

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

ROBERT CARNEY, on behalf of
himself and all others similarly
situated

Plaintiff,

v.

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 PLAINTIFF'S
MOTION FOR TEMPORARY
INJUNCTION

INTRODUCTION

Plaintiff Robert Carney ("Carney") submits this Memorandum in response to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Injunction. Because Defendants have mischaracterized the law and Carney's arguments, and because Carney has demonstrated the elements for a temporary injunction, his motion should be granted.

I. WHILE CARNEY CONTINUES TO ASSERT THAT THE POLITICAL CONTRIBUTION REFUND IS A TAX REFUND, THIS DEFINITION IS NOT DISPOSITIVE OF THE ISSUES BEFORE THIS COURT.

Defendants assert that Carney's reliance Minn. Stat. § 270C.435 is solely based "on the grounds that it applies to a tax refund," but this is not the case. (Defs.' Mem. at 2.) Most importantly, for the purposes of this Motion, Carney has asserted that the Commissioner has injured him and those similarly situated through his decision not only to deny any refunds, but also by refusing to follow the statutorily required processes, and specifically by altering the refund forms found on the Department of Revenue's website. Irrespective of the classification of the refunds owed to the taxpayers of Minnesota, the unilateral decision to change the statutory scheme established through the legislative process is the essential issue in this case, and the subject of this request for equitable relief.

The fact remains that Carney continues to assert that this is, in fact, an issue about a tax refund. To begin with, only Minnesota **taxpayers** are eligible to receive the refund; this is not a refund based solely on residency, participation in the political process, or any other establishing criteria. There is also a great weight of practical evidence that this is a tax refund: (1) the Political Contribution Refund ("PCR") is codified as part of the section of the Code devoted to taxation,

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Minn. Stat. § 290.06 (2008) entitled “**RATES OF TAX; CREDITS**”; (2) the history of the PCR is one of a tax credit that was amended to be a tax refund; and (3) the very form used in order to take advantage of the tax refund program is found on the State of Minnesota tax website. Finally, as noted previously, the Eighth Circuit, in *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1555 (8th Cir. 1996), specifically called this program a tax refund, stating that “the tax credit became the present tax refund in 1991.” Plaintiff has previously argued that the status of the PCR as a tax refund places the state in a position of a creditor, and in the final analysis, whether the PCR is a tax refund or a payment payable, the legislature has established a requirement, through Minn. Stat. § 270C.435 (2008), that these monies be paid directly to the taxpayer to whom they are owed, and not diverted as was done here.

II. DEFENDANTS OVERSTATE THE FORCE OF THE “NOTWITHSTANDING CLAUSE” BY ALLOWING IT TO ELIMINATE THE PCR RATHER THAN MERELY “SUSPEND OR DEFER” IT.

As argued in the previous Memorandum, to eliminate the program goes beyond the unallotment authority, even assuming that Defendants followed the procedures required under Minn. Stat. § 16A.152. In other words, the most that Defendants can say under the unallotment statute is that “the state is not going

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to pay the PCR this biennium now that it is apparent that revenues are less than anticipated,” but the Defendants cannot convert the unallotment authority to make the statement they have made, which is essentially that the political contribution refund statute is void.

Defendants argue that because the unallotment took place before Carney’s political contribution was made it was never a payment payable, but this assumes that the elimination of the statutory program that would create the payable to Carney was proper. The lack of authority to eliminate this program is the very foundation of this case. Carney argued in his previous Memorandum that Defendants lacked the statutory authority to undertake the unallotment. Defendants are correct that if it is assumed that Defendants had the power to **eliminate** the PCR as of the start of the biennium, then it follows that no refund was created to generate a payment payable to Carney, or any other similarly situated taxpayer. To assume that the payment payable has not been generated requires resolving the very issue in dispute—did Defendants have the authority under Minn. Stat. § 16A.152 (2008) to eliminate the PCR?

Defendants’ position requires the assumption that the “notwithstanding clause” preempts the **creation** of the refund obligation, but this is not what the

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statute says. “Notwithstanding any other law to the contrary, the commissioner is empowered to **defer or suspend** prior statutorily created obligations. Minn. Stat. § 16A.152 subd. 4(b) (emphasis added). If it is assumed that the statutory predicates were followed, and the legislature had not enacted Minn. Stat. § 270C.435, it would be reasonable for an unallotment to recognize the existence of a statutorily-required refund and withhold payment based on the lack of funds required. By eliminating the PCR, and continuing to deny the existence of the PCR for this biennium, Defendants have overstepped their constitutional and statutory authority.

III. THE UNALLOTMENT AUTHORITY WAS CLEARLY DESIGNED AS A DEVICE TO AMEOLIRATE FISCAL CRISIS, THE IMMEDIACY OF WHICH IS NOT UPON US.

As justification for the preemptive use of the unallotment power, Defendants have, in both press releases and now legal memoranda, asserted the requirement of a balanced budget at the outset of the biennium. This is inaccurate and misleading. Defendants can cite no requirement that a budget for the State of Minnesota must balance at the outset of a biennium. Defendants’ statement that for this Court “to rule that the \$10.4 Million Dollars in spending for political contribution refunds should not have been unallotted, as Carney

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seeks, would mean this amount instead should have been cut through spending on other programs this biennium to maintain the required balance budget” is simply not correct. (Defs.’ Mem., p. 6.) This Court is not being asked to make that decision, even implicitly. This Court is being asked to require Defendants to utilize the constitutional legislative processes to resolve this initial budget imbalance, and not to usurp authority that is not allocated to them under the Constitution or the laws of Minnesota. Because, as stated in the prior Memorandum, Defendants did not follow the statutorily prescribed process for invoking the unallotment authority, and therefore this process was wrongful, the question of which program does or does not get unallotted does not come before this Court.

IV. THIS COURT CAN CRAFT EQUITABLE RELIEF THAT IS NOT DISPOSITIVE OF THE CASE AS A WHOLE.

Defendants, in a footnote, narrowly construe Carney’s proposed remedies. (Defs.’ Mem., p. 6.) The payment of \$50.00 to Carney does not resolve this case. Carney’s proposed class includes those who have made contributions to political candidates and have been unable to assert their claim to the PCR. Defendants have chilled the filing of the forms necessary to generate the payment payable at issue by their public statements that the program has been eliminated, and by

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altering the forms on the Department of Revenue website to indicate that no form can be filed after July 1st for any contribution that took place after July 1st. This is a de facto elimination of the program. This Court should enjoin Defendants from continuing to deny enrollment in this statutorily created program. If, as Defendants have argued, the PCR program is "suspended," then making the forms available is still required by Minn. Stat. § 290.06, subd. 23(d). If it is eliminated, as Defendants have also said, then Defendants have overstepped their constitutional authority, and this Court should order the reinstatement of the program.

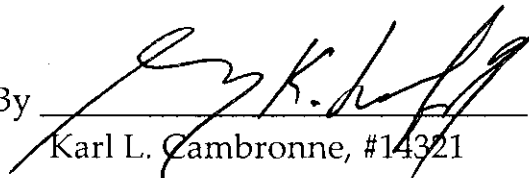
CONCLUSION

This case is not just about whether Defendants pay \$50.00 to Carney. It is about Defendants' violations of Minn. Stat. § 290.06, in addition to Minn. Stat. § 16A.152 and the constitutional separation of powers. Providing equitable relief would ensure that Defendants' action do not have the effect of concealing the full membership of the class of similarly situated persons, or continuing to chill participation in the PCR program by contributors. Defendants should not benefit from their unlawful overreaching by limiting the number of people to whom they may be liable should this case eventually be determined in favor of Carney.

Dated: October 8, 2009

CHESTNUT & CAMBRONNE, P.A.

By


Karl L. Cambronne, #14321

Gary K. Luloff, #0389057

3700 Campbell Mithun Tower

222 South Ninth Street

Minneapolis, MN 55402

(612) 339-7300

ATTORNEYS FOR PLAINTIFFS