

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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State of Minnesota Ex Rel Speaker of House of Representatives Hon Steve Sviggum, Majority Leader Hon. Erik Paulsen, State Representatives Hon. Paul Kohls, Hon. Scott Newman, Hon. Mark Buesgens, Hon. Tim Wilkin, Hon. Chris DeLaForest, Hon. Duke Powell, Hon. Kurt Zellers, Hon. Matt Dean, Hon. Jim Knoblach, Hon. Jeff Johnson, Hon. Philip Krinkie, Hon. Tom Emmer, Hon. Patrick Garofalo, Hon. Paul Gazelka and Hon. Rob Eastlund, and State Senators Hon. Tom Neuville, Hon. Michele Bachmann, Hon. Sean Nienow, Hon. David Hann, Hon. Warren Limmer, Hon. Mady Reiter, Hon. David Senjem, Hon. Ellen Anderson, Hon. Leo Foley, Hon. John Hottinger, Hon. Cal Larson, Hon. Sharon Marko, Hon. Jane Ranum, Hon. Ann Rest, and Hon. Charles Wiger, in their capacity as State Legislators and individually,

FILE NO. C9-05-9413

ORDER AND MEMORANDUM

Petitioners,

vs.

Peggy Ingison in her official capacity as Commissioner of Finance or her successor, and the State of Minnesota,

Respondents.

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The above matter came on for hearing before the undersigned judge of district court, in Courtroom 1240 of the Ramsey County Courthouse, in the city of Saint Paul, state of Minnesota.

Erick G. Kaardal, Esq., and William F. Mohrman, Esq., appeared as counsel on behalf of the petitioners. Michael J. Vanselow and Kenneth E. Raschke, Jr., Assistant Attorneys General, appeared as counsel on behalf of respondents.

The petitioners have petitioned the court to issue a writ of *quo warranto* to respondent Peggy Ingison, commissioner of finance, requiring her to show by what constitutional authority she disburses state funds without an appropriation by law and requiring the respondent and her successor to cease and desist from any further disbursements of state funds at the end of the fiscal

biennium without an appropriation by law.

The petitioners further seek judgment against the state of Minnesota for the costs of litigation, including attorney's fees.

Respondents have moved the court for an order dismissing the petitioners' petition for a writ of *quo warranto* with prejudice on the grounds that the court lacks subject matter jurisdiction over the petition and that the petition fails to state a claim against respondents upon which relief can be granted.

Respondents further seek an award of attorney's fees on the basis that petitioners' claim is not warranted under existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law.

Now, therefore, based on the foregoing, the court makes the following:

ORDER

1. The petition for a writ of *quo warranto* is denied in its entirety.
2. Petitioners' motion for an award of attorney's fees is denied.
3. Respondents' motion for an award of attorney's fees is denied.

DATED: March 3, 2006

  
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Gregg E. Johnson  
Chief Judge  
Ramsey District Court

## MEMORANDUM

The Minnesota Legislature concluded its 2005 regular session and a special session convened by Governor Tim Pawlenty without approving the appropriations for a number of executive branch agencies

On June 15, 2005, Attorney General Mike Hatch filed a petition with the court seeking a ruling that in the event of a government shutdown on July 1, 2005, the state of Minnesota through the commissioner of finance, Peggy Ingison, must continue to fund the core services of government relating to life, health and safety.

Governor Pawlenty subsequently filed a motion to intervene, which was granted at the June 23, 2005 hearing on the attorney general's petition. Prior to the June 23, 2005 hearing, the court ordered the attorney general to serve the petition upon House of Representatives Speaker Steve Sviggum with an order to show cause as to why the court should not grant the attorney general's petition.

The court held a hearing on the petition of the attorney general on June 23, 2005. Attorney General Mike Hatch appeared on behalf of the state of Minnesota. Eric Lipman, counsel for the governor, appeared on behalf of Governor Tim Pawlenty. None of the petitioners, including Speaker Sviggum, appeared or presented argument at the hearing.

Subsequent to the June 23, 2005 hearing, an order was issued granting the motion for temporary funding. The order required that the executive branch fund certain core functions of government consistent with state and federal mandates. The order was to remain in effect until the earliest of the following:

1. July 23, 2005;
2. The enactment of a budget by the state of Minnesota to fund all core functions of government after June 30, 2005; or,
3. Further order of this court.

The Order for Temporary Funding was served on the Speaker of the House of Representatives,

Steve Sviggum.

Further hearings were held on June 29 and 30, 2005, wherein the court ordered that the provision of health care for the state of Minnesota's most vulnerable citizens is a core function of government and that payments to recipients of medical assistance, General Assistance Medical Care, and Minnesota Care would continue in the event of a government shutdown.

At the end of the regular session of the legislature, the provisions of the Order for Temporary Funding went into effect due to the lack of an appropriation for the executive branch agencies identified in the petition. Hearings were held on petitions for funding and subsequent orders were issued by the court on the various requests without appearance or objection by the petitioners herein.

By July 14, 2005, various appropriations were made by the legislature and signed into law by the governor. On July 26, 2005, this court issued an order vacating the Order for Temporary Funding. In its appropriation, the legislature retroactively ratified all of the expenditures that the petitioners herein challenged. The petitioners in this matter, all members of the legislature, did not seek to intervene in the case establishing the temporary funding orders. In addition, the petitioners failed to challenge the constitutionality of the proceedings nor did they appeal this court's order.

The petitioners have petitioned the court to issue a writ *quo warranto* to the commissioner of finance requiring her to show by what constitutional authority she disbursed state funds at the end of the fiscal biennium without an appropriation by law or, in the absence of such a showing, require her and her successors to cease and desist from any further disbursements of state funds without an appropriation by law; said action being in violation of Articles III, IV, and XI of the Minnesota Constitution. The petitioners' claim that such actions injured them as state legislators in that their prerogative to appropriate state funds was usurped. Petitioners further claim standing as taxpayers to challenge respondent Peggy Ingison's conduct.

Respondents argue that the petitioners as individual legislators lack standing to bring this action in their *ex officio* capacity as legislators and as taxpayers. Respondents further assert in

response to the primary complaint of petitioners that this court's order created a conflict between the branches of government and usurped the legislature's appropriation authority, that the prerogative to bring such a claim lies with the legislature as an institution and not to the petitioners as individual members.

The court agrees with the petitioners that, at a minimum, they have standing as citizen taxpayers. The court in *McKee v. Likvis*, 261 NW2d 566 (Minn 1977), recognized that taxpayers have the right "to maintain an action in the courts to restrain the unlawful use of public funds." Although the court disagrees with the petitioners' claim that the commissioner of finance made expenditures without following constitutional procedures, they have standing to argue that expenditures were made without an appropriation by law.

Despite granting the petitioners' standing, the court agrees with the respondents' argument that although the writ of *quo warranto* requires the person subjected to the writ to demonstrate by what authority they purport to exercise certain powers, the writ by its very nature is not available to challenge past conduct. The writ is intended to apply to situations involving a continuing course of unauthorized usurpation of authority.

In *State ex rel Lommen v. Gravlin*, 295 NW654 (Minn 1941), and *State ex rel. Groybach v. Common School District No. 65*, 54 NW2d 130 (Minn 1952), the court determined that the writ of *quo warranto* is not allowable as preventive of, or remedy for, official misconduct and cannot be employed to test the legality of the official action of public or corporate officers.

Although petitioners argue that such actions may occur in the future, there is no ongoing unauthorized usurpation of authority by the respondents. This court believes that a petition for a writ of *quo warranto* is an improper procedure by which to contest the past conduct of the respondent commissioner of finance.

The petitioners more appropriately should have challenged the respondents' authority to petition the court for an order for temporary funding at the time of the court hearing on June 23, 2005.

In response to the claim that such conduct on the part of the respondents may occur in the future, the petitioners will have the opportunity to seek judicial review at the time of the purported usurpation of their legislative prerogative, should it ever occur.

The respondents are correct in arguing there is currently no case or controversy for the court to exercise jurisdiction. The petitioners are essentially seeking an advisory judicial opinion regarding a potentially unknown set of facts. What's more, there is no relief to be granted in that the petitioners are not challenging ongoing or reasonably foreseeable conduct, but, rather, seek a ruling on a hypothetical question.

This court further concludes that the controversy at issue is moot in that the petitioners have failed to meet the standard established in *Elzie v. Commissioner of Public Safety*, 298 NW2d 29 (Minn 1980), that challenged conduct is capable of repetition, yet likely to evade judicial review.

The two elements necessary to meet the “*capable of repetition yet evading review*” doctrine are set out in *Kahn v. Griffin*, 701 NW2d 815 (Minn 2005).

1. The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and,
2. There was a reasonable expectation that the same complaining party would be subjected to the same action.

The main factor to consider in this analysis is that the petitioners were on notice of the hearing on the petition for temporary funding and failed to take any action regarding an objection to the proceedings. The legislature could have further withheld ratification of this court's funding order and requested judicial review regarding the constitutionality of the order.

The doctrine of laches can also be applied in this case in that the petitioners delayed any challenge to the action until it was too late for this court to grant any effective relief. The petitioners were fully informed of the proceedings and the rulings of this court and, yet, failed to take any action to assert an objection. The petitioners not only remained silent as the court proceedings commenced, but further participated in the ultimate legislative ratification of the court ordered

expenditures.

The court now turns to the merits of the petitioners' claim that respondent acted in contravention of her legal authority. The petitioners' disagreement is really with the rulings of this court. The appropriate method to challenge the action of the attorney general and the governor of the state of Minnesota was to make an appearance and contest the action when it was properly before the court. If dissatisfied with the court's ultimate ruling, the petitioner's remedy was to seek appellate review.

The petitioners argue that an appropriation of state funds cannot include a court order. However, the Minnesota Supreme Court has long recognized that legislative power to authorize expenditures is not exclusive or absolute but, instead, must be balanced against other constitutional imperatives.

In *State ex rel. Mattson v. Keidrowski*, 391 NW2d 777 (Minn 1986), the Supreme Court held that the legislature could not "gut" a constitutional executive office by removing "core functions" of that office and necessary funding. The court ordered functions and funds returned to the state treasurer's office contrary to legislative action wherein the treasurer's funding was appropriated to the department of finance.

The cases of *Sharood v. Hatfield*, 210 NW2d 275 (Minn 1973) and *Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 241 NW2d 781 (Minn 1976), stand for the proposition that the court has the inherent judicial authority to preserve the court's power. Likewise, a similarly reasonable argument can be made as relates to the essential governmental functions outside the judiciary. This court's order merely temporarily preserved essential governmental functions on an emergency basis pending action by the legislature and governor. As stated earlier, the legislature ultimately retroactively ratified all of the funding ordered by this court.

The Kentucky Supreme Court in *Fletcher v. Commonwealth*, 163 SW3d 852 (Ky 2005), clearly addresses the issue before this court when Chief Justice Lambert writes:

The constitutional separation of powers provisions are implicated by the potential of the legislature to use the appropriations clause to control the executive and judicial branches. The constitution is not a "suicide pact." It must be interpreted to further its purpose of supporting an enduring republic. The logical extension of allowing the legislature to control the executive by way of the appropriations clause strikes at the heart of the purpose of separation of powers and the logical extension of this idea would be the destruction of government. *Id.* at 873-77.

The constitution of the state of Minnesota likewise is not a *suicide pact* and must be interpreted to further its principle purpose of preserving the state. The executive and judicial branches must retain the right and duty to respond to such emergencies as presented here by the inability of the legislative branch to fulfill its constitutional responsibility.

The legislature remains the branch of government with the expertise necessary to fulfill the appropriations role. The court's reluctant intervention on a temporary basis was done with caution in order to ensure funding for core services of government related to life, health and safety.

GEJ