

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVID W. SMITH and DONALD LAMBRECHT,

Petitioners,

v.

GOVERNOR THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF HUMAN SERVICES,

Respondents.

No. _____
ORIGINAL
JURISDICTION

PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

INTRODUCTION

Petitioners David W. Smith ("Mr. Smith") and Donald Lambrecht ("Mr. Lambrecht"), by and through undersigned counsel, move pursuant to Pennsylvania Rule of Appellate Procedure 1532(a) for special relief enjoining Respondents Governor Thomas W. Wolf ("Gov. Wolf") and the Pennsylvania Department of Human Services ("Department") from implementing or enforcing Executive Order 2015-5 ("Executive Order").¹ In support of this application, Mr. Smith and Mr. Lambrecht hereby incorporate by reference their Petition for Review in the

¹ By way of notice to the Court, because Mr. Smith is unable to travel and Mr. Lambrecht is unable to leave Mr. Smith unattended, Mr. Smith and Mr. Lambrecht will request that they participate in any court proceedings, if their participation is necessary, by telephone.

Nature of a Complaint for Declaratory Judgment and Injunctive Relief (“Petition”), filed in this action on April 6, 2015. Mr. Smith and Mr. Lambrecht further state as follows:

SUBJECT PETITION

1. Mr. Smith and his direct care worker, Mr. Lambrecht, demonstrate in their Petition that Gov. Wolf’s Executive Order is an invalid and unlawful exercise of executive power.

2. Mr. Smith’s and Mr. Lambrecht’s Petition seeks a declaration that the Executive Order is constitutionally invalid and unlawful because it does not serve to implement or supplement statutes or the constitution and conflicts with statutory and constitutional authority. Nat’l Solid Wastes Mgmt. Ass’n v. Casey, 580 A.2d 893, 898 (Pa. Cmwlth. 1990) (“Because the Association’s claim is premised on a constitutional violation and because that claim alleges both that the substance of the order violates the legislated regulatory scheme and that the Governor was without either constitutional or statutory authority to issue an order effectively altering that scheme, we must find that an action for declaratory judgment is the appropriate procedure by which to resolve the instant matter.”).

JURISDICTION AND LEGAL STANDARD

3. This Court may order special relief, including a preliminary or special injunction, “in the interest of justice and consistent with the usages and principles of law.” Pa. R.A.P. 1532(a).

4. “The test for obtaining a preliminary injunction under [Pennsylvania Rule of Appellate Procedure 1532(a)] is the same as that for the grant of a preliminary injunction under

the Rules of Civil Procedure.” Com. ex rel. Pappert v. Coy, 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004). The moving party must show:

1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004) (quotation marks omitted).

APPLICATION FOR INJUNCTION

5. Because the Executive Order is constitutionally invalid and unlawful, its implementation irreparably harms Mr. Smith, Mr. Lambrecht, other Direct Care Workers and participants, and the general public. This Court should enjoin the implementation of the Executive Order to prevent such injury. See Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount Inc., 573 Pa. 637, 828 A.2d 995, 1002 (Pa. 2003).

6. In response to a similar argument, this Court issued a preliminary injunction against implementation or enforcement of a nearly identical executive order issued by Governor Edward Rendell in 2010. Petition, Exhs. B, C.

7. First, an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Among other harms:

- a. As set forth in the Petition, the Executive Order violates the law. See Keller v. Casey, 595 A.2d 670, 674 (Pa. Cmwlth. 1991) (“In Pennsylvania, the violation of an express statutory provision per se constitutes irreparable harm, . . . and a preliminary injunction may issue where the other requisite elements are present, as here.”);
- b. The Executive Order will allow Mr. Lambrecht’s name and home address to be made available to employee organizations. His name and home address will continue to be available to employee organizations in the immediate future and will be used by these employee organizations to canvass and recruit potential supporters and to pressure him into supporting the employee organizations’ petitions against his will. Petition Exh. A, at 4.a;
- c. The election process set forth in the Executive Order contains no notice requirements or waiting periods before an election may commence;
- d. Mr. Smith’s ability to control and direct his care will be limited by the exclusive representation of his Direct Care Worker with authority to bargain concerning issues that will impact him, including “[s]tandards for compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]oluntary payroll deductions.” Petition Exh. A, at 3.b;
- e. Mr. Lambrecht’s employment as a Direct Care Worker will be affected by the employee organization’s authority to bargain as an exclusive representative concerning issues that will impact him, including “[s]tandards for

compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]oluntary payroll deductions.” Petition Exh. A, at 3.b;

f. The Executive Order was made “effective immediately.” Petition Exh. A, at 7;
and

g. Money damages are insufficient to compensate Mr. Smith and Mr. Lambrecht for harm caused by a statutory and constitutional violation and, specifically, the loss of privacy and control over terms and conditions of employment.

8. Second, greater injury would result from refusing an injunction than from granting it, and issuance of an injunction will not substantially harm other interested parties.

Among other examples:

- a. The Executive Order is invalid and unlawful;
- b. Once private information is shared with employee organizations or Direct Care Workers are made to be exclusively represented, Mr. Lambrecht’s personal information is no longer private, and Mr. Lambrecht may face pressure from employee organizations to support their petition;
- c. The terms and conditions of Mr. Smith’s and Mr. Lambrecht’s employment relationship will be substantially altered by the unlawful employee organization representation process set forth in the Executive Order;
- d. Mr. Smith’s ability to control and direct his care will be limited by the exclusive representation of his Direct Care Worker;

- e. Mr. Lambrecht will have little meaningful opportunity to prevent exclusive representation by an employee organization;
- f. The Executive Order interferes with the unique relationship between Direct Care Workers and direct care participants across Pennsylvania;
- g. Allowing the Executive Order to be implemented will create representative relationships and encourage reliance on those relationships, with no assurance of the Executive Order's validity;
- h. Meanwhile, no employee organization will be harmed by issuance of an injunction because no employee organization has yet assumed the role of exclusive representative;
- i. Similarly, Direct Care Workers will not be harmed, as they have yet to operate under either favorable or unfavorable terms and conditions set forth in a memorandum of understanding; and
- j. No employee organization or Direct Care Worker is entitled to the benefit, if any, from a constitutionally defective Executive Order.

9. Third, a preliminary injunction will properly restore the parties to their status as it existed immediately prior to issuance of the Executive Order, because it will prevent implementation of the Executive Order. See SEIU Healthcare Pennsylvania v. Com., 104 A.3d 495, 509 (Pa. 2014) (“[T]he relevant standard requires that an injunction must address the status quo as it existed between the parties before the event that gave rise to the lawsuit, not to the situation as it existed after the alleged wrongful act but before entry of the injunction.”). Among other examples:

- a. If the preliminary injunction is issued, Direct Care Workers would continue their employment without the violation of privacy caused by collection and dissemination of their names and addresses and recruitment efforts;
- b. If the preliminary injunction is issued, direct care participants would continue to manage and direct the terms of Direct Care Workers' employment, as Mr. Smith has with respect to Mr. Lambrecht for 25 years;
- c. If the preliminary injunction is issued, Direct Care Workers would continue to directly negotiate terms and conditions of their employment with direct care participants, as Mr. Lambrecht has with Mr. Smith for 25 years;
- d. If the preliminary injunction is issued, Gov. Wolf and the Department would continue to abide by the Attendant Care Services Act ("Act 150"), and leave "the right to make decisions about, direct the provision of and control . . . attendant care services" in the hands of direct care participants. 62 P.S. § 3052(3); Petition at 7; and
- e. If the preliminary injunction is issued, Gov. Wolf and the Department would continue to abide by the Public Welfare Code, 62 P.S. § 201(1), (2), and the terms of direct care Medicaid waivers, which give direct care participants the "right to make decisions about and self-direct their own waiver services" and to act as the employer of the Direct Care Worker. Petition Exh. D, at p. 140; Exh. E, at p. 109; Exh. F, at p. 130; Exh. G, at p. 121; Exh. H, at p. 131.

10. Fourth, for the reasons developed in the Petition, Mr. Smith and Mr. Lambrecht are likely to prevail on the merits.

11. Fifth, the injunction sought is reasonably suited to abate the offending activity, in that it would prevent implementation of the Executive Order that enables the complained-of statutory and constitutional violations.

12. Sixth, granting the injunction will not adversely affect the public interest. Among other examples:

- a. Granting the injunction will protect the public from an unlawful exercise of executive power and will prevent the Executive Order from instituting an unlawful process that interferes with the rights of both Direct Care Workers and direct care participants;
- b. Granting the preliminary injunction will also prevent roughly 20,000 direct care participants in the Commonwealth who will be limited in their ability to manage and direct the terms of their own care; and
- c. Relatedly, an injunction would prevent almost 60,000 Direct Care Workers in Pennsylvania from a significant privacy compromise and the loss of millions of dollars in the form of dues to an employee organization, without assurance of the legality of the Executive Order.

13. Because granting a preliminary injunction will cause little or no harm to Respondents, the Court should impose only a nominal bond or security under Pa. R.C.P. 1531(b).

WHEREFORE, for the foregoing reasons and those set forth in the Petition, Mr. Smith and Mr. Lambrecht respectfully request that this Court grant this Application and enter an order enjoining Gov. Wolf and the Department, their agents, servants, officers, or others from

implementing, enforcing or otherwise effectuating the Executive Order and provide any ancillary relief necessary to support this Court's order.

RESPECTFULLY SUBMITTED this 6th day of April, 2015.

A handwritten signature in black ink, appearing to read 'D. Osborne', is positioned above a solid horizontal line.

David R. Osborne

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VERIFICATION

I, Donald Lambrecht, being subject to penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, hereby state that I am a direct care services worker for David Smith and that the facts set forth in the foregoing Application for Special Relief are true and correct to the best of my knowledge, information and belief.

Dated: April 6, 2015

By: 
Donald Lambrecht

VERIFICATION

I, David Smith, being subject to penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, hereby state that I am a direct care services recipient and that the facts set forth in the foregoing Application for Special Relief are true and correct to the best of my knowledge, information and belief.

Dated: April 6, 2015

By: _____

A handwritten signature in black ink, appearing to read 'D. Smith', written over a horizontal line.

David Smith

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Application for Special Relief, filed on behalf of Petitioners David W. Smith and Donald Lambrecht, has on this date been served on Defendants electronically and/or by certified mail, addressed as follows:

Governor Thomas W. Wolf
Denise Smyler, General Counsel
225 Main Capitol Building
Harrisburg, PA 17120

Attorney General Kathleen Kane
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Harrisburg, PA 17120

Secretary Theodore Dallas
Commonwealth of Pennsylvania,
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Date: April 6, 2015



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