

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff—Appellant,

Supreme Court
No. 137451

v

SECRETARY OF STATE,

Court of Appeals
No. 280792

Defendant—Appellee.

Lower Court No.
06-001537-AA

BRIEF OF AMICUS CURIAE
MICHIGAN STATE EMPLOYEES ASSOCIATION

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STATEMENT OF JURISDICTION

The Michigan State Employees Association adopts the Statement of Jurisdiction set forth in MEA's brief.

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STATEMENT OF QUESTIONS INVOLVED

1. Whether a school district's use of government resources for a payroll deduction plan for contributions made by members of the plaintiff Michigan Education Association (MEA) to MEA's political action committee is either an "expenditure" or a "contribution" under Section 6 of the Michigan Campaign Finance Act (MCFA), MCL 169.206?

Amicus Curiae MSEA answers: "No."
The Court of Appeals declined to answer this question.

2. Whether Section 57(1) of the MCFA, MCL 169.257(1), prohibits a school district from expending government resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA?

Amicus Curiae MSEA answers "No."
The Court of Appeals declined to answer this question.

3. Whether a school district has the authority to collect and deliver payroll deductions for such contributions?

Amicus Curiae MSEA answers "Yes."
The Court of Appeals declined to answer this question.

INTEREST OF AMICUS CURIAE

The Michigan State Employees Association ("MSEA") is a non-profit Michigan corporation and a labor organization. MSEA is the duly-elected and certified collective bargaining representative of approximately 4,000 classified Civil Service employees employed by the State of Michigan in the Safety and Regulatory Unit and the Labor and Trades Unit. MSEA is Michigan's oldest State employee organization representing classified Civil Service employees of the State. MSEA was organized by State employees in 1950 and has continuously represented the interests of State employees and advocated for their rights since that time.

MSEA and its members have a critical interest in the proper interpretation of whether a public body can administer a payroll deduction plan for voluntary contributions by its members to a separate segregated fund ("SSF") or political action committee ("PAC") without violating the Michigan Campaign Finance Act ("MCFA"). For several years, public employers have permitted employees to use automatic payroll deductions for many purposes, including such things as payment of union dues, child support, charitable contributions, deposits in savings accounts, and satisfaction of garnishment orders. The outcome of this case may carry controlling legal consequences as to whether a public employer can expand the list of permissible uses of automatic payroll deductions to include an employee's voluntary contribution to a separate segregated fund established by the employee's union when the public employer is reimbursed for 100% of the cost of administering the payroll deduction. If this Court finds that public employees are not permitted to make voluntary contributions to a PAC, a public employee's ability to participate in the political process will be drastically reduced, if not eliminated. Unlike wealthy donors who can write substantial checks, public

employees who wish to contribute financially to a political cause in an effective manner depend largely upon payroll deductions.

MSEA and its members are directly impacted by the outcome of this case because on December 19, 2007 the Michigan Civil Service Commission adopted new Civil Service Commission Rule 6-16 which allows Classified Civil Service employees to voluntarily authorize a payroll deduction from their paychecks for a contribution to their union's Political Action Committee ("PAC"). Shortly after the adoption of the Rule by the Civil Service Commission, the Attorney General and the Secretary of State filed suit in the Ingham County Circuit Court against the Michigan Civil Service Commission and the State Personnel Director, (Ingham County Circuit Court Case No. 08-101-CZ, herein referred to as the "Civil Service Commission Case") alleging that the new Rule violates the Michigan Campaign Finance Act and the Michigan Constitution. MSEA intervened in that suit as a party Defendant.

On February 27, 2009 Ingham County Circuit Court Judge Paula Manderfield entered an Opinion and Order reluctantly granting summary disposition in favor of the Attorney General and the Secretary of State. In her Opinion and Order, Judge Manderfield stated in pertinent part:

"Based on the above reasoning, this Court is convinced that Rule 6-16 does not violate Section 57 of MCFA. This Court, however, is constrained by the Court of Appeals decision in *MEA v Secretary of State, et al, supra*, because a published decision of the Court of Appeals is controlling precedent for trial courts. Accordingly, this Court reluctantly finds that Rule 6-16 violates Section 57 of the MCFA."

(Slip Op., p 9.)

The Defendants filed a Motion for Reconsideration of Judge Manderfield's Opinion and Order and on May 4, 2009 Judge Manderfield entered an Order Staying Defendants'

Motion for Reconsideration pending the Supreme Court's decision in *MEA v Secretary of State, supra.*"

Therefore, MSEA will be directly affected by this Court's decision in this present case. Accordingly, MSEA and its members have a vital interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the substantial issue of whether a labor organization representing employees of public schools, colleges, and universities can administer a payroll deduction plan allowing its members to voluntarily contribute to a PAC through voluntary payroll deductions when all administrative costs are fully reimbursed in advance. On May 8, 2009, this Court ordered the parties to submit supplemental briefs addressing the following three issues:

1. Whether a school district's use of government resources for a payroll deduction plan for contributions made by members of the plaintiff Michigan Education Association (MEA) to MEA's political action committee is either an "expenditure" or a "contribution" under Section 6 of the Michigan Campaign Finance Act (MCFA), MCL 169.206;

2. Whether Section 57(1) of the MCFA, MCL 169.257(1), prohibits a school district from expending government resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA; and

3. Whether a school district has the authority to collect and deliver payroll deductions for such contributions.

These are similar to the three issues that Justice Whitbeck, in his dissent, asserted should have been answered prior to the Court of Appeals ruling in this case. *Michigan Education Association v Secretary of State, et al*, 280 Mich App 477; 761 NW2d 234 (2008). As the analysis in this brief details, this Court should answer the first two questions in the negative. Section 57(1) of the MCFA does not prohibit a school district, or other public body for that matter, from administering a payroll deduction plan when the costs of the plan are prepaid because the school district is not making a "contribution" or "expenditure". As for the third question, this Court should find that a school district has the authority to collect and deliver payroll deductions for such contributions. With respect to this third issue, MSEA relies on MEA's brief.

STATEMENT OF FACTS

MSEA adopts the Statement of Facts set forth in MEA's Brief.

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ARGUMENT

I. A SCHOOL DISTRICT'S USE OF GOVERNMENTAL RESOURCES FOR A PAYROLL DEDUCTION PLAN FOR CONTRIBUTIONS MADE BY MEMBERS OF MEA TO MEA'S PAC IS NEITHER AN "EXPENDITURE" NOR A "CONTRIBUTION" UNDER SECTION 6 OF THE MCFA.

A public body's administration of a payroll deduction plan for contributions to PACs by its members is neither an "expenditure" nor a "contribution" under the MCFA for two important reasons. First, the public body's administration of a payroll deduction plan for contributions made by its members does not transfer value where the public body is fully reimbursed in advance for all expenses and costs. Where there is no transfer of value, there is no contribution or expenditure as defined by the MCFA. Second, even if there was a transfer of value, which there is not, an expenditure, as defined by Section 6 of the MCFA, does not include an expenditure for the establishment, administration, or solicitation of a contribution to an SSF. Accordingly, this Court should find that the payroll deduction plan at issue does not violate the MCFA.

A. An expenditure by a school district, or other public employer to facilitate automatic payroll deductions for PAC contributions by school district employees which must be fully reimbursed does not constitute a contribution or expenditure under the MCFA because there is no transfer of value.

The voluntary automatic payroll deduction for PAC contributions does not constitute an expenditure or contribution under the MCFA because there is no transfer of value where the costs associated with the deduction are reimbursed. The MCFA relevantly defines "contribution" as:

a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value...

MCL 169.204(1). Under the MCFA, “expenditure” is relevantly defined as:

A payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities...

MCL 169.206(1). This is the first instance the Michigan courts have had to address whether a reimbursed payroll deduction constitutes a contribution or expenditure under Section 57 of the MCFA. However, the law is clearly established that a reimbursed payroll deduction does not constitute a contribution or expenditure under Section 54 of the MCFA.

The language of Section 57 is mirrored in Section 54, which prohibits corporations from using their funds for the same purposes that public entities are prohibited under Section 57 from using their funds. Specifically, MCL 169.254 provides in relevant part:

(1) 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 dependent sovereign, 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).*

(2) An officer, director, stockholder, attorney, agent, or any other person acting for a labor organization, a domestic dependent sovereign, or a corporation or joint stock company, whether incorporated under the laws of this or any other state or foreign country, except corporations formed for political purposes, 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).

MCL 169.254 (Emphasis added). Under the statutory language of Section 54 of the MCFA, the Michigan authorities have continually held that corporations that provide automatic payroll deductions for employees, to facilitate contributions to their union PACs, are not engaged in unlawful contributions or expenditures by the corporation if the cost is reimbursed

by the union PAC.¹ Specifically, in a 2001 Interpretive Statement, the Secretary of State opined,

A corporation does not make an expenditure or contribution to a candidate or committee if it is promptly reimbursed for the full value of the goods or services provided because no transfer of value occurs.

* * *

There is nothing in the MCFA that prevents a corporation from receiving reimbursement for a product or service it provides. Because the intent of Section 54 is to prevent the use of a corporate treasury to enrich a candidate committee, reimbursement must be based on the total cost of the goods or services provided (including all overhead, such as benefits, salary, equipment, etc.) or the market value of the goods or services—whichever is higher. That way, there will be no question over whether the corporation has made a contribution.

If the corporation chooses to avail itself of this option, it is the responsibility of the corporation to prove that the goods or services provided are correctly valued. Moreover, if the expenditure is a contribution, the corporation should be reimbursed prior to providing the services.

Interpretive Statement Kathleen Corkin Boyle, June 15, 2001, p5-6, a copy of which is attached to this Brief as **Attachment A**. Likewise, in a 2005 Interpretive Statement, the Secretary of State noted,

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

¹ Similarly, the Federal Election Commission has implemented a rule which expressly authorizes a corporation to provide its employees with a payroll deduction process for union PAC contributions in exchange for reimbursement of costs. 11 CFR §114.5. Additionally, the Federal Election Campaign Act provides in relevant part:

Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

2 USC 441b(b)(6).

expenditure that is prohibited by section 54 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.

Interpretive Statement Robert S. LaBrant, November 14, 2005, p 2, a copy of which is attached to this Brief as **Attachment B**. Because there is no logical distinction between the language and circumstances of Section 57 and Section 54, this Court should hold that a school district's administration of a payroll deduction plan, which plan requires compensation to the school district for all costs associated with implementing the automatic payroll deduction plan, does not constitute an expenditure or contribution under the MCFA because there has been no transfer of value. However, even if there was a transfer of value, which there is not, the payroll deduction plan would still not constitute an expenditure or contribution under Section 6 of the MCFA because an expenditure for the establishment, administration, or solicitation of a contribution to an SSF is expressly excluded from the MCFA's Section 6 definition.

B. A voluntary automatic payroll deduction does not constitute a prohibited expenditure under the MCFA because an expenditure for the establishment, administration, or solicitation of a contribution to an SSF is expressly excluded from the MCFA's definition of expenditure.

The MCFA, relevantly provides:

(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.

(2) Expenditure does not include any of the following:

(c) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.

MCL 169.206. A fundamental principle of statutory construction is that a clear and unambiguous statute allows for no judicial construction or interpretation. *In re Certified Question from US Court of Appeals for 6th Cir*, 468 Mich 109, 113; 659 NW2d 597 (2003). Thus, “when a statute specifically defines a given term, that definition alone controls”. *Tryc v Michigan Veteran’s Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Accordingly, where the legislature has unambiguously conveyed its intent in a given statute, the statute speaks for itself and the proper role of the court is simply to apply the terms of the statute to the circumstances of a particular case. *In re Certified Question*, 468 Mich at 113. “The fact that another statutory scheme might appear to have been wiser or would produce fairer results is irrelevant.” *US Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass’n*, 274 Mich App 184, 194; 731 NW2d 481 (2007) quoting *Smith v Cliffs on the Bay Condo Ass’n*, 463 Mich 420, 430; 617 NW2d 536 (2000).

The MCFA clearly and unambiguously excludes expenditures for the establishment, administration or solicitation of contributions to an SSF from its definition of expenditure. In the dissent to the Court of Appeals decision in this case, Justice Whitbeck noted and opined:

The threshold question, then, is whether the allocated costs of administration by the Gull Lake Public Schools for collecting and delivering payroll deductions for “contributions” by members of the MEA affiliate to the MEA-PAC constitute an “expenditure” as the MCFA defines that word.²

In my opinion, such costs do not constitute such an “expenditure”. I base this conclusion upon the plain and simple language of the MCFA, As I noted above, the definition of “expenditure” does not include expenditures for the

² Justice Whitbeck noted, “I observe that the term ‘political action committee’ (PAC) is not defined in the MCFA. It comes from federal election law and, according to the Secretary, is a term of art that has gained common acceptance and usage to describe independent committees or political committees, apparently including separate segregated funds, established under the MCFA to support or oppose candidates.” *MEA* (in dissent), 280 Mich App at 496.

“establishment, administration, or solicitation of contributions to a separate segregated fund...” The costs of administration, including the allocated costs of administration by the Gull Lake Public Schools of collecting and delivering payroll deductions for “contributions” by members of the MEA affiliate to the MEA-PAC, are therefore not expenditures as the MCFA defines that word. While these allocated costs of administration are most certainly costs, they are most certainly not “expenditures” in the self-contained looking glass world of the MCFA.

Simply, in that world, such allocated costs of administration do not constitute “expenditures” as the MCFA defines that word. To the extent that the majority accepts the trial court’s threshold conclusion that these allocated costs of administration are “expenditures” as the MCFA defines that word, the majority errs.

The MCFA definition of “expenditure” could not be clearer. It specifically excludes an “expenditure” for the “administration” of a separate segregated fund. “When a statute specifically defines a given term, that definition alone controls.” Indeed, as the Secretary notes, when the Legislature has defined a term in a statute, that definition must be applied and is binding on the courts. There is no language in the definition of “expenditure” that even remotely suggests that the exclusion in that definition for the costs of administration of a separate segregated fund is limited in the manner that the Secretary claims. “Nothing may be read into the statute that is not within the manifest intent of the Legislature as derived from the act itself. There is no hint in the MCFA that the definition of “expenditure” applies to private entities but does not apply to public bodies. There is no hint of ambiguity in the definition of “expenditure” and, as the Michigan Supreme Court has said, “[w]hen the language of a statute is unambiguous, the Legislature’s intent is clear and judicial construction is neither necessary nor permitted.” “In discerning legislative intent, a court must give effect to every word, phrase, and clause in a statute...” “A statute must be read in its entirety and the meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole.”

Further, I note that the Legislature amended the definition of “expenditure” as recently as 2003 without limiting the exclusion in that definition for the costs of administration of a separate segregated fund. And the Legislature is also presumed to be aware of all existing statutes when it enacts another. Here, when the Legislature enacted Section 57 relating to public bodies, it specifically selected the word “expenditure,” a pre-existing defined term under the MCFA with a pre-existing exclusion. Again, there is simply no support for the proposition that the definition of “expenditure,” and the exclusion in that definition for the costs of administration of a separate segregated fund, does not apply to Section 57 public bodies. Nor does a public body trigger the

application of Section 57's prohibitions when it collects and delivers payroll deductions for "contributions" by members of a labor organization to a union PAC because the cost of the administration of such collection and delivery is not an "expenditure" as the MCFA defines that term.

Thus, at the threshold, the allocated costs of administration by the Gull Lake Public Schools, for example, of collecting and delivering payroll deductions for "contributions" by members of the MEA affiliate to the MEA-PAC are not an "illegal expenditure" under the MCFA. Rather, as the MCFA defines that word, these allocated costs are not an "expenditure" at all. To the extent that the majority now accepts the Secretary's proposition that such costs are an "illegal expenditure" under the MCFA, I believe the majority to be wrong.

MEA (in dissent), 280 Mich App at 503-506.

A school district's use of governmental resources for a payroll deduction plan for contributions made by members of MEA to MEA's PAC is not an expenditure under Section 6 of the MCFA because the MCFA clearly and unambiguously excludes contributions to an SSF from its definition of expenditure. Additionally, as previously discussed, there is no contribution or expenditure because in this case there has been no transfer of value. When there is no contribution or expenditure there can be no violation of Section 57(1) of the MCFA.

II. SECTION 57(1) OF THE MCFA DOES NOT PROHIBIT A SCHOOL DISTRICT FROM EXPENDING GOVERNMENTAL RESOURCES FOR SUCH A PAYROLL DEDUCTION PLAN WHEN THE COSTS OF THE PLAN ARE PREPAID BY MEA.

The costs of administration by a school district for collecting and delivering payroll deductions for contributions to a PAC cannot be deemed a prohibited contribution under Section 57(1) of the MCFA. The MCFA regulates political activity, campaign financing, and campaigning contributions and expenditures. MCL 169.201 *et seq.* Section 57 of the MCFA prohibits a public entity from using public resources to make political contributions or expenditures. MCL 169.257. Specifically, MCL 169.257 provides in relevant part:

(1) 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...*

MCL 169.257 (Emphasis added). While this provision prohibits the use of public resources for purposes of electioneering, this section is only implicated if the public resources are being used to make a contribution or an expenditure.³ Accordingly, in this case, Section 57(1) of the MCFA does not prohibit a school district from administering a payroll deduction when the costs of the plan are prepaid by MEA because, as discussed above, there is no expenditure or contribution.

Moreover, while Section 57(1) essentially prohibits a public body from “making” a contribution or expenditure, this statute does not prohibit a public body from “facilitating the making” of a contribution or expenditure by another person. The statute effectively prohibits a public body from making a contribution or expenditure from its own funds or assets. The statute does not prohibit a public body from facilitating, at no expense to itself, someone else from making a contribution or expenditure with his or her own assets. As noted by Justice Whitbeck in the Court of Appeals dissent,

However, the “contribution” in question here is not the “contribution” of an employee. The “contribution” in question, if it is a “contribution” at all, is the allocated costs that a public body employer, such as a school district, incurs as a result of collecting and delivering payroll deductions for “contributions” by members of labor organization to a union PAC.

³ See *Interpretive Statement David E. Murley, October 31, 2005, p 1*, a copy of which is attached to this Brief as **Attachment C** (Noting “Section 57 prohibits a public body from making contributions and expenditures as those terms are defined in the MCFA ...”); *Interpretive Statement Kathleen Corkin Boyle, June 15, 2001, p 5, Attachment A* (Noting “if an activity does not constitute a corporate contribution to, or expenditure on behalf of, a candidate it is not prohibited by the MCFA”); *Interpretive Statement Eric E. Doster, May 30, 2003, p 3*, a copy of which is attached to this Brief as **Attachment D** (Stating “the MCFA does not govern the activities of persons –including political parties –whose activities cannot be defined as contributions or expenditures”).

MEA, 280 Mich App at 509. Accordingly, because the school district is merely facilitating the making of a contribution to a PAC, and the school district is not authorized to make a contribution on behalf of itself, there is no conflict with Section 57 of the MCFA.

RELIEF

WHEREFORE, Amicus Curiae Michigan State Employees Association respectfully requests that this Honorable Court hold that (1) a school district's use of government resources for a payroll deduction plan for contributions made by members of MEA to MEA's PAC is not an expenditure or contribution under the MCFA; (2) Section 57(1) of the MCFA does not prohibit a school district from expending government resources for such a payroll deduction plan when the costs of the plan are prepaid by MEA; and (3) a school district has the authority to collect and deliver payroll deductions for such contributions.

Respectfully submitted,

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