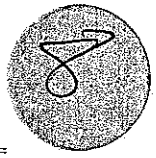
MINNESOTA STATE LAW LIBRARY



A10-64

STATE OF MINNESOTA

IN SUPREME COURT

Deanna Brayton, et al.,

Respondents,

vs.

Tim Pawlenty, Governor of the State of Minnesota, et al.,

Appellants.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

LORI SWANSON
Attorney General
State of Minnesota

ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
JOHN S. GARRY
Assistant Attorney General
Atty. Reg. No. 0208899
JEFFREY J. HARRINGTON
Assistant Attorney General
Atty. Reg. No. 0327980

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1450

ATTORNEYS FOR APPELLANTS

PATRICK D. ROBBEN
General Counsel to Governor
Tim Pawlenty
Office of Governor
Atty. Reg. No. 0284166

130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155
(651) 282-3705

ATTORNEY FOR APPELLANT
GOVERNOR TIM PAWLENTY

(Respondents' counsel listed on inside cover)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

MID-MINNESOTA
LEGAL ASSISTANCE

GALEN ROBINSON
Atty. Reg. No. 165980
DAVID GASSOWAY
Atty. Reg. No. 389526

430 First Avenue North, Suite 300
Minneapolis, Minnesota 55401
(612) 332-1441

RALONDA J. MASON
Atty. Reg. No. 194487

830 W. St. Germain, Suite 300
P.O. Box 886
St. Cloud, Minnesota 56302
(320) 253-0121

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

A. State Revenue And Expenditure Forecasts. 5

B. The 2009 Legislative Session. 6

C. Unallotments By The Executive Branch For The 2010-2011 Biennium. 6

D. Unallotment Of Funding For The MSA-SD Program. 10

STANDARD OF REVIEW 11

ARGUMENT 11

I. THE UNALLOTMENT OF FUNDING FOR THE MSA-SD PROGRAM IS AUTHORIZED BY MINN. STAT. § 16A.152. 11

A. The Plain Language Of The Statute Controls. 12

1. The Commissioner's Unallotments Comply With The Plain Language Of Section 16A.152 12

2. The District Court Ignored The Plain Language Of The Statute And The Plain Language Doctrine. 15

B. Even Assuming The Statute Is Ambiguous, The Commissioner's Interpretation Is Supported By Established Principles Of Statutory Construction. 16

1. The Statute's Purpose Of Avoiding Budget Deficits And Preventing Financial Crises Is Consistent With The Commissioner's Interpretation Of The Law. 17

2. The Consequence Of The Commissioner's Interpretation, Which Avoids The Potential Shutdown Of State Government, Further Supports The Commissioner's Use Of The Unallotment Statute. 18

3. The Public Interest In Continuing The Operation Of State Government Also Lends Credence To The Commissioner's Application Of The Unallotment Statute. 20

4. Courts Defer To A Commissioner's Interpretation Of A Statute That The Commissioner Administers. 21

II. THE UNALLOTMENT OF FUNDING FOR THE MSA-SD PROGRAM DOES NOT VIOLATE SEPARATION OF POWERS UNDER THE MINNESOTA CONSTITUTION 22

A. A Constitutional Violation Is Found Only With Extreme Caution And Legislative Delegations Are Liberally Permitted To Facilitate The Administration Of State Laws. 23

B. Unallotment Does Not Constitute The Exercise Of Purely Legislative Power By The Executive Branch. 24

CONCLUSION 30

ADDENDUM

APPENDIX

TABLE OF AUTHORITIES

Page

MINNESOTA CONSTITUTION

Minn. Const. art. IV 29

Minn. Const. art. V 1, 25

Minn. Const. art. XI 1, 6, 19, 25

MINNESOTA STATUTES

Minn. Stat. § 3.30 (2008) 9

Minn. Stat. § 16A.011 (2008) 7, 13, 27

Minn. Stat. § 16A.055 (2008) 5

Minn. Stat. § 16A.103 (2008) 4, 5, 14

Minn. Stat. § 16.14 (2008) 6

Minn. Stat. § 16A.152 (2008) ..... passim

Minn. Stat. § 16A.152 (2008 & Supp. 2009) 7

Minn. Stat. § 256D.44 (2008) 10

Minn. Stat. §§ 256D.33-256D.54 (2008) 10

Minn. Stat. § 645.16 (2008) ..... passim

Minnesota Session Laws 1939, ch. 431 6

Minnesota Session Laws 1987, ch. 268 6

Minnesota Session Laws 2009, ch. 79 ..... 6, 11, 29

Minnesota Session Laws 2009, ch. 101 8

Minnesota Session Laws 2009, chs. 36, 37, 78. 83, 93-96, 101, 126, 143, 172 6

MINNESOTA RULES

Minn. R. Civ. P. 54.02 4

MINNESOTA CASES

American Tower, L.P. v. City of Grant,
636 N.W.2d 309 (Minn. 2001) 12

Anderson v. Commissioner of Highways,
267 Minn. 308, 126 N.W.2d 778 (1964) 24, 28

Burkstrand v. Burkstrand,
632 N.W.2d 206 (Minn. 2001) 18

Geo. A. Hormel & Co. v. Asper,
428 N.W.2d 47 (Minn. 1988) 22

Green Giant Co. v. Commissioner of Revenue,
534 N.W.2d 710 (Minn. 1995) 16

Hutchinson Tech., Inc. v. Commissioner of Revenue,
698 N.W.2d 1 (Minn. 2005) 16

Hyatt v. Anoka Police Dep't,
691 N.W.2d 824 (Minn. 2005) 12

In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota,
624 N.W.2d 264 (Minn. 2001) 22

Inter Faculty Org. v. Carlson,
487 N.W.2d 192 (Minn. 1991) 29

Kelly v. First Minneapolis Trust Co.,
178 Minn. 215, 226 N.W. 696 (1929) 20

Krumm v. R.A. Nadeau Co.,
276 N.W.2d 641 (Minn. 1979) 22

Lee v. Delmont,
228 Minn. 101, 36 N.W.2d 530 (1949) ..... passim

Lee v. Fresenius Med. Care, Inc.,
741 N.W.2d 117 (Minn. 2007) 17

Miller v. Foley,
317 N.W.2d 710 (Minn. 1982) 15

Minnesota Fed'n of Teachers v. Quie,
No. 447358 (Second Jud. Dist. Feb. 27, 1981) 26

Mower County Bd. of Comm'rs v. Board of Trustees of Pub. Employees Ret. Ass'n,
271 Minn. 505, 136 N.W.2d 671 (1965) 20

Reiter v. Kiffmeyer,
721 N.W.2d 908 (Minn. 2006) 16

Remington Arms Co., Inc. v. G.E.M. of St. Louis, Inc.,
257 Minn. 562, 102 N.W.2d 528 (1960) 23

Rukavina v. Pawlenty,
684 N.W.2d 525 (Minn. Ct. App. 2004),
rev. denied (Minn. Oct. 19, 2004) ..... passim

State ex rel. Humphrey v. Philip Morris USA, Inc.,
713 N.W.2d 350 (Minn. 2006), *cert. denied*, 549 U.S. 1206 (2007) 11

State ex rel. Sviggum v. Hanson,
732 N.W.2d 312 (Minn. Ct. App. 2007) 19, 29

State v. Jesmer,
293 Minn. 442, 196 N.W.2d 924 (1972) 16

State v. King,
257 N.W.2d 693 (Minn. 1977) 23, 27

State v. Larsen,
650 N.W.2d 144 (Minn. 2002) 23

State v. Peck,
773 N.W.2d 768 (Minn. 2009) 16, 17

State v. Tennin,
674 N.W.2d 403 (Minn. 2004) 23

Wulff v. Tax Court of Appeals,
288 N.W.2d 221 (Minn. 1979) 1, 24

OTHER STATE CASES

Colorado General Assembly v. Lamm,
700 P.2d 508 (Colo. 1985) 28

Hunter v. State,
865 A.2d 381 (Vt. 2004) 28

New England Div. of American Cancer Soc'y v. Commissioner of Admin.,
769 N.E.2d 1248 (Mass. 2002) ..... passim

North Dakota Council of Sch. Adm'rs v. Sinner,
458 N.W.2d 280 (N.D. 1990) 27

Opinion of the Justices,
376 N.E.2d 1217 (Mass. 1978) 25

University of Connecticut Chapter AAUP v. Governor,
512 A.2d 152 (Conn. 1986) 27

OTHER AUTHORITIES

Journal of the House (2009) 6

Legislative History of Unallotment Power (Senate Counsel, June 29, 2009) 21

LEGAL ISSUES

I. Is the unallotment of funding for the Minnesota Supplemental Aid-Special Diet program authorized by Minn. Stat. § 16A.152?

This issue was raised in Respondents' amended complaint, in Respondents' motion for a temporary restraining order, in the parties' competing arguments on that motion, and in Appellants' motion to dismiss the amended complaint. Appellants' Appendix at A1-A32; MNCIS Document Nos. 15-16, 18, 21, 23-24; Transcript of Nov. 16, 2009 Hearing. The district court ruled that the unallotment does not comply with the statute due to the timing of the unallotment. Appellants' Addendum at 7-18. The issue was preserved for appeal by the judgment entered on January 8, 2010. *Id.* at 19-24.

Rukavina v. Pawlenty, 684 N.W.2d 525 (Minn. Ct. App. 2004)

Minn. Stat. § 16A.152
Minn. Stat. § 645.16

II. Does the unallotment of funding for the Minnesota Supplemental Aid-Special Diet program violate separation of powers under the Minnesota Constitution?

This issue was raised and preserved for appeal in the same manner as the first issue. At the hearing on their motion, Respondents clarified that they admit section 16A.152 is constitutional, but claim if the unallotment is authorized by the statute that the unallotment violates separation of powers due to its timing. Transcript at 11, 18, 45. The district court acknowledged that section 16A.152 is constitutional, but ruled that the unallotment violates separation of powers because it does not comply with the statute due to the timing of the unallotment. Appellants' Addendum at 10-12.

Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530 (1949)
Wulff v. Tax Court of Appeals, 288 N.W.2d 221 (Minn. 1979)
Rukavina v. Pawlenty, 684 N.W.2d 525 (Minn. Ct. App. 2004)

Minn. Stat. § 16A.152
Minn. Const. arts. V, XI

STATEMENT OF THE CASE

This appeal concerns the validity of the executive branch's reduction of the unexpended allotments of the appropriations available to fund payments under the Minnesota Supplemental Aid-Special Diet ("MSA-SD") program in the current biennium of July 1, 2009 to June 30, 2011. Under the unallotment statute, Minn. Stat. § 16A.152 (2008), the executive branch reduced funding for the MSA-SD program effective November 1, 2009, by $2.133 million for fiscal year 2010 and $3.2 million for fiscal year 2011. This was part of a larger set of approximately $2.5 billion in unallotments of expenditures made by the executive branch under section 16A.152 to address the State's current biennial budget crisis. The Commissioner also took various administrative actions to reduce the budget deficit by about an additional $200 million. *See* Appellants' Appendix ("A") at A67-A111.

Respondents are six Minnesota residents who qualify for payments under the MSA-SD program. They filed this lawsuit on November 3, 2009, in Ramsey County District Court against Appellants, who are the Governor of the State of Minnesota and the Commissioners of the Minnesota Departments of Management and Budget, Human Services, and Revenue.

Respondents claim that the unallotment of funding for the MSA-SD program does not comply with the unallotment statute. A21-A22. Alternatively, Respondents contend that if the statute authorizes the unallotment, then the unallotment violates separation of powers under the Minnesota Constitution due to its timing. A22-A23; Transcript at 18, 45. Respondents admit that the unallotment statute is constitutional. Transcript at 11, 45.

Respondents' amended complaint also challenges the validity of the unallotment that reduces funding for renters' property tax refunds in FY 2011, the second year of the biennium. A22.

On November 6, 2009, Respondents filed a motion for a temporary restraining order to require Appellants to restore the unallotted funding for the MSA-SD program. A28. On November 12, 2009, Appellants filed a motion to dismiss the amended complaint. A30. They argued that the challenged unallotments are authorized by section 16A.152 and do not violate separation of powers.

After extensive briefing by the parties, Respondents' motion was heard by the district court, Chief Judge Kathleen R. Gearin, on November 16, 2009. That same day, a committee of the House of Representatives voted 14-8 to authorize submission of an amicus brief in support of Respondents. A letter in opposition to the filing of the amicus brief was submitted by a member of the House committee on November 16, 2009. With the district court's permission, the amicus brief was filed on November 20, 2009.

The district court granted Respondents' motion in an order filed on December 30, 2009. Appellants' Addendum ("Add.") at 7-17.[1] The order was based solely on the court's legal conclusion that the unallotment of funding for the MSA-SD program does not comport with section 16A.152 and therefore violates separation of powers. *Id.* The court's reasoning calls into question the validity of all of the $2.5 billion in unallotments

[1] The district court issued an amended order the same day which changed a reference in the initial order to the fiscal years for the current biennium. Add. 18. The current biennium in fact covers fiscal years 2010 and 2011.

made to address this biennium's budget crisis. *Id.* In addition, as the court noted, the November 2009 Economic Forecast mandated by Minn. Stat. § 16A.103 (2008) projects a further deficit of about $1.2 billion this biennium, beyond the approximate $2.7 billion deficit already addressed by the Commissioner. Add. 14; A142-A150.

The district court recognized that the unallotment statute is constitutional, but ruled that the unallotment of funding for the MSA-SD program does not comply with section 16A.152 because of its timing. Add. 10-12. Without applying or analyzing the specific language of section 16A.152, the court reasoned that the executive branch exceeds its authority under section 16A.152 if it unallots funding to eliminate a deficit that was known at the time the appropriation bills for the biennium were signed into law. *Id.* The court suggested that in light of the November 2009 Economic Forecast, the conditions for unallotment in this biennium exist now, at least with respect to the projected additional deficit of about $1.2 billion. *Id.* at 14.

Based on the order granting Respondents' motion, the parties stipulated to the denial of Appellants' motion to dismiss, and entry of final judgment for Respondents under Minn. R. Civ. P. 54.02, on the claim that the unallotment of funding for the MSA-SD program is unlawful. Add. 19-24. The judgment, entered on January 8, 2010, requires Appellants to immediately restore the funding with respect to that unallotment. *Id.* at 23-24.

Appellants' notice of appeal from the judgment was filed on January 12, 2010. A33. By order filed on January 19, 2010, the Court granted Appellants' petition for

accelerated review and their motion for expedited review. Oral argument in the case has been set for March 15, 2010.

STATEMENT OF FACTS

The district court's decision is based on the public records regarding the unallotments and the court's analysis of the law. The relevant facts are not in dispute.

A. State Revenue And Expenditure Forecasts.

The Commissioner of Minnesota Management and Budget ("MMB"), Tom Hanson ("Commissioner"), is required to "manage the state's financial affairs." Minn. Stat. § 16A.055, subd. 1(a)(2) (2008). As part of this responsibility, in February and November of each year, the Commissioner must prepare "a forecast of state revenue and expenditures." Minn. Stat. § 16A.103, subd. 1 (2008).

In preparing the forecast, "[r]evenue must be estimated for all sources provided for in current law." *Id.,* subd. 1a. The forecast must take into account economic information available at the time of the forecast. *Id.,* subd. 1e. A forecast prepared in the first year of a biennium must cover the current and subsequent biennium. A forecast prepared in the second year of the biennium covers the current and next two bienniums. *Id.,* subd. 1g. The Commissioner's forecast is delivered to both the Legislature and the Governor. *Id.,* subd. 1. Between forecasts MMB releases monthly reports documenting monthly revenue collections which compare actual receipts to forecast projections. *See* A120-A121.

B. The 2009 Legislative Session.

Between May 4 and May 21, 2009, the Legislature passed and presented to the Governor the appropriation bills for the 2010-11 biennium, which were signed by the Governor on May 7, 14-16, and 21-22, 2009. *See* Minnesota Session Laws 2009, chs. 36, 37, 78, 79, 83, 93-96, 101, 126, 143, 172. On May 8, 2009, the Legislature passed a bill that increased taxes from existing tax laws. House File 885 (chapter 77). The Governor vetoed the bill on May 9, 2009. A vote by the Legislature on May 17, 2009 to override the veto was unsuccessful. Journal of the House 6563-64 (2009). The 2009 legislative session concluded on May 18, 2009, and at that time a huge budget deficit existed. Add. 5; A67.

C. Unallotments By The Executive Branch For The 2010-2011 Biennium.

Because Article XI of the Minnesota Constitution limits the manner in which public debt may be used to fund State government, the State must maintain a balanced budget for each biennium. Minn. Const. art. XI, § 6. In 1939, to ensure that the State's budget remains balanced during a biennium, the Legislature enacted a so-called "unallotment" statute authorizing the executive branch to reduce State spending to correct a biennial budget shortfall. Minnesota Session Laws 1939, ch. 431, art. 2, § 16.[2] The Legislature has amended the law through the years. *See, e.g.,* Minnesota Session Laws 1987, ch. 268, art. 18, §§ 1-3; Add. 4.

---

[2] The allotment and encumbrance system does not apply to the legislative and judicial branches. *See* Minn. Stat. § 16.14, subd. 2a (2008).

The current version of the unallotment law is found in Minn. Stat. § 16A.152 (2008 & Supp. 2009), which is entitled "Budget Reserve and Cash Flow Accounts." Add. 1-4. Subdivisions 1 and 1(a) of section 16A.152 establish a "cash flow account" and "budget reserve" to manage the state's cash flow needs and provide for a so-called "rainy day fund." Subdivision 2 of section 16A.152 provides that "if on the basis of a forecast of general fund revenues and expenditures" the Commissioner determines that a surplus will exist for the biennium, the Commissioner must allocate money to the cash flow and budget reserve accounts and for other specified purposes depending upon the amount of the surplus. Subdivision 3 states, in part, that "[t]he budget reserve may be used when a negative budgetary balance is projected . . . ."

Subdivision 4 of section 16A.152, entitled "Reduction," then states in relevant part as follows:

> (a) If the commissioner [of MMB] determines 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*, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, *reduce the amount in the budget reserve account as needed to balance expenditures with revenue.*
>
> (b) *An additional deficit* shall, with the approval of the governor, and after consulting the legislative advisory commission, be *made up by reducing unexpended allotments of any prior appropriation or transfer.* Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

(Emphasis added); *see also* Minn. Stat. § 16A.011, subd. 4 (2008) (defining "appropriation" as "an authorization by law to expend or encumber an amount in the treasury"); *id.*, subd. 3 (defining "allotment" as "a limit placed by the commissioner [of

MMB] on the amount to be spent or encumbered during a period of time pursuant to an appropriation").[3]

Pursuant to section 16A.152, subdivision 4(a), the Commissioner determined on June 4, 2009 in a letter to the Governor and the Legislature that probable general fund receipts for the 2010-2011 biennium would be less than anticipated in the Commissioner's February 2009 forecast and that the amount available for the biennium would be less than needed to balance expenditures with revenues. Add. 5; A67. The Commissioner also noted that the budget reserve account had previously been drawn down to zero and that an approximate $2.7 billion deficit remained in the general fund for the 2010-2011 biennium based on the February forecast (after adjustments enacted by the Legislature). *Id.*

The Commissioner therefore concluded that the budget deficit for the biennium will be greater than $2.7 billion because revenue will be significantly less than projected in his February forecast. *Id.* The Commissioner decided to unallot $2.5 billion, and take administrative action saving $200 million, and await his November 2009 forecast and/or possible legislative action during the 2010 session before making additional unallotments. *Id.;* A139-A140.

The Commissioner's proposed unallotments to eliminate approximately $2.5 billion in expenditures were approved by the Governor on July 1, 2009, after consultation

[3] Statutory references to the Commissioner of Finance are now to the Commissioner of Minnesota Management and Budget, the agency into which Finance was merged. *See* Minnesota Session Laws 2009, ch. 101, art. 2, § 109.

with the Legislative Advisory Commission ("LAC"), which included two formal public meetings of the LAC attended by the Commissioner and other executive branch officials.[4] A69-A98, A102. The unallotments were implemented beginning in July 2009. A92-A111. The Commissioner also notified the legislative budget committees of the approved unallotments within fifteen days, as required by subdivision 6 of section 16A.152. A99-A111.

The Commissioner's determination that "probable receipts for the general fund will be less than anticipated" was based on MMB's evaluation of compelling evidence of a worsening economy and decreasing revenue collections. Add. 5; A67. As the Commissioner concluded, this information established that receipts for the 2010-2011 biennium would be less than projected in his February 2009 Economic Forecast, which in turn had been significantly lower than the November 2008 forecast. *Id.* Subsequent analyses by MMB in the summer and fall of 2009 showed significant continuing reductions in the State's revenues from previously anticipated levels reflected in the February 2009 forecast. A38-A66, A112-A121. On November 10, 2009, MMB determined that actual receipts for the first four months of the 2010-2011 biennium were already $81.4 million less than projected. A120-A121.

The Commissioner's November 2009 Economic Forecast, issued on December 2, 2009, projected that general fund revenues will be $1.156 billion lower than the February 2009 forecast. A142-A150. The November 2009 forecast projected an additional budget

[4] The LAC consists of legislative leaders, including the majority leader of the Senate and the speaker of the House. Minn. Stat. § 3.30, subd. 2 (2008).

deficit of about $1.2 billion this biennium, beyond the approximate $2.7 billion deficit already addressed by the Commissioner's unallotments and administrative actions. *Id.*

Many of the $2.5 billion of unallotments approved in July 2009 take effect in the second year of the biennium, which begins July 1, 2010. A92-A98. This delay provides more time to prepare for the spending reductions and their implementation. It also permits time for the Minnesota Legislature to address the reductions, if it chooses, during the 2010 legislative session. However, the longer it takes to implement the necessary spending corrections, the more difficult it will be to balance the budget during the biennium. At this time, approximately 30% of the biennium has already elapsed. The largest unallotment is a $1.77 billion deferral in payments to school districts, $702 million of which is scheduled for the 2011 fiscal year. A92.

D. Unallotment Of Funding For The MSA-SD Program.

The unallotments approved in July 2009 include funding for the Minnesota Supplemental Aid-Special Diet ("MSA-SD") program. A95. MSA-SD is part of the broader Minnesota Supplemental Aid ("MSA") program. The MSA program, which is supervised by the Department of Human Services ("DHS") and administered by counties, provides for State-funded monthly cash payments to supplement federal Supplemental Security Income benefits for certain individuals. *See* Minn. Stat. §§ 256D.33-256D.54 (2008). MSA-SD provides for special needs payments to qualified MSA participants for certain medically prescribed diets. *Id.*, § 256D.44, subd. 5(a).

MSA-SD is not funded by a separate appropriation specific to that program, but rather as part of a general appropriation to DHS for all the various MSA grants.

Minnesota Session Laws 2009, ch. 79 (House File 1362), art. 13, § 3, subd. 4(j) (A127). In the current biennium, the general appropriation to DHS for all MSA grants is $33.93 million for FY 2010 and $35.191 million for FY 2011. *Id.*

In July 2009, the Commissioner reduced the allotment of the FY 2010 DHS appropriation for MSA grants by $2.866 million, and the allotment of the FY 2011 DHS appropriation for MSA grants by $4.3 million, or approximately 8% and 12.2% of total MSA funding for FY 2010 and 2011, respectively. A100. These unallotments represent a reduction in MSA-SD funding of $2.133 million for FY 2010 and $3.2 million for FY 2011. A95. The effect of the unallotments was to eliminate funding for MSA-SD payments for the period of November 1, 2009 through June 30, 2011. *Id.*

STANDARD OF REVIEW

Statutory and constitutional interpretation present questions of law, which the Court reviews de novo. *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006), *cert. denied,* 549 U.S. 1206 (2007).

ARGUMENT

I. THE UNALLOTMENT OF FUNDING FOR THE MSA-SD PROGRAM IS AUTHORIZED BY MINN. STAT. § 16A.152.

Application of the plain language of the statute, and longstanding principles of construction if the statute is considered ambiguous, establishes that the challenged unallotment is authorized by section 16A.152.

A. The Plain Language Of The Statute Controls.

It is settled law that the plain language of the statute controls and "shall not be disregarded under the pretext of pursuing the spirit [of the statute]." Minn. Stat. § 645.16 (2008); *see also American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (stating that in applying statute's plain language, "statutory construction is neither necessary nor permitted"). Indeed, the plain language of a statute controls whether or not the reviewing court considers the result to be "reasonable" or "good policy." *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 826-28 (Minn. 2005).

1. The Commissioner's Unallotments Comply With The Plain Language Of Section 16A.152.

Under the plain language of section 16A.152, subdivision 4(a), the unallotment authority may be exercised if the MMB Commissioner "determines 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." Once the Commissioner makes this determination, the statute empowers him, with the approval of the Governor and after consulting with the LAC, to eliminate a deficit in the general fund by first exhausting the amount in the budget reserve account and then eliminating any remaining deficit "by reducing unexpended allotments of any prior appropriation or transfer." *Id.*, subds. 4(a)-(b).

The public records confirm that each of the conditions of section 16A.152 was satisfied with respect to the unallotments made for this biennium. The Commissioner reported to the Governor and the Legislature in his June 4, 2009 letter that he had

"determined, as defined in Minnesota Statutes 16A.152, that 'probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the [2010-2011] biennium will be less than needed.'" Add. 5; A67. The budget reserve account was previously drawn down to zero. *Id.* The Commissioner's proposed unallotments were approved by the Governor in July 2009, after the Commissioner's consultation with the LAC. A69-A91. The Commissioner then notified the legislative budget committees of the approved unallotments within fifteen days as required by section 16A.152, subdivision 6. A99-A111. As to the MSA-SD program, there was an unexpended FY 2010 allotment and an unexpended FY 2011 allotment of the appropriation from which the program was to be funded this biennium. A95, A100, A128; Minn. Stat. § 16A.011, subds. 3-4.

The Commissioner explained in his June 4, 2009 letter to the Governor and the Legislature that "probable receipts for the general fund will be less than anticipated" because compelling evidence of a worsening economy and decreasing revenue collections showed that receipts for the 2010-2011 biennium would be less than projected in the Commissioner's February 2009 Economic Forecast (as well as the November 2008 Economic Forecast). Add. 5; A67. The Commissioner's determination that "the amount available for the remainder of the [2010-2011] biennium will be less than needed" was based on the obvious deficiency between authorized spending and revenues provided for under existing law. *Id.*

The Commissioner's use of the February 2009 forecast as the reference point for "anticipated" revenue is consistent with the literal language of the statute. Minnesota law

mandates that the Commissioner prepare these forecasts, Minn. Stat. § 16A.103, and the forecasts are explicitly referenced in section 16A.152. Minn. Stat. § 16A.152, subd. 2(a)-(b). As part of the forecasts the Commissioner must project anticipated revenue for the biennium. Minn. Stat. § 16A.103, subd. 1a. Considering the importance of these forecasts and the context of section 16A.152, the Commissioner's forecasts are certainly an appropriate benchmark for "anticipated" receipts when he determines whether "probable receipts for the general fund will be less than anticipated." Moreover, the plain language of the statute does not preclude the Commissioner from using his forecasts as a benchmark for "anticipated" revenue.

The accuracy of the Commissioner's June 2009 determination that probable receipts for the 2010-2011 biennium would be less than anticipated in his February 2009 Economic Forecast has been borne out by subsequent reports of actual receipts. As MMB reported on November 10, 2009, actual receipts for the first four months of the biennium were already $81.4 million less than the forecasted amount. A120-A121. The November 2009 Economic Forecast projected an approximate $1.15 billion decrease in revenue from the February 2009 forecast and an additional budget deficit of about $1.2 billion this biennium. A142-A150.

Under the plain language of section 16A.152, each of the conditions for unallotment was met, including a determination that probable receipts for the biennium

would be less than anticipated and a budget deficit exists. The unallotments are therefore authorized by the statute.[5]

2. The District Court Ignored The Plain Language Of The Statute And The Plain Language Doctrine.

The district court did not even reference, much less apply, the plain language of subdivision 4(a) or legal principles applicable to the interpretation of the plain language of laws. Rather, the district court erroneously concluded that the statute was inapplicable because the State's budget crisis was not "unforeseen," Add. 12, a term that does not appear, and a condition that does not exist, in section 16A.152.

The district court also concluded that the Commissioner improperly used the unallotment authority because the budget crisis "was neither unknown nor unanticipated when the appropriation bills became law." *Id.* The court's analysis again fails to apply the statutory unallotment standards. In so doing, the court erroneously rewrites

---

[5] The Commissioner also properly decided to unallot and take administrative action to address the $2.7 billion deficit reflected in his February 2009 forecast (after adjustments enacted by the Legislature) and defer further unallotments until he issued his November 2009 forecast and/or until possible legislative action at the 2010 legislative session. A67-A111; A139-A140. Once the Commissioner determined the predicate facts under section 16A.152, subdivision 4(a), necessary to invoke the unallotment statute, he then had discretion to determine how best to effect the unallotments. *See Rukavina v. Pawlenty,* 684 N.W.2d 525, 533-35 (Minn. Ct. App. 2004), *rev. denied* (Minn. Oct. 19, 2004). As stated in *Miller v. Foley,* 317 N.W.2d 710, 714 (Minn. 1982), which involved budget reduction decisions of the government:

> When considering decisions of a governmental unit involving judgment and discretion, the *court will not substitute its judgment* for that of the governmental unit. . . . If the reasonableness of the action of the governmental unit is "*at least doubtful, or fairly debatable,*" the court will uphold the action.

(Emphasis added; citations omitted.) The Commissioner's November 2009 forecast quantified the additional deficit in the amount of $1.2 billion. See *supra* pp. 9-10.

subdivision 4(a)'s requirement that the Commissioner determine "probable receipts for the general fund will be less than anticipated" to include a temporal limitation that this determination can be based only on information received after the appropriation bills are signed.

As this Court has repeatedly emphasized, the plain language doctrine does not permit such a limitation to be read into the statute. *See, e.g., Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) (reiterating that "we will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently"); *Hutchinson Tech., Inc. v. Commissioner of Revenue*, 698 N.W.2d 1, 12 (Minn. 2005) (reiterating that "we are unwilling to write into a statute what the legislature did not"); *Green Giant Co. v. Commissioner of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995) ("We will not supply that which the legislature purposefully omits or inadvertently overlooks.").

In sum, because the plain language of section 16A.152 establishes that the statute authorizes the Commissioner's unallotments, construction of the statute is not necessary nor permitted. *State v. Peck,* 773 N.W.2d 768, 772 (Minn. 2009) ("We have consistently refused to assume a legislative intent in plain contradiction to words used by the legislature.") (quoting *State v. Jesmer*, 293 Minn. 442, 443, 196 N.W.2d 924, 924 (1972)).

B. Even Assuming The Statute Is Ambiguous, The Commissioner's Interpretation Is Supported By Established Principles Of Statutory Construction.

As discussed above, the Commissioner's unallotments were based on an application of the unambiguous language of the statute. However, if the Court finds

section 16A.152 to be ambiguous with respect to the Commissioner's use of the unallotment authority, the Court may construe the statute by considering factors that include the purpose of the statute, the consequences of the competing interpretations, the public interest, and the implementing agency's interpretation. Minn. Stat. § 645.16; *Peck,* 773 N.W.2d at 772. All of these principles support the Commissioner's unallotments.

1. The Statute's Purpose Of Avoiding Budget Deficits And Preventing Financial Crises Is Consistent With The Commissioner's Interpretation Of The Law.

An ambiguous statute should be construed to effectuate its purpose. *See* Minn. Stat. § 645.16(3)-(4); *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007). The Commissioner's interpretation of section 16A.152 effectuates the purpose of the law.

Section 16A.152 is intended to prevent budget deficits and avert financial crises. *See Rukavina*, 684 N.W.2d at 533 ("The entire statutory scheme [in Minn. Stat. § 16A.152] is designed to enable the commissioner of finance, with approval of the governor and after consultation with the legislative advisory commission, to compensate for deficits in the general fund."); *id.* at 535 (stating that section 16A.152 "authorize[s] the executive branch to avoid, or reduce, a budget shortfall in any given biennium" and "enables the executive to protect the state from financial crisis in a manner designated by the legislature"). *See also New England Div. of American Cancer Soc'y v. Commissioner of Admin.,* 769 N.E.2d 1248, 1257 (Mass. 2002) (stating that the Massachusetts unallotment law "reflects a legislative determination that the Commonwealth's need to

remain solvent overrides particular statements of social policy contained in those appropriation items subject to allotment"). The statutory purpose conforms to the constitutional mandate that the State's biennial budget be balanced. See *supra* p. 6.

The Commissioner initiated the unallotment process to address a large State budget shortfall after concluding in June 2009 that "the state's revenues are not anticipated to be sufficient to support planned spending in the upcoming biennium." Add. 5; A67. The Commissioner's use of the unallotment authority effectuates the statute's purpose, and the corresponding constitutional requirement, by avoiding a huge budget deficit and averting a financial crisis.

2. The Consequence Of The Commissioner's Interpretation, Which Avoids The Potential Shutdown Of State Government, Further Supports The Commissioner's Use Of The Unallotment Statute.

The consequences of the interpretations at issue in this appeal are also pertinent to the Court's construction of the statute. *See* Minn. Stat. § 645.16(6); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001). Here, the Commissioner's interpretation avoids a potential government shutdown, and the opposing interpretation does not. This lends further support to the Commissioner's construction of the statute.

As the district court recognized, its interpretation of section 16A.152 calls into question the validity of all the unallotments approved by the Governor in July 2009. Add. 23. Indeed, the district court's interpretation appears to mean the executive branch could not eliminate the $2.7 billion deficit with unallotments even at this point in time, despite the court's apparent acknowledgment that the statutory conditions for unallotment are now present based on the November 2009 Economic Forecast. Add. 14-16. Under

the district court's view, the $2.7 billion deficit would have to be eliminated by agreement of the Legislature and Governor or not at all.[6] It is unclear whether the district court concluded that the additional $1.2 billion deficit can be corrected by the Commissioner through unallotment.[7]

The district court's interpretation of section 16A.152 produces obvious adverse consequences for the operation of State government. The Minnesota Constitution does not permit the State's biennial budget to remain in deficit. Minn. Const. art. XI, § 6. The Governor and Legislature were previously unable to reach agreement on how to resolve the $2.7 billion budget deficit. Under the district court's reasoning, in the absence of such an agreement, spending pursuant to the biennium's appropriation bills will continue until such time as the State simply runs out of money before the biennium ends, resulting in a government shutdown, at least as to non-core functions. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 315-17, 324 (Minn. Ct. App. 2007) (rejecting, on procedural grounds, challenge to June 2005 court order that authorized the finance commissioner to

---

[6] *See, e.g.*, Add. 16 ("Their [the executive and legislative branches'] policy differences regarding how to deal with Minnesota's present budget situation can only be resolved by them.").

[7] *See* Add. 14 (referring to $1.2 billion budget deficit reflected in November 2009 forecast and stating "[e]ven if the budget had been balanced through painful give and take between the Executive and Legislative branches, the Governor would have had to use his unallotment authority before the end of this biennium").

continue to fund "core functions" of the executive branch in the absence of legislative appropriations for them).[8]

In contrast, the Commissioner's interpretation of section 16A.152 allows an alternative mechanism to resolve the deficit in the State's general fund and avoid a government shutdown. Thus, Appellants submit that the consequence of the competing interpretations before the Court, *i.e.,* the ability of State government to operate, weighs in favor of the Commissioner's interpretation of section 16A.152.

3. The Public Interest In Continuing The Operation Of State Government Also Lends Credence To The Commissioner's Application Of The Unallotment Statute.

The Court must also consider the public interest in construing section 16A.152. *See Mower County Bd. of Comm'rs v. Board of Trustees of Pub. Employees Ret. Ass'n*, 271 Minn. 505, 512, 136 N.W.2d 671, 676 (1965) (stating that "the public interest is involved in every case before us and in every judicial or administrative construction of statutes"); *Kelly v. First Minneapolis Trust Co.*, 178 Minn. 215, 218, 226 N.W. 696, 697 (1929) ("Where the proper construction of a statute is otherwise doubtful, arguments from possible injustice or prejudice to the public interests or common rights may be considered.").

---

[8] The potential outcome of the district court's construction of the statute would be worse than the 2005 partial shutdown, when the State had money but no appropriation authorizing its expenditure. A potential consequence of the district court's construction would be to require an additional $2.5 billion in general fund expenditures in the remaining months of the biennium — at a time when a $1.2 billion deficit exists that must be closed by the end of the biennium, on June 30, 2011. The district court's construction would mean that the State could be without money to even pay for core function expenditures ordered by a court.

The public interest is implicated by competing public policies relating to the interaction between the executive branch and Legislature to implement a balanced budget. On the one hand, the Governor and Legislature attempt to agree on a balanced budget at the outset of the biennium. On the other hand, section 16A.152 has been enacted to allow the executive branch to remedy a budget shortfall through unallotment to avoid a financial crisis for the State and its citizens. See *supra* pp. 17-18.

In this instance, the Governor and Legislature have been unable to reach an agreement on how to balance the State's budget. Our system of democracy relies on periodic elections for the voters to express their approval or disapproval of their elected officials' public policy determinations. The current budget crisis and impasse may certainly be a subject of consideration by the voters.

In the meantime, it is in the public interest for the State to continue to operate for the benefit of its citizens. The statute serves as a method to continue the operation of State government if the predicate conditions of section 16A.152, subdivision 4(a), are satisfied. In this regard, the executive and legislative branches are in a position to control whether the predicate condition of a budget deficit exists, *id.*, based on when, and if, they pass and sign (or veto) appropriation bills. No biennial budget deficit can exist unless the appropriation bills are enacted authorizing the State to spend money.

4. Courts Defer To A Commissioner's Interpretation Of A Statute That The Commissioner Administers.

The office of the Commissioner of Finance (now MMB) has administered the unallotment statute in its various iterations for almost forty years. *See Legislative History*

of Unallotment Power, at 4-13 (Senate Counsel, June 29, 2009) available at *www.senate.leg.state.mn.us/departments/scr/treatise.* A Commissioner's interpretation of a statute he administers is entitled to deference. *See, e.g., Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979) (stating established principle that "[w]hen the meaning of a statute is doubtful, courts should give great weight to a construction placed upon it by the department charged with its administration"). This judicial deference is "rooted in the separation of powers doctrine." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001) (footnote omitted). In according the required deference, "an agency's interpretation of the statutes it administers . . . should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). Because no such conflict exists here, caselaw provides that the Court should defer to the Commissioner's interpretation of the statute.

If section 16A.152 is deemed ambiguous, established principles of construction lead to the same conclusion as application of the statute's plain language, thereby authorizing the Commissioner's use of the statute.

II. THE UNALLOTMENT OF FUNDING FOR THE MSA-SD PROGRAM DOES NOT VIOLATE SEPARATION OF POWERS UNDER THE MINNESOTA CONSTITUTION.

The district court recognized that the unallotment statute is constitutional. Add. 10. However, the court erroneously concluded, due to the timing of the challenged unallotment, that section 16A.152 does not apply and therefore the unallotment violates separation of powers. Add. 10-12. As discussed above, the Commissioner's

unallotments comply with section 16A.152, see *supra* pp. 11-22, and accordingly do not violate separation of powers.

Respondents admit that the statute is constitutional, but contend that the timing of the challenged unallotment, even if it complies with the statute, violates separation of powers.[9] This argument is without merit because regardless of its timing, the unallotment by the executive branch does not involve the exercise of purely legislative power.

A. A Constitutional Violation Is Found Only With Extreme Caution And Legislative Delegations Are Liberally Permitted To Facilitate The Administration Of State Laws.

Constitutional violations will be found by a court "with extreme caution and only when absolutely necessary." *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (quoting *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002)). That is particularly true in this case because the Court has "chosen to view legislative delegations liberally in order to facilitate the administration of laws which . . . are complex in their application." *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977).[10] Indeed, the Court has taken a very practical approach to determine whether separation of powers is violated. As stated in

---

[9] *See, e.g.*, A22-A23; Transcript at 45 (Respondents' counsel clarifying at November 16, 2009 hearing before district court,"[i]t is not that the statute is unconstitutional, it's that the Defendants' use of it at this time is unconstitutional").

[10] Over the last sixty years, since the seminal legislative delegation case of *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949) was decided, the Court has found only one instance of legislative delegation which violated separation of powers. That case has no bearing here. *Remington Arms Co., Inc. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960) (invalidating statutory provision that delegated legislative powers to private parties).

Anderson v. Commissioner of Highways, 267 Minn. 308, 311-12, 126 N.W.2d 778, 780-781 (1964):

> The modern tendency is to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws *as the complexity of economic and governmental conditions increase. . . .* [I]t is *impossible for the legislature to deal directly with the many details in the varied and complex conditions* on which it legislates, but must necessarily leave them to the *reasonable discretion of administrative officers.*

(Emphasis added; footnotes omitted.)

B. Unallotment Does Not Constitute The Exercise Of Purely Legislative Power By The Executive Branch.

In addressing the separation of powers doctrine, this Court has emphasized that "there has never been an absolute division of governmental functions in this country, nor was such even intended." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979) (footnote omitted). "[S]ome functions of one branch may be performed by another branch without subverting the Constitution. That there is some interference between the branches does not undermine the separation of powers; rather, it gives vitality to the concept of checks and balances critical to our notion of democracy." *Id. See also New England Div. of American Cancer Soc'y v. Commissioner of Admin. ("New England"),* 769 N.E.2d 1248, 1256 (Mass. 2002) (stating "we speak in abstract terms of separation of powers; in reality, some overlap is inevitable, and may well be desirable").

Separation of powers is violated if the Legislature "delegate[s] purely legislative power" to the executive branch. *Lee v. Delmont*, 228 Minn. at 112, 36 N.W.2d at 538. The Court reasoned in *Lee v. Delmont* that "[i]t does not follow, because a power may be wielded by the legislature directly, or because it entails an exercise of discretion and

judgment, that it is exclusively legislative." *Id.* at 113, 36 N.W.2d at 538. Rather, purely legislative power "is the authority to make a complete law — complete as to the time it shall take effect and as to whom it shall apply — and to determine the expediency of its enactment." *Id.* The Minnesota Constitution gives the Legislature the power to make appropriation laws. Minn. Const. art. XI, § 1 ("No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.").

The spending power, however, belongs to the executive branch. *See* Minn. Const. art V, § 3 (providing Governor the responsibility and duty to execute the laws); *see also Opinion of the Justices,* 376 N.E.2d 1217, 1222 (Mass. 1978) (observing that "spending money is essentially an executive task" and thus "it is the function of the executive branch to expend funds"). In the *New England* case, the Massachusetts Supreme Court rejected a separation of powers challenge to the Massachusetts unallotment statute. In so doing, it reasoned as follows:

> Two key concepts are determinative of our analysis: (1) a statute may not constitutionally allow the Governor to exercise the appropriation power; but (2) a *statute may grant the Governor discretion to determine how to spend appropriated funds, or, in limited circumstances, to withhold their expenditure.* Thus, "[a] distinction must be made between the power of the Legislature to control the expenditure of funds in the sense that it determines the purposes for which expenditures may be made, and the *power to control the extent of expenditures* committed to a particular purpose." We conclude that [the Massachusetts unallotment law] is an example of the latter power and constitutes, *not the legislative power of appropriation, but rather the executive power of expenditure.*

769 N.E.2d at 1256 (emphasis added; citations and footnote omitted).

The *New England* court further stated:

> [The unallotment law] confers on the Governor neither the *authority to set aside money* from the treasury to be spent for a particular purpose, nor the *authority to direct that any money so appropriated be spent in a manner different* from what the Legislature intended. Instead, [the unallotment law] *permits the Governor to use her executive judgment to reduce public expenditures in a time of true financial emergency.* This obligation conforms to the *constitutional requirement for a balanced budget.* It reflects a legislative determination that the Commonwealth's need to *remain solvent overrides particular statements of social policy* contained in those appropriation items subject to allotment . . . .

Id. at 1257 (emphasis added; citations omitted). The court in *New England* also discussed the practical aspect of the use of the unallotment law:

> [T]he Governor can reduce only the allotment; the underlying *appropriation remains fully in force to establish an upper limit on what may be spent for that line item,* should sufficient revenue be forthcoming. It should not be overlooked either that [the unallotment law] requires that the *Legislature be put on notice when a projected budget deficit triggers the statute's operation.* To the extent that the Legislature chooses, *it retains full authority to restore* funding to programs affected by . . . allotment reductions . . . by enacting legislation . . . to make up for any budget deficiency. Further, the Legislature may pass "conditions" to items in an appropriation bill, exempting the funds in question from allotment reductions. . . .

Id. (emphasis added).

Relying on *Lee v. Delmont,* the Court of Appeals similarly recognized in *Rukavina* that Minn. Stat. § 16A.152 does not delegate the purely legislative power of making an appropriation law. *Rukavina,* 684 N.W.2d at 535 (concluding that the statute "does not represent a legislative delegation of the legislature's ultimate authority to appropriate money," and "only enables the executive to protect the state from financial crisis in a manner designated by the legislature"); *see also Minnesota Fed'n of Teachers v. Quie,* No. 447358, at 4 (Second Jud. Dist. Feb. 27, 1981) (upholding constitutionality of prior

version of the statute and stating "[t]his Court can find no basis for the claim of the plaintiffs that the statute in question constitutes an unlawful delegation from the legislature to the executive branch") (A137). The district court itself referred to the *Rukavina* decision in acknowledging that section 16A.152 is constitutional. Add. 10.

The statute gives the Commissioner power to reduce the allotment for an appropriation to avoid a budget shortfall. An "allotment" as defined by the Legislature is "a limit placed by the *commissioner* [of MMB] on the amount to be *spent* or encumbered during a period of time *pursuant to an appropriation*." Minn. Stat. § 16A.011, subd. 3 (emphasis added). Section 16A.152 simply authorizes the executive branch to reduce spending in accordance with the statute if certain predicate facts are determined by the Commissioner. *See, e.g., Rukavina,* 684 N.W.2d at 535. As stated by this Court in *Lee v. Delmont,* "[t]he power to ascertain facts, which automatically brings a law into operation by virtue of its own terms, is not the power to pass, modify, or annul a law." 228 Minn. at 113, 36 N.W.2d at 538; *see also King,* 257 N.W.2d at 697 ("While the legislature may not delegate the authority to make a complete law, it may constitutionally authorize an administrative body to determine those facts that will make a statute effective.").

Other state court decisions, in addition to *New England,* have also held that their state's unallotment laws do not delegate the legislative power of appropriation. *See, e.g., University of Connecticut Chapter AAUP v. Governor,* 512 A.2d 152, 158 (Conn. 1986) (stating that the Connecticut unallotment law "does not delegate the legislative authority to appropriate," but rather "delegates to the governor the power" to reduce "allotments"); *North Dakota Council of Sch. Adm'rs v. Sinner,* 458 N.W.2d 280, 286 (N.D. 1990) ("The

Legislature has not given the director of the budget power to make a law, but only the authority to execute the law within the parameters established by the Legislature."); *Hunter v. State,* 865 A.2d 381, 392 (Vt. 2004) (recognizing that "appropriation is a legislative power, but spending is an executive power" and the Vermont unallotment statute "involves shared powers at the intersection of the branches of government"). *See also Colorado General Assembly v. Lamm,* 700 P.2d 508, 520 (Colo. 1985) (noting that the governor's "duty to execute appropriations or spending laws encompasses the authority to administer the budget").

The authority that section 16A.152 provides to the executive branch does not involve purely legislative power, irrespective of the timing of the unallotments. *See Rukavina,* 684 N.W.2d at 529, 533-35 (recognizing that an allotment made in conformity with the terms of section 16A.152 does not violate separation of powers). The separation of powers analysis is based on the "nature of the power" delegated by the statute, *Lee v. Delmont,* 228 Minn. at 115, 36 N.W.2d at 539, not the timing of the exercise of that authority. The Legislature passed legislation appropriating money for the biennium and the unallotment law involves the executive branch's authority to spend the appropriated funds. The Commissioner's unallotments were made in accordance with section 16A.152 and therefore Respondents' separation of powers claim must be rejected by the Court.[11]

---

[11] Since Respondents admit that section 16A.152 is constitutional, see *supra* pp. 2, 23, the issue of whether the statute contains, or is required to contain, a standard for application of the statute, *see, e.g., Lee v. Delmont,* 228 Minn. at 112-14, 36 N.W.2d at 538-39; *Anderson,* 267 Minn. at 311-13, 126 N.W.2d at 780-82, is not before the Court. However, the statute does satisfy applicable law.

Respondents' separation of powers argument is based on their disagreement with the manner in which the Governor interacted with the Legislature during the 2009 legislative session. *See* A10-A11, A22-A23; Transcript at 14-15, 18-19; Pls.' Mem. in Supp. TRO Mot. at 10-11, 25, 27. The Governor, however, was not obligated under the law to call a special session or veto the appropriation bills.[12] Nor were the Governor and Legislature required to agree to a balanced budget during the session. Respondents' policy concerns are not a basis for a separation of powers claim. Moreover, the legislative branch is ultimately in the position to consider amendments to section 16A.152 in order to set the conditions as to when unallotment authority is used in the future. *See, e.g., Sviggum,* 732 N.W.2d at 323 (recognizing that "it is the legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses").

---

[12] Respondents also claim that the Governor should have line-item vetoed funding for the MSA-SD program instead of unalloting. A23. The Governor is under no legal obligation to veto any particular appropriation. In addition, funding for the MSA-SD program was not subject to a line-item veto because there was no separate appropriation for that program. Rather, the MSA-SD program is funded from the large, general appropriation for all the various MSA grants, which is $33.93 million for FY 2010 and $35.191 million for FY 2011. Minnesota Session Laws 2009, ch. 79, art. 13, § 3, subd. 4(j) (A127). *See* Minn. Const. art. IV, § 23 ("If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill."); *Inter Faculty Org. v. Carlson,* 487 N.W.2d 192, 195 (Minn. 1991) ("An 'item of appropriation of money' is a separate and identifiable sum of money appropriated from the general fund dedicated to a specific purpose.").

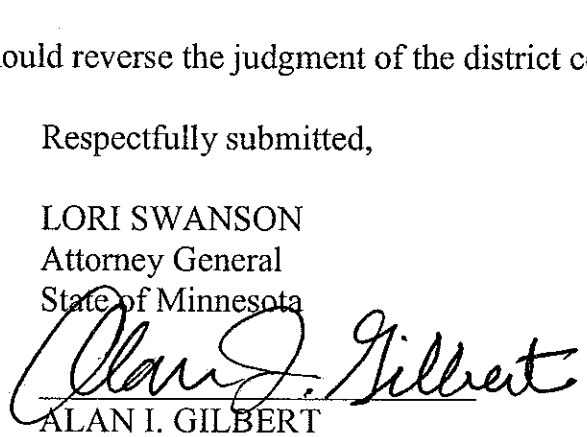
CONCLUSION

For the reasons stated, the Court should reverse the judgment of the district court.

Dated: February 9, 2010

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678

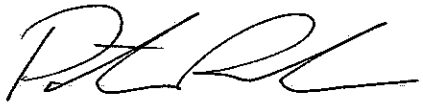
JOHN S. GARRY
Assistant Attorney General
Atty. Reg. No. 0208899

JEFFREY J. HARRINGTON
Assistant Attorney General
Atty. Reg. No. 0327980

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1450

ATTORNEYS FOR APPELLANTS

Dated: February 9, 2010



PATRICK D. ROBBEN
General Counsel to Governor Tim Pawlenty
Office of Governor
Atty. Reg. No. 0284166

130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155
(651) 282-3705

ATTORNEY FOR APPELLANT
GOVERNOR TIM PAWLENTY

AG· #2574589-v