

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

RICHARD SOUTHWELL, et al.

Plaintiffs

vs.

DANIEL J. MCKEE, et al.

Defendants

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C.A. No. PC2021-05915

**PLAINTIFFS’ MOTION TO ADJUDGE DEFENDANTS’
IN CONTEMPT OF DISMISSAL STIPULATION**

On January 8, 2024, the parties to this action filed a dismissal stipulation, setting forth certain conditions to which the parties agreed. As part of that stipulation, the parties agreed that, “the Rhode Island Department of Health (“RIDOH”) shall seek public comment on a Proposed Permanent Regulation (“PPR”), the substance and form of which has been agreed upon by the parties to this action.” (Exh. A) As we will show, RIDOH did a “bait and switch” and proposed a regulation to which the Plaintiffs did not agree.

Nearly one year ago, in February of 2023, the parties began mediation of this case towards a final resolution. The then attorneys for Defendants from the Attorney General’s office took a “back seat” to the mediation and turned the negotiations over to the Chief Legal Counsel of RIDOH, Kenny Alston.¹ On April 24, 2023, Mr. Alston presented to Plaintiffs the proposed regulation. See attached email (Exh. B) and attached proposed regulation (Exh. C).

¹ The relevance of the turnover in Defense counsel may become evident if they assert that this turnover resulted in some confusion as to what regulation was agreed to. The original four attorneys for the Defendants (Michael Field, Chrisanne Wyrzykowski, Jonathan Whitney, and Morgan Goulet) have all withdrawn from this case, along with a least one other attorney (Etie-Lee Shaub). Mr. Alston also withdrew from the case shortly before the settlement conference of December 12, 2023. There are currently five attorneys which, since December 12, 2023, have either entered their appearance or are involved in the case presently for the defense: Justin Sullivan; Matthew Shaw; Andrea Shea; Claire Richards; and Julia Wyman.

At no time since April 24, 2023, has RIDOH sent Plaintiffs any other proposed regulation. The only other document sent regarding the regulation was a draft “Protocol to Consider Before Requiring Masking in Schools”, 216-RICR-30-30-4, dated May 5, 2023. (Exh. D).

After some delays,² the parties agreed to file a dismissal stipulation. On January 3, 2024, Plaintiffs’ counsel sent an email to Defendants’ counsels with a proposed stipulation which would specifically reference the proposed regulation as agreed to by the parties dating back to April of 2023. (Exh. E). Plaintiff attached the proposed regulation that the parties agreed to. At no time did the Defendants’ attorneys attempt to dispute or correct what they asserted was the agree to regulation. Instead, Defendants’ attorneys objected to attaching the regulation since it was not yet final, and for the first time Defendants’ attorneys stated that the proposed regulation had to be submitted to the “Office of Regulatory Reform” (ORR). (Exh. F). As a result, the parties agreed to include the language in the dismissal stipulation that the regulation was “the substance and form of which has been agreed upon by the parties.”

On January 16, 2024, an attorney for RIDOH sent the undersigned an email indicating that the proposed regulation was being sent to ORR. (Exh. G) He attached a document entitled “Proposed_Masking Regs_draft_5-7-2023”. (Exh. H) At no time had Plaintiffs or their counsel ever seen this proposed regulation before.

Shortly thereafter, Plaintiffs and their attorney discovered that the draft regulation sent to ORR by RIDOH was different than what was agreed to. On January 29, 2024, the undersigned sent an email with both the original draft regulation from April of 2024 and the “new” draft from

² These delays were caused by an August 24, 2023, memorandum sent by RIDOH to all school districts which Plaintiffs asserted implied that there was still in place a statewide mask mandate for K-12 schools. This concern was addressed by Defendants agreeing to send out a clarifying memorandum, as set forth in paragraph 2 of the dismissal stipulation.

May 7, 2024, highlighting the difference. We noted: “It appears sections 4.3.A and B are different. The biggest concern with what you sent to ORR is the inclusion of this language in 4.3.B:

‘An absence of scientific evidence regarding the effectiveness of face masks against a specific pathogen will not prevent the Department from considering a face mask requirement.’”

We asked for an explanation as to the switch. As of the filing of this motion, the only response received was from Attorney Julia C. Wyman, Acting Executive Counsel for RIDOH. (Exh. I), indicating that the Mr. Sullivan was out of town, and she would look into it.

So here the Plaintiffs are. We trusted that the Defendants and their attorneys would propose the regulation which we have been discussing since April of 2023, and what we agreed to. Instead, RIDOH saw fit to change to regulation, and try to sneak it past the Plaintiffs. Most disturbing, as this Court must notice, is that RIDOH is attempting to claim that they can issue a regulation absent any scientific basis or proof. One suspects that this has been RIDOH’s *modus operandi* from the start of this litigation; that the mandatory masking of school children was not about the “science” but of something else. We can all speculate as to what that was.

As for a remedy, RIDOH should be obligated to change the regulation back to what was agreed to. And Plaintiffs should be awarded legal fees for having to bring this motion. Any other remedy we leave to the discretion of the Court.

Respectfully submitted
Plaintiffs,
By their Attorneys,

/s/Gregory P. Piccirilli, Esquire #4582
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CERTIFICATION

I hereby certify that January 30, 2024, this document was electronically submitted using the Court's electronic filing system. Therefore, it is available for reviewing by registered viewers who have signed up to receive notices in this case.

/s/Gregory P. Piccirilli, Esquire #4582