

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.

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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

disapproved shall be void

N.D. Const. art. V, ? 10.

On May 5, 1993, Governor Edward T. Schafer vetoed Section 4 of House Bill 1002. The vetoed section provides:

SECTION 4. TRANSFER - HUMAN SERVICE CENTER FUNDING. Upon approval of the budget section, the director of the department of human services may transfer appropriation authority between agencies and institutions included in subdivisions 1 through 10 of section 1 of this Act. 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.

The question presented is whether the veto can be sustained because it falls within line item veto authority granted the governor by Article V, Section 10. The North Dakota Supreme Court analyzed and defined the scope of the governor's line item veto authority in State ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979). The court held the governor may only exercise his line item veto power under Article V, Section 10 to 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.

Id. at 270-71. Applying that holding to the facts in State ex rel. Link v. Olson, the court refused to uphold then Governor Link's partial veto because the remaining portion of the bill was "not workable legislation and the primary purpose of the bill to create a federal aid coordinator office [was]

destroyed." Id. at 271.

Thus, under State ex rel. Link v. Olson, the governor may exercise the line item veto only when the material vetoed is severable from the material approved, the material approved continues to be a workable bill, and the fundamental purpose of the legislation is not changed by the deletion. For example, the line item veto may not be used to veto a condition on an appropriation unless the appropriation is also vetoed. Id.

The section of House Bill No. 1002 which the Governor vetoed contains two distinct functions. The first sentence creates a mechanism to authorize transfers between agencies and institutions upon approval of the Budget Section. The remaining portion of the section codifies legislative spending priorities and provides a mechanism for changing them. The effectiveness of the Governor's veto regarding these distinct functions are discussed separately.

I.

The first sentence of Section 4 of House Bill No. 1002 provides:

Upon approval of the budget section, the director of the department of human services may transfer appropriation authority between agencies and institutions included in subdivisions 1 through 10 of section 1 of this Act.

This sentence permits transfers of appropriation authority between agencies and institutions upon approval of the Budget Section. It does not condition or restrict the expenditure of the appropriation provided for in subdivisions 1 through 10 of Section 1 of the Act. Rather, it merely creates a mechanism which allows the Department of Human Services additional flexibility for its spending authority by allowing the Budget Section to transfer appropriation authority from one division to another. Thus the first sentence of Section 4 is a substantive provision. It is separate and distinct from the remainder of the bill and does not impose a condition or restriction on any appropriation. When removed, the first sentence of Section 4 leaves workable legislation which comports with the Legislature's fundamental purpose in enacting House Bill 1002. It is my opinion that the Governor had authority under N.D. Const. art. V, § 10, to line item

veto the first sentence of Section 4 of House Bill 1002.

II.

The remaining portion of Section 4 provides:

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 language limits the Department of Human Services' discretion to prioritize expenditure of the money appropriated for the human services center programs by restricting expenditures to the priorities set forth in a legislative working document. By codifying the priorities in this manner, the Legislature assured that its intent must be followed. See Martinez v. Florida Legislature, 542 So.2d 358, 362 (Fla. 1989) (statements of intent and working papers are "a manifestation of how the legislature thinks, in its considered opinion, . . . appropriations should be spent. . . . The legislature cannot give the force of law to something which it refuses to enact into law.") This language constitutes a condition or restriction on the appropriation to the Department of Human Services in Section 1 of House Bill 1002.

Although the governor may veto a restriction on an appropriation, he may do so only if he also vetoes the appropriation. In this case the Governor did not veto the appropriation restricted by the second sentence in Section 4. Therefore it is my opinion the Governor did not have authority to line item veto that part of Section 4 of House Bill 1002 which requires spending to be in accordance with specified priorities.

Like the language in the first sentence of Section 4, the last two sentences of Section 4 provide a procedure which allows the Budget Section to approve a change in the legislatively established priorities. However, the procedure established in these sentences is not separate and distinct from the language

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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.

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