

North Dakota Legislative Assembly v. Burgum

2018 ND 189, 916 N.W.2d 83 (N.D. 2018).

JIM NICOLAI

DEPUTY SOLICITOR GENERAL

NORTH DAKOTA OFFICE OF ATTORNEY GENERAL

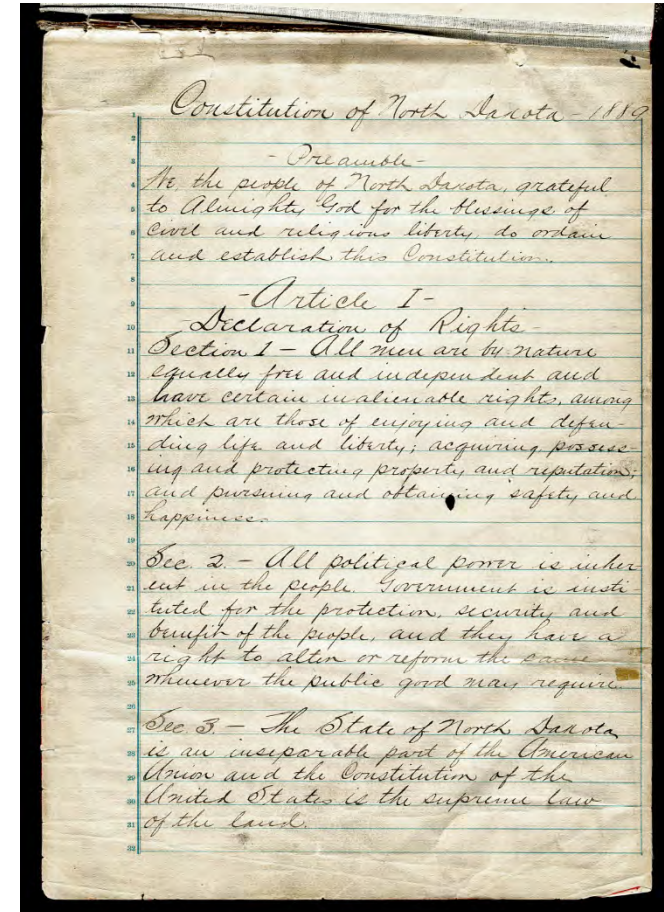
The Story Behind the Case



North Dakota Constitution

“No regular session of the legislative assembly may exceed eighty natural days during the biennium.”

N.D. Const. Art. IV § 7.



**IN EMERGENCY
BREAK GLASS**



Creation of Budget Section

Legislative Research Comm.

-5-

March 29, 1965

ballot for Senator Longmire for the position of Chairman. The motion carried unanimously, and Senator Longmire was declared elected Chairman of the Committee.

The Chairman announced that he would receive nominations for the position of Vice Chairman.

It was moved by Senator Becker and seconded by all other members of the Committee that the name of Representative Solberg be placed in nomination, that the nominations be closed, that the rules be suspended, and that the Secretary record a unanimous ballot for Representative Solberg for the position of Vice Chairman. This motion carried unanimously, and the Chairman declared Representative Solberg to have been elected as Chairman.

The Chairman next presented a proposed subcommittee structure for the biennium, consisting of a Subcommittee on Taxation chaired by Senator Becker; a Subcommittee on Education chaired by Representative Hauf; a Subcommittee on State, Federal, and Local Government chaired by Senator Ringsak; a Subcommittee on Social Welfare chaired by Representative Haugland; a Subcommittee on Constitutional Revision chaired by Senator Reichert; a Subcommittee on Budget chaired by Representative Solberg; a Subcommittee on Transportation chaired by Senator Thompson; and a Subcommittee on Political Subdivisions chaired by Representative Mueller.

Representative Haugland suggested to the Chairman that he include within the subcommittee list a Subcommittee on Legislative Employment and Legislative Handbook with Representatives Backes and Bier to serve as co-chairmen, and that Representative Stallman and Senator George be requested to serve upon this subcommittee together with the Committee Director, the Secretary of the Senate, and the Chief Clerk of the House of Representatives. The Chairman announced that without objection he would include Representative Haugland's suggestion in his proposed subcommittee list.

It was moved by Representative Haugland and seconded by Senator Becker that the subcommittee structure and study assignments as listed by the Chairman be approved. This motion carried unanimously.

TENTATIVE AGENDA

NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE

SUBCOMMITTEE ON BUDGET

Blue Room, State Capitol, Bismarck
January 14, 1966

At the request of the Chairman, the Director read and made explanatory statements on Chapter 358 of the 1965 Session Laws which created the Executive Office of the Budget. This was followed by a general discussion of the duties and responsibilities of the Office. One of the duties of the Director of the Budget, Mr. Ralph Dewing, was to appoint a Budget Analyst. During the past year Mr. Dale Moug was appointed to the position of Budget Analyst, and he was introduced to the Committee.

Tentative Agenda

North Dakota Legislative Council

Meeting of
April 2, 1971
Room G-2 - State Capitol
Bismarck, North Dakota

10:00 a.m.

Call to order
Roll call
Minutes of previous meeting

Presentation by Chairman of Interim Committee Structure, Studies Assigned, and Committee Chairmen and Vice Chairmen

Review of Interim Committee membership assignments from list prepared by Chairman

Establishment of Council policy in regard to inactive committee members

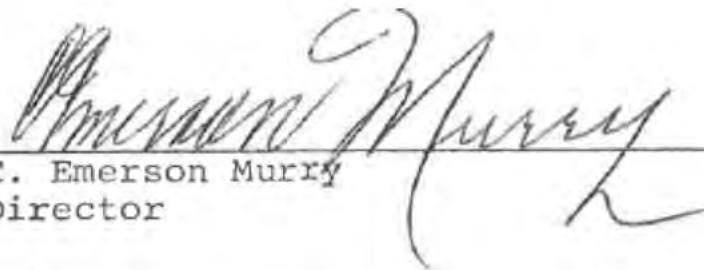
Designation of Budget Section made up of the membership of Budget Committees "A" and "B" as Council Budget Committee for statutory purposes

Other items as proposed by Council members

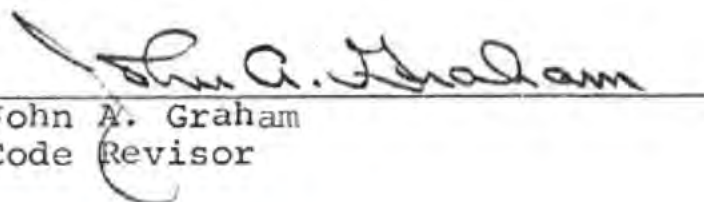
April 2, 1971

The Chairman noted that the "Budget Committee" structure had been modified somewhat for this interim, and that two "Budget Committees", designated Budget Committee "A" and Budget Committee "B", had been created as independent committees to carry out particular studies during the interim. However, the membership of these two Budget Committees would also comprise the membership of a "Budget Section," and this Budget Section would serve as the statutory committee to receive the reports and requests of the various agencies and institutions which are required by law to report certain action to the "Budget Committee." ● ● ●

IT WAS MOVED BY SENATOR CHRISTENSEN, SECONDED BY REPRESENTATIVE BACKES, AND CARRIED that Budget Committees "A" and "B" comprise the Budget Section of the Legislative Council committee structure, that the statutory duties of the Budget Committee of the Legislative Council be performed by the Budget Section of the Council, and further, that the selection of Representative Robert F. Reimers as Chairman of the Budget Section, as proposed by the Chairman, be approved. ● ● ●


C. Emerson Murry
Director


Dean F. Bard
Assistant Director


John A. Graham
Code Revisor

By 2017, at least twenty-one provisions of North Dakota law required budget section approval for payment of appropriated funds or other substantive matters in existing legislation.

N.D.C.C. § 20.1-02-16.1 Game & Fish Spending

The department shall spend moneys in the game and fish fund within the limits of legislative appropriations, only to the extent the balance of the fund is not reduced below fifteen million dollars, **unless otherwise authorized by the budget section.**

N.D.C.C. § 54-06-37 Purchase or Lease of Aircraft

A state agency or other entity of state government may not purchase or lease an aircraft **without specific authorization from the legislative assembly or the budget section** of the legislative management if the legislative assembly is not in session.

N.D.C.C. § 15-03-04 Investments by the Board of University and School Lands

Notwithstanding any investments made before July 1, 1997, the board may not use any funds entrusted to it to purchase, as sole owner, commercial or residential real property in North Dakota **without prior approval of the legislative assembly or the budget section** of the legislative management.

N.D.C.C. § 37-17.1-27 State Disaster Relief Fund

Moneys in the fund are to be used subject to legislative appropriations and emergency commission **and budget section approval** for providing the required state share of funding for expenses associated with presidential-declared disasters in the state and for the purposes of reimbursing costs under section 37-17.1-28

etc. etc. etc.



ND Attorney Generals 1985 - Present



Nicolas Spaeth 1985-1992



Heidi Heitkamp 1993-2000



Wayne Stenehjem 2001 – Present

N.D.A.G. Letter to Rayl (Sep. 25, 1987)

September 25, 1987

Mr. Richard L. Rayl
Director
Office of Management and Budget
State Capitol
Bismarck, ND 58505

Dear Mr. Rayl:

Thank you for your letter of July 17, 1987, in which you request my formal opinion on the proper interpretation of Senate Bill No. 2536 (N.D.C.C. § 54-44.1-13.1) as passed by the Fiftieth Legislative Assembly. In your letter, you explain that your questions have arisen in connection with the referral of the sales tax on cable TV services which has suspended the tax pending a vote of the people.

N.D.C.C. § 54-44.1-13.1 states as follows:

54-44.1-13.1. APPORTIONMENT OF REDUCTIONS IN SPENDING AUTHORITY CAUSED BY AN INITIATIVE OR REFERENDUM ACTION. If as a result of any action taken pursuant to article III of the Constitution of North Dakota the moneys available in the state general fund or in any special fund in the state treasury are or will be reduced or eliminated, the director of the budget shall reduce the moneys available to all departments, agencies, and institutions for which moneys have been appropriated or are otherwise available from the affected fund for the current biennial period. The director of the budget shall reduce affected budgets by a percentage sufficient to cover the estimated losses caused by the initiative or referendum action, subject to the approval of the budget section of the legislative council. Notwithstanding the provisions of section 54-44.1-13, the authority to make reductions pursuant to this section applies equally to all entities of the executive, legislative, and judicial branches.

Your first question regarding N.D.C.C. § 54-44.1-13.1 is whether the director of the budget is required to submit to the Budget Section across-the-board cuts or whether the reductions may vary from agency to agency. The statute requires that the director of the budget reduce "affected budgets by a percentage sufficient to cover the estimated losses." It is my interpretation that the term "a percentage" indicates that a uniform reduction for all affected budgets is to be submitted by the director of budget to the Budget Section of the Legislative Council.

I recognize that the legislative history of Senate Bill No. 2536 indicates that the original text of the bill contained the term "uniform percentage" and based on that history it could

N.D.A.G Letter to Rayl (Sept. 25, 1987)

Clearly, there exists a substantial question whether the role reserved by the legislature in executing N.D.C.C. § 54-44.1-13.1 impermissibly usurps executive functions and violates fundamental separation of powers principles.

Your second question is whether the Budget Section has the authority to approve cuts that are varying in percentage from agency to agency and whether they can approve variations in the plan submitted by you. N.D.C.C. § 54-44.1-13.1 clearly contemplates that the reduction plan submitted by the director of the budget needs the approval of the Budget Section but does not authorize the Budget Section to modify the reduction plan. It is my opinion, therefore, that the Budget Section of the Legislative Council is not authorized by N.D.C.C. § 54-44.1-13.1 to modify the reduction plan submitted by the director of the budget.

Your third question asks whether the Budget Section may disapprove or veto cuts altogether. N.D.C.C. § 54-44.1-13.1 clearly requires the approval of the Budget Section of the Legislative Council in order that the reduction plan submitted by the director of the budget may be lawfully effectuated. It is my opinion, therefore, that under N.D.C.C. § 54-44.1-13.1 the Budget Section may disapprove of the submitted reduction plan and prevent the implementation thereof. Again, I must emphasize, however, that there is considerable doubt that the Budget Section has any constitutional authority in the process in light of relevant United States Supreme Court decisions.

You have also communicated to a member of my staff that you desire to know whether N.D.C.C. § 54-44.1-13.1 mandates that the director of the budget prepare a reduction plan and submit it to the Budget Section for approval. N.D.C.C. § 54-44.1-13.1 states that the director of the budget "shall reduce affected budgets by a percentage sufficient to cover the estimated losses." The term "shall" is generally regarded as making a provision

N.D.A.G Letter to Rayl (Sept. 25, 1987)

N.D.A.G. Letter to Treadway (Nov. 6, 1991)

November 6, 1991

Mr. Doug Treadway
Chancellor
North Dakota University System
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0230

Dear Chancellor Treadway:

Thank you for your October 24, 1991, letter in which you ask whether the Budget Section of the Legislative Council has the power to authorize the Board of Higher Education to issue bonds for the purpose of constructing an Energy and Environmental Research Center (the "Center") to be located at the University of North Dakota. You state that no state funds will be pledged or used to pay the debt service on these bonds, but that they will be paid solely with revenues to be received in connection with the use of the Center and that the bonds will be guaranteed by the UND Foundation.

The motion adopted by the Budget Section at its October 8, 1991, meeting authorizes

THE BOARD OF HIGHER EDUCATION TO ISSUE BONDS IN THE AMOUNT OF \$2,500,000 FOR THE PURPOSE OF PROVIDING THE BOARD'S COST SHARE OF THE CONSTRUCTION PROJECT LOCATED ON THE CAMPUS OF THE UNIVERSITY OF NORTH DAKOTA, SPECIFICALLY THE ENERGY AND ENVIRONMENTAL RESEARCH CENTER, THAT THE CENTER'S REVENUES ARE APPROPRIATED FOR THE PAYMENT OF THE BONDS, THAT ANY CENTER SHORTFALLS ARE TO BE PAID BY THE UNIVERSITY OF NORTH DAKOTA FOUNDATION, AND THAT THE BOND ISSUE IS NOT AN OBLIGATION OF THE STATE OF NORTH DAKOTA.

N.D.C.C. S 15-10-12.1, pursuant to which the Budget Section authorized the Board of Higher Education to locate the Center at the University of North Dakota, does not grant the Budget Section the power to authorize the issuance of bonds to finance the construction of buildings or other improvements. Furthermore, the Budget Section has no authority to authorize the issuance of bonds to finance the construction of such buildings and improvements even if the bonds are to be paid with revenues received from the use of the buildings or improvements and are not obligations of the state or of the Board.

The Legislative Assembly, through N.D.C.C. ch. 15-55, has provided a statutory scheme pursuant to which the Board of Higher Education may issue bonds for the construction "of such revenue-producing buildings or other revenue producing campus improvements as,

N.D.A.G. Letter to Treadway (Nov. 6, 1991)

each house. Wattam. Furthermore, N.D. Const. art. V, § 9, like the federal Constitution provides that legislative acts must be presented to the Chief Executive Officer.

In addition to complying with procedural requirements, the Legislature may only operate within its sphere of authority. In Metropolitan the Board was granted veto power over the actions of a state-created airport authority. The Court reviewed the membership and membership selection process of the Board and concluded that the Board was merely an agent of the Congress. The process of determining membership and appointment of members to the Board in Metropolitan is similar to the process for determining and appointing members to the Budget Section. I conclude that a court would find that the Budget Section is merely an agent of the Legislature, not a body to which the Legislature has properly delegated decision making authority.

The Court next reviewed the authority of the Board. The Court held that the Board's veto power was an executive power. As an agent of Congress, the Board could not constitutionally exercise that executive power. Thus Congress had violated the separation of powers doctrine because it established a mechanism which allowed it to move out of its sphere of authority and exercise powers which were executive in nature.

The authority exercised by the Budget Section is comparable to that given to the Board. It is my opinion that much of that authority is executive in nature. It is therefore my opinion that when the Budget Section, which is an agent of the Legislature, acts in an executive capacity, as it did by approving the issuance of bonds for UND's project, it violates the Separation of Powers Doctrine.

I am aware that legislation has been introduced to authorize the sale of bonds for this project. Because of my concern with the constitutionality of executive actions taken by the Budget Section, I advise that in the future approval is sought from the entire Legislature for this project. Furthermore, legislation authorizing issuance of bonds should not include a requirement for Budget Section approval or allow a Budget Section authorization or veto of the issuance. The Legislature must act as a legislative body and observe the constitutional procedures required for a valid legislative act.

I trust that this discussion is responsive to your question. If not, or if you would like to discuss this matter in further detail, please get in touch with me.

Sincerely,

Nicholas J. Spaeth

N.D.A.G. Letter to Treadway (Nov. 6, 1991)

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-05

Date issued: May 25, 1993

Requested by: Senator Dan Wogsland
Senate Majority Leader

- QUESTIONS PRESENTED -

I.

Whether the Governor had authority to line item veto that portion of Section 4 of House Bill 1002, an appropriation bill, which allows the Budget Section to authorize line item transfers.

II.

Whether the Governor had authority to line item veto that portion of Section 4 of House Bill 1002, an appropriation bill, which mandates that appropriated funds be spent according to priorities adopted by the Legislature unless those priorities are changed by the Budget Section.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Governor had authority to line item veto that portion of Section 4 of House Bill 1002 which allows the Budget Section to authorize line item transfers.

II.

It is my opinion that the Governor did not have authority to line item veto that portion of Section 4 of House Bill 1002 which mandates that appropriated funds be spent according to priorities adopted by the Legislature unless those priorities are changed by the Budget Section.

- ANALYSIS -

The North Dakota Constitution provides:

The governor shall have power to disapprove of any item or items, or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items, and part or parts

N.D.A.G. 1993-F-05

codifying the priorities. The procedure to change the priorities is specifically referenced in the sentence codifying the priorities. Furthermore, if the sentence referencing the priorities were excised, the reference to funding "the programs in a different manner" would be meaningless. Because the procedure for changing the priorities is not separate and distinct from the priorities themselves, it is my opinion that the Governor did not have authority to line item veto the last two sentences of Section 4 of House Bill 1002.

Because the attempted line item veto of the last three sentences of Section 4 was not authorized, the veto of that part of Section 4 is void and has no effect. See State ex rel. Link v. Olson, 286 N.W.2d at 272. In sum, the Governor's veto of Section 4 of House Bill 1002 is only effective as to the first sentence in that section, and the following language of Section 4 of House Bill 1002 remains in effect:

Funding for human services center programs must be used for programs in the manner they were prioritized in documents filed with the fifty-third legislative assembly on April 24, 1993, except as otherwise provided in this section. Upon approval from the budget section, the department of human services may fund the programs in a different manner. Each member of the budget section must be provided information and justification for any proposed changes at least one week before a budget section meeting.

This opinion does not address the constitutionality of the Budget Section involvement required by the portion of Section 4 which continues in force. See Letter from Attorney General Nicholas J. Spaeth to Chancellor Doug Treadway (Nov. 6, 1991); Letter from Attorney General Nicholas J. Spaeth to Director of OMB Richard L. Rayl (Sept. 25, 1987).

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-1. It governs the actions of public officials until such time as the question presented is decided by the courts.

N.D.A.G. 1993-F-05

LETTER OPINION
2007-L-08

June 6, 2007

The Honorable Tim Mathern
State Senator
429 16th Avenue South
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter asking about the constitutionality of section 10 of House Bill No. 1015 passed by the 2007 Legislative Assembly. For the reasons indicated below, it is my opinion that if a court were to rule on this matter, it would determine that subsection 8 of section 10 of House Bill No. 1015, which provides the Budget Section of the Legislative Council authority to approve or reject a plan to construct or remodel state correctional facilities, is unconstitutional as a violation of the separation of powers doctrine.¹ In light of the strong presumption of constitutionality of legislative enactments, and the absence of controlling case law on the issue, I decline to offer an opinion on the constitutionality of the delegation of decision-making authority to the Emergency Commission.

ANALYSIS

The primary question raised is whether section 10 of House Bill No. 1015 violates the constitutional separation of powers doctrine, *i.e.*, usurps an executive function, because it grants the Budget Section of the Legislative Council¹ the power to approve or reject the Emergency Commission's² authorized option for constructing or remodeling state correctional facilities.³ Because it is the Attorney General's role to defend statutory enactments from constitutional attacks, this office is ordinarily reluctant to issue an opinion questioning the constitutionality of a legislative enactment. As I explained in N.D.A.G. 2003-L-21:

¹ The Legislative Council is established by law under N.D.C.C. ch. 54-35. The Council is composed of members of the North Dakota Legislature. N.D.C.C. § 54-35-01.

² The Emergency Commission consists of the Governor, the majority leaders of the Senate and House of Representatives of the Legislative Assembly, the Secretary of State, and the chairmen of the Senate and House of Representatives Appropriations Committees. N.D.C.C. § 54-16-01.

³ In your letter you indicate you are primarily concerned with the constitutionality of section 10 of House Bill No. 1015, but that sections 8 and 9 "may also be problematic." Sections 8 and 9 are not subject to the same infirmities as section 10 and are thus entitled to the strong presumption of constitutionality afforded legislative enactments. See N.D.A.G. 2003-L-21. Also, sections 8 and 9 are appropriation provisions. Even if the Legislature attached void conditions to an appropriation bill, only the void condition fails, not the appropriation. See *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929).

N.D.A.G. 2007-L-08

it did by approving the issuance of bonds for UND's project, it violates the Separation of Powers Doctrine.³⁷

Under section 10 of House Bill No. 1015, the Legislature has granted the Budget Section of the Legislative Council the authority to veto the choice of the Emergency Commission in approving one of the three correctional facility building options. Consistent with the case law and other authorities cited above, the Budget Section would likely be determined to be an agent of the Legislative Assembly. And, its power to veto the Emergency Commission's choice without the further action of the passage by both houses of the Legislature³⁸ and signing by the Governor³⁹ would implicate the separation of powers doctrine. Consequently, it is my opinion that if a court were to rule on this matter, it would determine that subsection 8 of section 10 of House Bill No. 1015 would violate the separation of powers doctrine and therefore be unconstitutional.⁴⁰

Although not specifically asked, an additional constitutional concern is whether the Legislative Assembly has properly delegated to the Emergency Commission the authority to choose one of the three alternatives to be developed by the study provided for in section 10 of House Bill No. 1015. Subsections 7 and 8 of section 10 direct the Emergency Commission to consider one of the three alternatives forwarded to it by the Legislative Council. But the Commission is not mandated to authorize one of the three alternatives; subsection 8 states "[i]f the Commission authorizes one of the three concepts"

What is unique, however, about the procedure outlined in section 10 of House Bill No. 1015 is that the Emergency Commission is neither part of the Legislative Council nor part of the legislative branch. "The United States Supreme Court has held that the principle of separation of powers does not prevent the legislative branch from obtaining the assistance of its coordinate branches."⁴¹ "So long as the legislative branch lays down by legislative act an intelligible principle to which the body authorized to exercise the delegated authority

³⁷ Id.

³⁸ See N.D. Const. art. IV, § 13.

³⁹ See N.D. Const. art. V, § 9.

⁴⁰ The same constitutional infirmities that plague subsection 8 of section 10 of House Bill No. 1015 also apply to N.D.C.C. §§ 54-16-04, 54-16-04.1, 54-16-04.2, and 54-16-09 wherein the Legislature has reserved in the Budget Section of the Legislative Council the authority to approve or reject actions of the Emergency Commission. If these Budget Section approval provisions were properly before a court, I believe that they would also be determined to be an unconstitutional usurpation of executive power. Any constitutional infirmity, however, would likely be limited to the Budget Section approval provisions and not the Emergency Commission's powers generally. See N.D.C.C. § 1-02-20; State ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979); Baird v. Burke County, 205 N.W. 17 (N.D. 1925).

⁴¹ N.D.A.G. 92-15 (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).



Five Disputed Vetoes



Workplace Safety Veto

SECTION 12. ENTREPRENEURSHIP GRANTS AND VOUCHER PROGRAM - EXEMPTION.

Section 1 of this Act includes the sum of \$2,250,000, of which \$600,000 is from the general fund and \$1,650,000 is from special funds, for an entrepreneurship grants and voucher program to be developed and administered by the department of commerce, for the biennium beginning July 1, 2017, and ending June 30, 2019. Of the amount appropriated, \$900,000 is to be distributed equally to entrepreneurial centers located in Bismarck, Fargo, and Grand Forks, \$300,000 to an organization that provides workplace safety, and \$300,000 for biotechnology grants. The department shall establish guidelines to provide grants to entrepreneurial centers certified by the department. The department also shall establish guidelines to award vouchers to entrepreneurs to procure business development assistance from certified entrepreneurial centers or to provide grants to entrepreneurs working with an entrepreneurial center. The amount appropriated for entrepreneurship grants in section 1 of this Act is not subject to section 54-44.1-11 and any unexpended funds from this line item are available during the biennium beginning July 1, 2019, and ending June 30, 2021.



— State of —
North Dakota
Office of the Governor

Doug Burgum
Governor

May 1, 2017

Honorable Brent Sanford
President of the Senate
State Capitol
Bismarck, ND 58505

Dear President Sanford,

Pursuant to Article V, Section 9, I have signed Senate Bill 2018, the appropriations bill for the commerce department, with an item veto in Section 12.

The portion of Section 12 that reads: "\$300,000 to an organization that provides workplace safety," is vetoed.

This earmark appeared in the final commerce appropriations bill from conference committee. It was added without the benefit of full transparency and scrutiny afforded appropriations that proceed through the public hearing process and full legislative review.

The remaining language in Section 12 gives clear direction to the commerce department to establish guidelines and procedures for awarding grants and vouchers.

Sincerely,


Doug Burgum
Governor



Credit Hour/Future Intent Veto

SECTION 39. LEGISLATIVE INTENT - NORTH DAKOTA STATE UNIVERSITY - LEASE ARRANGEMENT AND OTHER SAVINGS. It is the intent of the sixty-fifth legislative assembly that future general fund appropriations in support of the North Dakota state university department of nursing program in Bismarck be adjusted for savings resulting from facility lease negotiations and for credit-hours completed at the school.



State of
North Dakota
Office of the Governor

Doug Burgum
Governor

May 2, 2017

The Honorable Brent Sanford
President of the Senate
North Dakota Senate Chambers
North Dakota State Capitol
Bismarck, ND 58505

Dear President Sanford,

Pursuant to Article V, Section 9 of the North Dakota Constitution, I have signed Senate Bill 2003, but vetoed items in Sections 18, 24, 32, 39 and all of Section 6. SB 2003 is the North Dakota University System appropriations bill.

Section 6.

Article VIII, § 6 of the North Dakota Constitution gives the State Board of Higher Education "full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control." and "control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state." ND Const. art. VIII, § 6(b)(c). The restrictions in Section 6 intrude upon the operations of the Board and violate the separation of governmental powers established by the North Dakota Constitution.

Section 18.

That portion of paragraph 3, Section 18 that reads "any portion of" is vetoed. The ambiguity of the vetoed language will cause unintended confusion and uncertainty. The remaining language in paragraph 3 achieves the intent of the legislative assembly.

Section 24.

Paragraph 3 (c) of Section 24 is vetoed. This paragraph requiring Dickinson State University to certify that "a North Dakota architect was used to design the presidential library" is hereby vetoed. For example, this condition would preclude the hiring of one of the many North Dakota State University architecture graduates who work at firms across the United States.

Section 32.

The second sentence under Section 32 is vetoed. We have instructed the President of Bismarck State College to work collaboratively with the parks and recreation department director, the state historical society and other stakeholders to develop a plan for the optimum use or sale of the Dakota Institute property as identified in Section 32.

Section 39.

The portion of paragraph 39 that reads "and for credit hours completed at the school" is hereby vetoed. Reducing general fund appropriations based upon credit hours is contrary to the legislatively approved higher education funding formula.

Sincerely,



Doug Burgum
Governor



Dickinson State/Any Portion Veto

SECTION 18. DICKINSON STATE UNIVERSITY - USES OF FUNDS.

1. The one-time operations and debt repayment line item included in subdivision 8 of section 1 of this Act includes the sum of \$7,409,626, or so much of the sum as may be necessary, which must be used by Dickinson state university as follows:
 - a. \$3,100,000 must be used to repay any outstanding debt of the Biesiot activities center. The funds provided under this subdivision may be used only if the funding provided under this subdivision will result in final satisfaction of any debt associated with the facility; and
 - b. \$4,309,626 must be used for the operations of the institution.
2. Dickinson state university shall utilize up to \$2,000,000 of funding from campus reserves for any additional funding needed to maintain the operations of the institution during the biennium beginning July 1, 2017, and ending June 30, 2019.
3. Dickinson state university may not discontinue any portion of its department of nursing academic program during the biennium beginning July 1, 2017, and ending June 30, 2019.
4. The appropriations identified under this section are considered one-time funding items.



State of
North Dakota
Office of the Governor

Doug Burgum
Governor

May 2, 2017

The Honorable Brent Sanford
President of the Senate
North Dakota Senate Chambers
North Dakota State Capitol
Bismarck, ND 58505

Dear President Sanford,

Pursuant to Article V, Section 9 of the North Dakota Constitution, I have signed Senate Bill 2003, but vetoed items in Sections 18, 24, 32, 39 and all of Section 6. SB 2003 is the North Dakota University System appropriations bill.

Section 6.

Article VIII, § 6 of the North Dakota Constitution gives the State Board of Higher Education "full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control." and "control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state." ND Const. art. VIII, § 6(b)(c). The restrictions in Section 6 intrude upon the operations of the Board and violate the separation of governmental powers established by the North Dakota Constitution.

Section 18.

That portion of paragraph 3, Section 18 that reads "any portion of" is vetoed. The ambiguity of the vetoed language will cause unintended confusion and uncertainty. The remaining language in paragraph 3 achieves the intent of the legislative assembly.

Section 24.

Paragraph 3 (c) of Section 24 is vetoed. This paragraph requiring Dickinson State University to certify that "a North Dakota architect was used to design the presidential library" is hereby vetoed. For example, this condition would preclude the hiring of one of the many North Dakota State University architecture graduates who work at firms across the United States.

Section 32.

The second sentence under Section 32 is vetoed. We have instructed the President of Bismarck State College to work collaboratively with the parks and recreation department director, the state historical society and other stakeholders to develop a plan for the optimum use or sale of the Dakota Institute property as identified in Section 32.

Section 39.

The portion of paragraph 39 that reads "and for credit hours completed at the school" is hereby vetoed. Reducing general fund appropriations based upon credit hours is contrary to the legislatively approved higher education funding formula.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doug Burgum".

Doug Burgum
Governor



Water Commission Veto

**SECTION 5. STATE WATER COMMISSION PROJECT FUNDING DESIGNATIONS -
TRANSFERS - BUDGET SECTION APPROVAL.**

1. Of the funds appropriated in the water and atmospheric resources line item in section 1 of this Act from funds available in the resources trust fund and water development trust fund, \$298,875,000 is designated as follows:
 - a. \$120,125,000 for water supply;
 - b. \$27,000,000 for rural water supply;
 - c. \$136,000,000 for flood control; and
 - d. \$15,750,000 for general water.
2. The funding designated in this section is for the specific purposes identified; however, the state water commission may transfer funding among these items, subject to budget section approval and upon notification to the legislative management's water topics overview committee.



May 2, 2017

State of
North Dakota
Office of the Governor

Doug Burgum
Governor

The Honorable Larry Bellew
Speaker of the House
North Dakota House of Representatives
State Capitol
Bismarck, ND 58505

Dear Speaker Bellew:

Pursuant to Article V, Section 9 of the North Dakota Constitution, I have vetoed the last sentence of paragraph 2, Section 5 and all of Section 27 of House Bill 1020, the appropriations bill for the State Water Commission.

The portion of Section 5 that reads: "subject to budget section approval and upon notification to the legislative management's water topics overview committee." is vetoed. This sentence requires the Commission to seek budget section approval before transferring funding between the projects identified under paragraph 1, Section 5.

In *Kelsch v. Jagger*, the North Dakota Supreme Court concluded the legislature may not delegate legislative powers to a subset of its members. 641 N.W.2d 100 (ND 2002). If enacted, the vetoed portion of Section 5 will interfere with the duties and responsibilities of the State Water Commission as defined under North Dakota law. NDCC § 61-02-04.

Section 27 of House Bill 1020 requires the Commission budget for the 2019-2021 biennium comply with NDCC §§ 54-44.1-16 and include line items for salaries and wages, operating expenses, capital assets, project carryover, new projects "and any additional line items as determined necessary by the commission or office of management and budget." NDCC § 54-44.1-04.

While well intentioned, these requirements will impair the duties and responsibilities of the Commission. Many water projects fit into multiple line item categories. Certain projects proceed slowly, delayed by legal, environmental, cost share and other factors driven by outside parties. The simpler budgeting format previously adopted and approved by the legislature gives the Commission a flexible and efficient model from which to work and should be retained.

As Chair of the State Water Commission, I will ensure our governing board prioritizes public transparency of project expenditures through regular and detailed reporting.

Sincerely,


Doug Burgum
Governor



University School Lands/IT Project Veto

SECTION 12. INFORMATION TECHNOLOGY PROJECT - BUDGET SECTION APPROVAL - LEGISLATIVE INTENT - AGENCY EFFICIENCIES. The capital assets line item and the total special funds line item in section 1 of this Act include \$3,600,000 from the state lands maintenance fund for an information technology project. Of the \$3,600,000, \$1,800,000 may be spent only upon approval of the budget section. It is the intent of the sixty-fifth legislative assembly that during the 2017-18 interim, the governor and the commissioner of university and school lands achieve efficiencies and budgetary savings within the department of trust lands through the use of innovative ideas and through alternative solutions relating to information technology.



State of
North Dakota
Office of the Governor

Doug Burgum
Governor

May 2, 2017

The Honorable Brent Sanford
President of the Senate
North Dakota Senate
State Capitol
Bismarck, ND 58505

Dear President Sanford,

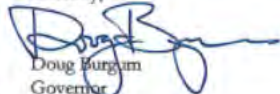
Pursuant to Article V, Section 9 of the North Dakota Constitution, I have vetoed Section 4, Section 20 and a portion of Section 12 of Senate Bill 2013, the appropriations bill for the Department of University and School Lands.

Section 4 was amended in conference committee and approved by the legislature without the scrutiny or transparency of the full legislative public hearing process. This section directs the State Treasurer to transfer \$16,100,000 – \$8.0 million from the strategic investment and improvements fund and \$8.1 million from the state disaster relief fund – to appropriate the sum of \$10,000 to each of approximately 1,610 organized and unorganized townships in non-oil producing counties. At a time when North Dakota is dealing with an unprecedented revenue shortfall, nearly every state agency and department has made substantial cuts in budgets based upon limited reserves and/or new initiatives that streamline state government. Without demonstrated evidence of differentiated need or want, this exactly equal, across-the-board appropriation is both arbitrary and an inefficient use of our scarce financial resources. Further, given how depleted all of our reserves and ending balances have become, it would be risky to reduce the state disaster relief fund by \$8.1 million.

The portion of Section 12 that reads: "Of the \$3,600,000, \$1,800,000 may be spent only upon approval of the budget section," is vetoed. This sentence requires the Department of University and School Lands to seek budget section approval before spending funds approved by the full legislative assembly. In *Kalich v. Jagger*, the North Dakota Supreme Court stated: "as otherwise provided in the constitution, the legislature may not delegate legislative powers to others, including a subset of its members." 641 N.W.2d 100 (ND 2002). If enacted, the vetoed portion of Section 12 would interfere with proper management of this state agency. The specific language addressed to the Governor and the Commissioner in Section 12 "to achieve efficiencies and budgetary savings...through the use of innovative ideas and through alternative solutions relating to information technology" remains. Our office, in conjunction with our state CIO, will monitor this IT project closely in terms of scope, budget, spending, and outcomes and work closely with the Commissioner of University and School Lands to accomplish the project goals.

Section 20 of Senate Bill 2013 directs the Commissioner of University and School Lands to apply a specific interpretation to the terms "gross production," "market value" and "gross proceeds of sale" as stated in its mineral lease form. The North Dakota Attorney General acts as legal counsel to the Commissioner of University and School Lands, including providing legal advice related to its minerals leases and other contracts. The restrictions set forth in Section 20 are an encroachment upon the Attorney General's authority to provide legal advice to this state agency and a violation of the separation of governmental powers established by the North Dakota Constitution.

Sincerely,



Doug Burgum
Governor

Honorable Wayne Stenehjem
Attorney General
State Capitol
Bismarck, ND 58505

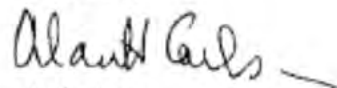
Dear Mr. Stenehjem:

We request your opinion on the following questions regarding vetoed legislation:

1. Under Section 9 of Article V of the Constitution of North Dakota, may the Governor veto a portion of a sentence within a bill providing an appropriation, when doing so changes the intent of the legislation? Specifically, do the vetoes of a portion of a sentence in Sections 18 and 39 of 2017 Senate Bill No. 2003, a portion of a sentence in Section 12 of 2017 Senate Bill No. 2018, and a portion of a sentence in 2017 House Bill No. 1020 exceed the constitutional authority of the Governor, as interpreted by the North Dakota Supreme Court, to veto an item in an appropriation bill?
2. Under Section 9 of Article V of the Constitution of North Dakota, may the Governor veto a condition or restriction on an appropriation without vetoing the appropriation to which the condition or restriction is tied? Specifically, do the vetoes of condition or restrictions on the use of appropriations in Section 6 of 2017 Senate Bill No. 2003, Section 12 of 2017 Senate Bill No. 2013, Section 12 of 2017 Senate Bill No. 2018, and Section 5 of 2017 House Bill No. 1020 exceed the constitutional authority of the Governor, as interpreted by the North Dakota Supreme Court, to veto an item in an appropriation bill?
3. Is it a violation of Section 26 of Article XI of the Constitution of North Dakota for the Legislative Assembly to create statutory interim committees to study issues related to state employee health insurance and to monitor state revenues and state economic activity?

Because of the time-sensitive nature of the questions presented, we would appreciate your expedited review of our request.

Sincerely,



Al Carlson
House Majority Leader



Rich Wardner
Senate Majority Leader

LETTER OPINION
2017-L-04

June 19, 2017

The Honorable Rich Wardner
State Senate
1042 12th Ave W
Dickinson, ND 58601-3654

The Honorable Al Carlson
House of Representatives
2548 Rose Creek Parkway S
Fargo, ND 58104-6699

Dear Senator Wardner and Representative Carlson:

Thank you for your letter asking whether the Governor has authority to veto section 6 and portions of sentences in sections 18 and 39 of S.B. 2003, 2017 N.D. Leg., a portion of a sentence in section 12 of S.B. 2018, 2017 N.D. Leg., a portion of a sentence in section 5 of H.B. 1020, 2017 N.D. Leg., and section 12 of S.B. 2013, 2017 N.D. Leg.

You also ask if the Legislative Assembly may create statutory interim committees to study issues related to state employee health insurance and to monitor state revenues and state economic activity.

ANALYSIS

The North Dakota Constitution provides “[t]he governor may veto a bill passed by the legislative assembly. The governor may veto items in an appropriation bill. Portions of the bill not vetoed become law.”¹

The leading North Dakota case regarding the veto authority of the Governor is *State ex rel. Link v. Olson* which involved a partial veto exercised by Governor Art Link.² In the *Link* case, the Court held that “the governor . . . may only veto items or parts in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after

¹ N.D. Const. art. V, § 9.

² *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979).

N.D.A.G. 2017-L-04

In *Keish*, the Court found that a statute gave “unfettered discretion to a single person to stop an election for state senator in District 26 in 2002.”²⁶ Here, neither H.B. 1020 nor S.B. 2013, 2017 N.D. Leg., provides any guidelines for the Budget Section to follow when determining whether or how to spend significant amounts of money.

These significant budgetary decisions delegated to the Budget Section by the Legislature, in H.B. 1020 and S.B. 2013, are rightly within the function of the executive branch.²⁷ As this office has explained in past opinions, “[t]he North Dakota Legislature, like Congress, is given broad authority to enact legislation.²⁸ To properly exercise that authority however, the constitutional procedures must be followed. This requires the approval by a majority of the members-elect of each house.²⁹ Furthermore, N.D. Const. art. V, § 9, like the federal Constitution, provides that legislative acts must be presented to the Chief Executive Officer.”³⁰

If a court were to rule on these two bills, it is my opinion that it would determine it is a violation of the separation of powers doctrine to authorize the Budget Section of the Legislative Management to approve or disapprove any transfer of funds by the State Water Commission and spend \$1.8 million of a \$3.6 million appropriation for an information technology project.

In summary, it is my opinion the Governor’s vetoes of subsections 1, 2, and 5 of section 6 and portions of sections 18 and 39 in S.B. 2003, 2017 N.D. Leg., as well as a portion of section 12 of S.B. 2018, 2017 N.D. Leg., are authorized by law. The Governor’s veto of subsections 3 and 4 of section 6 of S.B. 2003, 2017 N.D. Leg., is not authorized by the Constitution and is not effective. However, although the Governor’s vetoes of a portion of section 5 of H.B. 1020, 2017 N.D. Leg., and a portion of section 12 of S.B. 2013, 2017 N.D. Leg., are not authorized by the Constitution, the vetoed language, in my opinion, would be found by a court to violate the separation of powers doctrine.

The last question you have is whether it is a violation of section 26 of Article XI of the Constitution of North Dakota for the Legislative Assembly to create statutory interim committees to study issues related to state employee health insurance and to monitor state revenues and state economic activity.

While there is no constitutional restriction on the Governor’s authority to veto language regarding a particular study, Legislative Management nonetheless has broad statutory

²⁶ *Id.*

²⁷ See N.D.A.G. 2007-L-08.

²⁸ N.D. Const. art. IV, § 12.

²⁹ *State ex rel. Wattam v. Poindexter*, 183 N.W. 852 (N.D. 1921).

³⁰ N.D.A.G. Letter to Treadway (Nov. 6, 1991).

power to conduct studies during the interim to study and recommend future legislation. Specifically, the law states that Legislative Management has the power:

To study, consider, accumulate, compile, and assemble information on any subject upon which the legislative assembly may legislate, and upon such subjects as the legislative assembly may by concurrent or joint resolution authorize or direct, or any subject requested by a member of the legislative assembly; provided, that the legislative management may screen and prioritize studies assigned by concurrent or joint resolution to maintain its workload within the limitations of time and legislative appropriations.³¹

As I explained in 2007, courts have consistently held that legislatures may validly hold committee hearings and conduct investigations.³² There is a long-recognized power of the Legislature to form study committees and ascertain facts.³³ Therefore, it is my opinion it is not a violation of section 26 of Article XI of the Constitution of North Dakota for the Legislative Assembly to create statutory interim committees to study issues related to state employee health insurance and to monitor state revenues and state economic activity.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³⁴

³¹ N.D.C.C. § 54-35-02(1).

³² N.D.A.G. 2007-O-10.

³³ *Id.*

³⁴ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).

N.D.A.G. 2017-L-04

20170436
FILED BY THE CLERK
OF THE SUPREME COURT
DECEMBER 8, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative Al Carlson,)
Senator Rich Wardner, Senator Joan Heckaman,) Supreme Court
and Representative Corey Mock,) Case No: _____
)
Petitioners,)
)
v.)
)
North Dakota Governor Doug Burgum,)
)
Respondent.)

*** *** ***

**PETITION FOR DECLARATORY JUDGMENT,
OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS**

Randall J. Bakke, #03898
Shawn A. Grinolds, #05407
Bakke Grinolds Wiederholt
300 West Century Avenue
P.O. Box 4247
Bismarck, ND 58502-4247
(701) 751-8188
rbakke@bgwattorneys.com
sgrinolds@bgwattorneys.com

Attorneys for Petitioners

ND Legislative Assembly v. Burgum

Filed 7/30/18 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2018 ND 189

North Dakota Legislative Assembly,
Senator Ray Holmberg, Representative Al
Carlson, Senator Rich Wardner, Senator
Joan Heckaman, and Representative
Corey Mock, Petitioners and Cross-Respondents

v.

North Dakota Governor Doug Burgum, Respondent and Cross-Petitioner

and

North Dakota Attorney General Wayne K.
Stenehjem, Cross-Petitioner

No. 20170436

Petition for Declaratory Judgment, or in the Alternative, for Writ of
Mandamus, and Cross-Petition for Declaratory Judgment.

LEGAL STATUS DECLARED.

Opinion of the Court by Tufte, Justice.

Shawn A. Grinolds (argued) and Randall J. Bakke (appeared), Bismarck, N.D.,
for petitioners.

Wayne K. Stenehjem (argued), Attorney General, and James E. Nicolai
(appeared), Deputy Solicitor General, Bismarck, N.D., for respondent.

The Opinion



Summary

“The Legislative Assembly petitions for a declaratory judgment voiding the five partial vetoes and declaring that the bills, without the challenged vetoes, are the current law. Alternatively, if a declaratory judgment is not granted, the Legislative Assembly seeks a writ of mandamus compelling the Governor to treat the partial vetoes as a nullity. The Governor and the Attorney General cross-petition for a declaratory judgment stating that the budget section provisions stricken by the Water Commission Veto and the IT Project Veto are unconstitutional in violation of the non-delegation and separation of powers doctrines.”



Some Ground Rules



Reaffirmation of State ex. rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979)

“The governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items and part or parts disapproved shall be void, unless enacted in the following manner: ...that the governor, in exercising his partial veto power, may only veto items or parts in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill can stand as workable legislation which comports with the fundamental purpose the legislature intended to effect when the whole was enacted. He may not veto conditions or restrictions on appropriations without vetoing the appropriation itself.”

Reaffirmation of Sandaker v. Olson, 260 N.W. 586 (N.D. 1935)

“An ‘item’ subject to partial veto includes a specified sum of money designated for a particular purpose... In Sandaker, the legislature passed a bill that contained twelve items, including the amounts of \$6,960 for the salaries of assistant dairy commissioners and \$3,584 for the salary of the dairy commissioner, among others. The governor vetoed all the items, except for the dairy commissioner’s salary. We stated that the governor did not reduce, or pare, or scale, any of these to make an item less than what the Legislature made. He struck out the items entirely...It is true he said the total appropriation was reduced to \$3,584 by his act; but this is immaterial. This was merely his answer to a problem in subtraction. The fact is, he disapproved of each of the items in that subdivision except the item of \$3,584. The effect of this was to cut the appropriation for that department to \$3,584...**The veto power is an eraser, not a pencil.** The Governor may strike words or numbers in a bill, but he may not insert them...Although the Governor lacks the power to alter the mathematical calculations that result from vetoed items, any vetoed items are as a matter of law subtracted from any larger amount in which they are included.”

Workplace Safety Veto

“The Legislative Assembly argues that because the source of the funding cannot be ascertained, the \$300,000 cannot be deemed an item of appropriation...Here, Section 12 provides, “Section 1 of this Act includes the sum of \$2,250,000, of which \$600,000 is from the general fund and \$1,650,000 is from special funds.” The Legislative Assembly argues that the \$300,000 must be a condition because the exact source (general fund or special funds) cannot be determined, and thus the Workplace Safety Veto could not have been of an item of appropriation. We disagree. Section 14 of the same bill, Senate Bill 2018, states that the source of the \$300,000 is the research North Dakota fund...The Legislative Assembly may not insulate an item from veto by including it within a larger appropriation, funding that larger appropriation from multiple special funds, or failing to identify the funding source for the item. Here, it is plain which funds are allocated to which expenditures, so the itemized appropriations each satisfy the required specification of purpose, amount, and funding source.”

Credit Hour/Future Intent Veto

“The item veto power does not authorize the Governor to veto any part of a statement of legislative intent. The Legislative Assembly has the prerogative to state its intent in legislation without the Governor altering that statement by selectively removing portions.”

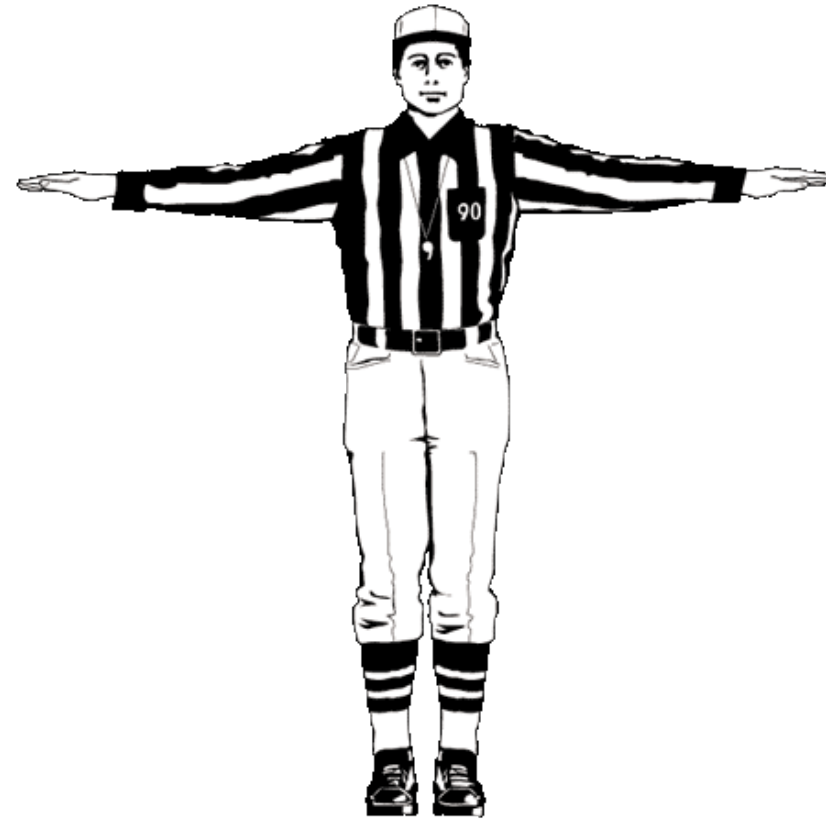
Water Commission Veto

“This veto did not strike a sum of money. Because Section 5, House Bill 1020, conditions the \$298,875,000 appropriation on the approval of the budget section as to the transferring of funds among categories, and the Governor did not veto the \$298,875,000 appropriation itself, the Water Commission Veto was unauthorized. This veto is ineffective.”

The University/School Lands/IT Project Veto

“The veto did not strike an item of appropriation. Because Section 12, Senate Bill 2013, conditions half of the \$3.6 million appropriation on the approval of the Budget Section, and Governor Burgum did not veto the appropriation itself, the IT Project Veto was unauthorized. The veto is ineffective.”

Score at Halftime:



**Legislative
Assembly: 4**

Governor: 1

But Wait, There's More in the Second Half!



**SECOND
HALF**

JAN 12 2018

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
Representative Corey Mock,)

CROSS-PETITION FOR
DECLARATORY JUDGMENT

Petitioners,)

Supreme Court No. 20170436

vs.)

State of North Dakota ex rel. Wayne K.)
Stenehjem, in his capacity as Attorney)
General of the State of North Dakota;)
North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioners.)

[¶1] Pursuant to N.D.C.C. § 54-12-02, Cross-Petitioner Attorney General Wayne Stenehjem hereby joins Respondent and Cross-Petitioner Governor Burgum in petitioning the Court to exercise its original jurisdiction under Article VI, § 2 of the North Dakota Constitution on the grounds that the issues raised in this cross-petition "involve[] questions affecting the sovereign rights of this state" and are "of strictly public concern." N.D.C.C. § 27-02-04.

[¶2] Cross-Petitioners pray for relief in the form of a declaratory judgment declaring that Section 5 of House Bill No. 1020, 2017 N.D. Leg.; and Section 12 of Senate Bill, 2017 N.D. Leg.; are unconstitutional in violation of the non-delegation doctrine and the separation of powers doctrine because both bills grant to the Budget Section Committee, a subset of the Legislative Assembly, unfettered discretion to determine whether a law passed by the entire Legislative Assembly takes effect or not, and

Statute or Constitution?

“The Legislative Assembly also argues that the Attorney General has a duty to defend state statutes against constitutional challenge and thus may not properly advocate on behalf of the Governor against the constitutionality of the budget section provisions as a result of this apparent conflict.”



The Constitution Wins

“The Attorney General has acknowledged a general duty to defend statutes against constitutional challenge. Whatever may be the source for such a duty, where there is a conflict, the Attorney General’s overriding duty is to the Constitution he is sworn to support. N.D. Const. art. XI, § 4. We hold that the Attorney General is not precluded from representing the Governor in challenging the constitutionality of a statute.”

State ex. rel. Link v. Olson Revisited

“Having determined that the governor’s attempted veto was unauthorized and SB 2460 became law in its entirety, we must now determine whether or not that portion of s 1 which assigns the position of federal aid coordinator to the lieutenant governor is constitutional.”



Although a Governor’s veto is ineffective when it strikes a condition without striking the corresponding appropriation, the Governor can still ask the Supreme Court to review whether the condition itself is unconstitutional.

Non-Delegation Doctrine

“Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other body...The Legislative Assembly may not delegate to another body the power to make law—to legislate—but it may bestow authority to execute the laws it enacts...The modern view of the non-delegation doctrine recognizes that, in a complex area, it may be necessary and appropriate to delegate in broad and general terms, as long as there are adequate standards and procedural safeguards.”



Other Key Statements

“The power to make a law is legislative, but the power to administer or execute the law under the provisions of the law itself, as enacted by the Legislature, is executive.”

“The power to appropriate money is purely a legislative power.”

“An appropriation is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object...In the context of a legislative appropriation, the Legislative Assembly must specify (1) the amount, (2) the object or purpose for which the amount is authorized, and (3) the fund from which the amount is set apart. In reviewing whether a legislative act meets these requirements, we determine whether it contains reasonably clear guidelines to enable the appropriate body to ascertain the facts.”



The Water Commission Bill violates the Non-Delegation Doctrine

“House Bill 1020, § 5, does not set forth any standard for the budget section to apply in deciding whether to permit the water commission to transfer funds. A law that provides no safeguards against arbitrary action is a clear sign that the Legislative Assembly has improperly attempted to delegate legislative power. Because it lacked any guidelines, House Bill 1020, § 5, unlawfully delegated legislative authority to the budget section. The budget section provision of House Bill 1020, § 5, is unconstitutional in violation of the non-delegation doctrine.”

The University School Lands/IT Project Veto violates the Non-Delegation Doctrine

“Here, the budget section lacks adequate guidance, leaving it discretion to approve or reject the use of the \$1.8 million appropriated for an IT project subject only to the budget section’s subjective assessment of efficiency achieved or budget savings. Thus, the budget section provision of Senate Bill 2013, § 12, is unconstitutional as a violation of the non-delegation doctrine.”



Separation of Powers Doctrine



“These decisions are consistent with the separation of powers decisions interpreting the North Dakota Constitution. Under our constitutional system, the Legislature may not delegate to itself, or to a subset of its members, executive or judicial functions. In its exercise of legislative power, it must follow the constitutionally mandated procedures, including a recorded vote of a majority of the members elected to each house followed by presentment to the governor for signature. To do otherwise would violate the separation of powers.”

Other Key Statements

“Once a bill is enacted, the Legislative Assembly may control the bill’s administration only indirectly through passing new legislation. After enactment, that duty belongs to the executive branch, not a subset of the legislative branch.”

“The budget section provision of House Bill 1020, § 5, violates the required separation of powers and is unconstitutional as beyond the authority of the Legislative Assembly.”

“By arrogating to itself, through a committee of its members, the power to administer appropriations, the Legislature has unconstitutionally encroached upon the executive and consolidated the power to both make and execute the laws into its own hands. The budget section provision of Senate Bill 2013, § 12, violates the separation of powers.”

Counting Votes

5-0 on Non-Delegation
Doctrine

All five justices agreed that
both challenged bills violated
the non-delegation doctrine.



Counting Votes

2-1?-2 on
Separation of
Powers



Justice VandeValle says:

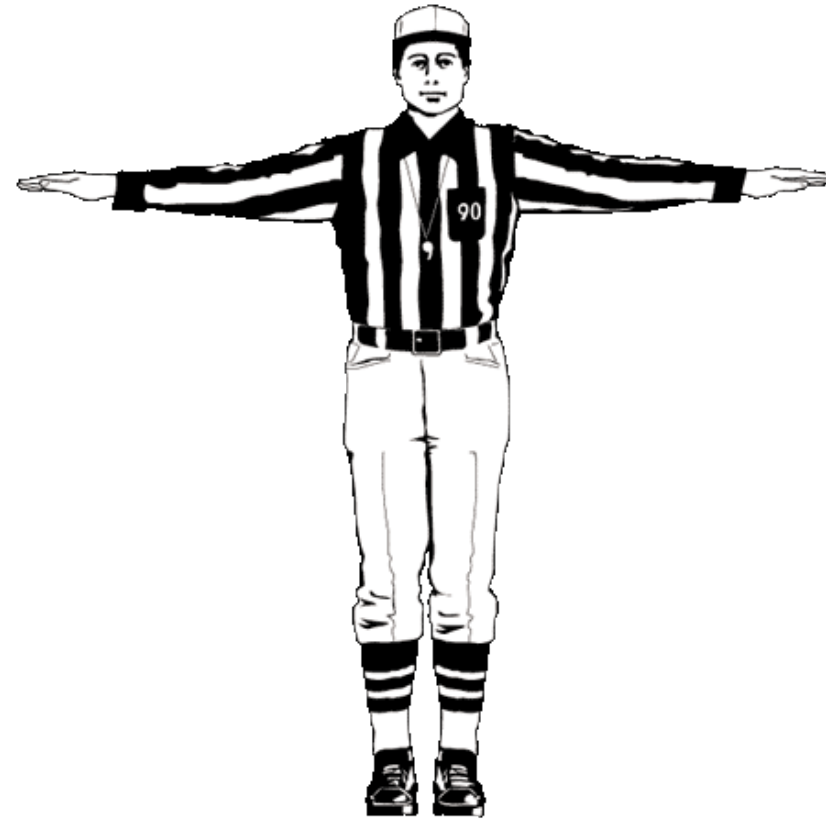
“With respect to the Governor’s cross-petition, I agree with that portion of Part IV of the opinion holding the bills unconstitutional as violating the non-delegation-of-legislative-authority doctrine because in delegating its authority, the legislature did not provide adequate standards to the budget section. However, I respectfully dissent to that portion of Part IV of the opinion and its extensive discussion and holdings under the doctrine of separation of powers. I do so because 1) it is unnecessary to our decision, and 2) I am not convinced the delegation to the budget section, if proper standards were in place, would violate that doctrine.”

Justice Crothers (joined by Justice McEvers and Justice VandeValle) says:

“In the present case the non-delegation basis is narrower than the separation of powers grounds because the former usually can be fixed through more artful legislative drafting while the latter tends to implicate the structure of governance. Thus, the narrower grounds for considering the validity of H.B. 1020, § 5, is a determination whether the budget section provision contains a constitutionally excessive delegation of legislative authority. We have done just that, after which we should stop further analysis.”

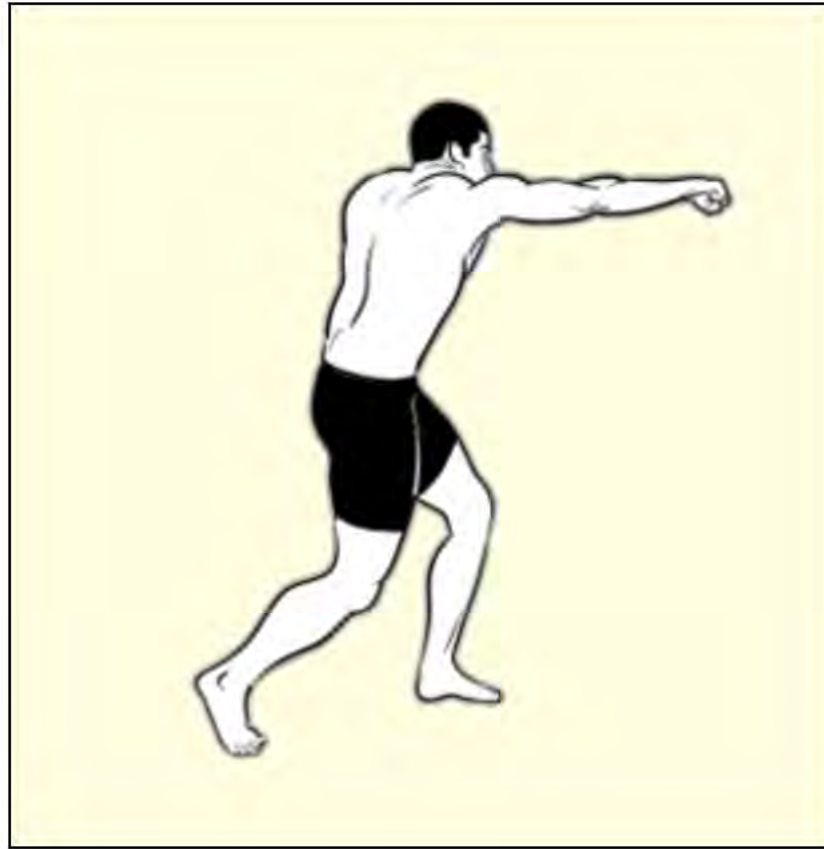
Final Score:

**Legislative
Assembly: 2**



Governor: 3

Legislature's Response



54-35-02.9. Budget section - Appointment - Powers and duties.

1. To provide for flexibility in the management of state funds between regular sessions of the legislative assembly and to minimize the need for and the expense of a special session, the legislative management, during each biennium, shall appoint a budget section.
2. The membership of the budget section must include:
 - a. The majority leader and the assistant majority leader of the house of representatives;
 - b. The majority leader and the assistant majority leader of the senate;
 - c. The minority leader and the assistant minority leader of the house of representatives;
 - d. The minority leader and the assistant minority leader of the senate;
 - e. The speaker of the house of representatives; and
 - f. Each member of the legislative assembly appointed to serve on the appropriations committees of the house of representatives and the senate.
3. The legislative management shall designate the chairman of the budget section. The budget section shall operate according to the statutes and procedures governing the operation of other legislative management interim committees. The budget section shall meet at least quarterly upon the call of the chairman.
4. The legislative assembly, by law, may provide the authority for the budget section to approve specific actions, projects, and transfers.

5. a. When evaluating state agency requests, the budget section shall consider criteria applicable to the request, including whether:
 - (1) The request is for a specific purpose;
 - (2) The request is for a specific amount of funds and for a specific time frame, not to continue beyond the end of the current biennium;
 - (3) The request conforms with legislative intent;
 - (4) The request is consistent with related statutory provisions;
 - (5) The request supports state priorities;
 - (6) The request improves state efficiencies and promotes effective state government;
 - (7) If the request is for a new program, the program does not extend beyond the current biennium; and
 - (8) The request addresses a state emergency.
- b. The budget section shall gather documentation that addresses each of the applicable criterion included in subdivision a from the agency requesting budget section approval.

Will there be a sequel?

