

N.D.A.G. Letter to Rayl (Sep. 25, 1987)

September 25, 1987

Mr. Richard L. Rayl
Director
Office of Management and Budget
State Capitol
Bismarck. ND 58505

Dear Mr. Rayl:

Thank you for your letter of July 17, 1987, in which you request my formal opinion on the proper interpretation of Senate Bill No. 2536 (N.D.C.C. § 54-44.1-13.1) as passed by the Fiftieth Legislative Assembly. In your letter, you explain that your questions have arisen in connection with the referral of the sales tax on cable TV services which has suspended the tax pending a vote of the people.

N.D.C.C. § 54-44.1-13.1 states as follows:

54-44.1-13.1. APPORTIONMENT OF REDUCTIONS IN SPENDING AUTHORITY CAUSED BY AN INITIATIVE OR REFERENDUM ACTION. If as a result of any action taken pursuant to article III of the Constitution of North Dakota the moneys available in the state general fund or in any special fund in the state treasury are or will be reduced or eliminated, the 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. Notwithstanding the provisions of section 54-44.1-13, the authority to make reductions pursuant to this section applies equally to all entities of the executive, legislative, and judicial branches.

Your first question regarding N.D.C.C. § 54-44.1-13.1 is whether the director of the budget is required to submit to the Budget Section across-the-board cuts or whether the reductions may vary from agency to agency. The statute requires that the director of the budget reduce "affected budgets by a percentage sufficient to cover the estimated losses." It is my interpretation that the term "a percentage" indicates that a uniform reduction for all affected budgets is to be submitted by the director of budget to the Budget Section of the Legislative Council.

I recognize that the legislative history of Senate Bill No. 2536 indicates that the original text of the bill contained the term "uniform percentage" and based on that history it could

be argued that the qualifier "uniform" was removed in an effort to afford the director of the budget more discretion in making the required reductions. However, such legislative history is relevant only where the statute is ambiguous on its face. See N.D.C.C. § 1-02-39; State for Benefit of Workmen's Compensation Fund v. E.W. Wylie Company, 58 N.W.2d 76 (N.D. 1953). Inasmuch as the term "a percentage" unambiguously requires a uniform reduction for all affected budgets, the legislative history is not persuasive in interpreting the statute.

Additionally, an interpretation of N.D.C.C. § 54-44.1-13.1 that affords unfettered discretion to the director of budget in making the budget reductions renders the statute subject to a constitutional challenge under the delegation doctrine. On the other hand, an interpretation requiring across-the-board cuts is not susceptible to a successful challenge under the delegation doctrine. The North Dakota Supreme Court has indicated that if a statute is susceptible to two constructions, one which will be compatible with the constitutional provisions or one which will render the statute unconstitutional, the construction which will make the statute valid must be adopted. Paluck v. Board of City Comm'rs, 307 N.W.2d 852, 856 (N.D. 1981). Therefore, even if I determined that the statute is ambiguous with respect to the discretion afforded the director of budget in making the required reductions, I would construe the statute in a manner requiring across-the-board cuts so as to remove any doubt as to its constitutional validity.

Your second and third questions relate to the authority of the Budget Section of Legislative Council over the execution of N.D.C.C. § 54-44.1-13.1. Before answering your specific questions, I will generally discuss the constitutionality of the Budget Section's role in executing this law.

On two recent occasions, the United States Supreme Court has had the opportunity to analyze the constitutionality of federal legislation whereby Congress reserved a role in executing the law. In I.N.S. v. Chadha, 462 U.S. 919 (1983), the Court struck down a one-house "legislative veto" provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make:

Disagreement with the Attorney General's decision on Chadha's deportation -- that is, Congress' decision to deport Chadha -- no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Id. at 945-55.

The United States Supreme court was presented with a similar issue involving separation of powers in Bowsher v. Synar, 106 S. Ct. 3181 (1986). In that case, the Supreme Court invalidated the "Gramm-Rudman-Hollings Act" on the basis that it permitted an officer

controlled by Congress to execute the laws. In holding that this kind of congressional control over the execution of laws is constitutionally impermissible, the Court stated as follows:

[A]s Chadha makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation. (Citations omitted.) By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the act and has intruded into the executive function. The Constitution does not permit such intrusion.

Id. at 3192.

The above federal constitutional analysis would be persuasive in determining the permissibility, under North Dakota's constitution, of the Budget Section's role in the execution of N.D.C.C. § 54-44.1-13.1.

Clearly, there exists a substantial question whether the role reserved by the legislature in executing N.D.C.C. § 54-44.1-13.1 impermissibly usurps executive functions and violates fundamental separation of powers principles.

Your second question is whether the Budget Section has the authority to approve cuts that are varying in percentage from agency to agency and whether they can approve variations in the plan submitted by you. N.D.C.C. § 54-44.1-13.1 clearly contemplates that the reduction plan submitted by the director of the budget needs the approval of the Budget Section but does not authorize the Budget Section to modify the reduction plan. It is my opinion, therefore, that the Budget Section of the Legislative Council is not authorized by N.D.C.C. § 54-44.1-13.1 to modify the reduction plan submitted by the director of the budget.

Your third question asks whether the Budget Section may disapprove or veto cuts altogether. N.D.C.C. § 54-44.1-13.1 clearly requires the approval of the Budget Section of the Legislative Council in order that the reduction plan submitted by the director of the budget may be lawfully effectuated. It is my opinion, therefore, that under N.D.C.C. § 54-44.1-13.1 the Budget Section may disapprove of the submitted reduction plan and prevent the implementation thereof. Again, I must emphasize, however, that there is considerable doubt that the Budget Section has any constitutional authority in the process in light of relevant United States Supreme Court decisions.

You have also communicated to a member of my staff that you desire to know whether N.D.C.C. § 54-44.1-13.1 mandates that the director of the budget prepare a reduction plan and submit it to the Budget Section for approval. N.D.C.C. § 54-44.1-13.1 states that the director of the budget "shall reduce affected budgets by a percentage sufficient to cover the estimated losses." The term "shall" is generally regarded as making a provision

mandatory. See 73 Am. Jur.2d Statutes 22 (1974).

Nevertheless, the term "shall" has been given a directory or permissive meaning when such construction is necessary to give effect to the legislative intention Anderson v. Peterson, 54 N.W.2d 542, 552-553 (N.D. 1952). The present statute, N.D.C.C. § 54-44.1-13.1, does not evince a legislative intention that the term "shall" is to be given a directory or permissive meaning. It is my opinion, therefore, that the director of the budget must prepare a budget reduction plan in regard to the cable TV sales tax referral and submit this plan to the Budget Section of the Legislative Council.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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