

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

The Ninetieth Minnesota State Senate and the
Ninetieth Minnesota State House of
Representatives,

Case Type: Civil Other
File No. 62-CV-17-3601
Judge John H. Guthmann

Plaintiffs,

v.

Mark B. Dayton, in his official capacity as
Governor of the State of Minnesota, and
Myron Frans, in his official capacity as
Commissioner of the Minnesota Department
of Management and Budget,

**NOTICE OF
INTERVENTION**

Defendants,

and

Association for Government Accountability,

Defendant-in-Intervention.

TO: The Ninetieth Minnesota State Senate and the Ninetieth Minnesota State House of Representatives and their counsel Douglas A. Kelley and Steven E. Wolter, Kelly, Wolter & Scott, P.A., #170707 Centre Village Offices, Suite 2530 431 South Seventh Street Minneapolis, MN 55415; Governor Mark B. Dayton and Commissioner Myron Frans and their counsel Sam Hanson, Scott G. Knudson, Scott M. Flaherty and Emily M. Peterson, Briggs and Morgan, P.A., 2200 IDS Center 80 South Eighth Street Minneapolis, MN 55402; and Commissioner Myron Frans and his attorney.

PLEASE TAKE NOTICE that Association for Government Accountability (“AGA”) hereby serves upon you this Notice of Intervention demonstrating the reasons for the claim of entitlement to intervention, pursuant to Minn. R. Civ. P. 24.03, accompanied by a Draft Answer in Intervention setting forth the nature and extent of every claim or defense as to which intervention is sought. In the absence of objection by an existing party to the action within 30 days after service of this Notice upon the party, such intervention shall be deemed to have been accomplished.

REASONS FOR ENTITLEMENT TO INTERVENTION

Defendant-in-Intervention Association for Government Accountability (“AGA”) seeks intervention in this matter as taxpayers to obtain dismissal of Plaintiffs’ Complaint through a judgment on the pleadings and to appeal the Temporary Injunction ordered by the Court and stipulated to by the parties.¹ The goal of the AGA’s intervention is to assist the Court in having a legal process conforming to Minnesota’s Constitution and statutes and to assist the Court in avoiding political questions which are the other branches’ prerogatives – even when the other branches of government request such judicial intervention.

For example, the AGA has identified these three constitutional and statutory issues in the current litigation:

- The three branches of government have taken actions which have resulted in the 2016 Constitutional Amendment and Minnesota Statute § 15A.0825 regarding legislative pay being violated. Minnesota Statute § 15A.0825 states “By March 31 of each odd-numbered year, the council must prescribe salaries for legislators to take effect July 1 of that year.” The Legislative Pay Council prescribed \$45,000 in March. Now, in July of 2016, pursuant to the Court’s temporary funding order, the Senate

¹ AGA will also seek a stay pending appeal of the Temporary Injunction, waiver of any bond requirement (which was waived under the Stipulation, anyway), and expedited consideration of this Notice of Intervention and the appeal of the Temporary Injunction.

members receive the legally-required \$45,000 and the House members receiving \$31,140 – a significant legal inequity.

- The Court Order for temporary funding based on the June 26, 2017 stipulation agreed to by the Governor, Commissioner and state legislature filed in and relied upon by the Court violates Minnesota Statute § 16A.281 which states, “An unexpended balance not carried forward and remaining unexpended and unencumbered at the end of a biennium lapses and shall be returned to the fund from which appropriated.” No exceptions in Minnesota Statute § 16A.281 apply.
- The June 26, 2017, stipulation agreed to by the Governor and state legislature authorizing spending is violative of the Minnesota’s Constitutional requirements that the legislature pass bills and present them to the Governor for his signature for veto. The Governor and the state legislature by introducing such a stipulation to the Court invited the Court into political questions where the Court has no subject matter jurisdiction since legislating appropriations is the responsibility of the legislative and executive branches of government, not the judiciary.

To begin, in the general election of 2016, the people of Minnesota approved a constitutional amendment to Article IV, section 9 that requires that the Commissioner of the Minnesota Department of Management and Budget (“Commissioner”) fund legislative pay as set forth by the Legislative Salary Council (“LSC”) on July 1 of odd-numbered years regardless of the Governor’s veto, as explained in more detail in AGA’s Petition for a Writ of Mandamus in a related case.² On March 21, 2017, exercising its constitutional authority and the authority set forth in Minnesota Statutes section 15A.0825, the LSC prescribed \$45,000 as the legislator salary effective July 1, 2017. The Commissioner must fund these salaries regardless of the Governor’s veto.

Despite this new constitutional requirement, the Commissioner continues to ignore the mandate of the Minnesota Constitution and Minnesota Statutes and has instead signed

² See *Association for Government Accountability v. Frans*, Petition for Writ of Mandamus, Case No. 62-CV-17-3396 (Minn. Dist. Ct. June 5, 2017), available at http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/Documents/62cv173396_PetitionforWrit_6-5-17.pdf.

on to a Stipulation, adopted by this Court in its Order Granting Temporary Injunctive Relief (“Order”), which fails to fund the Legislature as required by the constitution, related statutory provisions, and the salary-setting decision of the LSC. Instead, the Stipulation agreed to by the existing parties to this case and the Court’s Order ignores Article IV, section 9 and also violates the express terms of Article XI, section 1 and Minnesota Statutes section 16A.281, which prohibit the payment of money from the treasury for a legislative appropriation except in certain circumstances, which circumstances do not exist here. Further, the Order granting the temporary injunction invades political questions to be decided by the will of the people. The Commissioner had no authority to enter into the Stipulation, and the Court’s Order violates the Minnesota Constitution and the Minnesota Statutes.

Consequently, Plaintiffs’ Complaint is deficient and should be dismissed because its legal argument for funding legislative pay is incorrect and thus fails to state a claim for relief, and, more importantly, the Defendants here are not adequately protecting the interests of the Minnesota taxpayers who approved the new constitutional amendment last November. AGA respectfully requests that the Court grant it intervention in this case so that AGA can appeal the Order and move for judgment on the pleadings related to the Plaintiffs’ Complaint and seek appeal of the court order authorizing temporary funding.

FACTS

In the 2016 general election, the people of Minnesota voted for a new constitutional amendment to Article IV, section 9 which created the Legislative Salary Council. Article IV, section 9 now states as follows:

Compensation. The salary of senators and representatives shall be prescribed by a council consisting of the following members: one person who is not a judge from each congressional district appointed by the chief justice of the Supreme Court, and one member from each congressional district appointed by the governor. If Minnesota has an odd number of congressional districts, the governor and the chief justice must each appoint an at-large member in addition to a member from each congressional district. One-half of the members appointed by the governor and one-half of the members appointed by the chief justice must belong to the political party that has the most members in the legislature. One-half of the members appointed by the governor and one-half of the members appointed by the chief justice must belong to the political party that has the second-most members in the legislature. None of the members of the council may be current or former legislators, or the spouse of a current legislator. None of the members of the council may be current or former lobbyists registered under Minnesota law. None of the members of the council may be a current employee of the legislature. None of the members of the council may be a current or former judge. None of the members of the council may be a current or former governor, lieutenant governor, attorney general, secretary of state, or state auditor. None of the members of the council may be a current employee of an entity in the executive or judicial branch. Membership terms, removal, and compensation of members shall be as provided by law. The council must prescribe salaries by March 31 of each odd-numbered year, taking into account any other legislative compensation provided to legislators by the state of Minnesota, with any changes in salary to take effect on July 1 of that year. Any salary increase for legislators authorized in law by the legislature after January 5, 2015, is repealed.

This new constitutional provision led directly to the creation of the LSC. Consistent with this amendment, Minnesota Statutes section 15A.0825, Subd. 7 requires the LSC to perform its functions as follows:

Duties. By March 31 of each odd-numbered year, the council must prescribe salaries for legislators to take effect July 1 of that year. In setting salaries, the council must take into account any other legislative compensation provided to the legislators by the state and the most recent budget forecast. The council must submit a report by March 31 of each odd-numbered year with the prescribed salaries to the governor, the majority and minority leaders of the senate and the house of representatives, the chairs of the committees in the senate and the house of representatives with jurisdiction over the legislature's budget, and the chairs of the committees in the senate and house of representatives with jurisdiction over finance. The report must describe the council's rationale for selecting the prescribed salaries.

The LSC followed its legal mandate and set the salaries for legislators at \$45,000 per year, to take effect on July 1, 2017. 2017 Report of the Legislative Salary Council (March 17, 2017), *available at* http://www.lcc.leg.mn/legsalarycouncil/reports/lsc_final_report_2017.pdf. Thereafter, in May of 2017, the state legislature passed an appropriation bill that included funding for state legislator salaries, but the Governor vetoed the line items related to those salaries, precipitating the above-captioned action. Letter from Governor Mark Dayton to the Honorable Michelle Fischbach, May 30, 2017, *available at* http://mn.gov/gov-stat/pdf/2017_05_30_Chapter_04.pdf. The Commissioner has failed to make payments for legislator salaries according to the prescription of the LSC and continues to fail to pay legislator salaries according to the prescription of the LSC.

In June 2017, this lawsuit and the related *Association for Government Accountability* lawsuit were commenced. After the Defendants here filed a motion for judgment on the pleadings, the parties agreed to a Stipulation that would temporarily fund the Legislature and fund payments for rent for the Senate Office Building and debt service payments for the parking garage. Stipulation, June 23, 2017, *available at* http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/Documents/62-CV-17-3601_Stipulation_6-26-17.pdf. The parties, in the Stipulation, also stated as follows: “The parties agree that the Senate is authorized by Minn. Stat. § 16A.281 to use its carryforward funds to make payments for the Senate Office Building and parking garage not funded under the temporary injunction under Paragraph 5

above.” *Id.* p. 3. The Court approved the Stipulation and adopted its key provisions, holding as follows in the Order Granting Temporary Injunctive Relief:

2. Before midnight on June 30, 2017, the Minnesota Senate shall pay from its fiscal year 2017 appropriation the amount of \$683,954 to the Minnesota Department of Administration. This sum represents June 2017 rent for the Senate Office Building and debt service payments for the parking garage.

3. Beginning in July 2017, and monthly thereafter while this injunction is in effect, the Minnesota Senate shall pay the amount of \$669,332 to the Minnesota Department of Administration for rent for the Senate Office Building and debt service payments for the parking garage.

4. In accordance with the parties’ Stipulation, and to the extent the funding is not included as part of the injunction set forth in paragraph 1 of this Order, the Senate is authorized by Minn. Stat. § 16A.281 to use its carryforward funds to make payments for the Senate Office Building and parking garage.

There is no provision in the new Article IV, section 9 of the Minnesota Constitution that states that the LSC’s salary prescription provides for payments on debt service or rent. There is no provision in Minn. Stat. § 16A.281 that provides that payments for rent and debt service are allowed absent appropriation by law. Furthermore, there is no authority for granting any salary amount other than that set by the LSC—the Stipulation and Order provide for less than the legislators are entitled to under Minnesota law. Nonetheless, the parties and the Court have agreed that such payments are to be made. The AGA, a government watchdog association made up of Minnesota taxpayers, is thus compelled to intervene to enforce the rule of law.

ARGUMENT

I. THE COURT SHOULD GRANT INTERVENTION TO THE AGA BECAUSE THEY MAY INTERVENE OF RIGHT AS TAXPAYERS OF THE STATE OF MINNESOTA.

Under Minn. R. Civ. P. 24.01,

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

“Rule 24 should be construed liberally and . . . technicalities should not be invoked to defeat intervention.” *Engelrup v. Potter*, 224 N.W.2d 484, 488 (Minn. 1974) (internal marks and alterations omitted). Moreover, “Rule 24.01 establishes four requirements for intervention as of right: (1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties.” *League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). “In determining whether conditions for intervention have been met, the court will look to the pleadings and, absent sham or frivolity, a court will accept the allegations in the pleadings as true. . . . Secondly, on motion to intervene of right, the merits of the proposed [pleading] are not to be determined.” *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 164 (Minn. 1974).

Given Minnesota’s policy of liberally granting intervention under Rule 24.01, Defendants in Intervention satisfy all four requirements because (1) this application is timely in that a motion for judgment on the pleadings has been heard, only a temporary injunction has just been issued, and Defendant in Intervention has sought relief closely related to the issues in the above-captioned action; (2) Defendants in Intervention have an interest in the subject of the action—legislative pay—as a group of taxpayers in the State of Minnesota; (3) absent intervention, AGA cannot challenge the Court’s Order, which granted funding from the State treasury *ultra vires*; and (4) the existing parties entered into the Stipulation and have

ignored the constitutional requirements set forth by Minn. Const. Art. IV, section 9, Minn. Stat. § 15A.0825, Subd. 7, and Minn. Stat. § 16A.281.

A. AGA's Intervention of Right Is Timely.

The timeliness of an application to intervene depends on “all the circumstances shown.” *Engelrup*, 224 N.W.2d at 488. Intervention is allowable even “several years after commencement of suit.” *Id.* (quoting Moore, 3B Federal Practice (2 ed.), p. 24-523). “A timely application generally involves a motion to intervene under circumstances where the additional party’s presence will not unduly and adversely affect the rights of the existing parties.” *Id.* at 489. In *Engelrup*, “[a]lthough almost 10 months passed between the commencement of the action and the attempted intervention,” because “no rights have yet been adjudicated between the original parties and no new issues have been introduced which will prejudice either of the original parties,” intervention was timely given the requirement that courts liberally construe Rule 24. *Id.*

Like in *Engelrup*, intervention is also appropriate here. In this case, the Court has not adjudicated the merits of any claim between the parties: a temporary injunction is in effect as the Court considers a motion for judgment on the pleadings. *E.g., Metro. Sports Facilities Comm'n v. Minnesota Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002) (“The grant of a temporary injunction neither establishes the law of the case nor constitutes an adjudication of the issues on the merits. *Indep. Sch. Dist. No. 35 v. Engelstad*, 274 Minn. 366, 370, 144 N.W.2d 245, 248 (1966).”). Importantly, AGA has sought relief similar to the Plaintiffs here in a sister case, and the temporary injunction only took effect on or about June 30, 2017 before midnight, meaning that AGA has not been dilatory in seeking this intervention.

Furthermore, intervention will not prejudice the current parties: the Court's Order Granting Temporary Injunctive Relief is appealable under Minn. R. App. P. 103.03(b), and any deadline for filing a motion for judgment on the pleadings against Plaintiffs' Complaint is not close to passing. Rule 24 is to be construed liberally, and the Court should accordingly allow intervention here.

**B. The AGA Is an Association of Taxpayers That Has an Interest in Both the Lawsuit as a Whole and the Order Granting Temporary Injunctive Relief, Which Authorizes Payment of State Funds
*Ultra Vires.***

“Intervention as a matter of right requires an interest relating to the property or transaction which is the subject of the action. Minn. R. Civ. P. 24.01.” *Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 287, 292 (Minn. Ct. App. 1996) (internal marks omitted). An interest in a subject of the litigation arises when the intervenor has “a beneficial interest in the subject matter in suit . . . even though the intervener may have another remedy.” *Veranth v. Moravitz*, 284 N.W. 849, 851 (Minn. 1939). Taxpayers have a right to intervene where expenditures are challenged as illegal. *State, by Peterson v. Werder*, 273 N.W. 714, 715-16 (Minn. 1937).

The AGA here has an interest in this lawsuit and in the Court's Order because the lawsuit and Order have caused a specific disbursement of State funds in a manner not authorized by law. The AGA has both taxpayer standing and associational standing to challenge the Plaintiffs' claims in the action writ large and the disbursements issued as a result of the entry of the Order upon the Stipulation. *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009) (taxpayer standing and

associational standing conferred on party where the party “challenge[s] a specific disbursement of money, alleging that it was wrongful”).

C. Absent Intervention, the AGA Cannot Stop the Court’s Order.

The Court’s Order here provided for disbursement of funds that cannot be prevented without a reversal of the Order’s validity. Where intervention is timely and the applicant must intervene to protect the interest at stake, intervention is granted. *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 29 (Minn. 1981) (reversing denial of motion to intervene where the parties had the necessary interest and inadequate representation).

The AGA must be allowed to protect the taxpayers’ interests here. There are at least two illegal results that will occur and continue to occur if the AGA is not granted intervention: (1) the Order will continue to allow the payment of funds not authorized by Minn. Stat. § 16A.281 or any other provision of law; and (2) the *amount* of salary paid to each legislator will be that fractional percentage of the amount set for the *previous* biennium, not that fractional amount of the \$45,000 prescribed by the LSC, as required by law. The AGA will seek the Court’s power to redress these illegalities as they currently exist.

D. The Existing Parties Do Not Adequately Represent the AGA, as Demonstrated by Their Agreement to the Stipulation.

The AGA must only “carry the ‘minimal’ burden of showing that the existing parties ‘may’ not adequately represent their interests.” *Jerome Faribo Farms, Inc. v. Cty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990). The Stipulation, which purports to authorize *ultra vires* action by the Court, and which the Court adopted, as stated above, provides ample evidence that the current parties do not adequately represent the AGA. As referenced

above, the AGA has a different view of the application of the Constitution and statutes in this case.

First, the three branches of government have taken actions which have resulted in the 2016 Constitutional Amendment and Minnesota Statute § 15A.0825 regarding legislative pay being violated. Minnesota Statute § 15A.0825 states “By March 31 of each odd-numbered year, the council must prescribe salaries for legislators to take effect July 1 of that year.” The Legislative Pay Council prescribed \$45,000 in March. Now, in July of 2016, pursuant to the Court’s temporary funding order, the Senate members receive the legally-required \$45,000 and the House members receiving \$31,140 – a significant legal inequity.

Second, the Court Order for temporary funding based on the stipulation agreed to by the Governor, Commissioner and state legislature filed in and relied upon by the Court violates Minnesota Statute § 16A.281 which states, “An unexpended balance not carried forward and remaining unexpended and unencumbered at the end of a biennium lapses and shall be returned to the fund from which appropriated.” No exceptions in Minnesota Statute § 16A.281 apply.

Third, the stipulation agreed to by the Governor and state legislature authorizing spending is violative of the Minnesota’s Constitutional requirement that the legislature pass bills and present them to the Governor for his signature or veto. The Governor and the state legislature by introducing such a stipulation to the Court invited the Court into political questions where the Court has no subject matter jurisdiction since legislating appropriations is the responsibility of the legislative and executive branches of government.

Consequently, because of these differences in interpreting the Constitution and statutes, the Court should grant intervention as a matter of right under Minn. R. Civ. P. 24.01.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION TO THE AGA BECAUSE WHETHER THE COMPLAINT SHOULD BE DISMISSED AND WHETHER THE ORDER AUTHORIZES AN UNLAWFUL DISBURSEMENT OF MONEY ARE COMMON QUESTIONS OF LAW OR FACT IN THIS CASE.

Permissive intervention under Rule 24.02 may be granted where, upon timely application, “an applicant's claim or defense and the main action have a common question of law or fact.” Minn. R. Civ. P. 24.02. “The grant of permissive intervention lies within the discretion of the district court.” *Heller*, 548 N.W.2d at 292. The only requirement for permissive intervention is that “the proposed intervenors have ‘a common question of law or fact’ with the action.” *League of Women Voters Minnesota*, 819 N.W.2d at 642.

Here, the AGA seeks to intervene on at least two common issues of law in the underlying case: (1) did the Order unlawfully authorize the disbursement of State money to pay for more than just legislative salary; and (2) are defendants entitled to judgment on the pleadings vis-à-vis Plaintiffs’ Complaint? Further, allowing permissive intervention would not be untimely for the same reasons stated above for intervention of right. The Court should grant intervention in favor of the AGA.

If the Court deems full permissive intervention to be unnecessary, the Court can alternatively grant limited permissive intervention as to the issue related to the Court’s Order and resulting Temporary Injunction. *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) (the court “could exercise its discretion by allowing limited intervention if

existing parties would not be prejudiced. 7A C. Wright & A. Miller, Federal Practice and Procedure s 1922 (1972”); *see also* § 1922 Conditions on Intervention, 7C Fed. Prac. & Proc. Civ. § 1922 (3d ed.) (“Since the trial court has full discretion to grant or deny an application for permissive intervention under Rule 24(b), it may if it chooses impose conditions on its grant of the application. There are many reported instances in which conditions of this kind have been imposed. Most commonly, intervention has been allowed, but participation by the intervenor has been limited to certain issues.”) (internal marks omitted). The AGA would not object to such an alternative so long as the AGA is able to challenge the Order and retains full appeal rights as to the validity of the Order.

CONCLUSION

The current parties to this case agreed to a Stipulation that violates Minnesota law, and the Court ordered the relief they sought in the Stipulation, relying directly on it, despite there being no exception under Minn. Stat. § 16A.281 that might authorize it. Consequently, the Court should allow the AGA to intervene as of right, or in the alternative, permissively, or in the alternative, permissively for the limited purpose of challenging the Order.

Dated: July 17, 2017.

**MOHRMAN, KAARDAL & ERICKSON,
P.A.**

/s/ Erick G. Kaardal

Erick G. Kaardal, 229647
James V. F. Dickey, 393613
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074
Facsimile: 612-341-1076
kaardal@mklaw.com

Attorneys for the AGA

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211, Subd. 3, to the party against whom the allegations in this pleading are asserted.

Dated: July 17, 2017

/s/ Erick G. Kaardal

Erick G. Kaardal