STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, S.C. SUPERIOR COURT

RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE; RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION; ANN MARIE MUMM; and DANIEL WEISMAN,	:	
Plaintiffs	:	
	:	
v.	:	**C.A. NO. PC 08-5696**
	:	
DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island; and JEROME WILLIAMS, in his capacity as Director of the RHODE ISLAND DEPARTMENT OF ADMINISTRATION,	:	
Defendants	:	

MOTION TO HOLD DEFENDANTS IN CONTEMPT
AND/OR MOTION FOR TEMPORARY RESTRAINING ORDER

I. The Court's September 15 Ruling

On March 27, 2008, Governor Carcieri issued Executive Order 08-01, which states that the Department of Administration ("Department" or "DOA") shall require that all persons and businesses, including grantees, contractors and their subcontractors and vendors doing business with the State of Rhode Island register with and utilize the E-Verify program. Four months later, in response to Executive Order 08-01, the Rhode Island Department of Administration's Division of Purchases sent notices to persons and businesses on the State of Rhode Island Vendor Registration List. The notices require all businesses on the Vendor Registration List to certify that they and their subcontractors have registered with and will utilize E-Verify. Plaintiffs all received a notice from the Department of Administration regarding the Executive

Order. Plaintiffs filed a motion for a temporary restraining order enjoining the Defendants from requiring state contractors to register with and utilize E-Verify.

This Court ruled on the motion for a temporary restraining order on September 15, 2008. In its decision this Court found it

> more likely than not that the APA was illegally circumvented by the DOA when it imposed the E-Verify requirement contained in the Executive Order along with a certification protocol. The DOA is subject to the APA and must adhere to its notice and public input requirements before promulgating a rule. It cannot seriously be argued that E-Verify is not a rule as defined under the APA.
>
> See *RI Coalition Against Domestic Violence, et als., v. Carcieri*, No. 08-5696, 2008 R.I. Super. Lexis 116, * 6-7.

This Court specifically held that "in implementing the Executive Order, DOA should have promulgated an E-Verify rule ***utilizing the notice and public comment requirements set forth in the APA."*** Id. at * 7 (emphasis added).

In issuing its decision, the Court explained that a rule could "presumably" be promulgated by the DOA "in a matter of weeks," and therefore a temporary restraining order was unnecessary.[1] However, not satisfied with this timeframe dictated by the APA's normal rule-making process, the DOA has instead, more than one month later, adopted a rule unilaterally. It has done so by audaciously, and improperly, making use of the APA's "emergency" provision under R.I.G.L. §42-35-3(b). The agency's emergency rule filing is not only in contempt of the ruling of this Court, it is itself yet another clear violation of the APA. Because such a circumvention of the law and this Court's order should not be allowed to stand, Plaintiffs request an appropriate order of relief from this Court.

[1] Plaintiffs respectfully submit, for many of the reasons described *infra*, that rule-making under the APA is not the simple *pro forma* approach that a quick reading of the Court's opinion might suggest. In any event, as the opinion implies, the APA does set reasonable time periods that are designed to promote public input to state administrative agencies without undue delay.

II. The APA's "Imminent Peril" Exception Clearly is Inapplicable

R.I.G.L. §42-35-3(b) provides:

> (b) If an agency finds that an ***imminent peril*** to the public health, safety, or welfare requires adoption of a rule upon less than thirty (30) days' notice, and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule so adopted may be effective for a period of not longer than one hundred twenty (120) days renewable once for a period not exceeding ninety (90) days, but the adoption of an identical rule under subdivisions (a)(1) and (a)(2) is not precluded (emphasis added).

By its own terms, this provision is narrowly crafted and meant for true "emergencies," limited as it is to situations where there is an "imminent peril" to the public.

The DOA cannot seriously claim that failure to go through the rule-making process of the APA to implement the E-Verify program constitutes an "imminent peril" to the public. The program at issue is a ***federal program that is voluntary at the federal level***. Requiring vendors to make use of it is not necessary in any way to comply with any federal or state law. Indeed, in light of the many flaws with the program, pointed out by Plaintiffs in their initial Memorandum of Law, there are numerous reasons for employers and the State ***not*** to use this system.

Be that as it may, any concern by the Defendants about "unauthorized" workers in the private sector workplace is already addressed by current and long-standing federal law. Every employer is responsible for verifying the employment eligibility and identity of all employees hired to work by completing a so-called I-9 form. The employer must review documentation presented by the employee and record document information on the form. There are federal penalties for knowing violation of this law. Defendants might wish to do more to address this national issue, but that hardly provides the basis for emergency action.

In examining the Defendants' filed "purpose and reason" for emergency adoption of these regulations, it is apparent that there is ***no*** evidence of a peril to the public health or welfare, much less an "imminent" one.

The first third of the Department's "purpose and reason" is merely a recitation of parts of the Governor's executive order and a recognition, which Plaintiffs do not dispute, of the establishment of the E-Verify program by the federal government. As noted above, however, it is difficult to comprehend how the public faces an "imminent peril" if the state is unable to immediately implement a ***voluntary*** federal program.

The two more substantive justifications offered by the Defendants in their "purpose and reason" statement fare little better. The Defendants cite the so-called "courthouse raids" which took place in July of this year as the basis for the emergency. Noting that "more than thirty (30) alleged undocumented foreign workers providing janitorial services in state courthouses under the terms of contracts entered into between two (2) vendors and the State of Rhode Island were taken into custody by the Rhode Island State Police," the Defendants claim that this "brought to light and highlighted a serious lack of safeguards in place to assure that persons and businesses, including contractors and vendors doing business with the State of Rhode Island – many with access to sensitive and/or confidential documents and work areas - are eligible to work in the United States." As a result, "unless the State took immediate action to enforce the requirement that persons and businesses doing business with (or seeking to do business with) the State of Rhode Island register and utilize the E-Verify program (or similar federally approved program), it would not be able to ensure compliance with federal and state law and there would continue to be a very real, imminent peril to the public health, safety, and welfare." With all respect, this line of reasoning is nothing but a lengthy *non sequitur*.

First, as the statement filed by the Department explicitly acknowledges, at least one of the two vendors was found to be in non-compliance with the verification requirements – the completion of a so-called I-9 form – that ***every*** employer and employee in the state must ***currently*** complete. If anything, this demonstrates that safeguards are ***already*** in place to address the problems of an unauthorized workforce.

Second, to the extent that the Defendants seek to rely on E-Verify as a "back-up," this is no justification for the adoption of emergency regulations. In any event, that reliance is quite misplaced. As Plaintiffs have previously noted, the many flaws in the E-Verify program prevent it from being the magical fix Defendants wish it to be. Perhaps it is best exemplified by one of the most highly-publicized raids conducted by Immigration and Customs Enforcement (ICE) agents in the past two years. In December, 2006, ICE agents raided meatpacking plants owned by Swift & Company, one of the world's largest meat processors. In all, more than 1,200 non-citizen workers in six states were arrested and charged with administrative immigration violations, greatly disrupting Swift & Company's business, which was forced to suspend operations in the days following the raids. Ironically, the company had done everything according to the rules. Since 1997 they had voluntarily participated in Basic Pilot – the predecessor program to E-Verify – and had verified the work eligibility of all of their employees with the SSA and DHS.[2]

It is also important to emphasize that, by its very terms, E-Verify is a forward-looking program. By law, ***it can only be used to verify the work status of newly-hired employees, not current employees***. This further undercuts any arguments for finding any sort of "imminent peril" if E-Verify is not immediately implemented.

---

[2] See "Federal Employment Raid Hits Firm Using Verification Program, available at http://www.workforce.com/section/00/article/24/60/75.html.

Finally, Defendants make the striking argument that adoption of this regulation on an emergency basis is a public employment measure. Noting Rhode Island's high unemployment rate and the fact that the State "is the largest employer in Rhode Island," the Defendants suggest that enactment of this emergency regulation will somehow solve this economic crisis. There is absolutely no support for such an argument. Indeed, the state itself, which has engaged in a hiring freeze and an enticement benefit for the retirement of the state workforce, has been a leading contributor to the unemployment rate.

If there were any logic to the State's reasoning, one would expect that other states that have been using E-Verify would be faring better than others. That is not the case. Presently, there are two states in the country – Arizona and Mississippi – which require virtually all employers in the state (not just government employers or vendors with the state) to use E-Verify. According to the most recent unemployment data from the U.S. Department of Labor, Arizona's unemployment rate has almost doubled in the past year.[3] Mississippi has the third highest unemployment rate in the nation, and is one of nine states, like Rhode Island, with a current unemployment rate of more than 7%.[4]

In short, the Defendants have failed to supply any rational justification for adopting these regulations on an emergency basis. Indeed, the attempt to justify the regulations on the ground that cleaning personnel have "access to sensitive and confidential documents and work areas" is nothing less than specious, and constitutes an egregious, purposeful engagement in the sort of hysterical rhetoric which does a disservice to legitimate consideration of the larger issue.

---

[3] See, Arizona Republic, "Unemployment Rate in Ariz. Rose to 5.9% in September", October 17, 2008, available online at http://www.azcentral.com/arizonarepublic/business/articles/2008/10/17/20081017biz-jobs1017.html.

[4] See, e.g., Fort Mills (MS) Times, "Miss Unemployment Third Highest in Nation", October 22, 2008, available online at http://www.fortmilltimes.co124/story/332342.html.

Plaintiffs have found only two R.I. Supreme Court cases in which an emergency regulation was challenged as failing to meet the APA's "imminent peril" requirement. One, contesting an emergency regulation adopted by the Department of Human Services, was dismissed as moot after the rule at issue was adopted through the normal rule-making process. See *Roy v. R.I. Department of Human Services*, 624 A.2d 1092 (R.I. 1993). In the only other relevant case, the Court upheld the Department of Health's emergency promulgation of rules affecting the administration of breathalyzer tests. The emergency regulations were adopted to avoid casting into doubt the admissibility of many such test results in administrative and judicial drunk driving proceedings. In upholding the DOH's action, the Court noted that the "state's ability to enforce its drunk-driving laws is a matter of the highest concern for the health, safety, and welfare of the public." *State ex rel. Town of Middletown v. Watson*, 698 A.2d 181, 183 (R.I. 1997). Nothing approaching this "highest concern" is present here.

It is also worth noting that the Executive Order at issue in this case was adopted on March 27th. It was not until four months later – on July 29th – that Defendants sent notices to the Plaintiffs and other state vendors and contractors, advising them of their obligation to register with E-Verify.[5] More than one month passed between this Court's initial decision requiring APA compliance and the Defendants' decision to file emergency regulations. All of this certainly belies any claim of an "imminent peril" to the public requiring emergency rule-making.

III. Defendants Seek to Benefit from their Violation of the APA

Perhaps most disturbingly, by seeking to adopt the rules on an emergency basis, the Department, like the storied child who murders his parents and then seeks mercy from the court for being an orphan, actually seeks to reward itself for violating the APA. As early as April of

[5] It has also been three months since the "courthouse raids," which the Defendants highlight in their explanation for the emergency regulations, took place.

this year, the Department was on notice that there was public interest in the formal rule-making proceedings that were expected to precede the actual implementation of E-Verify. At that time, Plaintiff RI ACLU wrote the Department, inquiring about rule-making proceedings on this very issue. The Department responded that the organization would be advised of any such proceedings. Yet, having been called to task by this Court for failing to adopt any rules before implementing the program, as required by the APA, Defendants seek to use their failure to do so to again circumvent that statute's rule-making process.[6]

In short, having been caught violating the law, the Department proposes to create its own emergency to violate it again. Allowing the Department to proceed in this fashion would eviscerate the whole point of the APA. Agencies could violate the APA with impunity and then hope that their failure to properly promulgate rules is not caught in time (See R.I.G.L. §42-35-3(c), establishing a two-year statute of limitations in many circumstances for challenging improper rule-making). And if the agency ***is*** caught in time, as happened in this case, it could nonetheless continue to avoid – ***for up to seven months*** – dealing with any public comment or input by filing rules on an emergency basis. This is more than enough of a time period for the mechanisms of a program to become well-established, thus making it even less likely for the agency to take seriously any suggestions for changes offered by the public once rule-making belatedly takes place.[7]

[6] The DOA's decision to ignore the APA's rule-making requirements in this regard is particularly alarming, since only a few months earlier, the Rhode Island Senate Committee on Government Oversight had issued a comprehensive report documenting problems with the DOA's state purchasing procedures. Specifically, the report listed 17 areas of concern that arose from the Committee's investigation of those procedures. ***Of those 17, four of them specifically related to the DOA's failure to comply with the rule-making provisions of the APA in various respects***. An executive summary of the report can be found at: http://www.rilin.state.ri.us/SenateGO/Documents/SGOES2007.pdf.

[7] In this instance, the Department both filed the regulations on an emergency basis and scheduled a public hearing on the same regulations for December 3rd.

IV. The Importance of the Rule-Making Process

Compliance with the APA is neither a game nor an empty exercise in the democratic process – at least, it was not meant to be. In adopting this law over forty years ago, the General Assembly appropriately recognized that many critical activities of state government are conducted through agencies of the executive branch. In acknowledgment of the important public interest in the functions and decisions of these agencies, the APA provides a mechanism for citizens to have a formal opportunity to offer comments on their policies and procedures, and to avert unbridled discretion within the agencies by requiring formal and publicly-adopted rules and regulations governing their activities – ***before those activities take place***.

The importance of the APA cannot be underestimated. The special nature of government agencies as bodies authorized by statute to exercise wide-ranging powers argues for the necessity of cabining agency discretion through a publicly transparent rule-making process. Although it guarantees citizens no ***substantive*** impact on an agency's actions, the APA does create a mechanism for advocacy that at least allows interested parties to offer input on agency practices. Plaintiffs have previously pointed to some of the issues and concerns regarding the E-Verify program that could be addressed through a public rule-making process, such as the obligations imposed on vendors to assure compliance by subcontractors, as well as defining the scope of the term "subcontractor" itself. Offering the public an opportunity to present suggestions for implementation of the program is not – or at least should not be – an empty exercise.

Finally, it is worth emphasizing that public notice and input is also of benefit to the state agencies themselves promulgating rules. Public testimony can make agencies aware of unclear language, of conflicts with other state or federal laws, or of other problems with the proposal that they simply had not considered. All of that is lost when the APA's deliberative rule-making

procedures are circumvented. The end result, in some instances, can be regulations that create more problems than they resolve and that are subject to other legal challenges.

V. The Standard for Contempt

A finding of contempt is within the sound discretion of the trial justice. *Durfee v. Ocean State Steel, Inc.,* 636 A.2d 698, 704 (R.I. 1994). Earlier this year, the R.I. Supreme Court restated the standards for holding parties in contempt of court. *State v. Lead Industries Ass'n, Inc*., 951 A.2d 428 (R.I. 2008). In that case, the Court noted:

> To establish civil contempt, there must be a showing by clear and convincing evidence that a specific order of the court has been violated. *Direct Action for Rights and Equality*, 819 A.2d 651, 661 [citation omitted]. "A finding of civil contempt must be based on a party's lack of substantial compliance with a court order, which is demonstrated by the failure of a party to 'employ[ ] the utmost diligence in discharging [its] * * * responsibilities.'" *Gardiner v. Gardiner*, 821 A.2d 229, 232 (R.I. 2003) (quoting *Durfee*, 636 A.2d at 704). Determining whether there has been substantial compliance with an order of the court, so as to avoid a finding of civil contempt, "depend[s] on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest." *Durfee*, 636 A.2d at 704 (quoting *Fortin v. Commissioner of Massachusetts Department of Public Welfare*, 692 F.2d 790, 795 (1st Cir. 1982)). Id. at 466.

Finally, "[b]ecause of the severe consequences of a civil-contempt finding, courts have 'read court decrees to mean rather precisely what they say.' *NBA Properties Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990)." Id. at 468.

There can be little question that the Defendants' attempt to circumvent the APA's rule-making process represents a "lack of substantial compliance" with this Court's order. The "nature of the interest at stake" has been described in the previous section, and the Defendants' noncompliance directly and completely affects that interest.

VI. The Emergency Regulations Violate R.I.G.L. §37-2-13(d)

In light of the emergency promulgation of these regulations, Plaintiffs request that the Court address one of the arguments presented in the initial Motion for a Temporary Restraining Order that was not addressed in the September 15th ruling. By seeking to apply this emergency regulation to current contracts, Plaintiffs submit that this is in direct violation of R.I.G.L. §37-2-13(d), which specifically states that "no state purchasing regulation shall change in any way a contract commitment by the state nor of a contractor to the state which was in existence on the effective date of the regulation." These emergency regulations clearly impose new duties on Plaintiffs that were not contemplated when they entered into contracts with the State before Executive Order 08-01 was issued. Thus, emergency adoption of this regulation to apply to current vendors, contractors and subcontractors with the State conflicts with the statute by altering the terms of currently existing State contracts and establishing consequences for contractors' failure to abide by the new terms.

VII. Conclusion

If the Court determines that it should not exercise its authority to find the Defendants in contempt, Plaintiffs move for a temporary restraining order to stay the implementation of the emergency rules, as the promulgation of the rules under these circumstances is clearly unlawful under both the APA and R.I.G.L. §37-2-13(d). The Defendants have simply not provided any adequate justification for making use of the APA's emergency rule-making provisions in this instance, nor can they justify its implementation against current vendors in light of the constraints imposed by Chapter 2 of Title 37.

In referring to his enactment of the Executive Order on "illegal immigration," the Governor has commented that: "At the end of the day, state officials have an obligation to

enforce the law as it currently exists."[8] Plaintiffs seek only to hold Defendants to that obligation. Defendants have been preliminarily found to have violated the APA. Their latest attempt to avoid that finding should be forcefully rejected.

WHEREFORE, Plaintiffs respectfully request that Defendants be held in contempt of the Court's September 15th ruling or, alternatively, that this Court issue a temporary restraining order against Defendants' implementation of the regulations on an emergency basis.

PLAINTIFFS
By their attorney,

_____

Randy Olen, Esq.
Rhode Island Affiliate,
American Civil Liberties Union
55 Bradford Street, Suite 203
Providence, RI 02903
(401) 274-1400
(401) 274-2480 (fax)
Attorney for Plaintiffs

[8] See http://www.projo.com/news/content/projo_20080409_govchat.4a26b87f.html.