STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN EDUCATION ASSOCIATION,

Petitioner-Appellee,

v

SECRETARY OF STATE,

Respondent-Appellant,

and

MICHIGAN CHAMBER OF COMMERCE, MICHIGAN STATE AFL-CIO, CHANGE TO WIN, MACKINAC CENTER FOR PUBLIC POLICY, SENATE MAJORITY LEADER, SENATE MAJORITY FLOOR LEADER, and SENATE CAMPAIGN AND OVERSIGHT COMMITTEE CHAIR,

Amici Curiae.

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No. 280792
Ingham Circuit Court
LC No. 06-001537-AA

Advance Sheets Version

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

O'CONNELL, J.

Respondent Secretary of State appeals by leave granted the trial court order setting aside as arbitrary and capricious respondent's declaratory ruling interpreting § 57 of the Michigan Campaign Finance Act, MCL 169.201 *et seq*. (MCFA). We reverse.

I. Basic Facts and Procedural History

A. The Parties

1. The Secretary of State

The respondent-appellant in this matter is the Secretary of State (the Secretary). The position of Secretary of State is an elective office under the Michigan Constitution. See Const

1963, art 5, § 21. The Secretary is the single executive heading the Department of State (the Department). See Const 1963, art 5, § 3. The Department of State is one of the principal departments in the executive branch of state government. See MCL 16.104(1). The Secretary has certain duties and responsibilities, see MCL 11.4 *et seq*., including the administration of the MCFA, MCL 169.215. Under the MCFA, MCL 169.215(1)(e), and under the Administrative Procedures Act, MCL 24.263, the Secretary of State may issue "a declaratory ruling as to the applicability to an actual state of facts of a statute."

2. The MEA

The petitioner-appellee in this matter is the Michigan Education Association (MEA). The MEA is a voluntary, incorporated labor organization that in August 2006 represented some 136,000 members employed by public schools, colleges, and universities throughout Michigan. The MEA's MEA-PAC is a separate segregated fund under § 55 of the MCFA, MCL 169.255. According to the MEA: MEA-PAC is funded in part by MEA member payroll deductions; the MEA or its affiliates have entered into collective bargaining agreements with various public school districts throughout the state; some of those collective bargaining agreements, including the agreement between the Kalamazoo County Education Association/Gull Lake Education Association (presumably affiliates of the MEA) and the Gull Lake Public Schools, include a requirement that the school district employer administer a payroll deduction plan for contributions to MEA-PAC; the Gull Lake collective bargaining agreement also requires the Gull Lake Public Schools to make other payroll deductions, such as the payment of MEA dues and service fees; and in 2006, it proposed that it pay the Gull Lake Public Schools, in advance, for all anticipated costs of Gull Lake Public Schools attributable to administering payroll deductions to MEA-PAC or any other separate segregated fund affiliated with the MEA. The MEA contends that under this proposal, Gull Lake Public Schools would not incur any costs or expenses in administering the requested deductions, because the Gull Lake Public Schools would be reimbursed, in advance, for such costs and expenses.

3. The Amici

Various entities and persons have filed helpful briefs amicus curiae in this matter. They are the Mackinac Center for Public Policy, the Michigan State AFL-CIO and Change to Win, the Michigan Chamber of Commerce, and Senate Majority Leader Michael D. Bishop, Senate Majority Floor Leader Alan Cropsey, and Senator Michael McManus, Chairman of the Senate Campaign and Election Oversight Committee.

B. The MEA's Request for Declaratory Ruling

On August 22, 2006, the MEA filed a request for a declaratory ruling by the Secretary. The MEA detailed the facts concerning the Gull Lake Public Schools summarized above and asserted that the administration of the payroll deductions by the school district did not "constitute an 'expenditure' under the MCFA" and did not constitute a violation of § 57 of the MCFA, MCL 169.257. The MEA then requested a declaratory ruling on three questions:

1. May the Gull Lake Public Schools continue to make and transmit to MEA-PAC the payroll deductions requested by MEA members through a properly completed, voluntary consent form?

2. May the Gull Lake Public Schools, 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?

3. What costs should be considered by the Gull Lake Public Schools in determining the costs attributable to administering the payroll deductions that are to be transmitted to the PAC [political action committee]?

C. The Secretary's Declaratory Ruling

On November 20, 2006, the Secretary issued her declaratory ruling in response to the MEA's request. Regarding the MEA's first question, the Secretary noted that the Department of State and the Attorney General had both concluded that a public body is prohibited from collecting and remitting contributions to a "committee" through its administration of a payroll deduction plan. The Secretary noted that § 55 of the MCFA allowed the named private entities to make "expenditures" for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. However, citing § 55(1) and § 57, the Secretary went on to note that "no corresponding provision authorizes a public body to do so. "The Secretary stated that "[t]he 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."

Regarding the MEA's second question, the Secretary stated that the Department was mindful of the Attorney General's recent conclusion that

> a violation [of § 57] could not be avoided by requiring the union to pay the anticipated costs before they are incurred. The language of MCL 169.257(1) unqualifiedly prohibits the use of public resources for the described purposes, making no exception for compensated uses. [OAG, 2005-2006, No 7187, p 81 (February 16, 2006).]

The Secretary stated that this opinion was consistent with the Department's previous position, citing several previous interpretative statements, and that the Department saw no reason to depart from this rationale. The Secretary also concluded that it was unnecessary to address the MEA's third question, given her response to the first and second questions.

D. The Trial Court's Decision

The MEA filed in the Ingham Circuit Court a petition for review challenging the Secretary's declaratory ruling.[1] On September 4, 2007, the trial court issued its opinion setting aside the Secretary's declaratory ruling. The trial court summarized the Secretary's declaratory ruling and stated: "This means that unions cannot take voluntary payroll deductions from their member employees and contribute those funds to PACs established by the unions, if the employees in the union work for a public body."

After stating the standard of review contained in the Administrative Procedures Act, MCL 24.306(1),[2] the provisions of § 57 of the MCFA, and the positions of the parties, the trial court determined that the Secretary's declaratory ruling was "arbitrary, capricious, and an abuse of discretion." The trial court concluded that under the plain language of § 57, the administration of payroll deductions to a union PAC constitutes an "expenditure" under the MCFA. The trial court then stated:

> However, where the costs of administration are reimbursed, no transfer of money to the union PAC occurs, and therefore an "expenditure" has not been made within the meaning of the MCFA. Thus, a public body may administer payroll deductions so long as all costs of making deductions are reimbursed by the PAC. § 57 does not explicitly prohibit a public body from administering the payroll deduction requests of its employees.

The trial court also disagreed with the Secretary's assertion that her declaratory ruling was consistent with past rulings and statements. While the trial court agreed with the Secretary that she is free to make prospective changes in the course and direction of the declaratory rulings, it stated that such changes "must not be arbitrary, capricious, or in violation of any other law." The trial court concluded that the Secretary made such an arbitrary change when she issued her declaratory ruling. The trial court then held that public bodies, such as the Gull Lake Public School system, may "administer payroll deductions requested by their employees, provided that all expenses of making the deductions are borne by the PAC or its sponsoring labor organization and are paid in advance."

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[1] "A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case." MCL 24.263.

[2] See also Const 1963, art 6, § 28.

E. The Secretary's Appeal

On September 27, 2007, the Secretary filed an application for leave to appeal the trial court's decision, and on December 19, 2007, a panel of this Court granted that application. In her brief on appeal, the Secretary outlined the question involved as follows:

> The Secretary of State issued a declaratory ruling that § 57 of the Michigan Campaign Finance Act prohibits a school district, as a public body, from administering a payroll deduction plan on behalf of a union's political action committee and that a violation could not be remedied by a union's reimbursement of the costs associated with administering such a plan. On appeal, the circuit court found that the plain language of § 57 prohibited the administration of payroll deductions by a union political action committee, but that where the costs of administration are reimbursed in advance, a violation does not occur. Was the circuit court correct in finding that the declaratory ruling by the Secretary of State was arbitrary, capricious, and an abuse of discretion?

II. Standard of Review

We review de novo questions of statutory interpretation. *Faircloth v Family Independence Agency*, 232 Mich App 391, 406; 591 NW2d 314 (1998).

> [A]gency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. While the agency's interpretation may be helpful in ascertaining the legislative intent, courts may not abdicate to administrative agencies the constitutional responsibility to construe statutes. Giving uncritical deference to an administrative agency would be such an improper abdication of duty. [*In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).]

III. Statutory Interpretation

MCL 169.257(1) provides, in pertinent part:

> A public body[3] 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 or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a).

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[3] There is no dispute that a school district is a public body and, therefore, governed by MCL 169.257.

The MCFA defines "expenditure" as "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." MCL 169.206(1). "[W]hen 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). The Secretary previously issued an interpretive statement indicating that "the department interprets the term 'expenditure' to include the costs associated with collecting and delivering contributions to a committee" and that "[a] payroll deduction system is one method of collecting and delivering contributions." Interpretative Statement to Mr. Robert LaBrant (November 14, 2005).

None of the parties appears to question this interpretation.[4] Rather, as stated above, the sole issue before us is whether, under the MCFA, advance reimbursement for the costs of a payroll deduction system prevents what is otherwise an illegal expenditure from ever becoming an "expenditure." We conclude that it does not. We find nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure. This Court presumes that the Legislature intended the meaning clearly expressed in unambiguous statutory language, and no further construction is required or allowed. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). We note that although MCL 169.204(3)(c) provides that "[a]n offer or tender of a contribution, if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt" is not a contribution, MCL 169.206(2)(e) provides that only rejection and return prevent an expenditure and does not permit "refund." "[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). We may not assume that the omission of the term "refund" from MCL 169.206(2)(e) was inadvertent. *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 530; 734 NW2d 533 (2007).

We also conclude that reimbursement, advance or otherwise, does not prevent an otherwise illegal expenditure from ever becoming an expenditure because "there is no transfer of value." Contrary to the trial court's reasoning, a transfer of value has occurred because there is time spent by employees that monetary reimbursement cannot return. For example, it takes employees to distribute voluntary payroll deduction forms, receive the signed forms, make certain the forms conform to legal requirements, enter the information into the payroll system, and update the information yearly. Although monetary reimbursement can compensate the school district for the salary paid for the time spent by the employees performing those functions, the time spent on non-school district business is irretrievably lost and cannot be recovered. This work constitutes a transfer of value for which monetary reimbursement is insufficient. Accordingly, reimbursement does not prevent an expenditure from occurring. The trial court erred by concluding that reimbursement prevents an expenditure from occurring, and its declaratory ruling was arbitrary and capricious.

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[4] In fact, the trial court and the appellate briefs concede that an expenditure has occurred absent the asserted magical effects of prior reimbursement.

IV. Additional Issues

The dissent raises two issues that were not set forth in the statement of questions presented on appeal, nor were they raised by any of the nine parties or amici in their briefs or at oral argument. We are not obligated to consider issues not properly raised and preserved or those that were first raised on appeal, *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994); *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), and we generally do not consider any issues not set forth in the statement of questions presented, *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). We, therefore, decline to address them because they are not properly before us. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Although the dissent's legal argument may "have substantive merit, it can be of no avail [because each of the parties and amici] failed to raise the issue in a timely fashion." *Forton v Laszar*, 463 Mich 969, 970 (2001) (CORRIGAN, C.J., concurring).[5]

If the parties wish to make arguments to resolve these "other issues," they are free to file a separate lawsuit. However, this Court should not sua sponte create issues on appeal and then remand to the trial court for a determination of those issues, or request additional briefing to dispose of the issues for the first time on appeal.[6]

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[5] The dissent's description of the MCFA as a "self-contained looking-glass" full of circus type mirrors may be accurate. However, in light of the MCFA prohibitions, we believe that the dissent "has traveled one mirror too far." Unlike § 55 for corporations, § 57 does not authorize a public body to make expenditures to establish, administer, or solicit "contributions" for a management PAC, nor is there authorization to administer a payroll deduction plan for "contributions" to a separate segregated fund. Absent such authorization, school districts are prohibited from engaging in the political process. In our opinion, the prohibition on expenditures and contributions, coupled with the absence of express permission for a payroll deduction plan, should end the discussion.

We concede that the Legislature may have the authority to allow public bodies to engage in some limited form of partisan politics. However, until the Legislature explicitly makes such a pronouncement, courts should be reluctant to allow public bodies to engage in any form of politics. Sincere advocates can read self-contained looking-glass legislation and reach different results, but it is beyond question that the intent of this legislation was to prevent taxpayer funded public bodies from engaging in partisan politics. In our view, the methodological manner in which the dissent interprets the MCFA turns the statute upside down and inside out, resulting in permission for that which the statute was intended to prevent.

[6] If we were to address the dissent's issues, we would still reverse. The MCFA treats public entities and private entities differently. Compare MCL 169.254 with 169.257. Given this differential treatment, we would conclude that the allocated costs of collecting and delivering payroll deductions by members of the MEA affiliate to the MEA-PAC are both an expenditure and a contribution to the MEA-PAC by the Gull Lake Public Schools. See OAG, 2005-2006, No 7187, p 81, (February 16, 2006) (Concluding that "[a] public body's use of its resources to administer the payroll deduction plan would 'cause' the contribution to 'happen,' and thus violate section 57.").

(continued…)

We reverse the circuit court's order. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

(…continued)

Under our system of government, public bodies should not participate in the political process. To effectuate this, our Legislature prohibited them from making "expenditures" and "contributions." MCL 169.257(1). Over time, the prohibition became more detailed, and now includes "the use or authoriz[ation of] 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 . . . ." *Id.* Numerous Attorney General opinions have made this proposition clear. See, e.g., OAG, 1993-1994, No 6763, p 45 (August 4, 1993) ("School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue . . . . School districts may not endorse a particular candidate or ballot proposal."); OAG, 1965-1966, No 4291, p 1 (January 4, 1965) (School district not allowed to spend funds to advocate a favorable vote on a tax and bond ballot proposal). Given the consistency with which the MCFA has been interpreted to prohibit public bodies from spending public funds or otherwise utilizing public resources paid for by all taxpayers to advocate for a particular political position or candidate, it is absolutely illogical, inconsistent, and contrary to the very purpose of MCL 169.257 to conclude that it is permissible for a school district (a public body) to administer payroll deductions sent to MEA-PAC (a group whose very purpose is to advocate for various political positions and candidates).