District Court of Minnesota,
Second Judicial District.
Ramsey County

Deanna BRAYTON, Darlene Bullock, Forough Mahabady Debra Branley, Marlene Griffin and Evelyn Bernhagen on behalf of themselves and all others similarly situated, Plaintiffs,
v.
Tim PAWLENTY, Governor of the State of Minnesota; Thomas Hanson, Commissioner, Minnesota Department of Management and Budget; Cal Ludeman, Minnesota Department of Human Services; and Ward Einess, Commissioner. Minnesota Department of Revenue, Defendants.

No. 62-CV-09-11693.
December 30, 2009.

Order

Kathleen Gearin, District Court Chief Judge.

The above-entitled matter came on for hearing before the undersigned on Monday, November 16, 2009, pursuant to a motion for a temporary restraining order requested by the Plaintiffs and a motion to dismiss requested by the Defendants. The hearing was originally scheduled for November 12th, 2009. It was continued by the Court at the request of the General Counsel for Governor Pawlenty.

Attorneys Galen Robinson, David Gassoway, and Rolanda Mason represented the Plaintiffs. Solicitor General Alan I. Gilbert appeared on behalf of the Defendants. Patrick D. Robben, General Counsel to the Governor, appeared for Defendant Governor Pawlenty.

At the request of the Chair of the Minnesota House of Representatives Committee on rules and legislative administration, the Court granted a motion to allow the Minnesota House of Representatives to submit an Amicus Curiae. This brief was filed on November 20th, 2009.

Based upon the files, records, and proceedings herein, the Court makes the following Order:
1. Plaintiffs' motion for a temporary restraining order under Rule 65.01 of the Minnesota Rules of Civil Procedure enjoining Defendants Governor and the Commissioner of the Minnesota Department of Management and Budget from reducing allotments to the Minnesota Supplemental Aid Special Diet program and enjoining Defendant Commissioner of the Minnesota Department of Human Services from implementing the unallotment of the MSA Special Diet grant is granted retroactive to November 1st, 2009 until further order of this Court.
2. Defendants' motions are continued to the March 1, 2010 hearing, which has already been scheduled.
3. The Commissioner of the Minnesota Department of Management and Budget is ordered to reinstate the allotments to the Minnesota Supplemental Aid Special Diet program retroactively to November 1st, 2009, until further order of this Court.
4. Commissioner of the Minnesota Department of Human Services is enjoined from implementing the unallotment of the MSA Special Diet grant until further order of this Court.
5. This Order does not prohibit either the Governor or the Legislature from the exercise of their legitimate constitutional power in light of the current budget issues facing the State of Minnesota.
6. Either the Legislature or the Governor may bring a motion before this Court to end this order if either believes that a legitimate exercise of either branch's constitutional powers has made the issues in this lawsuit moot.
7. The attached Memorandum is incorporated into and made a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 12-30-09

BY THE COURT

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Kathleen Gearin

District Court Chief Judge

MEMORANDUM

At the temporary restraining order hearing, the undersigned stated that "the judicial branch should tread lightly when dealing with "separation of powers issues"." It is just as important that the legislative branch tread lightly when dealing with separation of powers issues. It is equally important that the Governor tread lightly when dealing with separation of powers issues.

The Court has chosen to use the phrase "separation of powers" when discussing the issues raised in this lawsuit. The Minnesota Constitution Article 3 Section 1: "The powers of government shall be divided into three distinct departments." Minnesota case law uses these terms interchangeably. The Court has chosen to use the term separation of powers when referring to this doctrine as it believes that that is more commonly understood by the average citizen.

The Governor's unallotment power granted to him by the Legislature in Minn. Stat. § 16A.152, Subd. 4, has been held by the Minnesota Court of Appeals to be constitutional. *Rukavina v. Pawlenty,* 684 NW 2nd 525 (Minn. App. 2004). In the *Rukavina* case, the Court of Appeals stated: "We conclude that MinnStat § 16A.152, does not reflect an unconstitutional delegation of Legislative power, but only enables the Executive to protect the State from financial crisis in a manner designated by the Legislature." That remains the settled law in the State of Minnesota, and it would be improper for this Court to revisit the constitutionality of the unallotment statute itself. It is constitutional. It was the specific manner in which the Governor exercised his unallotment authority that trod upon the constitutional power of the Legislature, and the Legislature alone, to make laws that, in the Court's opinion, was unconstitutional.

In order to understand the Court's decision, it is necessary to go into a brief summary of the Governor's actions at the end of the 2009 Legislative session. Minnesota operates on a two-year budget cycle. The biennial budget is comprised of appropriations established in bills passed by the Legislature and signed into law by the Governor. The Governor has authority to veto line items in every appropriation bill. He may even veto an entire bill. The Commissioner of Management and Budget is required to prepare a series of forecasts of anticipated revenues and expenditures. MinnStat. § 16A.103. In November of 2008, the Commissioner forecast a $4.847 billion budget deficit for the 2010/2011 biennium. The Commissioner's February 2009 forecast continued to project a budget deficit of $4.847 billion for the next biennium. In light of the forecast, the Governor submitted two proposed budgets for the 2010/2011 biennium to the Legislature. One was submitted in January, and the second proposed budget was submitted to the Legislature in March of 2009. Both proposed budgets submitted by the Governor relied upon the projected budget deficit and included numerous reductions in expenditures. Throughout this time period, the Governor and the State Legislature made efforts to develop a state budget. Both branches relied upon the projected budget deficit of the Commissioner. The discussions were often rancorous and did not result in compromise legislation acceptable to both the legislative majority and the governor.

On May 11th, 2009, the Legislature approved H.F. No. 1362, the Health and Human Services appropriations bill. That bill contained the appropriations for all Human Services programs for the 2010/2011 biennium, including appropriations for the Minnesota Supplemental Aid Program, which is the subject of this temporary restraining order. Three

days later, on May 14th, 2009, Governor Pawlenty signed this bill. He exercised his right to line-item veto on only one provision in the bill, funding for the General Assistance Medical Program. He did not veto the entire bill or the section of the bill which included the MSA Program. On the same day that he signed this bill into law, therefore making these appropriations the law of the State of Minnesota, the Governor announced at a news conference that he would use the unallotment statute to balance the state budget.

Four days later, on May 18th, the final day of the Legislative session, the Legislature approved H.F. No. 2323, which contained provisions to increase revenues needed to pay for the appropriations already signed into law by the Governor. Governor Pawlenty vetoed H.F. 2323 in its entirety three days later, on May 21st, 2009. Because the legislative session had ended, there was no opportunity for the legislature to attempt to override this veto or to continue to work on a compromise.

The revenue bill that the governor vetoed would have balanced the budget based on the anticipated receipts forecast in February 2009. The governor used unallotment rather than calling a special session of the legislature or vetoing the appropriations bill to balance the budget. He did this after signing numerous spending bills which taken together, he knew would not balance the budget unless revenues were raised. He used the unallotment statute to address a situation that was neither unknown nor unanticipated when the appropriation bills became law. The Governors actions in this instance differed from his use of unallotment in the *Rukivina* case.

In that situation the governor used unallotment to protect the state from a financial crisis that was both unknown and unanticipated when the appropriation bills were signed. In the beginning of June of 2009, Defendants took steps to unilaterally balance the budget by unallotting specific programs enacted into law during the session. By exercising his unallotment authority to apply to reductions in revenues that were determined by a forecast made before the budget had even been enacted and by not excluding reductions that were already known when the budget was enacted, the Governor crossed the line between legitimate exercise of his authority to unallot and interference with the Legislative power to make laws, including statutes allocating resources and raising revenues. The authority of the Governor to unallot is an authority intended to save the state in times of a previously unforeseen budget crisis, it is not meant to be used as a weapon by the executive branch to break a stalemate in budget negotiations with the legislature or to rewrite the appropriations bill.

In light of the significant financial problems and the most recent budget projections, the state continues to face six months later, it is highly likely that cuts made to the appropriations in the health and human services appropriations bill will have to be made. Why then should the courts bother to enjoin this unallotment? Is the separation of powers part of our constitution that important?

The citizens of Minnesota, as well as the entire country, are the heirs of our founding fathers, the drafters of the United States Constitution. It was their brilliance that resulted in the creation of a government consisting of three co-equal branches. This results in a system of checks and balances that ensures that none of the three branches has absolute power. This system of checks and balances was embraced by the writers of the Minnesota Constitution in the mid-19th Century and continues to the present day in Minnesota, as well as in our country. At times, this system results in disagreements, conflicts, and convoluted compromises that leave no one happy.

In an 1865 Minnesota Supreme Court case entitled *In the Matter of the Application of the Senate,* 10 Minn. 78 (1865), the balance of powers was described as follows: "By the constitution, the power of the state government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for." Citing Minn. Const., art. III, § 1. This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the other not within the scope of its jurisdiction; and, 'it is the duty of each to abstain from and to oppose encroachments on either.' Any departure from these important principles must be attended with evil."

This 1865 case involves a resolution passed by the Minnesota Senate requesting the Supreme Court to furnish to the Senate its opinion upon certain questions. The Court ruled this resolution unconstitutional because "... neither the Legislative nor the Executive branches can constitutionally assign to the Judicial, any duties but such as are properly judicial and to be performed injudicial manner." Citing *Hayburn's Case,* 2 U.S. 408, 2 Dall. 409, 1 L.Ed. 436 (1792). The above description of the separation of powers was cited with approval by the Minnesota Supreme Court in the case of *Sharood v. Hatfield,* 296 Minn. 416, 210 N.W.2d 275 (1973).

The Court is aware that the actual revenues received by the State since the beginning of the 2010/2011 biennium are even less than predicted in the February 2009 dismal forecast. On December 2, Minnesota's Management and Budget Department reported that general fund revenues for the present two-year budget period are forecast to be $1.156 billion below pre-biennium estimates mainly because of a decline in tax receipts. Even if the budget had been balanced through painful give and take between the Executive and Legislative branches, the Governor would have had to use his unallotment authority before the end of this biennium.

In 2005, the judicial branch became embroiled in a case, State ex rel. *Sviggum v. Hanson,* 732 N.W.2d 312 (Minn.App.2005), involving separation of powers issues when the Legislature ended the 2005 legislative session without appropriating the money necessary to fund significant executive-branch functions for the fiscal biennium beginning on July 1st, 2005. It may be helpful to review the facts of that case to understand the complexity of the present situation. At the end of the 2005 session the Governor exercised his constitutional power to call a special session to allow the Legislature to pass the necessary appropriations bills. While the Legislature was still in special session and before agreement had been reached breaking the impasse on appropriations bills, the Attorney General filed a petition in District Court seeking a declaration that the Executive branch must undertake core functions required by the State and Federal constitutions and an order requiring the Commissioner of Finance to fund those functions. The Governor filed a petition to intervene in this lawsuit. He requested similar relief. Neither the Minnesota Senate nor the House of Representatives took part in the temporary funding proceedings. The District Court granted the requests of the Attorney General and the Governor's office and issued an order authorizing the Commissioner of Finance to continue to fund core government functions in the event the Legislature failed to appropriate the necessary funds before the next fiscal biennium. Fifteen days later the Legislature appropriated funding retroactively to July 1st, 2005 (the beginning of the biennium) for base level operations of all the agencies whose biennium appropriations had not yet been approved. The Governor signed the bill into law.

Approximately six weeks later a bipartisan legislative group petitioned the Supreme Court for a declaration that the funds the Commissioner dispersed under the District Court's authorization without a legislative appropriation were dispersed in violation of the constitution. The Supreme Court required that it be heard first in District Court. The District Court denied the petition and the matter went to the Minnesota Court of Appeals.

The Minnesota Court of Appeals held, among other things, that a writ of quo warranto could not be used to challenge the constitutionality of completed disbursements of public funds. It further ruled that the controversy was not justiciable because it had already been resolved by the Legislature when the Legislature passed the appropriations bill and made them retroactive to July 1st. Because of this, the constitutionality of the District Court's action has never been fully addressed by an appellate court. The Court of Appeals stated:
"The Legislature has exercised its fundamental constitutional power to appropriate the public funds and to provide that the appropriations are retroactive to the beginning of the biennium and supersede the court-approved disbursements by the Commissioner. The judiciary does not have the constitutional power to "re-legislate" the effect of the Legislature's appropriations decisions." *Id.* at 323.

The Court of Appeals, however, was clearly sympathetic to the Legislators' position and referred to their argument as "compelling". The Court also stated "... because of the structure and function of Legislative power, it is the Legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses." *Id.*

Regarding the present situation, this Court believes that it is the Executive branch that has the institutional competency and authority to decide what appropriations should be unalloted, not the judiciary.

The Legislative branch has the fundamental constitutional power to appropriate the public funds. This power is tempered by the Governor's veto authority. Their policy differences regarding how to deal with Minnesota's present budget situation can only be resolved by them. Those branches have the institutional competency to break the present budgetary deadlocks, not the judicial branch.

It is important that all parties understand that the decision made by this Court today has nothing to do with the merit or lack of merit of the individual programs unalloted by the Governor. The Court's decision was based on the way he unalloted, not what he unalloted. Difficult decisions that will be painful to many citizens will have to be made by the Executive and Legislative branches in order to deal with the continuing budget crisis in this state. Those budget and policy decisions are not the business of the courts unless they are made in a way that violates the Constitution.

Earlier the Court posed a question regarding whether the separation of powers doctrine continues to be as important in tough economic times as it has been in our past. The answer is yes. Two Minnesota Supreme Courts have wisely warned us that:
"The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundation upon which our system of government rests." *Juster Bros. v. Christgau,* 214 Minn. 108, 7 N.W.2d 501, at 506 (1943), citing *State ex rel. Young v. Brill,* 100 Minn., 499, 520, 111 N.W. 294, 639-40 (1907).

This court agrees with the above quote, and therefore must answer yes to the question posed.

KG

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Brayton v. Pawlenty
2009 WL 5150309 (Minn.Dist.Ct.) (Trial Order)

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