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DR

November 15, 1982

Honorable Ray C. Hotchkiss
Ingham County Circuit Court
Lansing, Michigan

Dear Judge Hotchkiss:

This letter is pursuant to your Order remanding, to the Secretary of State for a written interpretation, the question of the use of funds realized from the sale of entertainment tickets at face value. This letter applies the provisions of the Campaign Finance Act, 1976 PA 388, as amended ("the Act") to the facts which gave rise to Dick M. Jacobs v Richard Austin Secretary of State which is presently before the Court.

Specifically, the issue can be stated as follows:

Does the Act prohibit the Secretary of State from matching pursuant to section 64 the gross amount realized from the sale of entertainment tickets to persons contributing \$100.00 or less to a candidate committee of a candidate for governor who qualifies for primary election public funding?

Section 64 provides as follows:

"Sec. 64. (1) A candidate in a primary election may obtain moneys from the state campaign fund in an amount equal to \$2.00 for each \$1.00 of qualifying contribution if the candidate certifies to the secretary of state that:

(a) The candidate committee of the candidate received an amount of qualifying contributions at least equal to 5% of the candidate's designated spending limit.

(b) The full name and address of each person making a qualifying contribution is recorded by the candidate committee of the candidate certifying. This requirement is in addition to and not in lieu of any other requirements relating to the recording and reporting of contributions.

(2) An unopposed candidate for nomination in a primary election is not entitled to moneys from the state campaign fund except as provided in subsection (3).

(3) If a major party has a contest for the nomination for the same office, an unopposed candidate for nomination of another party in a primary election may receive up to 25% of the maximum payment provided in subsection (6).

(4) A candidate is not entitled to moneys from the state campaign fund for a primary election if it is determined the name of the candidate is ineligible to appear on the primary election ballot pursuant to section 53 of Act No. 116 of the Public Acts of 1954, as amended, being section 168.53 of the Michigan Compiled Laws.

(5) For purposes of this act, a write-in candidate shall not be regarded as opposition, or as creating a contested primary.

(6) A candidate may not receive from the state campaign fund for a contested primary more than 66% of the candidate's expenditure limit designated in section 67(1).

(7) For purposes of this section, primary election is an election held pursuant to section 52 of Act No. 116 of the Public Acts of 1954, as amended, being section 168.52 of the Michigan Compiled Laws."

Section 12(1) of the Act sets forth the definition of the term "qualifying contribution" as follows:

"Sec. 12. (1) "Qualifying contribution means a contribution of money made by a written instrument by a person other than the candidate or the candidate's immediate family, to the candidate committee of a candidate for the office of governor which is \$100.00 or less and made after April 1 of the year preceding a year in which a governor is to be elected. Not more than \$100.00 of a person's total aggregate contribution may be used as a qualifying contribution in any calendar year. Qualifying contribution does not include a subscription, loan, advance, deposit of money, in-kind contribution or expenditure, or anything else of value except as prescribed in this act."

"Contribution" is defined in section 4 of the Act. The relevant portion of that section reads as follows:

"Sec. 4. (1) 'Contribution' means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, donation, pledge or promise of money or anything of ascertainable monetary value whether or not conditional or legally enforceable, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. An offer or tender of a contribution is not a contribution if expressly and unconditionally rejected or returned.

(2) Contribution includes the purchase of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and similar fund raising events, an individual's own money or property other than the individual's homestead used on behalf of that individual's candidacy, the granting of discounts or rebates not available to the general public, or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office."

Based on the definition of the term contribution it appears that the purchase of a ticket from a candidate committee is a contribution "made for the purpose of

influencing the nomination or election of a candidate." A key element in determining whether a payment is a contribution is the committee's plan for utilizing the money received, the intent of the contributor is not the sole determinant. A committee's purpose in raising money is to utilize the money by making expenditures. The use of a particular form of fundraising cannot convert a contribution into a purchase of goods or services.

In the situation at hand, the committee receiving the payments for entertainment tickets apparently included the funds received as qualifying contributions in the committee's application for matching funds in the primary election. Presumably, the monies received were then used to make expenditures in assistance of the candidate's election.

Such utilization of the monies is for the purpose of influencing as well as in assistance of the nomination or election of a candidate. The tickets were sold as a means of raising funds for the campaign.

The term "contribution" is defined by the Federal Election Campaign Act in much the same way as it is defined in the Act. When the federal statute's provisions for matching contributions in presidential primaries first went into effect, the Federal Election Commission utilized procedures which made certain purchases of goods and entertainment tickets "nonmatchable." That is, while the purchase of the ticket was reported as a contribution the whole price of the ticket was not matched. This approach was expanded in regulations which were published subsequent to the 1976 Presidential elections.

The revised regulations grew out of a controversy surrounding the question of whether the full price of tickets to some concerts used by Presidential candidates as fundraisers could be matched pursuant to the Federal Election Commission policies then in effect. The regulations which limited the matchability of some contributions are attached. Basically, regulations currently in effect provide that only the amount in excess of the fair market value of a concert ticket purchase is matchable. These events are described as "any activity that primarily confers private benefits in the form of entertainment to the contributor. . . ." A contribution in the form of a ticket purchase to an event that is "essentially political" is fully matchable.

Recently the Federal Election Commission has issued proposed regulations for presidential primary matching funds which would clarify and elaborate on the regulations now in effect, Federal Register August 17, 1982, pp 35892, 35912. The proposed regulations make no substantive changes with respect to matchability, however, the F.E.C. did request that comments be made on the matchability of contributions made in the form of ticket purchases. It is interesting to note that the comment period for these proposed regulations has been extended because of comments received dealing with the matchability of concert ticket sales. A copy of the proposed regulations is attached.

The State of New Jersey also has a matching program for gubernatorial primary elections. In discussions with New Jersey officials administering the program, Departmental staff have been informed that insofar as the matchability of

contributions is concerned New Jersey's regulations are very similar to the federal regulations.

In presidential primaries and gubernatorial primaries in Michigan and New Jersey, a person purchasing a ticket or other incentive from a campaign is making a contribution. However, the matchability of such contributions is limited, by promulgated rules, for presidential primaries and New Jersey gubernatorial primaries. The Michigan statute does not specifically make contributions in the form of ticket purchases nonmatchable.

The limitations on matchability in the Act are included in section 12(1) of the Act which is set out above. Those limitations are that a contribution or portion of a contribution which may be matched:

1. Must be a contribution of money, in kind contributions may not be used for matching purposes.
2. Is limited to \$100.00 in a calendar year.

The question of the propriety of matching contributions in the form of entertainment ticket purchases was raised very late in the primary campaign. This foreclosed the possibility of making changes in the legislation in time to limit matchability of these contributions in the 1982 gubernatorial primary. Matching is not utilized in conjunction with the general election. Between now and the next gubernatorial primary election there is adequate time to seek legislative changes and implement any necessary changes in administrative rules so that contributions which are matched with public funds, as nearly as possible, indicate actual support for the candidate.

Inasmuch as courts do not rewrite statutes,¹ and the remedy for defects in the laws is with the Legislature,² administrative agencies, such as the Secretary of State's Office, may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed powers given it by statute.³ Because the practice of reselling entertainment tickets is within the Legislature's definition of contribution, any substantive change in the definition should be rendered by the Legislature not the administrative agency.

As Secretary of State I believe that Michigan should, for future elections, adopt an approach similar to the federal and New Jersey approach to the issue. I believe that a majority of concerned persons would be willing to support the adoption of such an approach. My staff has been directed to spearhead the effort to ensure that only contributions which actually indicate support for a candidate will qualify for matching in the 1986 gubernatorial primary.

Very truly yours,

Richard H. Austin
Secretary of State

- 1 Connolly v Reading, 268 Mich 224; 256 NW 432 (1934).
- 2 Warren Township v Engelbrecht, 251 Mich 608; 232 NW 346 (1930).
- 3 Sterling Secret Police, Inc v Michigan Department of State Police, 20 Mich App 502; 174 NW2d 298 (1969).