STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota

Court File No: 62-CV-11-5203
Judge Kathleen R. Gearin

***AMICUS CURIAE* BRIEF OF KAREN ORGANIZATION OF MINNESOTA**

INTRODUCTION

Karen Organization of Minnesota ("KOM") is a Minnesota nonprofit corporation which delivers services to refugees living in Minnesota pursuant to contracts with the Minnesota Department of Human Services ("DHS"), most of the funding for which comes from federal funds. The threatened shutdown of most functions of the executive department of the State of Minnesota threatens both KOM's ability to serve its clients as required by its contracts with DHS and its very existence.

KOM receives an average of about $29,500 per month in revenues from three DHS contracts pursuant to programs that funnel federal funds to KOM – employment services, social services and youth program services. In addition, KOM receives an average of about $1,600 per month from its DHS contract for health services, all from state appropriations, which services would have to be terminated altogether in the event of a shutdown.

Grounds raised by other participants in this case for the authority of the Court to take action to ensure the continuation of funding streams that nonprofit service providers use to provide social services to vulnerable Minnesotans apply equally to the refugees served by KOM and the refugee services provided by KOM and will not be repeated here.

KOM wishes to emphasize here the statutory support for the continuation of funding streams for services that involve significant federal dollars, and the ability provided the Court by the constitutional and statutory structure of Minnesota's budget setting provisions to avoid a government shutdown altogether and minimize the Court's need to get into the details of the merits of each recipient of funds or services from the state in determining how to proceed in the absence of an adopted budget for the fiscal 2012-13 biennium.

ARGUMENT

I. Functions that Spend Federal Funds Must Continue to Operate

With respect to federal funds, Minnesota Statutes Section 4.07, subd. 3, provides:

> All such money received by the governor or any state department or agency designated by the governor for such purpose shall be deposited in the state treasury and, subject to section 3.3005, are hereby appropriated annually in order to enable the governor or the state department or agency designated by the

governor for such purpose to carry out the purposes for which the funds are received.

Section 3.3005 contains a process for expenditure review with respect to federal funds. It includes that, if a request to spend federal funds is submitted by the Governor to the Legislature as part of the Governor's budget request, the applicable state agencies are authorized to expend the money so included unless, within the last 20 days before the deadline set by the Legislature for legislative budget committees to act on finance bills, a member of the Legislative Advisory Commission ("LAC") requests further review. Even if such a request is made, the funds can be spent after the regular session of the Legislature is adjourned for the year. Minn. Stat. Sec. 3.3005, subd. 2, 2a. Either way, such funds are now available for spending.

Given that the budget dispute is over how much revenue the state should raise by state taxes and other state-enacted revenue provisions and spend, the spending of federal funds provided to the state under federal law would seem not to be in dispute. Therefore, the state government functions involved in disbursing such federal funds should not be shut down and the federal funds should be disbursed in the ordinary course of business, notwithstanding any state government shutdown.

Furthermore, the authorization to spend the federal funds carries with it the authorization to spend state matching funds at least to the extent that the state match is included in the Governor's budget request. Minn. Stat. Sec. 3.3005, subd. 2, 2a, 3.

Therefore, the state functions that spend state matching funds as well as federal funds should continue to operate and to disburse those funds in the ordinary course of business, notwithstanding any state government shutdown.

These provisions are particularly important because such spending of federal funds often involves spending on human services programs, the recipients of which would suffer greatly if the spending were cut off due to the inability of the Governor and Legislature to agree upon a budget for raising and spending state dollars.

The ordinary course of business means, for service providers like KOM, that the service provider submits an invoice to DHS and the funds are disbursed to KOM in payment thereof. Questions can be raised; audits can occur after the fact, but those functions can be performed entirely, or virtually entirely, after the fact. Essentially all that is necessary to keep services funded by federal funds going is the relatively inexpensive ministerial activity of making disbursements in response to invoices submitted in accordance with well established contractual procedures.

KOM is not aware of the extent, if any, to which the DHS employees whose actions are necessary to disburse funds to KOM and similarly situated service providers are paid through federal funds. Presumably, however, some actions by Minnesota Management and Budget employees are required from time to time with respect to such disbursements of funds, and such employees are paid from state funds. And where both

federal and state dollars fund the services, there would be more substantial spending of state dollars.

Minnesota Statutes Sections 4.07, subdivision 3, and 3.3005 together compel the conclusion that the funds in question have been appropriated and are available to be spent notwithstanding the veto of the various appropriations bills.

The Supremacy Clause of the United States Constitution may also require, in some or many instances, that federally funded programs the funding for which flows through state agencies continue notwithstanding the Legislature's and Governor's collective failure to adopt a budget for the spending of state-raised funds. It would seem unnecessary, however, to reach that question in light of the strong state statutory support for continuation of federally funded programs.

Even if an argument to the contrary can be made, the leveraging of state dollars inherent in continuing to fund services that are significantly funded with federal dollars is tremendous. A little bit of state-provided money goes a long way in providing services. The case for taking advantage of this leverage is particularly compelling when, as in KOM's case, the service recipients are vulnerable Minnesotans.

If the Court decides to proceed by ordering the continuation of specific executive department functions, KOM respectfully submits that the functions ordered continued include those necessary to disburse funds to nonprofit service providers in cases in which

the funding is either exclusively from federal funds or from a mix of federal and state funds in which a substantial portion thereof is federal funds.

If the Court decides to proceed by avoiding a government shutdown and authorizing spending decisions to be made by the executive department until such time as the Legislature adopts appropriation bills that become law through gubernatorial signature or legislative override of a gubernatorial veto, KOM respectfully submits that the Court direct the executive department to carry out the statutory mandates of Minnesota Statutes Sections 4.07, subdivision 3 and 3.3005 that functions substantially funded by federal funds receive the intended funding.

II. Minnesota Statutes Section 3.30, in Conjunction with Legislative Passage of Appropriations Bills, Provides a Model for Negating the Need for a Government Shutdown

Even if the Court ordered that federally funded services continue to be funded during a shutdown, KOM's interest and concerns would not be fully remedied. KOM receives an average of about $1,600 per month from DHS for services in a wholly state funded program for vulnerable refugee clients. Those services will have to be discontinued if there is a government shutdown. KOM accordingly has an interest in the Court finding a way to avoid shutting down government.

The operative assumption in Minnesota's evolving budget dispute is that Minnesota state government must shut down to some degree on July 1, 2011, because no state budget for the FY 2012-13 biennium that begins on July 1 has been enacted as a

result of the Governor's vetoes of almost all of the Legislature's appropriations bills and the Legislature's failure to override those vetoes, as a result of which the state will not be able to spend money due to the provision of Minnesota Constitution Article XI, Section 1 that:

> No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

This Constitutional provision is implemented statutorily by Minnesota Statutes Section 16A.57, Appropriation, Allotment, and Warrant Needed, which provides:

> Unless otherwise expressly provided by law, state money may not be spent or applied without an appropriation, an allotment, and issuance of a warrant or electronic fund transfer.

This approach to the issue at hand essentially adopts a model that there is no, or relatively little, Minnesota government unless the Legislature and Governor agree, or the Legislature overrides the Governor's vetoes, on the entire scope of government. A more moderate model would be that government in Minnesota is an ongoing enterprise, with fiscal adjustments required every two years, which would suggest that government should not come to a screeching halt over failure to agree on exactly how much to spend or exactly how to spend it.

Fortunately, Minnesota Statutes Section 3.30, subdivision 1 provides a model that the Court could use in either of two ways to completely avoid a government shutdown, without dictating budget details to the legislative and executive departments. It provides in relevant part:

> A general contingent appropriation for each year of the biennium is authorized in the amount the legislature deems sufficient.... Transfers from the appropriations to the appropriations of the various departments and agencies may be made by the commissioner of management and budget subject to the following provisions:
>
> ...
>
> (c) Transfers exceeding $10,000 may be authorized by the governor but no transfer exceeding $10,000 may be made until the governor has consulted the Legislative Advisory Commission and it has made its recommendation on the transfer. Its recommendation is advisory only. Failure or refusal of the commission to make a recommendation is a negative recommendation.
>
> The commissioner of management and budget shall return to the appropriate contingent account any funds transferred under this subdivision that the commissioner determines are not needed.

A. <u>The Court Could Hold that Section 3.30, subd. 1, Dictates that the Governor Can Now Proceed as Provided Therein with Respect to the Total of the Vetoed Appropriations Bills</u>

"[T]he amount the legislature deems sufficient" was plainly established by the Legislature's passage of appropriations bills that collectively constitute an entire balanced

budget. The Governor's vetoes of those bills does not change the fact that the Legislature made a determination of sufficiency. Therefore, "a general contingent appropriation for each year of the biennium is authorized" and spending thereof is pursuant to an "express provision of law" and "in pursuance of an appropriation by law."

This would not end the uncertainty over the FY 2012-13 budget. Unanswered questions include whether the contingent authorizations must be understood as being allocated among general spending areas on the same basis as the Legislature indicated by its passage of the various appropriations bills, or whether the sum total of such bills constitutes a single contingent authorization.

Either way, it would appear that the Governor would have ultimate authority to spend that amount of money on appropriate activities of the state, as determined by the governor in consultation with the LAC. The Court would not then be involved in determining which functions to fund or how much to spend on them.

This outcome would not cause constitutional spending problems because the Legislature's total contingent appropriation would not exceed the projected funds available to the state general fund, or any other state fund, in the FY 2012-13 biennium, thus not running afoul of the constitutional balanced budget requirement, which exists in the form of restrictions on the state's ability to borrow found in Article XI of the Minnesota Constitution. Section 4 thereof limits the power of the state to contract public

debts to the purposes enumerated in Section 5, which do not include covering a budget deficit. Section 6 authorizes the issuance of certificates of indebtedness, but:

> No certificates shall be issued in an amount which with interest thereon to maturity, added to the then outstanding certificates against a fund and interest thereon to maturity, will exceed the then unexpended balance of all money which will be credited to that fund during the biennium under existing laws.

This constitutional balanced budget requirement would not be violated by interpreting Minnesota Statutes Section 3.30, subdivision 1, as provided above.

Using direct statutory interpretation to put the budget back into the province of the legislative and executive departments would have the Court playing a minimal role. Unfortunately, such a broad interpretation of Section 3.30, subdivision 1 would be highly questionable. Clearly, the statute was not aimed directly at solving the current problem. At least two objections to this interpretation could be raised.

First, the vetoed appropriations bills arguably are nullities: they never became law.

Second, the statute is regularly used to provide a contingency fund and a specific appropriation made to fund that fund. That has not happened here.

These objections carry considerable, if not overwhelming, force. That suggests a second approach, using Section 3.30, subdivision 1 as a model for an order by the Court as opposed to the statutory source for the Court's decision (the "Statutory Model").

Also supporting the reasonableness of the Statutory Model is the Governor's statutory unallotment authority under Minnesota Statutes Section 16A.152, subdivision 4. While the standard for unallotment has not been met here, what the Governor would be doing under the Statutory Model to confine spending within the constitutional limitations thereon would be analogous to unallotment. Neither the Minnesota Constitution nor Minnesota statutes contains a provision dealing with exactly this situation for the simple reason that its coming up was never foreseen.

B. The Court Could Issue an Order Using Section 3.30, subdivision 1 as a Model for How the Governor and Legislature Will Proceed to Deal with the Budget

Using the Statutory Model for an order would have the Court exercising certain inherent powers, beyond mere statutory interpretation, in issuing the order. KOM believes that the Court has such power and that the exercise thereof would be less of a stretch than interpreting Section 3.30, subdivision 1 to apply automatically to this situation.

Minnesota Constitution Article I, Section 1, Object of Government, provides: "Government is instituted for the security, benefit and protection of the people..." When, as here, both the Governor and leaders of the Legislature appear willing to shut down much of the government, which would negatively impact the security, benefit and

protection of the people, the Court can hardly fail to consider the situation when asked to do so, and could be expected to act if it determines that it can do so within the constitutional constraints that apply to it.

The Court's constitutional constraints are found in Minnesota Constitution Article III, Section 1, Division of Powers, which provides:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

The Court is faced with an extraordinary situation. If it chooses to do nothing, it appears as though the Governor will shut down all or most of the executive department on July 1 out of a belief that shut down is constitutionally compelled. If it chooses to do something, it inevitably faces the question of whether, and if so to what extent, it will intrude into the normal realms of the legislative and executive departments.

Petitioner Attorney General, and the Governor, who realistically is the other key participant in advocating what the Court should do, unless and until legislators or the House or Senate or the Legislature as an institution also move the Court to act in a particular manner, are urging the Court to determine that certain functions of Minnesota

state government are essential and must be continued notwithstanding the failure to adopt a budget, and, either expressly or by implication, that all remaining functions of state government are non-essential and should shut down due to failure to adopt a budget. This approach would involve the Court in many detailed determinations, which could be expanded ad infinitum because others may well deem functions omitted from the Attorney General's and Governor's lists of essential functions, or those developed by the Court through its own review of the $34-36 billion general fund budget, to be essential; could allow the ability of state government to conduct all other functions throughout the FY 2012-13 biennium to be irrevocably crippled; and would effectively transfer decision making on the operational scope and details of government from the legislative and executive departments to the judicial department.

KOM respectfully submits that using the Statutory Model for an order might avoid both a government shutdown and the need for the Court to make detailed determinations of which functions are and are not essential; keep state spending within the constitutionally prescribed limits; encourage the legislative and executive departments to work in accordance with the usual constitutional and statutory provisions to adopt a budget for FY 2012-13; protect Minnesotans against the possibility that those two departments might fail to reach agreement; result in more efficient and probably more effective determinations of what programs and spending have to be cut to keep the budget balanced; and be more in accord with the separation of powers prescribed in the Minnesota Constitution than would the approach being advocated by the Attorney General and Governor. KOM therefore asks the Court to consider making an order using

the Statutory Model as an alternative to proceeding in the fashion being advocated by the Attorney General and Governor.

An order using the Statutory Model (the "Hypothetical Order") might include authorizing the Governor to spend in the FY2012-13 biennium all the money that the Legislature included in its appropriation bills, and that the Governor gets to decide how it is spent, after consultation with the Legislative Advisory Commission, whose recommendations would be nonbinding, unless and until legislation is enacted (and any gubernatorial veto overridden) specifying how all or any portion thereof is to be spent.

Very importantly in this historic and hopefully never to be repeated situation, the Legislature did pass appropriations bills covering the entire gamut of state spending, and they would produce a balanced budget with no constitutional spending problems, as set forth above.

The Hypothetical Order would respect the positions of both the Legislature and the Governor in this dispute. The Legislature essentially has said: "Here is the money and how we want it spent." The Governor essentially has said: "This is not enough money, and some important functions are so under funded as to make this budget worse for Minnesota's future than shutting down the government until legislators agree to spend more in total and on certain functions."

The Hypothetical Order would respect the Legislature's view on how much money there will be to spend. This seems appropriate because neither the Minnesota Constitution nor any Minnesota statute gives a governor or the Court the power to force the Legislature to enact a tax increase against the will of the Legislature.

The Hypothetical Order would respect the Governor's view that some functions are seriously under funded by allowing him to allocate the funds as he sees fit, subject to some constraints.

The Hypothetical Order would encourage both Governor and Legislature to get back to work on agreeing on a budget for the next two years. Legislators would not appreciate having the Governor deciding how to spend $34 billion. The Governor would not appreciate not having what he believes is enough money to avoid doing serious harm to many Minnesotans and Minnesota institutions. Each would have an incentive to continue negotiating with each other for a mutually acceptable outcome.

The Hypothetical Order would not shut down state government. And it would not hold five million Minnesotans, and all or virtually all the functions of government, hostage to the inability of the Legislature and the Governor to agree on the best way forward, or for the Legislature to muster the support of 2/3 of the members of each house to override the Governor if legislators are collectively that convinced that the Governor's point of view is mistaken.

Finally, the Hypothetical Order would enable the Court to stay out of the business of determining what the state will and will not do, and what payments will or will not be made to which service providers and other recipients. Caveat: KOM prays that the Court will include in its order that federally funded service contracts continue to be funded, for the reasons and based on the authority, set forth above.

In sum, the Hypothetical Order would recognize Minnesota government as the ongoing enterprise that it is, subject to constitutionally mandated biennial fiscal adjustments, and keep the details of determining what those adjustments should be and what the government should do in the legislative and executive departments, to which they are assigned by the Minnesota Constitution. Both the Statutory Model and the unallotment statute allow for gubernatorial discretion in consultation with the LAC in analogous situations. The Hypothetical Order would have the Court ordering them to use a similar approach in this situation.

C. What Might the Hypothetical Order Include?

KOM does not purport to have the expertise to lay out exactly what the Hypothetical Order should include. In the event that using the Statutory Model as the basis for something along the lines of the Hypothetical Order appears to the Court to be the best way to proceed, the Court will be able to obtain input from all interested parties.

The Hypothetical Order probably would include findings, authorizations and constraints.

The findings could come largely from taking judicial notice of facts within the public realm. They might include findings along the following lines:

(1) The constitutionally prescribed limits on spending contained in Minnesota Constitution Article XI, Sections 4-6;

(2) The statutorily prescribed role of economic forecasts in limiting the amount of spending that can occur within the constitutionally prescribed spending limits;

(3) The forecast deficit for FY 2012-13 contained in the February forecast, as adjusted by the amounts contained in the appropriation bills passed by the Legislature and vetoed by the Governor;

(4) The Legislature's failure to authorize enough spending to fund the programs the Legislature has previously enacted into law at the levels currently applicable and with the participants projected for FY 2012-13;

(5) The failure of the legislative process to result in an adopted budget for FY 2012-13 through either passage of bills acceptable to the Governor or legislative override of gubernatorial vetoes, resulting in almost no spending having been formally authorized in the ordinary fashion;

(6) The completely untenable position of the executive department in being faced with administering current law programs requiring more spending than there will be revenue to fund them caused by the Legislature's failure to change the programs by overriding the Governor's vetoes of bills he considered to make unwise changes in such programs;

(7) The tie between the state and local governments created by state funding of many services delivered locally, state requirements on local governments respecting service delivery, local government revenue sources being controlled by the state, and local levy limits affecting the ability of local governments to raise revenues;

(8) The seeming conflict between the constitutional provisions on no spending in the absence of an appropriation and the purposes and functions of government; and

(9) The need for the Court to interpret Minnesota's statutes and Constitution and issue an order so as to enable state government to continue to function within the constitutionally prescribed spending limit, notwithstanding the situation described in findings (4)-(7).

The authorizations might include the following:

(1) To determine how to spend the total sought to be appropriated by the Legislature in the vetoed appropriations bills, subject to the constraints;

simply veto bills until the Legislature came down to a spending level acceptable to the Governor or overrode the Governor's veto. No rational Legislature would refuse to continue existing program spending out of a demand that there be more yet.

An order like the Hypothetical Order would never become necessary if the Governor wanted to spend more than the Legislature wanted, but the excess over the spending desired by the Legislature was not already imbedded in law. No rational Governor would refuse to continue existing program spending out of a demand that there be more yet.

An order like the Hypothetical Order only could be relevant if current law requires more than the Legislature is willing to spend and the Governor is unwilling to accept the Legislature's cuts. That is exactly the situation Minnesota is in.

Nobody argues with the spending limits imposed by the Minnesota Constitution. If a budget complying with those limits is adopted and subsequent economic developments mean that the limits will be exceeded unless spending is cut, either the Legislature through legislation or the Governor through unallotment, which requires consultation with the LAC, but not approval by the Legislature, can impose the necessary cuts.

The situation facing Minnesota this year is unusual – programs already in law would require more spending than the constitutional limit would allow in the next

biennium, unless the Legislature is willing to increase taxes or enact other revenue enhancing provisions, which is not unusual, but the Legislature and Governor have been unable to reach the normal outcome of an adopted budget, which makes this situation highly unusual. The Governor has no power under the Constitution to raise revenues through taxes or other means. The Legislature has declined to do either. Because the Governor is unwilling to accept the reduction in future spending authorized by current law that the Legislature wants to impose, and the Legislature is unable to muster the 2/3 majority to force its will on the Governor, Minnesota is left with either (1) spending obligations exceeding the constitutional limit unless something is done to reduce the obligations, or (2) no ability to spend money on anything unless something is done to allow some spending.

Since the Legislature and the Governor have proved unable between them to do anything to resolve their differences, the Court is asked to step in. Assuming that it is unthinkable to do nothing, the Court can either wade in itself to the detailed decision making on spending, including assuming some inchoate level of responsibility for ensuring that spending does not exceed the constitutional limit thereon, or issue an order along the lines of the Hypothetical Order, respecting the Legislature's constitutional power to deny revenue increases and enabling the Governor to make the tough decisions necessary to bring spending in line with the constitutional limits thereon that the Legislature has been unable to do through the normal law making process.

Which is better able to make spending decisions, either to hold at current law levels or cut from there to some extent – the judicial department, which is not involved in program and spending administration, or the executive department, which exists to carry out the laws and administer programs and spending? KOM respectfully submits that the executive department is much better positioned to make the multitude of spending cut decisions that must be made unless the Legislature relents and agrees to raise revenue, that the Hypothetical Order makes that process directly analogous to other interactions on spending between the legislative and executive departments that are standard operating procedure, and that proceeding along the lines suggested by the Hypothetical Order therefore ought to receive serious consideration by the Court and, if adopted, ought to be acceptable to the Legislature and the Governor.

D. What About a Special Session?

The Hypothetical Order would carry with it one big risk: that by the time the Legislature comes back into regular session in 2012, the Governor, who would have no choice but to move aggressively as soon as the Court's order is issued due to the large budget deficit to be closed, would have made changes that the Legislature would prefer not be made. The antidote to this risk is a special session of the Legislature, which the Governor could call. But would he, if authorized to allocate $34 billion in mere consultation with legislative leaders?

In summary, KOM respectfully submits that the Court should require continued funding of services provided by nonprofit organizations with federal dollars passed through the state, which will enable it to continue to exist and serve its vulnerable refugee clients under three major contracts it has with DHS, and that the Court consider avoiding a government shutdown altogether through issuance of an order along the lines of the Hypothetical Order modeled on the Statutory Model, which would also allow KOM to continue to serve its vulnerable refugee clients under one contract with DHS which is funded solely with state funds.

Dated: June 24, 2011

Respectfully submitted,

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The undersigned hereby acknowledges that sanctions may be imposed pursuant to Minn. Stat. §549.211.

John P. James