SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4829-16T4

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

    Appellants,

v.

CHRIS CHRISTIE, GOVERNOR
OF THE STATE OF NEW JERSEY,

    Respondent.

_____

Argued September 18, 2017 - Decided February 21, 2018

Before Judges Messano, Accurso and Vernoia.

On appeal from Executive Order No. 225.

Charlette Matts-Brown argued the cause for
appellants (Weissman & Mintz, LLC,
attorneys; Charlette Matts-Brown and Steven
P. Weissman, on the brief).

Peter Slocum, Assistant Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney
General, of counsel; Peter Slocum and
Melanie R. Walter, Deputy Attorney General,
on the brief).

PER CURIAM

On June 1, 2017, former Governor Christie issued Executive Order No. 225, directing the State's Chief Technology Officer (CTO) to transfer the responsibility for certain agency-specific software applications from the Office of Information Technology (OIT) to the Executive Branch agencies for which they were developed. 49 N.J.R. 1577(b) (June 19, 2017). The Order also directed the CTO to undertake "a thorough review of the State's information technology infrastructure" and inform the Governor within 180 days of the CTO's plan for consolidating IT "infrastructure assets and functions." Id. at 1578.

The Order arose out of a comprehensive IT review by the CTO, which he presented to the Governor in a report entitled "Multi-Phase Plan for the Modernization and Optimization of Information Technology Services in the State of New Jersey, Executive Branch." The Plan traced the history of the efforts of several administrations to centralize IT resources across the Executive Branch beginning with Governor Kean's comprehensive effort in EO84, Exec. Order No. 84 (Oct. 17, 1984), 1 Laws of New Jersey 1984 1336, to consolidate in OIT's predecessor the mainframe processing infrastructure within the Departments of Human Services, Labor, Law and Public Safety, and Transportation.

The Plan detailed how the evolution from mainframe technology to "newer distributed server technologies" allowed the departments "to reestablish their own respective IT infrastructure footprints." State of New Jersey Office of Information Technology, <u>Multi-Phase Plan for the Modernization and Optimization of Information Technology Services in the State of New Jersey, Executive Branch</u>, at 3 (2017). IT infrastructure re-sprouted across departments led to Governor Whitman's effort in EO87, <u>Exec. Order No. 87</u> (Sept. 4, 1998), 30 N.J.R. 3569(a) (Oct. 5, 1998), "to refocus on consolidation and integration" by coordinating IT "planning and budgeting on a statewide basis to effectively realize operating efficiencies." <u>Multi-Phase Plan</u>, at 3.

Following another statewide IT assessment in 2006, Governor Corzine issued EO42, <u>Exec. Order No 42</u> (Nov. 20, 2006), 38 N.J.R. 5195(b) (Dec. 18, 2006), establishing the position of CTO with "the overall responsibility and authority for all IT operations in the Executive Branch," including agency operations. <u>Multi-Phase Plan</u>, at 3. EO42, codified the following year in the Office of Information Technology Reorganization Act, N.J.S.A. 52:18A-224 to -234, "led to a second consolidation of Executive Branch data centers, beginning with the Department of Transportation." <u>Multi-Phase Plan</u>, at 3.

A-4829-16T4

Since that time, however, the CTO opined that although "OIT was created for the primary purpose of managing statewide information technology and infrastructure needs of the Executive Branch, it has also become responsible for developing and maintaining agency-specific software applications on behalf of individual agencies." Id. at 2. In his view, an "imbalance of functions between OIT and the Executive Branch agencies" had developed, resulting in OIT being "responsible for developing and maintaining agency-specific software applications on behalf of individual agencies," and "individual departments and agencies largely maintain[ing] their own information infrastructures rather than relying upon the shared resources and expertise that OIT can provide." Ibid.

The CTO proposed a three-phase strategy for addressing those problems. First, the CTO recommended transferring the responsibility for maintaining and developing agency-specific software to the agencies, requiring each agency "to maintain and develop its own software unique to that agency, with OIT providing support as necessary." Id. at 4-5. That change, accomplished in Phase One, would result in the CTO, "[s]ubject to any required approval from the Civil Service Commission," transferring 192 OIT employees to eight departments in the Executive Branch. Id. at 5. The employees would be transferred

from OIT to the agency for which they were performing daily
assignments. Ibid.

Phase Two would address the problem of IT infrastructure
scattered across the Executive Branch. The CTO reported that
"most of the employees engaged in activities related to the
management of server, storage, network, and data center assets
are employed by agencies other than OIT." Id. at 5-6. "In
Phase Two[,] various enterprise infrastructure functions and
operations in the Executive Branch currently performed by
agencies will be consolidated and assigned to OIT." Id. at 6.

Although the CTO believed that consolidation would "lead to
a significant reduction in information technology infrastructure
redundancies while enabling the maximum utilization of the
State's computing, network, and storage resources within its
enterprise-class data centers," he acknowledged OIT was not
"apprised of the full extent of all assets and personnel
connected to such infrastructure." Ibid. Accordingly, he
proposed "a comprehensive survey among the various agencies in
the Executive Branch to inventory all such assets and resources"
followed by the development of a "comprehensive proposal to
determine which assets and resources, and which corresponding
functions and operations, should appropriately be transferred to
OIT." Ibid.

A-4829-16T4

In Phase Three, the CTO proposed addressing the many

outdated legacy applications in the Executive Branch. The Plan

called for OIT to assist the departments and agencies in

identifying applications relying on outdated programming

languages and inefficient interfaces with the goal to "modernize

or decommission these legacy systems." Ibid.

Responding to the Plan and acknowledging his

"responsibility . . . to define and establish the overall

direction, standards, and priorities for the information

technology community in the Executive Branch," N.J.S.A. 52:18A-

234, Governor Christie issued EO225 in June 2017 to begin

implementation of the CTO's multi-phase plan. Exec. Order No.

225 (June 1, 2017), 49 N.J.R. 1557(b) (June 19, 2017).

Declaring that

> aligning the State's core information
> technology infrastructure footprint through
> server virtualization and the consolidation
> of dozens of server rooms into shared,
> enterprise-class data centers would enhance
> the efficiency, security, and reliability of
> State data and information technology
> services and ensure the protection of the
> State's information across the Executive
> Branch in a consistent and uniform manner,
> thereby enabling the State to better carry
> out its essential governmental functions and
> protect against cyber threats;

the Governor directed the CTO to

1. . . . take any actions as are necessary
and appropriate to accomplish the plan to
decentralize software development and
maintenance functions and operations for
agency-specific applications that do not
serve shared business requirements across
the Executive Branch.

2. . . . undertake a thorough review of the
State's information technology
infrastructure, defined as computer,
storage, network, and data center assets, to
identify opportunities for centralizing
common information technology functions and
operations.

3. . . . be specifically authorized to ask
department and agency heads to submit an
inventory of all information technology
infrastructure assets within a department's
or agency's server room(s) or otherwise
under the management of department or agency
staff to the CTO within 30 days in a manner
prescribed by the CTO. The CTO shall be
authorized to transfer the ownership and
management of any information technology
infrastructure assets included in the
aforementioned inventory submission.

4. . . . be specifically authorized to ask
department and agency heads to submit a
roster of all staff performing information
technology infrastructure functions and
operations to the CTO within 30 days in a
manner prescribed by the CTO.

5. . . . inform the Governor of his plan
for consolidating information technology
infrastructure assets and functions pursuant
to this Order no later than 180 days
following the issuance of this Order.

[Id. at 1577-78.]

The EO further directed that

6. The aforementioned recommendations from the CTO shall conform to the applicable provisions of the Office of Information Technology Reorganization Act, N.J.S.A. 52:18A-224 [to -234], the State Agency Transfer Act, N.J.S.A. 52:14D-1 [to -8], and the Civil Service Act, N.J.S.A. 11A:1-1 [to 11A:12-6], as well any other applicable state or federal requirements.

7. The CTO shall be specifically authorized to ask department and agency heads to submit to the CTO a roster of legacy applications in need of modernization within 60 days, as well as proposals for the modernization or decommissioning of such applications within 180 days, in a manner prescribed by the CTO.

8. The CTO shall enter into Service Level Agreements, Memoranda of Understanding, or such other arrangements, as well as take such other actions, as are necessary and appropriate in the judgment of the CTO, to accomplish the recommendations contained in the aforementioned report and to carry out this Order.

9. This Order shall take effect immediately.

[Id. at 1578.]

Plaintiffs Michael Lombardi and Alan Hardy were among the State employees transferred from OIT to other agencies pursuant to EO225. They and their union, the Communication Workers of America, AFL-CIO, "seek the rescission of those portions of EO225 that authorize the CTO to transfer to other agencies of State government software and application development and

maintenance functions — core functions that OIT and its predecessor . . . have performed for decades."

Plaintiffs contend the Governor's transfer of those "statutorily-assigned functions" by executive order violates constitutional principles of separation of powers, N.J. Const. art. III, ¶ 1, because it conflicts with the OIT Reorganization Act. We disagree and hold the former Governor acted pursuant to the OIT Reorganization Act in issuing EO225 and, consequently, not in violation of the separation of powers doctrine.

It is well-settled that "[e]xecutive orders, when issued within their appropriate constitutional scope, are an accepted tool of gubernatorial action." Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 254 (App. Div. 2010). "When, as here, the Governor purports to be acting consistently with express or implied authority from the Legislature, []he 'exercises not only [his] own powers but those delegated by the legislature.'" Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 575 (App. Div. 2000) (quoting Worthington v. Fauver, 180 N.J. Super. 368, 376 (App. Div. 1981), aff'd, 88 N.J. 183 (1982)). Accordingly, the only question before us is whether the directive in EO225 authorizing the CTO to transfer software and application development and maintenance functions from OIT to the agencies can reasonably be construed to conform with the

OIT Reorganization Act, the statute under which the Governor

purported to act. See In re Highlands Master Plan, 421 N.J.

Super. 614, 625 (App. Div. 2011).

In enacting the OIT Reorganization Act, the Legislature

found and declared that

> a. Since its inception, the Office of
> Information Technology (OIT) has served an
> integral role in providing essential State
> services, developing the State's technical
> infrastructure, and maintaining an efficient
> and transparent State government;
>
> b. Beyond its core responsibilities of
> application development and maintenance,
> data center operations, and
> telecommunications, OIT provides invaluable
> data management, Internet development, and
> geographic information systems to
> departments and agencies within the
> Executive Branch of State Government;
>
> c. From developing the Department of
> Human Services' computer-based disability
> insurance systems to maintaining criminal
> databases utilized by the State Police, and
> from designing the Motor Vehicle
> Commission's online services to assisting
> the Division of Taxation in collecting State
> revenues, OIT provides the critical
> resources to connect various layers of State
> Government and deliver services to State
> residents;
>
> d. Despite its achievements, OIT has
> been restrained by a lack of accountability,
> control, and monitoring in planning,
> developing, and conducting department and
> agency information technology projects;

e.   The lack of oversight has contributed to <u>disorganization and economic inefficiencies</u>, while also restricting growth, limiting innovation, and discouraging creative input within OIT;

f.   <u>In order to realize the office's potential</u>, keep pace with technological advancements, and meet the needs of residents and businesses throughout the State, <u>it is necessary to reinforce OIT's role with a new structure, leadership, and mission</u>; and

g.   Therefore, the State must take a proactive approach in <u>coordinating and integrating information technology planning, budgeting, and spending throughout the Executive Branch</u> to advance cost savings, improve the quality of services, and retain operating efficiencies.

[N.J.S.A. 52:18A-225 (emphasis added).]

Plaintiffs focus on the language of the preamble identifying "application development and maintenance" among OIT's "core responsibilities." N.J.S.A. 52:18A-225(b). They contend that because OIT "is in but not of" the Department of Treasury, the Governor did not possess "the authority to order the transfer of [those] legislatively assigned functions . . . without amending the OIT Reorganization Act." We do not read the statute the same way.

There is no question but that OIT was established "in but not of" the Department of the Treasury and "independent of any supervision or control" by the Treasurer, N.J.S.A. 52:18A-

227(b), providing it the "double legislative guarantee" of

agency independence.[1] See N.J. Exec. Comm'n on Ethical Standards

v. Byrne, 238 N.J. Super. 84, 90 (App. Div. 1990) (noting such

language "represents a double legislative guarantee of the

agency's independence and a warning against departmental

interference with its function"). And, as the Supreme Court

explained in In re Plan for the Abolition of the Council on

Affordable Housing, 214 N.J. 444, 449 (2013), "to abolish or

change the structure of independent agencies, both the

legislative and executive branches must enact new laws that are

passed by the Senate and Assembly and signed by the Governor."

But we do not agree the CTO's transfer pursuant to EO225 of the

responsibility for agency-specific software applications from

OIT to the agencies changed the structure of OIT.

---

[1] The Legislature amended the OIT Reorganization Act in 2013 to
abolish the New Jersey Information Technology Governing Board,
which had, among other things, defined and established the
overall direction, standards, and priorities for the information
technology community in the Executive Branch and transferred
those oversight powers and duties to the Governor. L. 2007, c.
56 § 10. See also Sponsor's Statement to A. 3067 (Feb. 7,
2013); Assembly Regulatory Oversight & Gaming Committee,
Statement to A. 3067 (Feb. 7. 2013); Sponsor's Statement to S.
2603 (Feb. 26, 2013); and Senate State Government, Wagering,
Tourism & Historic Preservation Committee, Statement to S. 2603
(Mar. 11, 2013). As the issue is not implicated in this appeal,
we express no opinion on the effect such transfer may have on
the autonomy traditionally enjoyed by independent "in but not
of" agencies. See generally In re Plan for the Abolition of the
Council on Affordable Hous., 214 N.J. 444, 449 (2013).

Although the Legislature acknowledged in its findings and declarations that "application development and maintenance" had been a "core responsibility" of OIT, "[s]ince its inception," citing several examples of its work for particular departments and agencies, it also stressed the need for a "new structure, leadership, and mission" to allow OIT to "realize [its] potential, keep pace with technological advancements, and meet the needs of residents and businesses throughout the State." N.J.S.A. 52:18A-225(a) to (c) and (f) (emphasis added). Most critically, the Legislature identified the need for "a proactive approach" to "coordinating and integrating" IT "planning, budgeting, and spending throughout the Executive Branch to advance cost savings, improve the quality of services, and retain operating efficiencies." N.J.S.A. 52:18A-225(g).

To that end, the OIT Reorganization Act "established an Office of Information Technology," "allocated in but not of the Department of the Treasury," to be "directed by the Chief Technology Officer," reporting "directly to the Governor," and made the office responsible for "providing and maintaining the information technology infrastructure of the Executive Branch of State Government, including all ancillary departments and agencies." N.J.S.A. 52:18A-227(a)-(c) and (e)(1) (emphasis added). Further, the Legislature invested the CTO, "qualified

by education, training, and prior experience to direct the work of the office and to perform the duties, functions and responsibilities of the position," N.J.S.A. 52:18A-229(a), with the authority to "[e]stablish the internal organizational structure of the Office" and "[c]oordinate and conduct all information technology operations in the Executive Branch of State Government, including agency technology operations," N.J.S.A. 52:18A-230(a) and (b) (emphasis added).

"When interpreting a statute we look first, and foremost, to its actual language and ascribe to its words their ordinary meaning." State v. Sutherland, ___ N.J. ___ (Jan. 11, 2018) (slip op. at 20). Doing so here makes clear the OIT Reorganization Act tasks OIT with the responsibility for the Executive Branch's IT infrastructure and authorizes the CTO to "[e]stablish [its] internal organization structure" as he deems necessary in order to "[c]oordinate and conduct all information technology operations" for the Executive Branch, including all departments and agencies. See N.J.S.A. 52:18A-227(e); N.J.S.A. 52:18A-230(a) and (b) (emphasis added). Nowhere does the statute say that OIT must perform agency-specific software and application development and maintenance functions with its own employees. To the contrary, restructuring OIT so as to transfer those employees performing such agency-specific IT tasks in OIT

to the agencies for which the applications were developed appears well within the authority the Legislature conferred on the CTO to dictate OIT's internal structure and "[c]oordinate and conduct" IT operations in the agencies. Ibid.

Nor is there any merit to plaintiffs' argument that the Legislature's reference to "application development and maintenance" as among OIT's "core responsibilities" in the preamble to the OIT Reorganization Act, N.J.S.A. 52:18A-225(b), makes it a "statutorily-assigned function" that cannot be altered without amending the statute.[2] As we noted, that same

---

[2] Both parties rely extensively on the history of executive orders predating the OIT Reorganization Act in their arguments to us, noting the Legislature's preservation of "[t]he functions, powers, and duties granted to the [OIT] by Executive Order No. 84 of 1984, Executive Order No. 87 of 1998, and Executive Order No. 42 of 2006" to the extent not "inconsistent with the provisions of this act." N.J.S.A. 52:18A-227(f). Plaintiffs argue those executive orders represent "decades of policy calling for the consolidation of information technology functions in a centralized agency," which EO225 reverses by "foist[ing] those critical IT responsibilities back onto the agencies." The State uses those same executive orders to argue that OIT was only ever "responsible for developing and maintaining only a small fraction of the agency-specific software applications in the Executive Branch," and that "[o]ne of the key goals behind the 2007 statute was to allow OIT to divest itself of those agency-specific applications."

Although it is no doubt possible to find isolated phrases in the past executive orders to support each of those disparate views of the history of IT operations in the Executive Branch, we have no need to endorse either. Because the question before us is answered by the plain language of the statute, we need not

A-4829-16T4

preamble declared OIT in need of "new structure, leadership, and mission" and "a proactive approach" to "coordinating and integrating" IT "planning, budgeting, and spending throughout the Executive Branch." N.J.S.A. 52:18A-225(f) and (g). The Legislature assigned OIT that new mission in N.J.S.A. 52:18A-227(e) and permitted the CTO in N.J.S.A. 52:18A-230(a) and (b) to dictate its structure. Although we find no conflict between the Legislature's findings and declarations in N.J.S.A. 52:18A-225 and the text of N.J.S.A. 52:18A-227(e) and 52:18A-230(a) and (b), "[t]o the extent that the preamble is at variance with the clear and unambiguous language of the statute, the preamble must give way." DiProspero v. Penn, 183 N.J. 477, 497 (2005).

Because we do not find the directive in EO225 authorizing the CTO to transfer software development and maintenance functions from OIT to the agencies to be inconsistent with the OIT Reorganization Act, we reject plaintiffs' arguments that the executive order violates the statute or the separation of powers doctrine. Plaintiffs' remaining arguments, to the extent we

_____

(continued)
look beyond that language to divine the Legislature's intent.
See DiProspero v. Penn, 183 N.J. 477, 492 (2005) (instructing that "[a] court should not 'resort to extrinsic interpretative aids' when 'the statutory language is clear and unambiguous, and susceptible to only one interpretation.'" (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004))).

have not addressed them, lack sufficient merit to warrant

discussion in a written opinion. <u>See</u> <u>R.</u> 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION

A-4829-16T4