2-06-CD

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

November 1, 2006

Mr. Kevin S. Harty
Thrun Law Firm, P.C.
Post Office Box 2575
East Lansing, Michigan 48826-2575

Dear Mr. Harty:

On August 7, 2006, you submitted a request for a declaratory ruling to the Department of State (Department) concerning the ability of the Gull Lake Community Schools (school district) to administer a payroll deduction plan for a political action committee, consistent with the provisions of the Michigan Campaign Finance Act (MCFA), 1976 PA 388, MCL 169.201 *et seq.* A copy of your request was published on the Department's website for public comment beginning August 10, 2006. Attorneys representing the Michigan Chamber of Commerce and Michigan Education Association (MEA) separately filed comments concerning your request with the Department. Following the publication of the Department's October 11, 2006 draft response to your request, counsel for the MEA and the Michigan State AFL-CIO and Change to Win each submitted written comments urging the Department to modify its ruling to allow a public body to operate an automatic payroll deduction plan on behalf of a labor organization's separate segregated fund. These comments were carefully considered, yet the Department was not persuaded to revise its position.

The MCFA and corresponding administrative rules, as well as the Administrative Procedures Act, 1969 PA 306, MCL 24.201 *et seq.*, authorize the Department to issue a declaratory ruling in limited circumstances. MCL 169.215(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 carefully reviewed your correspondence of August 7, 2006 and determined that, as an interested person who has presented a description of actual facts and concise questions of law, it is appropriate to grant your request for a declaratory ruling in this matter.

Your letter acknowledges that the school district is a public body within the meaning of the MCFA. MCL 169.211(6)(c). According to the factual circumstances described in your letter, the school district is a party to an expired collective bargaining agreement with the Kalamazoo County Education Association / Gull Lake Education Association (labor union), and currently is engaged in negotiations concerning the provisions of a new agreement. Under the terms of the former collective bargaining agreement, the school district was required to administer a payroll deduction plan for the collection and transfer of contributions to the Michigan Education

Association Political Action Committee (MEA-PAC), an independent committee registered with the Department. You indicate that "in current collective bargaining negotiations, the union has proposed retention of the CBA language requiring such payroll deductions for MEA-PAC and has opposed the [school district's] efforts to remove that language based upon OAG 2005-2006, No. 7187, as well as the Department's February 17, 2006 Interpretive Statement."

Three questions are presented for the Department's consideration; the Department's response to each of these inquiries is set forth separately below.

Question 1: *"May the [school district] administer, consistent with the MCFA, a payroll deduction plan for a political action committee for or on behalf of the Kalamazoo County Education Association, the Gull Lake Education Association or the Michigan Education Association?"*

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). "[T]he [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).

Subsequently, an Attorney General opinion and interpretive statement issued by the Department in February 2006 concluded that a public body is prohibited from administering an automatic payroll deduction system for the purpose of accumulating and forwarding employee contributions to a committee. OAG, 2005-2006, No 7187, p ___ (February 16, 2006); Interpretive Statement to Mr. Robert LaBrant (February 17, 2006). The Attorney General's opinion and the Department's interpretive statement both refer to the state's consistent and long-established public policy of barring state and local units of government from participating in political activities. Citing section 57 of the MCFA and numerous prior Attorney General opinions[1] and Department statements[2], the Department concluded that a public body is prohibited from expending government resources for a payroll deduction plan that deducts wages from its employees on behalf of a political action committee.

Legislation recently introduced in the Michigan House of Representatives supports the Department's position. Proponents of the bill seek to amend section 57 of the MCFA to 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

[1] 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); 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).

[2] 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).

collective bargaining unit provides full compensation to the public body for the use of the resources." House Bill No. 6460, 93rd Legislature. Enactment of this legislation may allow the school district to use public resources in the operation of a payroll deduction plan to effectuate the collection and remittance of contributions to the MEA-PAC.

Although the question presented specifically pertains to the school district's ability to administer a payroll deduction plan that benefits the MEA-PAC, the Department emphasizes that the same reasoning applies to a public body's payroll deduction plan that receives and transfers employee contributions to any candidate, ballot question, political, independent, or political party committee. In fact, had the Department concluded that the MCFA authorizes the deployment of public resources in this manner, nothing would prevent an incumbent officeholder from establishing a payroll deduction plan for the benefit of his or her candidate committee at taxpayer expense. This significant, institutional fundraising advantage would further weaken the ability of non-incumbent candidates to mount an effective challenge. Furthermore, the Department's position "does not single out political contributions to only certain parties, candidates or issues," and is wholly unrelated to affiliation or political agenda of the committee that receives contributions collected by a public body's payroll deduction system. *Toledo Area AFL-CIO Council, et al. v Pizza*, 154 F.3d 307 (CA 6, 1998).

Question 2: "May the [school district], consistent with the MCFA, enter into a new CBA with the local affiliate of the Michigan Education Association which requires or permits the [school district] to administer a payroll deduction plan on behalf of a political action committee?"

Given the Department's conclusion that the MCFA prohibits the school district from administering a payroll deduction plan on behalf of the MEA-PAC, in the Department's view, a collective bargaining agreement that contains such provisions is not "consistent with the MCFA". It is worth noting "that contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void." *Maids Int'l, Inc. v Saunders, Inc.*, 224 Mich. App. 508, 511 (1997).

The necessary implication of the question you pose is whether the school district possesses the requisite legal authority to execute an employment contract that includes terms pertaining to the payment and deduction of employees' wages. The Administrative Procedures Act authorizes the Department to issue a declaratory ruling concerning "the applicability to an actual state of facts *of a statute administered by the agency* or of a rule or order of the agency." MCL 24.263 (emphasis added). Administrative rules promulgated by the Department for the purpose of implementing the MCFA provide that the Department "may issue a declaratory ruling *as to the applicability of the act or these rules* to an actual statement of facts." Mich Admin Code R 169.6(1) (emphasis added). The school district's duty to engage in collective bargaining and its authority "to make and enter into collective bargaining agreements" is governed by the Public Employment Relations Act, 1947 PA 336, MCL 423.201 *et seq.* MCL 423.215(1). Furthermore, the Payment of Wages and Fringe Benefits Act, 1978 PA 390, MCL 408.471 *et seq.*, regulates the deduction of an employee's wages. These statutes are implemented and enforced by other state agencies. As your question concerns a matter that exceeds the reach of the MCFA or this Department's regulation, the Department declines to render a declaratory ruling or interpretive statement on this issue, and simply states that such an agreement is not "consistent with the MCFA".

Question 3: *"If the labor union offers to reimburse the [school district] for expenses involved in administering a payroll deduction plan to facilitate employee contributions to a political action committee, would this offer obviate any violation of the MCFA by the [school district]?"*

Having already determined that a public body lacks the requisite legal authority to operate a payroll deduction plan for the benefit of a political action committee, the Department is next asked to consider whether a political action committee's reimbursement of the public body's expenditure for the cost of managing an automatic payroll deduction plan cures this violation. In the Department's view, it does not.

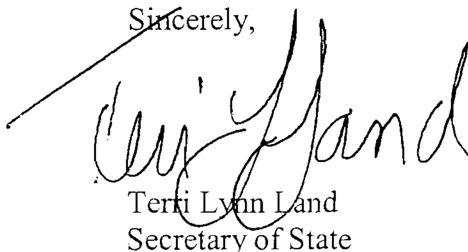
As the Attorney General recently opined, "[t]here is nothing in the language of section 57 that indicates a violation may be remedied or excused through a reimbursement mechanism ... There is no basis in the plain language of section 57 for reading in a remedy or exception to the prohibition for unions that offer to reimburse the State for its use of public resources." OAG, 2005-2006, No 7187, p ___ (February 16, 2006). The Attorney General's conclusion is consistent with the Department's longstanding 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).

If a political action committee or its sponsoring organization were permitted to reimburse a public body for costs attributed to the operation of a payroll deduction plan for political contributions, a public body could easily circumvent the prohibition against the use of public resources contained in section 57. The MCFA clearly prohibits government agencies from utilizing public resources to make a political contribution or expenditure, and makes no exception for the operation of a payroll deduction plan. Concluding that a political action committee's reimbursement of the government's cost would, in effect, create such a statutory exception where none currently exists.

In summary, the school district is prohibited by section 57 of the MCFA from administering a payroll deduction plan for the collection and remittance of political contributions to the MEA-PAC, and the MEA-PAC's offer to reimburse the school district for costs incurred in the operation of such a plan does not purge the violation. The Department offers no opinion concerning the school district's legal authority to execute a collective bargaining agreement containing such terms.

The foregoing statement constitutes a declaratory ruling concerning the applicability of the MCFA to the unique factual circumstances and legal questions presented in your August 7, 2006 correspondence.

Sincerely,



Terri Lynn Land
Secretary of State