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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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FREEDOM FOUNDATION,

Appellant/Plaintiff,

v.

BETHEL SCHOOL DISTRICT, and the WASHINGTON STATE  
PUBLIC DISCLOSURE COMMISSION,

Respondents/Defendants,

WASHINGTON STATE EDUCATION ASSOCIATION,

Possibly interested party.

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**BRIEF OF RESPONDENT BETHEL SCHOOL DISTRICT**

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## I. INTRODUCTION

There are two reasons the superior court orders dismissing the lawsuits brought by Freedom Foundation (“Foundation”) should be affirmed by this Court. First, the Foundation lacks standing to bring a citizen’s suit alleging a violation of the Fair Campaign Practices Act (FCPA), chapter 42.17A RCW, and it also lacks standing to challenge the PDC’s decision to dismiss the Foundation’s complaint.

The Foundation lacks standing to bring a citizen’s suit because the Public Disclosure Commission (“PDC”) dismissed the Foundation’s complaint within 90 days after receiving the complaint. Under the revised FCPA, such action by the PDC deprives the Foundation of standing to bring a citizen’s action. The Foundation also lacks standing to appeal the PDC’s dismissal of the Foundation’s complaint—as contended by the PDC in its successful motion to dismiss the Foundation’s petition—because the Foundation cannot satisfy the requirements for standing and because the appeal is not authorized by Washington’s Administrative Procedures Act.

Second, the Foundation has challenged acts of the Bethel School District (“District”) that are authorized by Washington law. Specifically, Washington law requires school districts to process payroll deductions when at least ten percent of its employees specify the same payee. Because more than ten percent of the District’s employees designated the

Washington Education Association's Political Action Committee (WEA-PAC) and the National Education Association Fund for Children and Public Education (NEA-FCPE) as payees, the processing of these deductions is required by state law.

In addition, activities which are part of the normal and regular conduct of an agency are excluded from the FCPA's prohibition against using public facilities in political campaigns. Because the processing of payroll deductions for hundreds of employees on a monthly basis is part of the District's normal and regular conduct, the District did not violate the FCPA. Finally, the FCPA allows employers to process payroll deductions to political committees when authorized in writing by employees. Because the payroll deductions to WEA-PAC and NEA-FCPE were authorized in writing, there has been no violation of the FCPA. Because the District acted in conformity with state law, and because the processing of these deductions is part of the District's normal and regular conduct, the District did not violate the FCPA. Thus, the superior court properly dismissed, as a matter of law, the Foundation's suit challenging the District's processing of payroll deductions for the benefit of WEA-PAC and NEA-FCPE.

For these reasons, the District requests that the Court affirm the superior court orders dismissing the lawsuits brought by the Foundation.

## **II. RESTATEMENT OF THE ISSUES**

1. Does a plaintiff lack standing to bring a citizen's action under the recently-amended FCPA, when the PDC takes action by dismissing a complaint within 90 days after receiving the complaint?

2. Does a school district comply with RCW 28A.405.400, which requires school districts to process payroll deductions when at least ten percent of employees specify the same payee, as in this case where the District processed deductions for WEA-PAC and NEA-FCPE after 24 percent of the District's employees specified WEA-PAC as a payee and 17 percent specified NEA-FCPE as a payee?

3. Does the FCPA prohibit a school district from processing payroll deductions for the benefit of WEA-PAC and NEA-FCPE, when the deductions are authorized in writing by the employee and when such deductions are part of the normal and regular conduct of the agency, as in this case the District processes these payroll deductions for hundreds of employees on a monthly basis?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. The District's Process for Handling Employee-Authorized Payroll Deductions**

As required by RCW 28A.405.400, the District allows employees to make payroll deductions to specific payees. CP 16. Under the law, such deductions are mandatory if at least ten percent of the employees specify

the same payee. CP 16; RCW 28A.405.400.<sup>1</sup> Of the District's 2800 employees, approximately 24 percent (680 employees) have specified the WEA-PAC as a payee, while approximately 17 percent (475 employees) have specified the NEA-FCPE as a payee. CP 16. Because more than ten percent of employees have specified the WEA PAC or the NEA-FCPE, these deductions are mandatory under RCW 28A.405.400.

In addition, the District allows employees to make written requests for payroll deductions to political committees in accordance with RCW 42.17A.495(3).<sup>2</sup> CP 16. The District has processed these deductions for several years and continued to do so in 2019. CP 16. These payroll deductions are processed monthly and are part of the District's normal and regular conduct. CP 16.

#### **B. Procedural Status of the Lawsuits**

On June 20, 2018, the Foundation filed a complaint with the PDC. CP 23. The complaint alleged a violation of RCW 42.17A.555<sup>3</sup> based upon the use of District facilities to process employee contributions to WEA-PAC and NEA-FCPE. CP 23 On August 30, 2018, the District responded to the complaint. *Id.* The PDC reviewed the complaint, the documents filed by the

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<sup>1</sup> RCW 28A.405.400 is attached as Appendix A.

<sup>2</sup> RCW 42.17A.495 is attached as Appendix B.

<sup>3</sup> RCW 42.17A.555 is attached as Appendix C.

Foundation, and the response of the District, and assessed the factual and legal arguments governing the complaint. After conducting this review and assessment, the PDC determined that the complaint was without merit. CP 23. As a result, the PDC dismissed the complaint on September 10, 2018. CP 24.

**1. The Citizen’s Action Lawsuit (Thurston County Superior Court Cause No. 18-2-05084-34)**

On October 10, 2018, the Foundation filed a lawsuit against the District in Thurston County Superior Court Cause No. 18-2-05084-34, alleging the same violation of RCW 42.17A.555 that was alleged in the Foundation’s complaint to the PDC. CP 1-2. The Complaint and case caption also listed the Washington Education Association and the PDC as “Possibly interested parties.” CP 1. In its Answer, the District asserted affirmative defenses, including lack of standing and a failure to state a claim upon which relief can be granted. CP 12.

The District moved for summary judgment, contending that the Foundation’s suit should be dismissed because: (1) the Foundation lacked standing to file a citizen’s suit under RCW 42.17A.775,<sup>4</sup> and (2) the payroll deductions challenged by the Foundation are authorized by Washington law. CP 36-37. On April 19, 2019, the Honorable Carol Murphy granted the

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<sup>4</sup> RCW 42.17A.775 is attached as Appendix D.

District's motion and dismissed the Foundation's claims with prejudice. CP 200-202. The Foundation timely appealed the court's order. CP 204-11.

**2. The Petition To Review the PDC's Decision (Thurston County Superior Court Cause No. 18-2-05092-34)**

Concurrently with the above lawsuit, the Foundation filed a petition to review the PDC's decision in Thurston County Superior Court Cause No. 18-2-05092-34. CP 216-29. In its Answer to the petition, the District asserted affirmative defenses, which included lack of standing and a failure to state a claim upon which relief can be granted. CP 233.

The PDC moved to dismiss the petition. CP 236-47. The PDC contended that the Foundation lacked standing and that the Administrative Procedures Act provided no basis for judicial review of the dismissal of the complaint by the PDC. On March 1, 2019, the Honorable Erik Price granted the PDC's motion. CP 412-13.

The District also moved for summary judgment, joining in the arguments raised by the PDC. CP 248-58. The District also argued that the Foundation lacked standing to bring a citizen's suit and that Washington law authorized the District's actions. CP 249. On March 29, 2019, Judge Price granted the District's motion and dismissed the Foundation's claims against the District. CP 432-34. The court's order was based solely on the grounds that the Foundation lacked standing under the APA. CP 433. On

April 1, 2019, the Foundation appealed the order granting the District's motion and the order granting the PDC's motion. CP 435-44.

Subsequently, the Foundation moved to consolidate the appeals filed in Cause No. 18-2-05084-34 and Cause No. 18-2-05092-34. This Court has consolidated the appeals under Cause No. 53415-1-II.

#### IV. ARGUMENT

##### A. Standard for Reviewing Summary Judgment Orders

An appellate court reviews a summary judgment order de novo and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with “specific facts showing that there is a genuine issue for trial.” CR 56(e). To meet this burden, “a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain.” *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). “Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted.” *Id.*

**B. The Foundation’s Lack of Standing Is Fatal to its Claims.**

**1. The Foundation lacks standing to file a citizen’s suit.**

Prior to 2018, the “citizen suit provision of the FCPA” permitted “citizens to file a ‘citizen action’ alleging violations of the act if they give notice of a violation in writing to the [Attorney General] and the AG ‘fail[s] to commence an action hereunder.’” *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 405, 341 P.3d 953 (2015) (citing RCW 42.17A.765(4)(a)(i)). Under the FCPA in effect at that time, a citizen could file suit in superior court alleging a violation of the FCPA if the Attorney General failed to file a lawsuit within 45 days of receiving notice of an alleged violation of the FCPA. *Utter*, 188 Wn.2d at 412 (“We hold that RCW 42.17A.765 precludes a citizen suit only where the AG or local prosecuting authorities bring a suit themselves, and it does not preclude a citizen suit where the AG declines to sue.”)

In 2018, however, the legislature passed Engrossed Substitute House Bill 2938,<sup>5</sup> which amended the FCPA. CP 20, 25-29. Section 14 of the ESHB 2938 amended the FCPA by deleting RCW 42.17A.765(4)(a)(i),

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<sup>5</sup> The full text of Engrossed Substitute House Bill 2938 may be found at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2938-S.SL.pdf>

while Section 16 of ESHB 2938 inserted a new section, RCW 42.17A.775, that now governs citizen suits. CP 20, 26-29.

Under the revised FCPA, citizens may sue only if the PDC fails to take action within 90 days of receiving a complaint:

(2) A citizen's action may be brought and prosecuted only if the person first has filed a complaint with the commission and:

(a) The commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission; and

(b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action within forty-five days of receiving referral from the commission.

RCW 42.17A.775.

The "action" authorized by RCW 42.17A.755(1) includes dismissing the complaint after a preliminary review:

(1) The commission may initiate or respond to a complaint, request a technical correction, or otherwise resolve matters of compliance with this chapter, in accordance with this section. If a complaint is filed with or initiated by the commission, the commission must:

(a) **Dismiss the complaint** or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances **after conducting a preliminary review**;

(b) Initiate an investigation to determine whether an actual violation has occurred, conduct hearings, and issue

and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or

(c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.

RCW 42.17A.755(1) (emphasis added).

The legislative history behind the amended FCPA establishes that the legislature intended to prohibit a citizen action if the PDC dismisses the complaint within 90 days. The Final Bill Report for ESHB 2938 states:

*Citizen's Action.* The citizen's action procedures are changed. In order to file a citizen's action, a person first must file a complaint with the PDC. **If the PDC takes certain action within 90 days of receiving the complaint, then the person may not go forward in the process. Such action includes dismissing or otherwise resolving the complaint after a preliminary review,** initiating an investigation and holding any appropriate hearings, or referring the matter to the AG. If the PDC refers the matter to the AG within 90 days, a citizen's action may only proceed if the AG does not commence an action within 45 days of receiving the referral.

Final Bill Report for ESHB 2938 at pp. 5-6 (emphasis added). CP 34-35.

The amendments to the FCPA became effective on June 7, 2018. CP 25, 35.

Here, the Foundation submitted its complaint to the PDC on June 20, 2018. CP 23. The PDC conducted a review and then dismissed the complaint on September 10, 2018. CP 23-24. That date was 82 days after the PDC received the complaint.

Because the PDC dismissed the Foundation's complaint within 90 days, the Foundation lacks standing to bring a citizen's action. *See* RCW 42.17A.775(1). Because the Foundation lacks standing, the superior court's dismissal of the citizen's action should be upheld.

**2. The Foundation lacks standing to challenge the PDC's decision.**

In its motion to dismiss, the PDC contended that the Foundation lacked standing and that the Administrative Procedures Act provided no basis for judicial review of the dismissal of the complaint by the PDC. CP 236-47. The PDC noted that the Foundation had failed to meet the requirements for standing because; (1) it had not been prejudiced by the PDC's action; (2) the PDC, in taking action, was not required to consider the Foundation's interests; and (3) a judgment in favor of the Foundation would provide no remedy in the absence of a showing of prejudice. CP 240-44. The PDC also contended that its decision was not reviewable under RCW 34.05.570(3). CP 246.

In its motion for summary judgment dismissal of the Foundation's petition, the District joined in the arguments raised by the PDC. CP 248. The District also argued that the petition should be dismissed because the District did not violate the FCPA and because the Foundation lacked

standing to bring a citizen's action, should the superior court construe the petition as a citizen's action. CP 249.

Because the Foundation lacks standing to bring a citizen's action and to file a petition to review the PDC's decision,<sup>6</sup> this Court should affirm the dismissal of both lawsuits.

Furthermore, as discussed below, there are additional grounds for affirming the dismissals.

**C. The Summary Judgment Orders Should Be Affirmed Because No Reasonable Trier of Fact Would Conclude that the District Violated the FCPA.**

**1. Washington law requires a school district to make payroll deductions to a payee when authorized by at least ten percent of the district's employees.**

Washington law requires school districts to make payroll deductions when these deductions are authorized by at least ten percent of its employees:

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**

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<sup>6</sup> In the superior court, the District joined in the arguments raised by the PDC regarding the Foundation's lack of standing. Because it is likely that the PDC will make the same or similar arguments in its response brief, the District anticipates joining in these arguments in this appeal.

**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

RCW 28A.405.400 (emphasis added). The statute is mandatory and does not give the District discretion unless less than ten percent of employees request the deduction, subject to any limitations in district equipment or personnel.

Of the District's 2800 employees, approximately 24 percent (680 employees) have requested payroll deductions be sent to the WEA-PAC as a payee, while approximately 17 percent (475 employees) have specified NEA-FCPE as payee. CP 16. Because more than ten percent of employees have specified the WEA PAC or the NEA-FCPE as payees, these deductions are mandatory under RCW 28A.405.400. These payroll deductions are processed monthly and are part of the normal and regular conduct of the District. CP 16 (¶ 3).

**2. Activities which are part of the normal and regular conduct of the District are excluded from the FCPA's prohibition against using public facilities in campaigns.**

The Foundation alleges that the District violated RCW 42.17A.555. This statute prohibits the use of any facilities of a public agency in campaigns, but it does not apply to activities which are part of the normal and regular conduct of the 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 stationery, 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). Because “‘normal’ and ‘regular’ are not statutorily defined, they should be given their ordinary meaning.” *King Cty. Council v. Pub. Disclosure Com*, 93 Wn.2d 559, 561, 611 P.2d 1227 (1980).

In *King County Council*, the Washington Supreme Court held that the Council’s endorsement of a ballot proposition did not violate the FCPA because the endorsement was part of the Council’s normal and regular conduct. *King Cty Council*, 93 Wn.2d at 561-63. The conduct was “normal” because the Council had passed similar endorsements 13 times in the previous five years. *Id.* at 562. The endorsement was “regular” because it was lawful. *Id.* at 563 (“[W]e conclude the action of the council was lawful and therefore ‘regular.’”).

Consistent with *King County Council*, state regulations define “normal and regular conduct” to include conduct that is 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).

With hundreds of employees requesting monthly deductions to WEA-PAC and NEA-FCPE, a reasonable trier of fact would conclude that the processing of these deductions are part of the normal and regular conduct of the District. Because the processing of the deductions is part of the normal and regular conduct of the District, the District’s actions do not violate RCW 42.17A.555.

**3. The FCPA allows employers to process payroll deductions to political committees when authorized in writing by employees.**

Washington law authorizes employers to withhold or divert a portion of an employee’s wages for contributions to political committees upon the written authorization of the employee:

(3) 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. The employee may revoke the request at any time. At least annually, the employee shall be notified about the right to revoke the request.

RCW 42.17A.495 (emphasis added). To implement this statute, the PDC has issued a regulation, WAC 390-17-100, which contains the information that must appear on the form used for the withholding of wages for political contributions. The form used by the District complies with this regulation. CP 16, 18.

In a case involving several school districts, the Washington Supreme Court upheld payroll deductions for the WEA, upon written authorization of school district employees, under the statute that is now codified as RCW 42.17A.495(3). *State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 618-19, 999 P.2d 602 (2000) (“[The Superior] court concluded that Respondent School Districts did not violate section 680(3) because WAC 390-17-100, the rule promulgated by the Public Disclosure Commission to implement the statute, is entitled to great weight and the School Districts have complied with it. We affirm.”) In affirming the school districts’ actions, the Supreme

Court accepted the school districts' status as an employer under the statute that is currently codified as RCW 42.17A.495(3). *See Evergreen*, 140 Wn.2d at 623. The *Evergreen* decision stands for the proposition that school districts may divert part of an employee's wages to a political committee, if it is done properly and in accordance with RCW 42.17A.495(3).

To hold otherwise would render RCW 42.17A.495(3) inapplicable for public employees. The *Evergreen* court did not reach that holding and neither should this Court.

Here, the District, in its processing of payroll deductions, has acted in accordance with RCW 28A.405.400, RCW 42.17A.555, and RCW 42.17A.495.

As required by RCW 28A.405.400, the District allows employees to make payroll deductions to specific payees. CP 16 (§ 4). Under this statute, such deductions are mandatory when at least ten percent of the employees specify the same payee. Because more than ten percent of employees have specified the WEA PAC or the NEA-FCPE, these deductions are mandatory under RCW 28A.405.400. The District's compliance with the statute provides proof that the processing of the deductions is part of the normal and regular conduct of the District.

Activities that are part of the normal and regular conduct of the District are excluded from the FCPA's prohibition against using public

facilities in political campaigns. A reasonable trier of fact would find that the District's processing of hundreds of payroll deductions on monthly basis is part of the District's normal and regular conduct.

As authorized by RCW 42.17A.495, the District allows employees to make written requests for payroll deductions to political committees. CP 16 (§ 2). The District's compliance with RCW 42.17A.495 provides further proof that the processing of the deductions is part of the normal and regular conduct of the District.

Because the District's processing of payroll deductions is part of its normal and regular conduct, no reasonable trier of fact would conclude that the District violated the FCPA. Thus, the summary judgment orders should be affirmed.

**D. The Foundation's Opening Brief Advances a Strained Interpretation of the Revised FCPA that Lacks Credibility.**

The plain language of the recently-revised FCPA, states that a citizen's action may only go forward if the PDC fails to take action authorized under RCW 42.17A.755(1) within 90 days of the complaint being filed. RCW 42.17A.775. The action authorized under RCW 42.17A.755(1) includes dismissing the complaint after a preliminary review.

Here, the PDC, after conducting a preliminary review, dismissed the complaint within 90 days. CP 22-24. As stated in the PDC's letter dismissing the complaint:

[N]o evidence supports a finding of a material violation warranting further investigation. The PDC has closed the matter, and will not be conducting a more formal investigation into your complaint or pursuing further enforcement action in this case.

CP 24.

Rejecting the plain language of RCW 42.17A.755(1) and 42.17A.775, the Foundation's opening brief launches into a convoluted and confusing argument that appears to contend that citizen's suits can go forward even after the PDC dismisses a complaint in a timely fashion. *See* App. Br. at 11-17. This Court should ignore the Foundation's strained interpretation of the FCPA.

The Foundation then argues that the processing of payroll deductions on a monthly basis for hundreds of employees is not part of the District's normal or regular conduct. App. Br. at 17-26. The Foundation's argument defies common sense and the holding in *King County Council*. In that case, the Washington Supreme Court held that the endorsement of the Council was "normal" because the Council had passed similar endorsements 13 times in the previous five years, and that the endorsement was "regular" because it was lawful. 93 Wn.2d at 562-63. Here, the

District's processing of payroll deductions occurs on a far more frequent basis than the conduct in *King County Council*.

Faced with overwhelming evidence that the District's processing of payroll deductions are part of its normal and regular conduct and that this conduct is authorized by state law, the Foundation responds by incorrectly asserting that the District is engaging in political activities when it processes payroll deductions. *E.g.* App. Br. at 18, 20, 22, 26. The Foundation's assertions are wrong.

When the District processes employee deductions, it does so on a neutral basis, irrespective of the political or religious viewpoints of the employee or the employee's designee. Indeed, the District would be required by RCW 28A.405.400 to make payroll deductions for the benefit of the Foundation itself, should at least ten percent of its employees designate the Freedom Foundation as the payee.

The Foundation even claims that no law authorizes the payroll deductions at issue in this case, while simultaneously recognizing that RCW 28A.405.400 requires payroll deductions. App. Br. at 27. Confusingly, the Foundation acknowledges that the payroll deductions in RCW 28A.405.400 are mandatory, but then adds that this mandatory requirement is a "mere distraction." App. Br. at 27 ("It is certainly true that the cited statute [RCW 28A.405.400] is phrased with a mandatory 'shall,'

but this is a mere distraction . . . .”) Far from a mere distraction, RCW 28A.405.400 requires school districts to process payroll deductions to any entity whenever ten percent or more of district employees designate that entity.

Moreover, the District’s neutral processing of payroll deductions is consistent with District Policy No. 4260 concerning the Community Use of School Facilities. CP 195-96 (¶¶ 2-3), 198-99. The District policy provides that school facilities may be used for political, religious or other activities on an equal basis. CP 198-99. The Foundation offered no evidence suggesting that the District has granted preferential treatment to WEA-PAC or NEA-FCPE in the processing of payroll deductions. CP 196 (¶ 4).

Despite the Foundation’s allegations, there is no evidence to support the Foundation’s claim that the District itself is engaging in political activities. On the contrary, as the PDC found, the District’s processing of payroll deductions is part of its normal and regular conduct:

The Bethel School District processes employee payroll deductions and other employee voluntary withholdings as part of the “normal and regular conduct” of the school district. No evidence was found that the district provided any preferential treatment concerning district employee’s withholding of funds designated for the WEA-PAC and NEA-FCPE, and any other district employee withholdings for charitable contributions, deferred compensation, etc.

PDC letter to Maxford Nelson, dated Sept. 10, 2018. CP 24.

Because these payroll deductions are authorized by state law, they are lawful and thus constitute regular conduct by the District. *See King Cty Council, supra*. Because these deductions are processed for hundreds of employees on a monthly basis, year after year, they constitute normal conduct by the District. *See King Cty Council, supra*. Because the processing of payroll deductions constitutes normal and regular conduct, the District's actions do not violate the FCPA. To claim otherwise, as the Foundation does, strains credibility. No reasonable trier of fact would conclude that the District's processing of employee payroll deductions violates the FCPA. Thus, the Court should affirm the summary judgment dismissals.

**E. The Foundation's Failure To Request a CR 56(f) Continuance Is Fatal to its Claim that Incomplete Discovery Warrants Reversal of the Summary Judgment Order.**

The Foundation claims that "the trial court erred in entering summary judgment in favor of the Bethel School District, where discovery in the matter was incomplete . . ." App. Br. at 5; App. Br. at 29, 33-34. The Foundation makes this assertion even though the District, in its summary judgment briefing, pointed out that the Foundation had failed to move for a CR 56(f) continuance. CP 97. The Foundation never moved for a CR 56(f) continuance.

CR 56(f) provides:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the [summary judgment] motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f).

The failure to clearly request a CR 56(f) is fatal to the Foundation's claim that the trial court erred in granting summary judgment because additional discovery needed to be conducted. *See Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009). In *McCarthy*, this Court stated that no error occurs when the trial court decides a summary judgment motion on the evidence before the court when a continuance is not clearly requested:

As noted, BIAW did not move for a continuance. Where a continuance is not clearly requested, the trial court does not err in deciding a summary judgment motion based on the evidence before it. [citations omitted] In light of BIAW's failure to clearly move for a continuance, we hold that the trial court did not err in deciding the County's summary judgment motion based on the evidence before the court.

*McCarthy*, 152 Wn. App. at 743.

Moreover, CR 56(f) requires that a party requesting the continuance demonstrate by affidavit good cause for the delay in hearing the summary judgment motion. 4 K.B. Tegland, *Washington Practice: Rules Practice*

CR 56, at 381 (5th ed. 2006). A court will be justified in denying a continuance if:

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

*Modumetal, Inc. v. Xtallic Corp.*, 4 Wn. App. 2d 810, 832, 425 P.3d 871, (2018) (internal quotations omitted). “Vague, wishful thinking is not enough to justify a continuance.” *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 401, 928 P.2d 1108 (1996).

In the months that preceded the District moving for summary judgment, the Foundation failed to submit a single discovery request to the District. The Foundation offered no reason for this delay in pursuing discovery. CP 98. Nor does the Foundation state what evidence would be established through discovery.

Indeed, the Foundation claims only that discovery might have “revealed significant additional information – potentially including other violations of the FCPA and/or other applicable law in processing employees’ payroll deductions.” App. Br. at 33-34. Such vague, wishful thinking does not warrant a continuance.

## V. CONCLUSION

Because the Foundation lacks standing and because no reasonable trier of fact would find that the District violated the FCPA, the District requests that this Court affirm the superior courts' orders dismissing the Foundation's lawsuits.

RESPECTFULLY SUBMITTED this 2 day of October, 2019.

VANDEBERG JOHNSON &  
GANDARA, LLP

By   
William A. Coats, WSBA #4608  
Daniel C. Montopoli, WSBA #26217  
Attorneys for Respondent  
Bethel School District

## **APPENDICES**

APPENDIX A: RCW 28A.405.400

APPENDIX B: RCW 42.17A.495

APPENDIX C: RCW 42.17A.555

APPENDIX D: RCW 42.17A.775

## Rev. Code Wash. (ARCW) § 28A.405.400

Statutes current through 2019 Regular Session

*Annotated Revised Code of Washington > Title 28A Common School Provisions (Chs. 28A.04 — 28A.900) > Chapter 28A.405 Certificated Employees (§§ 28A.405.005 — 28A.405.900) > Salary and Compensation (§§ 28A.405.400 — 28A.405.415)*

### **28A.405.400. Payroll deductions authorized for employees.**

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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.

### **History**

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1991 c 116 § 18; 1972 ex.s. c 39 § 1. Formerly RCW 28A.67.095.

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## Rev. Code Wash. (ARCW) § 42.17A.495

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*Annotated Revised Code of Washington > Title 42 Public Officers and Agencies (Chs. 42.04 — 42.60) > Chapter 42.17A Campaign Disclosure and Contribution (§§ 42.17A.001 — 42.17A.919) > Campaign Contribution Limits and Other Restrictions (§§ 42.17A.400 — 42.17A.550)*

### **42.17A.495. Limitations on employers or labor organizations.**

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(1) No employer or labor organization may increase the salary of an officer or employee, or compensate an officer, employee, or other person or entity, with the intention that the increase in salary, or the compensation, or a part of it, be contributed or spent to support or oppose a candidate, state official against whom recall charges have been filed, political party, or political committee.

(2) No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee. 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.

(3) 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. The employee may revoke the request at any time. At least annually, the employee shall be notified about the right to revoke the request.

(4) 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.

### **History**

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2010 c 204 § 613; 2002 c 156 § 1; 1993 c 2 § 8 (Initiative Measure No. 134, approved November 3, 1992). Formerly RCW 42.17.680.

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## Rev. Code Wash. (ARCW) § 42.17A.555

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*Annotated Revised Code of Washington > Title 42 Public Officers and Agencies (Chs. 42.04 — 42.60) > Chapter 42.17A Campaign Disclosure and Contribution (§§ 42.17A.001 — 42.17A.919) > Public Officials', Employees', and Agencies' Campaign Restrictions and Prohibitions — Reporting (§§ 42.17A.555 — 42.17A.575)*

### **42.17A.555. Use of public office or agency facilities in campaigns — Prohibition — Exceptions.**

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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 stationery, 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:

- (1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
- (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
- (3) Activities which are part of the normal and regular conduct of the office or agency.
- (4) This section does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010.

### **History**

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2010 c 204 § 701; 2006 c 215 § 2; 1979 ex.s. c 265 § 2; 1975-'76 2nd ex.s. c 112 § 6; 1973 c 1 § 13 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.130.

Annotated Revised Code of Washington

## Rev. Code Wash. (ARCW) § 42.17A.775

Statutes current through 2019 Regular Session

*Annotated Revised Code of Washington > Title 42 Public Officers and Agencies (Chs. 42.04 — 42.60) > Chapter 42.17A Campaign Disclosure and Contribution (§§ 42.17A.001 — 42.17A.919) > Enforcement (§§ 42.17A.750 — 42.17A.785)*

### **42.17A.775. Citizen's action.**

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- (1) A person who has reason to believe that a provision of this chapter is being or has been violated may bring a citizen's action in the name of the state, in accordance with the procedures of this section.
- (2) A citizen's action may be brought and prosecuted only if the person first has filed a complaint with the commission and:
- (a) The commission has not taken action authorized under RCW 42.17A.755(1) within ninety days of the complaint being filed with the commission, and the person who initially filed the complaint with the commission provided written notice to the attorney general in accordance with RCW 42.17A.755(5) and the attorney general has not commenced an action, or published a decision whether to commence action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving the notice;
  - (b) For matters referred to the attorney general within ninety days of the commission receiving the complaint, the attorney general has not commenced an action, or published a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b), within forty-five days of receiving referral from the commission; and
  - (c) The person who initially filed the complaint with the commission has provided notice of a citizen's action in accordance with subsection (3) of this section and the commission or the attorney general has not commenced action within the ten days provided under subsection (3) of this section.
- (3) To initiate the citizen's action, after meeting the requirements under subsection (2) (a) and (b) of this section, a person must notify the attorney general and the commission that the person will commence a citizen's action within ten days if the commission does not take action authorized under RCW 42.17A.755(1), or the attorney general does not commence an action or publish a decision whether to commence an action pursuant to RCW 42.17A.765(1)(b). The attorney general and the commission must notify the other of its decision whether to commence an action.
- (4) The citizen's action must be commenced within two years after the date when the alleged violation occurred and may not be commenced against a committee or incidental committee before the end of such period if the committee or incidental committee has received an acknowledgment of dissolution.
- (5) If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he or she shall be entitled to be reimbursed by the state for reasonable costs and reasonable attorneys' fees the person incurred. In the case of a citizen's action that is dismissed and that the court

also finds was brought without reasonable cause, the court may order the person commencing the action to pay all trial costs and reasonable attorneys' fees incurred by the defendant.

## **History**

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2019 c 428 § 40; 2018 c 304 § 16.

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## CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 2<sup>nd</sup> day of October, 2019, I caused to be served via email and first class mail a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2<sup>nd</sup> day of October, 2019, at Tacoma, Washington.

  
\_\_\_\_\_  
Kim Somerville, Legal Assistant

**VANDEBERG JOHNSON & GANDARA, LLP**

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IN THE COURT OF APPEALS  
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FREEDOM FOUNDATION,

Appellant/Plaintiff,

v.

BETHEL SCHOOL DISTRICT, and the WASHINGTON STATE PUBLIC DISCLOSURE  
COMMISSION,

Respondents/Defendants,

WASHINGTON STATE EDUCATION ASSOCIATION,

Possibly interested party.

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**AMENDED CERTIFICATE OF SERVICE**

---

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## CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2<sup>nd</sup> day of October, 2019, at Tacoma, Washington.



Kim Somerville, Legal Assistant

**VANDEBERG JOHNSON & GANDARA, LLP**

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