For Opinion See 781 N.W.2d 357

Supreme Court of Minnesota.
Deanna BRAYTON, et al., Respondents,
v.
Tim PAWLENTY, Governor of the State of Minnesota, et al., Appellants.

No. A10-05-64.
February 9, 2010.

Brief of Amici Curiae Rep. Tom Emmer, Rep. Bud Normes, Rep. Bob Dettmer, Rep. Bob Gunther, Rep. Connie Doepke, Rep. Dan Severson, Rep. Dean Urdahl, Rep. Greg Davids, Rep. Jenifer Loon, Rep. Joe Hoppe, Rep. Joyce Peppin, Rep. Keith Downey, Rep. Laura Brod, Rep. Mark Buesgens, Rep. Marty Seifert, Rep. Mary Kiffmeyer, Rep. Mary Liz Holberg, Rep. Matt Dean, Rep. Mike Beard, Rep. Paul Anderson, Rep. Paul Kohls, Rep. Peggy Scott, Rep. Rod Hamilton, Rep. Ron Shimanski, Rep. Steve Drazkowski, Rep. Steve Gottwalt, Rep. Steve Smith, Rep. Tom Hackbarth, Rep. Tony Cornish, aa Rep. Rob Eastlund, Rep. Carol Mcfarlane, Rep. Randy Demmer, Rep. Torrey Westrom of The Minnesota House of Representatives; And Sen. Amy Koch of the Minnesota Senate

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INTRODUCTION

Amici Curiae submit this brief in support of Appellants.[FN1] *Amici curiae* are members of the Minnesota House of Representatives and Minnesota Senate. *Amici* are concerned that the district court decision unconstitutionally usurps legislative power and unnecessarily involves the judiciary in a political dispute between the legislative and executive branches of government.

> FN1. Pursuant to Minn. R. Civ. App. P. 129.03, amici curiae state that counsel for none of the captioned parties authored this brief, in whole or in part, and that no other person or entity made a monetary contribution or promise of contribution to the preparation or submission of the brief.

STATEMENT OF FACTS

Amici curiae adopt and incorporate the factual statement presented in Appellant's brief.

SUMMARY OF ARGUMENT

The district court's ruling should be reversed. The unallotment statute is a constitutional delegation of legislative power to the executive. In granting the temporary restraining order - ostensibly to preserve separation of powers - the district court unconstitutionally usurped the legislative authority to enact or amend legislation in violation of the separation of powers doctrine. Finally, public policy supports reversing the district court's decision, as the dispute at issue is a wholly political dispute to be resolved between the executive and legislative branches.

ARGUMENT

I. The unallotment statute is a constitutional delegation of legislative power to the executive.

The power to make the laws is expressly reserved to the legislature. *See, Blake v. Winona & St. Peter RR,* 19 Minn. 418 (Gil. 362) (1873), aff'd, 94 U.S. 180 (1876). The power to execute the laws belongs to the executive. See Minn. Const. art. V § 3. However, "additional duties .. may be imposed on the Governor by the legislature." *State ex rel. Kinsella v. Eberhart,* 116 Minn. 313, 319, 133 N.W. 857, 860 (1912).

"Although purely legislative power cannot be delegated, the legislature may authorize others to do things (insofar as the doing involves powers that are not exclusively ***3** legislative) that it might properly, but cannot conveniently or advantageously, do itself." *Lee v. Delmont,* 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949). Pure legislative power "is the authority to make a complete law - complete as to the time it shall take effect and as to whom it shall apply - and to determine the expediency of its enactment." *Id.*

The power to appropriate money belongs to the legislature. Minn. Const. Art. XI § 1. Recognizing that it is possible

that revenues may be insufficient to meet appropriations, the legislature enacted Minn. Stat. § 16A.152 (the "unallotment statute") to empower the Governor to unallot appropriations. The statute does not allow the Governor to appropriate money, but merely enables the executive to utilize the legislatively delegated power to unallot to remedy budget shortfalls.

Because the legislature only delegated an authority to reduce appropriations, and not its ultimate authority to appropriate money, the Minnesota Court of Appeals determined that it was a constitutional delegation of authority from the legislature to the Governor. *See Rukavina v. Pawlenty,* 684 N.W.2d 525 (Minn. App. 2004), (*review denied* Minn. 2004) ("We conclude that Minn. Stat. § 16A.152, does not reflect ***4** 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.") *Amici* acknowledge that the opinion of the Minnesota Court of Appeals in *Rukavina* is not binding on this Court.

However, for the reasons enunciated therein, *amici* ask that this Court find that the unallotment statute is a constitutional delegation of legislative power to the executive.

II. The district court's ruling should be reversed as it violated separation of powers by unconstitutionally usurping the legislature's express power to make and amend the laws.

The Minnesota Supreme Court has stated that "[a]gainst no one more than themselves should judges be meticulous in observance of the boundaries of their constitutional function." *Anderson v. Consolidated Sch. Dist. No 144,* 196 Minn. 256, 259, 264 N.W. 784, 786 (1936). The district court recognized that its order implicated the separation of powers doctrine, providing:
In an 1865 Minnesota Supreme Court case entitled *In the Matter of the Application of the Senate,* 10 Minn. 78 (1865), the balance of power was ***5** 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.

(Order, p. 7).

The district court failed to observe the boundaries of its Constitutional function. While purporting to enforce the separation of powers doctrine, the district court trod heavily upon it by unconstitutionally usurping legislative powers.

The legislature, as the voice of the sovereign people, is "subject only to the limitations as the people have seen fit to incorporate in their Constitution, the legislature is vested with the sovereign power of the people themselves .." *Town of Bridgie v. Koochiching,* 227 Minn. 320, 323, 35 N.W.2d 537, 539-40 (Minn. 1948) (citing ***6***State ex rel. Simpson v. City of Mankato,* 117 Minn. 458, 463, 136 N.W. 264, 266 (1948)).

In exercising its check on legislative power, the judiciary is limited to determining only what the law is, not what it should be. *Estate of Karger,* 253 Minn. 542, 93 N.W.2d 137 (1958) (noting that the legislature is to decide what the law ought to be; what the law is rests with the courts). The courts are "to determine the *application* of legislative action, not to revise it." *Board of Education v. Public School Employees No. 63,* 233 Minn. 144, 152, 45 N.W.2d 797 (1951). "Whatever our individual opinions may be as to the wisdom of the present law or the necessity for further legislation, our duty here is simply to apply the law objectively as we find it." *Id.*

In 1939, the legislature exercised its constitutional power and enacted the "unallotment statute", what is now Min-

nesota Statute § 16A.152 (2008). The statute provides in relevant part:

Subd. 4. Reduction.
(a) If the commissioner [of Minnesota Management and Budget] determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the ***7** commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.
(b) An additional deficit shall, with the approval of the governor, and after consulting the legislative advisory commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

The district court found that the unallotment statute was constitutional. (Order, p. 4). Having found that the unallotment statute was a constitutional delegation of legislative authority, the district court's review was then limited to whether the executive exceeded that legislatively delegated authority. The district court erred -in effectively amending the unallotment statute to include requirements not contained therein - in reaching its conclusion.

The district court found that there was a "$4.847 billion budget deficit for the 2010/2011 biennium." (Order, p. 4). It also found that "[b]y exercising his unallotment authority to apply to reductions in revenues that were ***8** 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." (Order, p. 6, emphasis added).

Having found the statute constitutional, and that there was a deficit for the biennium, the district court held that the Governor's action was unconstitutional. (Order, p. (6). To reach this holding, the court effectively amended the statute to specifically require when the anticipated shortfall can occur before exercise of the unallotment authority is proper.

This Court has written that rules of statutory construction "forbid adding words or meaning to a statute that were intentionally or inadvertently left out." *Genin v. 1996 Mercury Marquis,* 622 N.W.2d 114, 117 (Minn. 201), *see also Phelps v. Commonwealth Land Title Ins. Co.,* 537 N.W.2d 271, 274 (Minn. 1995) (noting that courts should not read into statutes restrictions that the: legislature did not include). The unallotment statute reads in pertinent part "probable receipts for the general fund will be less ***9** than anticipated." Minn. Stat. § 16A.152 Subd. 4(a) (2008). Instead, the district court effectively amended the statute to provide that unallotment is appropriate only when "probable receipts for the general fund will be less than anticipated *after passage of the biennium budget."*

It is on the basis of its reading of the "revised statute" that the district court determined the Governor exceeded his authority. The district court moved from determining what the law is, which is a constitutional exercise of its authority, into determining what the law ought to be, which was an unconstitutional usurpation of legislative power.

Had the legislature intended to restrict unallotment authority to anticipated shortfalls occurring only *after passage of the biennium budget,* it could have so written. It did not. The legislature has amended the unallotment statute three out of the five legislative sessions since it was declared constitutional in *Rukavina.* It amended subdivision 2 in 2005 and again in 2007. *See* 2005 Minn. Laws. Ch. 156, Art. 2, § 16; 2007 Minn. Laws. Ch. 146, Art. 1, § 1. Finally, it amended subdivision 2 and inserted subdivision 8 in 2009. *See* 2009 Minn. Laws. Ch. 36, art. 2, ***10** § 1; Ch. 86, art. 1, § 4; Ch. 101, art. 2, § 49. At no time did the legislature amend the unallotment statute to restrict the exercise of the unallotment authority to only circumstances wherein the anticipated shortfall in general fund receipts occurs after passage of the biennium budget. Yet, the district court's order reads such words into the statute. Had the legislature intended to so restrict the unallotment authority, it had ample opportunity and continues to have ample opportunity. Having chosen not to so amend the statute, the legislature manifested its intent to delegate authority to the executive as written.

The district court also effectively amends subdivision 4(b). In holding that the Governor unconstitutionally usurped the legislative authority to make the laws, the court writes "[t]he Governor used unallotment rather than calling a special session of the legislature or vetoing the appropriations bill to balance the budget." (Order, p. 6). The plain language of the unallotment statute reads: "Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations." Minn. Stat. § 16A.152 subd. 4 (b). Rather than accept the plain language of the ***11** statute, the district court effectively amends it to read: "Notwithstanding any other law to the contrary, *except the Governor's authority to call a special session or to veto legislation, which shall in all cases be utilized before exercising the authority granted herein,* the commissioner is empowered to defer or suspend prior statutorily created obligations." Once again, the district court extended its authority beyond determining what the law is to what the law should be. In doing so, the district court unconstitutionally usurped the legislative power to make the laws. Had the legislature intended the statute to restrict the Governor's unallotment power as the district court interprets it, the legislature could have written it that way. That it did not, does not give the district court license to do so.

This Court has written in regards to the legislature and the executive that, "[t]here is a wide field wherein their decision, even though wrong is final. The same is true of judges, the sum of whose errors will be kept somewhere near an irreducible minimum in proportion as they refrain from attempts to decide issues which constitutional and statutory law have committed to the legislative and ***12** executive departments of government." *Lindquist v. Abbet,* 196 Minn. 233, 240, 265 N.W. 54, 57 (1936). The legislature had ample opportunity to amend the statute as the district court would seek to have it amended. It did not.

The *amici curiae* support the Governor's execution of his unallotment authority. But *amici* acknowledge that there may be an instance where the Governor exercises that authority in a manner inconsistent with their intent. In such a circumstance, the *amici* would resort to restricting that action through the use of their legislative authority, rather than resort to the courts to exercise their legislative authority for them. In fact, within days of the Governor's May 2009 announcement that he would unallot, a bill was introduced to repeal the Governor's unallotment power. H.F. 2395, 2009 Leg., 86th Sess. (Minn. 2009). The introduction of this bill illustrates the legislature's recognition of its power to restrict the delegated authority to the Governor.

The district court's ruling should be overturned as it unconstitutionally usurped the legislative authority to make and amend the laws by effectively amending the unallotment statute to include requirements not placed in ***13** it by the legislature. It was apparently on the basis of this "revised statute" that the district court found that the Governor violated the act.

III. Public policy supports the reversal of the district court's decision as the proper outcome of political disputes is not for the courts to determine.

The district court should be reversed because public policy supports that political disputes between the legislature and the executive be settled by the legislature and the executive, rather than the courts. The district court finds that the discussions between the legislature and the governor in determining priorities and establishing a balanced budget "were often rancorous and did not result in compromise legislation acceptable to both the legislative majority and the governor." (Order, p. 5). However, just because; the legislature and the executive were unable to settle a political dispute on how best to balance the budget, does not mean the district court should make that determination for them. "The executive and legislative departments of government have, properly, an extensive field of action, wherein, if they err, there results no justiciable question for court determination. It ***14** is often a political issue, and if such it is, it is not for the courts to settle it. An error in that field ought to be corrected by an appeal to the voters at the proper time." *Ketterer v. Independent School Dist. No. 1,* 248 Minn. 212, 221-222, 79 N.W.2d 428, 435-436 (Minn. 1948). Sound public policy demands that wholly political disputes are best resolved between the executive and legislative branches; not among the executive, legislative and judicial branches.

Assuming arguendo that the governor did exceed the authority delegated to him by the legislature, there would be a

justiciable controversy for the court to review. But in the case at issue, we assert that the Governor did act within the scope of authority that the legislature granted to him. An affirmance of the district court's decision would leave the court as the final arbiter of every political dispute between the legislature and the executive -an outcome that does not comport with sound public policy.

CONCLUSION

The district court's ruling should be reversed. The unallotment statute is a constitutional delegation of ***15** legislative power to the executive. In granting the temporary restraining order - ostensibly to preserve separation of powers - the district court unconstitutionally usurped legislative authority to enact or amend legislation. Finally, public policy supports reversing the district court's decision, as the dispute at issue is a wholly political dispute to be resolved between the executive and legislative branches.

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