STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: 14 Other Civil

Robert Carney, Jr., on behalf of himself and all others similarly situated

Plaintiff,

vs.

State of Minnesota and Ward Einess, Minnesota Commissioner of Revenue,

Defendants.

Court File No. 62-CV-09-8663
Chief Judge Kathleen R. Gearin

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Carney's response memorandum provides no grounds to support the claims made in his complaint. In fact, he identifies absolutely no support for his claims under sections 290.06 and 270C.435 that political contribution refunds are tax refunds outside the authority given by subdivision 4(b) of the unallotment statute. Complaint ¶¶ 2-3, 17-18, 36-37. Nor does he offer any support for his subsidiary claim that the Revenue Commissioner is violating the requirement to make application forms available for political contribution refunds. *Id.* ¶¶ 24-26. Carney's new claims that the unallotment violated subdivision 4(a) of the statute and the Minnesota Constitution are not in his complaint and thus should not be addressed, and in any event, are without merit.

ARGUMENT

I. THE POLITICAL CONTRIBUTION REFUND PROGRAM IS NOT EXEMPT FROM THE UNALLOTMENT STATUTE.

Carney wrongly contends that the "notwithstanding" clause in subdivision 4(b) of the unallotment statute applies only to statutory obligations that existed as of 1987, when the clause

was added to the statute. *See* Pl.'s Response Mem. at 16-18. The clause's plain meaning confirms that an unallotment overrides any statutory obligation, *existing at the time of the unallotment*, that otherwise would require the appropriated amount to be spent. Indeed, the "notwithstanding" clause's reference to "prior statutorily created obligations" simply reflects that the unallotment of funding for a program does not prevent the subsequent enactment of legislation restoring the funding for that biennium. The available legislative history confirms that the 1987 amendment to the unallotment statute was not meant to narrow the statute's scope. *See* Garry Aff. Exh. 14.

The alternative reading posited by Carney would yield the absurd result that all of the numerous statutory obligations enacted in the last two decades are exempt from unallotment, and that the effective date of each obligation would have to be determined and compared to the date of the insertion of the "notwithstanding" clause. Of course, it is presumed that the legislature did not intend such an absurd result. Minn. Stat. § 645.17(1) (2008).

The only other argument asserted in support of the claims made in Carney's complaint is the baseless notion that the unallotment is a prohibited "assignment" under section 270C.435. *See* Pl.'s Response Mem. at 18-19. The unallotment obviously was not a transfer by Carney to another of the right to a refund for which he had not yet even made a contribution or filed an application. *See* Black's Law Dictionary, p. 119 (6th ed. 1990) (stating that the term "assignment" means "[t]he act of transferring to another all or part of one's property, interest, or rights"). Section 270C.435 is also inapplicable for the other reasons discussed in the memorandum in support of Defendants' motion to dismiss, at pages 10-11, and the memorandum in opposition to Plaintiff's motion for temporary injunction, at pages 3-5.

II. THE NEW CLAIMS ASSERTED IN THE RESPONSE MEMORANDUM ARE NOT IN CARNEY'S COMPLAINT AND, IF NEVERTHELESS CONSIDERED, ARE WITHOUT MERIT.

The response memorandum claims that all of the unallotments for this biennium did not meet conditions required by subdivision 4(a) of section 16A.152 and violated the Minnesota Constitution. These claims are not asserted in Carney's complaint and, therefore, should not be decided by the Court. *See, e.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (noting it is "axiomatic" that a court cannot deny a motion to dismiss based on claims not asserted in the complaint), *cert. denied*, 470 U.S. 1054 (1985).[1] If the Court nevertheless addresses these new claims, they also fail as a matter of law and should be dismissed.

A. Carney's Complaint Does Not Assert A Violation Of Subdivision 4(a) Of The Unallotment Statute Or The Minnesota Constitution.

Carney's complaint contains no allegation that any condition in subdivision 4(a) of the unallotment statute was violated. To the contrary, the complaint states that subdivision 4(b), setting out the statute's substantive reach, is "[t]he relevant portion of the law." Complaint ¶ 7. Carney also makes absolutely no mention of the Minnesota Constitution in his complaint, much less allege a constitutional violation.

Carney's previous submissions and public statements confirm that his complaint does not include the subdivision 4(a) and constitutional claims. Carney's memorandum in support of his cross-motion for a temporary injunction argues on the merits only that political contribution refunds are a tax refund and protected from unallotment by section 270C.435. Mem. at 2, 10. Indeed, that memorandum concludes by stating: "[T]his dispute is simply a matter of interpreting an unambiguous statute" based on Carney's claim that "[t]he State is not permitted to use the

[1] Notably, these claims were not raised in Carney's memorandum in support of his motion for a temporary injunction, which presents his arguments for why he believes he should prevail on the merits of this lawsuit.

legal process of unallotment to cancel tax refunds" *Id.* at 13. Likewise, Carney's informational statement describes this case as follows: "Plaintiff asserts that the power of unallotment under Minn. Stat. § 16A.152 does not extend to the elimination of a tax refund." Pl.'s Info. St. at ¶ 3. Leaving no doubt about the scope of this lawsuit, Carney informed the media when the case was filed that: "This is not in the context of the rest of the unallotment issue, because there you have disputes between the Legislature and the governor as to how extensive the unallotment power is. This is simply a question of an individual taxpayer's right to their money." *http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2009/07/unallotment_law.shtml.* Thus, Carney has never understood, presented or intended his complaint as making the entirely different claims agued now in the response memorandum.

It is especially inappropriate for the Court to consider the unpled, eleventh-hour claims in light of their sweeping nature. These claims question the validity of all the unallotments this biennium, not just the $10.4 million unallotment of funding for political contribution refunds. Carney, however, has demonstrated no standing to challenge any of the other unallotments. *See Rukavina v. Pawlenty*, 684 N.W.2d 525, 531-33 (Minn. Ct. App. 2004) (holding that a taxpayer or other person who is affected no differently than the citizenry at large lacks standing to challenge an unallotment), *rev. denied* (Minn. Oct. 19, 2004). Furthermore, none of the parties affected by the validity of the other unallotments is before the Court.

Carney's stake in this matter involves the $50 political contribution refund he seeks. He can suffer no harm until June 15, 2010, when interest could first accrue on the requested refund under section 290.06. By that time the legislature will have had the opportunity to determine whether to restore funding for such refunds this biennium. Under these circumstances it is particularly inappropriate to decide the broad claims not raised in Carney's complaint because

they affect numerous absent parties, and go far beyond his limited interest which may be resolved during the upcoming legislative session.

B. In Any Event, Carney's New Claims Are Without Merit.

If the Court nevertheless addresses the new claims asserted in the response memorandum, these contentions also fail as a matter of law for several reasons. First, the complaint does not state a claim for violation of subdivision 4(a) of the unallotment statute because it makes no allegation that any of the conditions of subdivision 4(a) were unsatisfied. To the contrary, the complaint acknowledges that "[t]he State of Minnesota is facing an anticipated budget shortfall for the current biennium." Complaint ¶ 7. The complaint therefore necessarily fails to state a claim under subdivision 4(a) because, as discussed above, it alleges no such violation or supporting facts. *See, e.g., Hebert v. City of Fifty Lakes,* 744 N.W.2d 226, 229, 235 (Minn. 2008) (reiterating that a complaint must allege facts to support an asserted legal claim).

Second, the public records confirm that each of the conditions of the unallotment statute was satisfied. The Commissioner of Minnesota Management and Budget, Tom Hanson, reported to the Governor and the legislature that he had "determined, as defined in Minnesota Statutes 16A.152, that 'probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the [2010-2011] biennium will be less than needed.'" Garry Aff. Exh. 1. The budget reserve account was drawn down to zero. *Id.* Commissioner Hanson's proposed unallotments to eliminate the remaining deficit were approved by the Governor, after consultation with the Legislative Advisory Commission; and Commissioner Hanson notified the legislative budget committees of the approved unallotments within fifteen days. *Id.* Exhs. 2-7. As to political contribution refunds, there was an unexpended allotment of

$10.4 million of the appropriation to pay such refunds this biennium. Garry Aff. Exh. 6, p. 2, Exh. 7; Minn. Stat. §§ 16A.011, subds. 3-4, 290.06, subd. 23(g).[2]

Carney wrongly contends that the Court should read into the unallotment statute a requirement prohibiting use of the unallotment authority at the beginning of a biennium or that the legislature and the Governor must agree to a balanced budget at the start of the biennium. The Commissioner's application of the statute tracks its literal language. In accordance with subdivision 4(a)'s express terms, the Commissioner determined that "probable receipts for the general fund will be less than anticipated" because evidence of a worsening economy and decreasing revenue collections showed that receipts for the 2010-2011 biennium would be less than projected in the February 2009 forecast as well as the November 2008 forecast. Garry Aff. Exh. 1. The Commissioner further determined, again in accordance with the explicit language of subdivision 4(a), that "the amount available for the remainder of the [2010-2011] biennium will be less than needed" because expected revenues would be less than needed to cover authorized spending. *Id.*

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[2] Carney mistakenly suggests that consideration of these public records makes the motion to dismiss one for summary judgment. *See* Pl.'s Response Mem. at 7. As noted in Defendants' opening memorandum at page 5, the law is clear that consideration of such records does not convert a motion to dismiss to one for summary judgment. *See also, e.g., Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) (stating that "court may take judicial notice of public records and may thus consider them on a motion to dismiss"). Carney cites no authority to the contrary. In any event, Carney has not submitted an affidavit establishing that there is a genuine issue of material fact as required by Minn. R. Civ. P. 56.03 and 56.05. Equally baseless is Carney's oblique suggestion that discovery may be needed to ascertain whether Commissioner Hanson made the determinations required under subdivision 4(a) of the unallotment statute. *See* Pl.'s Response Mem. at 8. These determinations are explicitly set forth in the public records. Moreover, Carney agreed in his informational statement, *after* Defendants' motion papers were filed, that no discovery was needed to decide the motion. Nor has Carney requested a continuance to conduct discovery, let alone submitted the affidavit required by Minn. R. Civ. P. 56.06 to obtain such a continuance.

It is well established that the plain language of the statute controls and "shall not be disregarded under the pretext of pursuing the spirit [of the statute]." Minn. Stat. § 645.16 (2008); *see also American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001) (stating that in applying statute's plain language, "statutory construction is neither necessary nor permitted"); *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 826-28 (Minn. 2005) (stating that plain language of statute controls whether or not reviewing court considers the result to be "reasonable" or "good policy"); *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998) (stating that courts are "prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked"). Accordingly, the plain language of subdivision 4(a) mandates rejection of Carney's contention.[3]

Carney's contention is also without merit if the Commissioner's unallotment is viewed in light of the purpose of the statute. The legislature authorized the executive branch to respond to a budget shortfall by adjusting State expenditures. *Rukavina*, 684 N.W.2d at 533 ("The entire statutory scheme [in Minn. Stat. § 16A.152] is designed to enable the commissioner of finance, with approval of the governor and after consultation with the legislative advisory commission, to compensate for deficits in the general fund."); *see also Minnesota Fed'n of Teachers v. Quie*, No. 447358, at 4 (Second Jud. Dist. Feb. 27, 1981) ("The statute in question is a clear enunciation of the intent of the legislature that the State of Minnesota must not indulge in deficit financing, and that expenditures can never exceed income during any fiscal period.") (Garry Aff. Exh. 15). In keeping with this purpose, Commissioner Hanson initiated the unallotment process after his determinations under subdivision 4(a) regarding receipts and expenditures produced the

[3] Carney is also wrong in suggesting that agency spending plans formulated under Minn. Stat. § 16A.14, subd. 3 (2008) cannot take into account unallotments made early in a biennium. Section 16A.14 contains no provision preventing consideration of unallotments.

conclusion that "the state's revenues are not anticipated to be sufficient to support planned spending in the upcoming biennium," with the resulting shortfall for the biennium expected to be $2.7 billion. Garry Aff. Exh. 1.

In addition, a Commissioner's interpretation of a statute he administers is entitled to deference. *See, e.g., In re Kleven*, 736 N.W.2d 707, 709 (Minn. Ct. App. 2007) (reiterating established principle that "an agency's interpretation of a statute that it administers is entitled to deference"). The office of the Commissioner of Finance (now Management and Budget) has administered the unallotment statute in its various iterations for almost forty years. *See Legislative History of Unallotment Power*, at 4-13 (Senate Counsel, June 29, 2009) available at *www.senate.leg.state.mn.us/departments/scr/treatise.*

Moreover, Carney's proposed construction of the unallotment statute would produce adverse consequences for the operation of State government. If the executive branch were unable to reduce allotted spending at the start of a biennium to avoid a deficit, then spending would continue until such time as the State simply ran out of money before the biennium ended, resulting potentially in a government shutdown, at least as to non-core functions. *See State ex rel Sviggum v. Hanson*, 732 N.W.2d 312, 315-17 (Minn. Ct. App. 2007) (rejecting, on procedural grounds, challenge to June 2005 court order that authorized the finance commissioner to continue to fund "core functions" of the executive branch in the absence of legislative appropriations for them); Minn. Const. art. XI (State cannot incur debt to finance its operations).[4]

[4] The potential outcome of Carney's proposed construction of the statute would be worse than the 2005 partial shutdown, when the State had money but no appropriation authorizing its expenditure. Carney's construction would mean that the State could be without money to even pay for core function expenditures ordered by a court.

Carney's constitutional claim is also without merit.[5] This claim is predicated on Carney's erroneous contention that the unallotment statute was violated. The Court of Appeals has already held that an unallotment made in conformance with the statute does not violate separation of powers. *Rukavina*, 684 N.W.2d at 535 (concluding that the statute "does not represent a legislative delegation of the legislature's ultimate authority to appropriate money, but merely enables the executive to deal with an anticipated budget shortfall before it occurs"). Moreover, because it is the legislature that granted unallotment authority to the executive branch, it is within the legislature's power to circumscribe or expand that authority by amending the statute, as it has in the past. *See Sviggum*, 732 N.W.2d at 323 (recognizing that "it is the legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses").

[5] Statutes are presumed constitutional and will be declared unconstitutional "with extreme caution and only when absolutely necessary." *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (quoting *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002)). To successfully challenge the constitutionality of a statute, the challenger "must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional." *Tennin*, 674 N.W.2d at 407 (citing *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990)).

CONCLUSION

The Court should grant Defendants' motion to dismiss Plaintiff's complaint.

Dated: October 9, 2009

Respectfully submitted,

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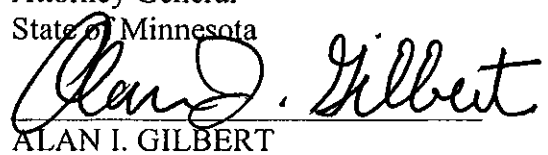

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