

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, MICHAEL
LOMBARDI, and ALAN HARDY,

Appellants,

v.

GOVERNOR CHRIS CHRISTIE,

Respondent.

Superior Court of New Jersey,
Appellate Division

App. Div. Dkt. No. A-

APPELLANTS' BRIEF IN SUPPORT OF EMERGENT RELIEF TO RESCIND
PORTIONS OF EXECUTIVE ORDER 225 and ACCELERATION OF THE APPEAL

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INTRODUCTION

This is a request by Appellants - Michael Lombardi and Alan Hardy, Software Development Specialists currently employed by the Office of Information Technology (OIT), and the Communications Workers of America, AFL-CIO (CWA) - for a Stay, in part, of Executive Order 225 (EO 225) issued on June 1, 2017. (Aa1).¹ Lombardi and Hardy have been notified that they will be transferred to other agencies effective July 22, 2017 to perform the same duties they currently perform for OIT. CWA represents approximately 600 OIT employees, including the approximately 180 employees who have been notified that they will be transferred to other State agencies. (Aa21, 32, 46, 50).

Appellants seek the rescission of those portions of EO 225 that authorize the Chief Technology Officer (CTO) of OIT to transfer to other agencies of State government software and application development and maintenance functions - core functions that OIT and its predecessor agency, the Office of Technology and Information Systems (OTIS), have performed for decades. OIT is an independent agency, that is "in but not of" the Department of Treasury. The CTO has informed approximately 180 Software Development Specialists who perform these functions that effective July 22, 2017, they will be transferred to other

¹"Aa _" denotes appendix to this brief.

agencies of State government, including the Departments of Treasury, Labor, Children and Families, Human Services, Health and Transportation, and the Motor Vehicle Commission, the Juvenile Justice Commission and the State Police.

Appellants maintain that the Governor does not have the authority to authorize the transfer of core OIT functions to other agencies. OIT is an independent agency and therefore not subject to the provisions of the Executive Reorganization Act, N.J.S.A. 52:14C-1 et seq. If the Governor wants to transfer core functions of OIT to other agencies - functions that the Legislature has statutorily assigned to OIT - he must do so through the legislative process. He cannot circumvent that process through the mechanism of an executive order. Accordingly, EO 225 violates separation of powers principles and the Presentment Clause of the New Jersey Constitution. N.J. Const. Art. III, ¶1; Art. V, §1, ¶14.

STATEMENT OF FACTS

A. The Office of Information Technology

1. The Office of Information Technology Reorganization Act

The Office of Information Technology Reorganization Act (the Act or the OIT Reorganization Act), N.J.S.A. 52:18A-224 to -234, enacted in 2007, codified Executive Order No. 87, issued by Governor Whitman on September 4, 1998, establishing OIT and

abolishing OTIS, the predecessor agency. The Act designates OIT as an office that is "in but not of the Department of Treasury" and provides that OIT is "independent of any supervision or control by the State Treasury, or the department or by any division, board, office, or other officer thereof." N.J.S.A. 52:18A-227.

In the Act's findings and declarations section, the Legislature recognized the broad array of IT functions performed by OIT, including the "core responsibilities of application development and maintenance," and expressly acknowledged the role of OIT in developing Department of Human Services' computer-based disability insurance systems, maintaining criminal databases utilized by the State Police, designing the Motor Vehicle Commission's online services, and assisting the Division of Taxation in collecting State revenues. N.J.S.A. 52:18A-225. The Act further provides that the "functions, powers and duties granted . . . by Executive Order No. 84 of 1984, Executive Order No. 87 of 1998 and Executive Order No. 42 of 2006 shall be continued" N.J.S.A. 52:18A-227 (emphasis added). (Executive Orders 84, 87 and 42 are included in the appendix to this brief at Aa7, 9 and 12 respectively.) EO 84, which established OTIS, expressly stated that OTIS would serve as a centralized agency to provide "information processing

guidance and systems development assistance to all agencies of State Government." (emphasis added).

As we discuss at greater length infra, and as the certifications of Lombardi, Hardy and Burdge establish, the software and application development functions that EO 225 authorizes the CTO to transfer to other agencies are functions that were first assigned to OTIS and thereafter to OIT, both by executive order and by statute. They are functions the agency has performed for almost two decades. (Aa21, 44, 49).

2. The Legislative History Preceding the OIT Reorganization Act

On April 19, 1984, the Legislature enacted the General Services Administration Act of 1984, N.J.S.A. 52:18A-178 et seq., which consolidated the functions of the Divisions of Purchase and Property and Building and Construction, along with the procurement and operational functions of the Division of Data Processing and Telecommunications into a General Services Administration ("GSA") within the Department of Treasury. With respect to data processing and telecommunications, the GSA was assigned responsibility for developing efficient uses of information processing and establishing and consolidating information processing centers throughout the State. N.J.S.A. 52:18A-187 to -190.

On October 17, 1984, EO 84 was issued pursuant to N.J.S.A. 52:18A-186 to -190, which outlined the functions, powers and duties of the GSA. (Aa7). EO 84 also established OTIS, thereby consolidating under the umbrella of a single State agency the operational responsibilities of the existing data centers within the Departments of Human Services, Labor, Law and Public Safety, and Transportation, along with their funding, personnel, equipment, powers, duties and functions.² As previously noted, the functions assigned to OTIS included the software and application development and maintenance functions that are about to be transferred from OIT to other agencies of State government - functions the OIT Reorganization Act expressly states shall be performed by OIT.

In 1998, EO 87 abolished OTIS and established OIT. (Aa9). EO 87 designated OIT as an independent office allocated in but not of the Department of Treasury. OIT continued to perform all of the functions, powers and duties previously performed by OTIS. Employees of OTIS became employees of OIT and retained

² See Bulletin issued by OTIS (Volume 1, Issue 1) dated December 1984, which states that the primary purpose of OTIS is to consolidate and coordinate all telecommunications and information processing systems within the State under one central organization. (Aa27).

their duties, employment status under Title 11A, and their collective negotiations status. (Aa21, 22, 44)

B. Executive Order 225

1. The CTO's Transfer of Core OIT Functions to other agencies

EO 225, issued by Governor Chris Christie on June 1, 2017, orders, inter alia, the CTO to decentralize software development and maintenance functions and operations for agency-specific applications that do not serve shared business requirements across the Executive Branch. Acting pursuant to the Executive Order's direction, the CTO is in the process of transferring the software and application development and maintenance functions, along with the approximately 180 OIT employees who perform these functions, to nine different state agencies. (Aa50). Under the CTO's decentralization plan, the functions of maintaining and developing agency-specific software would no longer be carried out by OIT. See Multi-Phase Plan for the Modernization and Optimization of Information Technology Services in the State of New Jersey Executive Branch (Aa15).

OIT employees received written notices of transfer, dated June 5, 2017, by regular mail to their residences. (Aa24, 46). The OIT employees who received notices of transfer develop and maintain the software and applications for the Motor Vehicle Commission, State Police, Juvenile Justice Commission, and the

Departments of Treasury, Transportation, Labor, Health, Children and Families, and Human Services.

After learning of the transfer notices, CWA requested a meeting with OIT and the Governor's Office of Employee Relations (OER). On June 12, 2017, CWA representatives and legal counsel met with OER and OIT representatives, including CTO David Weinstein, to discuss the transfer of OIT employees and their functions to other departments and agencies. (Aa50). CWA inquired about the reason for the transfers and whether there were any emergent circumstances that required the transfer of employees effective July 22. (Ibid.). Weinstein acknowledged that there was no emergent reason to transfer employees on July 22 and that following their transfer, employees would continue to perform the same programming and development duties they had performed prior to being transferred. (Ibid.).

2. Core OIT functions of software and application development and maintenance are being transferred to other agencies.

Prior to the establishment of OTIS, persons performing data processing duties for State departments and agencies were employees of the department or agency whose data processing systems they developed. (Aa21, 44). OTIS, and later OIT, was established for the purpose of consolidating the development of the State's data processing and telecommunications systems into

a single office. N.J.S.A. 52:18A-189 to -190. After its establishment, OIT continued to perform all of the duties and functions of OTIS. Pursuant to its enabling Act, OIT's core responsibilities include "application development and maintenance, data center operations, and telecommunications...." N.J.S.A. 52:18A-224 (emphasis added). The CTO's decentralization plan transfers the core functions of OIT related to application development and maintenance of agency-specific applications to other State agencies - effectively undoing the Legislature's decision to centralize these critical functions under a single agency.

ARGUMENT

I. The Standard for Granting a Stay

The factors to be considered when deciding an application for a stay are similar to the factors considered by a court when presented with an application for preliminary injunctive relief: the likelihood that the movant will prevail on the merits at the final hearing; whether the movant will suffer irreparable harm if relief is not granted; a balancing of the relative hardships and equities between the parties; and the public interest. See Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982). Generally, the movant must establish all of the Crowe factors clearly and convincingly, however, a court "may take a less rigid view in

its consideration of these factors when the interlocutory injunction sought is designed to merely preserve the status quo." McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007). See also Waste Management of N.J., Inc. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Here, Appellants seek to preserve the status quo and stay the transfer of software and application development and maintenance functions from OIT to other State agencies pending appeal.

II. There is a likelihood of success on the merits because the Governor does not have the authority to transfer legislatively assigned functions of an independent agency such as OIT, which is "in but not of" the Executive Branch of State government, without amending the OIT Reorganization Act.

Pursuant to the terms of its enabling statute, OIT is an independent agency that "is in but not of" the Department of Treasury. Over the past half-century, the New Jersey Supreme Court has held that the phrase "in but not of" is manifestly utilized to comply with the constitutional mandate that every agency be allocated to an established department in the Executive Branch while insulating the agency from complete Executive control. See N.J. Tpk. Auth. v. Parson, 3 N.J. 235, 244 (1949). To transfer the statutorily assigned functions of independent agencies, such as OIT, to other agencies of State government, "both the legislative and executive branches must enact new laws that are passed by the Senate and Assembly and

signed by the Governor." In re Plan for Abolition of Council on Affordable Housing, 214 N.J. 444, 449 (2013).

A. Independent agencies that are "in but not of" the Executive Branch may not be abolished or changed without Legislative action

In his decision denying the Appellants' request to rescind portions of EO 225, the Governor's Counsel states that EO 225 is "within the Governor's executive authority and consistent with the Office of Information Technology's authorizing statute [the OIT Reorganization Act]." (Aa6). Neither is true. The authorizing statute - the OIT Reorganization Act - clearly assigns to OIT the very functions the Governor authorizes the CTO to transfer to other agencies by executive order. As previously noted, the enabling Act expressly recognizes that OIT's core responsibilities include "application development and maintenance." N.J.S.A. 52:18A-224. Further, the OIT Reorganization Act provides that the functions granted by prior executive orders to OIT and OTIS "shall" continue to be performed by OIT. N.J.S.A. 52:18A-227. Pursuant to EO 84, OTIS was to serve as a centralized agency to provide "information processing guidance and systems development assistance to all agencies of State Government." (Emphasis added). For almost 20 years following the issuance of EO 87 by Governor Whitman (Aa9), OIT has performed the functions that will be transferred to nine

other State agencies on July 22, 2017, along with the 180 employees who perform these functions.

When the enabling statute of an agency designates the agency as "in but not of" an Executive Branch department, the Governor does not have the authority to change or abolish the agency. The Supreme Court in In re COAH considered whether the Governor had the power to abolish COAH, an independent agency created by legislative action, and to transfer its functions to the Department of Community Affairs (DCA). 214 N.J. at 448. There, Governor Christie sought to transfer COAH's functions to DCA by issuing Reorganization Plan No. 001-2011 pursuant to the Executive Reorganization Act. The Court held that the Executive Reorganization Act does not apply to COAH, because COAH is in but not of the Executive Branch. Id. at 455.

The Executive Reorganization Act grants the Governor the authority to reorganize the Executive Branch of government by submitting a reorganization plan to the Legislature. Absent disapproval by concurrent resolution of the Legislature within 60 days of the plan's submission, the proposed reorganization goes into effect. N.J.S.A. 52:14C-7. The Executive Reorganization Act authorizes the Governor to "transfer . . . the whole or part of the functions [of an agency] . . . to the jurisdiction and control of another agency" By

utilizing the authority granted pursuant to the Executive Reorganization Act the Governor may effectively amend existing enabling legislation without adhering to the constitutionally-mandated legislative process. N.J.S.A. 52:14C-4. If OIT was not an independent agency and was covered by the Executive Reorganization Act, the Governor could achieve what he seeks to accomplish here by filing a reorganization plan with the Legislature. Indeed, he would be obligated to do so since he is transferring "part of the functions [of OIT] . . . to the jurisdiction and control" of nine other agencies of State government.

However, the Executive Reorganization Act does not apply to independent agencies, such as COAH - agencies that are "in but not of" a department of State government. In re COAH, 214 N.J. at 454. "[W]ithout clear direction in the Reorganization Act that it should apply to independent agencies . . . there is no basis from which to infer that the Legislature intended to permit a governor to undo such a balanced representation scheme through a reorganization plan." Id. (quoting In re COAH, 424 N.J. Super. 410, 426 (App. Div. 2013)). The Court held that "an explicit legislative mandate was required" to authorize Governor Christie's proposed change to COAH. In re COAH, 214 N.J. at 455. Similarly here, the OIT Reorganization Act cannot be

rewritten without affirmative legislative agreement in the form of an amendment to the enabling legislation.

Like COAH, OIT's enabling Act states that "the office shall be allocated in but not of the Department of Treasury." N.J.S.A. 52:18A-227. Thus, the Executive Reorganization Act does not vest the Governor with authority to transfer to other State agencies core functions of OIT, including the functions of software and application development and maintenance - even those software and application development functions that are agency-specific. Whether or not such a transfer is sound policy is not the issue. Indisputably, these are functions OIT has performed for decades, and before that these functions were performed by its predecessor, OTIS. They are functions expressly assigned to OIT by the OIT Reorganization Act. The Governor cannot do through the use of an executive order what he cannot do through the Executive Reorganization Act. If agency functions cannot be transferred through the device of a reorganization plan filed with the Legislature, the Governor's only other recourse is to utilize the legislative process and urge the Legislature to amend the OIT Reorganization Act to remove from OIT and reassign to other State agencies the core functions that are to be transferred effective July 22, 2017.

B. EO 225 undermines the distribution of legislative and executive powers enumerated in the New Jersey Constitution

1. EO 225 violates the Presentment Clause of the New Jersey Constitution and Separation of Powers Principles

By transferring functions statutorily assigned to OIT via executive order, rather than by seeking appropriate legislation, the Governor is violating separation of powers principles and the Presentment Clause of the New Jersey Constitution.

New Jersey courts uphold executive orders when they derive authority from the State Constitution or a statute and do not impinge on legislative or judicial functions. Kenny v. Byrne, 144 N.J. Super. 243 (App. Div. 1976). However, an executive order is invalid when it conflicts with or amends existing law. "There can be no dispute that neither an Executive Order nor a regulation can change or repeal specific statutory authorizations." Twiss v. State, Dept. of Treasury, Office of Financial Management, 239 N.J. Super. 342, 352 (App. Div. 1990), rev'd on other grounds, 124 N.J. 461 (1991) (regulation, promulgated pursuant to an executive order, which barred public inspection of records concerning the escheat of real and personal property, deemed invalid because it was inconsistent with a statute clearly authorizing public inspection); Accident Index Bureau, Inc. v Hughes, 46 N.J. 160 (1965) (court

invalidated a regulation, promulgated pursuant to an executive order, which barred public inspection of workers' compensation records, because the regulation, conflicted with a statute requiring workers' compensation records to be open to public inspection.); Williamson v. Treasurer, 357 N.J. Super. 253, 272 (App. Div. 2003) (executive order invalid that amended the definition of public information to exclude certain personal financial information relative to life insurance policies and annuity contracts. "Simply put, an Executive Order cannot amend or repeal a statute."). "[W]hile an executive order is entitled to deference, it cannot amend or repeal specific statutory authorization." Perth Amboy Bd. Of Ed. v. Christie, 413 N.J. Super. 590, 600 (App. Div. 2010).

EO 225 effectively amends the OIT Reorganization Act in violation of Art. III, ¶1 and Art. V, §1, ¶14 of the New Jersey Constitution. The latter constitutional provision "prevents the exercise of law-making power without the concurrence of both houses of the Legislature and approval by the Executive, unless the Legislature can muster a two-thirds majority vote of both houses to override the executive veto." Gen. Assembly v. Byrne, 90 N.J. 376, 378- 80 (1982). Article III, paragraph 1 of the New Jersey Constitution states:

The powers of the government shall be divided among three distinct branches, the legislative,

executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N.J. Const., Art. III, ¶1.

The separation of powers principle was designed to "prevent the concentration of unchecked power in the hands of any one branch." David v. Vesta Co., 45 N.J. 301, 326 (1965); Brown v. Heymann, 62 N.J. 1, 11 (1972) (the aim of separation of powers is not to prevent cooperation among the branches of government, but to ensure that one branch cannot "claim[] or reciev[e] an inordinate power."). As the Court observed in Communications Workers of America v. Florio, 130 N.J. 439, 457 (1990), "the taking of power is more prone to abuse and therefore warrants an especially careful level of scrutiny." "In such scenarios of unilateral aggrandizement, our courts have applied a more stringent standard of review." CWA v. Christie, 413 N.J. Super. 229, 258 (App. Div. 2010).

Here, the Governor violated separation of powers principles by using the device of an executive order to, in effect, amend the OIT Reorganization Act that assigns to OIT specific IT functions, among them software and application development and maintenance. This "taking of power" and "aggrandizement" warrants a high level of scrutiny by this Court.

III. Appellants satisfy the irreparable harm prong of the test

A stay maintaining the status quo is necessary to prevent the irreparable harm that will be caused by the transfer of OIT employees to other agencies and to preserve fundamental democratic principles that are violated by the continued abuse of executive power by this Governor. Approximately 180 OIT employees, performing core OIT functions, will be transferred to other agencies effective July 22, 2017. Many of these employees will be physically transferred on that date, along with their computers and other essential equipment necessary to perform their functions. Other employees will be transferred soon thereafter. Others, may, for some period, remain at their current work stations because there is no space to house them in the departments or agencies to which they are being transferred. However, as to those employees, the agencies will have to make arrangements to accommodate the employees slated for transfer.

The employees in question perform vital functions with respect to the computer systems of nine agencies of state government, including the Motor Vehicle Commission, the Department of Human Services, the Department of Labor, the Department of Children and Families and the State Police. It is inconceivable that this unlawful, and for that matter unnecessary, transfer of employees and functions will not cause

some level of disruption to the computer operations of agencies performing essential and sensitive functions, including law enforcement and child protective services. Additionally, for some period of time during the transfers, OIT employees may not have access to the State's networks and databases to make necessary repairs to software and application systems. (Aa46).

Thereafter, if this Court voids the portion of EO 225 that authorizes and mandates this transfer of functions, the entire process will have to be reversed, resulting in yet additional and unwarranted disruption. This is a quintessential case calling for the preservation of the status quo pending appeal - an appeal that Appellants have moved to accelerate.

Moreover, this is not the first time this Governor has exceeded the scope of his executive authority. Indeed, immediately upon coming into office he issued Executive Order No. 7, which this Court vacated as exceeding his executive power and as "so fundamentally incompatible with our existing laws and statutes as to impair the 'essential integrity' of the constitutional powers of the Legislature." CWA v. Christie, 413 N.J. Super. at 274. Similarly, the Governor's action here exceeds his executive power and as in CWA v. Christie, the objectives he seeks "must be pursued through legislation." Ibid. Three years after this Court decided CWA v. Christie, the

New Jersey Supreme Court cautioned that if the Governor wants to transfer the functions performed by an independent state agency, such as COAH, or for that matter OIT, he must to "take another path," namely, seek legislation. In re COAH, 214 N.J. at 580.

When the Governor exceeds the scope of his executive authority, and does so repeatedly, his action impairs the "essential integrity" of our representative democracy and its system of checks and balances secured by separation of powers principles. The harm to the integrity of the constitutional fabric of our State government, even for brief periods, is by definition "per se" irreparable. As we explain in Point III infra, there is no discernable prejudice to the Governor or to the CTO if the status quo is maintained while this appeal is heard on an accelerated basis.

IV. A balancing of the relative hardships to the parties favors the granting of a stay

Significantly, there is no compelling reason that the transfer of functions and employees must take place on July 22, 2017. The employees in question will continue to perform the same functions after their transfer as they performed as OIT employees. In certain instances they will perform those functions working out of the same office and at the same work station even after July 22. (Aa 46, 50). In other instances, the impacted employees will perform their functions from new

locations. However, the CTO is unable to identify any emergent need to transfer the functions at issue - certainly not on July 22. (Aa46).

V. The granting of a stay is in the public interest

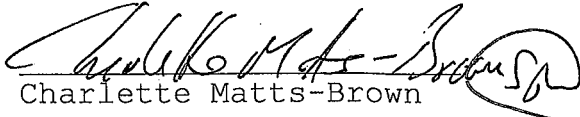
The public interest is served when the branches of government operate within the bounds of their constitutional authority and it is in the public interest to prevent the exercise of "tyrannical" power when a governor arrogates to himself the power to both make and enforce the law. General Assembly, 90 N.J. at 383.

Conclusion

For the reasons set forth in this brief, the July 22, 2017 transfer of functions and employees should be stayed and the operation of the portion of EO 225 authorizing the CTO to transfer software and application development and maintenance functions to other State agencies should also be stayed. Further, the appeal should be accelerated.

Respectfully submitted,


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Charlette Matts-Brown

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