

Borrello v Hochul

[*1] Borrello v Hochul 2022 NY Slip Op 22418 Decided on July 8, 2022 Supreme Court, Cattaraugus County Ploetz, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on July 8, 2022
Supreme Court, Cattaraugus County

George Borrello, New York State Senator, Chris Tague, New York State Assemblyman, Michael Lawler, New York State Assemblyman, and Uniting NYS, LLC, Individually, and on behalf of all those similarly situated., Petitioners,

against

Kathleen C. Hochul, New York State Governor, Mary T. Bassett, New York State Commissioner of Health, New York State Health Department, and Public Health and Health Planning Council, Respondents.

Index No. 91239

Ronald D. Ploetz, J.

By order to show cause dated April 6, 2022, Petitioners sought an order barring Respondents from implementing and enforcing 10 NYCRR § 2.13, Isolation and Quarantine Procedures (hereinafter "Rule 2.13") and declaring that Rule 2.13 is null and void.

Petitioners allege that said rule was enacted in excess of Respondents' jurisdiction and in violation of the New York State and United States Constitution. The Order to Show Cause was scheduled to be heard by this Court on April 14, 2022.

Two days before this return date, this state court action was removed to the Federal District Court for the Western District of New York. On April 19, 2022, however, the Federal District Court: 1. granted the Petitioners' Motion to amend its petition to eliminate all claims arising under the United States Constitution; 2. found that all remaining claims turn exclusively on New York State Law and the New York State Constitution; and 3. remanded the case to this state court. Following remand, a conference was held and a schedule set for filing of responsive pleadings and memoranda of law. The Court also granted an application by Assembly Members Joseph M. Giglio, Andrew W. Goodell and William Barclay to file an Amicus Curiae Brief in support of invalidating Rule 2.13. Oral argument was heard on May 27, 2022. At oral argument, counsel agreed that there were no questions of fact, and the issue to be determined was solely one of law.

Factual Background

The matter before the Court comes about as a result of the COVID-19 pandemic that swept across the state and the country in the spring of 2020, and the actions of both the New York State Legislature and the Executive branch to combat that disease. There can be no doubt that the efforts of both branches of the government were well intentioned. The sole issue is whether one of these measures, Rule 2.13, adopted by the New York State Health Department is valid and enforceable.

Prior to March 2020, New York Executive Law § 29-a allowed a governor, during a declared state of emergency, to temporarily suspend provisions of existing laws and rules as long as it was done so as to not contravene the State or Federal Constitution, or Federal Statutes and Regulations. On March 3, 2020, in response to the COVID-19 outbreak, the Legislature amended [*2]Executive Law § 29-a and expanded the Governor's power to not only suspend laws, but to also issue directives by executive order to cope with the emergency.

On March 7, 2020, by Executive Order No. 202, the Governor modified Public Health Law § 225 to the extent necessary to allow the Commissioner of Health to promulgate emergency regulations. On March 9, 2020, the Commissioner of Health adopted Rule 2.13. [FN1]

On March 12, 2021, the Legislature again amended Executive Law § 29-a, deleting the Governor's authority to issue directives pursuant to Executive Orders, but still allowing the

Governor to temporarily suspend statutes during declared emergencies. On June 24, 2021, acknowledging the declining COVID-19 transmission rates, the Governor terminated Executive [*3]Order 202. At no time either before March 12, 2021, or thereafter has the Governor suspended the provisions of Public Health Law § 2102.

Since adoption, Rule 2.13 has been extended by successive 90-day periods through July 20, 2022. Respondents acknowledged that the Commissioner of Health now seeks to make Rule 2.13 permanent.

Discussion

The key issue in this hybrid Article 78/Declaratory Judgment Action concerns the separation of powers. Article III § 1 of the New York State Constitution endows the Legislature with exclusive power to make laws, while Article IV gives the Executive Branch power to execute and administer the laws. However, some overlap between the branches does not violate the constitutional principal of separation of powers. It is recognized that where it is impracticable for the Legislative body to fix specific standards for enforcement without destroying the flexibility necessary to meet the variety of circumstances likely to be encountered in carrying out the Legislative will, broad flexibility in determining how the Executive enforces the law will be sustained (*Clark v. Cuomo*, 66 NY2d 185 [1985]). "It is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated (*Id.* at 189).

To determine whether administrative rule making crosses the line into improper lawmaking, four factors established by the seminal case of *Boreali v. Axelrod* (71 NY2d [1987]) must be considered. Particularly:

1. Whether "the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems";
2. Whether "the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance";
3. Whether "the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve";
4. Whether "the agency used special expertise or competence in the field to develop the challenged regulation".

NYC C.L.A.S.H., Inc. v. New York State Office of Parks Recreation & Historic Preserv., (27 NY3d 174, 179-180 [2016] [citing *Boreali*, 71 NY2d at 11-14]).[FN2]

Consideration of the four Boreali factors must also be done in light of New York Public Health Law § 2120, which provides as follows:

PHL § 2120. Communicable diseases; control of dangerous and careless patients; commitment¹. Whenever a complaint is made by a physician to a health officer that any person is afflicted with a communicable disease or is a carrier of typhoid fever, tuberculosis, diphtheria or other communicable disease and is unable or unwilling to conduct himself and to live in such a manner as not to expose members of his family or household or other persons with whom he may be associated to danger of infection, the health officer shall [*4]forthwith investigate the circumstances alleged.² If the health officer finds after investigation that a person so afflicted is a menace to others, he shall make and file a complaint against such person with a magistrate, and on such complaint the said person shall be brought before such magistrate.³ The magistrate after due notice and a hearing, if satisfied that the complaint of the health officer is well founded and that the afflicted person is a source of danger to others, may commit the said person to any hospital or institution established for the care of persons suffering from any such communicable disease or maintaining a room, ward or wards for such persons.⁴ In making such commitment the magistrate shall make such order for payment for the care and maintenance of the person committed as he may deem proper.⁵ A person who is committed pursuant to the provisions of this section shall be deemed to be committed until discharged in the manner authorized by section two thousand one hundred twenty-three of this chapter.

Boreali Factor #1 Did the Department of Health do more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between policy goals to resolve social problems?

Rule 2.13 was promulgated during the outbreak of a nationwide pandemic that would ultimately lead to the death of over 70,000 New Yorkers. No one disputes that efforts were necessary to alleviate the suffering. Although, Rule 2.13 may be considered a viable step to combat the pandemic, the Department of Health was not writing on a clean slate. PHL § 2120 was enacted by the Legislature in 1953 and provides a procedure for obtaining a quarantine or isolation order. There are obvious and substantial differences between Rule 2.13 and PHL § 2120. For example:

¹ PHL§ 2120 provides that its provisions are triggered when a physician reports to a health officer that a person who is afflicted with or a carrier of a disease refuses to conduct himself or live in a manner as not to expose others to possible infection. In contrast, Rule 2.13 is triggered by a determination of the Commissioner of Health and may be directed towards

anyone that the Commissioner deems appropriate. There is no requirement that the subject individual be afflicted with or a carrier of the disease.² PHL § 2120 requires an investigation by a health officer and then a hearing before a magistrate with the subject individual present. If the magistrate finds that the person is a danger to others, the magistrate may issue an isolation order. Discharge of a committed person can be accomplished by chief medical officer of the hospital or institution where the person was committed (PHL § 2123). Under Rule 2.13, the Commissioner determines the terms of isolation including its location and duration.³ Only Rule 2.13 authorizes the Commissioner to utilize local law enforcement to enforce isolation orders.

In adopting PHL § 2120, the Legislature balanced the protection of individual rights as against the need for public safety. Rule 2.13 disregards any balancing of individual rights against public safety needs.

I conclude that Boreali Factor #1 favors Petitioners.

Boreali Factor #2 Did the Department of Health Rule 2.13 merely fill in details of a broad policy or did it write on a clean slate, creating its own rules without the benefit of legislative guidance?

As set forth above in the Court's decision on Factor #1, Rule 2.13 does more than fill in the details regarding the Legislative guidance set forth in PHL 2120. Rule 2.13 actually [*5]contravenes the procedures set forth in PHL 2120 and ignores the balancing act between an individual's rights and the need for public safety.

I conclude that Boreali Factor #2 strongly favors Petitioners.

Boreali Factor #3 Did the Legislature unsuccessfully try to reach an agreement on the issue so as to indicate that the matter is a policy consideration for the elected body to resolve?

The Legislature set isolation procedures via PHL § 2120. However, the Legislature did not enact other enhanced isolation requirements during the period of the COVID-19 pandemic.

The Petitioners assert that the Legislature's failure to adopt Bill A. 416, a bill with many provisions similar to Rule 2.13, is evidence the Legislature disapproved Rule 2.13. Proposed bills, however, fail to be adopted, or even to make it out of committee, for many reasons. Similarly, a letter in opposition to permanent adoption of Rule 2.13, signed by many, but not a majority of Legislators, is not persuasive proof the Legislature rejected Rule 2.13.

I conclude that Boreali Factor #3 favors neither Petitioners nor Respondents.

Boreali Factor #4 Did the Department of Health utilize any special expertise or competence in the field to develop rule 2.13?

The efficacy of isolating or quarantining infected individuals has been known to mankind since Biblical times, and probably before. Respondents offered no scientific data or expert testimony why Rule 2.13 was a necessary response to combat Covid-19, but instead contend only that it would provide a quick and nimble approach to combatting the pandemic.[FN3] Nevertheless, during oral argument of this matter, at a time when we hope that the worst of the pandemic is behind us, counsel for the Respondents were unable to cite any instance where the procedure set forth in Rule 2.13 was actually utilized.

I conclude that Boreali Factor #4 favors Petitioners.

Conclusion

While none of the Boreali factors are individually conclusive, when considered together, this Court finds that adoption of Rule 2.13 was invalid in light of the pre-existing provisions adopted by the Legislature in PHL § 2120.

In light of this determination, the Court need not consider whether adoption of Rule 2.13 would have been authorized in the absence of PHL § 2120. Similarly, this Court need not now determine whether or not Rule 2.13 runs afoul of the due process protections under the New York Constitution. Nevertheless, some discussion of due process protections is appropriate.

Involuntary detention or hospitalization, even if done pursuant to PHL § 2120, triggers Constitutional protections including the right to counsel (*Rapoport v. G.M.*, 239 AD2d 422 [2 Dept 1997]) as well as proof of the need for detention by clear and convincing evidence (*Bradley v. Crowell*, 181 Misc 2d 529 [Sup Ct Suffolk Co, 1999]). PHL § 2120 provides for a determination before an independent magistrate before an involuntary isolation order is granted.

No such due process protections are afforded by Rule 2.13. The Commissioner has unfettered discretion to issue a quarantine or isolation for anyone, even if there is no evidence that person is infected or a carrier of the disease. Further, the Commissioner sets the terms, duration, and location of the detention, not an independent magistrate as

required by PHL § 2120. Only Rule 2.13 allows local law enforcement to enforce the Commissioner's ex-parte order.

Involuntary detention is a severe deprivation of individual liberty, far more egregious than other health safety measures, such as requiring mask wearing at certain venues. Involuntary quarantine may have far reaching consequences such as loss of income (or employment) and isolation from family.

While Rule 2.13 provides that isolation and quarantine must be done "consistent with due process of law" and the detainee has the right to seek a judicial review and the right to counsel, these protections are after-the-fact, and would force the detainee to exercise these rights at a time when he or she is already detained, possibly isolated from home and family, and in a situation where it might be difficult to obtain legal counsel in a timely manner. Rule 2.13 merely gives "lip service" to Constitutional due process.

Accordingly, until the New York State Legislation acts otherwise, based upon the argument of counsel, a review of the moving papers and opposition thereto, and upon careful consideration, it is hereby

Ordered and Adjudged, that 10 NYCRR 2.13 is violative of New York State law as promulgated and enacted, and therefore null, void and unenforceable as a matter of law, and it is further,

Ordered and Adjudged, that Respondents are hereby permanently enjoined from enforcing 10 NYCRR 2.13, and are further permanently enjoined from readopting 10 NYCRR 2.13, and it is further,

Ordered, that all other relief requested herein is Denied.

This Constitutes the Decision, Order, and Judgment of the Court.

Dated: July 8, 2022
Little Valley, New York

HON. RONALD D. PLOETZ
Acting Justice of the Supreme Court Footnotes

Footnote 1: Rule 2.13 provides as follows:

10 NYCRR Section 2.13. Isolation and Quarantine Procedures

(a) Duty to issue isolation and quarantine orders (1) Whenever appropriate to control the spread of a highly contagious communicable disease, the State Commissioner of Health may issue and/or may direct the local health authority to issue isolation and/or quarantine orders, consistent with due process of law, to all such persons as the State Commissioner of Health shall determine appropriate. (2) Paragraph (1) of this subdivision shall not be construed as relieving the authority and duty of local health authorities to issue isolation and quarantine orders to control the spread of a highly contagious communicable disease, consistent with due process of law, in the absence of such direction from the State Commissioner of Health. (3) For the purposes of isolation orders, isolation locations may include home isolation or such other residential or temporary housing location that the public health authority issuing the order determines appropriate, where symptoms or conditions indicate that medical care in a general hospital is not expected to be required, and consistent with any direction that the State Commissioner of Health may issue. Where symptoms or conditions indicate that medical care in a general hospital is expected to be required, the isolation location shall be a general hospital. (4) For the purposes of quarantine orders, quarantine locations may include home quarantine, other residential or temporary housing quarantine, or quarantine at such other locations as the public health authority issuing the order deems appropriate, consistent with any direction that the State Commissioner of Health may issue. (b) Any isolation or quarantine order shall specify: (1) The basis for the order; (2) The location where the person shall remain in isolation or quarantine, unless travel is authorized by the State or local health authority, such as for medical care; (3) The duration of the order; (4) Instructions for traveling to the isolation or quarantine location, if appropriate; (5) Instructions for maintaining appropriate distance and taking such other actions as to prevent transmission to other persons living or working at the isolation or quarantine location, consistent with any direction that the State Commissioner of Health may issue; (6) If the location of isolation or quarantine is not in a general hospital, instructions for contacting the State and/or local health authority to report the subject person's health condition, consistent with any direction that the State Commissioner of Health may issue; (7) If the location of isolation or quarantine is a multiple dwelling structure, that the person shall remain in their specific dwelling and in no instance come within 6 feet of any other person, and consistent with any direction that the State Commissioner of Health may issue; (8) If the location of isolation or quarantine is a detached structure, that the person may go outside while remaining on the premise, but shall not leave the premise or come within 6 feet of any person who does not reside at the premise, or such other distance as may be appropriate for the specific disease, and

consistent with any direction that the State Commissioner of Health may issue; (9) Such other limitations on interactions with other persons as are appropriate, consistent with any direction that the State Commissioner of Health may issue; (10) Notification of the right to request that the public health authority issuing the order inform a reasonable number of persons of the conditions of the isolation or quarantine order; (11) A statement that the person has the right to seek judicial review of the order; (12) A statement that the person has the right to legal counsel, and that if the person is unable to afford legal counsel, counsel will be appointed upon request. (c) Whenever a person is subject to an isolation or quarantine order, the State Department of Health or local health authority, or the local health authority at the State Department of Health's direction shall, consistent with any direction issued by the State Commissioner of Health: (1) monitor such person to ensure compliance with the order and determine whether such person requires a higher level of medical care; (2) whenever appropriate, coordinate with local law enforcement to ensure that such person comply with the order; and (3) the extent such items and services are not available to such person, provide or arrange for the provision of appropriate supports, supplies and services, including, but not limited to: food, laundry, medical care, and medications. (d) If the location of an isolation or quarantine order is owned by a landlord, hotel, motel or other person or entity, no such landlord or person associated with such hotel, motel or other person or entity shall enter the isolation or quarantine location without permission of the local health authority, and consistent with any direction that the State Commissioner of Health may issue. (e) No article that is likely to be contaminated with infective material may be removed from a premise where a person is isolated or quarantined unless the local health authority determines that such article has been properly disinfected or protected from spreading infection, or unless the quarantine period expires and there is no risk of contamination. Such determinations shall be made pursuant to any direction that the State Commissioner of Health may issue. (f) Any person who violates a public health order shall be subject to all civil and criminal penalties as provided for by law. For purposes of civil penalties, each day that the order is violated shall constitute a separate violation of this Part. (g) Duty of attending physician (1) Every attending physician shall immediately, upon discovering a case or suspected case of a highly contagious reportable communicable disease, cause the patient to be appropriately isolated and contact the State Department of Health and the local health authority where the patient is isolated and, if different, the local health authority where the patient resides. (2) Such physician shall advise other members of the household regarding precautions to be taken to prevent further spread of the disease, consistent with any direction that the State Commissioner of Health may issue. (3) Such physician shall furnish the patient, or caregiver of such patient where applicable, with detailed instructions regarding the

disinfection and disposal of any contaminated articles, consistent with any direction that the State Commissioner of Health may issue. Footnote 2: The parties dispute the applicability of the federal non-delegation and major questions standard of review. These standards are part of federal jurisprudence, and not that of New York State. In light of the Petitioner's abandonment of federal claims, this standard will not be considered. Similarly, this Court declines to consider arguments regarding field preemption or issue preemption since such arguments are rightly relegated to questions involving the sustainability of local laws in light of contrary or inconsistent state laws and regulations. On the contrary, the issue before this Court involves a conflict between two branches of the State Government.

Footnote 3: In each county, a Superior Court level Judge is assigned to hear quarantine issues. This protocol, which existed prior to the COVID-19 pandemic is intended to provide quick access to the courts where isolation or quarantine is required.

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