

**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).

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.”³

The Supreme Court concluded that the partial veto by Governor Link was not authorized by the Constitution and had no effect because the vetoed section of the bill was not a separate and distinct provision which could be removed without affecting the other provisions of the measure because the remaining parts of the bill were not workable legislation and the primary purpose of the bill was destroyed.⁴

The other instructive analysis regarding governors’ vetoes is found in a 2001 Attorney General’s opinion.⁵ That opinion addressed the question of whether the Governor has authority to veto an item in an appropriation bill when the vetoed item contains no appropriation, condition, or restriction on an appropriation. The item was a general substantive provision that was not related to any appropriation.⁶

The opinion stated, “[t]o permit the Legislature to include general substantive provisions in appropriation bills, but not permit the Governor to veto those provisions, would disrupt an essential check and balance and violate the principle of separation of powers.”⁷ This opinion concluded, “it is my opinion the Governor’s item veto power includes the power to veto portions of an appropriation bill not dealing with appropriations.”⁸

You ask whether several vetoes issued by Governor Burgum after the 2017 legislative session adjourned exceed the veto authority of the Governor found in section 9 of art. V of the North Dakota Constitution. I will examine the vetoes in the four bills you asked about.

Governor Burgum vetoed three parts of S.B. 2003, 2017 N.D. Leg. (the budget of the North Dakota University System): all of section 6, a portion of a sentence in section 18, and a portion of a sentence in section 39.

Section 6 of S.B. 2003, 2017 N.D. Leg., which was vetoed in its entirety, reads as follows:

SECTION 6. A new section to chapter 15-10 of the North Dakota Century Code is created and enacted as follows:

³ *Id.* at 270- 271.

⁴ *Id.*

⁵ N.D.A.G. 2001-F-04.

⁶ See N.D.A.G. 2001-F-04.

⁷ N.D.A.G. 2001-F-04.

⁸ *Id.*

Capital project and capital lease requests - Maintenance reserve account.

1. Notwithstanding any existing agreements, an institution under the control of the state board of higher education shall obtain approval from the legislative assembly before the institution acquires any additional facility space to be used by the institution for any purpose, if the acquisition would result in additional operating costs funded from any source. This subsection does not apply to operating lease agreements that preclude the ownership of the leased facility.
2. Notwithstanding any existing agreements, an institution under the control of the state board of higher education shall obtain approval from the legislative assembly before an institution purchases, rents, occupies, or otherwise utilizes a building or any portion of a building for a purpose that directly or indirectly supports or relates to the institution's educational or administrative functions if the building is located more than ten miles from the campus of the institution. This subsection does not apply to buildings utilized by an institution to offer dual credit courses, buildings utilized by the agricultural experiment station and research extension centers, and buildings utilized by the North Dakota state university extension service. For purposes of this section, "campus" means the campus of the institution under the Federal Clery Act [Pub. L. 105-244; 20 U.S.C. 1092(f)].
3. An institution under the control of the state board of higher education may undertake a facility renovation project only if the project will reduce the deferred maintenance amount of the facility by no less than seventy five percent of the total cost of the renovation. The institution shall maintain documentation that demonstrates the cost and scope of the deferred maintenance reduction that results directly from the renovation. This subsection does not apply to projects undertaken solely to correct building code deficiencies or to installations of infrastructure determined by the board to be essential to the mission of the institution.

4. Facility construction and renovation projects undertaken by an institution under the control of the state board of higher education must conform to campus master plan and space utilization requirements approved by the state board of higher education.
5. An institution that obtains legislative approval under subsection 1 must establish a maintenance reserve fund of three percent of the total construction cost or replacement value, whichever is greater, of the acquired space. The institution's plans for funding the maintenance reserve fund must be included in the request for legislative approval under subsection 1. Maintenance reserve funds must be deposited in an account under the control of the state board of higher education before the acquired space may be occupied, and the funds may be used for maintenance repairs after the total deferred maintenance of the space exceeds thirty percent of its replacement value. The funds may not be used for any other purpose. This subsection does not apply to additional space acquired through the sale of revenue bonds that require by covenant the establishment of maintenance reserve funds.

Subsections 1 and 2 direct that an institution under the control of the State Board of Higher Education obtain legislative approval before it acquires, purchases, rents or utilizes a building. Subsection 5 states that an institution that obtains legislative approval under subsection 1 must establish a maintenance reserve fund. If not vetoed, the language in subsections 1, 2, and 5 requiring legislative approval would apply on and after July 1, 2017, and would not have applied to any appropriations made during the 2017 legislative session, because that session was adjourned on April 27, 2017. Thus, subsections 1, 2, and 5 do not deal with any appropriation in S.B. 2003, 2017 N.D. Leg. Based on N.D.A.G. 2001-F-04, subsections 1, 2, and 5 were properly vetoed by the Governor.⁹

In contrast to subsections 1, 2, and 5, subsections 3 and 4 do not require legislative approval. Subsection 3 authorizes an institution to “undertake a facility renovation project” only if certain requirements are met. Subsection 4 states that “[f]acility construction and renovation projects” must meet certain other requirements. If not vetoed, this language in subsections 3 and 4 establishes certain requirements for facility construction and renovation projects that would become effective July 1, 2017.

⁹ These subsections would not have taken effect until the next legislative session, if at all.

According to the Office of Management and Budget, S.B. 2003 does make appropriations for facility construction and renovation projects and the Legislature intended for subsections 3 and 4 to apply to those projects. The \$168,505,000 appropriated for capital projects in S.B. 2003 is for renovation of two buildings at the University of North Dakota and three North Dakota State University projects for new buildings and renovations. Therefore, the conditions and restrictions in subsections 3 and 4 are tied to a specific appropriation in S.B. 2003.

The Governor's veto of subsections 3 and 4 constitutes an attempt to veto conditions or restrictions on appropriations in the bill without vetoing the appropriations themselves. Therefore, based on the *Link* case, the veto of subsections 3 and 4 in section 6 of S.B. 2003, 2017 N.D. Leg., in my opinion, is not effective.

Governor Burgum also vetoed language in section 18 of S.B. 2003, as underlined below:

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. (emphasis added).

Section 18 is entitled "Dickinson State University – Uses of Funds" which is a list of the Legislature's conditions that Dickinson State University must follow in order to receive appropriations. This language in subsection 3 relates to the nursing program at Dickinson State University and is a condition tied to the funds appropriated in section 1 of S.B. 2003. Therefore, based on the *Link* case, the Governor's veto of a portion of a sentence in section 18 of S.B. 2003, 2017 N.D. Leg., was not effective because it is an attempt to veto a condition or restriction without vetoing the corresponding appropriation.

Finally, section 39 of S.B. 2003 was vetoed as indicated below by the underlined portion:

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. (emphasis added).

Section 39 merely states legislative intent regarding future general fund appropriations. Thus, it has nothing to do with an appropriation made in S.B. 2003. Future legislative assemblies would be free to disregard that statement of legislative intent or not, as it is a fundamental constitutional principle that one legislative assembly may not in any way

restrict or bind future legislative action.¹⁰ Therefore, the veto of a portion of a sentence in section 39 of S.B. 2003, 2017 N.D. Leg., was authorized based on N.D.A.G. 2001-F-04.

Governor Burgum also vetoed the language underlined below in section 12 of S.B. 2018, 2017 N.D. Leg.:

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. (emphasis added).

By directing that \$300,000 of a \$2,250,000 appropriation be used for a particular purpose, the Legislature, in effect, appropriated \$300,000 for that purpose. Removal of the \$300,000 appropriation for “an organization that provides workplace safety” is sufficiently separate and distinct that the “entrepreneurship grants and voucher program” in the bill remains workable legislation and still comports with the fundamental purpose the Legislature intended. It is my opinion that the veto of a portion of section 12 of S.B. 2018, 2017 N.D. Leg., was authorized by the Constitution.

Governor Burgum vetoed H.B. 1020, 2017 N.D. Leg., as indicated below by the underlined portion:

¹⁰ N.D.A.G. 82-75; N.D.A.G. 87-16.

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. (emphasis added).

This is a veto of a restriction on an appropriation. A governor may veto a restriction or condition on an appropriation only if he also vetoes the appropriation.¹¹ Here, the corresponding appropriation was not vetoed, so the veto of a portion of section 5 of H.B. 1020, 2017 N.D. Leg., would not be effective.

Although this veto is not effective, there remains the question of whether the condition regarding budget section approval imposed in H.B. 1020 is itself constitutional. In past opinions, this office has questioned the constitutionality of the Budget Section's involvement.¹² I will address this issue further after I discuss the veto related to S.B. 2013, 2017 N.D. Leg., as the constitutionality of the Budget Section's approval is also raised by S.B. 2013.

Finally, a portion of section 12 of S.B. 2013, 2017 N.D. Leg., was vetoed by Governor Burgum as indicated by underlining below:

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

¹¹ *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979), N.D.A.G. 93-F-05.

¹² See N.D.A.G. 2007-L-08, N.D.A.G. 93-F-05, N.D.A.G. Letter to Treadway (Nov. 6, 1991), N.D.A.G. Letter to Rayl (Sept. 25, 1987).

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. (emphasis added).

The approval of the Budget Section is a restriction on spending \$1,800,000 of the \$3,600,000 appropriation. A governor may veto a restriction on an appropriation only if he also vetoes the appropriation.¹³ Here, the Governor did not veto the appropriation restricted by the second sentence in section 12. Therefore, it is my opinion the vetoed sentence in section 12 of S.B. 2013, 2017 N.D. Leg., would not be effective.

However, the vetoed language gives authority to the Budget Section of the Legislative Assembly to, in effect, veto a \$1,800,000 appropriation of the Legislature. The Budget Section is given the authority to determine if this money should be spent or not, with no procedural safeguards or standards.¹⁴ This appears, once again, to raise the question whether the role delegated to the Budget Section by the Legislature is constitutional.

The North Dakota Supreme Court has not considered whether the Legislature's delegation to the Budget Section approval constitutes a violation of the constitutional separation of powers doctrine. 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 past opinions:

It is presumed when construing a statute that the Legislature intended to comply with the constitutions of North Dakota and of the United States and any doubt must be resolved in favor of a statute's validity. Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994); Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D. 1945); N.D.C.C. § 1-02-38(1). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984).

¹³ *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979), N.D.A.G. 93-F-05.

¹⁴ See N.D.A.G. 2007-L-08 citing N.D.A.G. 92-15 ("North Dakota follows 'the modern view of the delegation doctrine which recognizes that, in a complex area, it may be necessary and appropriate for the legislature to delegate in broad and general terms, as long as there are adequate procedural safeguards and adequate standards'").

Also, a statute will only be found unconstitutional upon concurrence of four of the five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. “One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.” S. Valley Grain Dealers Ass’n v. Bd. of County Comm’rs of Richland County, 257 N.W.2d 425, 434 (N.D. 1977).¹⁵

However, this office has considered this issue on three different occasions over the last 30 years.

In 1987, the Attorney General issued an opinion relating to a law that delegated authority to the Budget Section to make budgetary cutbacks caused by initiative or referred measures.¹⁶ The Attorney General stated “there is considerable doubt that the Budget Section has any Constitutional Authority in the process [of reducing the budgets] in light of relevant United States Supreme Court decisions.”¹⁷

A 1991 Attorney General opinion concluded 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.”¹⁸ The opinion explained that the Budget Section of the Legislative Council cannot fill the void of the Legislature when it is not in session and that the Budget Section’s approval action was “inappropriate because it violates the separation of powers doctrine.”¹⁹

In the most recent opinion in 2007, I examined a bill that granted the Budget Section of the Legislative Council authority to veto the decision made by the Emergency Commission in approving one of the three correctional facility building options.²⁰ In that opinion, I explained the application of the separation of powers doctrine as it applied to the Budget

¹⁵ N.D.A.G. 2003-L-21 and N.D.A.G. 2007-L-08.

¹⁶ N.D.A.G. Letter to Rayl (Sept. 25, 1987) (“[T]he 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*”) (emphasis added).

¹⁷ *Id.* The two United States Supreme Court decisions examined in N.D.A.G. Letter to Rayl (Sept. 25, 1987) are *I.N.S. v. Chadha*, 462 U.S. 919 (1983) and *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

¹⁸ N.D.A.G. Letter to Treadway (Nov. 6, 1991).

¹⁹ *Id.*

²⁰ N.D.A.G. 2007-L-08.

Section as an agent of the Legislature.²¹ I determined that if a court were to rule on the matter, it would determine that the provision in the law that authorized the Budget Section of Legislative Management²² to approve or reject a plan to construct or model state correctional facilities would be unconstitutional as a violation of the separation of powers doctrine.²³

Once again, we have two bills that delegate authority to the Budget Section of Legislative Management. House Bill 1020, 2017 N.D. Leg., requires the State Water Commission to secure approval from the Budget Section before it may transfer funding among four listed water related items. The bill does not include any guidelines or direction to be used by the Budget Section when considering the transfers. Likewise, the Budget Section is given authority in S.B. 2013, 2017 N.D. Leg., to spend \$1.8 million of a \$3.6 million appropriation to the Commissioner of University and School Lands for an information technology project, without any guidelines, procedural safeguards or adequate standards.

Specific direction by the Legislature is important in determining whether a power is delegable or non-delegable. Generally, except as otherwise provided in the Constitution, the Legislature may not delegate legislative powers to others, including a subset of its members, or to private citizens.²⁴ The North Dakota Supreme Court explained:

[T]he true distinction between a delegable and non-delegable power was whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature. 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.²⁵

²¹ See generally N.D.A.G. 2007-L-08.

²² H.B. 1436, 2009 N.D. Leg., replaced “Legislative Council” with “Legislative Management.” See 2009 N.D. Sess. Laws, ch. 482.

²³ N.D.A.G. 2007-L-08.

²⁴ *Kelsh v. Jaeger*, 641 N.W.2d 100 (N.D. 2002) (citation omitted). See *MCI Telecomms. Corp. v. Heitkamp*, 523 N.W.2d 548, 554 (N.D.1994); *Eklund v. Eklund*, 538 N.W.2d 182, 189 (N.D. 1995) (Sandstrom, J., concurring) (under our constitutional system, the legislature may not delegate to itself, or to a subset of its members, executive or judicial functions; neither may the legislature delegate legislative power to a subset of its members).

²⁵ *Kelsh*, 641 N.W.2d at 109.

In *Kelsh*, 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).