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District Court, Southern District, Leonard v Dutchess County Dep't of Health

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SEPARATION OF POWERS

N.Y. CONST. art. III:

The legislative power of this state shall be vested in the senate and assembly.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Leonard v. Dutchess Cty. Dep't of Health[1]
(decided July 11, 2000)

Plaintiffs are restaurateurs, owners of bowling centers, and members of the National Smokers' Alliance,[2] brought an action against the Dutchess County Department of Health, its commissioner, the Dutchess County Board of Health (hereinafter "Board"), and its board members in their official capacities, seeking declaratory[3] and injunctive relief,[4] as well as attorneys fees.[5] Plaintiffs alleged that the promulgation of certain smoking regulations by defendants exceeded their authority,[6] denied plaintiffs equal protection,[7] and their right to free speech,[8] and

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[1] 105 F. Supp. 2d 258 (S.D.N.Y. 2000).

[2] *Id.* at 260.

[3] 28 U.S.C. § 2201(a) (2000) provides in pertinent part:

> [A]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id.

[4] 28 U.S.C. § 2202 (2000) provides in pertinent part: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." *Id.*

[5] 42 U.S.C. § 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of . . . § 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." *Id.*

[6] *Leonard*, 105 F. Supp. 2d at 263. *See* N.Y.C.P.L.R. § 7803 (McKinney 2001). This allows parties to bring proceedings against a state administrative body or officer acting in excess of jurisdiction.

[7] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges

violated their civil rights under the Federal[9] and New York State Constitutions.[10] The court enjoined the Board from enforcing its smoking regulations.[11]

Following public hearings, the Board enacted regulations prohibiting smoking in restaurants without bars.[12] In addition, the smoking regulations enacted by the Board provided for an exception to the ban with respect to "private social functions," which included weddings, parties and similar gatherings.[13] During a public hearing, opponents of the regulations expressed concerns that the regulations would result in financial hardship, citing potential loss of business to nearby counties, as well as the expense of improvements necessary to comply with the regulations.[14] However, there was no discussion regarding the scientific evidence related to the health risks involved with smoking relied upon by the Board.[15] Shortly thereafter, at a closed board meeting, the Board discussed the issues raised by the public hearing and referred the matter to its Tobacco Committee for review and

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or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[8] U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (Supreme Court holding that freedom of speech is a fundamental, personal right and liberty protected from impairment by the states by the due process clause of the 14th Amendment).

[9] 42 U.S.C. § 1983 provides for liability to the injured party at law and in equity for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws . . . . " *Id.*

[10] N.Y. CONST. art. I § 11. Article I provides in pertinent part: "No person shall be denied the equal protection of the laws of this state . . . by the state or any agency . . . . " *Id.*

[11] *Leonard,* 105 F. Supp. 2d at 260.

[12] *Id.* at 264. While the regulations expressly ban smoking in restaurants without bars, the code permits smoking in restaurants with bars in and around the bar area, sports arenas, bingo halls, and bowling centers, provided that patrons may wait in an area other than the bar, the bar area is separated from all other areas by floor-to-ceiling partitions and is ventilated to prevent environmental tobacco smoke from entering other areas of the building. *Id.* at 264-65.

[13] *Id.* at 266.

[14] *Id.*

[15] *Id.*

recommendation regarding the public testimony.[16] Upon further review of the public testimony, the Tobacco Committee proposed an additional resolution banning smoking in the bar areas of restaurants to protect the health of workers in those areas.[17] However, the Board declined to pass the recommended resolution.[18]

Plaintiffs argued that, as an administrative agency charged with enacting regulations involving public health only, the Board exceeded its authority when it considered social, economic, and privacy issues in the formulation of its smoking regulations.[19] Although the plaintiffs raised additional issues, including equal protection and free speech claims, the court addressed only the procedural issue of jurisdiction and substantive issue of the separation of powers.[20]

Initially, the court addressed the separation of powers issue by defining the limits of an administrative agency authority.[21] Although New York Public Health Law delegates authority to boards of health to "formulate, promulgate, adopt and publish rules, regulations, orders and directions for the security of life and health,"[22] regulations enacted by a board are subject to review to ensure conformity with the requirements of state and federal constitutions.[23] Furthermore, in *Whalen*,[24] the separation of powers doctrine was set forth by the New York Court of Appeals, whereby legislative delegation of power to administrative agencies is permissible, provided that the agency acts within the bounds of reasonable safeguards and standards to administer the law as enacted by the Legislature.[25] However, the legislature "may not

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[16] *Leonard*, 105 F. Supp. 2d at 266.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 263.
[20] *Id.* at 261-62.
[21] *Leonard*, 105 F. Supp. 2d at 262-63.
[22] *Id.* at 262, (quoting N.Y. PUB. HEALTH LAW § 347).
[23] *Id.* at 262.
[24] In the Matter of Levine v. Whalen, 39 N.Y.2d 510, 515, 349 N.E.2d 820, 821, 384 N.Y.S.2d 721,723 (1976).
[25] *Id.*

pass on its law-making functions to other bodies."[26] Additionally, an administrative agency may not create new law.[27]

The New York Court of Appeals in *Boreali v. Axelrod*, held that a regulation enacted by an administrative agency will be invalid when it uses a statute "as a basis for drafting a code embodying its own assessment of what public policy ought to be."[28] Even if an administrative agency acts within its authority, a court may deem its regulation invalid.[29] In *Co-Pilot Enters., Inc. v. Suffolk County Dep't of Health*, the court struck down a regulation promulgated by the Department of Health regarding the placement of cesspools and drinking water wells on private, single-dwelling lots, because compliance with the distance requirements in the regulation would deprive the property owner use of his property.[30] This constituteted a taking without compensation in violation of the Fifth Amendment of the United States Constitution.[31] In order to withstand judicial review an administrative agency regulation must be promulgated within the scope of the enabling statute, must not create new law, and must be in conformity with the federal and state constitutions.[32]

The court in *Leonard* looked to the decision in *Boreali*, where the New York Court of Appeals established factors to determine whether an administrative agency acted outside the scope of its authority.[33] The *Boreali* Court noted that where a regulation contains an exemption, without foundation in considerations that the agency is charged to administer, the agency will be deemed to be usurping the role of the legislature and acting

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[26] *Id. See* N.Y. CONST. art III § 1. Article III provides in pertinent part: "The legislative power of this state shall be vested in the senate and assembly." *Id.*

[27] Boreali v. Axelrod, 71 N.Y.2d 1, 9, 517 N.E.2d 1350, 1353, 523 N.Y.S.2d 464, 468 (1987).

[28] *Id.*

[29] Co-Pilot Enters., Inc. v. Suffolk Co. Dep't of Health, 38 Misc. 2d 894, 896, 239 N.Y.S.2d 248, 250 (Sup. Ct. 1963) (holding that the Suffolk County Board of Health had the authority to adopt standards regulating sewage systems and private well water. However, regulations were held invalid and unenforceable against plaintiff). *Id.*; at 900, 239 N.Y.S.2d at 253.

[30] *Id.*

[31] *Id.*

[32] *Leonard*, 105 F. Supp. 2d at 264.

[33] *Boreali*, 71 N.Y.S.2d at 11-13, 517 N.E.2d at 1354-56, 523 N.Y.S.2d at 469-71.

outside the scope of its authority.[34] In *Boreali*, the Public Health Counsel ("PHC") "carved out exemptions" in its smoking regulations for social and economic reasons.[35] Although the enabling statute at issue in *Boreali* was constitutional, the Court held that the PHC exceeded its authority by "creating its own comprehensive set of rules without the benefit of legislative guidance," rather than implementing laws enacted by the legislature.[36] Moreover, the Court also noted that an administrative agency acted outside the scope of its authority when the agency promulgated regulations in areas where the legislature tried and failed to reach agreement.[37] The PHC assumed the role of legislature by formulating smoking regulations which encompassed issues yet unresolved by the legislature.[38] As a result of the PHC's actions, the Court struck down those regulations.[39] The Court further noted that failure to consider special expertise or technical competence in the formulation of regulations, coupled with exemptions, may result in a determination by the court that the regulation is outside the authority of the agency.[40] In view of the fact that the PHC did not involve health experts in the formulation of its smoking regulations, and provided for exemptions not based on public health issues, the court asserted that the agency acted outside the scope of its authority.[41]

Conversely, in the dissent, Justice Bellacosa stated that the legislature delegated broad authority to the PHC, which fostered flexibility and necessarily enabled an objective administrative agency to regulate for the public health "free from the sometimes paralyzing polemics associated with the legislative process."[42] In

[34] *Id.* at 11-12, 517 N.E.2d at 1354-55, 523 N.Y.S.2d at 469-70.

[35] *Id.* at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 (reasoning that the PHC built a regulatory scheme based on its own conclusions regarding health and cost and thus operated "outside its proper sphere of authority").

[36] *Id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

[37] *Id.*

[38] *Boreali*, 71 N.Y.S.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

[39] *Id.* (noting that "[m]anifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends").

[40] *Id.* at 14, 517 N.E.2d at 1356-57, 523 N.Y.S.2d at 471.

[41] *Id.*

[42] *Id.* at 17-18, 517 N.E.2d at 1358-59, 523 N.Y.S.2d at 473-74 (Bellacosa, J., dissenting).

addition, Justice Bellacosa contended that the record showed the PHC carefully and narrowly exercised the authority granted to it by the legislature and did not overstep its bounds.[43]

District courts within the Second Circuit have also struck down similar regulations where an administrative agency considered non-health factors in formulating smoking regulations.[44] In *Nassau Bowling Proprietors Ass'n v. Nassau County*,[45] the court held that an exemption from smoking regulations for work and leisure environments, as well as consideration of economic concerns, were not health-related concerns and thus, have no bearing on the formulation of administrative regulations.[46] The court reasoned that providing exemptions for private social functions would not protect the health of non-smokers in attendance, since if smoking were permitted and not restricted to a confined, well-ventilated area, all those who attend these functions would be exposed to second-hand smoke.[47] Furthermore, the court also noted that in order to formulate regulations with respect to these issues, distinctions must be made between competing social interests. Therefore, elected officials must resolve these issues and determine whether private social functions should be treated the same as parties held in private homes.[48] Determinations of such distinctions fall outside the scope of an agency charged with the protection of public health.[49]

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[43] *Boreali*, 71 N.Y.S.2d at 19, 517 N.E.2d at 1359, 523 N.Y.S.2d at 474 (Bellacosa, J., dissenting) (noting that "[n]o decision of this court and no relevant administrative law principle have been found where general rule-making power was nullified by a court because exceptions to the rule were also promulgated by the regulating entity in response to ancillary social, economic or even policy factors").

[44] *Leonard*, 105 F. Supp. 2d at 265.

[45] Nassau Bowling Proprietors Ass'n v. Nassau County, 965 F. Supp. 376 (E.D.N.Y. 1997).

[46] *Id.* at 380. *See* Justiana v. Niagara Dep't of Health, 45 F. Supp. 2d 236 (W.D.N.Y. 1999) (due to serious economic impact of smoking regulations, agencies must take into account non-health considerations).

[47] *Id.*

[48] *Id.* (holding that balancing of competing social interests unrelated to health is a function of elected officials).

[49] *Id.*

Similarly, in the instant case, a review of the public transcripts revealed that the exemptions to the regulations made by the Board were based on non-health related issues, such as social and economic costs.[50] A review by the court of the transcripts of the next regular Board meeting revealed that the Board viewed itself as singularly qualified to consider all the issues raised by the proposed smoking regulations.[51] However, the Board had submitted the proposed regulations to the Tobacco Committee for review and comment.[52] Nevertheless, the court reasoned that as further evidence of acting outside its scope of authority, the Board declined to pass a recommended resolution banning smoking in bar areas to protect the health of workers in those areas.[53] The court maintained that the private function exception conflicted with the Board's stated purpose of protecting people of all ages from the dangers of second-hand smoke.[54] The court held this exception was based upon privacy issues, which it deemed to be the province of the legislature.[55] By exempting certain types of businesses and private functions from the general smoking ban, the court concluded that the Board merely weighed the goal of promoting health against the social costs and reached a compromise without the benefit of legislative guidance.[56]

In addition to considering non-health concerns, courts have held that administrative regulations more restrictive than the laws enacted by the state legislature constitute a violation of legislative authority.[57] Such courts reasoned that the primary function of

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[50] *Leonard*, 105 F. Supp. 2d at 266.

[51] *Id.* at 266. Since there were no minutes or notes, the court was enable to determine what factors were expressly discussed by the Board's Tobacco Committee in drafting its smoking regulations. *Id.*

[52] *Id.* "The exemption likely was based on privacy concerns, but this kind of balancing is within the province of the legislature, not an administrative agency." *Id.* (citing *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. 2d at 380). *Id.*

[53] *Id.* at 267.

[54] *Id.* To highlight the non-health related considerations made by the Board in adopting the private function exception, the *Leonard* court stated: "[T]he nature of the risk [of exposure to second-hand smoke] is unaffected by who makes the seating arrangements." *Id.*

[55] *Leonard*, 105 F. Supp. 2d at 266.

[56] *Id.* at 264.

[57] *Nassau Bowling Proprietors Ass'n*, 965 F. Supp. at 380.

administrative agencies is "interstitial rule-making."[58] Where a regulation promulgated by an administrative agency does more than "fill-in the details of broad legislation describing the over-all policies to be implemented," that agency exceeded its authority.[59] Similarly, the Board in the instant case, promulgated rules more restrictive than the laws enacted by the state legislature.[60] In addition, courts have held that an administrative agency lacks the authority to promulgate regulations where the legislature has tried and failed to pass legislation.[61] In the instant case, the court held that because the Dutchess County legislature unsuccessfully attempted to pass anti-smoking legislation, the Board impermissibly "interceded to perform a legislative function the County legislature could not, or would not, perform."[62]

Finally, another important issue that the court addressed was whether special expertise or technical competence was involved in the formulation of the regulations enacted by an administrative agency.[63] The *Boreali* Court held that the utilization of special expertise in formulation of smoking regulations is an essential part of an administrative agency's duty to properly implement legislation.[64] Although the court, in the instant case, determined that no expertise was required, the court found the Board exceeded its authority on other grounds.[65] The

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[58] *Id.* (noting that "[u]nlike the Board, which has authority to deal only with health issues, a legislature may consider issues as diverse as economic interests and privacy concerns, in addition to health issues"). *See also* Justiana, 45 F. Supp. 2d at 245. "By adopting regulations that are substantially more restrictive than existing legislation, the Board went beyond interstitial rule-making and into the realm of legislating." *Id.*

[59] *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471 (holding that the PHC's actions were "a far cry from interstitial rule-making that normally typifies administrative regulatory activities").

[60] *Leonard*, 105 F. Supp. 2d at 267.

[61] *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

[62] *Leonard*, 105 F. Supp. 2d at 268

[63] *Id.* "[A]lthough indoor smoking is unquestionably a health issue, no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here." *Id.* (quoting *Boreali*, 71 N.Y.2d at 13-14, 517 N.E.2d at 1356-57, 523 N.Y.S.2d at 471).

[64] *Boreali*, 71 N.Y.2d at 14, 517 N.E.2d at 1356-57, 523 N.Y.S.2d at 471.

[65] *Leonard*, 105 F. Supp. 2d at 268. "In sum, the Board, by enacting smoking regulations which necessarily required a balancing of economic, social and privacy interests with health interests, has exceeded its authority as an

court granted plaintiffs' motion for summary judgment and denied defendants' cross-motion and held that the Dutchess County Board of Health ("Board"), as an administrative agency, exceeded its authority by enacting smoking regulations which required a balancing of non-health interests, such as economic, social, and privacy interests with health interests in violation of the state principal of separation of powers.[66]

In cases involving the authority of an administrative agency to promulgate smoking regulations, the differences between federal and state law are indistinguishable. In fact, both federal and New York State courts rely upon the separation of powers doctrine as set forth in *Boreali*, which analyzed a non-delegation claim under a four-part test.[67]

Although the separation of powers doctrine is neither expressly provided for in the United States Constitution, nor required to be followed by states,[68] New York State is similar to the federal model.[69] Legislative power is vested in the Senate and the Assembly.[70] Like the federal system, the state legislature

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administrative agency in violation of the state principle of separation of powers." *Id.*

[66] *Leonard*, 105 F. Supp. 2d at 268.

[67] *See Justiana*, 45 F. Supp. 2d at 243-45. The court began its analysis with the Court of Appeals decision in *Boreali*, and held the administrative agencies smoking regulations invalid, stating, "[i]n this context, even where the state legislature has provided some guidance for the restriction of smoking, the enactment of further substantive restrictions is a task properly left to the legislative arm of government." *See Boreali*, 71 N.Y.2d at 11, 517 N.E.2d at 1354, 523 N.Y.S.2d at 469. "In promulgating its antismoking rules, the PHC transgressed the line that separates administrative rule making from legislating and thereby exceeded its statutory powers." *Id. See Nassau Bowling Proprietors* 965 F. Supp. at 380. "In sum, the Board—in enacting an ordinance which includes significant provisions based on non-health related considerations—exceeded its authority as an administrative, as distinct from a legislative body." *See also Leonard*, 105 F. Supp. 2d at 264. "The *Boreali* court set forth several factors which, taken together, demonstrated that the PHC "improperly assumed for itself the open-ended discretion to choose ends . . . which characterizes the elected Legislature's role in our system of government." *Id.*

[68] Parcell v. Kansas, 468 F. Supp. 1274, 1277 (D.Kan. 1979). "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Id.*

[69] *Leonard*, 105 F. Supp. 2d at 263.

[70] N.Y. CONST. art III § 1.

cannot pass its law-making functions to other governmental bodies.[71] In both the federal and New York State system, administrative authority is limited by an enabling statute, which provides the boundary for administrative action.[72]

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[71] *Whalen*, 39, N.Y.2d at 515, 349 N.E.2d at 821, 384 N.Y.S.2d at 723. *See* Boreali, 71 N.Y.2d at 9, 517 N.E.2d at 1353, 523 N.Y.S.2d at 468. (citing Wayman v Southard, 10 Wheat [U.S. 23] 1, 42-3).

[72] *Boreali*, 71 N.Y.2d at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466. "While the legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative body." *Id.*

THE SUPREME COURT AND LOCAL GOVERNMENT LAW: THE 1999-2000 TERM

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