North Dakota Legislative Council
Prepared for the Government Finance Committee
LC# 23.9095.01000
July 2021

SENATE BILL NO. 2290 (2021)

This memorandum addresses considerations relating to the implementation of Senate Bill No. 2290 (2021) which was declared an emergency measure and enacted after the Legislative Assembly overrode Governor Doug Burgum's veto of the bill.

Senate Bill No. 2290 amended North Dakota Century Code Section 54-16-04.1 to allow the Emergency Commission, with approval of the Budget Section if the amount under consideration exceeds $50,000, to authorize any state officer to receive and expend federal money from the date the money become available until June 30 following the next regular session and limits the aggregate amount of requests to expend funds during each biennium to $50 million. The bill also amended Section 54-16-04.2 to permit the Emergency Commission, upon a finding an emergency exists and with the advice of the Office of Management and Budget, and upon the approval of the Budget Section if the amount under consideration exceeds $50,000, to authorize a state officer to receive and expend money from gifts, grants, donations, or other sources not otherwise appropriated if the Legislative Assembly has not indicated an intent to reject the money or the program.

The bill also provided if the aggregate amount of requests to be approved in a biennium under Section 54-16-04.1 exceeds $50 million or a request from a federal act that makes available more than $50 million of funds to the state, or if the aggregate amount of requests or a single request to be approved in a biennium under Section 54-16-04.2 exceeds $5 million, the request may be approved only by the Legislative Assembly during a regular legislative session or a special legislative session called by the Governor. The bill authorizes the Budget Section to approve a request under either section as it is received by the Emergency Commission if the request does not exceed $3 million or to amend and approve a request that exceeds $3 million in which case an amended and approved request is deemed to be approved by the Emergency Commission.

VETO OF SENATE BILL NO. 2290

On April 26, 2021, Governor Burgum vetoed Senate Bill No. 2290. In his veto message, he asserted the bill violated the nondelegation doctrine. As described in the North Dakota Supreme Court's holding in *North Dakota Legislative Assembly v. Burgum,* the nondelegation doctrine prohibits the Legislative Assembly from "delegat[ing] to another body the power to make law - to legislate - but it may bestow authority to execute the laws it enacts."[1] The power to make law is reserved for the Legislative Assembly as a whole. Governor Burgum argued Senate Bill No. 2290 violates the nondelegation doctrine by "expand[ing] the Budget Section's authority, allowing it to reject an Emergency Commission approval and issue a revised decision." He argued the Budget Section's authority to reject an Emergency Commission approval constitutes the power to make law. The veto message did not criticize the delegation of authority to approve spending requests to the Emergency Commission of which the Governor is one of six members.

In a divided opinion in the *Burgum* case, the Supreme Court addressed the role of the Budget Section in approving expenditures authorized by the Legislative Assembly. Chief Justice Jensen and Justice Tufte reaffirmed the court's support for the modern view of the nondelegation doctrine by stating "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 ... The power to ascertain certain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers ... However, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts." (internal citations omitted) The two justices concluded the Budget Section's role in two of the disputed provisions was an unconstitutional delegation of authority and violated the separation of powers doctrine. Justice VandeWalle agreed the provisions violated the nondelegation doctrine but only "because in delegating its authority, the legislature did not provide adequate standards to the budget section." He also stated "I am not convinced the delegation to the budget section, if proper standards were in place, would violate that doctrine." He indicated the Budget Section's role actually gave an

[1]North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 46 (N.D. 2018).

executive branch agency more flexibility rather than diminishing the agency's authority. Similarly, Justice Crothers stated the disputed Budget Section provisions violated the nondelegation doctrine, although such violations "usually can be fixed through more artful legislative drafting." He stated the court should not have delved into the question whether the provisions violated the separation of powers doctrine. Justices VandeWalle and McEvers agreed with his opinion.

The Legislative Assembly's position is the delegation of authority to the Budget Section constitutes authority to execute the law with the adequate standards and procedural safeguards described in the *Burgum* opinion and in compliance with the modern view of the nondelegation doctrine. Although the Jensen-Tufte opinion in *Burgum* indicates the Budget Section, as a group of legislators, may not be the appropriate body to carry out statutes, the VandeWalle-Crothers-McEvers opinions indicate the Budget Section can do so if given the appropriate guidelines. Additionally, the Jensen-Tufte opinion specifically states "the emergency commission may authorize the transfer of funds" even when it would be a constitutional violation for the Budget Section to do so. The Emergency Commission is comprised of only six members, four of whom are legislators, and the Jensen-Tufte opinion does not provide an explanation for treating the two entities differently under the applied analysis.

During the 66th Legislative Assembly, Senate Bill No. 2055 (2019) created the membership of the Budget Section for the purpose of providing 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 while also providing guidelines for budget requests. The guidelines established through the passage of Senate Bill No. 2055 render the Governor's reliance on the nondelegation doctrine moot as the guidelines are consistent with the VandeWalle-Crothers-McEvers opinions, which indicated delegations of authority within appropriate standards to the Budget Section would not violate the nondelegation doctrine. Senate Bill No. 2055 (2019) was codified as Section 54-35-02.9 and delineates the parameters for the Budget Section to consider when evaluating a 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.

In his veto message, Governor Burgum also stated the trigger for requiring special legislative sessions may result in the Legislative Assembly violating the 80-day limitation on sessions. However, the Governor neglected to note the language in Section 7 of Article IV of the Constitution which specifically states days spent in special sessions are excluded from the 80-day limitation. Senate Bill No. 2290 does not create a risk of violating the limitation on the length of legislative sessions.

AUTHORITY TO APPROPRIATE FUNDS

Section 12 of Article X of the Constitution of North Dakota provides all public money, from whatever source derived, must be remitted to the State Treasurer monthly for deposit in the state treasury and may be spent only pursuant to legislative appropriations. The North Dakota Supreme Court is clear in holding that the power to appropriate money lies with the Legislative Assembly.[2] Section 54-16-03 provides an agency head may not expend more money than the Legislative Assembly appropriated or use money appropriated for one purpose for another purpose. In 1991, in *Red River Human Services Foundation v. North Dakota Department of Human Services*, the North Dakota Supreme Court noted the court has "consistently held that an appropriation is the setting apart of a definite sum of money for a specific purpose in such a way that public officials are authorized to spend that sum, and no more, for the specified purpose."[3] Federal and special funds exceeding the cap provided in Senate Bill No. 2290 have not been appropriated and may not be spent. While the language in Senate Bill No. 2290 can be interpreted as providing an appropriation of the funds up to the $50 million cap, subject to the conditions in the bill, the language could be clarified to make the appropriation more explicit.

[2]North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 52. See also Trinity Medical Center v. North Dakota Bd. of Nursing, 399 N.W.2d 835, 841 (N.D. 1987) (quoting Wilder v. Murphy, 56 N.D. 436, 218 N.W. 156, 159 (1928)).
[3]1477 N.W.2d 225, 228 (N.D. 1991).

EMERGENCY COMMISSION

Chapter 54-16 establishes the Emergency Commission on which the Majority Leaders of the Senate and House of Representatives, the Appropriations Committees Chairmen of the Senate and House of Representatives, the Governor, and the Secretary of State serve as members. The role of the Emergency Commission is to consider budgetary issues during an emergency. Sections 54-16-04.1 and 54-16-04.2 set forth the procedure for state agencies to gain authorization from the Emergency Commission and Budget Section to accept and disburse federal and other funds. In his veto message, the Governor suggests the ability of the Budget Section to amend the actions of the Emergency Commission violates the separation of powers doctrine. Although the Court in *Burgum* acknowledged the authority of the Emergency Commission to authorize the transfer of funds during an emergency, the court did not provide a basis for treating the Emergency Commission and Budget Section differently.

Allowing the Emergency Commission to approve more than $50 million without input from the Legislative Assembly could present constitutional challenges relating to the nondelegation and separation of powers doctrines because a group of six individuals, only four of whom are legislators, would be responsible for appropriating millions of dollars without clear guidelines or the power to appropriate funds which lies exclusively with the legislative branch. Based on the Governor's reasoning, if the Budget Section is unconstitutional, the use of the Emergency Commission to achieve the same result of approving funding requests, although supported by two justices, also would be unconstitutional. If the Budget Section and Emergency Commission approval process were determined to be inconsistent with constitutional appropriation requirements, the Governor may have to call a special session for the Legislative Assembly to appropriate any federal or special funds that become available during the biennium.

SUMMARY

Section 12 of Article X of the Constitution of North Dakota requires the appropriation of funds by the Legislative Assembly, and Senate Bill No. 2290 arguably appropriated a maximum of $50 million, subject to approval by the Budget Section consistent with the holding in *Burgum* and other conditions. The bill does not require the Governor to call a special session. However, if there is a desire to use funds in excess of the $50 million cap before the next regular session of the Legislative Assembly, the Governor would need to do so to satisfy the constitutional requirement for the Legislative Assembly to appropriate public funds before the funds may be spent. Absent the use of the process outlined in Senate Bill No. 2290, requests for the use or transfer of funds in excess of the limitations in the bill should not be approved unless the Legislative Assembly appropriates the funds.