

**[J-79A-2017 and J-79B-2017] [MO: Todd, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

JESSICA MARKHAM, VICTORIA : No. 109 MAP 2016  
MARKHAM, JESSE CHARLES, :  
PENNSYLVANIA HOMECARE : Appeal from the Order of the  
ASSOCIATION, UNITED CEREBRAL : Commonwealth Court at No. 176 MD  
PALSY OF PENNSYLVANIA, : 2015 dated September 22, 2016,  
: exited September 26, 2016.

Appellees

v.

THOMAS W. WOLF, IN HIS OFFICIAL :  
CAPACITY AS GOVERNOR OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF HUMAN SERVICES, :  
OFFICE OF LONG TERM LIVING, :  
:

Appellants

DAVID W. SMITH AND DONALD : No. 110 MAP 2016  
LAMBRECHT, :  
: Appeal from the Order of the  
Appellees : Commonwealth Court at No. 177 MD  
: 2015 dated October 14, 2016.

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

**DISSENTING OPINION**

I join Chief Justice Saylor's dissenting opinion in full. I would affirm the Commonwealth Court's grant of summary relief invalidating Sections 3 and 4 of Executive Order 2015-05 (Executive Order). I recognize it is a justifiable goal of the Executive Branch to collect information to best serve the needs and welfare of the citizens of the Commonwealth. For that reason, I agree with the Commonwealth Court that the Governor's Advocacy Group on Participant-Directed Home Care created by Section 2 of the Executive Order is within the scope of the Executive Branch's power and serves a legitimate purpose. However, the Direct Care Worker Representative Election Process, Meet and Confer Process, and Memorandum of Mutual Understanding subsections memorialized in Section 3 create an employment relationship between DCWs and the Commonwealth.<sup>1</sup>

DCWs are hired directly by the participants and are not subordinates of the Executive Branch. Under Section 3, a Direct Care Worker Representative is designated through an election conducted by the American Arbitration Association and tasked with meeting on a monthly basis with The Secretary of Human Services and the Deputy Secretary of Human Services for Long Term Living. Section 3(b)(2)(a)-(h) discusses the issues that "shall" be discussed including, *inter alia*, recruitment and retention of qualified DCWs, standards for compensating DCWs including wage ranges, health care benefits, retirement benefits and paid time off. Section 3(c)(1) then states "mutual understandings reached . . . shall be reduced to writing." Executive Order, § 3(c)(1). In addition, the section states "[w]here appropriate . . . understandings reached . . . will be implemented as the policy of the Department related to Direct Care Workers providing Participant-

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<sup>1</sup> I also find Section 4 pertaining to the Direct Care Worker List flawed but refrain from additional commentary based on the Majority's remand for proceedings in the Commonwealth Court.

Directed Services.” *Id.* Recognizing the aforementioned language in Section 3 was analogous to language in the Pennsylvania Labor Relations Act and Pennsylvania Employe Relations Act, the Commonwealth Court concluded the Section 3 directives amounted to collective bargaining. I am compelled to agree. Despite the Majority’s conclusion, Section 3 is not a “voluntary discussion process.” Majority Op. at 25. It is a mandated process for electing and conferring with one purportedly representative designee regarding policy considerations implicating all DCWs.<sup>2</sup>

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<sup>2</sup> The Majority disputes this conclusion asserting the Executive Order does not contain “the hallmarks of collective bargaining[.]” Majority Op. at 24. I respectfully disagree. For example, the first hallmark listed by the Majority in support of this averment is the absence of an exclusive bargaining representative. Nevertheless, the Order explicitly states, “There shall only be one Direct Care Worker Representative recognized at any time.” Executive Order § 3(a)(3). Accordingly, there is a de facto exclusive bargaining representative.