STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 20, 2006

Ms. Kathleen Corkin Boyle
White, Schneider, Young & Chiodini, P.C.
2300 Jolly Oak Road
Okemos, Michigan 48864-4597

Dear Ms. Corkin Boyle:

In a letter dated August 22, 2006, you requested a declaratory ruling from the Department of State (Department) to determine whether the Michigan Campaign Finance Act (MCFA), 1976 PA 388, MCL 169.201 *et seq.*, authorizes the Gull Lake Community Schools (school district) to continue to administer a payroll deduction plan for the Michigan Education Association PAC (MEA-PAC).

A copy of your request was published on the Department's website for public comment beginning August 24, 2006. Counsel for the Michigan Chamber of Commerce filed written comments in response to your request. On October 26, 2006, the Department published the draft response to your request on its website, which elicited additional comments from an attorney representing the Michigan State AFL-CIO and Change to Win and yourself. These submissions contended that the Department's draft ruling incorrectly concluded that a public body is prohibited from administering an automatic payroll deduction plan on behalf of a labor organization's separate segregated fund. The Department weighed the arguments presented, but remains convinced that the plain language of the MCFA repudiates the position articulated by the comments' authors.

The Department is authorized to issue declaratory rulings in appropriate cases. MCL 269.215(2), Mich. Admin. Code R 169.6, and MCL 24.263. A person who submits a request for a declaratory ruling must be an interested party, recite a reasonably complete statement of facts, provide a succinct description of the legal question presented, and put forth the request in a signed writing. MCL 169.215(2), Mich. Admin. Code R 169.6(1). The Department has applied these criteria to your correspondence of August 22, 2006 and determined that it is proper to grant your request for a declaratory ruling in this matter.

According to the statement of facts provided in your letter, your firm serves as legal counsel to the Michigan Education Association (MEA). The MEA is a labor organization that functions as the exclusive bargaining representative for approximately 136,000 members, who are employed by public school districts, colleges and universities throughout the state. The schools that employ MEA members are "public bodies" under the MCFA. MCL 169.211(6)(c). The MEA

has created a separate segregated fund, the MEA-PAC, for the purpose of receiving contributions and making expenditures under the MCFA. MCL 169.255(1).

The MEA-affiliated Kalamazoo County Education Association / Gull Lake Education Association (labor union) represents certain employees of the Gull Lake Community Schools (school district). The most recent collective bargaining agreement between the labor union and school district, which has now expired, required the school district to administer a payroll deduction plan for, among other things, the collection and transfer of employees' contributions to the MEA-PAC.[1] Other collective bargaining agreements between public school employers and the MEA or its affiliates contain similar provisions. You further indicate that "[i]n regard to the MEA members employed by the [school district], however, the MEA proposes to pay the employer, in advance, for all anticipated costs of the employer attributable to administering payroll deductions to MEA-PAC or any other separate segregated fund that is affiliated with the MEA."

You offer three questions for the Department's analysis, each of which are answered separately below.

Question 1: "May the [school district] continue to make and transmit to MEA-PAC the payroll deductions requested by MEA members through a properly completed, voluntary consent form?"

The MCFA prohibits a public body or an individual acting on its behalf from "us[ing] or authoriz[ing] 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(1). The words "contribution" and "expenditure" are generally defined to include anything of ascertainable monetary value that is used to influence or assist a candidate's nomination or election to public office, or the qualification, passage or defeat of a ballot question. MCL 169.204(1), 169.206(1). As it is anticipated that deductions taken from employees' wages under the payroll deduction plan in question will be used to finance MEA-PAC's contributions to candidate and ballot question committees or its other political activities, "the [D]epartment interprets the term 'expenditure' to include the costs associated with collecting and delivering contributions to a committee. A payroll deduction system is one method of collecting and delivering contributions." Interpretive Statement to Mr. Robert LaBrant (November 14, 2005).

In view of the MCFA's prohibition on public body expenditures, and the Department's recent statement that the operation of a payroll deduction plan constitutes an expenditure, the Department and Attorney General have both concluded that a public body is prohibited from collecting and remitting contributions to a committee through its administration of a payroll deduction plan. OAG, 2005-2006, No 7187, p ___ (February 16, 2006); Interpretive Statement to Mr. Robert LaBrant (February 17, 2006). This position is consistent with numerous prior Attorney General opinions[2] and Department statements[3].

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[1] A recent declaratory ruling request submitted to the Department by Mr. Kevin Harty, dated August 7, 2006, indicates that the collective bargaining agreement to which you refer has expired, and that the labor union and school district are presently engaged in negotiations concerning the provisions of a new agreement.

[2] *See, e.g.*, OAG, 1965-1966, No 4291, p 1 (January 4, 1965); OAG, 1965-1966, No 4421, p 36 (March 15, 1965); OAG, 1979-1980, No 5597, p 482 (November 28, 1979); OAG, 1987-1988, No 6423, p 33 (February 24, 1987);

Notably, the MCFA specifically authorizes "[a] corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization ... [to] make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL 169.255(1). However, no corresponding provision authorizes a public body to do so. *Cf.* MCL 169.255(1), 169.257. And although a corporation[4] "may solicit or obtain contributions for a separate segregated fund ... from an individual ... [enrolled] in a payroll deduction plan," if the individual provides his or her affirmative consent, in writing, on an annual basis, such powers are not conferred upon public bodies under the statute. *Cf.* MCL 169.255(6), 169.257.

Perhaps the most significant differences among corporations and public bodies codified in the MCFA are the provisions that exempt certain acts from the broad language that bans corporations and public bodies from making contributions and expenditures. In particular, section 54(1) prohibits corporate contributions and expenditures, "[e]xcept with respect to the exceptions and conditions in subsections (2) and (3) and section 55". As noted above, section 55(1) plainly allows corporations to make expenditures "for the establishment and administration and solicitation of contributions to a separate segregated fund". This explicit statutory authorization stands in marked contrast to the text of section 57:

> Sec. 57. (1) A public body or an individual acting for a public body shall not use or authorize the use of ... public resources to make a contribution or expenditure ... 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.

OAG, 1987-1988, No 6446, p 131 (June 12, 1987); OAG, 1993-1994, No 6763, p 45 (August 4, 1993); OAG, 1993-1994, No 6785, p 102 (February 1, 1994); and OAG, 2005-2006, No 7187, p ___ (February 16, 2006).

[3] *See, e.g.*, Interpretive Statement to Mr. Robert Padzieski (June 20, 1983); Interpretive Statement to Mr. Daniel Kreuger (June 14, 1990); Interpretive Statement to Mr. David Cahill (August 4, 1998); Interpretive Statement to Mr. David Murley (October 31, 2005); and Interpretive Statement to Mr. Robert LaBrant (February 17, 2006).

[4] Sections 54 and 55 specifically apply to corporations (for-profit and non-profit), labor organizations, domestic dependent sovereigns, and joint stock companies. For brevity, the use of the words "corporation" and "corporate" in this declaratory ruling includes these entities.

Thus, section 57 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 to 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.[5]

Some have argued that taxpayers, consistent with the MCFA, may bear the cost of administering a payroll deduction plan, as the amount of a public body's expenditure would be negligible. The MCFA simply does not recognize a statutory exception for *de minimis* expenditures; instead, the statutory definition of expenditure encompasses "anything of ascertainable monetary value". MCL 169.206(1). According to the statement of facts presented in your August 22, 2006 request, the MEA counts among its members approximately 136,000 public school employees. Even on the assumption that only a small fraction of these members participate in the MEA's automatic payroll deduction program, and that deductions are taken from their pay on a biweekly or semimonthly basis, public bodies would perform literally hundreds of thousands, perhaps millions, of transactions per year for the benefit of the MEA-PAC. The Department does not consider this volume of activity to be *de minimis*, and maintains that a public body's provision of this service for a labor union's separate segregated fund undoubtedly holds an ascertainable monetary value.

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 section 55(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 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.

Question 2: "May the [school district], consistent with the provisions of the MCFA, administer the payroll deductions to MEA-PAC if either the MEA or MEA-PAC pays the school district, in advance, for any costs associated with administering those payroll deductions?"

The Department is mindful that the Attorney General recently concluded, "a violation [of section 57] could not be avoided by requiring the union to pay the anticipated costs before they are actually incurred. The language of MCL 169.257(1) unqualifiedly prohibits the use of public

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[5] House Bill No. 6460, 93rd Legislature, would allow a public body to utilize "public resources to permit a public employee to contribute to a political action committee of the employee's collective bargaining unit by payroll deduction, if the collective bargaining unit provides full compensation to the public body for the use of the resources."

resources for the described political purposes, making no exception for compensated uses." OAG, 2005-2006, No 7187, p ___, n 8 (February 16, 2006). The Attorney General opinion is consistent with the Department's previous position that "the underlying prohibition in section 57 cannot be avoided by permitting [a student assembly] to reimburse the University for activities, which are themselves prohibited by section 57, without express statutory authority." Interpretive Statement to Mr. David Cahill (August 4, 1998); *see also* Interpretive Statement to Mr. Robert LaBrant (February 17, 2006) ("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."). The Department sees no reason to depart from this rationale.

Question 3: "What costs should be considered by the [school district] in determining the costs attributable to administering the payroll deductions that are to be transmitted to the [MEA-]PAC?"

Given the Department's response to the first and second questions presented in your correspondence, it is unnecessary to address this aspect of your declaratory ruling request.

Hence, the Department has concluded that the school district is prohibited by section 57 of the MCFA from using public resources to make deductions from employees' wages to facilitate contributions to the MEA-PAC, regardless of the MEA's offer to pay the costs of the payroll deduction plan before any contributions are collected. The advance payment of the school district's costs is not specifically authorized by the MCFA, and the Attorney General has opined that such prepayment cannot cure the violation of section 57. The Department's prior interpretive statements and declaratory rulings, which are supported by numerous Attorney General opinions, emphasize the necessity of prohibiting public bodies from engaging in campaign activities to preserve government neutrality in elections.

The foregoing statement constitutes a declaratory ruling with respect to the applicability of the MCFA to the unique factual circumstances and legal questions presented in your August 22, 2006 letter.

Sincerely,

Terri Lynn Land
Secretary of State