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SECRETARY OF STATE

MICHIGAN  
DEPARTMENT  
OF STATE

LANSING, MICHIGAN 48918

August 4, 1987

Mr. Peter F. McNenly  
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3000 Town Center, Suite 1800  
Southfield, Michigan 48075

Dear Mr. McNenly:

This is in response to your request for a declaratory ruling concerning the applicability of the Campaign Finance Act (the Act), 1976 PA 388, as amended, to a reverse check-off procedure for collecting contributions, as proposed by the Michigan Education Association (MEA) and the Michigan Education Association Political Action Council (MEA-PAC).

You indicate the "MEA is a voluntary membership organization composed of approximately 100,000 individuals, both professional and nonprofessional, employed by Michigan education institutions." Membership is not required in order to secure or maintain employment in an institution. However, all MEA members must join both an affiliated local association and MEA's parent organization, the National Education Association (NEA).

In most cases, the local association is the exclusive representative of MEA members for purposes of collective bargaining under the Public Employment Relations Act (PERA), 1947 PA 336, as amended. Pursuant to section 10(1) of PERA (MCL 423.210):

"Local associations are permitted . . . to negotiate what are commonly called 'agency shop clauses' in their collective bargaining agreements. Under an agency shop clause an individual is not required to be a member of the MEA or its local affiliate in order to work, but the local association and public employer agree 'to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members . . . .' The rights of nonmember agency fee payers are controlled by MEA Administrative Policy V which provides that they shall receive all 'appropriate services' but shall not be permitted to participate in policy making, voting, or holding of office within MEA or its affiliates. Perhaps most important, for present purposes, agency fee payers are not solicited for contributions to MEA's separate segregated fund MEA-PAC, discussed infra, and no part of the service or agency fee goes to support MEA-PAC activities. Further, under the proposal discussed infra, the MEA-PAC contribution will not be part of the service or agency fee."

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MEA-PAC is a separate segregated fund established by MEA, a non-profit corporation, pursuant to section 55 of the Act (MCL 169.255). This section states, in relevant part:

"Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.

\* \* \* \* \*

(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:

- (a) Members of the corporation who are individuals.
- (b) Stockholders of members of the corporation.
- (c) Officers or directors of members of the corporation.
- (d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities."

You indicate that presently, most contributions to MEA-PAC are collected from MEA members through a voluntary payroll deduction plan. Upon joining MEA, an individual may execute a MEA-PAC Voluntary Contribution Authorization form, which is printed separately and as part of the MEA Continuing Membership Application. The authorized amount is then deducted from the member's paycheck and remitted by the local association to MEA, along with the member's dues. Upon receipt, the MEA-PAC contribution is transferred directly to MEA-PAC. A member may prevent MEA-PAC contributions by revoking his or her payroll deduction authorization in writing prior to September 1 of the next membership year (September 1 through August 31).

MEA and MEA-PAC propose to modify the current collection procedure by implementing a Guaranteed Contribution System. Under this proposal, a \$10.00 contribution will automatically be deducted from each member's salary and remitted to MEA-PAC unless the member indicates that he or she does not wish to make a contribution, or the member requests a refund. The system will be funded by increasing MEA dues by \$1.00 per month for each of the 10 months (September through June) in which dues are collected. Agency fee payers will not be subjected to a corresponding increase.

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Any new member will be required to execute a Continuing Membership Dues Authorization form. A notice will appear on the form indicating that 1) a contribution to MEA-PAC is included in the member's MEA dues; 2) the contribution will be made on the member's behalf unless the member indicates on the front of the form that he or she does not elect to make a contribution, or unless the member requests a refund; 3) a full refund will be made if the member submits a written refund request by December 1 of the current fiscal year; 4) a request for refund will automatically operate to discontinue contributions in future years; 5) the contribution will be used to help support candidates for elective office; 6) the contribution is voluntary and not a condition of membership or employment; 7) a member has the right to refuse to contribute; and 8) such refusal will in no way alter the person's membership or employment status, rights or benefits.

A new member may refuse to participate in the system by indicating or "checking off" on the form that he or she does not elect to make a MEA-PAC contribution. Under the revised system described in your third ruling request, if a member checks-off, the additional dollar will not be deducted from the member's paycheck.

Existing MEA members "will be advised of the new procedure by way of a notice which will appear in each issue of the MEA VOICE during the first year the proposed system is implemented and in the September issues of each year thereafter." A copy of the VOICE, which is published 15 times per year, is sent to each member's home. The proposed notice will contain information substantially similar to the information provided to new members. In addition, a form will be provided to every member who does not contribute to MEA-PAC under the current payroll deduction plan. The member may refuse to participate in the Guaranteed Contribution System by checking off and returning the form to his or her local treasurer or to MEA. If a member checks-off before the start of the next fiscal year, a contribution will not be deducted from the member's paycheck.

A member who does not check-off, or a member who elects to make a contribution, will have \$1.00 per month transferred to MEA-PAC on his or her behalf unless a request for refund is made by December 1 of the current membership year. Under your revised proposal, MEA-PAC will refund \$10.00 to any member who submits a timely refund request. If the member has contributed less than \$10.00 when the refund is made, an additional dollar will continue to be deducted from the member's paycheck during that fiscal year and will be used to reimburse MEA-PAC. However, no deduction will be made in subsequent fiscal years.

MEA requests a ruling that the proposed Guaranteed Contribution System, as described above, does not violate the Act.

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Section 54 of the Act (MCL 169.254) prohibits a corporation from making contributions or expenditures in candidate elections. However, as noted previously, section 55 authorizes a corporation to make expenditures for the establishment, administration and solicitation of contributions to a separate segregated fund. The fund may be used to make contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees and independent committees.

Contributions to a separate segregated fund established by a nonprofit corporation are restricted by section 55(3) and (4). Pursuant to subsection (3), contributions may only be solicited from a limited number of persons, including individual members of the corporation. The method used to collect contributions is restricted by subsection (4), which states:

"Sec. 55. (4) Contributions shall not be obtained for a fund established under this section by use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals."

The Attorney General has indicated that the Act "does permit a voluntary payroll deduction plan as a form of collection of contributions to [a] separate segregated fund." OAG, 1977-78, No 5279, p 391 (March 22, 1978). The issue raised by your inquiry is whether contributions collected under the reverse check-off procedure are voluntary, or whether they are obtained by coercion, force, threat, or as a condition of employment or membership.

The federal courts have previously considered the propriety of using labor union funds to finance political activity. In Abood v Detroit Board of Education, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), the Supreme Court considered the validity of an agency shop clause negotiated by the Detroit Federation of Teachers and the Detroit Board of Education pursuant to the Michigan Public Employment Relations Act, supra. The agency shop provision required non-members to pay to the union, as a condition of employment, a service fee equal to the amount of union dues. The Court ruled that service fees could be used to finance union expenditures for purposes of collective bargaining, contract administration and grievance procedures. However, they could not be used to support ideological causes:

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."  
Abood, supra, pp 235-236.

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The Court noted that in determining an appropriate remedy, the "objective must be to devise a way of preventing compulsory subsidization of ideological activity" without restricting the union's ability to finance collective bargaining activities. The case was then remanded to the Michigan Court of Appeals, with a suggestion that further judicial action be deferred pending the voluntary use of a refund procedure developed by the parties during the course of the litigation.

Other decisions have focused upon the construction of the Federal Election Campaign Act of 1971 (FECA) and particularly what is now 2 USC §441b(b)(3)(A). In Pipefitters Local 562 v United States, 407 US 385; 92 S Ct 2247; 33 L Ed 2d 11 (1972), petitioners were convicted under 18 USC §610, which prohibited a labor organization from making a contribution or expenditure in connection with a federal election. After the Court had heard oral argument, section 610 was amended by adding the language contained in section 441b(b)(3)(A) of the FECA. This section now states:

"(3) It shall be unlawful -

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;"

The Supreme Court's decision in Pipefitters is explained by the District Court in Federal Election Commission v National Education Association, 457 F Supp 1102, 1105 (DDC, 1978):

"Insofar as is pertinent here, the Court held that the Act merely codified existing law and further, that not all political contributions by labor organizations were prohibited, only those derived from funds that 'were actually or effectively required for employment or union membership.' Id. at 339, 439, 92 S.Ct. at 2256, 2276. The funds at issue in Pipefitters were raised by contributions and kept strictly segregated from the union's general treasury, which was financed by assessed dues. Id. at 414, 91 S.Ct. at 2264. The Court therefore concluded that reversible error had occurred because the jury was not instructed to determine whether the contributions to that segregated fund were voluntary or whether they were involuntary because required or effectively assessed. Id. at 435-38, 92 S.Ct. at 2274, 2275. To be voluntary the contribution must result from a 'knowing free-choice,' which means that the solicitation must be conducted under circumstances plainly indicating donations are for political purposes and that those solicited may decline to contribute without loss of job, union membership, or other reprisal.

Id. at 414, 92 S.Ct. at 2264. The purpose of such a standard, the Court said, is to protect the dissenting union member. Id. at 414-15, 92 S.Ct. at 2274."

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The issue in FEC v NEA, supra, was whether a reverse check-off system used by the NEA and certain of its state affiliates, including MEA, to collect contributions to its separate segregated fund violated section 441b(b)(3)(A). Under that system, a person executing a membership application automatically agreed to the deduction of a \$1.00 political contribution from his or her paycheck. The member had no opportunity to disallow the deduction in the first place but had to submit a separate, written refund request if the member did not wish to contribute to NEA-PAC.

After discussing Pipefitters, the Court cited with approval the decision reached in United States v Boyle, 157 US App DC 166; 482 F2d 755 (1973). In Boyle, the Court of Appeals considered a constitutional challenge to section 610 as amended by section 441b(b)(3)(A). Appellant argued that a union member's right not to contribute to a political cause could be protected less restrictively by permitting a refund "of a proportionate amount of a member's dues if the dissenter gives notice of his [or her] disagreement." The Court of Appeals rejected the refund alternative, indicating that Pipefitters required a union member to affirmatively approve a contribution "by assenting to have a deduction made from the member's paycheck." Boyle, supra, p 764.

The District Court concluded that "'knowing free-choice' means an act intentionally taken and not the result of inaction when confronted with an obstacle." FEC v NEA, supra, p 1109. Therefore, dissenting members could not be required to bear the burden of requesting a refund. In these circumstances, the Court ruled that "reverse check-off is per se violative of section 441b(b)(3)(A)'s prohibition against financing political funds by 'dues, fees, or other moneys required as a condition of membership in a labor organization.'" Id, p 1110. The Court did not rule out, however, a payroll deduction method which asked the union member beforehand if he or she wanted a contribution deducted along with his or her dues.

In so holding, the Court agreed with the Federal Election Commission (FEC), which had been asked prior to commencement of the litigation to render an advisory opinion concerning the federal act's application to variations of the reverse check-off procedure proposed by the NEA. The FEC had previously taken the position that reverse check-off violated section 441b(b)(3)(A). The NEA offered as an alternative a "premembership reimbursement method" under which the NEA would refund contributions to dissenting employees upon enrollment or at the beginning of each membership year, rather than at a later time. However, the employee's payroll deduction would continue throughout the year.

A majority of the Commission was unpersuaded:

"The illegality of the reverse check-off procedure stems from the deduction of political monies from a member's paycheck even though he or she may not wish to contribute to the union's political fund. These funds are required as a condition of membership in that the political payment must be made in order to become a member or to maintain membership status in the union. The Act and the regulations prescribe that a refund of the political monies does not relieve the

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condition of membership proscription. The proposed premembership reimbursement method does not change the operation of a reverse check-off procedure, it merely alters the timing of the reimbursement. The reimbursement continues to operate as a refund in that there is a subsequent automatic payroll deduction of political funds and membership dues. The essence of the illegality of the reverse check-off procedure goes to how and why the funds are collected and not to the timing of the dissenting member's reimbursement." A0 1977-37. (April 14, 1978)

The system which the FEC and the District of Columbia Court found offensive required an automatic deduction from each member's paycheck. A member could not refuse to participate in the system and could not prevent the deduction of a political contribution from his or her salary. Thus, the member's only recourse was to seek a refund.

These factors were absent in Kentucky Educators Public Affairs Council v Kentucky Registry of Election Finance, 677 F2d 1125 (CA6, 1982), where the Court of Appeals approved a reverse check-off plan similar to the plan proposed by MEA. In this case, the Kentucky Education Association (KEA) was prohibited by state law from making contributions in candidate elections. KEA therefore established the Kentucky Educators Public Affairs Council (KEPAC) as a "separate political arm" to engage in election activity. Contributions to KEA and KEPAC were collected as follows:

"Kentucky law authorizes local school systems to deduct KEA dues and other membership dues from salary checks. The deduction can be made only upon request of an employee or group of employees. This payroll deduction plan, called Automatic Payment Authorization, [hereinafter, 'APA'] has long been in use in Kentucky. Since 1975, KEPAC has used a 'reverse check-off' system in conjunction with KEA's payroll deduction of dues to obtain contributions. Under the reverse check-off system used by KEPAC, all KEA members executing APA forms have contributions, along with dues payments, insurance premiums, and retirement fund contributions, deducted from their salary checks unless the KEA member affirmatively checks off that she or he declines to contribute to KEPAC. The aims and activities of KEPAC are explained on the APA form. If a KEA member does not initially check off his or her designation to contribute to KEPAC, an automatic contribution is made. If the member does check off, and yet, subsequently decides not to participate, the member can stop the deduction and can also obtain a refund of past contributions. Separate forms are used for members who wish to contribute to KEPAC but not through the payroll deduction system." 677 F2d at 1127.

The Kentucky Corrupt Practices Act prohibited KEPAC from obtaining funds "by assessment or coercion." The issues before the Sixth Circuit, as described by the Court, were whether dissenting members were adequately protected by a reverse check-off procedure which allowed members to elect at the outset not to participate and which was coupled with a refund system, and whether contributions collected under this system were coerced or assessed.

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The Kentucky District Court had previously determined that the reverse check-off plan used by KEPAC did not violate Kentucky law. In so holding, the Court distinguished FEC v NEA, supra, stating that the two cases involved different statutes. The Court of Appeals, agreeing with the lower court, further distinguished the cases:

"...the fundamental questions in both cases was whether a reverse check-off system meets the 'Knowing Free-Service Donation' test set forth in Pipefitters. The District of Columbia Court held that a reverse check-off requiring a dissenter to submit a separate written request for refund rather than being able to disallow the deduction in the first place placed an undue burden on the dissenter. The Court below held that a reverse check-off procedure permitting a disallowance in the first place with a right of refund was not coercion and was not an assessment. The decisions are not incompatible, and the court below was correct in its analysis in its decision."

The Sixth Circuit held the rights of dissenting members were sufficiently protected because 1) they could leave KEA without jeopardizing their employment; 2) they could remain in KEA and attempt to influence its ideological positions; 3) they could check-off and refuse to contribute to KEPAC; or 4) they could request and receive refunds of KEPAC contributions. The Court also found no evidence indicating that contributions collected through reverse check-off were coerced or assessed.

The reverse check-off plan proposed by MEA is distinguishable from the NEA case in the same manner. Under MEA's revised proposal, new and existing members will be given the opportunity to check-off before any amount is deducted from their paychecks. If a member does not check-off or chooses to make a contribution, the member may still recover any amount transferred to MEA-PAC by requesting a refund. MEA-PAC will then return any money it has received from the member, plus any amount which will be deducted from the member's paycheck during the rest of that fiscal year. Although the member's payroll deduction will continue during that year, the deduction will not be for a political contribution but will be used to reimburse MEA-PAC. After a member requests a refund, the deduction will automatically be discontinued for subsequent fiscal years.

Moreover, you specifically state that service fee payers are not solicited, and their fees will not be increased under the proposed system. Thus, there is no danger that service fee payers will unknowingly or unwillingly subsidize MEA's political activities. Similarly, there is no suggestion that members will be coerced, threatened, or suffer job discrimination or financial reprisals if they refuse to contribute to MEA-PAC. Finally, by giving members notice and the opportunity to check-off beforehand, the proposal offers adequate measures which insure that members' contributions will be voluntary.

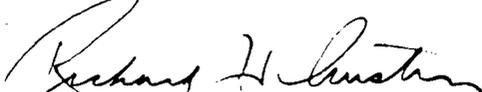
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In these circumstances, MEA will not obtain contributions for MEA-PAC as a condition of employment or membership. A member may refuse to make a contribution to MEA-PAC either before or after money is deducted from his or her paycheck. If a member checks-off or requests a refund, money will no longer be deducted from the member's salary for the purpose of making a contribution to MEA-PAC. Thus, a person is not required to contribute to MEA-PAC in order to acquire or maintain membership in MEA, or employment in an MEA institution. Moreover, it does not appear that MEA members will be coerced, forced or threatened, nor will they suffer job discrimination or financial reprisals if they refuse to contribute to MEA-PAC. Therefore, the revised Guaranteed Contribution System proposed by MEA does not violate section 55 and is permitted under the Act.

It must be emphasized, however, that transfers to MEA-PAC must be made from earmarked contributions and not from MEA's membership dues or general treasury funds. Any transfer of MEA funds to MEA-PAC would result in a violation of section 54 of the Act.

This response is a declaratory ruling concerning the specific facts and questions presented.

Sincerely,

  
Richard H. Austin