New York State Nurses Assn. v New York State Dept. of Health
2020 NY Slip Op 31588(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 153033/2020
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK, CIVIL TERM, PART IV

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NEW YORK STATE NURSES ASSOCATION,

Petitioner

Decision and Order

Index No. 153033/2020

-against-

NEW YORK STATE DEPARTMENT OF HEALTH and HOWARD A. ZUCKER, NEW YORK STATE COMMISSIONER OF HEALTH, in his official capacity,

Respondents

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HON. FRANK P. NERVO J.S.C:

This action stems from the COVID-19 pandemic and its effect on healthcare workers. Petitioner, a professional association comprising healthcare workers, seeks, inter alia, a writ of mandamus directing the New York State Department of Health ("DOH") rescind its guidance regarding healthcare workers' return to work prior to the expiration of a quarantine order. Petitioner further contends that a conflict exists between the COVID-19 Paid Sick Leave Law ("Paid Sick Leave Law") and the return to work guidance from the DOH, and thus the guidance must be rescinded. Finally, petitioner seeks to compel DOH to provide appropriate personal protective equipment ("PPE") to healthcare workers treating COVID-19 patients or working in potentially contagious environments.

Respondents contend that this matter is not justiciable, petitioner lacks standing, and no conflict exists between the Paid Sick Leave Law and the DOH return to work guidance. On the merits, respondents argue that the agency's determination is entitled to deference and was not arbitrary nor capricious.

The Court begins with jurisdiction and standing, as required. Challenges to justiciability and standing "must be considered at the outset of any litigation" (*Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d 761 [1991]). The burden to establish standing rests with the party seeking judicial review (*id.*). This inquiry considers the doctrine of separation of powers, and the Court's "properly limited role ... in democratic society," with policy considerations of access to justice and the adjudication of disputes on the merits (*Warth v. Seldin*, 422 US 490, 498 [1975]; *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d at 769).

It is beyond cavil that the exercise of duties, allocation of PPE resources, and day to day functions that petitioner seeks to challenge are questions of judgment. The bedrock principle of the doctrine of separation of powers provides that each branch of government should be free to discharge its lawful duties without interreference from either of the other two

branches *(Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 NY2d 233, 239 [1984]). "The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review" (*id.*). Furthermore, as a matter of policy, where the Court is ill-equipped to take responsibility for questions, and another branch of government is better suited, the matter is nonjusticiable (*Roberts v. Health and Hospitals Corp.*, 87 AD3d 311 [1st Dept 2011]; Jones, 45 N.Y.2d at 408-409, 408 N.Y.S.2d 449, 380 N.E.2d 277). "That an issue may be one of 'vital public concern' does not entitle a party to standing" (*Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 NY2d at 769). Simply put, this Court's review of Executive and Legislative action is done to "protect rights, not make policy" (*Campaign for Fiscal Equity v. State of New York*, 8 NY3d 14, 28 [2006]).

Insomuch as the legislature has conferred upon the Department of Health Commissioner ("the Commissioner") and the Public Health and Health Planning Council (PHHPC) the power to "deal with any matters affecting the security of life and health or preservation and improvement of public health in the State of New York," "designate the communicable diseases which are

dangerous to the public health" (NY Pub. Health Law §§ 224 and 225), and determine the appropriate isolation/quarantine procedures for individuals who have contracted the communicable disease (10 NYCRR §§ 2.1 and 2.2 et. seq.), and insomuch as the Governor has temporarily modified such statute to allow the Commissioner to designate a disease as dangerous to public health without public hearing (Executive Order 202; Executive Order 202.28), the Commissioner's decision determining the appropriate isolation period before health care workers may return to work, is beyond judicial review (*Roberts v. Health and Hospitals Corp.*, 27 AD3d at 325).

While the Court is most sympathetic to the position of petitioner's members and other healthcare workers, the law does not permit the Court to substitute its judgment for that of an administrative agency, such as respondent DOH. Petitioner's claim that the Commissioner's guidelines have violated their right to a safe work environment does not preempt the lawful exercise of discretion by the Executive and Legislative branches (*id.*; *McKechnie v. New York City Tr. Police Dept. of N.Y. City Tr. Auth.*, 130 A.D.2d 466, 468 [1987]).

As an alternative holding and assuming, arguendo, that petitioner has standing and the matter before the Court is justiciable, respondents' return to work guidance is not

arbitrary nor capricious. There is no evidence that the DOH acted in bad faith or without consideration of the present facts and circumstances. The evidence submitted by the DOH demonstrates that its employees in public health and medicine weighed the alternatives, and reached their determination on isolation and return to work guidelines for health care workers rationally. It is not the Court's role to weigh the desirability of this action by the DOH or to choose and order some alternative (*Apan v. Koch*, 75 NY2d 561, 570 [1990]; *see also* R*oberts v. Health and Hospitals Corp.*, 27 AD3d at 327).

Petitioner's mandamus claims must likewise fail. It is well settled that mandamus lies to enforce a clear legal right, enforce the performance of a ministerial duty, and sounds in equity (*see e.g. Economy Holding Corp v. Barry*, 234 AD 214, 217-18 [1st Dept 1932]). However, where mandamus is sought to compel an act within the officer's discretion or judgment, it cannot lie (*People ex rel. Hammond v. Leonard*, 74 NY 443 [1878]). Mandamus is also improper where the petitioner has an alternative remedy at law (*Towers Mgmt. Corp. v. Thatcher*, 271 NY 94 [1936]).

The actions sought by petitioner amount to a plea to substitute NYSNA's plan or own discretion for that of respondents'. This is not the proper subject of mandamus.

Furthermore, petitioner NYSNA has an alternative remedy at law, an action, or actions, against the individual hospitals and healthcare providers it alleges have violated the return to work directive or failed to provide PPE in accordance with applicable standards, guidance, and regulations.

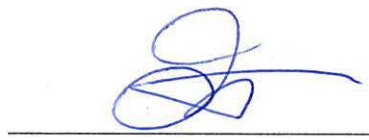
Accordingly, this Court has no authority to substitute its own judgment for that of respondent, nor is it in a position to oversee such exercise of discretion (*People ex rel. Lehmaier v. Interurban St. Ry. Co.*, 177 NY 296, 301 [1904]). Put another way, petitioner does not have standing, the Court does not have jurisdiction over the DOH based on the complaints made, and respondents' action was not arbitrary nor capricious and is founded on a rational basis. It is, therefore

ORDERED that petitioner's motion is denied in its entirety; and it is further

ORDERED that respondents' cross-motion to dismiss is granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

DATED: MAY 28, 2020



HON. FRANK P. NERVO, J.S.C.