

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA**

**COUNTY OF ALLEGHENY, a
political subdivision of the
Commonwealth of Pennsylvania,**

Plaintiff,

v.

THE CRACKED EGG, LLC,

Defendant.

CIVIL DIVISION

No. GD-20-009809

**TRIAL BRIEF RE MANDATORY
RULE MAKING PROCEDURE**

**Filed on Behalf of Defendant,
The Cracked Egg, LLC**

Counsel of Record for this Party:

ROBERT O LAMPL
PA I.D. #19809

JAMES R. COONEY
PA I.D. #32706

RYAN J. COONEY
PA I.D. #319213

SY O. LAMPL
PA. I.D. #324741

ALEXANDER L. HOLMQUIST
PA I.D. #314159

Benedum Trees Building
223 Fourth Avenue, 4th Floor
Pittsburgh, PA 15222
(412) 392-0330 (phone)
(412) 392-0335 (facsimile)

DENNIS M. BLACKWELL
PA I.D. #61040
The Blackwell Law Firm
Benedum Trees Building
223 Fourth Avenue
Ninth Floor
Pittsburgh, PA 15222
(412) 391-5299 (phone)

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And now, the Cracked Egg, LLC, by its attorneys, Robert O Lampl, James R. Cooney, Ryan J. Cooney, Sy O. Lampl, Alexander L. Holmquist and Dennis M. Blackwell, files the within Trial Brief:

Background:

On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency in response to the COVID-19 pandemic. In connection with the Governor's Proclamation, on July 1, 2020, the Secretary of the Pennsylvania Department of Health issued an Order "requiring universal face coverings." In issuing her Order, the Secretary failed to comply with the mandatory rule making procedure required under the Commonwealth Documents Law (*45 P.S. 1102 et seq.*), the Regulatory Review Act (*71 P.S. 745.1 et seq.*) and the Commonwealth Attorneys Act (*71 P.S. 732-101 et seq.*).

On July 16, 2020, Governor Wolf issued an Order “Directing Targeted Mitigation Measures.” Pursuant to the “Targeted Mitigation Measures,” among other things, restaurants were limited to the lesser of:

- A. 25% of fire code stated maximum occupancy for indoor dining; or
- B. 25 persons including staff.

In issuing his Order, the Governor failed to comply with the mandatory rule making procedure required under the Commonwealth Documents Law (*45 P.S. 1102 et seq.*), the Regulatory Review Act (*71 P.S. 745.1 et seq.*) and the Commonwealth Attorneys Act (*71 P.S. 732-101 et seq.*).

The “closure” Order:

On August 11, 2020, the ACHD conducted an inspection of the Cracked Egg’s restaurant. As the result of its inspection, the ACHD issued a Food Safety Assessment Report. As set forth in the Report, the ACHD ordered that the Cracked Egg’s restaurant be closed “for failure to comply with mask or facial covering guidelines.”

The Report did not cite any failure of the Cracked Egg to comply with published rules or regulations, but instead, relied solely upon the Secretary’s Order of July 1, 2020 “requiring universal face coverings.” By its letter dated August 11, 2020, the ACHD suspended the Cracked Egg’s Health Permit and ordered the Cracked Egg to close. As indicated, the suspension letter asserts that “An inspection of your facility on 8/11/20 indicates an imminent hazard to public health.”

The ACHD initiated the within action to enforce the suspension and closure orders. However, as set forth below, the orders are neither valid nor enforceable. Accordingly, the ACHD's request for an injunction must be denied.

DISCUSSION

A. The failure to comply with the mandatory rule making procedure under the Commonwealth Documents Law (and related regulatory acts) renders the orders invalid and unenforceable:

Commonwealth agencies, including the Pennsylvania Board of Health, may enact rules or regulations **only if** they comply with mandatory rule making procedures. The law is clear that:

The Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act establish **a mandatory, formal rulemaking procedure that is, with rare exceptions, required for the promulgation of all regulations**. See, *Germantown Cab Co. v. Philadelphia Parking Auth.*, 993 A.2d 933, 937 (Pa. Cmwlth. 2010), *aff'd*, 614 Pa. 133, 36 A.3d 105 (2012). Under the Commonwealth Documents Law, an agency must give notice to the public of its proposed rulemaking and an opportunity for the public to comment. Section 201 of the Commonwealth Documents Law, 45 P.S. § 1201; *Borough of Bedford v. Dept. of Env'tl. Prot.*, 972 A.2d 53 (Pa. Cmwlth. 2009). Under the Regulatory Review Act, the agency must also submit its proposed regulation to IRRC for public comment, recommendation from IRRC, and, ultimately, IRRC's approval or denial of a final-form regulation. Section 5 of the Regulatory Review Act, as amended, 71 P.S. § 745.5. The Commonwealth Attorneys Act requires the agency to submit all proposed regulations to the Attorney General and Governor's Office of General Counsel for review of the form and legality. 71 P.S. §§ 732-204(b), -301(10).

Naylor v. Commonwealth, 2012 Pa. Commw. LEXIS 285, 54 A.3d 429, 433-434 (2012) (emphasis added). See also, *Northwestern Youth Services v. Dep't of Public Welfare*, 620 Pa. 140, 66 A.3d 301 (2013).

In *Borough of Bedford v. Commonwealth*, 2009 Pa. Commw. LEXIS 158, 972 A.2d 53 (2009), the Court enumerated the requirements of the Commonwealth Documents Law as follows:

More fully, the requirements for an agency promulgating a regulation include, *inter alia*, (1) providing notice to the public of its intent to promulgate, amend or repeal an administrative regulation; (2) accepting, reviewing and considering written comments regarding the proposed regulation; (3) obtaining legal approval of the proposed regulation; and (4) depositing the text of the regulation with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. Sections 201, 202, 205 and 207 of the Commonwealth Documents Law, 45 P.S. §§1201, 1202, 1205, and 1207.

An agency's failure to comply with the Commonwealth Documents Law and other mandatory rule making procedures causes the rule or regulation to be unenforceable as a matter of law. See, *Germantown Cab Co. v. Philadelphia Parking Authority*, 614 Pa. 133, 36 A.3d 105 (2012). See also, *Transp. Servs. v. Underground Storage Tank Indemnification Bd.*, 2013 Pa. Commw. LEXIS 122, 67 A.3d 142 (2013):

The effect of an agency's failure to promulgate a regulation in accordance with the Commonwealth Documents Law is to have the regulation declared a nullity.

See also, *Naylor v. Commonwealth*, *supra*.

In the present case, the Secretary of Health failed to comply with these mandatory rule making procedures when she "declared" the universal face coverings order. Accordingly, such order is void and unenforceable.

B. The ACHD failed to comply with the mandatory rule making procedure set forth in the Local Health Administration Law:

The ACHD erroneously asserts that it can enforce its own Covid-19 mitigation measures under Article III of the County Code. However, Article III sets forth the County's "Food Safety Program." A review of Article III reveals that there is no mention whatsoever of Covid-19 mitigation measures.

To the extent that the ACHD claims authority under any of its other powers, it is required to follow the mandatory rule making procedure set forth in the Local Health Administration Law. Thus, Section 12011 of the Local Health Administration Law, *16 P.S. 12011 (c)*, provides that:

The board of health shall exercise the rule-making power conferred upon the county department of health by the formulation of rules and regulations for the prevention of disease, for the prevention and removal of conditions which constitute a menace to health, and for the promotion and preservation of the public health generally.

Rules and regulations formulated by the board of health shall be submitted to the county commissioners or, in the case of a joint-county department of health to the joint-county health commission, for approval or rejection. Within thirty (30) days after the receipt of the rules and regulations, the county commissioners or the joint-county health commission, as the case may be, shall give written notice to the secretary of the board of their approval or rejection.

If approved, the rules and regulations shall be certified by the secretary of the board of health, and shall be recorded in a book which shall be kept at the principal office of the county department of health and shall be at all reasonable times open to public inspection. Within ten (10) days after any rule or regulation is approved, it shall be published in at least one and not more than two newspapers of general circulation in each county. Instead of publishing the rule or regulation in full, an abstract thereof or the title thereof, as the county commissioners or joint-county health commission may determine, with reference, in any case, to its place of record, shall be a sufficient publication. No rule or regulation shall become effective sooner than the tenth day after it is approved, except that regulations which

are declared by the board of health to be emergency measures shall become effective immediately upon approval of the county commissioners or the joint-county health commission.

Thus, although the ACHD is empowered to enact rules and regulations under the Local Health Administration Law, such rules and regulations must be approved by the county commissioners and published before they become effective.¹

In *Tid Bid Alley, Inc. v. Erie County*, 103 Pa. Commw. 46, 520 A.2d 70 (1987), The Commonwealth Court held that a county health department's failure to comply with the procedure under *16 P.S. 12011 (c)* rendered its ordinance unenforceable. As stated by the Court:

ECDH also contends that the Erie County Board of Health need not follow the letter of section 11 of the Local Health Administration Law, 16 P.S. § 12011, each time the state changes its health regulations, because the state employs procedural safeguards when promulgating its own regulations.

We cannot agree. The Local Health Administration Law grants the power to formulate health rules and regulations only to the County Board of Health. Section 11 directs that rules and regulations formulated by the Board of Health:

- (1) Shall be submitted to the county commissioners for approval or rejection
- (2) The county commissioners shall give written notice to the board secretary of their approval or rejection within thirty days after receipt
- (3) The board secretary shall certify approved rules and regulations and record them in a book which shall be open at all reasonable times to public inspection

. . . .

ECDH concedes that, when DER promulgated 25 Pa. Code § 151.171 in 1971, ECDH followed none of these steps. We are aware of no authority which permits the circumvention of the express requirements of 16 P.S. § 12011.

¹ This is similar to the procedure which must be followed by Commonwealth agencies under the Commonwealth Documents Law.

See also, *Salada v. Commonwealth*, 156 Pa. Commw. 325, 627 A.2d 261 (1993).

These principles clearly apply in the present case.

CONCLUSION

In conclusion, the universal face coverings order is unenforceable since the Secretary failed to comply with the mandatory rule making procedures under the Commonwealth Documents law, the Regulatory Review Act and the Commonwealth Attorneys Act. Similarly, the ACHD failed to comply with the mandatory rule making procedures under the Local Health Administration Law. Based upon the same, the request for injunction must be denied.

Respectfully Submitted,

/s/ James R. Cooney

JAMES R. COONEY

PA I.D #32706

SY O. LAMPL

PA I.D. #324741

ROBERT O LAMPL

PA I.D. #19809

RYAN J. COONEY

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ALEXANDER L. HOLMQUIST

PA I.D. #314159

Benedum Trees Building
223 Fourth Avenue, 4th Fl
Pittsburgh, PA 15222
(412) 392-0330 (phone)
(412) 392-0335 (facsimile)

CERTIFICATE OF SERVICE

I, James R. Cooney, hereby certify that on the 26th day of January, 2021, a true and correct copy of the **Trial Brief** was served upon Counsel for the Plaintiff by Email as follows:

Vijya Patel, Asst. Solicitor
Michael Parker
Allegheny County Health Department
301 39th Street, Bldg. #7
Pittsburgh, PA 15201
Vijya.patel@alleghenycounty.us
Michael.parker@alleghenycounty.us

/s/ James R. Cooney
James R. Cooney