

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN EDUCATION ASSOCIATION,

Appellant,

vs.

Supreme Court Case No. 137451

TERRI LYNN LAND, MICHIGAN
SECRETARY OF STATE,

Court of Appeals Docket No. 280792

Appellee.

Lower Court File No. 06-1537-AA

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137451
reply

REPLY OF PETITIONER-APPELLANT

THIS APPEAL INVOLVES A RULING THAT A PROVISION
OF THE CONSTITUTION, A STATUTE, RULE, OR
REGULATION, OR OTHER STATE GOVERNMENTAL
ACTION IS INVALID.

FILED

DEC 05 2008

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Appellant, Michigan Education Association (“MEA”) reiterates the statement of judgment appealed from and relief sought set forth in the Application for Leave to Appeal. As noted in that statement, this appeal involves a declaratory ruling issued by Appellee Secretary of State regarding the interpretation of Section 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257. The declaratory ruling stated that the administration by a public employer of employee payroll deductions to a separate segregated fund (or PAC) established by a labor organization, constituted an expenditure in violation of the MCFA.

On appeal, the Ingham County Circuit Court, after full consideration of the statute and prior interpretations made by Appellee, found that where all costs attributable to the administration of the payroll deductions was paid, in advance by the union or its PAC, there was no “expenditure” under the Act, and no violation of MCFA Section 57.

The Appellee’s attempt to frame the issue as in this case as *whether or not an expenditure can be “remedied” by reimbursement* is erroneous. The issue before the Circuit Court was whether or not when all costs of administering the payroll deductions are borne by the union or its PAC, an expenditure occurs under the MCFA. The Circuit Court determined that an expenditure does not occur under those circumstances. The Appellee’s attempt to recast the issue by describing it as whether a *violation of Section 57 of the MCFA can be remedied by reimbursement or advance payment is designed to intentionally mislead this Court.*

STATEMENT OF QUESTION PRESENTED

- I. SHOULD THIS COURT GRANT LEAVE TO APPEAL BECAUSE THE CIRCUIT COURT CORRECTLY SET ASIDE APPELLEE'S DECLARATORY RULING AFTER DETERMINING THAT ADMINISTRATION OF PAYROLL DEDUCTIONS WOULD NOT CONSTITUTE AN "EXPENDITURE" IN VIOLATION OF THE MICHIGAN CAMPAIGN FINANCE ACT SECTION 57, IF ALL COSTS ATTRIBUTABLE TO THE ADMINISTRATION OF THE DEDUCTIONS WAS PAID BY THE UNION OR ITS POLITICAL ACTION COMMITTEE?

Appellant says: "Yes."

Appellee says: "No."

Amici Curiae AFL-CIO and CTW say: "Yes."

Amici Curiae Michigan Chamber of Commerce and Mackinac Center say: "No."

INTRODUCTION

Appellant Michigan Education Association (MEA), a voluntary, incorporated labor organization that represents more than 130,000 teachers, education support personnel and education professionals throughout the state of Michigan. This case addresses whether MEA members can continue to utilize payroll deductions to fund MEA-PAC, a separate segregated fund established by the MEA pursuant to Section 55 of the MCFA, MCL 159.255.¹ As set forth in some detail in the Statement of Facts included in Appellant's Application for Leave to Appeal, the Appellant established MEA-PAC in 1971, and since that time has funded the separate segregated fund through the payroll deductions of the Appellant's public school employee members. The declaratory ruling at issue in this case, which was issued by Appellee on November 20, 2006, found that MCFA Section 57, MCL 169.257, clearly and unambiguously prohibits any public employer from administering the payroll deduction requests of its employees for transmission to a union PAC. As set forth in Appellant's Application for Leave to Appeal, the Appellee has been well aware since before the original enactment of MCFA Section 57 that the Appellant was funding MEA-PAC through the payroll deductions of public school employees, and yet the Appellee had never advised the Appellant that the administration of those payroll deductions was a violation of MCFA Section 57.

On appeal, the Ingham County Circuit Court found that the November 20, 2006 declaratory ruling was not consistent with past rulings and interpretative

¹ MCFA Section 55 authorizes corporations, labor organizations, and domestic dependent sovereigns to establish separate segregated funds to be used for political purposes. These separate segregated funds are often referred to as political action committees or PACs, and those terms will be used interchangeably in this Brief.

statements made by Appellee. The Court ruled that where the costs of administration are reimbursed, no transfer of value to the union PAC occurs and, therefore, no “expenditure” has been made within the meaning of the MCFA. The Court’s finding of “no transfer of value” was in accordance with prior rulings and interpretive statements by Appellee regarding a corporation’s ability to administer the requests of its employees to make contributions to union PACs. Thus, the Circuit Court ruled that there was no violation of MCFA Section 57 because no expenditure occurred.

It was these interpretations of MCFA Section 57 that the Court of Appeals considered after granting leave to appeal in this matter. The Court of Appeals ultimately reversed the trial Court’s Opinion and Order, with the majority of the Court of Appeals panel ruling that an “expenditure” under the MCFA occurs even when all costs attributable to the administration of the payroll deduction plan are paid, in advance, by the MEA or its PAC.

Appellee contends that leave to appeal should not be granted by this Court for the following reasons, which are set forth on page 2 of Defendant-Appellee’s Response in Opposition to Application for Leave to Appeal:

This case does not involve legal principles of major significance to the state’s jurisprudence because the decision applies only within the narrow confines of the MCFA, and, most importantly, the Court of Appeals’ decision is not erroneous based on the plain language of Section 57 and the MCFA. While it may be that the issues are of significant public interest, that alone does not merit granting leave where the Court of Appeals correctly decided the case, and between the Court of Appeals’ opinion and the Secretary’s declaratory ruling, there is no need for additional Court interpretation of clarification.

Contrary to Appellee's assertions, this case *does* involve legal principles of major significance to this state's jurisprudence. It involves the correct interpretation of a statute, MCL 169.257, the violation of which constitutes a felony. Furthermore, the issues in this case are of significant public interest in that they profoundly impact the rights of labor organizations and their members to join together in political activity.

ARGUMENT

THIS COURT SHOULD GRANT LEAVE TO APPEAL OR PEREMPTORILY REVERSE THE COURT OF APPEALS, BECAUSE THE CIRCUIT COURT CORRECTLY SET ASIDE APPELLEE'S DECLARATORY RULING AFTER DETERMINING THAT THE ADMINISTRATION OF PAYROLL DEDUCTIONS TO A UNION PAC BY A PUBLIC EMPLOYER DOES NOT CONSTITUTE A VIOLATION OF THE MCFA SECTION 57 WHEN ALL COSTS ATTRIBUTABLE TO THE ADMINISTRATION OF THE DEDUCTIONS ARE PAID BY THE UNION OR ITS PAC.

Appellant's argument in support of the Application for Leave to Appeal are fully set forth in that document, and it is not the intention of the Appellant to repeat those arguments in detail here. Instead, it is the purpose of this reply brief to clarify, in the wake of arguments made in the Appellee's Response, the issue placed before the Secretary of State and the Ingham County Circuit Court in this case, and to demonstrate the jurisprudential and public interest of that issue.

The issue presented to the Appellee and to the Ingham County Circuit Court required the interpretation of the Michigan Campaign Finance Act, 169.201, *et seq.*, including MCFA Section 57, 169.257. That section of the Act provides that a public body cannot use "public resources" to "make a contribution or expenditure" as those terms are defined in the MCFA.² The specific question presented was whether a

² 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, stationary, 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 Section 4(3)(a).

public body could administer the payroll deduction requests of its employees to a union PAC, provided that all costs attributable to the administration of the deductions was paid by the union or its PAC.

At the time the question was presented to Appellee, there was ample reason to believe that the Appellee would conclude that the fully-paid administration of payroll deduction requests would not violate MCFA Section 57. First, as noted in the Application for Leave to Appeal and in the actual request for a declaratory ruling, the MEA and MEA-PAC (the separate segregated fund established by Appellant) had utilized the payroll deductions of public employees to fund the PAC for many years, and the Appellee was, at all times, aware of that fact. Since before Section 57 was added to the MCFA, the MEA had been involved in litigation with the Appellee regarding the statutory requirements for obtaining voluntary consent to payroll deductions. In addition, on at least three occasions, either the Appellee or Appellee's counsel had stated, either in writing or in open court, that the form used by the MEA to authorize the payroll deductions of members met the MCFA requirements for obtaining the voluntary consent to payroll deductions. As noted in the Appellant's earlier arguments, including the Application for Leave to Appeal, had the Appellee truly been of the opinion throughout the time in which Section 57 has been in force, that it was impossible for a public employer to legally administer payroll deductions, surely that opinion would have been communicated to the Appellant or its PAC. No such mention was ever made.

In fact, as set forth in Appellant's Application for Leave to Appeal and earlier arguments, there was every reason to expect that Appellee would conclude that so long as all costs attributable to administering the payroll deductions were paid by the

MEA or MEA-PAC, there would be no violation of the MCFA. The Appellee has consistently taken the position that although a corporation may not make an expenditure or contribution to any PAC other than the corporation's own PAC, a corporation may administer the payroll deduction requests of its employees to their union's PAC so long as the union or the PAC reimburse the corporation for the cost of administering the deductions.³ Appellee has stated that where the costs of making the payroll deductions is paid by the union or its PAC, there is "no transfer of value" from the corporation administering the deductions to the union PAC and, therefore, no violation of the MCFA Section 54 prohibition of corporate contributions or expenditures.⁴ Because the MCFA Section 54 prohibition⁵ of contributions or expenditures by corporations, labor organizations, and domestic dependent sovereigns uses the same language set forth in MCFA Section 57, it is logical to conclude that if no transfer of value occurs when the administration of payroll deductions by a corporation is reimbursed, no transfer of value (and henceforth no expenditure or contribution) will occur when all of a public body's administration costs are borne by a union or its PAC.

Appellee, however, has determined to interpret the two sections of the statute differently, without providing any logical reason for that difference in

³ See 2005 and 2006 Interpretative Statements to Robert LaBrant. The 2005 letter to LaBrant can be found on the Appellee's website at http://michigan.gov/documents/2005_Interpretive_Statement_142179_7.pdf. The 2006 letter can be found at http://michigan.gov/documents/Robert_S_150709_7_LaBrant_Final_Response_Corp_Payroll.pdf.

⁴ MCL 169.254.

⁵ The Section 54 prohibition reads: Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation, joint stock company, domestic dependence sovereign, or labor organization shall not make a contribution or expenditure or provide voluntary personal services that are excluded from the definition of a contribution pursuant to section 4(3)(a).

interpretation. As set forth in Appellant's Application for Leave to Appeal, as well as the brief of Amici Curiae *Michigan State AFL-CIO, et al.*, the Appellee's interpretation of MCFA Section 57 is illogical, inconsistent with its prior MCFA interpretations, and unsupportable. That error will have a profound impact on the ability of the Appellant and its members, as well as on other public employee unions and their members. The use of payroll deductions to fund MEA-PAC and the PACs of other labor organizations, allows union members the ability to participate in the political process by joining together a number of political contributions. Although taken individually each person's contribution is modest, their combination through MEA-PAC allows the members of the MEA and other labor organizations the opportunity to have a real voice. That voice will be silenced if the Appellee's declaratory ruling is allowed to stand.

Furthermore, as set forth in the brief offered by the *ALF-CIO* and *Change to Win*, the Court of Appeals' Decision in this case has the very real potential to reek havoc to all those whose conduct is governed by the MCFA. As noted in that brief, a public body's unreimbursed administration of employee payroll contributions, if considered to be either a contribution or an expenditure, would be classified as an "in-kind" contribution or expenditure pursuant to MCFA Section 9(3), MCL 169.209(3). There is no "in-kind contribution" or "in-kind expenditure" where the fair market value is paid for a good or service.

The Appellee's *Independent Committee and Political Committee (PAC) Manual* states, at page 11, "[i]n-kind contributions are goods, services and facilities provided to the committee at no cost or at a discount."⁶ Under the Act, as it has been

⁶The manual can be accessed at http://www.michigan.gov/documents/CFR_Independent_PAC_Committee_Manual_21854_7.pdf.

administered and interpreted by the Appellee to date, the provision of goods or services to a candidate or committee does not constitute either a "contribution" or an "expenditure" if the provider is paid the full market value of the goods or services. Were it not so, a candidate in this state would be hard pressed to conduct an election. That is, all yard signs, advertisements, etc., *even if fully paid for*, would be considered reportable contributions to the candidate. This surely is not what the Legislature intended in the MCFA.

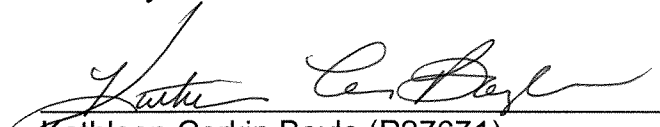
RELIEF

For all of the reasons set forth above, Appellant respectfully requests that this Court peremptorily reverse the Court of Appeals, or in the alternative, grant Appellant's Application for Leave to Appeal.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Petitioner

By:


Kathleen Corkin Boyle (P27671)

Dated: December 5, 2008

STATE OF MICHIGAN
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Appellee.

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CERTIFICATE OF SERVICE

I, Kyle Evan Cowden, hereby certify that I have provided Assistant Attorney General, Denise C. Barton, P.O. Box 30736, Lansing, Michigan 48909, Eric Doster, Esq., 313 S. Washington Square, Lansing, Michigan 48933, Patrick J. Wright, Esq., 140 West Main Street, P.O. Box 568, Midland, Michigan 48640, and Andrew Nickelhoff, Esq., 1000 Farmer, Detroit, Michigan 48226, with a copy of Appellant's Reply Brief by depositing same in the United States Post Box in Lansing, Michigan, on this the 5th day of December, 2008, with the proper postage affixed.



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December 5, 2008

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Hall of Justice
925 W. Ottawa Street
Lansing, MI 48909

Re: *Michigan Education Association v Terri Lynn Land, et. al.*
Court of Appeals Docket No. 276093
Ingham County Circuit Court Docket No. 06-1537-AA

Dear Sir/Madam:

Enclosed please find an original and seven copies of Petitioner-Appellant's Reply Brief for filing in the matter captioned above. I have further enclosed a Certificate of Service, reflecting that a copy of the enclosed has been served upon Denise C. Barton, Esq., Eric E. Doster, Esq., Patrick J. Wright, Esq., and Andrew Nickelhoff, Esq. If you should have any questions concerning the enclosed, please do not hesitate to contact me.

Thank you for your cooperation and assistance in this matter.

Very truly yours,

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Enclosures

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137451
**APPELLANT MICHIGAN EDUCATION ASSOCIATION'S
ANSWER TO THE MOTION OF THE MICHIGAN CHAMBER
OF COMMERCE TO FILE SUPPLEMENTAL AMICUS CURIAE
BRIEF**

Now comes Appellant, Michigan Education Association, through its counsel and in answer to the Michigan Chamber of Commerce's Motion to File Supplemental Amicus Curiae Brief with the Court says:

1. This matter is before the Court on Appellant's Application for Leave to Appeal the decision of the Michigan Court of Appeals in Case No. 280792.

FILED

MAR - 9 2009

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

2. The Michigan Chamber of Commerce filed a Motion to File Amicus Curiae Brief and a proposed Amicus Curiae Brief with this Court on or about October 31, 2008.

3. The Michigan Chamber of Commerce has now filed a Motion to File Supplemental Amicus Curiae Brief and a proposed Supplemental Amicus Curiae Brief, dated March 2, 2009.

4. According to paragraph 5 of that motion, the proposed Supplemental Amicus Curiae Brief discusses how Michigan House Bill 4245 and the United States Supreme Court decision in *Secretary of State of Idaho v Pocatello Education Association*, 555 US ____ (2009), apply to this case, which challenged a declaratory ruling issued by the Michigan Secretary of State interpreting the provisions of Section 57 of the Michigan Campaign Finance Act (MCFA), MCL 169.257.

5. The Respondent's declaratory ruling opined that MCFA Section 57 prohibits a public body from administering the requests of its employees to make payroll deductions for contribution to a separate segregated fund, or PAC, established by the employees' union. Appellant challenged that declaratory ruling, arguing that Respondent's interpretation of the statute was incorrect. The issue in this case is the correct interpretation of the statute.

6. *Secretary of State of Idaho v Pocatello Education Association, supra*, concerns the constitutionality of an Idaho statute. Appellant MEA has not challenged the validity or constitutionality of MCFA Section 57 in

the present case; instead this case is concerned solely with the proper statutory interpretation of that provision of the Michigan Campaign Finance Act.

6. The Motion of the Chamber of Commerce also seeks to present arguments regarding the impact of Michigan House Bill 4245 on this case. The introduction of a bill or bills in the Michigan Legislature to amend MCFA Section 57 has no bearing on whether or not the statutory interpretation employed by Respondent Secretary of State in the declaratory ruling is correct, nor is the amendment of the statute the "only" way to address the proper interpretation of the statute, as the Chamber of Commerce argues in the proposed brief.


RELIEF

WHEREFORE, Appellant Michigan Education Association respectfully requests that the Court deny the Motion of the Michigan Chamber of Commerce to file the Supplemental Amicus Curiae Brief, dated March 2, 2009. Should this Court grant the motion and accept the Supplemental Amicus Curiae Brief, Appellant requests that the Court consider this answer as Appellant's response thereto.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Michigan Education Association

By:



Kathleen Corkin Boyle (P27671)

Dated: March 5, 2009

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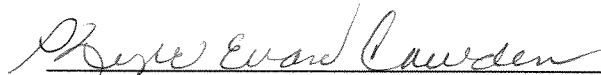
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March 5, 2009

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