

Legislative Analysis



PROHIBIT USE OF 'PUBLIC RESOURCES' BY PUBLIC EMPLOYEES & UNIONS

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House Bill 4052 (Substitute H-1)

Sponsor: Rep. Al Pscholka

Committee: Oversight, Reform, and Ethics

First Analysis (10-7-11)

BRIEF SUMMARY: The bill would prohibit a public employee or bargaining representative from using "public resources" for (1) political activities, (2) campaigning for office of a bargaining representative; (3) bargaining representative organizing activities, and (4) soliciting employees for membership in a bargaining representative. (Public resources would include funds, personnel, office space, computer hardware or software, electronic mail, property, stationery, postage, vehicles, equipment, supplies, and other public assets)

FISCAL IMPACT: House Bill 4052 is not expected to have a significant impact on state or local budgets.

THE APPARENT PROBLEM:

The Michigan Campaign Finance Act (at MCL 169.257) prohibits a public body, or an individual acting for a public body, from using or authorizing the use of public resources to make a contribution or expenditure towards a political campaign, or to provide volunteer personal services. (This applies to the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources.) Those who knowingly violate this provision are guilty of a misdemeanor punishable, if the person is an individual, by a fine of not more than \$1,000 and/or imprisonment for not more than one year, or if the person is not an individual, by a fine of not more than \$20,000, or a fine equal to the amount of the improper contribution or expenditure, whichever is the greater amount.

The Campaign Finance Law also specifies that this prohibition does *not* apply in six instances: during the expression of views by an elected or appointed public official who has policy-making responsibilities; during the production or dissemination of factual information concerning issues relevant to the function of the public body; during the production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, or magazine; during the use of a public facility if any candidate or committee has an equal opportunity to use the public facility; during the use of a public facility if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event; and when an elected or appointed public official is on personal time and is expressing personal views, expending personal funds, or is providing personal volunteer services. See **Background Information** for a link to the text of this provision in statute.

Recently some legislators have reported that public employees—in particular public school personnel and school union representatives—are using public resources, such as their in-school email systems, and telephones to contact them or other citizens, in an attempt to influence legislation (e.g., the School Aid budget, efforts to reform teacher tenure, expired contract modifications, etc.) by expressing their points of view, although these contacts have not been undertaken within the context of an organized political campaign, as that is defined in the Campaign Finance Law.

In one incident, a legislator cited a flyer circulated among teachers by the Michigan Education Association (MEA) Region 5C UniServ director which offered a "plan of action" that said, in part: *Contact your legislators and tell them to vote "NO" on these anti-labor, anti-school employee bills. Call them or use your **personal** (emphasis as it appeared in the original) email accounts. It is suggested that you contact them at least daily until this crisis is over. Email them when you boot up your computer at the start of the day and email them again just before you shut your computer down at the end of the day. Call their offices when you can as well.*

In a second incident, another legislator reported the use, for a political purpose, of the automated telephone warning system of the Lawrence Public Schools (in Van Buren County in southwestern Michigan). The legislator reported that a transcript of the automated message said: *This is a message from the Lawrence Public Schools (inaudible) alert system. This is an informational item and not directly associated with the school. Concerned parents interested in cuts to education...we're here to inform you that there is information about the problem. Also, be advised that there is a petition to recall Governor Snyder, if you want. Stop by Chuck Moden's house right by the school June 7th/8th between 3:30 and 4:00 pm. Thank you. Goodbye.*

At least some of the equipment that these public school employees used when they rallied supporters to their cause was school equipment paid for by local taxpayers. Further, according to committee testimony, some of the activities, such as telephone calls to legislators, occurred during school employees' hours of employment.

If incidents such as these occur in the context of a declared political campaign, then they are addressed and sometimes prohibited under the Michigan Campaign Finance Act. However, the prohibitions do not necessarily apply in instances that are not campaign related unless school districts had policies to prohibit political activity on behalf of candidates or issues in partisan or non-partisan elections during actual-duty time. (This prohibition exists, for example, for all state civil servants in Civil Service Rule 1-12.6).

In Michigan, since 1947, public employees may (but are not required to) organize in order to collectively bargain with their public employers about their salaries, benefits, and work conditions, under the Public Employment Relations Act, sometimes called PERA. The law, based in some ways on the National Labor Relations Act, provides the framework to describe public employer and public employee rights during collective bargaining. (State civil servants may organize to collectively bargain, but they are not governed by PERA, but rather by the Michigan Civil Service Commission.)

Legislation has been introduced to amend PERA to prohibit a public employee from using public resources when engaging in "political activities" (a term defined in the bill), and in certain union activities. Further, the proposed legislation would also apply this prohibition to a "bargaining representative," customarily referred to as a labor union or employee membership organization. In addition, the bill would prohibit a "public employee" or "bargaining representative" from using public resources when (a) campaigning for office of a bargaining representative; (b) conducting bargaining representative organizing activities; and when (c) soliciting employees for membership in a bargaining representative.

THE CONTENT OF THE BILL:

House Bill 4052 (H-1) would amend the Public Employment Relations Act (PERA), which authorizes public employees to organize and to negotiate or bargain collectively with their public employers through representatives of their own choice, and prohibits strikes.

The bill would prohibit a public employee or bargaining representative from using public resources for (1) political activities, (2) campaigning for office of a bargaining representative; (3) conducting bargaining representative organizing activities, or (4) soliciting employees for membership in a bargaining representative.

[Under PERA, "public employee" is defined at MCL 423.201(1)(e). See ***Background Information*** for the link to the complete definition. Generally, the term means a person holding a position by appointment or employment in state or local government, in public schools, or in a special district, authority, commission, board, or in any other branch of the public service, subject to a few exceptions. The term "bargaining representative" is defined in PERA at MCL 423.201(1)(a) to mean "a labor organization recognized by an employer or certified by the commission as the sole and exclusive bargaining representative of certain employees of the employer."]

The bill says that the prohibition on the use of public resources would *not* prohibit the use of public resources in any of the following circumstances:

- If the public resource is a public forum or limited public forum, on the same basis as allowed members of the general public.
- For contract negotiation activities.
- To implement or maintain contractual obligations among public employees, labor organizations, bargaining representatives, public employers, or public school employers.
- To perform a duty of the employee's job in furtherance of the interests of the public employer.

[Note: PERA does not define "public employer," but does define the term "public school employer" at 423.201(1)(h) to mean a public employer that is the board of a school district, intermediate school district, or public school academy; is the chief executive

officer of a school district in which a school reform board is in place under Part 5A of the Revised School Code; or is the governing board of a joint endeavor or consortium consisting of any combination of school districts, intermediate school districts, or public school academies.]

Penalties. House Bill 4052 (H-1) specifies that a person who violates this section of the law would be guilty of a misdemeanor punishable as follows: (a) if the violator is not an individual, then by a fine of not more than \$10,000; or (b) if the violator is an individual, then by imprisonment for not more than one year and/or a fine of not more than \$1,000.

Definitions. The bill defines three terms: "political activities," "influence," and "public resources." Under the bill, the phrase "political activities" includes: (1) an activity performed on behalf of a candidate or issue in connection with a partisan or non-partisan election; and (2) an activity that involves a direct or indirect communication with an official in the executive or legislative branch of state government that is reasonably intended to influence administrative or legislative action.

The term "influence" means promote, support, affect, modify, oppose, or delay by any means, including providing or using information, statistics, studies, or analysis.

The phrase "public resources" includes funds, personnel, office space, computer hardware or software, an electronic mail system, property, stationery, postage, vehicles, equipment, supplies, or other public assets.

MCL 423.209

BACKGROUND INFORMATION:

For the relevant provisions of the Campaign Finance Act, see:

[http://www.legislature.mi.gov/\(S\(obtvpqqvshxnod55xx5hs445\)\)/mileg.aspx?page=getObject&objectName=mcl-169-257](http://www.legislature.mi.gov/(S(obtvpqqvshxnod55xx5hs445))/mileg.aspx?page=getObject&objectName=mcl-169-257)

For the relevant definitions in the Public Employment Relations Act, see:

[http://www.legislature.mi.gov/\(S\(obtvpqqvshxnod55xx5hs445\)\)/mileg.aspx?page=getObject&objectName=mcl-423-201](http://www.legislature.mi.gov/(S(obtvpqqvshxnod55xx5hs445))/mileg.aspx?page=getObject&objectName=mcl-423-201)

ARGUMENTS:

For:

Those who favor this legislation argue that Michigan taxpayers should not have to subsidize the policy positions of public school employees and their union representatives when they advance views about education issues or officeholders, or when they attempt to influence legislation, whether this occurs during school hours or outside work hours.

(The bill applies to other public employees as well, but the problem being addressed has been identified as involving public school employees.)

In particular, proponents say, no "public resources," including funds, personnel, office space, computer hardware or software, an electronic mail system, property, stationery, postage, vehicles, equipment, supplies, or other public assets, should be used to communicate the points of view of individual employees or of groups of employees.

Because very few school districts and local governments have (or are willing to enforce) this kind of work rule, it is necessary to state this policy position clearly and firmly in state law.

During committee testimony, proponents cited three examples of political behavior that this bill would make illegal: (1) a phone call to a legislator using a classroom telephone (to convey opposition to education funding cuts); (2) the use of a school-issued computer to send a legislator an email (to convey opposition to education funding cuts, as well as to legislation proposing tenure reform, and contract modification); and (3) the use of a school-based automatic weather-alert telephone system school district-wide (to disseminate school aid and gubernatorial recall information).

Supporters of the bill say these are but three examples of a widespread pattern of abuse by public school employees, as they use their government-issued equipment to advance a particular political purpose. They characterize this behavior as an "abuse of public resources," and as "a breach of promise to the public," an affront that diminishes the public's trust in school and government employees to stay clear of the political process while on the job.

For:

Further, proponents of this legislation say Michigan taxpayers should not have to subsidize the labor organizations when public employees run for union office, organize employees, or solicit members. Proponents note that while Michigan has allowed public sector unionization for more than 60 years, its citizens need not actively promote unionization of public employees by allowing tax dollars to be used to make union organizing easier. While unionization is voluntary in our state, it has come to seem obligatory to many workers in the public sector—and especially to some school teachers—and that obligatory view should be challenged, not encouraged.

Against:

Opponents of the bill say that it will have unintended consequences because the definitions of the terms "political activity" and "influence," as well as the list of prohibitions, are far too broad, and the exceptions (allowable behaviors) far too narrow. The bill could prevent or inhibit the valuable exchange of ideas.

For example, the phrase "*political activities*" is defined to include (1) *an activity performed on behalf of a candidate or issue in connection with a partisan or non-partisan election*, and (2) *an activity that involves a direct or indirect communication*

with an official in the executive or legislative branch of state government that is reasonably intended to influence administrative or legislative action.

The bill provides an exception to the prohibition on the use of public resources in order "to perform a duty of the employer's job in furtherance of the interests of the public employer." Opponents say that exception when taken together with the definitions cited above could silence employees who need to be heard, for example "whistleblowers." Under these restrictions, "whistleblowing" might become an illegal activity. "Whistleblowers" customarily use copies of government documents, made on the premises, to demonstrate their allegations of inappropriate behavior, acts that often do not "further the interest of the public employer." Under this bill, it is possible that "whistleblowers" would be prohibited from telling legislators or others in authority about dishonest or illegal activities occurring in government departments or in public or private organizations or companies, without risking a severe penalty.

The bill also could have a negative impact on educational programs where public school teachers and university faculty encourage students to engage in policy debates, as advocates of social improvement. These activities are aimed at enhancing students' basic citizenship and research skills, better preparing their students for life in a participatory democracy that values argument advanced by evidence. During the course of their classwork, students may be taught to raise thoughtful, yet critical, challenges directed at people in authority so that social problems are more clearly defined, and so that the governmental programs designed to ameliorate those problems incorporate research-based "best practices." Yet the bill would prohibit public employees from using public resources to "influence" legislators, a term that is broadly defined to mean *promote, support, affect, modify, oppose, ...[by] providing or using information, statistics, studies, or analysis*. Opponents of the bill ask: Are these classes, educational projects, and university-based research institutes in jeopardy?

Against:

Some opponents argue that the bill is unnecessary, because many school districts, universities, and local units of government already prohibit the use of public resources for political purposes, and also prohibit public employees from practicing politics during their work hours. These opponents say the bill, like others proposed this legislative session, assumes that locally elected school boards, other local officials, and university trustees are not capable of carrying out their responsibilities and should not be trusted with making basic decisions at the local level.

Against:

Critics also say that to the extent the bill targets teachers and teacher unions, it hurts efforts to improve schools and lift academic achievement. Legislation debated this year that singles out school personnel and their union representatives in order to restrict their right to organize collectively and to express their ideas about proposed public policies erodes the dignity of the teaching profession, leaving teachers feeling "besieged". Substantive educational reform to lift academic achievement cannot occur in schools where teachers are demoralized. They also say the attitude toward public employee

unions that underlies the bill is unfair because public employers and employee unions have historically worked together in Michigan to solve common problems and promote the public good.

POSITIONS:

The National Federation of Independent Businesses supports the bill. (9-20-11)

Americans for Prosperity support the bill. (9-20-11)

The American Federation of Teachers - Michigan opposes the bill. (9-20-11)

The American Civil Liberties Association (ACLU) opposes the bill. (9-20-11)

The Michigan State Employees Association opposes the bill. (9-20-11)

The Michigan Association of Secondary School Principals opposes the bill. (9-20-11)

The Michigan American Association of University Professors (AAUP) opposes the bill. (9-20-11)

The Michigan Education Association opposes the bill. (9-20-11)

The American Federation of State, County, and Municipal Employees (AFSCME) opposes the bill. (3-22-11)

The Michigan AFL-CIO opposes the bill. (3-22-11)

The Operating Engineers, Local 324 opposes the bill. (3-22-11)

The Michigan Association of Police Organizations opposes the bill. (3-22-11)

The Michigan Association of School Boards is neutral on the bill. (3-22-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.