

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JACOB DOYLE CORMAN, III, <i>et</i> <i>al.</i> ,	:	
	:	No.: 294 M.D. 2021
Petitioners,	:	
	:	
v.	:	
	:	
ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH,	:	
	:	
Respondent.	:	

**PETITIONERS' RESPONSE TO RESPONDENT'S APPLICATION
FOR SUMMARY RELIEF**

AND NOW, come Petitioners, by and through their undersigned legal counsel, to file the within Response to Respondent's Application for Summary Relief pursuant to Pa. R.A.P. 1532(b), stating in support thereof as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted in part. It is admitted that Petitioners are asserting that

Respondent's Order was issued in violation of the Regulatory Review Act.

By way of further response, Petitioners are further asserting that Respondent's Order is in violation of the Disease Prevention and Control Law of 1955, 35 P.S. §521.1, et. seq, et. al. By way of further response, Petitioners are further asserting that if The Disease Prevention and Control Law, 35, P.S. §521.5; section 2102(a) of the Administrative Code of 1929, 71 P.S. §532(a); and the Department of Health's Regulation 27.60 – Control Measures, 28 Pa. Code §27.60, are interpreted to provide the Respondent with the authority to issue her Order, as asserted by the Respondent, then such statutory and regulatory authority violates the Non-delegation Doctrine because the Respondent would have unfettered discretion to implement disease control measures.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

**THE AUGUST 31, 2021 “ORDER OF THE ACTING SECRETARY
OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING
FACE COVERINGS IN SCHOOL ENTITIES” DOES NOT
CONSTITUTE A RULE OR REGULATION SUBJECT TO THE
PROVISIONS OF THE REGULATORY REVIEW ACT**

12. Denied. Petitioners deny that the Respondent had the authority to issue her Order under or pursuant to The Disease Prevention and Control Law, the Administrative Code of 1929, or the Department’s regulations. By way of further response, with the passage of the Disease Prevention and Control Law of 1955, the General Assembly first made a policy decision to identify the Department of Health as the agency responsible for health related issues with the Commonwealth; and, secondly, the General Assembly included within the Disease Prevention and Control Law standards to guide and restrain the exercise of administrative functions delegated to the Department of Health. *Protz v. Workers’ Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 652, 161 A. 3d. 827, 834 (2017); also see *Ala. Assoc. of Realtors v. Dep’t of Health and Hum. Servs.*, -- S.Ct. --, 2021 WL 3783142 (2021)

13. Denied. Petitioners deny that the Respondent is entitled to any deference, let alone “strong deference.” By way of further response, the Respondent’s reliance upon *Bethenergy* is misplaced. With respect to the

Respondent's "strong deference" assertion, the Bethenergy Court stated in relevant part as follows:

"Under the 'strong deference' standard, if we determine that the intent of the legislature is clear, that is the end of the matter and we, as well as the agency, must give effect to the unambiguously expressed intent of the legislature. If, however, we determine that the precise question at issue has not been addressed by the legislature, we are not to impose our own construction on the statute as would be necessary in the absence of an administrative interpretation, but review the agency's construction of the statute to determine whether that construction is permissible. *Pennsylvania Electric Company v. Pennsylvania Public Utility Company*. We must give deference to the interpretation of the legislative intent of a statute made by an administrative agency only where the language of that statute is not explicit or ambiguous. 1 Pa.C.S. § 1921(c)(8)." *Bethenergy Mines Inc. v. Com., Dept. of Environmental Protection*, 676 A.2d 711, 715 (1996); citing *Pennsylvania Electric Company v. PPUC*, 166 PaCmwlth, 413, 648 A.2d 63 (1994), petition for allowance of appeal denied, 542 Pa. 680, 668, A.2d 1141 (1995). Also, see add supreme court citation.

14. Denied. The Respondent's interpretation of section 521.5 is denied as an incorrect interpretation and conclusion of law. By way of further response, the language of section 521.5 is clear and unambiguous in that it expressly restrains the Respondent's exercise of its administrative functions.

15. Denied. The Respondent's interpretation of sections 532(a) and 1403(a), 71 P.S. §532(a), 71 P.S. §1403(a), of the Administrative Code of 1929 is denied as an incorrect interpretation and conclusion of law. By way

of further response, if sections 532(a) and 1403(a) Administrative Code of 1929, are interpreted to provide the Respondent with the authority to issue her Order, as asserted by the Respondent, then such sections directly violate Section 521.5 of the Disease Prevention and Control Law of 1955, and the Non-delegation Doctrine because the Respondent would have unfettered discretion to implement disease control measures.

16. Denied. The Respondent's interpretation of sections 532(a) and 1403(a), 71 P.S. §532(a), 71 P.S. §1403(a), of the Administrative Code of 1929 is denied as an incorrect interpretation and conclusion of law. By way of further response, the exercise of the Respondent's statutory and regulatory authority must, at all times, be in accordance with applicable law, including, but not limited to, The Disease Prevention and Control Law of 1995, the Regulatory Review Act, the Non-Delegation Doctrine, and the regulations approved by the Department of Health in accordance with the Regulatory Review Act. The Respondent's Order violates all of the above.

17. Denied. The Petitioners deny the averments contained in Paragraph 17 of Respondent's Application for Summary Relief, as stated. By way of further response, Regulation 27.60 was promulgated in accordance with applicable law, including, but not limited to, The Disease

Prevention and Control Law, 35 P.S. §521.1, et. seq, et. al., and the Regulatory Review Act, 71 P.S. § 745.1, et seq., at al.

18. Denied. The Respondent's interpretation of Paragraph (b) of Regulation 27.60 is denied, as stated. By way of further response, pursuant to section 521.5 – Control measures, 35 P.S. §521.5, the disease must be a disease "which is subject to isolation, quarantine, or any other control measure ..."; and then, and only then, does the Respondent have the authority to "*carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.*" By way of further response, the Respondent's authority is limited to the selection of one or more control measures that are contained within existing regulations. The Respondent does not have the unfettered authority to create a new control measure outside of the regulatory review process.

19. Denied. The Respondent's interpretation of Regulation 27.60 is denied as an incorrect interpretation and conclusion of law. By way of further response, Petitioners believe that the language of Regulation 27.60 is clear and unambiguous and that it does not provide the Respondent with the authority to issue her Order. However, if the Respondent's interpretation of Regulation 27.60 is considered a reasonable interpretation, such a conclusion would establish the language of Regulation 27.60 to be

ambiguous and open to differing interpretations. If the regulation's language is ambiguous, the agency that promulgated and approved the ambiguous regulation, the Department of Health in this case, does not have the authority to interpret its own ambiguous language or regulation.

20. Denied. The IRRC's comments speak for themselves. By way of further response, to the extent that Respondent interpretation of those comments is intended as a legal basis for the Respondent's Order, the same are denied. By way of further response, the IRRC does not possess the authority to grant the Respondent unfettered discretion to implement disease control measures.

21. Denied. The Respondent's interpretation of the IRRC's comments are denied. By way of further response, to the extent that Respondent interpretation of those comments is intended as a legal basis for the Respondent's Order, the same are denied. By way of further response, the IRRC does not possess the authority to grant the Respondent unfettered discretion to implement disease control measures.

22. Admitted.

23. Denied. The existing regulations do not provide the Respondent with the authority to issue her Order. By way of further response, it is admitted that the Disease Prevention and Control Law provides the

Department of Health with the authority to promulgate regulations in accordance with applicable law, including, but not limited to, The Disease Prevention and Control Law of 1995, the Regulatory Review Act, the Non-Delegation Doctrine, and the Regulatory Review Act. By way of further response, there is no existing regulation, including Regulation 27.60 that provides the Respondent with any authority to issue her Order.

24. The averments contained in Paragraph 24 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

25. The averments contained in Paragraph 25 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

26. The averments contained in Paragraph 26 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied.

27. Admitted.

28. Denied. For all of the reasons previously stated herein, which are incorporated herein by reference, Petitioners deny the averments contained in Paragraph 28 Respondent's Application for Summary Relief.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an Order denying Respondent's Application for Summary Relief and any other relief the Court deems appropriate.

THE AUGUST 31, 2021 "ORDER OF THE ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING FACE COVERINGS IN SCHOOL ENTITIES" DOES NOT VIOLATE THE PRINCIPLES GOVERNING THE DELEGATION OF ADMINISTRATIVE AUTHORITY

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted. The Respondent correctly quotes part of the *Gilligan* decision. By way of further response, the *Gilligan* as follows:

"In evaluating the standards implicit in this mandate, we are not unmindful of the admonition in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division*, 476 Pa. 302, 310, 382 A.2d 731, 735 (1978): The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined." *Gilligan at 96-97.*

33. Admitted in part. It is admitted that with the passage of the Disease Prevention and Control Law of 1955, the General Assembly first made a policy decision to identify the Department of Health as the agency responsible for health related issues within the Commonwealth; and, secondly, the General Assembly included within the Disease Prevention and Control Law standards to guide and restrain the exercise of administrative functions delegated to the Department of Health. *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 652, 161 A. 3d. 827, 834 (2017); also see *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, -- S.Ct. -- , 2021 WL 3783142 (2021).

34. Denied. The Respondent's interpretation of section 521.5 – Control Measures, 35 P.S. §521.5, is an incorrect interpretation and conclusion of law. By way of further response, the disease must be a disease “which is subject to isolation, quarantine, or any other control measure ...”; and then, and only then, does the Respondent have the authority to “*carry out the appropriate control measures in such manner and in such place as is provided by rule or regulation.*” By way of further response, the Respondent's authority is limited to the selection of one or more control measures that are contained within existing regulations. The

Respondent does not have the unfettered authority to create a new control measure outside of the regulatory review process.

35. Denied. The averments contained in Paragraph 35 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

36. Denied. The averments contained in Paragraph 36 of Respondent's Application for Summary Relief are conclusions of law and to the extent that such conclusions are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

37. Denied. To the extent that the averments contained in Paragraph 37 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth. By way of further response, the Respondent's reliance upon *Gilligan* is misplaced. The *Gilligan* court clearly states as follows:

“In evaluating the standards implicit in this mandate, we are not unmindful of the admonition in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division*, 476 Pa. 302, 310, 382 A.2d 731, 735 (1978): The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined.” *Gilligan at 96-97*.

38. Denied. To the extent that the averments contained in Paragraph 38 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

39. Denied. To the extent that the averments contained in Paragraph 39 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

40. Denied. To the extent that the averments contained in Paragraph 40 of Respondent’s Application for Summary Relief are intended to set forth a legal basis for the Respondent’s Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

41. Admitted in part and denied in part. It is admitted that the Respondent's responses to a communicable disease are limited to those provided for under existing rules or regulations. By way of further response, to the extent that the averments contained in Paragraph 41 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

42. Denied. To the extent that the averments contained in Paragraph 42 of Respondent's Application for Summary Relief are intended to set forth a legal basis for the Respondent's Order, the same are denied for all of the reasons previously set forth which are incorporated herein by reference as if fully set forth.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an Order denying Respondent's Application for Summary Relief and any other relief the Court deems appropriate.

Respectfully submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, L.L.P.**

By: /s/ Thomas E. Breth
Thomas E. Breth
PA. I.D. No. 66350
tbreth@dmkcg.com
Thomas W. King, III
PA. I.D. No. 21580
tking@dmkcg.com
Ronald T. Elliott
PA. I.D. No. 71567
relliott@dmkcg.com
Jordan P. Shuber
PA. I.D. No. 317823
jshuber@dmkcg.com

Counsel for Petitioners and *Special
Counsel to the Amistad Project of
the Thomas More Society.*

CERTIFICATE OF COUNSEL

I certify that this filing complies with provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania Care Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Thomas E. Breth
Thomas E. Breth, Esquire
*Counsel for Petitioners and Special
Counsel to the Amistad Project of
the Thomas More Society.*