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August 28, 2018

Jennifer Hansen
Compliance Officer
Public Disclosure Commission
711 Capitol Way #206
P.O. Box 40908
Olympia, Washington 98504-0908

Re: Tahoma School District
PDC Case No. 37408

Dear Ms. Hansen:

We are attorneys representing the Tahoma School District (“District”). This letter is the District’s response to the complaint filed by Maxford Nelsen on behalf of the Freedom Foundation dated June 20, 2018. The complaint alleges that the District is violating RCW 42.17A.555 by using public facilities to process employee contributions to the Washington Education Association’s Political Action Committee (“WEA-PAC”) and the National Education Association for Children and Public Education (“NEA-FCPE”). The District denies any violation of law, including RCW 42.17A.555. Rather, the District processes employee contributions to WEA-PAC and NEA-FCPE upon written request of employees as specifically authorized by state statute, RCW 42.17A.495(3). *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 999 P.2d 602 (2000). As a result, the Public Disclosure Commission (“PDC”) should dismiss the complaint.

The statute Mr. Nelsen alleges the District violated, RCW 42.17A.555, prohibits use of a public office or agency facilities in campaigns, but does not apply to “activities which are part of the normal and regular conduct of the office or agency”:

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationary, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space,

publications of the office or agency, and clientele lists of persons served by the office or agency. However, *this does not apply to the following activities:*

...

(3) *Activities which are part of the normal and regular conduct of the office or agency.*

RCW 42.17A.555 (emphasis added).

PDC regulations define the “normal and regular conduct” of a public office or agency for purposes of the above statute to include that authorized by state law:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17A.555, *means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate’s campaign or promoting or opposing a ballot proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.*

WAC 390-05-273 (emphasis added).

State law and PDC implementing regulations authorize employers, including the District, to withhold or divert a portion of an employee’s wages or salaries for contributions to political committees upon written authorization of the employee. *See* RCW 42.17A.495(3); WAC 390-17-100. In November 1992, Washington voters passed Initiative 134 (“I-134”), the “Fair Campaign Practices Act.” Section 8 of that initiative, later codified as RCW 42.17.680(3), addressed the circumstances under which an employer may deduct employee wages for purposes of certain political contributions. That statute was recodified as RCW 42.17A.495 in 2012, but the relevant language of Subsection (3) has remained unchanged since I-134:

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) of this section.*

RCW 42.17A.495(3) (emphasis added). The PDC has issued a rule implementing this statute, WAC 390-17-100, which provides additional detail about the requirements for written deduction requests.

The Washington Supreme Court in *State ex rel. Evergreen Freedom Foundation, supra*, upheld school district payroll deductions for the Washington Education Association (“WEA”) upon written employee authorization under what is now RCW 42.17A.495(3). The Freedom Foundation (then called the Evergreen Freedom Foundation) filed a complaint against several public school districts and the Washington Education Association (“WEA”) alleging violations of campaign finance, reporting, and contribution requirements under then-Chapter 42.17 RCW (now codified as Chapter 42.17A RCW). 140 Wn.2d at 623. In particular, the Freedom Foundation claimed that the District and other respondents had violated what is now RCW 42.17A.495(3) by “withholding funds from wages or salaries to be used for political committees or for use as political contributions without obtaining annual written authorizations.” *Id.* at 623-24. *However, the Freedom Foundation specifically did “not claim funding of WEA-PAC violates RCW 42.17.680(3) [now RCW 42.17A.495(3)].” Id.* at 621, n.17.

The Supreme Court ultimately decided in favor of the school districts and other respondents. Specifically, the Court held that WAC 390-17-100 properly requires an employer school district to obtain annual written authorization from employees for payroll deductions for political contributions only when payment from the deductions is made to a political committee or a candidate for state or local office. 140 Wn.2d at 619-20.

The instant complaint alleges that there is no constitutional, charter, or statutory provision which authorizes a school district to facilitate contributions to WEA-PAC or NEA-FCPE. That is simply not true. As interpreted in *State ex rel. Evergreen Freedom Foundation, supra*, RCW 42.17A.495(3) provides exactly the authorization required for processing of contributions to political committees to be considered “normal and regular conduct of the office or agency” under RCW 42.17A.555(3). Therefore, provided the District complies with the requirements of RCW 42.17A.495(3), processing of such contributions is permitted by state law.

Here, the District has complied with RCW 42.17A.495(3). The District is an “employer” for purposes of this statute. *See* 140 Wn.2d at 623.¹ The District’s nonsupervisory certificated

¹ In *State ex rel. Evergreen Freedom Foundation*, the Court accepted, without discussion, the District’s status as an “employer” under what is now RCW 42.17A.495(3). *See* 140 Wn.2d at 623 (“Respondent School Districts acknowledge[d] they are ‘employers’ under RCW 42.17.680(3) and the Educational Employment Relations Act.”). Further, the District is an employer for purposes of this statute for two reasons. First, the context and overall purpose of I-134 demonstrate that it applies to school districts. Second, the statutory duty to obtain written consent for political contributions in RCW 42.17A.495(3) applies to both an “employer” and a “person” responsible for disbursing employee pay. RCW 42.17A.005(38) defines a “Person” to include a “local governmental entity or agency however

employees are represented by the Tahoma Education Association (“TEA”), which is an exclusive bargaining representative under the Educational Employment Relations Act (“EERA”), Chapter 41.59 RCW. To authorize political contributions, the District’s certificated employees complete a form provided by the WEA notifying them of the prohibition against employer and labor organization discrimination using the exact language prescribed by RCW 42.17A.495(2): “No employer or labor organization may discriminate against an officer or employee in the terms and conditions of employment for (i) the failure to contribute to, (ii) the failure in any way to support or oppose, or (iii) in any way supporting or opposing a candidate, ballot proposition, political party or political committee.” RCW 42.17A.495(2); App’x to Complaint, Page 17 (Employee form, “Authorization for Political Contributions”). The District then retains such authorization forms.

In sum, RCW 42.17A.495(3) provides specific statutory authorization for the District to withhold or divert a portion of employees’ wages or salaries for contributions to political committees, such as WEA-PAC and NEA-FCPE, upon written request of the employees. The written requests provided by District employees comply with the requirements of this statute. Therefore, the deductions are “part of the normal and regular conduct” of the District and fall within the exception provided in RCW 42.17A.555(3).

The complaint devotes several pages to arguing that RCW 28A.405.400 does not authorize school districts to collect political contributions via payroll deductions. The District does not rely on that statute for such authorization. Instead, as detailed above, the District has authorization per RCW 42.17A.495(3).

The District’s policies do not prohibit the District from withholding or diverting wages for contributions to political committees in accordance with RCW 42.17A.495(3). The District acknowledges that Policy 4400 states that the District “will assure that public facilities are not . . . used to assist in any candidate’s campaign or to support or oppose any ballot measure.” Similarly, Policy 5252 states that “District property and work time, supported by public funds, may not be used for political purposes.” These policies reflect the general state prohibition on using public facilities and property for political purposes. Importantly, however, the policies do not specifically explain and cite the exceptions and authorizations provided by RCW 42.17A.495(3) and RCW 42.17A.555(3). School district policies do not incorporate every statutory provision governing their operation. The fact that a specific statutory authorization is not referenced in a school district’s policies does not prohibit a district from acting in accordance with that authorization.

constituted.” The District is a local governmental entity—specifically, a municipal corporation organized under Title 28A RCW. *Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 765, 261 P.3d 145 (2011) (“School districts are municipal or quasi-municipal corporations.”).

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Nothing in the District's policies prohibits or contradicts the statutory authority provided by RCW 42.17A.495(3).

The complaint also argues that collective bargaining agreements cannot require a school district to facilitate contributions to political committees, and that nothing in the contract between the District and the TEA requires the District to process such payroll deductions. However, collective bargaining law provides additional authority for the deductions at issue. Washington courts have made clear that school districts have broad authority to negotiate labor agreements under collective bargaining laws, such as the EERA, Chapter 41.59 RCW. *See, e.g., Peninsula Sch. Dist. No. 401 v. Pub. Sch. Empls. of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996) (interpreting the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as entitled to liberal construction, and stating that conflicts with other statutes must be decided in favor of the bargaining act). Moreover, the District is not using the collective bargaining agreement as the authority for processing the employee contributions at issue; as discussed above, the District relies on RCW 42.17A.495(3).

In short, the PDC should dismiss the Freedom Foundation's complaint, because the District is authorized to make the payroll deductions per written employee authorization as "normal and regular conduct" under RCW 42.17A.555 pursuant to the grant of authority in RCW 42.17A.495(3). The Freedom Foundation should be barred from contesting this issue, given it had knowledge of the practice but did not challenge it in *State ex rel. Evergreen Freedom Foundation*.

Given that this letter is a preliminary response under PDC rules, the District denies any allegations made in the complaint not specifically discussed herein and reserves the right to supplement the grounds relied upon should further proceedings occur. Please contact me with any questions or if you need further information.

Sincerely,

PORTER FOSTER RORICK LLP



Lauren C. McElroy

LCM:cs
cc: Tony Giurado, Superintendent