IN THE SUPREME COURT OF PENNSYLVANIA

110 MAP 2016

DAVID W. SMITH and DONALD LAMBRECHT,

Appellees,

v.

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

Appellants.

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

Appeal by Right of the Order of the Commonwealth Court Entered on October 14, 2016 in 177 M.D. 2015)

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation, Inc., is a nonprofit, charitable organization that provides free legal aid to individuals whose rights are infringed by compulsory union associations, including fee requirements. Foundation attorneys frequently represent individuals subjected to forced union representation and/or compulsory union fees before state and federal courts and administrative agencies. *E.g.*, *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

The Foundation has an interest in this case because it provides free legal aid to independent workers in other cases concerning whether those citizens can be subjected to compulsory union representation or fee requirements, even though they are not government employees. *E.g.*, *id.*; *Bierman v. Dayton*, No. 17-1244 (8th Cir. docketed Feb. 2, 2017). Consequently, Foundation attorneys have experience with the type of regulatory regime that Governor Thomas W. Wolf seeks to impose on direct care workers ("DCWs") with Executive Order 2015-05.

COUNTERSTATEMENT OF THE QUESTION INVOLVED

The Foundation adopts the Appellees' Counterstatement of the Question Involved.

COUNTERSTATEMENT OF THE CASE

The Foundation adopts the Appellees' Counterstatement of the Question Involved.

SUMMARY OF ARGUMENT

Executive Order 2015-05 establishes a system of mandatory union representation and collective bargaining indistinguishable from that found in Pennsylvania's Public Employe Relations Act ("PERA"), 43 P.S. § 1101.101 *et seq.*, and in the laws of states that subject DCWs to public sector collective bargaining. The Commonwealth Court was therefore correct in finding that Governor Wolf exceeded his executive authority by creating a new system of collective bargaining through executive fiat. *See Markham v. Wolf*, 147 A.3d 1259, 1275-77 (Pa. Cmwlth. 2016).

ARGUMENT

A. The Executive Order Imposes a Regime of Collective Bargaining on Direct Care Workers that Is Indistinguishable from that Found in the PERA and Other States' Laws.

1. "[T]he federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization." *Harris*, 134 S. Ct. at 2623. "Almost every State has established such a program." *Id*. That includes the

Commonwealth, which operates five Medicaid-waiver programs. *See* Gov. Br., 9-10. "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." *Harris*, 134 S. Ct. at 2623. These persons are often called personal care attendants or personal assistants. *Id*. at 2624. In Pennsylvania, they are referred to as direct care workers.

In recent years, several states have amended their laws to extend their public-sector labor relations statutes to encompass DCWs who are not employed by the government, but rather by persons enrolled in state Medicaid programs. This includes California, Cal. Welf. & Inst. Code, § 12301.6(c)(1); Connecticut, Conn. Gen. Stat. § 17b-706b; Illinois, 20 Ill. Comp. Stat. 2405/3(f); Maryland, Md. Code Health Gen. § 15-901; Massachusetts, Mass. Gen. Laws ch. 118E, § 73; Minnesota, Minn. Stat. § 179A.54; Missouri, Mo. Rev. Stat. § 208.862(3); Oregon, Or. Rev. Stat. § 410.612; Vermont, Vt. Stat. Ann. tit. 21, § 1640(c), and Washington, Wash. Rev. Code § 74.39A.270.

In Executive Order 2015-05, Governor Wolf attempts to impose a similar regime in Pennsylvania—to create a collective bargaining system of non-employee DCWs—absent legislative authority to do so. As

the Commonwealth Court explained, that is not something the Governor can unilaterally do by executive fiat because, among other reasons, the PERA establishes the parameters of permissible collective bargaining *vis-à-vis* the Commonwealth. *Markham*, 147 A.3d at 1276.

The PERA comprehensively regulates when and how "public employer[s]"— which include the Commonwealth and its agencies, 43 P.S. § 1101.301(1)—must "meet and discuss" recommendations submitted by a union representing individual employees, *id*. at § 301(17), designated through an election procedure, 43 P.S. §§ 1101.603-605, with the objective of reaching a written agreement with that representative. *Id*. at § 1101.901. Executive Order 2015-05 establishes a functionally-identical regulatory regime, as the Order requires that the Commonwealth, through the Department of Human Services, "meet and confer" with a union representing certain individuals, designated through an election procedure, with the objective of reaching a written agreement with that representative. Executive Order ("EO") 2015-05, ¶ 3.

The only relevant difference between the PERA and the Executive Order is that the former covers "public employes," 43 P.S. § 1101.301(1), while the latter covers DCWs, EO ¶ 1(c). That is why the Executive Or-

der is invalid. The Governor lacks authority to effectively expand the PERA's scope by unilaterally creating a parallel system of collective bargaining for persons excluded from the PERA's ambit.

This is made clear by the PERA's narrow definition of "public employe," which:

> means any individual employed by a public employer but shall not include elected officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes . . . .

43 P.S. § 1101.301(2). That definition demonstrates a legislative intent to limit who can be subjected to collective bargaining with a public employer.

The Governor acts contrary to that intent by unilaterally subjecting individuals whom the General Assembly deliberately excluded from the PERA's ambit to a regulatory system functionally identical to PERA. For example, just as it is clear that the Governor cannot unilaterally impose a PERA-like system on "elected officials, appointees of the Governor . . ., management level employes, confidential employes, [or] clergymen or other persons in a religious profession" who are expressly excluded from the PERA's "public employe" definition, *id.*, it is equally

clear that the Governor cannot impose a PERA-like system on individuals who are excluded from that definition because they are *not* "employed by a public employer." *Id.* That includes DCWs, by the Governor's own admission. *See* EO ¶ 5(a) (stating that "[n]othing in this Executive Order shall be interpreted to grant Direct Care Workers the status of Commonwealth employees.").

A contrary conclusion—*i.e.*, that the Governor is free to impose unilaterally by executive order his own version of the PERA on anyone not covered by the PERA—is not only illogical, but lacks a limiting principle. The Governor would be free to subject almost anyone who is not a public employee, but receives state funds, to a regime of collective bargaining with the Commonwealth with the mere stroke of the pen. For example, the Governor could issue executive orders identical to EO 2015-05 that target physicians accepting Medicaid monies, hospitals accepting Medicaid monies, or any other person or entity directly or indirectly receiving public monies. The proposition that the Governor possesses such vast executive powers is untenable, especially given that the General Assembly has already precisely defined in the PERA what parties can collectively bargain with the Commonwealth.

2. Governor Wolf and the *amici curiae* Pennsylvania AFL-CIO and Other Pennsylvania Unions ("Unions") attempt to escape this conclusion by arguing that Executive Order 2015-05's representational-system differs from the PERA's system. *See* Gov. Br., 38-43; Unions' Br., 9-14. The alleged differences are illusory.

First, the Governor avers that the PERA "provide[s] that the employer and elected representative have a legal obligation to bargain in good faith," while the Executive Order creates no legal obligation to bargain. Gov. Br., 40; *see* Union Br., 12-13 (similar). This ignores that the Executive Order mandates that "[t]he Secretary, the Deputy Secretary, and the Direct Care Worker Representative *shall meet and confer*," and "*shall meet* at least monthly, on mutually agreeable dates and times," and "*shall discuss* relevant issues, including the following . . .." EO ¶¶ 3(b), 3(b)(1), 3(b)(2) (emphasis added). The Governor's claim also ignores his Executive Order's diktat that "[a]gencies under the Governor's jurisdiction shall take all steps necessary to implement the provisions of this Executive Order." EO ¶ 6. The Secretary's and Deputy Secretary's obligations to meet and confer with a representative under the Executive Order is as binding on those officials as the PERA's requirement

that public employers must meet and discuss issues with a designated union representative, 43 P.S. § 1101.701.

Second, the Unions argue that labor statutes allow "unions to complain about unfair labor practices to a labor board endowed with statutory and regulatory authority to issue enforceable orders against an employer," while the "Executive Order confers no such right legal rights to, or protection for, the DCWs or their representative." Union Br., 10-11. This assertion overlooks the Executive Order's mandate that "all existing or future vendors or contractors providing financial management services for the Commonwealth *shall refrain from interfering* with a Direct Care Worker's decision *to join or refrain from joining a labor organization,*" EO ¶¶ 6, 5(e) (emphasis added), which is enforceable against the vendors and contractors by the Commonwealth's agencies. *See id.* at ¶ 6 (requiring that "[a]gencies under the Governor's jurisdiction shall take all steps necessary to implement the provisions of this Executive Order.").

The Executive Order thus calls for the Commonwealth's agencies to compel third parties— "vendors or contractors"—not to interfere with union campaigns to cause DCW's to join the union. This enforceable

prohibition against vendors and contractors is similar, in both language and effect, to the PERA's unfair labor practice provision that states that "[p]ublic employers, *their agents* or representatives are prohibited from: . . . *interfering*, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act," 43 P.S. § 1101.1201 (emphasis added), which include the ability to "organize, form, *join* or assist in employe organizations." 43 P.S. § 1101.401 (emphasis added).

Third, Governor Wolf claims that the PERA calls for designating an "'exclusive representative,'" Gov. Br., 41 (quoting 43 P.S. § 1101.606), while the Executive Order does not limit a "'[DCW's] ability, individually or in concert with others, to petition Commonwealth regarding any issue of concern,'" *id*. at 41-42 (quoting EO ¶ 5(g)); *see* Union Br., 14-15 (similar). No such distinction exists, as the PERA's exclusive representation provision similarly:

> Provide[s], That any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect . . . .

43 P.S. § 1101.606. Thus, under both the PERA and the Executive Order, individuals are free to try to petition the Commonwealth and its

agencies, notwithstanding the designation of a representative to speak and contract on their behalf.

Moreover, while the Executive Order does not use the word "exclusive," a DCW representative *is* an exclusive representative because the Order provides that "[t]here shall only be one Direct Care Worker Representative recognized at any time." EO ¶ 3(a)(2).

Fourth, Governor Wolf disingenuously claims that, unlike the PERA, the "Executive Order does not provide for enforceable contracts," and does not "compel executive branch officials to do anything." Gov. Br., 42; *see* Union Br., 13-14 (similar). But with respect to agreements and bargaining obligations, the PERA and the Order similarly state:

PERA	**EO 2015-05**
"Once an agreement is reached between the representatives of the public employes and the public employer, the agreement shall be reduced to writing and signed by the parties. Any provisions of the contract requiring legislative action will only be effective if such legislation is enacted." 43 P.S. § 1101.901	"[T]he meet and confer process shall be reduced to writing. Where appropriate, and with the approval of the Governor, understandings reached through the meet and confer process will be implemented as the policy of the Department related to [DCWs] providing Participant-Directed Services. If any such mutual understanding requires legislation or rulemaking, the [DCW] Representative may make recommendations for legislation or rulemaking to the relevant body." EO, ¶ C(1)

"[S]uch obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession." 43 P.S. § 1101.701.	"Nothing in this Executive Order shall compel the parties to reach mutual understandings." EO, ¶ C(2).

Thus, little daylight exists between the PERA and the Executive Order when it comes to bargaining. Both require the Commonwealth to meet and discuss certain issues with a union representative, and neither compels either party to reach an agreement. Both require that any agreement reached be put into writing, but that terms of the agreement that require legislation are effective only if such legislation is enacted. The bargaining process established by the Executive Order is indistinguishable from the PERA's process.

Finally, neither the Governor and Unions make any attempt to distinguish the Executive Order's most notable feature from the PERA—namely, that the Executive Order creates an election procedure to determine which union will exclusively represent everyone in the bargaining unit, *i.e.*, are invested with the lawful privilege of being *listened to* by the Commonwealth and its officials. EO ¶ 3(a). The government putting to a vote whether a union shall represent everyone in a definable group in their relations with the government is a defining feature of a

public labor relations statute, including the PERA. 43 P.S. §§ 1101.603-05.

3. That the Executive Order creates a collective bargaining system also is apparent by its identity with statutes from other states that authorize collective bargaining for DCWs. As noted above, nine states—California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Oregon, Vermont, and Washington—have statutes subjecting DCWs to union representation for purposes of bargaining with the government over its Medicaid policies. *See* p.1 *supra*. These laws underscore that it is the prerogative of the General Assembly, and not the Governor, to decide whether DCWs are subjected to such a regulatory system.

Five of these states—California, Connecticut, Illinois, Massachusetts, and Oregon—simply declared DCWs to be public employees solely for purposes of the state's existing public-sector bargaining law, with few modifications or caveats. *Id*. In other words, these states passed laws making DCWs subject to their versions of PERA.

The parallels between the Executive Order and the laws of the remaining five states (Maryland, Minnesota, Missouri, Vermont, and

Washington) are even more notable. Like the Executive Order, these state laws:

- call for the certification of a union to represent all DCWs in their relations with a government agency;[1]
- call for an election or similar procedure to determine which union shall act as the DCW's designated representative;[2]
- require that the government meet and discuss policy issues with that representative, including the compensation paid to DCWs, training and orientation programs, payment procedures, registry requirements, and payroll deductions for union dues;[3]
- require that the resulting agreement be reduced to writing, and that the government agency seek rulemaking and/or legislation to implement the agreement;[4]

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[1] Md. Code Health Gen. § 15-903(b); Minn. Stat. § 179A.54, subd. 10; Mo. Rev. Stat. § 208.862(4); Vt. Stat. Ann., tit. 21, § 1634(a); Wash. Rev. Code § 41.56.080. The provision of the Washington Code is made applicable to DCWs by Wash. Rev. Code § 74.39A.270(1).

[2] Md. Code Health Gen. § 15-903(c); Minn. Stat. § 179A.54, subd. 8; Mo. Rev. Stat. § 208.862(4); Vt. Stat. Ann., tit. 21, § 1635; Wash. Rev. Code § 74.39A.270(2)(b);

[3] Md. Code Health Gen. § 15-904(d); Minn. Stat. § 179A.54, subd. 3; *id*. at § 256B.0711, subd. 4(c-d); Vt. Stat. Ann., tit. 21, §§ 1634(b-c); Wash. Rev. Code § 74.39A.270(5-6).

[4] Md. Code Health Gen. §§ 15-904(f), 15-904(g); Minn. Stat. § 179A.54, subd. 5, *id*. at § 256B.0711, subd. 4(d-e); Mo. Rev. Stat. § 208.862(4); Vt. Stat. Ann., tit. 21,

- acknowledge that program participants have the authority to select, supervise, and otherwise employ their DCWs;[5] and
- acknowledge that DCWs are not government employees, except with respect to being subjected to a regime of collective bargaining.[6]

In sum, the Executive Order is indistinguishable from both the PERA and other states' laws imposing systems of collective bargaining on DCWs. Consequently, this is not a system that Governor Wolf can create by executive fiat without authorizing legislation.

B. Governor Wolf's Rationale for His Executive Order Is Belied by His Admission That His Agents Could Meet and Speak with Union Officials without the Executive Order.

As discussed above, that the Executive Order establishes a system of collective bargaining can be ascertained by comparing the Order to the PERA and collective bargaining statutes applicable to DCWs. That proposition can also be demonstrated by approaching the question from another angle. To wit, the Governor's claim that his Executive Order is merely meant to enable his agents to discuss issues with a DCW repre-

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§ 1639; Wash. Rev. Code § 74.39A.270(5)(h).

[5] Md. Code Health Gen. § 15-907(b); Minn. Stat. § 179A.54, subd. 4; Mo. Rev. Stat. § 208.862(1); Vt. Stat. Ann., tit. 21, § 1640(a); Wash. Rev. Code § 74.39A.270(4).

[6] Md. Code Health Gen. § 15-907(a); Minn. Stat. § 179A.54, subd. 2; Mo. Rev. Stat. § 208.862(7); Vt. Stat. Ann., tit. 21, §§ 1640(b-c); Wash. Rev. Code § 74.39A.270(3).

sentative is belied by his own admission that an executive order is not needed for that purpose.

The Governor repeatedly claims that he issued Executive Order 2015-05 not to establish a system of collective bargaining, but merely "to establish a process for executive branch officials to periodically meet and confer with a representative chosen by direct care workers." Gov. Br. 22; *see id.* at 17-18 (similar); *id.* at 19 (similar) Yet, the Governor also admits that "[he] could have directed the same officials to meet with the same individuals or representative *without issuing an executive order*." *Id.* at 22 (emphasis added). The latter assertion is certainly true to the extent that the Governor's agents could meet with officials from the United Home Care Workers of Pennsylvania ("UHCWP"), and obtain their views on Medicaid policies, without the Order.

That the Executive Order is not necessary to enable the Governor's agents to meet and talk with UHCWP officials means that the Order must have greater purposes. Indeed, it would make no sense for the Governor go to the trouble of issuing a complicated Executive Order that is over 2400 words in length, and to defend its legality in court, just to do what the Governor could easily do without such an Order.

The Executive Order's greater purposes are apparent from its text: to impose a regime of mandatory UHCWP representation on DCWs. For although the Governor could meet and talk with UHCWP officials without an Executive Order, a collective bargaining system had to be established to: (i) make the UHCWP the mandatory representative of *all* DCWs, including those who want nothing to do with the union, EO ¶ 3(a)(2); (ii) make agreements with the UHCWP that will govern *all* DCWs, not just those who are union members, EO ¶ 3(c); and (iii) justify collecting union dues for the UHCWP from Medicaid payments owed to DCWs, *see* EO ¶ 3(b)(2)(h) (requiring that the Secretary discuss "[v]oluntary payroll deductions for Direct Care Workers"). The Governor lacks executive authority to unilaterally create such a regulatory system, which takes an act of the General Assembly.

CONCLUSION

The Court should affirm the Order of the Commonwealth Court and hold that the Executive Order is not a valid exercise of the Governor's executive authority.

Respectfully submitted,

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March 20, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the length of brief limitations of Pennsylvania Rules of Appellate Procedure 531(b)(3) because it contains 3,171 words, excluding parts exempted by Rule 2135(b). This Certification is based upon the word count of the word processing system used to prepare the brief.

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