

October 5, 2017

**STATE OF MINNESOTA
IN SUPREME COURT**

**OFFICE OF
APPELLATE COURTS**

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

Respondents,

vs.

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,

Appellants.

**APPELLANTS' INFORMAL MEMORANDUM AND
ADDENDUM IN RESPONSE TO ORDER OF
SEPTEMBER 28, 2017**

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INTRODUCTION

In the Order dated September 28, 2017, this Court requested two separate items:

1) the identification of “*all* funds the Legislature may use to fund its operations in the absence of an appropriation for the FY2018-2019 biennium, whether current appropriations or carryover funds,” and 2) “the authority that permits the Legislature to use these funds.” Order dated September 28, 2017, pp. 3-4. In response to the Order, the Governor will first explain how Respondents have failed to be forthright in their court filings, and next will provide his answers to the Court’s request.

RESPONDENTS HAVE NOT BEEN CANDID WITH THE COURT ABOUT THE AVAILABILITY OF FUNDS

Clearly important to the Court’s constitutional analysis is the availability of funding to Respondents in the absence of an appropriation. (*See* Sept. 8, 2017 Order, p. 4 (“But the extent of the funding available to the Legislature without the parties’ stipulations and the district court’s June 26 and July 31 funding orders is unclear, as is the date by which that funding will be exhausted given actual expenditures after the start of this fiscal year and anticipated expenses before the next regular legislative session convenes.”).) Nevertheless, Respondents attempted to create a constitutional crisis by repeatedly stating in their filings, without factual support, that the Governor’s vetoes have “abolished” the Legislature or that the Legislature faces imminent shutdown. In addition to the false claim of abolishment, Respondents have failed to candidly disclose *all* available resources to the Court.

Respondents reported in their September 18, 2017 filing entitled, “Statement of Legislative Finances,” on the status of only the House and Senate carryover accounts.

We now know that Respondents obtained legal advice that they could access Legislative Coordinating Commission (“LCC”) carryover and FY 18-19 biennial appropriated funds, and they have stated they intend to use both. Only Respondents can explain why they failed to call these funds to the Court’s attention. In fact, it was the Governor in his September 15, 2017 filing who provided details about the existence of the LCC funds. (Appellants’ September 15, 2017 Informal Mem., p. 9 n.2.)

Consistently throughout their lawsuit, Respondents have insisted that the Governor’s line-item vetoes “abolished” them, even though they had access to (1) over \$16 million in Temporary Injunction funds from July 1 through October 1¹, (2) over \$16 million in carryover funds, (3) over \$3.8 million in LCC carryover funds, and (4) up to as much as over \$31 million in LCC FY 18-19 biennial general fund appropriations. Even as recently as their September 26, 2017 filing, Respondents declared that they are facing “imminent shutdown” and that the Governor has “forced the entire Legislature into survival mode.” (*See* Resp. to Appellants’ Amended Statement on Carryover Funds, p. 1.) These claims of abolishment are simply false.

RESPONSE TO THE COURT’S SPECIFIC QUESTIONS

The Court has requested briefing on the legal authority and amounts of any funds that can be used to finance Senate and House operations in the absence of an appropriation.

¹ October 1, 2017 was the last date that funding was available to Respondents under the district court’s Temporary Injunction. The date used herein to address availability of funds is October 2, 2017, the date after expiration of the Temporary Injunction funding.

I. The Legislature Has Granted Itself Significant Flexibility In Law To Access Funds.

The Legislature has enacted several laws that give itself special access to funds. These statutes apply uniquely to the Legislature—neither the Executive nor Judicial branches have the same access to funding. As a result of these statutes, the House and Senate have access to significant funds that can finance their operations well into the beginning of the next legislative session, at which point they can pass new appropriations.

A. The House and Senate Have Access to Their Carryover Accounts.

Unlike the Executive branch or the Courts, the Legislature—including the House, Senate, and legislative committees and commissions—has authority to carry over into the next biennium unexpended appropriated balances from prior years. Minn. Stat. § 16A.281. The Legislature does not require approval from the Commissioner of Management and Budget to carry over or spend these funds. *Id.* These carryover accounts, which are accounts in the general fund, can be used to pay operational expenses. *Id.* (carryover funds can be used “to pay expenses associated with sessions, interim activities, public hearings, or other public outreach efforts and related activities”).

B. The LCC Also Has Carryover Funds.

Minnesota Statutes section 16A.281 provides authority to carry over funds not only to the House and Senate, but also to the LCC. As of October 2, 2017, the LCC’s carryover balance in the general fund is approximately \$3,871,375.

C. Appropriations Are Available to The Legislature in Either Year of the Biennium.

Also unlike Executive branch agencies, the Legislature can spend biennial appropriated funds “in either year of the biennium.” Minn. Stat. § 16A.281. This means that the LCC, for example, is entitled to use all or a portion of its FY 19 appropriation in FY 18.

D. The LCC May Transfer LCC Carryover And Biennial Funds To The House And Senate.

The State Government Appropriations bill, passed during the 2017 Special Session, made general fund appropriations to the LCC of \$17,383,000 for FY 18 and \$17,553,000 for FY 19. (Laws 2017 Spec. Sess. c. 4, art. 1 § 2, subd. 4.) As of October 2, 2017, the LCC has approximately \$14,162,967 remaining of its FY 18 general fund appropriation, and the entire \$17,553,000 of its FY 19 general fund appropriation. These appropriations to the LCC are identified in session law as appropriations that may be used for staff to support listed offices and commissions (*e.g.*, Legislative Auditor, Revisor of Statutes, Legislative Reference Library), and some listed amounts for specified activities (*e.g.*, \$130,000 in the first year for transit financial activity reviews required by statute).
Id.

However, Minnesota Statutes section 3.305, subd. 2 provides: “The Legislative Coordinating Commission may transfer unobligated balances among general fund appropriations to the legislature.” This broad transfer language provides the authority for

the LCC² to transfer LCC general fund appropriations—both carryover and biennial appropriations—for use by the House and Senate.³

In their Response to Appellants’ Amended Statement on Carryover Funds, Respondents suggest that Minnesota Management and Budget (“MMB”) has the discretion to limit the LCC’s transfer authority. (Resp. to Appellants’ Am. Statement on Carryover Funds, p. 2.) Appellants are not aware of any such discretionary authority on the part of MMB. Respondents may be referring to Minn. Stat. § 16A.285, which places general conditions on appropriation transfers of an “agency” in the executive, legislative, or judicial branch. Minn. Stat. § 16A.285 (allows appropriation transfers between programs in the same fund (*e.g.*, the general fund) if the agency first notifies MMB, the transfer is consistent with legislative intent, and “[i]f an amount is specified for an item within an activity, that amount must not be transferred or used for any other purpose”). This provision, to the extent it applies to the LCC, does not require MMB approval, only notice to MMB.

In addition, section 16A.285 does not appear to prevent the transfer of LCC general fund balances, the legislative intent for which is codified in section 3.305, subd.

2. However, to the extent there is a conflict between these two provisions, section 3.305,

² The LCC members are: Rep. Kurt Daudt (R); Rep. Lyndon Carlson (DFL); Rep. Melissa Hortman (DFL); Rep. Joe Hoppe (R); Rep. Deb Kiel (R); Rep. Joyce Peppin (R); Sen. Michelle Fischback (R); Sen. Tom Bakk (DFL); Sen. Michelle Benson (R); Sen. Gary Dahms (R); Sen. Paul Gazelka (R); and Sen. Sandy Pappas (DFL).

³ As a result of the Governor’s line-item vetoes, the House and Senate do not have FY18-19 appropriations. However, under its section 3.305, subd. 2 authority to transfer balances “among general fund appropriations,” the LCC could transfer funds from the LCC general fund carryover and biennial appropriations, to the House and Senate carryover accounts, which are also general fund appropriation accounts.

subd. 2, the more specific statute expressly addressing LCC transfer authority, should govern over the general provisions of section 16A.285.⁴ The Legislature has not expressed any manifest intent that section 16A.285 should limit the LCC's broad authority under section 3.305, subd. 2 to transfer a significant amount of its general fund funds to the House and Senate carryover accounts.

Thus, by operation of both section 3.305, subd. 2 and section 16A.281, the LCC may transfer to the House and Senate: 1) LCC carryover funds; 2) LCC FY 18 and/or FY 19 biennial appropriated general fund funds; and/or 3) all of the above. *See* Minn. Stat. §§ 3.305, subd. 2 (LCC may transfer unobligated balances among legislative general fund appropriations); 16A.281 (carryover funds may be used for operations, and legislative appropriations can be used in either year of the biennium).

In their September 26, 2017 filing, Respondents protest that their use of LCC funds would impede the operations of the LCC. Respondents could consider, however, transferring only the LCC's carryover funds and FY 19 general fund funds to the House and Senate. By doing so, the LCC could continue, business as usual, using its FY 18 appropriations, without "par[ing] back significantly" the LCC's functions or imperiling the LCC's 140 employees, as Respondents portend. (Resp. to Appellants' Am. Statement

⁴ *See State v. Kalvig*, 296 Minn. 395, 401, 209 N.W.2d 678, 681 (1973) ("[O]ur statutory and case law history clearly indicate a support for the doctrine that the specific statute controls the general statute, unless the legislature manifestly indicates its intention that the latter shall be controlling."); *Nathan v. St. Paul Mut. Ins. Co.*, 243 Minn. 430, 438-39, 68 N.W.2d 385, 391 (1955) ("[W]here, as here, two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision."); Minn. Stat. § 645.26, subd. 1 (in irreconcilable conflict, specific provision controls over general unless general provision is enacted later and legislative intent is manifest that the general provision shall prevail).

on Carryover Funds, p. 2.) Then, in the next legislative session, the Legislature could pass an appropriations bill that restores to the LCC any funds that Respondents have used.

II. General Fund Amounts Available To The House And Senate

The parties agree that the House and Senate can use their carryover accounts to fund operations in the absence of an appropriation for the FY 18-19 biennium. As of October 2, 2017, the House carryover account contains approximately \$10,681,438 and the Senate carryover account contains approximately \$5,582,050.⁵

Additionally, assuming that under its section 3.305, subd. 2 authority, the LCC authorizes a transfer of its carryover funds, the amounts available to the House and Senate would increase by approximately \$3,871,375.

Finally, assuming the LCC authorizes a transfer of its FY 18-19 general fund appropriated funds, the amounts available to the House and Senate could increase by up to as much as \$31,715,967.⁶

⁵ Appellants previously identified a Senate carryover account balance of \$6,004,375.94 as of September 1, 2017 (Appellants' Statement on Carryover Funds, p. 2). During MMB's annual reconciliation of cash balances, it was discovered that expenditures of \$416,691.61 made by the Senate during fiscal year 2017 were not recorded in the accounting system. This has since been corrected, and the Senate carryover account balance has been reduced accordingly.

⁶ Of the general fund appropriation to the LCC, \$567,000 in FY 18 and \$10,000 in FY 19, are earmarked for specific items. (Laws 2017 Spec. Sess. c. 4, art. 1 § 2, subd. 4.) It is unclear whether those amounts could be used for other purposes. *Compare* Minn. Stat. § 16A.285 ("If an amount is specified for an item within an activity, that amount must not be transferred or used for any other purpose.") *with* Minn. Stat. 3.305, subd. 2 ("The Legislative Coordinating Commission may transfer unobligated balances among general fund appropriations to the legislature.").

In sum, the House and Senate could have access to up to as much as approximately \$51,850,830. (*See* Addendum, p. 1.) With this amount, even using Respondents' statement of anticipated monthly expenses, their funds potentially would not be exhausted until approximately into August 2018. If Respondents chose to use only their carryover funds, the LCC carryover funds, and the LCC's FY 19 general fund appropriation, funds would be exhausted approximately into May 2018.

The discussion above assumes that the House and Senate begin to use their carryover funds on October 2, 2017, with the expiration of the Temporary Injunction. This is the same assumption the House and Senate made when they calculated the exhaustion date for carryover funds in their September 18, 2017 Respondents' Statement of Legislative Finances, at p. 3. Recently, however, Respondents have indicated they may challenge that assumption. Appellants believe the Temporary Injunction funding is no longer in effect as of October 2, 2017. Accordingly, MMB will not process payments from the Temporary Injunction funding. If future draws were permitted to be made from Temporary Injunction funding, this obviously would delay further the exhaustion of the carryover funds.

III. Other Accounts

The House, the Senate, and the LCC all also have funds in other accounts. (*See* Addendum, p. 2.) It is not clear whether authority exists that would allow the House and Senate to use these other appropriations to finance their operations in the absence of a biennial appropriation.

CONCLUSION

In vetoing the House and Senate appropriations, the Governor satisfied all of the prerequisites set forth in Article IV, section 23 of the Constitution. Additionally, given the availability to the House and Senate of significant funds, as shown herein, as well as the potential for court-ordered funds if necessary to fund their critical, core functions, the Governor's vetoes did not accomplish an unconstitutional result. The Governor's May 30 line-item vetoes of the House and Senate appropriations are constitutional. The Court should reverse the district court's decision and dismiss Count I of the Complaint. As to Counts II and III, the Court should remand them to the district court to either dismiss them as not ripe because of the availability of funds, or to determine whether the House or Senate will have any need for funding of their critical, core functions when all available funds have been spent.

Dated: October 5, 2017

Respectfully submitted,

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