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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
OTHER CIVIL

Deanna Brayton, Darlene Bullock, Forough Mahabady, Debra Branley, Marlene Griffin and Evelyn Bernhagen, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

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.

Civil File No. 62-CV-09-11693
Chief Judge Kathleen R. Gearin

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER

Defendants claim to have the power, by virtue of Minn. Stat. § 16A.152 and the ruling in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn Ct., App. 2004), to reduce an item of appropriation at the beginning of a biennium. This claim is based on a misreading of both the statute and the *Rukavina* decision.

I. Plain Meaning of the Statute Controls

Defendants argue that Plaintiffs ask the Court to read language into the unallotment statute that is not there. Nothing can be farther than the truth. Plaintiffs ask only that the Court construe the statute according to its plain language. Statutory construction requires that every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. § 645.16.

The unallotment statute has two conditions that must be read together to understand when reductions can occur. The Commissioner must determine 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. What Defendants fail to include in their argument is the

necessary meaning the Court must give to the qualifying language in the second part of the statute – "for the remainder of the biennium."

Probable receipts and the amount available are two sides of the same coin. But the inclusion of the word "remainder" has to be given some meaning. Words are to be construed according to their common meaning. Minn. Stat. § 645.08(1). A remainder is only part of the whole. This provision makes little sense unless the use of the statute is restricted to those situations where a budget shortfall – anticipated receipts and the amount available – is discovered after the biennium begins. Defendants' interpretation of the statute renders the word "remainder" superfluous. Plaintiffs simply ask the Court to read the statute in its entirety, giving effect to all of its words and provisions.

Defendants' argument that Commissioner Hanson followed the statute is without merit. Parroting the language of a statute is not the same as following it. Defendants were aware of projected shortfalls for the 2010/2011 biennium during the 2008/2009 biennium. But for Defendants to use the unallotment statute to correct a shortfall discovered in 2008/2009, according to the plain language of the statute, they would have to apply it *to the remainder* of that biennium, not the next biennium. By the 2010/2011 biennium, the shortfall was no longer "less than anticipated."

Defendants ask the Court to defer to Commissioner Hanson's interpretation of the statute. However, a court is not required to defer to an administrative interpretation where it is erroneous and in conflict with the express purpose of the act and the intention of the Legislature. *Soo Line R. Co. v. Comm'r of Revenue*, 277 N.W.2d 7, 10 (Minn. 1979). And, although *Rukavina* held the unallotment statute constitutional, the use of the statute as Defendants have in this case has not been challenged before. *See McCloud v. Comm'r of Pub. Safety*, 394 N.W.2d 821, 824

(Minn. 1984). (If the statutes do not support the Commissioner's interpretation, the significance is weak, particularly where the Commissioner's interpretation has not been challenged before.)

Defendants also argue that nothing in the statutes required the Commissioner to wait until the start of FY2011 to set allotments. While technically true, there are other statutory provisions that must be followed in order for the Commissioner to make an allotment. These provisions must also be considered when determining whether and when allotments can be reduced.

Before the Commissioner can make an allotment, agencies must first submit spending plans for the next allotment period *certifying*, among other things, *that the amounts requested are consistent with legislative intent*, Minn. Stat. § 16A.14 subdiv. 3. The level of an appropriation demonstrates the legislative intent. Following that, the Commissioner *must* approve spending plans if they are within the amount and purpose of the appropriation. Minn. Stat. § 16A.14 subdiv. 4.

The legislative appropriation for the Health and Human Services Budget was signed into law by the Governor on May 14. On that same day, Governor Pawlenty announced that he would use the unallotment statute to balance the budget. He did this before any spending plans certifying that they are consistent with legislative intent could have been presented, and before any allotments could be approved for the appropriation. Minn. Stat. § 16A.152 subdiv. 4 cannot be interpreted to apply where there has been no initial allotment that follows the requirements of Minn. Stat. § 16A.14.

II. Defendants' Actions Violate the Minnesota Constitution.

Plaintiffs assert that while the unallotment statute itself has been determined to be constitutional, Defendants' use of the unallotment statute to balance the budget at the start of a biennium is unprecedented. This use of the statute extends beyond the facts in *Rukavina,* and contradicts the Minnesota Constitution and its history.

Inter Faculty Org. et al. v. Carlson et al., 478 N.W.2d 192 (Minn. 1991) illustrates the flaw in Defendants' arguments. At issue in *Inter Faculty* was Governor Carlson's use of the line item veto. Before reaching its decision, the Supreme Court analyzed the power conveyed by the line item veto in Article IV, § 23 of the Constitution. Because the authority is found in Article IV of the Constitution, the Court found it to be *an exception* to the authority of the Legislature, and as such "the power must be narrowly construed to prevent an unwarranted usurpation by the executive of powers granted the legislature in the first instance." *Id.* at 194.

The court went on to note:

> Second, the language of the provision itself limits the authority to the veto of "items of appropriations," not of a part or parts of an item. We therefore view that power as a negative authority, not a creative one - in its exercise the power is one to strike, *not to add to or even to modify the legislative strategy.*

Id. (emphasis added). Pursuant to Articles III and IV of the Constitution, the power to pass bills to balance the budget cannot be delegated or limited beyond that provided for by the line item veto.

Historically, Minnesota has been reluctant to accept any limitation to the power of the Legislature to meaningfully participate in the budget process. In 1915, a constitutional amendment was proposed that would have given the Governor the power to reduce an appropriation *in whole or in part*. (This is an item reduction veto.) *Id.* at 194, fn2. The amendment was rejected. The authority Defendants now claim to have by virtue of the unallotment statute – to reduce items appropriated in order to create a balanced budget at the start of a biennium – is the same as an item reduction veto. It differs in only one important respect—it does not even provide the Legislature with a right to try and override the reduction.

It stands to reason that if this limitation on legislative power could not be delegated to the executive branch absent an amendment to the Constitution, then the Legislature cannot pass a

statute that would have the same effect. *See, e.g., Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770, N.W.2d 169, 176 (Minn. Ct. App. 2009) (Legislature is presumed to act in a manner consistent with the Constitution). Defendants should not be permitted to do in two steps what the Constitution does not permit in one – taking an item of appropriation just signed into law and then almost immediately reducing the amounts. It defies logic to conclude that the Legislature can further limit its power by statute where a constitutional amendment that would have done so failed.

It is consistent with *Rukavina* to hold that the statute confers an ability on the executive to reduce allotments during a biennium while still holding that this same authority is not conferred to achieve a balanced budget for the beginning of a biennium.

Defendants' reliance on *New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248 (Mass. 2002) is misplaced. In *New England Division,* as in *Rukavina,* a reduction in allotments was made necessary by a decline in revenues after the Legislature enacted its fiscal year appropriations, *id.* 1249-50. Also, while the Court found the statute to be an example of the executive power of expenditure, it noted:

> The probability that the Governor might abuse her authority under §9C, to reduce, or eliminate altogether, funding for certain programs based on her own ordering of social priorities, is minimal. "To the contrary, the Governor is bound to apply [her] full energy and resources, in the exercise of [her] best judgment and ability, to ensure that the intended goals of legislation are effectuated."

Supra at 1257 (citations omitted).

In the case now before the Court, it cannot be said that Governor Pawlenty did not reduce programs based on his own ordering of social priorities – he vetoed a bill that would have raised the necessary revenue to fund this program that supports the poor. It also cannot be said that he applied his full energy to ensuring that the intended goals of Legislation were effectuated. On

the same day he signed the Human Services Appropriation bill, he announced his intention to ignore its provisions and unallot appropriations for programs he just approved.

III. Irreparable Injury

Of all the *Dahlberg* factors to be considered, the likelihood of immediate and irreparable injury will usually be the primary factor in deciding whether to grant a TRO. Herr & Haydock, Minnesota Practice, v. 2A, § 65.5 (4th Edition, 2005). In fact, Defendants raise no serious argument challenging that the balance of harm favors Plaintiffs.

Defendants limit their discussion of harm to Plaintiffs to a footnote in which they refer to other benefit programs that Plaintiffs might be able to receive. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, fn. 6, p. 15. The programs to which Defendants refer are public assistance programs which existed prior to November 1, 2009, the effective date of the unallotment of the MSA Special Diet program.

Plaintiffs and many class members already receive benefits from one or more of these programs; however, these programs do not provide assistance with the special dietary needs covered by the MSA Special Diet program. Minn. Stat. § 256D.44 subdiv. 5(a) provides that MSA Special Diet funds are available only when "those additional dietary needs cannot be met through some other maintenance benefit." Defendants' further assertion that Plaintiffs can supplement their nutritional needs by utilizing local food shelves ignores the reality that food shelves or public eating programs do not provide the types of food needed to maintain the diets Plaintiffs must follow. *See* Ex. E to Plaintiffs' Memorandum in support of a Temporary Restraining Order (Gjesvold Aff.).

In reality, Plaintiffs have no alternatives to replace the funding lost by the unallotment of the MSA Special Diet program. Without this funding, Plaintiffs will be unable to maintain their

medically necessary diets. Failure to follow those diets puts them at serious risk for major health complications. In contrast, Defendants allege only minimal harm to themselves if the temporary restraining order is granted. *See* Defendants' Memorandum in Opposition to Plaintiffs Motion for a Temporary Restraining Order, pg. 15.

IV. Conclusion

"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 foundations upon which our system of government rests." *State ex rel. Young v. Brill,* 111 N.W. 639, 640 (1907). It is just such a sacrifice that Defendants ask the Court to condone. For the above reasons, Plaintiffs' request for a Temporary Restraining Order should be granted.

MID-MINNESOTA LEGAL ASSISTANCE

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