

Florida Extraordinary TB Control Authority For Judges, Sheriffs and Federal Officers

By: Richard McNeils, Assistant General Counsel, Florida Department of Health, June 2008

On May 12, 2007, Mr. Andrew Speaker, a TB case, flew from Atlanta GA to Greece, Italy, Canada, and re-entered the US May 24, 2007. Allegations soon filled the air regarding whether Mr. Speaker had MDR or XDR TB, whether the Georgia Department of Public Health and/or the CDC had authority to order Mr. Speaker not to fly in May, and whether the Department of Homeland Security was competent to stop him at the US border on his return. CRS Report for Congress #RL34144, XDR TB, Apr. 1, 2008, pg. 2-3. The federal statute authorizing quarantine authority does not directly address persons leaving the country. *Id.* at pg. 6.

The WHO's revised International Health Regulations, effective June 2007, however, do provide authority for member states to stop and medically examine travelers on arrival or departure, and upon medical evidence and for public health purposes to require vaccination, prophylaxis or other health measures so long as they are the least intrusive effective measures available. Article 23.

This regulatory scheme matters because Florida has had at least one recent TB traveler case, though on less inflammatory facts than the Speaker case, but with the same public health significance. Subsequent to those events, Florida Department of Health TB Control personnel met with representatives of the CDC Division of Global Migration and Quarantine, and CDC Miami Quarantine Station, and CDC Division of Tuberculosis Elimination, organized by the CDC Public Health Law Program. Also participating were a state judicial officer, a Florida sheriff's department infection control nurse for a jail facility, numerous physicians and epidemiologists, public health legal counsel, Florida County Health Department nursing staff, and others. The meeting involved a scenario-based assessment for testing sufficiency of state TB laws, particularly testing the interface between state (and county) public health TB control measures and the federal Do Not Board protocols designed to prevent exposure of passengers to TB on commercial aircraft.

Florida law is unusual in that TB control efforts are treat to cure, rather than treat to non-infectiousness. Sec. 392.52(1), F.S. In emergency situations involving TB control, Florida Statutes provide two forms of temporary health detention. Many government officials are familiar with court-ordered emergency hold under sec. 392.57, F.S. In that procedure, the health department files a petition for an *ex parte* hearing, and when the pleadings and factual averments support it, an emergency hold order directed to one or more county sheriffs issues, instructing the sheriff to take an ill person into custody for up to five days pending a full hearing before the court. The statute provides, "the court shall direct the sheriff to immediately confine the person who has active tuberculosis. The sheriff shall confine and isolate the person in such a manner as required by the court." Sec. 392.57(3), F.S.

Despite best efforts, occasional situations arise where the ill person indicates an intention to flee or in fact runs to avoid public health officials or otherwise demonstrates a disregard for the public health, and access to court is not availing. The Florida Legislature has wisely provided a second form of temporary health detention in sec. 392.565, F.S., in those circumstances. That statute allows the State Health Officer, n/k/a State Surgeon General, or designee on statutory authority to issue an involuntary hold certificate. The statute provides, "the sheriff of the county in which the certificate was issued shall take such person into custody and shall deliver the person to the nearest available licensed hospital, or to another location where isolation is available" for a period not to exceed 72 hours pending a full hearing before the court.

The state's sheriffs are required by law to serve notices, processes and orders on ill persons where the ill person resides or wherever found, and further are required by law to take such

persons into custody and deliver them to the location identified in the order. Sec. 392.58, F.S. The Florida Department of Health recognizes that TB control in Florida involves partnership with other agencies of government, particularly law enforcement, and is committed to assist the sheriffs and their legal counsel in understanding the Legislature's assignment of duties to each.

Because of the compressed timeframes surrounding action on involuntary hold certificates and emergency hold orders, the Department of Health is committed to identifying judicial officers available in each of Florida's judicial circuits to consider these matters on an expedited basis.

It is important to note that all TB control activity of the Florida Department of Health is based on the premise that "all other reasonable means of obtaining compliance have been exhausted and that no other less restrictive alternative is available." See, e.g., sec. 392.55(3); 392.56(2)(c); and 392.64(1), F.S. Equally important is the emphasis on full judicial consideration of the facts and testimony, although sometimes such hearing occurs post-detention.

Florida's response to TB control is a graduated response, scalable to the circumstances presented and the degree of cooperation by the ill person. Alternative sites for treatment include not only licensed hospital facilities but also other health care or residential facilities including isolation in the person's own home. Sec. 392.56(3)-(4), F.S. By logical extension, such placement could also include motel rooms, dormitories, or migrant camp settings. The level of liberty restriction can be decided by the State Health Officer and may range from minimal to total confinement. See, e.g., sec. 392.56(5) (If department petitions circuit court to order hospitalization in 392.62(2) facility, department shall notify facility of the potential court order); sec. 392.565, F.S. (sheriff shall deliver person to "the nearest available licensed hospital, or to another location where isolation is available, as appropriate, for observation, examination, and treatment").

Finally, as a state public health agency exercising inherent police powers to protect the public health, Florida has an obligation to take every appropriate step under state legal authority in TB control when seeking assistance from our federal partners in measures to prevent exposure on commercial aircraft and other forms of transportation. When an ill traveler is turned away from an airline gate, our federal partners know that the Florida Department of Health already has or simultaneously will take action to place such ill persons in a treatment setting designed to cure them of tuberculosis at minimal risk to the general public and consistent with law.

In light of that commitment, the Florida Department of Health avers that it will meet the criteria for federal assistance in issuance of Do Not Board orders requested by Florida, and further requests our federal partners accept our involuntary hold certificates and emergency hold orders, described above, as *prima facie* evidence that all less restrictive measures to prevent exposure of the public have been exhausted. Similarly, for the public health system to effectively respond to emergency situations, an oral or written statement from the Florida State Epidemiologist or designated State TB Control Officer to our CDC and HHS partners about the foregoing must create a rebuttable presumption that a Do Not Board order should issue forthwith.

As the US House of Representatives, Committee on Homeland Security, found in its September 2007 report on the Speaker XDR-TB incident, "Attorneys at the Department of Homeland Security either failed to understand their authority, or were unable to convince other entities of their authority." Report, pg. 4. This document is designed to avoid unnecessary confusions and misunderstandings when time is of the essence, to craft a better and smoother relationship between the several important participants, and to better protect the public health.