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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ERIK ARNESON, individually and in his official capacity as Executive Director of the Office of Open Records, and SENATE MAJORITY CAUCUS, Petitioners, v. THOMAS W. WOLF, in his official capacity as Governor of the Commonwealth of Pennsylvania, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT, and OFFICE OF OPEN RECORDS, Respondents.	:	No. 35 MD 2015

EMERGENCY APPLICATION TO VACATE AUTOMATIC SUPERSEDEAS

Just yesterday, this Court held that the Governor cannot terminate the Executive Director of the Office of Open Records absent cause. In so holding, this Court found that Governor Thomas Wolf violated the Pennsylvania Constitution by purporting to "terminate" Executive Director Erik Arneson without the requisite grounds. In response to the Court's Order finding this violation of the law, Arneson returned to work yesterday, largely without incident. But today, when he attempted to do the same, he was effectively turned away. The reason? Seemingly Governor Wolf and the Department of Community and Economic Development (the Executive Respondents) claim the right to avoid the dictates of this Court's June 10, 2015 Order due to their appeal and the automatic supersedeas effected in their favor by Pa.R.A.P. 1736(b).

Yet, for the reasons set forth below, the supersedeas claimed by Executive Respondents does not extend to excluding Arneson from office since the Office of Open Records has not filed an appeal in order to effectuate an automatic supersedeas in its favor. If the Court agrees with this premise, then no further relief under or additional consideration of this application is necessary. However, should the Court deem that the Executive Respondents' supersedeas operates to exclude Arneson from office, then Petitioners submit that the supersedeas should be lifted immediately to end the various harms being caused by the Executive Respondents' avoidance of the Court's order. Alternatively, Executive Respondents' should be required to post appropriate security pending appeal. Therefore, per Pa.R.A.P. 123 and 1732, Petitioners Erik Arneson and the Senate Majority Caucus move for appropriate relief.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On January 13, 2015, then-Governor Tom Corbett appointed Petitioner Erik Arneson as the second ever Executive Director of the Office of Open Records (OOR). *See* Cmwlth. Ct. op. 6/10/15 at 3. Executive Director Arneson received his fixed six-year commission on the same date, designating his term as January 13, 2015 through January 13, 2021 "and until your successor is appointed and qualified, if you shall so long behave yourself well." *See* Cmwlth. Ct. op. 6/10/15 at 3. Executive Director Arneson took the oath of office on January 16, 2015. *See*

Cmwlth. Ct. op. 6/10/15 at 3. Executive Director Arneson's appointment was lawful. *See* Cmwlth. Ct. ord. 2/4/15 (Pellegrini, P.J.) ("Pursuant to the parties' stipulation … Governor Corbett's initial appointment of Petitioner will be deemed lawful.").

Despite Executive Director Arneson's six-year appointment, Governor Thomas Wolf, on the very day he was inaugurated, purported to "terminate" Arneson's appointment, "effectively [sic] immediately," by letter dated January 20, 2015, which was delivered to Arneson by messenger on January 22. *See* Cmwlth. Ct. op. 6/10/15 at 3. Governor Wolf did not cite any displeasure with Executive Director Arneson's performance or cite to any "cause" for his removal. Instead, despite Governor Corbett's lawful use of his appointment power to fill an empty seat at the OOR, Governor Wolf baldly stated that the lawful process "lacked transparency, was of questionable timing and appears to have been rushed through." *See* Cmwlth. Ct. op. 6/10/15 at 3 n.3.

Petitioners promptly filed a petition for review with this Court seeking a writ of mandamus as well as declaratory relief. Next, Petitioners initially filed in this matter an application for special and preliminary injunction, which was withdrawn after argument on the application. Petitioners then filed an application for summary relief, while Respondents Governor Wolf and the Department of Community and Economic Development (DCED) filed a cross application for summary relief.

Respondent OOR also filed a cross application for summary relief. The Court, sitting en banc, heard argument on the applications on March 11. The Court issued its Opinion and Order regarding the applications on June 10, 2015.

In summary, the June 10 Opinion concluded that the Executive Director of the OOR can only be removed for cause. *See* Cmwlth. Ct. op. 6/10/15 at 3. The majority of this Court reached that conclusion because it found that the General Assembly expressed its intent, consistent with Pennsylvania Constitution Article VI, § 1, that the Executive Director is not an at-will appointee. The Court found the General Assembly expressed this intent in six ways:

> [1] the Executive Director serves a fixed term that exceeds the appointing Governor's term; [2] statutory language indicates that the term is mandatory as opposed to directive; [3] the OOR's predominate statutory purpose is to perform quasi-judicial, adjudicatory functions in which the Executive Director is directly involved; [4] the OOR is structurally and functionally independent from the executive department; [5] the OOR does not perform any quintessential executive duties; and [6] most significantly, the OOR adjudicates disputes concerning the potential release of governmental documents in the possession of the Governor (which clearly reflects the legislature's intent that the Executive Director not be subject to the control of the Governor) and the executive branch in general.

See Cmwlth. Ct. op. 6/10/15 at 37 (numbering added).

With the Opinion, the Court entered an order stating as follows:

> 1. It is hereby declared that Governor Wolf exceeded his removal power under Article VI, Section 7 of the Pennsylvania Constitution and dismissed Arneson from his position of Executive Director without the authority of law.

> 2. Arneson is ordered to be restored to the position of Executive Director and shall receive any backpay and benefits owing, discounting any offsets to reflect actual loss of income.
>
> 3. Arneson's request for a permanent injunction and any other relief is denied.

See Cmwlth. Ct. ord. 6/10/15.

In response to paragraph 2 of the Court's June 10 Order, Arneson returned to work at OOR on June 10. Shortly after arriving, he was advised by Denise Gross, a representative of human resources for PennDOT (which apparently administers HR for DCED), that she had been told not to proceed with adding Arneson to the payroll and not to give him a computer, pending appeal. Notably, at the time of this conversation, no appeal had been filed. Arneson was, however, permitted to remain at the OOR, and he continued to work for the balance of the day.

Late in the day on June 10, Executive Respondents filed a Notice of Appeal and Jurisdictional Statement with this Court. OOR, the other Respondent in this matter, did *not* file an appeal (and still has not).

This morning Arneson attempted to return to work again, consistent with this Court's June 10 Order. While he was allowed access to the offices of OOR, including to the Executive Director's office, he was advised that HR had removed the telephone from the Executive Director's office. Arneson called Denise Gross, who told him the following:

- Arneson has not been "on-boarded"—i.e., he is not being processed as an employee in any way;
- HR is "not prepared" to start the on-boarding process "at this time"; and
- Although there was a telephone in the Executive Director's office yesterday (which Arneson used several times in the performance of his duties), the telephone had been removed apparently sometime between the close of business yesterday and the opening of business today.

Despite the fact that the Executive Director receives a direct appropriation to fund OOR and has the sole authority to manage this appropriation, 65 P.S. § 67.1301(f), Executive Respondents are circumventing the Executive Director's authority and seizing direct control of the OOR's purse strings to exact power and influence over the office. In fact, Arneson was also advised that PennDOT HR left the decision of whether to allow Arneson into the office in the hands of OOR staff (despite the obvious interference by Executive Respondents in OOR's operations). If they felt "uncomfortable" they were to call and have him removed. Of course, OOR staff told Arneson they would do no such thing. These actions eliminate any argument that the Governor would never interfere with the operations of the office.

In light of the above, Executive Director Arneson has been effectively barred from office, notwithstanding the Court's June 10 Order.[1] The apparent reason is the automatic supersedeas effected under Pa.R.A.P. 1736(b) by virtue of

[1] Executive Respondents have never articulated in the last 24 hours under what authority they could bar Arneson from his OOR duties.

Executive Respondents' appeal. These actions prompted this emergency application.

II. ARGUMENT

As a threshold matter, Petitioners find it necessary to state from what precisely they are seeking relief. As set forth above, the OOR *has not filed an appeal*. Hence, there is no supersedeas effected in favor of the OOR.

This is critical because of the concluding sentence of the Court's June 10 Opinion, which states as follows: "We summarily deny the OOR's motion because the OOR is a *necessary party* to this proceeding and *is obligated, per our order*, to restore Arneson to his former position and provide backpay if due." *See* Cmwlth. Ct. op. 6/10/15 at 40 (emphasis added). This sentence, coupled with OOR's lack of appeal means that only paragraph 1 of the Court's June 10 Order is stayed by Executive Respondents' appeal; paragraph 2, which obligates OOR to restore Arneson to office and provide backpay, remains in full force and effect. *Cf.* Pa.R.A.P. 1701(c) ("*Where only a particular item, claim or assessment adjudged in the matter is involved in an appeal* …the appeal … proceeding shall operate to prevent the trial court or other government unit from proceeding further *with only such item*, claim or assessment, unless otherwise ordered by the trial court … or by the appellate court or a judge thereof as necessary to preserve the rights of the appellant." (emphasis added)). As a practical matter, this means that Arneson can

continue to report to work, and get paid, regardless of Executive Respondents' appeal and any automatic supersedeas effected in their favor.[2]

However, should the Court disagree with the above analysis, and should the Court deem Executive Respondents' supersedeas operates expansively to exclude Arneson from resuming his duties at OOR, Petitioners seek to vacate any supersedeas in favor of Executive Respondents.

In order to prevail on an application to vacate an automatic supersedeas, Petitioners must establish three things: (1) that they are likely to prevail on the merits; (2) that without the requested relief they will suffer irreparable injury; and (3) that the removal of the automatic supersedeas will not substantially harm other interested parties or adversely affect the public interest. *Solano v. Pa. Bd. of Prob. & Parole*, 884 A.2d 943, 944 (Pa. Cmwlth. 2005) (single judge opinion, Leadbetter, J.); *see also* G. Ronald Darlington, *West's Pennsylvania Appellate Practice*, § 1736:6 (2014-15 ed.) ("Essentially, the appellee's burden is to demonstrate the converse of *Process Gas*, that is, the appellee should argue that the appellant is not likely to succeed on appeal, that the appellant will not be harmed if the supersedeas is vacated, that the appellee will be irreparably harmed if the

[2] Pa.R.A.P. 1736(b) expressly limits the operation of an automatic supersedeas only to the parties taking an appeal, stating: "Unless otherwise ordered pursuant to this chapter the taking of an appeal by any party specified in Subdivision (a) of this rule shall operate as a supersedeas *in favor of such party*, which supersedeas shall continue through any proceedings in the United States Supreme Court." Pa.R.A.P. 1736(b) (emphasis added). The Rule does not expand the operation of the automatic supersedeas to *all* parties, nor does it expand the operation to parties that have opted not to take an appeal.

supersedeas is not vacated and that the public interest will not be harmed if the supersedeas is vacated."). Petitioners can readily meet each of these requisite elements.

A. Petitioners are likely to prevail on the merits in the Executive Respondents' appeal.

Petitioners' likelihood of success before the Supreme Court is manifest in the well-reasoned June 10 Majority Opinion of this Court. Hence, this factor favors vacating the supersedeas.

B. Petitioners will suffer irreparable harm if the supersedeas is not vacated.

"[W]henever a violation of a statute is found, such violation constitutes irreparable harm per se[.]" *Com. v. Burns*, 663 A.2d 308, 312 (Pa. Cmwlth.1995) (citing *Pa. Pub. Utility Comm. v. Israel*, 52 A.2d 317 (Pa. 1947)); *see also SEIU Healthcare Pa. v. Com.*, 104 A.3d 495, 508 (Pa. 2014). As this Court just concluded, Erik Arneson's statutory right to occupy and exercise the rights of the Executive Director were summarily violated by his unlawful ouster. *See* Cmwlth. Ct. op. 6/10/15 at 10-16; *see also* 65 P.S. § 67.1310(b)-(f). As long as his illegal ouster continues, irreparable harm per se results. And this injury is present and ongoing until remedied by the restoration of Arneson to his lawfully appointed position as Executive Director. *Cf. Great Lakes Energy Ptnrs. v. Salem Twp.*, No. 8126 of 2005, 2006 Pa. Dist. & Cnty. Dec. LEXIS 228, at *3 (C.P. Westmoreland

2006) ("To force plaintiffs to comply with an invalid ordinance is irreparable harm per se."). Hence this factor too favors vacating the supersedeas.

C. If the supersedeas is vacated, neither Executive Respondents nor the public interest will be harmed.

By restoring Erik Arneson to his duly appointed role, no harm will fall to the Executive Respondents. Restoring Executive Director Arneson to his statutory position will simply restore the status quo that existed before Governor Wolf's unlawful activities. Once again the lawfully appointed Executive Director will be able to fulfill his statutory duties, just as he did in the days before he was illegally ousted. Having a competent and lawfully appointed Executive Director at the head of OOR will not negatively impact Executive Respondents in any way.

Further, previously in this case Executive Respondents argued that OOR is operating just fine without Executive Director Arneson, and should they raise that argument again here, it should be of no import. For purposes of vacating a supersedeas, the inquiry is not whether OOR is properly functioning without Arneson, but is, instead, whether Executive Respondents will be harmed if OOR is compelled to operate with Arneson as its leader. Looking at this application through that appropriate lens, the supersedeas should be vacated because no harm will follow from Arneson resuming his statutory duties.

Finally, the public interest favors vacating the supersedeas. Allowing Executive Director Arneson to fulfill his duties will ensure that the mandates of the

RTKL are fulfilled, specifically, the mandate that OOR have an independent leader. Further, given that few appeals to the Supreme Court are resolved in an expedited manner, it is reasonable to conclude that if Arneson is not immediately restored to his lawfully appointed post, it is possible he will remain unable to fulfill his role for over a year. The public interest is better served by having lawfully appointed officials serve in office than by having statutory offices remain vacant. As such, this factor also favors vacating the supersedeas.

III. ALTERNATIVE REQUEST FOR RELIEF

In the alternative to the above, if the Court decides not to vacate the supersedeas, Petitioners request that the Court require Executive Respondents to post appropriate security under Pa.R.A.P. 1737(1). *See* Darlington, *West's Pennsylvania Appellate Practice*, § 1737:2 ("Thus, for example, even though the filing of a notice of appeal by a political subdivision acts as an automatic supersedeas and the political subdivision is exempted from posting security, the appellee may apply for an order requiring the political subdivision to post appropriate security as a condition for the appeal to act as a supersedeas.").

If the supersedeas is interpreted to exclude Executive Director Arneson from reporting to work, and if the supersedeas is not lifted during the pendency of the appeal to the Supreme Court, Arneson will be displaced from his OOR benefits and salary for well in excess of a year. Further, he will incur substantial attorneys'

fees pursuing this matter in his official capacity, which, because it is an official capacity suit, those fees would otherwise be paid by OOR. It is patently unfair when a majority of this Court just ruled that Arneson was entitled to immediately return to work and be paid his salary and benefits, yet by operation of a procedural rule, a simple filing by Executive Respondents' displaces this outcome. Under these circumstances, Executive Respondents should, in the alternative to the above requested outright lifting of the supersedeas, be required to post security sufficient to cover Arneson's salary and benefits (including attorneys' fees) during the pendency of the appeal.

IV. CONCLUSION

This Court has concluded that Governor Wolf unlawfully removed Executive Director Arneson from the office to which he was lawfully appointed and which he is statutorily entitled to fulfill. Executive Respondents have taken an appeal from this Court's decision thereby yielding an automatic supersedeas in their favor, which means the dictates of the RTKL are being violated during the pendency of the appeal *if* their supersedeas extends as far as they suggest. That violation is irreparable harm per se. Further, Executive Respondents are unlikely to succeed on their appeal and no party will be harmed if Executive Director Arneson is entitled to fulfill the duties of his office while the appeal is pursued. As such, Petitioners ask the Court to enter an order granting the following relief:

1. Petitioner Erik Arneson shall be immediately reinstated as Executive Director of the Office of Open Records.

2. The Office of Open Records shall immediately process and ensure the payment of Erik Arneson's salary, including back pay, his full access to benefits, and his exercise of the Office of Executive Director of the Office of Open Records.

3. Governor Wolf shall make no further attempts to remove Erik Arneson as Executive Director without cause.

4. Any automatic supersedeas in favor of Executive Respondents pursuant to Pa.R.A.P. 1736(b) is vacated.

5. In the alternative, Governor Wolf and DCED shall post appropriate security.

Respectfully submitted,

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VERIFICATION

I, Erik Arneson, verify that the statements made in the foregoing Emergency Application to Vacate Automatic Supersedeas are true and correct to the best of my knowledge, information and belief. I make this verification subject to 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: 6/11/2015

Erik Arneson