorities of the Acting Assistant Attorney General because the office of Assistant Attorney General was vacant at that time. On April 13, 2015, the relevant 210-day time period during which Gupta could serve as Acting Assistant Attorney General under the FVRA expired and Gupta's term as Acting Assistant Attorney General ended. After April 13, 2015, Gupta continued serving solely as Principal Deputy Assistant Attorney General for the Division.[4]

The Village argues that because Gupta's 210-day term as Acting Assistant Attorney General expired more than a year before the Government's complaint was filed on November 23, 2016, her authorization and filing of the complaint was invalid under § 3348(d) of the FVRA. The Government counters that § 3348(d) of the FVRA does not invalidate Gupta's authorization of the complaint because § 3348(d) applies only to "the narrow class of non-delegable duties of Senate confirmed positions when those positions are vacant." Doc. 16 at 2.

Section 3348(a) of the FVRA defines a "function or duty" as used in § 3348:

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[3] The Village argues that the legislative history of the FVRA demonstrates Congress' intent to prevent federal agencies from avoiding their responsibilities under the FVRA by declaring certain functions and duties are delegable. However, the legislative history of the FVRA does not provide evidence of congressional intent to limit delegation of the authority provided for in 42 U.S.C. § 3614.

[4] The Government provides this timeline in its response to the motion to dismiss, Doc. 16 at 4–5, and the Village does not dispute its validity or accuracy.

> any function or duty of the applicable office that – (A)(i) is established by statute; and (ii) is required by statute to be performed by the applicable officer (and only that officer); or (B)(i)(I) is established by regulation; and (II) is required by such regulation to be performed by the applicable officer (and only that officer); and (ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

5 U.S.C. § 3348(a)(2). The definition refers to functions and duties that must be performed solely by the applicable officer and that applicable officer alone, which does not include a delegable duty that could be performed by another officer.[5] The definition in § 3348(a) clearly limits "function or duty" as used in § 3348 to non-delegable functions or duties. *See Broussard*, No. 16-00036-01, Doc. 20 at 2 ("the parameters established by the [FVRA] apply to the performance of *non-delegable* functions or duties of certain offices of Executive agencies") (emphasis in original); *Harris County*, No. 4:16-CV-2331, Doc. 53 at 5 (finding that delegable duties are not barred by the FVRA). Furthermore, as the Government points out in their response, the 1998 Senate Report on the FVRA ("the Senate Report") states that the § 3348 definition refers to "non-delegable functions or duties of the officer." S. REP. NO. 105-250, at 17–18 (1998).[6]

Because the enforcement of § 3614 is a delegable duty, § 3348(d)(1) of the FVRA does not apply to invalidate the Government's complaint in this case. *See Broussard*, No. 16-00036-01, Doc. 20 at 2 (finding that the FVRA did not act to limit or invalidate Principal Deputy Assistant Attorney General Gupta's authority because the FVRA applies to non-delegable functions); *Harris County*, No. 4:16-CV-2331, Doc. 53 at 5 (finding that Gupta's authorization of a complaint was not barred by the FVRA). *See also Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (finding no violation of the FVRA because the agency's decision could be made by the Assistant Secretary or by another official and therefore did not fall within the definition in § 3348(a)).

Date: July 17, 2017 /s/ Sara L. Ellis

[5] The word "only" means "alone in a class or category: sole." *See Only*, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/only, (last accessed July 13, 2017).

[6] The Village argues that two sentences on page 2 of the Senate Report support its position that § 3348 of the FVRA applies to the duties in 28 C.F.R. § 0.50. However, this argument is unpersuasive because page 2 of the Senate Report provides a summary of the legislation, while pages 17-18 include a detailed analysis of the "function or duty" definition in § 3348.