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6 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**
7 **OF THE STATE OF WASHINGTON**

8 In re the Matters of Enforcement Action
9 Against:

10 FEDEX CORPORATION,

11 Respondent.

PDC CASE No. 60811

ORDER ON MOTION FOR
SUMMARY JUDGMENT

12 THIS MATTER has come on regularly for hearing before the Public Disclosure
13 Commission on the PDC Staff's Motion for Summary Judgment. PDC Staff is
14 represented by AAG's Chad Standifer and Susie Giles-Klein; Respondent FedEx
15 Corporation is represented by James Frush, Eric Lindberg and Maia Robbins. Oral
16 argument was presented to the full Commission on January 27, 2022.

17 The following written materials were submitted by the parties and considered
18 by the Commission:

- 19 • PDC Staff's Motion for Summary Judgment, with supporting declaration
20 of Kurt Young;
- 21 • FedEx' Opposition to the Motion, with declarations of Maia Robbins and
22 Angela Breeding; and
- 23 • PDC Staff's Reply.

24 Having considered the parties' written submissions and oral argument, the
25 Commission now rules as follows.

26 The case arises from an April 2021 Notice of Administrative Charges alleging
that "FedEx Corporation (FedEx), a commercial advertiser under PDC laws and rules,
violated RCW 42.17A.345 by failing to timely provide books of account and related
documentation as a commercial advertiser concerning political advertisements
sponsored by Mercer Islanders for Sustainable Spending (MISS) during the 2019
election."

1 In the current Motion, the PDC Staff seeks an Order that would (a) determine
2 that, on the undisputed facts, FedEx' actions place it within the definition of a
3 "commercial advertiser," (b) declare, based again on the undisputed facts, that FedEx
4 has violated the statutory requirements for a commercial advertiser, and (c) set a
5 penalty for such violation(s).

6 An order on summary judgment is not appropriate when there are "material
7 facts" in dispute that require further proceedings to determine which facts are true and
8 which are not. A material fact is one on which the outcome of the case will depend.
9 The fact that FedEx provides many other services for other clients, for instance, is not
10 a material fact. The primary and threshold question in this case is whether FedEx
11 acted as a commercial advertiser with respect to its handling of certain documents
12 that were indisputably election campaign materials.

13 Whether or not FedEx was acting as a commercial advertiser on this occasion
14 hinges on the statutory definition of that term:

15 "Commercial advertiser" means any person that sells the service of
16 communicating messages or producing material for broadcast or
17 distribution to the general public or segments of the general public
18 whether through brochures, fliers, newspapers, magazines, television,
19 radio, billboards, direct mail advertising, printing, paid internet or digital
20 communications, or any other means of mass communications used for
21 the purpose of appealing, directly or indirectly, for votes or for financial
22 or other support in any election campaign.

23 RCW 42.17A.005(10).

24 Distilled down to what is at issue here, Respondent FedEx is a commercial
25 advertiser if it was engaged in selling the service of producing or communicating the
26 MISS campaign materials that Treasurer Mike Cero brought them.

27 To clarify the term "producing," the statute helpfully includes "printing" as an
28 example. To clarify the term "communicating," the statute helpfully includes "direct
29 mail advertising" as an example.

30 Although the statute doesn't seem to leave much room for doubt, its application
31 to a print shop directly producing campaign materials has been addressed by the
32 Commission. In Declaratory Order # 9 (July 28, 1992), the straightforward conclusion
33 was stated: "It is the act of selling the service of producing the printed material that
34 makes the print shop a commercial advertiser."

35 In this case, FedEx suggests that it is on a different footing since its staff played
36 no role in the design of the materials and had no hands-on role in their printing or
mailing. According to the declaration of store manager Angela Breeding, when Mr.

1 Cero brought the campaign materials in electronic form to the FedEx store in order to
2 get them printed and mailed, FedEx staff “uploaded Mr. Cero’s materials to the FedEx
3 internal website to locate third-party vendors to perform the printing and mailing
4 services.” Then, with Mr. Cero’s approval, FedEx directed the printing and mailing of
5 the documents and collected its payment from Mr. Cero. These undisputed facts
6 compel the conclusion that the service sold by FedEx was the production and
7 communication of the campaign materials and, thus, FedEx was acting as a
8 commercial advertiser under the statute.

9 The status of commercial advertiser brings with it certain statutory obligations:

10 (1) Each commercial advertiser who has accepted or provided
11 political advertising or electioneering communications during the
12 election campaign shall maintain current books of account and
13 related materials as provided by rule that shall be open for public
14 inspection during normal business hours during the campaign and
15 for a period of no less than five years after the date of the applicable
16 election. The documents and books of account shall specify:

- 17 (a) The names and addresses of persons from whom it
18 accepted political advertising or electioneering communications;
19 (b) The exact nature and extent of the services rendered; and
20 (c) The total cost and the manner of payment for the services.

21 RCW 42.17A.345.

22 The requirement of the statute is that the commercial advertiser maintain
23 “current books of account and related materials” and make them available for public
24 inspection during normal business hours. The statute grants the Commission express
25 authority to adopt rules regulating this process and the Commission has done so in a
26 way that gives recognition to current technology. WAC 390-18-050(3) provides that,
rather than immediately opening its books for inspection, the commercial advertiser
has the option of providing the materials to a member of the public by email so long as
that is done “promptly upon request.”

Questions regarding the timing of such production must be viewed in the
context of the statutory mention of “public inspection during normal business hours”
which conveys a heavy implication that the process is intended to be quick and easy -
particularly while the election campaign is ongoing.

In this case, there were three requests for information that was required by law
to be promptly provided. The October 18, 2019 request was fully complied with 34
days later. The November 21, 2019 request was fully complied with 26 days later. The
December 18, 2019 request was fully complied with 155 days later.

1 The Commission is not making any exacting finding as to the number of days of
2 impermissible delay (although the passing from the pre-election period into the post-
3 election period has significance) but is simply concluding that, on the undisputed facts,
each of the three responsive productions was not provided "promptly."

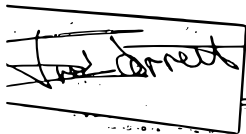
4 This determination is not clouded by the fact that some of the delay may have
5 been occasioned by FedEx' good intentions in trying to protect client confidences, in
6 diligently tracking down documents they had chosen to store in Texas and in engaging
the PDC in extended dialogue over its responsibilities. These circumstances may
indeed constitute mitigation but do not provide any broad defense to the allegations.

7 The Staff's Motion for Summary Judgment is GRANTED. FedEx was subject to
8 the obligations that the law imposes on a commercial advertiser and it failed to comply
9 with those requirements with respect to these MISS campaign materials in the 2019
election. Respondent FedEx violated RCW 42.17A.345.

10 Issues of the appropriate penalty are not reached in this Order. Unless the
11 parties agree on a penalty, this topic should be the focus of the hearing scheduled for
12 February 24, 2022. The parties shall make written submissions (arguing their
13 respective positions and providing documentary support) no later than Friday
14 February 18, 2022. The parties may also place into the administrative record other
materials believed to be helpful either to the Commission or to a subsequently
reviewing court.

15 So ORDERED this 31st day of January 2022.

17 WASHINGTON STATE PUBLIC
18 DISCLOSURE COMMISSION

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20 FRED JARRETT
21 Commission Chair

Nancy L. Isserlis (by WLD per NLI)

20 NANCY L. ISSERLIS
21 Commission Vice Chair

23 

24 WILLIAM L. DOWNING
25 Commissioner

Allen Hayward (by WLD per AH)

24 ALLEN HAYWARD
25 Commissioner

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6 *A copy of this Order mailed and/or emailed to:*

7 Chad C. Standifer, Assistant Attorney General
8 Counsel for Commission Staff
9 Email: chads@atg.wa.gov

10 James Frush,
11 Counsel for Respondent FedEx Corporation,
12 Email: jfrush@correronin.com

Additional Email Addresses:

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John S. Meader, Assistant Attorney
General, Counsel to the Commission
Email: john.meader@atg.wa.gov

13 I, _____, certify that I mailed a copy of
14 this order to the Respondent/ Applicant at his/her respective
15 address postage pre-paid on the date stated herein.

16 _____
Signed

Date