STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff-Appellee,

v

Court of Appeals No. 280792

TERRI LYNN LAND, MICHIGAN SECRETARY OF STATE,

Ingham County Circuit No. 06-1537-AA

Defendant-Appellant.
_____/

BRIEF OF AMICUS CURIAE
MACKINAC CENTER FOR PUBLIC POLICY

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JURISDICTIONAL STATEMENT

Amicus curiae Mackinac Center for Public Policy does not contest jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. Should MCL 169.257 be read in accord with its plain language, which would prevent public bodies from administering payroll deduction plans for the benefit of a union?

Plaintiff-Appellee Michigan Education Association says:	No
Defendant-Appellant Michigan Secretary of State says:	Yes
Amicus curiae Mackinac Center for Public Policy says:	Yes

II. Should equitable estoppel prevent current or future enforcement of the correct interpretation of MCL 169.257?

Plaintiff-Appellee Michigan Education Association says:	Yes
Defendant-Appellant Michigan Secretary of State says:	No
Amicus curiae Mackinac Center for Public Policy says:	No

STATEMENT OF FACTS

At issue in this case is whether MCL 169.257 of the Michigan Campaign Finance Act (MCFA) prohibits school districts from administering paycheck withdrawals for a "separate segregated fund" (more commonly referred to as a "political action committee" or "PAC").[1] On November 20, 2006, the Secretary of State issued a declaratory ruling that school districts could not administer payroll deductions for separate segregated funds even if the union agreed to reimburse the district in advance for any costs.[2] The MEA filed the instant action, and on September 4, 2007, the trial court held that as long as the union reimbursed a school district beforehand, the district could administer the payroll deduction program that would benefit the union's separate segregated fund.

The trial court's decision appeared to be influenced in part by the Secretary of State's previous interpretations and rulings concerning other provisions of the MCFA, which the trial court apparently believed to be inconsistent. Thus, to provide this Court with the context necessary to decide this case —which is about MCL 169.257, but which has been argued in the context of companion laws — this brief will discuss some history related to the MCFA, as well as interpretive statements and rulings regarding various relevant provisions of the MCFA.

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[1] "PAC" is not used in the MCFA and comes from federal election law. See generally 2 USC § 431(4). Where necessary for style or clarity, this brief will occasionally use the term "PAC" instead of the technical "separate segregated fund."

[2] The Secretary of State is responsible for administering the MCFA and has the power to issue declaratory rulings and interpretive statements. MCL 169.215.

MCL 169.257 was originally enacted as part of 1995 PA 264. In its present form, MCL 169.257(1) reads in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].[3]

MCL 169.257(1).[4]

The instant matter arose out of negotiations between the Gull Lake Community School District[5] (GLCSD) and the Kalamazoo County Education Association/Gull Lake Education Association (KCEA/GLEA), which is the collective bargaining entity for some of the education personnel in that district and is an affiliate of the Michigan Education Association (MEA).

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[3] MCL 169.204(3)(a) concerns volunteer personal services and some *de minimis* costs.

[4] As enacted in 1995 PA 264, MCL 169.257 stated:

> (1) A public body shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a). While acting for a public body, an elected or appointed public official, employee, or any other person shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to [MCL 169.204(3)(a)].
>
> (2) A person who knowingly violates this section is guilty of a felony punishable, if the person is an individual, by a fine of not more than $2,000.00 or imprisonment for not more than 1 year, or both, or if the person is not an individual, by a fine of not more than $20,000.00.

Id. (footnote omitted) 1996 PA 590 specified that a public body (or a person acting for one) could not use "funds, personnel, office space, property, stationery, postage, vehicles, equipment, supplies, or other public resources to" make a contribution or expenditure. It also added six exceptions to this rule. 2001 PA 250 left MCL 169.257 largely untouched except for the additions of "computer hardware or software" to the list of items that could not be used to make a contribution or expenditure.

[5] It is uncontested that Gull Lake Community Schools – or any other school district – is a "public body" for purposes of the MCFA. *See* MCL 169.211(6).

The MEA contends that the MEA-PAC has existed since 1971. Brief of Plaintiff-Appellee at 2. The MEA further contends that the MEA-PAC "has been largely funded by . . . payroll deductions of MEA members. . . . [T]he payroll deductions . . . have always been funded by public bodies, *i.e.*, school districts." *Id.* A prior collective bargaining agreement between the GLCSD and the KCEA/GLEA had led to the district's administering the union's payroll deduction process for the benefit of the MEA-PAC. But in February 2006, about the time the parties were negotiating a new agreement, both the Secretary of State and the Attorney General indicated that school district administration of union PAC payroll deductions was illegal. The GLCSD and the MEA both sought declaratory rulings on this point, which eventually led to the instant action.

Further background on various provision of the MCFA is necessary before discussing the trial court's decision. MCL 169.254 states that labor associations and corporations "shall not make a contribution or expenditure." This prohibits contributions from corporations' and labor associations' general treasury funds to "state and local candidates." *Michigan State AFL-CIO v Miller*, 65 FSupp2d 634 (ED Mich 1998). In its original form, MCL 169.254 applied only to corporations. This led the Michigan Chamber of Commerce to bring an equal protection challenge, which the United States Supreme Court rejected. *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990). Having lost in court, the Michigan Chamber of Commerce sought to have the statute amended to include labor

organizations, and that change occurred with the passage of 1994 PA 117. *Michigan State AFL-CIO v Miller*, 103 F3d 1240, 1244 (6th Cir 1997).

MCL 169.255 is an exception to the general prohibition against unions' and corporations' participation in state or local elections.[6] The relevant portion of the statute allows unions and corporations to solicit for their respective separate segregated funds. MCL 169.255(2), (4). Prior to the enactment of 1994 PA 117, MCL 169.255 allowed only corporations to create separate segregated funds.[7]

The 1994 and 1995 amendments led to a number of requests for declaratory rulings and interpretive-statement letters. These will be addressed in chronological order.

In an interpretive-statement letter to Robert LaBrant on July 11, 1997, the Secretary of State discussed the implications of MCL 169.254 for reimbursement of costs associated with administering payroll deduction plans for separate segregated funds under MCL 169.255.[8] First, the Secretary of State indicated that corporations are not required to offer payroll deduction plans for unions' separate segregated funds.[9] If a corporation chooses to offer such a plan, the corporation

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[6] More precisely, MCL 169.255(1) allows unions and labor organizations to 'mak[e] contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees.'

[7] Nothing in the pleadings addresses why the MEA needed to have MEA-PAC before 1994. Almost certainly it was due to federal election law issues.

[8] A copy of this letter can be found at pages 1-8 of the following web address: http://www.michigan.gov/documents/1997_126230_7.pdf.

[9] Under federal law, if a corporation offers a payroll deduction plan for its separate segregated fund, it must offer that same option to the union. 11 CFR 114.5(k)(1). If the corporation does not have a payroll deduction plan, it need not offer one to the union. *Id*. at 114.5(k)(4).

must be reimbursed for the costs of administering the plan, because those costs are an expenditure under MCL 169.254:

> Except for establishment, administration, and solicitation of contributions to its separate segregated fund, and except for ballot questions or loans made in the ordinary course of business, section 54 of the MCFA prohibits a corporation from making a contribution or an expenditure. . . .
>
> Costs incurred in the implementation and operation of a payroll deduction plan for automatic contributions is [sic] an expenditure under the MCFA. Such costs are similar to providing postage and pre-addressed envelopes, and other costs associated with the collection and delivery of contributions. The amount of the payroll deduction is a contribution of the person from whose wages the contribution is being deducted, but costs incurred in the collection and delivery of the contributions are expenditures by the person who pays for the payroll deduction system. . . .
>
> A corporation is prohibited from making a contribution to the separate segregated fund of a labor organization. However, a labor organization may compensate a corporation for all expenses incident to its instituting a payroll deduction plan for the solicitation of contributions to the labor organization's separate segregated fund.

July 11, 1997, letter to Robert LaBrant at 8 (emphasis added). This ruling was withdrawn in 1998 due to uncertainty created by subsequent litigation.

An interpretive-statement letter to David Cahill on August 4, 1998, discussed MCL 169.257 in the context of the collection of student fees by a university for the benefit of a ballot question committee.[10] The Secretary of State indicated that "[f]rom a plain reading of the language [of MCL 169.257], it appears that the Legislature's intent . . . was to re-emphasize the ban on public bodies from using

[10] A copy of this letter can be found at pages 9-14 of the following web address: http://www.michigan.gov/documents/1998_126232_7.pdf.

public funds to make expenditures." August 4, 1998, letter to David Cahill at 4. Thus, "it is the Department's position that the University [of Michigan] would be prohibited from collecting and transferring student funds to a ballot question committee account as described." *Id.* at 6.

The Secretary of State rejected the concept that reimbursement would excuse the expenditure:

> Your review also asked whether there were other alternatives that would permit the University to collect the fees and deposit them into a ballot question committee account. In this vein, one of the written comments posited that [the Michigan Student Assembly] could "reimburse" the University for its collection and payment activities. As indicated, it appears that the Legislature's intent in 1996 was to re-emphasize the ban on public bodies from using public funds to make expenditures. If the Legislature had wished to permit exceptions to this ban, they [sic] would have done so. Therefore, the underlying prohibition in section 57 can not be avoided by permitting MSA to reimburse the University for the activities, which are themselves prohibited by section 57, without express statutory authority.

Id.

An interpretive-statement letter to Kathleen Corkin Boyle on June 15, 2001, discussed MCL 169.254 in the context of the MEA's providing hyperlinks to campaign and ballot question committee websites from the MEA's homepage (which is accessible to the public, not just to members).[11] The Secretary of State began by noting that hyperlinks, even though often not charged for, have value:

> [T]he mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value — certainly something can be free of charge but still have value. . . .

[11] A copy of this letter can be found at pages 5-12 of the following web address: http://www.michigan.gov/documents/2001_126236_7.pdf.

> . . . A hyperlink is tantamount to a form of advertising, in that it is designed to induce the Internet viewer to visit a website he or she would not ordinarily visit. It eliminates the need to learn about candidates that the user supports or opposes, finding a candidate's address (e-mail or traditional) and asking for more information. Instead, a hyperlink takes the viewer directly to the candidate — an electronic middleperson. While this process holds the potential to make campaigns and candidates more accessible, it is still something of value for the "linked" candidate, and would thus constitute an expenditure.

June 15, 2001, letter to Kathleen Corkin Boyle at 4.

Having determined that a hyperlink was an expenditure, the Secretary of State then discussed the concept of reimbursement for such an expenditure:

> A campaign does not make an expenditure or contribution to a candidate or committee if it is promptly reimbursed for the full value of goods or services provided because no transfer of value occurs. With regard to a corporation that provides the goods and services in the ordinary course of business, this "prompt reimbursement" would be that which is offered to entities that are not subject to the MCFA. With regard to corporations that do not ordinarily provide the goods or services in question, the payment must be made prior to the transaction.

Id. at 5.

An interpretive-statement letter to Representative David E. Murley on October 31, 2005, discussed MCL 169.257 in the context of public-body resolutions on ballot questions or candidates.[12] The Secretary of State indicated that resolutions related to ballot questions were appropriate but that "use of public resources to distribute or publicize that resolution beyond the regular provision of factual information regarding actions taken by the city council would result in a

[12] A copy of this letter can be found at pages 1-6 of the following web address: http://www.michigan.gov/documents/2005_-_Interpretive_Statement_142179_7.pdf.

violation of [MCL 169.257]." October 31, 2005, letter to Representative David E. Murley at 3.

Also addressed was whether a public official could call or e-mail a constituent or the media regarding his or her position on a ballot question. The Secretary of State said incidental communication was acceptable, but a concentrated attempt to disseminate the public official's views on the ballot question would be improper:

> The occasional, incidental use of public resources to communicate with a constituent or the media on a ballot question falls within this exemption, as there are no resources devoted to an effort to assist or oppose the qualification, passage or defeat of that question.
>
> However, sending a mass e-mail or mailing that expressly advocates support for a ballot question or candidate or urges constituents to vote for or against a candidate or ballot question would result in the use of public resources to make an expenditure. The use of public resources in this manner falls squarely within the [MCL 169.257] prohibition against using anything of ascertainable monetary value in assistance of, or opposition to, the nomination or election of a candidate, or the qualification, passage or defeat of a ballot question.

Id. at 3.

An interpretive-statement letter to Robert LaBrant on November 14, 2005, discussed MCL 169.254 and corporate administration of a payroll deduction plan for a union's separate segregated fund.[13] Just as in its July 11, 1997, interpretive-statement letter, the Secretary of State indicated that the administration of the payroll deduction plan constitutes an expenditure but that a reimbursement would prevent a transfer of value:

[13] A copy of this letter can be found at pages 7-8 of the following web address: http://www.michigan.gov/documents/2005_-_Interpretive_Statement_142179_7.pdf.

> If a corporation through a payroll deduction system transfers anything of ascertainable monetary value for goods, materials, services or facilities to a committee other than its own separate segregated fund, it has made an expenditure that is prohibited by [MCL 169.254] of the MCFA. If the value of those goods, materials, services or facilities can be ascertained and the corporation is reimbursed, there is no corporate expenditure because there is no transfer of value.

November 14, 2005, letter to Robert LaBrant at 2.

On February 16, 2006, the Attorney General issued an opinion indicating that under MCL 169.257 the state could not administer a payroll deduction plan for the benefit of a union's separate segregated fund. The Attorney General stated that administration of a payroll deduction plan constituted use of a public resource since use of the plan "makes" the employee's "contribution" to the separate segregated fund occur. OAG 2005-2006, No 7187, p ___ (February 16, 2006).

A reimbursement could not cure this:

> There is no basis in the plain language of [MCL 169.257] for reading in a remedy or exception to the prohibition for unions that offer to reimburse the State for its use of public resources. To do so would be contrary to the intent of the Legislature as expressed in the plain language of [MCL 169.257].
>
> . . . A labor union's offer to reimburse the State for the expenses involved in administering a payroll deduction plan to facilitate employee contributions to a political action committee would neither obviate the violation nor permit the implementation of an otherwise prohibited plan.

Id. at ___.

On February 17, 2006, the Secretary of State issued two separate interpretive-statement letters to Robert LaBrant.[14] The first letter concerned whether reimbursement for payroll deductions by a public body was possible under MCL 169.257. The letter cited both the previous day's Attorney General opinion and the Secretary of State's August 4, 1998, interpretive-statement letter regarding a university. The Secretary of State wrote:

> For these reasons, the Department concludes that the utilization of public resources for the establishment and maintenance of a payroll deduction plan on behalf of a labor organization's separate segregated fund constitutes a prohibited expenditure under the MCFA, which cannot be expunged by a labor organization's reimbursement of the public body's actual costs.

February 17, 2006, letter to Robert LaBrant (1-06-CI) at 2.

The Secretary of State recognized that it was allowing reimbursement for private-sector payroll deductions under MCL 169.254 but not for public-sector deductions under MCL 169.257. The Secretary of State justified this distinction on the grounds that many statutes and government policies prohibit political activity by governmental employees:

> These policies defend the public's interest in sequestering political campaigning from the administration of government. It is imperative to maintain strict government neutrality in elections in order to protect the integrity of the democratic process. State and local units of government, and their elected officials and employees, share a heightened duty to safeguard public resources from misuse for political

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[14] A copy of the first and second letter can be found at the following web addresses respectively:
http://www.michigan.gov/documents/Robert_S_150708_7._LaBrant_Final_Response_Public_Body.pdf
http://www.michigan.gov/documents/Robert_S_150709_7._LaBrant_Final_Response_Corp_Payroll.pdf.

On the Secretary of State's website, these documents are entitled '1-06-CI,' and '2-06-CI,' respectively which designations will be included in the cite so to avoid confusion.

> purposes. The MCFA is only one part of the state's comprehensive statutory scheme that prohibits a public body from engaging in a political campaign. A public body that administers a payroll deduction plan on behalf of a separate segregated fund violates the Act and runs afoul of this sound public policy.

February 17, 2006, letter to Robert LaBrant (1-06-CI) at 3-4.

The second letter discussed payroll deductions under MCL 169.254. The Secretary of State indicated the fact that corporations were allowed to set up payroll deduction plans for stockholders, officers, directors, etc. implied that corporations were also allowed to set up such plans for the benefit of labor unions:

> [T]he Act authorizes a corporation to establish an automatic payroll deduction plan for a separate segregated fund established under MCL 169.255(1) for the purpose of collecting contributions, if the individual contributor provides his or her written consent for the deduction on an annual basis. MCL 169.255(6). Thus a corporate employer is authorized to (1) incur expenses in connection with the collection of contributions for a separate segregated fund, and (2) operate a payroll deduction plan for the purpose of collecting those contributions. <u>It follows that a corporation may incur similar costs to those identified above in connection with the administration of a payroll deduction system for the collection of contributions to a labor organization's separate segregated fund.</u>

February 17, 2006, letter to Robert LaBrant (2-06-CI) at 2 (emphasis added). The Secretary of State reiterated that "an otherwise illegal corporate expenditure is expunged by the reimbursement, as no transfer of value occurs." *Id.* at 3. A corporation must "obtain reimbursement for the actual costs it incurs in administering a payroll deduction plan that collects contributions to a labor organization's separate segregated fund." *Id.* The corporation is responsible for making a value determination. *Id.* Where the expenditure is outside the

corporation's normal course of operation, the union must pay for it in advance. *Id*. at 4.

The Secretary of State summarized:

> A corporation is authorized to make an expenditure for administrative costs incurred in the operation of a payroll deduction plan on behalf of a labor organization's separate segregated fund, provided that the corporation receives timely, complete reimbursement for the actual amount of the expenditure. Methods for calculating corporate costs incurred in the collection of contributions for a labor organization's separate segregated fund and the time limit for repayment depend on the nature of the corporation's business. A labor organization's failure to remit timely payment for the expenditure of corporate assets must result in the suspension of the payroll deduction plan.
>
> Unlike federal law, nothing in the MCFA compels a corporation that operates a payroll deduction plan for contribution to its own separate segregated fund to offer the same opportunity to a labor organization. *See* 11 C.F.R. § 114.5. However, a corporation that voluntarily elects to finance the administrative expenses of a labor organization's separate segregated fund assumes an affirmative duty to comply with the MCFA by making an accurate calculation of its costs and obtaining full reimbursement of its expenses in a timely manner.

Id. at 4-5.

Counsel for the GLCSD took note of the above developments and sought a declaratory ruling from the Secretary of State whether the district was allowed to administer a payroll deduction plan. November 1, 2006, letter to Kevin S. Harty.[15] The school district had administered such a plan under the former collective

[15] A copy of the letter can be found at the following web address: http://www.michigan.gov/documents/sos/Kevin_S._Harty_Final_Response_Public_Body_Payroll_Deduction_Plan_178095_7.pdf.

bargaining agreement but was now disputing with the union whether such a plan could be in the new agreement.

In response to the GLCSD counsel's request, the Secretary of State referred to the Attorney General opinion, the November 14, 2005, letter to LaBrant, and the first February 17, 2006, letter to LaBrant and declared that MCL 169.257 prevents a public body from administering a payroll deduction plan. It was noted that legislation had been introduced that would allow school districts to administer payroll deduction plans for the union, but that under current law such collections were prohibited. The Secretary of State indicated that a contrary view, or one in which a union could "cure" the public body's expenditure by reimbursement, could wreak havoc with the MCFA:

> [H]ad the Department concluded that the MCFA authorized the deployment of public resources in this manner, nothing would prevent an incumbent officeholder from establishing a payroll deduction plan for the benefit of his or her candidate committee at taxpayer expense. This significant, institutional fundraising advantage would further weaken the ability of non-incumbent candidates to mount an effective challenge. . . .
>
> . . .
>
> If a political action committee or its sponsoring organization were permitted to reimburse a public body for costs attributed to the operation of a payroll deduction plan for political contributions, a public body could easily circumvent the prohibition against the use of public resources in [MCL 169.257]. The MCFA clearly prohibits government agencies from utilizing public resources to make a political contribution or expenditure, and makes no exception for the operation of a payroll deduction plan. Concluding that a political action committee's reimbursement of the government's cost would, in effect, create such a statutory exception where none currently exists.

November 1, 2006, letter to Kevin S. Harty at 3-4.

The MEA filed its own request for a declaratory ruling on payroll deductions, which led to a November 20, 2006, declaratory-ruling letter.[16] The Secretary of State cited many of the above interpretive-statement letters and noted that none of the six exceptions from MCL 169.257 applied:

> Thus, [MCL 169.257] includes six exclusive exceptions to the general rule that precludes public bodies from using government resources to make contributions and expenditures, none of which reasonably can be construed to permit a public body's expenditure for the establishment, administration, or solicitation of contributions for a separate segregated fund. *Cf.* MCL 169.255(1), 169.257(1).
>
> In the absence of any statutory provision that unequivocally permits a public body to administer a payroll deduction plan on behalf of a committee, the Department is constrained to conclude that the school district is prohibited from expending government resources for a payroll deduction plan that deducts wages from its employees on behalf of MEA-PAC. It is the province of the legislature, and not the Department, to amend the MCFA to provide such express authority.

November 20, 2006, letter to Kathleen Corkin Boyle at 4.

The Secretary of State rejected the argument that payroll deductions must be proper given the department's past approval of the content and design of the MEA's voluntary consent forms, which are meant to comply with the "paycheck protection" provision found in MCL 169.255(6):

> While the question presented for the Department's consideration makes reference to the voluntary consent form that MEA members are required to complete in compliance with [MCL 169.255(6)], this procedural requirement is irrelevant in answering the threshold question of whether a public body may properly administer a payroll deduction plan for a separate segregated fund. Despite the assertion that the Department's approval as to form of the MEA's annual

[16] A copy of this letter can be found at the following web address: http://www.michigan.gov/documents/sos/Kathleen_Corkin_Boyle_Final_Response_11-20-2006_178712_7.pdf.

> consent acknowledgement document constituted tacit approval of a public body's use of public resources to manage a payroll deduction plan for political contributions, the propriety of a public body's operation of such a program was not raised at the time.

November 20, 2006, letter to Kathleen Corkin Boyle at 4.

Citing the Attorney General opinion, the August 4, 1998, letter to David Cahill, and the first February 17, 2006, letter to Robert LaBrant, the Secretary of State reiterated that reimbursement would not prevent the finding of a violation of MCL 169.257.

The MEA filed suit and claimed that from the time MCL 169.257 took effect in 1995 until the issuance of the November 20, 2006, declaratory ruling, it was common knowledge that the MEA was having school districts administer payroll deductions for the benefit of the MEA-PAC. Further, the MEA noted that in the context of MCL 169.254, the Secretary of State had allowed unions to pay reimbursement for corporations that were administering payroll deduction plans on a union's behalf.

On September 4, 2007, Ingham Circuit Court Judge Brown entered an order that allowed payroll deduction plans if the union reimburses the school district in advance for all costs in implementing the system:

> This Court finds that [the Secretary of State]'s Declaratory Ruling is arbitrary, capricious, and an abuse of discretion. Relying on the plain language of [169.257], the administration of payroll deductions to a union PAC constitutes an "expenditure" under the MCFA. However, where the costs of administration are reimbursed, no transfer of value to the union PAC occurs, and therefore, an "expenditure" has not been made within the meaning of the MCFA. Thus, a public body may administer payroll deductions so long as all costs of making the deductions are reimbursed by the PAC. [MCL

> 169.257] does not explicitly prohibit a public body from administering the payroll deduction of its employees.
>
> . . . [T]his Court does not agree that the Declaratory Ruling in the present case is consistent with past rulings and statements of Respondent. Drawing from the history of [the MEA] and [the Secretary of State] regarding payroll deductions of MEA members, Respondent has not in the past considered these deductions to be unlawful, and the declaratory ruling challenged in this case represents a new interpretation of the statute. While this Court agrees . . . that the Secretary of State is free to prospectively make changes in the course and direction of declaratory rulings, such changes must not be arbitrary, capricious, or in violation of any other law. Respondent made such an arbitrary change when it issued the declaratory ruling in this case. Therefore, this Court holds that public bodies such as the Gull Lake Public School system may administer payroll deductions requested by their employees, provided that all expenses of making the deductions are borne by the PAC or its sponsoring labor organization and are paid in advance.

Order of September 4, 2007, at 9.

The Secretary of State sought leave to appeal, which this Court granted on an expedited basis.

ARGUMENT

I. MCL 169.257 should be read in accord with its plain language, which would thereby prevent public bodies from administering payroll deduction plans for the benefit of a union.

A. Standard of Review

MCL 24.263, in pertinent part, states: "A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case." The dispute here is legal, not factual. The courts may set aside an agency's decision if it is "[i]n violation of the constitution or a statute" or is "[a]ffected by other substantial and material error of law." MCL 24.306.

The standard of review for an agency interpretation of an ambiguous statute within the agency's purview is unsettled at this time. The Michigan Supreme Court recently asked for briefing on "what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview." *SBC Michigan v Michigan Pub Serv Comm*, 480 Mich 977 (2007). This follows the Michigan Supreme Court's admission that:

> We acknowledge that our past case law has not been entirely consistent regarding the subject of the amount of deference to be given when an administrative agency with expertise in its field construes a statute governing the area regulated by the agency. The unique facts of this case, involving a protracted period of litigation, during which statutes were both enacted and repealed, makes this case poorly suited to resolve such inconsistencies. Accordingly, we express no view on such matters, leaving their resolution for another day.

In re MCI Telecomm Complaint, 460 Mich 396, 424 n. 4 (1999). Thus, the standard of review regarding an ambiguous statute within an agency's purview is an open

question. The possibilities fall along a continuum, with no deference to agency interpretation at one extreme and the federal courts' all-but-complete *"Chevron"* deference[17] at the other.

But in order for the standard-of-review issue to arise, a statute must be ambiguous. The Michigan Supreme Court has held (repeatedly) that "[w]hen the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Lash v Traverse City*, 479 Mich 180, 187 (2007).

B. MCL 169.257 does not permit public bodies to administer a union's separate segregated fund.

1. Unions' unique roles

This case arises in part because of the unique role that the state has assigned to public-sector unions. The United States Supreme Court has recognized that while state employees have a right to join a union, a state government has no constitutional obligation to bargain with that union. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). The union's authority to collective bargaining comes from the Public Employment Relations Act. MCL 423.201 *et seq*.

While the courts may see a cleavage between a union's political-advocacy role and its collective-bargaining role, it is fair to say that many unions see those roles as intertwined. Thus in collective-bargaining negotiations, many unions seek the

[17] See generally *Chevron USA, Inc v Natural Res Def Council, Inc*, 467 US 837 (1984).

assistance of the public bodies in collecting money for the unions' separate segregated funds, which has nothing directly to do with the workers' employment.

To the best of the undersigned's knowledge, public-sector unions are unique in their request to "rent" the apparatus of the state to help their PACs. But if this Court accepts the MEA's argument that prepayment of the public body's costs would make this "rental" legal, then others may seek the same opportunity.

If MCL 169.257 were read to allow reimbursements, then politicians' campaign committees might also seek to raise funds during the provision of any state service — not just distribution of the state payroll. Each candidate for local or state office would be free to arrange for a donation envelope for his or her candidate committee to be given to each constituent who visits the Secretary of State's office. Constituents could face similar solicitations when they seek a building license. Under the MEA's view of MCL 169.257, the members of this Court could send a fundraising solicitation with the opinion in this matter, so long as the administrative costs to the Michigan court system were prepaid.[18]

The question presented in this case is whether that is what the Legislature intended in enacting MCL 169.257.

[18] This "parade of horribles" is not mere hyperbole. Before the enactment of MCL 169.257, some school districts spent public resources advocating millage increases, despite Attorney General opinions prohibiting the practice. Further, the rise of federal 527 groups shows that in the cutthroat political arena, a "loophole" will be used once it is identified.

2. Plain meaning of MCL 169.257

As noted above, when a statute is clear, its plain language controls. The Michigan Supreme Court recently indicated that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is equally susceptible to more than a single meaning." *Fluor Enter, Inc v Revenue Div, Dep't of Treasury*, 477 Mich 170, 177 n. 3 (2007).

Again, MCL 169.257(1) states in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under [MCL 169.204(3)(a)].

MCL 169.257(1). At issue here is whether administration of a payroll deduction by a public body — the school district — for a labor organization's separate segregated fund constitutes an expenditure.

MCL 169.206 states:

> (1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:
>
> > (a) A contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.
> >
> > . . .
>
> (2) Expenditure does not include any of the following:

> (a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under [MCL 169.255].
>
> . . .
>
> (c) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.
>
> . . .

Id. (emphasis added).

Here, the implementation of the payroll deduction plan clearly constitutes an expenditure. The amount given to the separate segregated fund constitutes a contribution by the employee, but as stated in the July 11, 1997, interpretive-state letter, the costs of implementing the plan "are similar to providing postage and pre-addressed envelopes, and other costs associated with the collection and delivery of contributions," and so are an expenditure chargeable to the public body running the plan.

MCL 169.257 makes no mention of reimbursement "curing" an expenditure. Further, MCL 169.206 excludes two types of activities related to separate segregated funds from the definition of expenditure under the MCFA: (1) communications with those who can be solicited under the MCFA; and (2) expenditures related to the creation of a separate segregated fund. There is no exemption for expenditures that are "reimbursed," even though the MCFA often discusses the mechanics of separate segregated funds.

There are six exemptions to MCL 169.257. None of these are remotely apply to reimbursement.[19]

This is not a particularly surprising result. The concept of reimbursement is incongruous when applied to the government, because the government generally does not sell its services. School districts do not put their administrative services on the open market. Government's proper role is to provide basic needs for the functioning of society; it is not to facilitate a public-sector union's political clout by

[19] MCL 169.257 lists the following exemptions:

> This subsection does not apply to any of the following:
>
> (a) The expression of views by an elected or appointed public official who has policy making responsibilities.
>
> (b) The production or dissemination of factual information concerning issues relevant to the function of the public body.
>
> (c) The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.
>
> (d) The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.
>
> (e) The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event.
>
> (f) An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

allowing it to use public resources to maximize the amount its PAC will collect from public employees covered by a collective bargaining agreement.[20]

Thus, the plain language of MCL 169.257 indicates that public bodies may not administer payroll deduction plans, because that administrative service constitutes an unlawful expenditure.

3. MCL 169.254 and reimbursement

The MEA points to the manner in which the Secretary of State has interpreted MCL 169.254 as proof that reimbursement is proper. In pertinent part, MCL 169.254 states:

> (1) Except with respect to the exceptions and conditions in subsections (2) and (3) and [MCL 169.255], and to loans made in the ordinary course of business, a corporation . . . or labor organization shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution pursuant to section 4(3)(a).
>
> . . .
>
> (3) A corporation . . . or labor organization may make a contribution to a ballot question committee subject to this act. A corporation . . . or labor organization may make an independent expenditure in any amount for the qualification, passage, or defeat of a ballot question. A corporation . . . or labor organization that makes an independent expenditure under this subsection is considered a ballot question committee for the purposes of this act.

Id. (emphasis added).

[20] Amicus curiae assumes that the MEA believes it will receive more in contributions via a payroll deduction plan administered by a public body than it would if the MEA sent solicitation letters and self-addressed stamped envelopes to its members; otherwise, it would make little sense for the union to be litigating this matter. In any event, a holding that MCL 169.257 prohibits a public body from administering a payroll deduction plan does not prevent the MEA from receiving contributions from its members; it only changes the manner in which those contributions will be received.

The MEA may be correct that there is some inconsistency in how the Secretary of State has viewed expenditures under MCL 169.254 and MCL 169.257. But the error would be in the manner in which the Secretary of State has construed MCL 169.254, not MCL 169.257.

A straightforward application of the plain-language doctrine again applies. MCL 169.254 states that corporations and unions shall not use general treasury funds to make expenditures or contributions. MCL 169.254(3) is an exemption that allows corporations and unions to use general treasury funds on ballot questions. MCL 169.255 similarly exempts money used in the creation of separate segregated funds that may make "contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, political committees, and independent committees."

MCL 169.255(2)-(5) discuss who can be solicited by the various entities covered by the MCFA — for-profit corporations, not-for-profit corporations, unions, and Indian tribes. Unions may seek contributions from members of the union, officers and directors of the union, and employees of the union who have "policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities." MCL 169.255(4).

MCL 169.255(6) requires that an entity using a payroll deduction plan obtain the annual affirmative consent of the person making the contribution:

> A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in

> subsection (2), (3), (4), or (5) on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year.

As noted above, in her second letter to Robert LaBrant on February 17, 2006, the Secretary of State indicated that because a corporation could set up a payroll deduction plan for itself, it could also set one up for a union's benefit:

> [T]he Act authorizes a corporation to establish an automatic payroll deduction plan for a separate segregated fund established under MCL 169.255(1) for the purpose of collecting contributions, if the individual contributor provides his or her written consent for the deduction on an annual basis. MCL 169.255(6). Thus a corporate employer is authorized to (1) incur expenses in connection with the collection of contributions for a separate segregated fund, and (2) operate a payroll deduction plan for the purpose of collecting those contributions. <u>It follows that a corporation may incur similar costs to those identified above in connection with the administration of a payroll deduction system for the collection of contributions to a labor organization's separate segregated fund.</u>

February 17, 2006 letter to Robert LaBrant (2-06-CI) at 2 (emphasis added).

The Secretary of State is wrong; it does not follow that because a corporation is able to set up its own payroll deduction plan, it must be able to administer a payroll deduction plan for the benefit of a union's separate segregated fund. Nothing in MCL 169.254 or MCL 169.255 expressly allows for this.

Nor is this conclusion implied by the fact that unions may use payroll deduction plans for separate segregated funds. For instance, upon information and belief, there are members of the United Auto Workers who are not employees of an automobile manufacturer, but rather are employees of the union itself. The union could set up and administer a payroll deduction plan for these employees without needing a corporation to administer it. Whether or not any union does this is

irrelevant: The fact that it is possible precludes the argument that corporations must be able to administer union payroll deduction plans for unionized workers under MCL 169.255(6) in order for the union's power to engage in payroll deduction plans to have practical meaning.[21]

Further, in arguing for the reimbursement concept, the MEA neglects the Freedom of Information Act (FOIA), a statute in which the Legislature provided detailed guidance regarding the amount of reimbursement needed when a public body acts pursuant to a request. MCL 15.234, in pertinent part, states:

> (1) A public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record. Subject to subsections (3) and (4), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. A search for a public record may be conducted or copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because searching for or furnishing copies of the public record can be considered as primarily benefiting the general public. A public record search shall be made and a copy of a public record shall be furnished without charge for the first $20.00 of the fee for each request to an individual who is entitled to information under this act and who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.
>
> . . .
>
> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion

[21] It may be that 11 CFR § 114.5(k) requires a corporation that uses a payroll deduction plan for its own benefit to offer a similar plan to a union, but that would apply only to campaign funds covered by federal election law, not funds covered by state election law. If there is a federal preemption argument, the MEA has not presented it here.

> under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

Thus, FOIA includes an extremely detailed reimbursement mechanism. In contrast, MCL 169.254, 169.255, and 169.257, contain not a single word on the subject. Given that FOIA was enacted in 1976 (19 years before MCL 169.257), and given that FOIA is one of the best-known statutes in the state, it is difficult to understand why the Legislature would not have used the FOIA model to produce detailed guidance on reimbursement under payroll deduction plans if the Legislature really considered such reimbursement acceptable.

To the extent that there is any conflict between the manner in which the Secretary of State has interpreted "expenditure" under MCL 169.257 and under MCL 169.254 and MCL 169.255, the former should control under plain-meaning analysis. Moreover, the plain language of all three statutes does not mention the concept of a reimbursement to enable an otherwise prohibited expenditure. There are no ambiguities in these statutes; therefore, their plain language controls, and this Court should hold that a public body cannot administer a payroll deduction plan for the benefit of a union's separate segregated fund.

II. Equitable estoppel should not prevent current or future enforcement of MCL 169.257.

A. Standard of Review

This Court reviews de novo a trial court's use of equitable estoppel. *West Am Ins Co v Meridian Mutual Ins Co*, 230 Mich App 305, 309 (1998).

B. The trial court cannot alter a statute enacted by the Legislature.

Without saying so explicitly, the trial court seemed to use equitable estoppel principles to hold that the Secretary of State could not now enforce MCL 169.257 because she knew that some school districts had administered payroll deductions for the benefit of the MEA-PAC in the past. This Court has indicated that this doctrine applies only in limited circumstances: "[A]lthough equitable estoppel will be invoked against the state when justified by the facts, the doctrine should not be lightly invoked against the state, especially when its application tends to thwart public policy." *Attorney General v Ankersen*, 148 Mich App 524, 544 (1986). In *Powers v Dignan*, 312 Mich 315 (1945), the Michigan Supreme Court held that in denying a renewal license to an auto dealer, the Secretary of State was not estopped from considering conduct that it knew of before issuing the old license. *Id.* at 319.

Even rarely enforced statutes still have the force of law. *Board of Co Road Comm'rs of Washtenaw Co v Michigan Pub Serv Comm*, 349 Mich 663, 682 (1957) ("[S]tatutes don't wither by disuse."); *Stopera v Dimarco*, 218 Mich App 565, 569-70 (1996) ("It would be a long overstepping of our role as a court to ignore a statute duly enacted and never repealed by a coequal branch of government."). The separation-of-powers doctrine helps explain why this is so: the judicial branch

should not punish the legislative branch for the actions or inactions of the executive branch.

The MEA, MEA-PAC, and school districts might have an equitable estoppel argument if the Attorney General sought to criminally prosecute them for actions preceding this Court's decision in the instant case. But their future reliance interests are either slight or nonexistent. Upon information and belief, the school districts and unions have collective bargaining agreements that generally last three years or less. If this Court were to apply equitable estoppel, at most it should allow any collective bargaining agreements in which districts administer payroll deduction plans for the unions' benefit to expire of the agreements' own force. This Court could then prohibit any future collective bargaining agreements from allowing a district to administer a payroll deduction plan for the benefit of a union's separate segregated fund.

Such a holding would be in line with MCL 24.263, which in pertinent part indicates that an administrative agency may change its mind about a previous declaratory ruling: "An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling."

The plain language of MCL 169.257 prevents public bodies from administering payroll deduction plans for the benefit of a union's separate segregated fund. The executive branch of government should be allowed to enforce this statute as the Legislature enacted it.

RELIEF REQUESTED

For the reasons stated above, amicus curiae requests that the Secretary of State's declaratory ruling be reinstated.

DATED: March 7, 2008.

Respectfully Submitted,

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