SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

INGRID CUMMINGS, Plaintiff, -against- CITY OF NEW YORK and RAYMOND W. KELLY, Commissioner of the New York City Police Department, Defendants.	Index No. 38850/2002

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiff Ingrid Cummings ("Plaintiff") respectfully submits this memorandum of law in support of her motion for a preliminary injunction pursuant to CPLR §§ 6301 et seq. to enjoin defendants the City of New York and Police Commissioner Raymond W. Kelly from enforcing, or threatening to enforce, §§ 4-08(n)(4) or 4-12(g) and 4-12(g)of Title 34 of the Rules of the City of New York (the "School Parking Rule") to prohibit her from parking her truck and selling food on Clarkson Avenue between New York Avenue and East 37th Street in Brooklyn (the "Block").[1]

STATEMENT OF FACTS

The principle facts relevant to this motion are stated in the Affidavit of Ingrid Cummings, sworn to on September 25, 2002, and in the Affirmation of Philip G. Gallagher, dated September 26, 2002.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING DEFENDANTS FROM ENFORCING THE SCHOOL PARKING RULE TO PROHIBIT HER FROM PARKING ON THE BLOCK.

The Court should grant Plaintiff's motion for a preliminary injunction because defendants' improper conduct is causing her irreparable injury, she is likely to succeed on the merits of her claims, and the balance of equities tips decisively in her favor. It is well established that:

> A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. . . .

Doe v. Axelrod, 73 N.Y. 2d 748, 536 N.Y.S.2d 44 (1988).

[1] In relevant part, the School Parking Rule states: "No peddler, vendor, hawker or huckster shall permit his cart, wagon or vehicle to stand on any street . . . within 200 feet of any public or private school."

A. Plaintiff is likely to succeed on the merits of her claims for declaratory and injunctive relief because the School Parking Rule cannot properly be enforced against her.

1. Plaintiff is likely to prevail on her claims for declaratory and injunctive relief because defendants have improperly applied the School Parking Rule to prevent her from parking her truck on the Block.

Plaintiff is likely to prevail on the merits of her claim for a declaratory judgment pursuant to CPLR § 3001 that SUNY Downstate Medical Center (the "Medical Center") is not a "public or private school" within the meaning of the School Parking Rule and that, even if the Medical Center were a "public or private school" within the meaning of the School Parking Rule, the 200 foot prohibition of the Rule should be measured from the entrance of the Medical Center and not from its walls.

"An action for a declaratory judgment is the appropriate remedy for the determination of a justiciable controversy, where the plaintiff is in doubt as to his legal rights and wishes to avoid the hazard of taking action in advance of the determination of such rights." Bunis v. Conway, 17 A.D.2d 207, 208, 234 N.Y.S.2d 435, 437 (4th Dep't 1962). In particular, a declaratory judgment action is the appropriate mechanism for determining the applicability of a statute or regulation of uncertain definition. See, e.g., Pixel Int'l Network Inc. v. State, 267 A.D.2d 821, 823, 699 N.Y.S.2d 800, 803 (3d Dep't 1999) (declaring inapplicability of state finance law); Westwood Pharms., Inc. v. Chu, 164 A.D.2d 462, 564 N.Y.S.2d 1020 (4th Dep't 1990) (construing state tax law); Lewis v. Individual Practice Ass'n of Western N.Y., 187 Misc. 2d 812, 723 N.Y.S.2d 845 (Sup. Ct., Erie County 2001) (determining applicability of state health law); Arlyn Oaks Civic Ass'n v. Brucia, 171 Misc. 2d 634, 640, 654 N.Y.S.2d 1016, 1020-21 (Sup. Ct., Nassau County 1997) (construing the word "route" for purposes of state education law). Moreover, declaratory judgments and injunctions "may be had even with respect to penal statutes and against a public official or public agency whose duty it is to conduct appropriate prosecutions . . . ." Bunis, 17 A.D.2d at 208-09, 234 N.Y.S.2d at 438. See also Cherry v. Koch, 129 Misc. 2d 346, 491

N.Y.S.2d 934 (Sup. Ct., Kings County 1985) (entertaining declaratory judgment action to assess validity of anti-prostitution penal law), rev'd on other grounds, 126 A.D.2d 346, 514 N.Y.S.2d 30 (2d Dep't 1987).

(a) The Medical Center is not a "public or private school" within the meaning of the School Parking Rule.

The School Parking Rule prohibits vendors from parking "within 200 feet of any public or private school." R.C.N.Y. tit. 34, §§ 4-08(n)(4), 4-12(g). The phrase "public or private school" has a plain meaning, both in common usage and in New York law: it refers to secondary schools and below, not to universities, hospitals, or medical centers. Accordingly, Plaintiff is likely to succeed on the merits of her claim that the School Parking Rule does not bar her from parking on the Block in front of the Medical Center.

A leading legal authority states: "[t]he word 'school,' while a generic term, in its broad sense including all schools or institutions, whether of high or low degree, has acquired a more limited meaning in the public mind as applying only to educational institutions of the lower or ordinary grades." 94 N.Y. Jur. 2d Schools, Universities, and Colleges §1 (2002) (emphasis added). See also People v. Ulogiares, 39 Misc. 2d 246, 247, 240 N.Y.S.2d 429, 430 (Crim. Ct., N.Y. City 1963) ("A school is defined to be an institution of learning of a lower grade, below a college or a university.") (internal quotation omitted).

Numerous provisions of New York State law reflect the common understanding that "school" ordinarily refers to "educational institutions of the lower or ordinary grades." New York's Education Law, for example, defines the word "University" to apply to the University of the State of New York and the phrases "school authorities" and "school officer" to apply only to persons working for school districts that primarily provide education to children under the age of eighteen. N.Y. Educ. Law § 2 (3), (12), (13) (McKinney 2002). See also N.Y. Educ. Law § 3214 (1) (McKinney 2002) ("school delinquent" refers only to minors). Also, New York's Penal Law defines "school grounds" to include only property near a "public or private

elementary, parochial, intermediate, junior high, vocational, or high school." N.Y. Penal Law § 220.00 (14) (McKinney 2002). See also N.Y. Penal Law § 240.00 (3) (McKinney 2002). Similarly, New York State's Transportation Law specifically excludes universities from its definition of the word "school." N.Y. Transp. Law § 2 (26) (McKinney 2002).

The laws and rules of New York City also use the word "school" to refer to facilities for the education of children, not university students. For example, New York City's Zoning Resolution defines a "school" as a nursery school, kindergarten, or institution providing compulsory education mandated by New York's Education Law. N.Y.C. Zoning Res., Art. I § 12-10. Also, New York City's Youth Protection Against Tobacco Advertising and Promotion Act defines a "school building" to include only those places providing instruction "to students at or below the twelfth grade level." N.Y.C. Code § 27-508.2(j). Moreover, when the City wants to refer to schools and universities together, it uses the phrase "educational institution," not "school." See, e.g., N.Y.C. Code § 8-102 (8).

An analysis of the spirit, history, and purpose of the School Parking Rule demonstrates that it refers only to institutions providing education for the "lower or ordinary grades." Cf., e.g., In re Grand Jury Subpoena Duces Tecum, 93 N.Y.2d 729, 738, 697 N.Y.S.2d 538, 543 (1999) (construing Arts and Cultural Affairs Law in light of its history); People v. Gindi, 166 Misc. 2d 672, 680, 630 N.Y.S.2d 863, 869 (Crim. Ct., N.Y. County 1995) (construing traffic rule in light of its spirit and purpose).

The original wording of the School Parking Rule demonstrates that the Rule was not intended to apply to places of higher education: "No peddler, vender, hawker, or huckster shall permit his cart, wagon or vehicle to stand on any street . . . within two hundred feet of any school house, public or private." N.Y.C. Police Dep't, Traffic Regs. § 81 (1938).[2] Under New York law, it is well established that the term "school house" refers to places of education operated by a

[2] The Commissioner of the New York City Police Department promulgated the original rule but no longer has the authority to promulgate traffic rules. N.Y.C. Charter ch. 71, § 2903(a)(1) (2001).

board of education, such as elementary and secondary schools, but not to places of higher education. See, e.g., N.Y. Educ. Law §§ 401, 414, 2556 (McKinney 2002). See also In re Townsend, 195 N.Y. 214, 88 N.E. 41 (1909) (holding that "schoolhouse" did not include training school for nurses for purposes of a law regulating the sale of alcohol); People v. Ulogiares, 39 Misc. 2d 246, 247, 240 N.Y.S.2d 429, 430 (Crim. Ct., N.Y. City 1963) (holding that "school" and "schoolhouse" share the same meaning and that "school is defined to be an institution of learning of a lower grade, below a college or a university"). Additionally, there is no evidence that the change in wording, from "school house, public or private" to "public or private school," was intended to have any substantive significance. Cf. Ulogiares.

Also, the purpose of the School Parking Rule is evident as a matter of common sense: it is intended to protect school children from the temptations of ice cream and other snacks offered by street vendors. See, generally, Collis v. Town of Niskayuna, 178 A.D.2d 868, 868-69, 577 N.Y.S.2d 919, 920-21 (3d Dep't 1991) (finding that a traffic regulation applicable only to ice cream vendors was a reasonable measure for the protection of children); People v. George, 170 Misc. 707, 708, 9 N.Y.S.2d 937, 938 (County Ct., Westchester County 1939) (upholding as reasonable a law that prohibited vendors from selling candy or ice cream near a school during school hours), aff'd, 280 N.Y. 843, 21 N.E.2d 888 (1939). Plainly, there is no similar need to protect medical students from food vendors. Thus, the School Parking Rule was intended to apply, and does apply, only to secondary schools and below.

Finally, even if the School Parking Rule were ambiguous, ambiguities in the law, like those in other documents, are "construed against the drafter." People v. Brown, 170 Misc. 2d 266, 270, 648 N.Y.S.2d 283, 285-86 (County Ct., Allegheny County 1996) (internal quotation omitted). See also People v. Farone, 308 N.Y. 305, 312, 125 N.E.2d 582, 585 (1955). Because New York City drafted the School Parking Rule, any confusion as to its meaning should be construed against the City. See Brown, 170 Misc. 2d at 270, 648 N.Y.S.2d at 285-86 (construing town ordinance against town). See also Ulogiares (holding that university is not a "school" for

purposes of penal statute and inviting legislature to amend the law if it intended a different result).

Because the ordinary meaning of the phrase "public or private school" and the spirit, history, and purpose of the School Parking Rule demonstrate that the Medical Center is not a "public or private school" within the meaning of the Rule, Plaintiff is likely to succeed in establishing her claim for a judicial declaration that the Medical Center is not a "public or private school" for purposes of the School Parking Rule. Additionally, she can demonstrate that defendants' improper application of the Rule to prohibit her from selling food on the Block causes her irreparable harm because it decreases her income and endangers both her business and her livelihood. (Cummings Aff. ¶¶ 15-16.) Therefore, Plaintiff is also likely to succeed on the merits of her claim for injunctive relief.

(b) The 200 foot distance specified in the School Parking Rule should be measured from the entrance, not the walls, of schools.

Even if the Medical Center were a "public or private school" for purposes of the School Parking Rule, which it is not, the Court should declare that defendants may only require street vendors to remain 200 feet away from its entrance, not its walls. Because the School Parking Rule was enacted to insulate children entering and leaving school from the temptations offered by street vendors, it should be interpreted and applied in accord with that purpose.

Other laws designed to protect school children from temptations demonstrate that the distance requirement of the School Parking Rule should be measured from a school entrance which children actually use. For instance, in City of New York v. Loveshack Video, the court was called upon to interpret New York City's Nuisance Abatement Law, which did not specify how to measure the distance between a school building and an adult bookshop. 182 Misc. 2d 695, 700 N.Y.S.2d 397 (Sup. Ct., Queens County 1999). The high school at issue was housed within LaGuardia Community College which, significantly, neither party contended should be considered a school. The court rejected the City's argument that the distance between the

school and the adult bookshop should be measured from the entrance to the college, and instead held that the distance should be measured from the entrance to the high school inside the college complex. 182 Misc. 2d at 698, 700 N.Y.S.2d at 400. Similarly, New York State's Alcohol Beverage Control Law, which requires establishments receiving liquor licenses to be distant from schools, specifies that distances be measured between the entrances of schools and the entrances of the licensed establishments. N.Y. Alco. Bev. Cont. Law § 64 (7) (McKinney 2002).

Because the School Parking Rule, like the Nuisance Abatement Law and Alcohol Beverage Control Law, is intended to protect against temptations, it too should be interpreted to require that measurements be made from school entrances, not school walls. Measuring distances in this way would best serve the City's purposes and would allow Plaintiff to park in at least some legal parking spaces on the Block in front of the Medical Center. (Cummings Aff. ¶ 18, Exh. 2.) Accordingly, Plaintiff is likely to succeed on her claim for a judicial declaration that the School Parking Rule's 200 foot requirement should be measured from school entrances, not school walls.

Plaintiff is also likely to succeed on the merits of her claim for injunctive relief because defendants have improperly enforced the School Parking Rule to prohibit her from parking to sell food on the Block in front of the Medical Center. Defendants' actions have had a devastating impact on Plaintiff's ability to earn her livelihood, thereby causing her irreparable harm. Consequently, Plaintiff is likely to succeed in demonstrating that she is entitled to injunctive relief.

2. Plaintiff is likely to succeed in proving her claims under § 1983 because the School Parking Rule permits arbitrary and discriminatory enforcement.

In order to prevail on her § 1983 claim, Plaintiff must demonstrate two elements: "(1) the conduct complained of must have been committed by a person acting under color of state law, and (2) the conduct complained of must have deprived a person of the rights, privileges, or immunities secured by the federal constitution." Martin v. Lociccero, 917 F. Supp. 178, 181

(W.D.N.Y. 1995). Because Plaintiff can prove each of these elements, she is likely to succeed on the merits of her claim.

It is well established that a police officer who "invokes the real or apparent power of the police department or performs duties prescribed generally for police officers" acts under color of state law. Martin, 917 F. Supp. at 181. See also Monroe v. Pape, 365 U.S. 167 (1961); Oliver v. Cuttler, 968 F. Supp. 83, 87 (E.D.N.Y. 1997) (arrest by police officer was "unquestionably an action under color of state law"). Here, the police officers who ticketed Plaintiff, ordered her to move, and threatened her with arrest have exercised the authority accorded to them by the State of New York, and their actions therefore were taken under color of state law.

It is equally clear that enforcement of the School Parking Rule to prohibit Plaintiff from parking on the Block on front of the Medical Center violates Plaintiff's right to Due Process guaranteed by the Fourteenth Amendment to the United States Constitution. This right is violated whenever a statute, ordinance, or regulation "permit[s] or encourage[s] arbitrary and discriminatory enforcement." People v. Bright, 71 N.Y.2d 376, 382, 520 N.E.2d 1355, 1358 (1988). See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). As shown below, defendants' practice of enforcing the School Parking Rule against Plaintiff and others for parking near the Medical Center during the past year is exactly the type of arbitrary and discriminatory government enforcement against which the Due Process Clause protects. See City of Chicago v. Morales, 527 U.S. 41, 60-62 (1999) (striking down as unconstitutionally vague city ordinance that permitted arbitrary police enforcement).

The School Parking Rule is not sufficiently precise to permit fair administration of the law if "public or private school" includes hospitals that provide post-graduate medical instruction. As shown above in section A(1)(a), the phrase "public or private school" has a plain meaning, both in common usage and in New York law: it refers to secondary schools and below, not to universities, hospitals, or medical centers. Likewise, this meaning of the phrase is consistent with the history, spirit, and purpose of the School Parking Rule.

Given that the phrase "public or private school" does not normally include hospitals that happen to provide post-graduate education, defendants' enforcement of the School Parking Rule to prohibit Plaintiff from parking on the Block in front of the Medical Center shows that the Rule is unconstitutionally vague. If the Rule can be interpreted as defendants have interpreted it, then it unconstitutionally "confers on police a virtually unrestrained power to arrest and charge persons with a violation." Bright, 71 N.Y.2d at 383, 526 N.Y.S.2d at 70-71 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1973) (Powell, J., concurring)). Indeed, permitting the police to continue to define "school" as they wish would permit the ticketing of street vendors operating too close to secretarial schools, karate dojos, or even homes where parents provide home-schooling. A legislature or agency may have the authority to restrict activities near such facilities, but a law that permits the police acting alone to determine what actions fall afoul of the law is unconstitutional. Bright, 71 N.Y.2d at 383-84, 526 N.Y.S.2d at 71.

Further, the School Parking Rule has been enforced at the whim of the police. Plaintiff has operated her vending business in front of the Medical Center since 1996. (Cummings Aff. ¶¶ 3-4.) Although the School Parking Rule had long been in existence, the police never ordered Plaintiff to move her truck until 2001. (Cummings Aff. ¶ 7.) The reasons for the sudden change in police interpretation and enforcement of the School Parking Rule -- and their apparent enforcement of the rule only in front of the Medical Center -- remains unexplained.

Because the police exercise unfettered discretion when they enforce the School Parking Rule to prevent Plaintiff from parking to sell food on the Block, they engage in arbitrary and discriminatory enforcement and violate the Due Process Clause by doing so. Plaintiff is therefore likely to prevail on her § 1983 claim. Bright, 71 N.Y.2d at 387-88, 526 N.Y.S.2d at 72; People v. New York Trap Rock Corp., 57 N.Y.2d 371, 442 N.E.2d 1222 (1982).

B. Plaintiff will continue to suffer irreparable injury unless defendants' enforcement of the School Parking Rule against her is enjoined.

Plaintiff will continue to suffer irreparable injury if she is not granted preliminary relief because defendants' improper enforcement of the School Parking Rule causes her to lose income and threatens the continuing existence of her business. Defendants' actions have forced Plaintiff to operate her business at a greater distance from people entering and leaving the Medical Center, who are a majority of her customers. (Cummings Aff. ¶ 5.) Her sales have dropped by 50% since the police began requiring her to park away from the Medical Center. As a result, Plaintiff's ability to support herself and her family has been devastated, and she may have to close her business. (Cummings Aff. ¶¶ 15-16.)

It is well established that harm to the livelihood of an individual in a "precarious economic position" is irreparable. Farmer v. D'Agostino Supermarkets, Inc., 144 Misc. 2d 631, 639, 544 N.Y.S.2d 943, 949 (Sup. Ct., N.Y. County 1989). Because Plaintiff "should not be required to suffer further economic harm by loss of good will and patronage during the pendency of the action," People v. Anderson, 137 A.D.2d 259, 271, 529 N.Y.S.2d 917, 924 (4th Dep't 1988), a preliminary injunction against defendants should be granted. See also Social Spirits, Inc. v. Town of Colonie, 70 A.D.2d 1036, 1038, 418 N.Y.S.2d 227, 229 (3d Dep't 1979). Plaintiff also risks irreparable harm because defendants' actions may force her to close her business. See, e.g., Frank May Assocs., Inc. v. Boughton, 281 A.D.2d 673, 674, 721 N.Y.S.2d 154, 155 (3d Dep't 2001) (holding that damage to business is irreparable); Gilman & Ciocia, Inc. v. Reid, 153 A.D.2d 878, 878-79, 545 N.Y.S.2d 387, 388 (2d Dep't 1989) (same).

A preliminary injunction is also warranted because Plaintiff risks police tickets and arrest if she continues to sell her products in front of the Medical Center. Plaintiff has been ticketed by the police and has been threatened with more tickets on numerous occasions when she has attempted to conduct her business in front of the Medical Center. (Cummings Aff. at ¶¶ 8-9, 11.) Additionally, she has been threatened with criminal prosecution if she fails to obey police directives to move based on erroneous interpretations of the School Parking Rule (Cummings

Aff. at ¶ 11), and she knows that police officers have arrested other vendors who failed to obey their instructions to move (Cummings Aff. at ¶ 11). When the scope of a regulatory or criminal prohibition is unclear, preliminary relief against the enforcement of the regulation or law is necessary to protect a plaintiff from criminal prosecution pending resolution of an action. Dougal v. County of Suffolk, 87 A.D.2d 897, 449 N.Y.S.2d 752, 753 (2d Dep't 1982); Franza v. Carey, 115 Misc. 2d 882, 891, 454 N.Y.S.2d 1002, 1009 (Sup. Ct., N.Y. County 1982).

C. The balance of equities favors Plaintiff because her business, upon which her family depends, provides a community service and because defendants will suffer no harm from the entry of the requested injunction.

Plaintiff is also entitled to a preliminary injunction against enforcement of the School Parking Rule because the balance of equities weighs heavily in her favor. Plaintiff has gathered hundreds of signatures on petitions in support of her right to continue operating her business on the Block. These petitions demonstrate the large degree of support she enjoys and that her continued presence on the Block benefits the community. (Cummings Aff. ¶ 10, Exh. 1.) In addition, Plaintiff supports her two daughters with the business operated from her mobile food truck. Her younger daughter has already been forced to drop out of college because of the damage done to Plaintiff's income by the defendants' actions, and Plaintiff risks having her utilities cut off if the defendants continue to enforce their erroneous interpretation of the School Parking Rule. (Cummings Aff. ¶¶ 6, 15-16.)

In contrast, defendants will suffer no injury from the entry of the requested preliminary injunction. Plaintiff sold food products from legal parking spaces in front of the Medical Center from 1996 through 2001 without causing harm or running afoul of the police. (Cummings Aff. ¶¶ 3, 7.) Far from causing a problem to the public, Plaintiff's business provides a much-appreciated public service, as the petitions in her support show. (Cummings Aff. Exh. 1.) Additionally, if selling food in front of the Medical Center were harming the community, then the sidewalk vendors who do so would not be permitted to continue selling food there, as Plaintiff is now prohibited from doing. (Cummings Aff. ¶ 14.)

Thus, the balance of equities overwhelmingly favors granting Plaintiff a preliminary injunction, and her motion for a preliminary injunction should be granted.

CONCLUSION

Plaintiff's motion for a preliminary injunction should be granted in all respects.

Respectfully submitted,

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