



BACKGROUND (APRIL 2015)

*David W. Smith & Donald Lambrecht v. Governor Thomas W. Wolf & Commonwealth of Pennsylvania,
Department of Human Services*

THE EXECUTIVE SUMMARY

The Fairness Center represents Dave Smith and his homecare worker, Don Lambrecht, in their challenge to Governor Wolf's executive order "unionizing" Mr. Lambrecht and other homecare workers against Mr. Smith and other homecare recipients.

In late February, Governor Wolf issued an executive order¹ that would allow unions to easily force representation on certain homecare (or "direct care") workers who are paid through Medicaid or other state programs. Under the executive order, unions will be permitted to exact dues payments—up to \$8 million annually—from these homecare workers, many of whom cannot afford to pay union dues, do not want union representation, and will receive little benefit from forced representation. Governor Wolf's executive order is nearly identical to a 2010 executive order that then-Governor Rendell issued and that was ultimately rescinded after a court challenge.

Meanwhile, disabled and elderly homecare recipients stand to lose even more. Homecare recipients are the legal employers of their homecare workers targeted by the executive order; they have the authority to hire, train, manage, pay, and fire their homecare workers. *In other words, the unionization of homecare workers organizes workers against the homecare recipients that they serve.* Unions will take away homecare recipients' authority as employers.

In April, Mr. Smith and Mr. Lambrecht filed suit in the Commonwealth Court, asking the Court to stop Governor Wolf and the Department of Human Services ("Department") from implementing the executive order and requesting that the Court declare that the executive order is an unconstitutional exercise of the Governor's power.

On April 23, the Court issued a preliminary injunction to stop Governor Wolf and the Department from implementing the executive order until it could conduct a full hearing on the constitutionality of it. The Court will hear Mr. Smith and Mr. Lambrecht's case against the executive order's constitutionality in September 2015.

THE PROBLEM

¹ Exec. Order No. 2015-05 (Feb. 27, 2015), available at http://www.portal.state.pa.us/portal/server.pt?open=512&objID=708&PageID=224602&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/cop_general_government_operations/oa/oa_portal/omd/p_and_p/executive_orders/2010_2019/items/2015_05.html.

Mr. Smith is a Phoenixville resident who suffers from muscular dystrophy, rendering him quadriplegic. He would be unable to pay for the care he needs without the help of the Commonwealth. Pennsylvania funds the provision of Mr. Smith's care through a Department program called "Act 150."

Act 150, like the Medicaid programs affected by the executive order, gives Mr. Smith the ability to direct his own care by making him the legal employer of any homecare workers he hires. Given the unique needs that each homecare recipient has, the Department has long encouraged recipients to exercise as much employer authority as they can. Mr. Smith has the right to hire, train, manage, pay, and fire his homecare workers.² In support, the Department provides Mr. Smith with third-party payroll, accounting, and administrative services.

Before Mr. Smith hired Mr. Lambrecht 25 years ago, Mr. Smith had to fire a homecare worker who tried to take financial advantage of him. Now with Mr. Lambrecht, Mr. Smith directs his own care and sets terms and conditions of employment, including pay, with Mr. Lambrecht. Mr. Lambrecht is committed to caring for Mr. Smith, and the two are, in all respects, friends. Mr. Lambrecht would gain nothing from joining a union to negotiate against Mr. Smith's best interests.

In fact, Mr. Smith and Mr. Lambrecht have a relationship much like that of other homecare workers and recipients. Many homecare workers are close friends or family members of the recipient whom they serve. They are not motivated by money: the annual salary for a typical homecare worker is just over \$20,000.³

Governor Wolf's Executive Order

On February 27, 2015, Governor Wolf issued Executive Order 2015-05, which would enable forced union representation on at least 20,000 homecare workers like Mr. Lambrecht, a previously non-unionized segment of the homecare field. The executive order offers the union authority to meet with the Department to set terms and conditions of employment for *all* homecare workers, thus taking employer authority away from Mr. Smith and other recipients.

The union will also have the authority to automatically deduct dues—up to \$7.8 million annually—from homecare workers' paychecks.

Governor Wolf's executive order largely mirrors Executive Order 2010-04, issued by then-Governor Rendell. Rendell's executive order was quickly challenged at the Commonwealth Court, which ordered that the executive order was likely unconstitutional. After the court enjoined the executive order's implementation, Rendell rescinded his executive order.

Governor Wolf's executive order, like Rendell's, sets a low bar—lower than that found in labor laws—for a union that wants to take over as exclusive representative for this segment of homecare workers. Governor Wolf's executive order allows a union to force representation simply by:

² 62 P.S. § 3052(3) ("Recipients of attendant care have the right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of an attendant.")

³ *Occupational Employment and Wages, May 2014, 31-1011 Home Health Aides*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes311011.htm>.

1. Getting a list of homecare workers' names and addresses from the Department to begin their campaign by showing that just 50 homecare workers across the state would support the union;
2. Calling an election with the support of just 10% of homecare workers statewide (other state labor laws require 30%);
3. Conducting an election without notice or a waiting period (other labor laws require notice and/or a waiting period before holding an election); and
4. Winning an election with just a majority vote of those voting in the election.⁴

The particular homecare programs targeted by Governor Wolf in the executive order are only those in which the homecare worker is employed directly by the homecare recipient. Specifically, the executive order covers programs administered by the Department's Office of Long Term Living: Aging Waiver Program, Attendant Care Waiver Program, CommCare Waiver Program, Independence Waiver Program, OBRA Waiver Program, and Act 150 Program.

Under the executive order, the union would meet to negotiate and enter into an agreement with the Department to determine certain terms of employment for all homecare workers, even though the homecare workers targeted are not employed by the Department and share little in terms of job tasks or working conditions. The agreement would include, among other terms and conditions of employment, wages, benefits, paid time off, and training requirements—all of which are currently discussed between the homecare worker and the homecare recipient.

Implications

Governor Wolf's executive order is problematic for at least three reasons:

1. *The executive order allows a union to take money from homecare workers like Mr. Lambrecht, with little or no benefit to the homecare worker.* The union that will represent the homecare workers covered by the executive order will take 2% of homecare workers' pay in dues. But for this price, Mr. Lambrecht gets little in return: the union is not negotiating with Mr. Smith, his legal employer, and Mr. Lambrecht is not looking to receive benefits inappropriate in his situation, like more paid time off.
2. *The executive order alters the unique relationship between homecare workers and recipients.* Mr. Smith is Mr. Lambrecht's employer and has the right to direct his own care. A union would only hurt Mr. Smith's ability to direct his own care and set terms and conditions for his homecare worker.
3. *The executive order is a misuse of executive power and political payback for Governor Wolf's loyal supporters.* Governors do not have the authority to issue executive orders that make law, exactly what former Governor Rendell and now Governor Wolf did in trying to unionize homecare workers. Unions representing healthcare workers were among Governor Wolf's biggest supporters, and the executive order allows those unions to collect dues from a previously unavailable source.

⁴ The Pennsylvania Labor Relations Act ("PERA") requires a majority of workers. And although PERA also allows for a union victory on a majority of those voting, the Executive Order's minimal support and notice requirements up to this point make representative participation in the election less likely than in elections under the PERA.

THE LAW

The Governor's executive order violates the Pennsylvania Constitution for two basic reasons. First, Pennsylvania governors are not allowed to make law through executive orders.⁵ Instead, executive orders must implement existing statutes or constitutional provisions.⁶

Here, no statute or constitutional provision allows for Governor Wolf to issue an executive order organizing homecare workers, and the executive order itself makes no attempt to locate such a basis for its validity. Instead, the executive order reads and operates much like legislation, something only the General Assembly can create.

Second, Pennsylvania governors are never allowed to issue executive orders that conflict with existing statutory authority.⁷ Yet Governor Wolf's executive order does just that; it conflicts with homecare laws that allow homecare recipients to direct their own care, and it conflicts with labor laws that set higher protections for employees who do not wish to be represented by a union.

THE CASE LOGISTICS

Plaintiffs

- Dave Smith, 59, receives homecare under Act 150 as a result of muscular dystrophy, which has rendered him quadriplegic. Mr. Smith began using a wheelchair when he was 9 years old, was unable to stand by age 11, and now needs around-the-clock care.
- Don Lambrecht, 62, has been Mr. Smith's sole homecare worker for 25 years. Mr. Lambrecht lives at Mr. Smith's house and works around-the-clock to care for Mr. Smith.

Defendants

- Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania
- Commonwealth of Pennsylvania, Department of Human Services

Relief Sought

Preliminary injunction was granted by the Commonwealth Court on April 23, 2015. Declaratory judgment that the executive order is invalid and unlawful; and permanent (or final) injunction.

Date Filed

April 6, 2015

⁵ *Shapp v. Butera*, 348 A.2d 910, 914 (Pa. Cmwlt. 1975) ("The Governor's power is to execute the laws and not to create or interpret them.").

⁶ *Pennsylvania Institutional Health Srvs., Inc. v. Com., Dep't of Corr.*, 631 A.2d 767, 769 (Pa. Cmwlt. 1993) ("[E]xecutive orders may be legally enforceable only if the order serves to implement or supplement statutes or the constitution.").

⁷ *Shapp*, 348 A.2d at 914 ("In no event, however, may any executive order be contrary to any constitutional or statutory provision.").

THE LEGAL TEAM

David R. Osborne is General Counsel at the Fairness Center, where he provides advice and counsel to clients, directs the Fairness Center's legal strategy, and oversees all litigation efforts. Before joining the Fairness Center, David litigated on behalf of healthcare providers and conducted organizational and lobbying efforts for a national trade association. He previously worked as a judicial clerk to a Florida Supreme Court justice and served as official staff to a member of Congress. David graduated from the Florida State University College of Law.

Nathan R. Bohlander is Assistant General Counsel at the Fairness Center, where he focuses on client interaction and litigation activities. Before joining the Fairness Center, Nathan clerked for a judge in the Philadelphia Court of Common Pleas and maintained a solo practice. He has also previously worked for a nonprofit school choice organization, a Pennsylvania State Senator, and a member of Congress. Nathan graduated from the Pennsylvania State University Dickinson School of Law.