

STATE OF MINNESOTA
IN SUPREME COURT
A17-1142

FILED

October 5, 2017

**OFFICE OF
APPELLATE COURTS**

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

Respondents,

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,

Appellants,

**RESPONDENTS'
MEMORANDUM IN RESPONSE TO
THE COURT'S SEPTEMBER 28, 2017
ORDER**

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INTRODUCTION

The Court asked the parties to identify all funds that the Legislature may use to survive without appropriations for the remainder of the 2018–2019 fiscal biennium, and the legal authority for such use. There are two sources of funding the Legislature may use: the House and Senate carryforward funds, and funds appropriated to the Legislative Coordinating Commission (“LCC”). The use of these funds lies solely within the discretion of the Legislature, and no branch may force the Legislature, directly or indirectly, to exercise that discretion. *State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930); MINN. CONST. art. III, § 1.

Contrary to the Governor’s public assertions, the Legislature has been candid with this Court and the district court about funding available to support the operation of the House and Senate. The existence of the LCC funds is not news to the Governor or the courts. The Governor has argued throughout this case that his line-item vetoes were constitutional because the Legislature can access LCC funds. *See ROA 19 at 2, 4, Ex. B (Governor’s Answer); ROA 21 at 4, 16; Apprs.’ Statement of the Case 5 n.1, July 24, 2017; Apprs.’ Brief 5 n.4, July 28, 2017; Apprs.’ Informal Mem. 9 n.2, Sept. 15, 2017.* The district court rejected this argument, and ultimately concluded that the elimination of the Legislature’s appropriations prevented the Legislature from performing its constitutionally-mandated duties. *Add. 15 n.4.*

In the parties’ September 18, 2017 statements about legislative finances, the Governor agreed with the Legislature that the Senate would cease functioning on December 1, 2017, and the House on February 1, 2018. The Governor indisputably knew about the existence of the LCC funds then and omitted it from his statement. The Legislature did not conceal the LCC

funds and it is false for the Governor to claim otherwise. The only proper funding available to support House and Senate operations are their respective appropriations. The Governor used his line-item veto power to eliminate the Legislature's operational budget. The Governor now demands that the Legislature exhaust all its carryforwards and all of the funding for the LCC.

The Governor attempts to shift the blame for his actions to the victims. The Governor intentionally eliminated the funding for both the House and Senate for the entire 2018–2019 fiscal biennium. He intentionally did not eliminate the funding for the LCC. His stated aim was to coerce the Legislature into bending to his will by threatening their existence as a functioning body. Now, the Governor contends the House and Senate should ignore the appropriations process and victimize the very agencies he allowed to be funded. The Governor now suggests that the LCC voluntarily join the Legislature in plotting its own demise.

The Governor also argues that his line-item vetoes did not harm the Legislature because the Legislature had access to temporary injunction funding from July 1 to October 1, 2017. The premise underlying the Governor's argument is false. The district court's judgment unambiguously restored these appropriations to the Omnibus State Government Appropriations bill. That judgment was not stayed. The appropriations to the Legislature for the 2018–2019 fiscal biennium therefore passed into law and became effective July 1, 2017. The Governor and Commissioner Frans have simply decided to ignore the authority and judgment of the district court.¹

¹ On July 31, 2017, the parties stipulated to defer litigation over the interpretation of the district court's judgment on Count I until after October 1, 2017. *ROA 41 ¶1*. The parties agreed to continue funding at a fractional rate of the 2017 appropriations to the House and

DISCUSSION

I. THE HOUSE AND SENATE CARRYFORWARDS.

The amount of carryforward funds available to the House and Senate as of September 1, 2017, is undisputed: the House had \$10,681,438.14, and the Senate had \$5,582,050.² The House and Senate may, in their discretion, use their carryforward funds only for the purposes listed in Minnesota Statutes, section 16A.281.

II. THE LCC APPROPRIATIONS AND CARRYFORWARD.

A. Background on the LCC that May Be Helpful to the Court.

The LCC was established “to coordinate the legislative activities of the senate and house of representatives.” Minn. Stat. § 3.303, subd. 1. Six senators and six House members comprise the LCC. *Id.* at subd. 2. Eight members of the LCC are from the majority party (four from both the House and Senate), and four members are from the minority party (two from both the House and Senate). *Id.*

The LCC oversees legislative agencies that perform services supporting House and Senate operations. These agencies include the Revisor of Statutes, the Legislative Auditor, and the Legislative Reference Library, which provide essential services to the state. For example, the Revisor publishes the statutes, and drafts and publishes administrative rules. The Legislative Auditor conducts oversight of executive branch agency activities, and prepares

Senate until October 1, 2017. *ROA 41 ¶2*. The stipulation has since expired. The district court’s judgment remains in full effect.

² The parties previously reported that the Senate had \$6,004,325.94 in carryforward funds as of September 1, 2017. MMB has since adjusted that amount downward. The Senate does not currently have enough information to dispute this adjustment.

comprehensive annual financial reports (audits) for all of state government. The Legislative Auditor's functions are critical to the Legislature's oversight of the executive branch, which is an essential component of the checks and balances system of government provided under the Minnesota Constitution. Some of these agencies have full-time staff while other agencies receive administrative support from LCC's central staff. The LCC central staff assists those legislative agencies with organizing and noticing their meetings; preparing meeting agendas; preparing meeting materials; advising the agencies about their statutory duties and report deadlines; doing research as requested by the agency; attending to the recording of the meetings; and preparing the meeting minutes.

The LCC also has many duties prescribed by statute, including but not limited to the following:

- Rule review upon request. Minn. Stat. §§ 3.305, subd. 8; 3.843.
- Oversight of joint legislative studies. Minn. Stat. § 3.305, subd. 9.
- Redistricting: Upon enactment of a redistricting plan for the Legislature or Congress, the LCC must deposit the plan with the secretary of state. Minn. Stat. § 2.91. The LCC receives notice about corrections to redistricting plans. *Id.*
- Employment policy: The LCC adopts plans for sick leave and annual leave for the employees of the Legislature and of legislative committees and commissions. Minn. Stat. § 3.095.
- Rulemaking duties: The LCC may hold public hearings to investigate complaints with respect to rules. Minn. Stat. §§ 3.841–3.843.
- Reviewing and providing interim approval of collective bargaining agreements and compensation plans for state employees. Minn. Stat. § 3.855.

The LCC performs additional functions supporting the Legislature, such as contracting for services; maintaining a website that displays how funds from the Legacy Amendment and

the Environment and Natural Resources Trust Fund are being used; and facilitating visits by international and state delegations to the Legislature. In sum, the LCC provides critical support and services to the Legislature and Minnesotans.

B. The LCC Has Five Categories of Unspent Money.

The LCC has five categories of unspent money that the Legislature may, in its discretion, access: (1) the carryforward of general fund appropriations (monies appropriated for fiscal years prior to 2017 that have not been spent); (2) the fiscal year 2018 general fund appropriation; (3) the fiscal year 2019 general fund appropriation; (4) appropriations from statutory, non-general funds; and (5) appropriations from constitutionally dedicated non-general funds. The amounts of each of these potentially available sources and the legal authority for their use are discussed below.

1. The LCC carryforward funds.

As of September 1, 2017, the LCC had a carryforward balance of \$3,899,493.³ Of this amount, the LCC has designated \$26,000 to pay for certain IT costs of the Office of Legislature Auditor; \$260,000 for additional technology costs of the Revisor of Statutes; and \$147,000 for the LCC for the operating expenses of the commissions. As will be discussed below in Section II.C–D, the legal authority for and limitations on expenditure of the LCC carryforward funds derive from Minnesota Statutes, § 3.305, subd. 2 (general fund), and § 16A.285 (non-general fund).

³ The Governor previously stated the LCC's carryforward was \$3,640,956.91 as of September 1, 2017. (Apps.' Am. Statement Carryover Funds 3, Sept. 25, 2017.) That did not include the Legislative Auditor's carryforward.

Section 3.305, subdivision 2, does not apply to amounts appropriated from funds other than the general fund. Authority to use these non-general fund appropriations for other purposes is governed by Section 16A.285, which requires the use to be consistent with legislative intent and does not apply to amounts specified for items within an activity.

2. The FY 2018 appropriation to the LCC.

The amount of the appropriation to the LCC for fiscal year 2018 is \$17,511,000, including \$128,000 from the Health Care Access Fund. Of this amount \$14,072,000 is encumbered to pay the cost of employee compensation with \$3,311,000 available to pay for other costs of LCC operations such as utilities, equipment, and supplies. As discussed below in Section II.C–D, the legal authority for and limitations on expenditure of this money for the operations of the House and Senate derive from Minnesota Statutes, § 3.305, subd. 2 (general fund), and § 16A.285 (non-general fund).

3. The FY 2019 appropriation to the LCC.

The amount of the appropriation to the LCC for fiscal year 2019 is \$17,681,000, including \$128,000 from the Health Care Access Fund. None of this money is formally designated as encumbered, but all of it is expected to be used to pay employee compensation and other operating costs of the LCC's various functions.⁴ As discussed below in Section II.C–D, the legal authority for and limitations on expenditure of this money for the operations of the House and Senate derive from Minnesota Statutes, § 3.305, subd. 2 (general fund), and § 16A.285 (non-general fund).

⁴ See discussion at Section II.D *infra*.

4. Appropriations from statutory, non-general funds.

\$100,000 is appropriated to the LCC from the telecommunications access Minnesota fund each year for fiscal years 2018 and 2019 for closed captioning of legislative video coverage. MINN. LAWS 2017, ch. 94, art. 1, § 7, subd. 5(3). As discussed below in Section II.C–D, the legal authority for and limitations on expenditure of this money for the operations of the House and Senate derive from Minnesota Statutes, § 16A.285.

5. Appropriations from constitutionally dedicated non-general funds.

Appropriations are also made to the Legislature from constitutionally dedicated funds. The table below lists the funds and amounts appropriated. Authority to use these funds for other purposes is permitted by Section 16A.285 (described below), and must satisfy any constitutional restrictions on their uses. Appropriations from the Environment and Natural Resources Trust Fund established in Article XI, section 14, of the Minnesota Constitution may only be used “for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources.” Similarly, under Article XI, section 15 of the Minnesota Constitution, appropriations from the Outdoor Heritage fund, Clean Water fund, Parks and Trails fund, and Arts and Cultural Heritage fund “must supplement traditional sources of funding for these purposes and may not be used as a substitute.”

Function	Fund	FY 2018	FY 2019	Citation
Legislative-citizen commission on MN Resources	Environment and natural resource trust fund	\$1,200,000	Any unspent amounts from prior fiscal year	L. 2017, ch. 96, § 2, subd. 10(b)
LCC Legacy website	Environment and natural resource trust fund	5,000		L. 2017, ch. 96, § 2, subd. 10(c)
Lessard-Sams Outdoor Heritage Council	Outdoor heritage fund	571,000	578,000	L. 2017, ch. 91, art. I § 2, subd. 6(b)
LCC Legacy website	Outdoor heritage fund	8,000	7,000	L. 2017, ch. 91, art. I § 2, subd. 6(d)
LCC Legacy website	Clean water fund	15,000		L. 2017, ch. 91, art. II § 11
LCC Legacy website	Parks and trails fund	7,000		L. 2017, ch. 91, art. III § 5
LCC Legacy website	Arts and cultural heritage fund	9,000		L. 2017, ch. 91, art. IV § 3, subd. 11

To be clear, all of the funds appropriated to the LCC for fiscal years 2018 and 2019 are intended to pay for specific legislative operations. The amount of the appropriations were determined based on projected expenditures with no built-in contingency allowance for unexpected costs. The LCC might use its carryforward, in the normal course, for any costs unforeseen during the budgeting process. Any amount of the LCC's appropriation or carryforward that is transferred to the House and Senate will negatively impact the LCC. Some

legislative functions performed by the LCC will not occur. Expenses will go unpaid. LCC employees will eventually be laid off.

C. The Legal Authority to Use the LCC Funds Is Limited.

Accessing the LCC's funds is neither clear, simple, nor without significant consequence. First, most of the LCC's funds are encumbered or are needed for other purposes. If the House and the Senate use the LCC's money for their operations, the LCC will not meet its obligations. Second, procedural requirements must be met to access the funds. Third, the LCC maintains discretion over whether to transfer the LCC's funds to the House and the Senate.

D. The LCC Has Limited Statutory Authority to Transfer "Unobligated" Balances from General Fund Appropriations to the House and Senate.

By statute, the LCC may transfer a portion of its appropriation to the House and Senate. However, that authority is limited to transfers of "unobligated balances among general fund appropriations to the Legislature." Minn. Stat. § 3.305, subd. 2. The term "unobligated balance" is not defined in statute and has not been interpreted by the courts. In practice, the Department of Management and Budget ("MMB") accounting system permits or requires agencies to identify funds as "encumbered" when they are committed to meet an obligation. Funds that are not encumbered are listed by MMB as "unobligated."⁵ The use of "obligated" in section 3.305 may mean "encumbered" but that is not clear since the Legislature chose not

⁵ MMB, Accounting Services and Admin, Office of State Procurement, Statewide Operating Policy, *Encumbrances and M.S. 16A.15/16C.05 Compliance* (February 2, 2017), available at <http://mn.gov/mmb-stat/documents/accounting/fin-policies/chapter-7/0701-01-encumbrance-policy.pdf>.

to use “encumbered,” a term defined in statute, in drafting Section 3.305. *See* Minn. Stat. § 16A.011, subd. 11 (defining “encumbrance”).

At the start of a biennium, the executive director of the LCC designates the amount the LCC anticipates it will spend on salaries, per diem payments, other related benefits as “encumbered.” The executive director originally designated \$14,072,000 of the LCC’s general fund appropriation of \$17,383,000 for fiscal year 2018 as “encumbered,” because it is anticipated to be needed for compensation in fiscal year 2018.

A significant portion of the appropriations to the LCC for fiscal years 2018 and 2019 have a dedicated purpose in law:

- Office of the Legislative Auditor: \$6,744,000 the first year and \$6,564,000 the second year, with \$130,000 the first year being for a transit financial activity review;
- Revisor of Statutes: \$6,430,000 the first year, and \$6,093,000 the second year, with \$250,000 of this amount the first year for upgrades and repairs to the information technology data center; and
- Legislative Reference Library: \$1,622,000 the first year and \$1,445,000 the second year, with \$177,000 in the first year being for a digital preservation project.

MINN. LAWS 2017, First Special Session, ch. 4, art. 1, § 2, subd. 4.

The remainder of the appropriations to the LCC, which are not itemized, fund the LCC and other legislative commissions that support the Legislature.⁶ The remainder totals

⁶ Other legislative commissions that support the Legislature include:

- The Legislative Commission on Pensions and Retirement, which provides coordinated and comprehensive oversight of the funding and administration of the State of Minnesota’s pension plans for public employees, which provide

\$2,587,000 for fiscal year 2018, and \$3,451,000 for fiscal year 2019. These amounts include both employee and operating costs.

The use of these funds is further limited by procedural requirements. The LCC typically acts by a vote of the majority of its members. For the LCC to formally approve a transfer of any unobligated portion of a general fund appropriation to the LCC, the chair would need to call a meeting, and seven members of the LCC would have to vote in favor of the transfer. The members' respective votes are discretionary and cannot be directed or ordered by others.

Transferring a significant portion of the LCC's appropriation to the House and Senate would be unprecedented and of great consequence. Transferring money from the LCC to the House and Senate would exhaust the LCC's funding before the end of the biennium. The LCC would be unable to pay its staff and fund the legislative agencies that it oversees and supports.⁷

CONCLUSION

“Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion.” *Birkeland v. Christianson*, 229 N.W. at 314. The

pension benefits to over a half million employees of the state, counties, municipalities, school districts, and police and fire authorities;

- The LCC Subcommittee on Employee Relations, which considers and provides interim approval of state employee collective bargaining agreements and compensation plans that total some \$9 billion;
- The LCC Fiscal Services Office, which provides accounting and payroll services for the joint legislative agencies; and
- The Legislative Salary Council, established through constitutional amendment, to set salaries of Minnesota legislators.

⁷ The exact timing of when the LCC and legislative agencies will run out of money depends on the amount transferred.

decision to use the funds described above rests solely within the discretion of the Legislature. The Governor cannot use his line-item veto power to force the Legislature, directly or indirectly, to exhaust these discretionary funds. That would yield an unconstitutional result. As this Court noted, “[c]onstitutional powers may not be used ‘to accomplish an unconstitutional result.’” (Order 2, Sept. 8, 2017 (quoting *Starkweather v. Blair*, 71 N.W.2d 869, 876 (Minn. 1955).)

Allowing the Governor to use his line-item veto power to force the Legislature to exhaust these funds would accomplish another unconstitutional result. The line-item veto power is “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.” *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 194 (Minn. 1991). The LCC funds were appropriated to the LCC for specific purposes. The “legislative strategy” in appropriating funds to the LCC was clearly not to permit the temporary survival of the House and the Senate in the face of the Governor’s line-item vetoes. Allowing the Governor to force the Legislature to exhaust the LCC funds would modify the legislative strategy in violation of the Separation of Powers Clause of the Minnesota Constitution.

The constitutional harm inflicted by the Governor occurred the moment he line-item vetoed the appropriations to the Legislature for the 2018–2019 fiscal biennium. Using the LCC funds for the survival of the House and Senate would be an extraordinary and complicated measure with no guarantee of success. If the Court allows the Governor to force the Legislature to exhaust the LCC funds, the harm inflicted upon the Legislature will be extended to the LCC. The entire Legislative Branch is under threat. The Governor’s

indifference to the Legislative Branch and its employees is concerning. The Legislature respectfully requests that this Court affirm the Legislature's status as an independent, co-equal branch of government.

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