August 9, 2018

VIA EMAIL

Titus Micaiah Ragins
Compliance Coordinator
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504-0908

Re: *Kent School District's Response to Complaint*
Public Disclosure Commission Case No. 37217

Dear Mr. Ragins:

This letter serves as the response of Kent School District ("the District") to the PDC Complaint (assigned No. 37217), filed by Mr. Maxford Nelsen, Director of Labor Policy at the Freedom Foundation ("Complainant"). The complaint in this case has been focused and narrowed by the Commission as alleging that the District violated "RCW 42.17A.555 by using public facilities to process employee contributions to the Washington Education Association (WEA-PAC) and the National Education Association for Children and Public Education (NEA-FCPE)."

The District asserts that Washington law permits public employers—such as public school districts—to process authorized deductions from the wages or salary of employees for the purpose of political contributions, and that doing so does not constitute impermissible conduct that could be characterized as "assisting a campaign for election" or "the promotion of or opposition to any ballot" in violation of RCW 42.17A.555.

The complaint in this case correctly points out that RCW 42.17A.555 prohibits public employers and public employees from using or authorizing the use of any public facilities, directly or indirectly, to assist any person's campaign for election or to promote or oppose any ballot proposition. However, Washington law does not equate a public employer's processing of otherwise-permissible payroll deductions authorized by employees with the sort of activity prohibited by RCW 42.17A.555. On the contrary, Chapter 42.17A RCW recognizes that employers are authorized to process employee deductions intended for political purposes.

RCW 42.17A.495 is one such provision. Subsection (1) of that statute prohibits any employer from increasing the salary or other compensation of an officer or employee with the specific intention that the increase be contributed or spent to support or oppose a candidate, political party, political subcommittee, or any state official against whom recall charges have been filed. Subsection (2) prohibits any employer from discriminating against an officer or employee for (a) failing to contribute to, (b) failing to support or propose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee. The provision goes on to state: "At least annually, an employee from whom wages or salary are withheld under subsection (3) of this section shall be notified of the provisions of this subsection."

Subsection (3) of RCW 42.17A.495 is the portion of the statute most relevant to this complaint, and states as follows:

> No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. The request must be made on a form prescribed by the commission informing the employee of the prohibition against employer and labor organization discrimination described in subsection (2).

Subsection (4) requires the retention of records related to such political contributions:

> Each person or entity who withholds contributions under subsection (3) of this section shall maintain open for public inspection for a period of no less than three years, during normal business hours, documents and books of accounts that shall include a copy of each employee's request, the amounts and dates funds were actually withheld, and the amounts and dates funds were transferred to a political committee. Copies of such information shall be delivered to the commission upon request.

The Commission has promulgated rules to regulate how employers process an employee's authorized contribution withholding designated for political committees or candidates. *See* WAC 390-17-100.

There are only two possible ways to reconcile permissible conduct under RCW 42.17A.495 and the prohibitions of RCW 42.17A.555—either (a) one would have to conclude that RCW 42.17A.495 does not apply to public employers, like public school districts, and thus political deductions from public employees could be entirely disallowed under Section .555; or (b) one would have to conclude that Section .495 allows public employers to make political deductions, yet also conclude that the Legislature does not consider the authorized deduction or withholding of wages or salaries for political purposes to be impermissibly using or authorizing the use of "public facilities" to promote or assist campaigns or ballot propositions as prohibited by Section .555. The District maintains that the correct answer is the latter.

Nothing within RCW 42.17A.495 or WAC 390-17-100 indicates that public employers were to be excluded from these provisions. The two sections immediately following Section .495—RCW 42.17A.500 and .555—apply to public employers, yet they contain no language that disavows the application of Section .495 to public employers or expressly prohibits the types of political contributions from an employee's wage/salary deductions authorized under Section .495. A logical inference is that the Legislature and the Commission consider contributions or deductions from an employee's wage/salary to be *private* funds, not public funds under Section .500, and that the withholding of such for political purposes flows from an employee's individual decision and written authorization that does not constitute prohibited public agency conduct under Section .555.

Moreover, the Washington Supreme Court has explicitly cited RCW 42.17A.495 and WAC 390-17-100 in the context of public school districts making deductions from the pay of public school employees. *See State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wn.2d 615, 999 P.2d 602 (2000). In *Evergreen Freedom Foundation*, plaintiffs argued that various public school districts violated former RCW 42.17.680 (now codified as RCW 42.17A.495)[1], subsection (3), by failing to obtain annual written authorization from members before transmitting deducted dues and agency fees to the Washington Education Association (WEA); and that the WEA, in turn, violated the statute by using or distributing portions of the deductions for political purposes without written authorization from the union's members. *Id.* at 622-23.

The Court noted that the Commission promulgated WAC 392-17-100, which

> has required employers to obtain annual written authorization from employees for payroll deductions for political purposes only when a recipient is a registered political committee under chapter 42.17 RCW or a candidate for state or local office. Respondent School Districts acknowledge they are "employers" under RCW 42.17.680(3) and Chapter 41.59 RCW, the Educational Employment Relations Act.

[1] RCW 42.17.680 was recodified as RCW 42.17A.495 by Laws 2010, ch. 204, § 1102, eff. January 1, 2012.

Id. The trial court granted WEA's motion to dismiss the lawsuit on the grounds that WEA was not an "employer" governed by former RCW 42.17.680 (current RCW 42.17A.495). The trial court also granted the motions for summary judgment filed by the respective school districts, who asserted that they had not violated the law and that they had complied with the Commission's procedural rules contained in WAC 390-17-100. *Id*. at 625-26. The Washington Supreme Court affirmed the trial court, noting:

> In this State general membership dues of a labor organization may be used as a source for political contributions. The Federal Election Campaign Act of 1974, 2 U.S.C. § 441b, to the contrary, prohibits use of corporate funds and labor organization funds for direct political contribution to federal election campaigns. The federal statute is clear and unequivocal in its language. Appellants' argument that subsection (3) of the Washington statute, RCW 42.17.680, was intended to achieve a similar result is not supported by citation to any authority.

Id. at 632. The Court agreed with the trial court that the term "employer" as used in RCW 42.17.680(3) did not apply to the WEA. However, it was not disputed by either the Washington Supreme Court *or* the plaintiffs, or the defendant-school districts themselves that public school districts are "employers" subject to the terms of former RCW 42.17.680(3) (current RCW 42.17A.495(3)) and WAC 390-17-100:

> Appellants [including Evergreen Freedom Foundation] contend that Respondent School Districts violated RCW 42.17.680(3) by withholding dues and COP assessment deductions from the salaries or wages of WEA member-employees without their prior annual written authorization for contributions to "political committees" or for use as "political contributions" to candidates for state or local office. Respondent School Districts counter that transmitting the withheld funds to the WEA is not a "political contribution" under subsection (3). Appellants respond that, since WEA makes political contributions from the withheld funds, the payments to it are necessarily also "political contributions." This is not necessarily so.

Id. at 633. Interpreting the Commission's rules contained in WAC 390-17-100, the Court said:

> When an employer has notice that the funds deducted are for the use of a political committee or candidate, the employer may not then make that deduction without specific annual authorization. However, when the employer makes deductions under the Education Employment Relations Act, RCW 41.59.100, and the Public Employees Collective Bargaining Act, RCW 41.56.110, and the employer is not made aware of the specific intended use of the funds, the employer has no legal obligation or authority to seek annual written authorization.

Id. at 635. The Court affirmed the trial court's dismissal of the respective school districts because there was no evidence that they had violated the requirements of RCW 42.17.680(3) and WAC 390-17-100.

For purposes of this PDC Complaint, two important points can be drawn from this holding. First, RCW 42.17A.495—the new codification of RCW 42.17.680—as well as the Commission's rule in WAC 390-17-100, authorize public employers like school districts to deduct employee wages or salaries for political purposes, when authorized by the employee to do so. In other words, there is an approved statutory and regulatory mechanism for processing authorized deductions from employee pay for political contributions that does not run afoul of RCW 42.17A.555. Second, the Washington Supreme Court has recognized that authorized deductions for the use of a political committee or candidate may be withheld by a public employer who is aware of the purpose of such deductions, provided that the employer has the proper specific annual authorization from the employee to do so. This refutes the theory that simply processing such deductions constitutes a violation of state law.

The Complainant also claims that RCW 28A.405.400 does not permit school districts to make deductions for political purposes. That statutes states as follows:

> In addition to other deductions permitted by law, any person authorized to disburse funds in payment of salaries or wages to employees of school districts, upon written request of at least ten percent of the employees, shall make deductions as they authorize, subject to the limitations of district equipment or personnel. Any person authorized to disburse funds shall not be required to make other deductions for employees if fewer than ten percent of the employees make the request for the same payee. Moneys so deducted shall be paid or applied monthly by the school district for the purposes specified by the employee. The employer may not derive any financial benefit from such deductions. A deduction authorized before July 28, 1991, shall be subject to the law in effect at the time the deduction was authorized.

Several points should be noted about this provision. First, public schools are, in fact, expressly authorized to make deductions or withholdings from the wages or salaries of public school employees upon the written authorization of such employees. Second, such deductions or withholdings are only a mandatory obligation of the school district if ten percent or more of the employees authorize such deductions to the same payee, "subject to the limitations of district equipment or personnel." If fewer than ten percent of the employees make the request for the same payee, a school district is not obligated to calculate or withhold such deductions. Third, this statute does not *prohibit* a school district from withholding such deductions even if fewer than ten percent of the employees submit such an authorization—the school district simply is not required to do so. Finally, there is nothing in this provision that expressly prohibits payroll deductions for political purposes. Since such deductions would be consistent with the power of public employers under RCW 42.17A.495(3), there is no reason to conclude that deductions for

political purposes would not be allowed under RCW 28A.405.400 if properly authorized. *See Washington Educ. Ass'n v. Smith*, 96 Wn.2d 601, 609-10, 638 P.2d 77 (1981) (rejecting argument that permitting political payroll deductions for employees of common schools under former RCW 28A.67.095, now codified as RCW 28A.405.400, but not statutorily authorizing such deductions from community college teachers and other state employees violates the Equal Protection Clause of the Fourteenth Amendment).

If the Commission would like further information regarding other issues raised in the Complainant's analysis, or if the Commission has any additional questions, please do not hesitate to contact my office.

Very truly yours,

Curtis M. Leonard
Attorney for Kent School District

CML/CSP/ran