

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

PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

Petitioners David W. Smith (“Mr. Smith”) and Donald Lambrecht (“Mr. Lambrecht”), by and through undersigned counsel, file this action to vindicate their rights as a direct care participant and worker, respectively, in Pennsylvania. Mr. Smith and Mr. Lambrecht seek a declaratory judgment that Governor Tom Wolf (“Gov. Wolf”), through Executive Order 2015-05 (“Executive Order”), exceeded his authority in an effort to provide employee organizations with, among other tools: unilateral access to Direct Care Workers’ personal information; authority to automatically deduct funds from Direct Care Workers’ paychecks; and power to alter the terms and conditions of Direct Care Workers’ employment.

Mr. Smith and Mr. Lambrecht also seek both a preliminary¹ and permanent injunction to prohibit Gov. Wolf and any other Commonwealth official or employee from enforcing or otherwise taking action consistent with the Executive Order.

JURISDICTION

1. Mr. Smith and Mr. Lambrecht bring this lawsuit pursuant to the Judicial Code, 42 Pa.C.S. § 761(a), and the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541. Mr. Smith and Mr. Lambrecht seek to “obtain a declaration of rights, status, or other legal relations” with respect to the Executive Order. 42 Pa.C.S. § 7533.

2. Specifically, Mr. Smith and Mr. Lambrecht seek a declaration that the Executive Order is constitutionally invalid and unlawful because it does not serve to implement or supplement statutes or the Pennsylvania Constitution and otherwise 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.”).

PARTIES

3. Petitioner Mr. Smith is a direct care services participant; he is a quadriplegic adult with muscular dystrophy receiving care through the Attendant Care Services Act (“Act 150”), 62 P.S. §§ 3051-3058. Mr. Smith is also the employer of a Direct Care Worker covered

¹ Mr. Smith and Mr. Lambrecht hereby reference and incorporate their Application for Special Relief in the Nature of a Preliminary Injunction, filed in this action on April 6, 2015.

by the Executive Order, and the insertion of a union between he and his Direct Care Worker will limit the authority of Mr. Smith to make decisions about, direct the provision of, and control his direct care services. Mr. Smith is a Pennsylvania resident with an address of 152 Harvest Lane, Phoenixville, PA 19460, and his interest in this controversy is direct, substantial, and present.

4. Petitioner Mr. Lambrecht is a Direct Care Worker providing homecare to Mr. Smith through Act 150. Mr. Lambrecht has provided homecare to Mr. Smith for approximately 25 years, and he has successfully and amicably negotiated the terms and conditions of his employment without the aid of a union for all of those 25 years. Among other injuries, Mr. Lambrecht's name and home address will be made available to employee organizations for the purpose of canvassing and recruitment, and he will be subjected to unwanted exclusive representation by a labor organization under a process that violates state law and may materially alter the terms and conditions of employment. Mr. Lambrecht is a Pennsylvania resident with an address of 152 Harvest Lane, Phoenixville, PA 19460, and his interest in this controversy is direct, substantial, and present.

5. Respondent Thomas W. Wolf is the Governor of the Commonwealth of Pennsylvania, with a principal office at 225 Main Capitol Building, Harrisburg, Pennsylvania, 17120. In his official capacity, Gov. Wolf is vested with "supreme executive power" and "shall take care that the laws be faithfully executed." Pa. Const. art. IV, § 2.

6. Respondent Commonwealth of Pennsylvania, Department of Human Services ("Department") is an administrative agency of Pennsylvania with principal offices at the Health and Welfare Building, 625 Forster Street, Harrisburg, Pennsylvania, 17120. The Department is responsible, through the Department's Office of Long Term Living ("OLTL"), for administering

the Aging Waiver Program, the Attendant Care Waiver Program, the CommCare Waiver Program, the Independence Waiver Program, the OBRA Waiver Program, and the Act 150 Program (collectively, “OLTL Programs”).

BACKGROUND

Direct Care

7. Direct Care Workers play an important role across the country:

Millions of Americans, due to age, illness, or injury, are unable to live in their own homes without assistance and are unable to afford the expense of in-home care. In order to prevent these individuals from having to enter a nursing home or other facility, the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization. See 42 U.S.C. § 1396n(c)(1). A State that adopts such a program receives federal funds to compensate persons who attend to the daily needs of individuals needing in-home care. Ibid.; see also 42 CFR §§ 440.180, 441.300–441.310 (2013). Almost every State has established such a program.

Harris v. Quinn, 573 U.S. ___, 134 S.Ct. 2618, 2623 (2014); see also Dep’t of Health and Human Servs., Understanding Medicaid Home and Community Services: A Primer (2010), available at <http://aspe.hhs.gov/daltcp/reports/2010/primer10.pdf>.

8. Pennsylvania has adopted this model and receives federal Medicaid funding with respect to the OLTL Programs, with the exception of the state-funded² Act 150 Program.

Scope of the Executive Order

9. On February 27, 2015, Gov. Wolf issued the Executive Order, which became effective immediately. A true and correct copy of the Executive Order is incorporated by reference and attached hereto as “Exhibit A.”

² See 55 Pa. Code § 52.3.

10. With respect to the issues at stake in this matter, the Executive Order mirrors an executive order issued in 2010 by then-Governor Rendell, enjoined by this Court on grounds similar to those asserted here, see Pennsylvania Homecare Ass’n v. Rendell, No. 776 M.D. 2010, and which then-Governor Rendell ultimately rescinded. True and correct copies of Executive Order 2010-04³ and this Court’s Memorandum Opinion in support of the order granting preliminary injunctive relief are incorporated by reference and attached hereto as “Exhibit B” and “Exhibit C,” respectively.

11. The Executive Order allows an employee organization (i.e., labor union)⁴ to represent “Direct Care Workers,” defined in the Executive Order as “person[s] who provide [] Participant-Directed Services in a Participant’s home under [OLTL Programs].” Exh. A, at 1.c., f.⁵

12. The term “Participant-Directed Services” is defined as

personal assistance services, respite, and Participant-Directed community supports or similar types of services provided to a senior or a person with a disability who requires assistance and wishes to hire, terminate, direct and supervise the provision of such care pursuant to the Home Care Service Programs, provided now and in the future, to (i) meet such person’s daily living needs, (ii) ensure such person may adequately function in such person’s home, and (iii) provide such person with safe access to the community. Participant-Directed Services does not include any

³ Rendell’s rescission order is 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/publish/edcontent/publish/oa_general_government_operations/oa/oa_portal/omd/p_and_p/executive_orders/2010_2019/items/2010_04___rescission.html](http://www.portal.state.pa.us/portal/server.pt?open=512&objID=708&PageID=224602&mode=2&contentid=http://pubcontent.state.pa.us/publish/edcontent/publish/cop_general_government_operations/oa/oa_portal/omd/p_and_p/executive_orders/2010_2019/items/2010_04___rescission.html).

⁴ The Executive Order uses both the terms “employee organization,” Exh. A, at 1-5, and “labor organization,” Exh. A, at 5.d-f. The sole qualification for such an “employee organization” is “that [it] has as one of its primary purposes the representation of direct care workers in their relations with the Commonwealth or other public entities.” Exh. A, at 4.b.

⁵ Likewise, Rendell’s executive order applied to persons “who are consumer-directed . . . and who provide, under the [OLTL], ongoing Medicaid or commonwealth reimbursed non-medical, direct care services to older Pennsylvanians and Pennsylvanians with disabilities” Exh. B, at 1.a.

care provided by a worker employed by an agency as defined by Section 802.1 of the Health Care Facilities Act (35 P.S. § 448.802a).

Exh. A, at 1.i (emphasis added).

13. In other words, the Executive Order specifically applies where there is a “unique relationship between the individual participants and Direct Care Workers” in which a participant has chosen to exercise his “rights to select, hire, terminate and supervise a Direct Care Worker.” Exh. A, 5.c.

14. Any employee organization representing such Direct Care Workers pursuant to the Executive Order would serve as the sole representative for all Direct Care Workers. Exh. A, 3.a(2).

15. And any Direct Care Workers who wish not to be represented by the employee organization, including Mr. Lambrecht, must seek its removal under the terms of the Executive Order, which includes a prohibition on removal for the first year after the employee organization becomes the exclusive representative. Exh. A, 3.a(3).

The Executive Order’s Union Organization Process

16. The Executive Order sets forth a union organization process mirroring that set forth in Rendell’s executive order, which was enjoined by this Court and rescinded by Rendell. See Pennsylvania Homecare Ass’n, No. 776 M.D. 2010.

17. The Executive Order directs the Secretary of the Department of Human Services (“Secretary”) to “compile a list each month of the names and addresses of all Direct Care

Workers,” Exh. A, at 4.a., who have provided “Participant-Directed Services” through the Department’s OLTL Programs. Exh. A, at 1.d., i.⁶

18. Under the Executive Order, an employee organization,⁷ prior to any grant of exclusive representative status, may access the list of names and addresses of all Direct Care Workers “[u]pon a showing made to the Secretary” that just “50 Direct Care Workers support the organization’s petition to provide representation.” Exh. A, at 4.c.

19. After obtaining the list of names and addresses for Direct Care Workers, the employee organization may use the list to convince just 10% of Direct Care Workers to call an election that would make the employee organization the exclusive representative—called the “Direct Care Worker Representative”—for all Direct Care Workers. Exh. A, at 3.a(1), (2).⁸

20. To demonstrate that 10% of Direct Care Workers choose to be represented by the employee organization, the employee organization submits signed authorization cards from this 10% calling an election to Gov. Wolf or his designee. Exh. A, at 3.a(1).⁹

21. The Executive Order does not require that notice be provided to other Direct Care Workers or establish a time period for such notice.

⁶ Likewise, Rendell’s executive order required that “[t]he commonwealth shall create a list of providers who will constitute eligible voters for the purpose of determining a showing of interest justifying an election.” Exh. B, at 1.a.

⁷ Notably, the Executive Order determines, by assumption, that Direct Care Workers constitute a bargaining unit appropriate for purposes of organizing through an employee organization. See Exh. A, at 3 (“The Secretary shall recognize a representative for the Direct Care Workers for the purpose of discussing issues of mutual concern through a meet and confer process.”).

⁸ Likewise, Rendell’s executive order provided that, “[i]n order for an election to occur, a labor organization must demonstrate . . . that at least 10 percent of the providers on the eligible voter list request an election.” Exh. B, at 1.c.

⁹ By allowing the Governor himself to be the last line of defense before an election is conducted and representation is forced on all Direct Care Workers, the Executive Order is even more onerous than Rendell’s executive order, which required that the showing be made to the Secretary of Labor and Industry. Exh. B, at 1.c.

22. The employee organization may win an election and become the exclusive representative for Direct Care Workers by receiving a “majority of votes cast in the election,” meaning that exclusive representation may be authorized with minimal support—especially given the lack of notice provisions—from the universe of Pennsylvania’s Direct Care Workers. Exh. A, at 3.a(2).¹⁰

23. The Executive Order requires that the American Arbitration Association (“AAA”) conduct the election and certify the election outcome. Exh. A, at 3.a.

24. The employee organization, after forcing exclusive representation status on all Direct Care Workers, is required to “meet and confer” with the Secretary and the Deputy Secretary to discuss, among other things, “[s]tandards for compensating Direct Care Workers,” “Commonwealth payment procedures,” “[t]raining and professional development opportunities,” and “[v]oluntary payroll deductions.” Exh. A, at 3.b.¹¹

25. Under the Executive Order, the exclusive representative is also required to meet with Gov. Wolf or his designee “at least annually to discuss the outcome of the meet and confer sessions with the Secretary.” Exh. A, at 3.b(3).

26. Ultimately, the exclusive representative and the Secretary are to reach “[m]utual understandings . . . reduced to writing.” Exh. A, at 3.c(1).¹²

¹⁰ Likewise, Rendell’s executive order allowed an employee organization to win with “at least a majority of the votes cast.” Exh. B, at 1.d.

¹¹ Likewise, Rendell’s executive order required that “[t]he commonwealth . . . shall engage in negotiations with the [exclusive representative] concerning terms and conditions which directly impact providers” Exh. B, at 2.

¹² Just as with Rendell’s executive order, Exh. B, at 2-3, the Executive Order avoids using the term “collective bargaining agreement” to describe the written agreement between the exclusive representative and the Department. However, as this Court noted when it enjoined Rendell’s executive order:

27. Although “[n]othing in [the] Executive Order shall compel the parties to reach mutual understandings,” Exh. A, at 3.c(2), if “the parties are unable to reach mutual understandings, the Governor or a designee will convene a meeting of the parties to understand their respective positions and attempt to resolve the issues of disagreement,” Exh. A, at 3.c (3).

28. Mutual understandings may also become “the policy of the Department related to Direct Care Workers.” Exh. A, at 3.c(1).

29. The exclusive representative also receives special access to “make recommendations for legislation or rulemaking.” Exh. A, at 3.c(1).

Effect of the Executive Order

30. The Executive Order states that Direct Care Workers never attain the “status of Commonwealth employees.”¹³ Exh. A, at 5.b. However, at the conclusion of the process outlined above, an exclusive representative has, among other things: bargained on behalf of Direct Care Workers for terms and conditions of employment; memorialized those terms in a

Although respondents and intervenors maintain the agreement reached would not rise to the level of a collective bargaining agreement, the agreement could fall within the definition of a collective bargaining agreement: “[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.” Black’s Law Dictionary 280 (8th ed. 1999). Moreover, the use of the term “shall” is mandatory, Riddle v. Workers’ Comp. Appeal Bd. (Allegheny City Elect., Inc.), 603 Pa. 74, 981 A.2d 1288 (2009), and requires the Commonwealth to recognize a labor organization and engage in negotiations with notwithstanding the Order’s attempt not to confuse the Consumer-Provider’s and Commonwealth-Provider’s existing relationships. This is the essence of collective bargaining.

Exh. C, at pp. 12-13 (footnote omitted).

¹³ Likewise, Rendell’s executive order stated that “[n]othing in this Executive Order is intended to grant providers the status of commonwealth employees.” Exh. B, at 7.

memorandum of mutual understanding with the Commonwealth (perhaps with the Governor or a designee facilitating negotiations); and potentially had its terms and conditions “implemented as the policy of the Department related to Direct Care Workers providing Participant-Directed Services.” Exh. A, at 3.c.

31. The Executive Order states that it will not “alter the unique relationship between the individual participants and Direct Care Workers.”¹⁴ Exh. A, at 5.c. However, at the conclusion of the process outlined above, an exclusive representative has, among other things: assumed the authority of Direct Care Workers and individual participants to bargain for the terms and conditions of Direct Care Workers’ employment; and exerted that authority through memoranda of mutual understanding, revised agency policies, and/or legislation or rulemaking. Exh. A, at 3.c.

32. The Executive Order states that it will not “alter the rights of Direct Care Workers, including the right to become a member of a labor organization or to refrain from becoming a member of [sic] labor organization.” Exh. A, at 5.d. Additionally, the Executive Order states that it will not “require a Direct Care Worker to support a[n employee] organization in any way.” Exh. A, at 5.f. However, at the conclusion of the process outlined above, many Direct Care Workers have been forced to accept exclusive representation of an employee organization, which has the authority to determine various terms and conditions of employment on their behalf, through memoranda of mutual understanding, revised agency policies, and/or legislation or rulemaking. Exh. A, at 3.c.

¹⁴ Likewise, Rendell’s executive order stated that “[t]his Executive Order in no way alters the unique relationship between the individual provider and individual consumer.” Exh. B, at 6.

Applicable Law

1. The Pennsylvania Constitution

33. “The Governor’s power is to execute the laws and not to create or interpret them.” Shapp v. Butera, 348 A.2d 910, 914 (Pa. Cmwlth. 1975). “There is no mention in the Constitution of ‘Executive Orders.’ ” Id. at 912.

34. Accordingly, “executive orders may be legally enforceable only if the order serves to implement or supplement statutes or the constitution.” Pennsylvania Institutional Health Srvs., Inc. v. Commonwealth, Dep’t of Corrections, 631 A.2d 767, 769 (Pa. Cmwlth. 1993).

35. “In no event, however, may any executive order be contrary to any constitutional or statutory provision.” Shapp, 348 A.2d at 914.

36. Instead, the General Assembly is vested with the legislative power of the Commonwealth. Pa. Const. art. 2, § 1. “The legislative power is the power ‘to make, alter and repeal laws.’ ” Jubelier v. Rendell, 953 A.2d 514, 529 (Pa 2008) (quoting Blackwell v. State Ethics Comm’n, 567 A.2d 630, 636 (1989))

2. Direct Care Statutes

37. The Attendant Care Services Act (“Act 150”) creates a program under which covered individuals receive direct care services. 62 P.S. §§ 3051-3058. Under Act 150, direct care participants “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.” 62 P.S. § 3052(3).

38. Direct care participants who choose to direct their own services under Act 150 become employers of Direct Care Workers, and each has a federal employer identification number, is subject to workers' compensation and unemployment requirements, and pay relevant employer taxes.

39. Federal law and the Public Welfare Code empowers the Department to, among other things, apply for, receive, and use federal funds as well as develop and submit plans and proposals to the federal government for Department programs. 42 U.S.C. § 1396a(a); 62 P.S. § 201(1), (2).

a. Pursuant to the Public Welfare Code, the Department submitted to the Centers for Medicare & Medicaid Services ("CMS") its "Aging Waiver" application, renewal of which was approved, effective July 1, 2013, for a period of 5 years.¹⁵ A true and correct copy of the Department's approved renewal application is incorporated by reference and attached hereto as "Exhibit D."

i. Under the Aging Waiver, participants of care "are encouraged to self-direct their services to the highest degree possible." Exh. D, at p. 140. They "have the right to make decisions about and self-direct their own waiver services" and "may choose to hire and manage staff . . . or manage an individual budget." Id.

ii. A participant who chooses to hire and manage staff "serves as the common-law employer and is responsible for hiring, firing, training,

¹⁵ CMS-approved waivers are incorporated by reference to Pennsylvania's Administrative Code. 55 Pa. Code § 52.4.

supervising, and scheduling their support worker.” Id. Participants who manage a budget have “a broader range of opportunities for participant-direction,” still including “select[ion] and manage[ment of] staff.” Id.

b. Pursuant to the Public Welfare Code, the Department submitted to CMS its “Attendant Care Waiver” application, renewal of which was approved, effective July 1, 2013, for a period of 5 years. A true and correct copy of the Department’s approved renewal application is incorporated by reference and attached hereto as “Exhibit E.”

i. Under the Attendant Care Waiver, participants “are encouraged to self-direct their services to the highest degree possible.” Exh. E, at p. 109. They “have the right to make decisions about and self-direct their own waiver services” and “may choose to hire and manage staff . . . or manage an individual budget.” Id.

ii. A participant who chooses to hire and manage staff “serves as the common-law [] employer and is responsible for hiring, firing, training, supervising, and scheduling their support workers.” Id. Participants who manage a budget have “a broader range of opportunities for participant-direction,” still including “select[ion] and manage[ment of] staff.” Id.

c. Pursuant to the Public Welfare Code, the Department submitted to CMS its “COMM CARE Waiver” application, amendment of which was approved,

effective January 1, 2013, for a period of 5 years. A true and correct copy of the Department's approved renewal application is incorporated by reference and attached hereto as "Exhibit F."

i. Under the COMMCARE Waiver, participants "are encouraged to self-direct their services to the highest degree possible." Exh. F, at p. 130. They "have the right to make decisions about and self-direct their own waiver services" and "may choose to . . . hire and manage staff," allow an agency to manage staff for them, or some combination of the two. Id.

ii. A participant who chooses to hire and manage staff "is the employer and is responsible for hiring, firing, training, supervising, and scheduling their personal assistants." Id.

d. Pursuant to the Public Welfare Code, the Department submitted to CMS its "Independence Waiver" application, amendment of which was approved, effective July 1, 2013, for a period of 5 years. A true and correct copy of the Department's approved renewal application is incorporated by reference and attached hereto as "Exhibit G."

i. Under the Independence Waiver, participants "are encouraged to self-direct their services to the highest degree possible." Exh. G, at p. 121. They "have the right to make decisions about and self-direct their own waiver services" and "may choose to . . . hire and manage

staff,” allow an agency to manage staff for them, or some combination of the two. Id.

ii. A participant who chooses to hire and manage staff “is the employer and is responsible for hiring, firing, training, supervising, and scheduling their personal assistants.” Id.

e. Pursuant to the Public Welfare Code, the Department submitted to CMS its “OBRA Waiver” application, amendment of which was approved, effective July 1, 2013, for a period of 5 years. A true and correct copy of the Department’s approved renewal application is incorporated by reference and attached hereto as “Exhibit H.”

i. Under the OBRA Waiver, participants “are encouraged to self-direct their services to the highest degree possible.” Exh. H, at p. 131. They “have the right to make decisions about and self-direct their own waiver services” and “may choose to . . . hire and manage staff,” allow an agency to manage staff for them, or some combination of the two. Id.

ii. A participant who chooses to hire and manage staff “is the employer and is responsible for hiring, firing, training, supervising, and scheduling their personal assistants.” Id.

40. The OLTL Programs are administered by the Department’s OLTL, which provides various practical and administrative supports to direct care participants to facilitate the participants’ role as employer of Direct Care Workers. A true and correct copy of the

Department's OLTL Program Provider Handbook, outlining such supports, is incorporated by reference and attached hereto as "Exhibit I."

2. Labor Statutes

41. The National Labor Relations Act ("NLRA") covers most private-sector employees; it excludes from coverage, among other employees, "any individual employed . . . in the domestic service of any family or person at his home." 29 U.S.C. § 152(3).

42. Pennsylvania Labor Relations Act ("PLRA") covers private sector employees who are not covered by the NLRA; but it also excludes from coverage, among other employees, "any individual employed . . . in the domestic service of any person in the home of such person." 43 P.S. § 211.3.

43. The Public Employee Relations Act ("PERA") covers "[p]ublic employe[s]," among them "Commonwealth employe[s]," defined as "public employe[s] employed by the Commonwealth on any board, commission, agency, authority, or any other instrumentality thereof." 43 P.S. § 1101.301(2), (15).

44. The NLRA, PLRA, and PERA all require a showing of interest from at least 30% of employees prior to conducting an election for an exclusive representative. 29 CFR § 101.18(a); 43 P.S. § 211.7(c); 43 P.S. § 1101.603(a).

45. With respect to the PLRA and PERA, the Pennsylvania Labor Relations Board ("PLRB") has exclusive jurisdiction to certify a bargaining unit, conduct elections, and certify election results. See 43 P.S. § 211.7; 43 P.S. § 1101.602-605.

GROUND FOR RELIEF

46. Mr. Smith and Mr. Lambrecht seek a declaratory judgment that the Executive Order is void as an unconstitutional and unlawful exercise of executive power because: (1) the Executive Order does not serve to implement or supplement statutes or the constitution; (2) the Executive Order conflicts with statutory and constitutional authority concerning direct care workers; and (3) the Executive Order conflicts with statutory authority concerning employee organizing. Finally, Mr. Smith and Mr. Lambrecht request that (4) this Court enter a permanent injunction to prevent implementation of the Executive Order.

COUNT I: THE EXECUTIVE ORDER DOES NOT SERVE TO IMPLEMENT OR SUPPLEMENT STATUTES OR THE CONSTITUTION

47. Paragraphs 1-46 are realleged and incorporated by reference as if set forth fully herein.

48. The Executive Order is invalid or unlawful because it does not serve to implement or supplement statutes or the Pennsylvania constitution.

49. The Executive Order specifically denies that it implements or supplements the NLRA, PLRA, or PERA by stating that “[t]he provisions of this Executive Order shall not be construed or interpreted to create collective bargaining rights or a collective bargaining agreement under any federal or state law.” Exh. A, at 5.b.

50. The Pennsylvania constitution does not authorize the Governor to implement or supplement statutes relevant to Direct Care Workers or labor organization rights.

51. Neither the NLRA, PLRA, nor PERA authorize the Governor to implement or supplement statutory provisions with respect to Direct Care Workers or labor organization rights.

52. The PLRA and PERA occupy their respective fields with respect to employee organizing in Pennsylvania.

53. Direct Care Workers are specifically excluded from organizing under the NLRA or PLRA. 29 U.S.C. § 152(3); 43 P.S. § 211.3.

54. Direct Care Workers are excluded from organizing under PERA, as a Direct Care Worker's employer—the direct care participant—is not a “public employer.” See 43 P.S. § 1101.301(1).

55. Even if PERA were to authorize the Governor to implement or supplement its statutory provisions, the Executive Order specifically denies that it implements or supplements PERA by disclaiming that the Executive Order makes Direct Care Workers Commonwealth employees. Exh. A, at 5.b.

56. The Executive Order does not purport to implement or supplement any statutory or constitutional provisions.

57. The Executive Order does not in fact implement or supplement any statutory or constitutional provisions.

58. Instead, the Executive Order creates a new body of law that, among other things:

- a. determines that Direct Care Workers are a unit appropriate for purposes of organizing through an employee organization;
- b. allows an employee organization to organize Direct Care Workers;
- c. allows an employee organization to force exclusive representation on Direct Care Workers;

- d. allows for election of an exclusive representative on majority vote of those actually voting in the election;
- e. grants to both the Governor and the AAA the authority to assume power of the type wielded by the PLRB;
- f. gives the Secretary and an employee organization the power to negotiate terms and conditions of employment for Direct Care Workers;
- g. allows for a contract negotiated by the Secretary and an employee organization to set the terms and conditions of employment for Direct Care Workers; and
- h. creates special access for employee organizations to set agency policy.

59. Accordingly, this Court should find that the Executive Order is invalid and unlawful and should enjoin any actions taken pursuant to the Executive Order.

COUNT II: THE EXECUTIVE ORDER CONFLICTS WITH STATUTORY AND CONSTITUTIONAL AUTHORITY CONCERNING DIRECT CARE WORKERS

60. Paragraphs 1-59 are realleged and incorporated by reference as if set forth fully herein.

61. Regardless of whether the Executive Order implements a statute or constitutional provision, it is invalid and unlawful because it conflicts with statutory and constitutional authority concerning Direct Care Workers and the provision of participant-directed services.

62. The Executive Order conflicts with Act 150 because it limits a participant's "right to make decisions about, direct the provision of and control their attendant care services. . . . includ[ing] . . . hiring, training, managing, paying and firing of an attendant." 62 P.S. § 3052(3).

63. Specifically, the Executive Order would allow an employee organization—a third-party to the unique employment relationship created in Act 150 between a Direct Care Worker and a direct care participant—to negotiate for terms and conditions of Direct Care Workers’ employment, otherwise the right of the participant. According to the Executive Order, such terms and conditions would include including but not limited to:

- (a) The quality and availability of Participant-Directed Services in the Commonwealth, within the framework of principles of participant-direction, independent living and consumer choice.
- (b) The improvement of the recruitment and retention of qualified Direct Care Workers.
- (c) The development of a Direct Care Worker registry or worker-participant matching service to provide routine, emergency and respite referrals of qualified Direct Care Workers to participants who are authorized to receive long-term, in-home care services under one of the Home Care Service Programs.
- (d) Standards for compensating Direct Care Workers, including wage ranges, health care benefits, retirement benefits and paid time off.
- (e) Commonwealth payment procedures related to the Home Care Services Programs.
- (f) Development of an orientation program for Direct Care Workers working in a Home Care Services Program.
- (g) Training and professional development opportunities for Direct Care Workers.
- (h) Voluntary payroll deductions for Direct Care Workers.

Exh. A, at 3.b.

64. The Executive Order also conflicts with the Public Welfare Code because it impedes on the role given to the Department by the General Assembly in applying for, receiving, and using federal funds and submitting plans and proposals to the federal government for Department programs. See 62 P.S. § 201(1), (2).

65. Pursuant to the Department's role, it has applied for and received waiver approval from the federal government in order to implement its OLTL Programs, each of which affirms the program participants' "right to make decisions about and self-direct their own waiver services" and to act as the employer of the Direct Care Worker. 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.

66. As with Act 150, the Executive Order minimizes waiver program participants' "right to make decisions about and self-direct their own waiver services" and to act as the employer of the Direct Care Worker. 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.

67. Mr. Smith's ability to direct his care will be limited by implementation of the Executive Order.

68. Mr. Smith's status as the legal employer under the participant-directed model will be altered by implementation of the Executive Order.

69. Mr. Lambrecht's ability to negotiate for terms and conditions of his employment with Mr. Smith, his employer, will be limited by implementation of the Executive Order.

70. Mr. Lambrecht's desire to remain unrepresented by an employee organization will be threatened by implementation of the Executive Order.

71. Mr. Lambrecht must bear the burden of objecting, if such objection rights are even recognized, to payment of union dues upon the successful petition of an employee organization.

72. Therefore, this Court should find that the Executive Order is invalid and unlawful and should enjoin any actions taken pursuant to the Executive Order.

**COUNT III: THE EXECUTIVE ORDER CONFLICTS WITH STATUTORY AUTHORITY CONCERNING
EMPLOYEE ORGANIZING**

73. Paragraphs 1-72 are realleged and incorporated by reference as if set forth fully herein.

74. The Executive Order conflicts with statutory authority concerning labor relations between employees and their employers.

75. In enjoining Rendell's 2010 executive order mirroring this Executive Order, this Court found:

In our view, the terms of the Order conflict with Section 5 of the PLRA. In particular, Section 5 of the PLRA permits "employees" to self-organize, form, join or assist labor organizations, to collectively bargain, and to engage in concerted activities for the purposes of collective bargaining. The term "employee" as defined by the PLRA specifically excludes domestic service workers.

Exh. C, at p. 11.

76. The Executive Order here, just as Rendell's executive order, denies that it implements or supplements the NLRA, PLRA, or PERA by stating that "[t]he provisions of this Executive Order shall not be construed or interpreted to create collective bargaining rights or a collective bargaining agreement under any federal or state law." Exh. A, at 5.b.

77. Assuming, arguendo, that the Executive Order did implement or supplement the NLRA, the Executive Order conflicts with the NLRA because, among other reasons:

- a. Direct Care Workers are excluded from coverage under the NLRA. 29 U.S.C. § 152(3);

- b. the Executive Order assumes the power to designate a collective bargaining unit of all Direct Care Workers, whereas the NLRA vests such responsibility with the National Labor Relations Board (“NLRB”). See 29 U.S.C. § 159;
- c. the Executive Order allows just 10% of Direct Care Workers to call an election, whereas the NLRA requires 30%. See 9 CFR § 101.18;
- d. the Executive Order mandates that the Governor or a designee collect signed authorization cards, whereas the NLRA vests such responsibility with the NLRB. See 9 CFR § 101.18(a);
- e. the Executive Order provides no notice period to Direct Care Workers prior to conducting an election, whereas the NLRA requires notice to affected employees. See 29 C.F.R. § 103.20; and
- f. the Executive Order mandates that the AAA conduct elections and certify results, whereas the NLRA vests such responsibility with the NLRB. See 29 U.S.C. § 159.

78. Assuming, arguendo, that the Executive Order did implement or supplement the PLRA, The Executive Order conflicts with the PLRA because, among other reasons:

- a. Direct Care Workers are excluded from coverage under the PLRA. 43 P.S. § 211.3;
- b. the Executive Order assumes the power to designate a collective bargaining unit of all Direct Care Workers, whereas the PLRA vests such responsibility with the PLRB. 43 P.S. § 211.7(b);

- c. the Executive Order allows just 10% of Direct Care Workers to call an election, whereas the PLRA requires 30%. 43 P.S. § 211.7(c);
- d. the Executive Order mandates that the Governor or a designee collect signed authorization cards, whereas the PLRA vests such responsibility with the PLRB. 43 P.S. § 211.7(c);
- e. the Executive Order provides no notice period to Direct Care Workers prior to conducting an election, whereas the PLRA requires a 20-day period following the request for a secret ballot of employees. 43 P.S. § 211.7(c);
- f. the Executive Order mandates that the AAA conduct elections and certify results, whereas the PLRA vests such responsibility with the PLRB. 43 P.S. § 211.7(c); and
- g. the Executive Order confers exclusive representative status on an employee organization upon majority vote of those actually voting, whereas the PLRA requires a “majority of the employees in a unit appropriate for such purposes.” 43 P.S. § 211.7(a).

79. Assuming, arguendo, that the Executive Order did implement or supplement PERA and that the Direct Care Workers are in fact “Commonwealth employees,”¹⁶ the Executive Order conflicts with PERA because, among other reasons:

¹⁶ This Court, in enjoining Rendell’s executive order, noted:

We understand the Order states an intention not to grant Providers the status of Commonwealth employees. However, we believe the Order would make the Providers de facto Commonwealth employees because of the Commonwealth’s recognition of an exclusive representative for Providers and

- a. the Executive Order assumes the power to designate a collective bargaining unit of all Direct Care Workers, whereas PERA vests such responsibility with the PLRB. 43 P.S. §§ 1101.602(a), 1101.604; 34 Pa. Code § 95.23.
- b. the Executive Order allows just 10% of Direct Care Workers to call an election, whereas PERA requires 30%. 43 P.S. § 1101.603(a); 34 Pa. Code § 95.12.
- c. the Executive Order mandates that the Governor or a designee collect signed authorization cards, whereas PERA vests such responsibility with the PLRB. 43 P.S. § 1101.603(c); 34 Pa. Code § 95.17.
- d. the Executive Order provides no notice period to Direct Care Workers prior to conducting an election, whereas PERA requires at least 10 days notice. 43 P.S. § 1101.605(a).
- e. the Executive Order mandates that the AAA conduct elections and certify results, whereas PERA vests such responsibility with the PLRB. 43 P.S. § 1101.605(6); 34 Pa. Code §§ 95.51-95.59.

80. In any event, under the Executive Order, Mr. Lambrecht is included within an inappropriate bargaining unit; Direct Care Workers do not share, among other things, employers, places of employment, employment tasks, job responsibilities, or job functions. See PSSU, Local 668 of SEIU, AFL-CIO v. Pennsylvania Labor Relations Bd., 740 A.2d 270, 275 (Pa. Cmwlth. 1999) (“[T]he unit clarification petition procedure under the PERA is to determine

negotiation with that representative regarding terms and conditions of employment.

Exh. C, at p. 13 n.10.

whether certain job classifications are properly included in a bargaining unit based on the actual functions of the job.”).

81. Under the Executive Order, an employee organization will be permitted to act as exclusive representative for Mr. Lambrecht and other Direct Care Workers, in spite of his wish to remain unrepresented, yet without involvement of the PLRB.

82. Mr. Lambrecht may be forcibly represented by an employee organization with or without the ability or power to effectively represent his interests.

83. Mr. Lambrecht does not have the protections against forced union representation or “ambush” union elections granted to him by the General Assembly, including a 30% support threshold prior to conducting an election, oversight by the PLRB, and notice prior to an election.

84. Mr. Smith’s status as the legal employer will be altered by implementation of the Executive Order.

85. Mr. Lambrecht’s ability to negotiate for terms and conditions of his employment with Mr. Smith, his employer, will be limited by implementation of the Executive Order through the involvement of an employee organization elected outside of the statutorily mandated process.

86. Mr. Lambrecht must bear the burden of objecting, if such objection rights are even recognized, to payment of union dues upon the successful petition of an employee organization.

87. Because the Executive Order conflicts with state and constitutional authority, this Court should find that the Executive Order is unlawful and invalid.

**COUNT IV: PETITIONERS ARE ENTITLED TO A PERMANENT INJUNCTION TO PREVENT
IMPLEMENTATION OF THE EXECUTIVE ORDER**

88. Paragraphs 1-87 are realleged and incorporated by reference as if set forth fully herein.

89. Because the Executive Order is constitutionally invalid and unlawful, its implementation hurts Mr. Smith, Mr. Lambrecht, other Direct Care Workers and participants, and the general public.

90. Because Mr. Smith and Mr. Lambrecht have established a clear right to relief, this Court should enjoin Gov. Wolf and the Department, their agents, servants, officers, or others from implementing, enforcing or otherwise effectuating the Executive Order. See Pestco, Inc. v. Associated Products, Inc., 880 A.2d 700, 710 (Pa. Super. 2005).

91. An injunction is necessary to prevent a legal wrong for which there is no adequate redress at law and harm that is “not subject to exact valuation and compensation through damage awards.” Id. (quoting Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1233 (Pa. Super. 1989)). Specifically:

- a. the Executive Order violates the law;
- b. the Executive Order will allow Mr. Lambrecht’s name and home address to be made available to employee organizations for the purpose of canvassing and recruitment. See id. at 710-11 (“[W]here a defendant improperly obtains a plaintiff’s confidential information, as is the case here, the court is justified in granting an injunction to prevent future use of the information and to deter repetition of the conduct.”);

- c. the Executive Order will allow Mr. Lambrecht's private information to be disclosed to the employee organizations complicit with Gov. Wolf in violating direct care and labor laws by means of the Executive Order;
- d. Mr. Smith's ability to control and direct his care will be limited by the exclusive representation of Mr. Lambrecht, his Direct Care Worker; and
- e. money damages are insufficient to compensate Mr. Smith and Mr. Lambrecht for the harm caused by a statutory and constitutional violation.

92. Accordingly, permanent injunctive relief is appropriate, and this Court should grant such relief.

PRAYER FOR RELIEF

WHEREFORE, Mr. Smith and Mr. Lambrecht pray that this Court grant the declaratory and injunctive relief requested herein, specifically that this Court render a judgment in their favor and against Gov. Wolf and the Department, as follows:

- A. Declaring that the Executive Order is unlawful and invalid;
- B. Granting an injunction to prevent implementation of the Executive Order; and
- C. Granting further legal and equitable relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED this 6th day of April, 2015.

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

David R. Osborne

PA Attorney ID#: 318024

Nathan R. Bohlander

PA Attorney ID#: 312509

The Fairness Center

225 State Street, Suite 303

Harrisburg, PA 17101

844-293-1001

david@fairnesscenter.org

nate@fairnesscenter.org

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 Petition for Review 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 Petition for Review are true and correct to the best of my knowledge, information and belief.

Dated: April 6, 2015

By: 
David Smith

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Petition for Review and referenced exhibits, 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
1600 Strawberry Square
Harrisburg, PA 17120

Secretary Theodore Dallas
Commonwealth of Pennsylvania,
Department of Human Services
626 Forster Street
Harrisburg, PA 17120

Date: April 6, 2015



David R. Osborne

PA Attorney ID#: 318024

Nathan R. Bohlander

PA Attorney ID#: 312509

The Fairness Center
225 State Street, Suite 303
Harrisburg, PA 17101
844-293-1001
david@fairnesscenter.org
nate@fairnesscenter.org