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No. 82615-3
(Ct. App. No. 28375-1-II)

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Petitioner/Appellant,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT,

Respondents.

ANSWER TO WEA'S PETITION TO REVIEW

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I. IDENTITY OF RESPONDENTS

Gary Davenport, Martha Lofgren, Walt Pierson, Susannah Simpson, and Tracy Walcot (“Teachers”), individually and on behalf of all other nonmembers similarly situated, the prevailing parties in the Court of Appeals, Division II, and plaintiffs in Thurston County Superior Court, request that this Court deny review.

II. COUNTER-STATEMENT OF ISSUES

A. Has the Washington Education Association (WEA) failed to show a conflict between the Court of Appeal’s decision in *Davenport* and *Crisman*, where the common law restitution claim recognized by *Davenport* is distinct and stands alone from a private right of action rejected in *Crisman* and, unlike *Crisman*, RCW 42.17.760 (§760)¹ clearly protects individual interests in addition to the public’s interest in fair elections?

B. Has WEA failed to show a conflict between *Davenport* and this Court’s decisions in *Nelson v. Appleway*, where they are factually distinguishable: *Davenport* addressed the WEA’s unlawful *use* of nonmember wages and *Nelson v. Appleway* addressed the car dealership’s unlawful *receipt* of the customer’s funds to pay the dealership’s tax obligation?

C. Has WEA failed to show a conflict between *Davenport*’s recognition of a restitution claim and this Court’s opinion in *PDC v. WEA*,

¹ All references to RCW 42.17.760, unless otherwise indicated, are to former §760. The statute was amended by the Legislature in 2007.

where *PDC v. WEA* did not reach the issue of the lawfulness of WEA's use of nonmembers' wages for politics because it invalidated §760 on the ground the statute unconstitutionally presumed nonmember dissent?

D. On an appeal of a CR 12 decision denying dismissal, has WEA carried its heavy burden of showing each element of equitable estoppel based on its assertion that Teachers acquiesced to WEA's unauthorized use of their wages?

E. Has WEA failed to demonstrate a "substantial public interest" justifying acceptance of review, where its petition is devoid of any argument or citation, the State has resolved its enforcement action and this suit will likely be the last of its kind in light of the 2007 amendment to §760?

III. ALTERNATIVE COUNTER-STATEMENT OF ISSUES

If this Court accepts review, Teachers request that this Court reverse the Court of Appeals on the following grounds, and sustain the trial court:

A. Do Teachers have a private right of action for a violation of §760, as they are within a group of people the statute was designed to protect and Teachers have complied with the notice requirements of RCW 42.17.400(4)?

B. Do Teachers have a conversion claim, where the WEA used Teachers' wages for political purposes in direct contravention of the authority retained by Teachers over their wages?

IV. COUNTER-STATEMENT OF THE CASE

A. Procedural History

Pursuant to RCW 42.17.400(4), by letter dated August 11, 2000, Teachers and the Evergreen Freedom Foundation notified then Washington State Attorney General Christine Gregoire and County Prosecutors that there was reason to believe WEA had violated §760.² By written stipulation dated September 25, 2000, the WEA admitted it had received and deposited agency shop fees into its general fund, expended money from that fund for political purposes without nonmembers' authorization and that it had committed multiple violations of §760.³ One month later, the Public Disclosure Commission (PDC) commenced an enforcement action against the WEA seeking penalties and injunctive relief, but expressly stating it was not seeking the return of individual agency fee payers' funds.⁴ That case was tried to the court in May 2001 resulting in substantial penalties, including for willful violations, and permanent injunctive relief. The trial court stated in its Letter Opinion, incorporated into its Findings of Fact and Conclusions of Law, that it "declines to rule on issues involving repayment or restitution of amounts owed to individual fee payers."⁵ Agency fee payers were without a remedy.

² A-1 to A1-8

³ A-9 to A-10

⁴ *Davenport v. Washington Education Association*, 197 P.3d 686, 690 (2008). All references to the *Davenport* case herein are to this decision of the Court of Appeals, Div. Two.

⁵ A-18 to A-19

In March 2001, Teachers filed this class action alleging that WEA collected from them agency shop fees but failed to obtain their affirmative authorization and used the funds for political purposes in violation of §760. Teachers sought recovery of the political portion of the fees.⁶ WEA removed the case to federal district court.⁷ Ultimately the district court rejected removal and returned the case to Thurston County Superior Court.⁸ WEA moved to dismiss Teachers' private right of action and conversion claims under CR 12. The trial court denied the WEA's motion to dismiss and certified the class.

WEA sought and was granted discretionary review of the trial court's rulings. Argument was consolidated with the WEA's appeal of the *PDC* judgment. Without reaching the issues raised by the trial court's denial of WEA's CR 12 motion, the Court of Appeals invalidated §760 on federal constitutional grounds.⁹ This Court affirmed.¹⁰ In June 2007, the U.S. Supreme Court reversed.¹¹ In October 2007, this Court remanded the instant case to the Court of Appeals, which after re-argument and

⁶ Teachers pled sufficient facts to support a claim for restitution based on WEA's unlawful retention of agency shop fees. See *Seekamp v. Small*, 39 Wn.2d 578, 583, 237 P.2d 489 (1951).

⁷ A-20 to A-23

⁸ A-24 to A-25

⁹ *Public Disclosure Commission v. Washington Education Association*, 117 Wn.App. 625, 71 P.3d 244 (2003), hereinafter, *WEA v. PDC*.

¹⁰ *Public Disclosure Commission v. Washington Education Association*, 156 Wn.2d 543, 130 P.3d 352 (2006), hereinafter, *PDC v. WEA*.

¹¹ *Davenport v. Washington Education Association*, ___ U.S. ___, 127 S.Ct. 2372, 2379, 168 L.Ed.2d 71 (2007)

supplemental briefing, affirmed the trial court, except to modify the class certification to reflect a three year statute of limitations.¹²

On December 3, 2008, PDC and WEA entered into a Stipulation and Amended Judgment in which WEA agreed to pay nearly \$1 million, none of which will be used to compensate Teachers for the WEA's unlawful use of agency shop fees for the period covered by this lawsuit.¹³

B. Factual Background.

The facts are sufficiently set forth in the *Davenport* decision.¹⁴

V. REASONS REVIEW SHOULD BE REJECTED

A. Division Two's *Davenport* Decision Does Not Conflict with Its Decision in *Crisman*.

This Court observed that §760 encumbers the use of agency shop fees collected from nonmembers by prohibiting their expenditure for political purposes unless the union obtains their affirmative authorization.¹⁵ The statute confers on individual nonmembers, not the public, the right to authorize or withhold such authorization. That this authority is held by the individual agency fee payer is to be expected as the protected interests are the nonmember's First Amendment interests.¹⁶ "As applied to public-sector unions, §760 is not fairly described as a restriction on how the union can spend "its" money; it is a condition

¹² *Davenport*, 197 P.3d at 689-692.

¹³ A-26 to A-32

¹⁴ *Davenport*, 197 P.3d 686 at 689-692.

¹⁵ *PDC v. WEA*, 156 Wn.2d at 569.

¹⁶ *Davenport v. Washington Education Association*, ___ U.S. ___, 127 S.Ct. 2372, 2377, 168 L.Ed.2d 71 (2007)

placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.”¹⁷ Because it is the State that confers “the power, in essence, to tax government employees” the union has no greater right to nonmember funds than that which the legislature or the people by initiative give it.¹⁸

Viewed in this context, the union’s power to “tax” nonmember funds to pay for the union’s politics is circumscribed because it is the nonmember’s First Amendment interests that may be harmed. It follows that where the union fails to obtain the nonmember’s consent, as the WEA did here, the unlawful act directly injures the individual agency fee payer and indirectly the public’s interest in fair elections.

WEA contends *Crisman v. Pierce County*¹⁹ contradicts *Davenport*. WEA is misguided. First, *Crisman* did not implicate individual interests, and certainly not individual interests remotely similar to the nonmembers’ First Amendment interests implicated by §760. In *Crisman*, the plaintiff lost an election because his opponent allegedly used public facilities in his campaign in violation of RCW 42.17.130.²⁰ The alleged unlawful conduct involved the misuse of public facilities over which the plaintiff had no authority and could not connect to an individualized harm. If any party

¹⁷ 127 S.Ct. at 2380 (emphasis in the original).

¹⁸ 127 S.Ct. at 2379.

¹⁹ 115 Wn. App 16, 60 P.3d 652 (2002).

²⁰ RCW 42.17.130 states: “No elective official nor any employee of his 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.

possessed an interest violated by the defendant, it was the governmental agency whose facilities were misused for electioneering. The interests harmed distinguish *Crisman* and *Davenport*.

This Court recognized another individual interest protected under another provision of RCW 42.17, RCW 42.17.680(2), enacted by Initiative 134, the same ballot measure that enacted §760.²¹ In *Nelson*, a newspaper reporter sued her employer under §680(2) after she was transferred to a non-journalistic position because of her political activism.²² The employer argued on appeal that section §680(2) does not create an individual right to be free from discrimination.²³ This Court disagreed and “recognize[d the plaintiff’s] statutory right to avoid workplace discrimination based on her politics.”²⁴ Whether or not this Court recognized a private right of action in *Nelson*, this Court clearly held that RCW 42.17 does protect particularized individual interests while also protecting the public interest in fair elections.²⁵ Unlike *Crisman* and similar to *Nelson*, individual interests are harmed when §760 is violated.

²¹ *Nelson v. McClatchy Newspapers, Inc.* 131 Wn.2d 523, 936 P.2d 1123, cert. denied, 522 U.S. 866 (1997).

²² “(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

²³ *Nelson*, 131 Wn.2d at 533

²⁴ *Id.* at 543

²⁵ In *Nelson*, this Court observed that the plaintiff’s individual interest in being free of workplace discrimination furthered the public interest in fair elections: “Taken as a whole, the provision in question means that employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees.” *Nelson*, 131 Wn.2d at 534.

Second, *Crisman* does not contradict *Davenport* because the absence of legislative purpose to create a private right of action has no bearing on whether a plaintiff may assert an independent common law claim based on conduct that violates a statute. In *Crisman*, the Court of Appeals concluded that an absence of voter intent precluded a private right of action. However, voter intent is not required for an independent, preexisting common law cause of action, such as restitution, to provide a remedy.²⁶ As the majority in *Davenport* explains in its well-reasoned decision, a claim for restitution may lie, even in the absence of a defined property interest, where an initial transfer of funds may be lawful at the time, but subject to a condition, the subsequent failure of which deprives the funds of their initial lawful justification and makes their retention, and the benefits thereof, unjustifiable.²⁷

Notably, this Court held that a common law action for restitution based on the violation of a statute may be brought even where the statutory scheme does not necessarily support a private right of action.²⁸ In *Appleway*, this Court held that because the plaintiff had brought an independent claim of restitution, there was no need to address whether the B & O statute (RCW 82.04.500) implies a private right of action.²⁹ *Appleway*, severely undercuts the WEA's argument that if a statute does not support a private right of action, the plaintiff is barred from bringing

²⁶ One difference between a private right of action under RCW 42.17 and common law restitution is the difference in the statutes of limitations. *Davenport*, 197 P.3d at 704.

²⁷ *Id.*, at 699.

²⁸ *Nelson v. Appleway Chevrolet, Inc.* 106 Wn.2d 173, 175 P.3d 847 (2007).

²⁹ *Id.*, at 173.

an independent common law claim for restitution. *Crisman* and *Davenport* do not conflict. Review should be denied.

B. Davenport Does Not Conflict with *Nelson v. Appleway*.

The WEA also attempts to create a conflict where none exists between this Court's holding in *Appleway* and *Davenport*. The WEA contends a claim of restitution may lie only where the plaintiff can show the *transfer* of funds to the defendant was legally ineffective. *Appleway* cannot be so narrowly construed, nor does the weight of authority support such a narrow construction.³⁰ In *Appleway*, the crux of the plaintiff's restitution claim was that the dealership illegally charged plaintiff B & O tax that RCW 82.04.500 required the dealership to pay. The unlawful act in *Appleway* was the transfer of the tax payment from plaintiff to the dealership. The facts did not require this Court to address whether the dealership could lawfully receive the funds but under circumstances that subsequently made their retention unlawful. Thus, there was nothing in this Court's holding in *Appleway* to suggest the Court would reject the line of cases which also apply restitution to circumstances in which, as here, the initial transfer is (arguably) lawfully compelled at the beginning, subject to a condition that subsequently fails, depriving the transfer of its

³⁰ *Davenport*, 197 P.3d at 696-702. The Court of Appeals provides a careful and thorough analysis of Washington and other state authorities supporting an unjust enrichment claim. The WEA attempts to distinguish all of them on the ground that they did not deal with estoppel. WEA Petition, pgs. 17-19. But in doing so WEA concedes these cases stand for the proposition for which the Court of Appeals cites them: restitution is a common law claim that applies either when a transfer of funds is unlawful or when a lawful transfer is later nullified by the transferee's failure to satisfy a material condition subsequent. As discussed, *infra*, WEA cannot establish estoppel after it violated §760.

initially lawful justification, and making retention of its benefits unjustifiable.³¹

There is no conflict between *Davenport* and *Appleway*. *Davenport* and *Appleway* both apply the claim of restitution to a violation of a statute under circumstances in which a person is “unjustly enriched at the expense of another.”³²

C. The *Davenport* Decision Does Not Conflict with This Court’s Opinion in *PDC v. WEA*

As WEA all but concedes, in *PDC v. WEA* this Court did not reach the question of whether or not WEA *used* agency shop fees for political purposes in violation of §760.³³ Thus, *Davenport’s* holding that the WEA failed to meet a condition placed on that use cannot conflict with *PDC v. WEA*. This Court did not reach the “use” issue because it invalidated the statute on federal constitutional grounds. In fact, if an inference is to be drawn from the Court’s opinion, it is that this Court believed the statute *did* restrict the WEA’s use of its general treasury for politics because this Court believed the affirmative authorization requirement violated the WEA’s First Amendment rights.³⁴ In other words, the Court would not have had to reach the constitutional question if it concluded §760 permitted the union unfettered use of its general

³¹ *Id.*, at 699, 701; *Restatement (Third) of Restitution* §18 at 281-82 (Tentative Draft No. 1).

³² *Restatement (Third) of Restitution* §1.

³³ WEA claims this Court concluded it properly collected and held on to agency fees, but the issue of proper “use” remained in contention. WEA’s Petition, p. 10.

³⁴ *PDC v. WEA*, 156 Wn.2d at 569 (“Section 760 then encumbers the use of such funds by prohibiting their expenditure for [the WEA’s] political speech.”)

treasury for political purposes. Thus, *Davenport's* ruling that Teachers may pursue a cause of action for restitution cannot conflict with a holding this Court did not make.

Even if this Court should find a conflict and accept review of the issue of WEA's use of agency shop fees, WEA cannot prevail. An appeal from a CR 12 motion requires the appellate court to take all facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party.³⁵ It is abundantly clear from the trial court's Findings of Fact in the *PDC v. WEA* case, and WEA's own admission to multiple violations of §760, that sufficient facts exist to support the allegation in the complaint that WEA unlawfully used agency shop fees.³⁶ Moreover, the WEA did not seek interlocutory review of the "use" issue.³⁷

WEA attempts to overcome its impossible fact burden by relying on evidence it presented to the trial court in *PDC v. WEA*. WEA summarizes the alleged trial testimony of two unidentified accounting "experts," without citation, for the proposition its surplus in any given year exceeds agency shop fees so it could not have used such fees for politics. The trial court in *PDC v. WEA* rejected this testimony.³⁸ In effect, WEA urges this Court to accept review and reverse the trial court's CR 12 rulings based on evidence it presented in another trial that it lost.

³⁵ *Davenport*, 197 P.3d at 692.

³⁶ A-33 to A-40; A-9 to A-10

³⁷ A-41 to A-48

³⁸ A-36

Finally, WEA implies some sort of conflict between *Davenport* and *PDC v. WEA* based on the “uncertainty” over the constitutionality of §760. WEA seems to suggest that even if it violated the law, because the constitutionality of that law was uncertain, it was entitled to keep Teachers’ money. Of course it offers no legal support for such an absurd contention other than to cite to Judge Hunt’s dissent in *WEA v. PDC*, in which she would have upheld the trial court’s injunction requiring the union to return to nonmembers the political portion.³⁹

There is no conflict between the decision of the court below and this Court’s opinion in *PDC v. WEA*.

D. The Davenport Decision Does Not Conflict With This Court’s Opinion in *Nugget Properties v. County of Kittitas*.

Next WEA attempts to fabricate a conflict between *Davenport* and a 1967 mineral rights case, *Nugget Properties v. County of Kittitas*,⁴⁰ claiming that the failure to object under *Hudson* equitably estopped Teachers from bringing a restitution claim. This argument is without merit.

Equitable estoppel is not favored, and the party asserting estoppel must prove each element by clear, cogent, and convincing evidence.⁴¹ The elements to be proved are: first, an admission, statement, or act inconsistent with a claim afterwards asserted; second, action by another in

³⁹ 117 Wn. App. 625, 646, 71 P.3d 244 (2003).

⁴⁰ 71 Wn.2d 760, 431 P.2d 580 (1967).

⁴¹ *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992)

reasonable reliance on that act, statement, or admission; and third, injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.⁴² WEA contends that by Teachers failing to object under *Hudson*, WEA was justified in concluding it did not have to comply with §760 and could retain and spend agency fees on politics.

WEA's estoppel defense twists and confuses the separate rights secured for the benefit of nonmembers by §760 and by the First Amendment. Under the former, nonmembers must first "opt in" before the WEA may use their wages for certain political expenditures, while under the latter nonmembers must "opt out" to prevent the WEA from using their wages for an array of nonchargeable expenses.⁴³

Nonmembers declining to object, or to "opt out," under *Hudson* cannot relieve WEA of its obligation to comply with the law. *Hudson* provides the floor of protections for agency fee payers, while §760 requires more from the union to safeguard agency fee payers.⁴⁴ On its face, §760 places the onus on WEA to obtain the consent of nonmembers, or to "opt in." The statute's very purpose is to protect nonmembers who for whatever reason decline to act, or fail to "opt out," under *Hudson*. "Mere silence does not constitute a waiver unless there is an obligation to speak."⁴⁵ And §760's affirmative authorization requirement means

⁴² *Id.*; *Board of Regents of Univ. of Wash. v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).

⁴³ *PDC v. WEA*, 156 Wn.2d at 569.

⁴⁴ *Davenport v. WEA*, 127 S.Ct. at 2379.

⁴⁵ *Voelker v. Joseph*, 62 Wn.2d 429, 435, 383 P.2d 301(1963).

agency fee payers have no such obligation. It follows that Teachers could not as a matter of law fail to act (object) in a way that is inconsistent with their claim that WEA failed to fulfill its affirmative, statutory obligation to obtain Teachers' authorization.

WEA relies primarily on *Nugget Properties v. County Kittitas*, in which the plaintiff mining company belatedly asserting its rights to property sat on those rights for 35 years in full knowledge that the other parties were building homes on the property. *Nugget* is not remotely analogous to the instant case.

Voelker is instructive.⁴⁶ In *Voelker*, this Court said that acquiescence in the form of a failure to bring suit does not act as a waiver of a right as long as the suit is commenced within the statute of limitations. "Mere delay, lapse of time, and acquiescence standing alone do not bar a claim short of the statute of limitations."⁴⁷

Moreover, estoppel is not favored when it is raised in derogation of a statutory right, e.g. the right not to have one's wages used for another's politics unless one "opts in."⁴⁸ In *Castle Homes and Development, Inc. v. The City of Brier*, the city attempted to invoke estoppel against the developer since the developer had agreed to the improperly calculated traffic mitigation fees. The court said that the city couldn't raise estoppel as a defense since it was in violation of the statute that governed how to

⁴⁶ *Id.*

⁴⁷ *White Pass Co. v. St. John*, 71 Wn.2d 156, 163, 427 P.2d 398 (1967).

⁴⁸ *Voelker*, 62 Wn.2d at 436.

properly calculate the fees.⁴⁹ Similarly, the WEA cannot claim estoppel after it violated §760.

On appeal of a CR 12 ruling, WEA cannot possibly carry its burden of establishing estoppel. “In order to raise an estoppel by acquiescence the party estopped must have been aware of his own rights and have perceived that the other party was acting on a mistaken notion of his rights.”⁵⁰ WEA has no evidence, much less uncontroverted evidence, to establish that Teachers received the *Hudson* notices, opened them, read and sufficiently understood their contents, were made aware the WEA would use their agency shop fees for political purposes, knew WEA was acting on the mistaken belief it could use Teachers’ fees for political purposes, and knew WEA had to obtain their affirmative authorizations. In fact, WEA claims it did not use agency fees for politics because it had a sufficient surplus to cover its political expenditures.⁵¹ Accordingly, WEA cannot possibly prove Teachers knew what the WEA itself contends cannot possibly be true.

The WEA’s petition for review should be denied as there is no conflict between *Davenport* and *Crisman, PDC v. WEA or Nugget*.

E. WEA Has Failed to Show A Substantial Public Interest.

Having failed to show a conflict between *Davenport* and a decision of this Court or of the Court of Appeals, WEA must demonstrate its

⁴⁹ 76 Wn.App. 95, 109, 882 P.2d 1172 (1994)

⁵⁰ *De Boe v. Prentice Packing and Storage*, 172 Wn. 514, 521, 20 P.2d 1107 (1933).

⁵¹ WEA Petition, pgs. 10-11

petition involves an issue of substantial public interest. It does not. Indeed, other than a heading claiming a substantial public interest, WEA's petition is devoid of argument and citation to any supporting authority. Perhaps WEA's "argument" is a single sentence dropped in a footnote in which it suggests *Davenport's* restitution claim for WEA's unauthorized use of agency fee payers' wages "may have opened the floodgates of potential litigation seeking damages."⁵² It is easy to see why WEA relegated this "argument" to a footnote.

In the approximately thirty-five years of the Public Disclosure Act, there are three reported cases in which an individual plaintiff or plaintiffs sought some form of damages: *Nelson*, *Crisman* and *Davenport*. *Nelson* was decided in 1997 and though this Court held plaintiff had a "statutory right" under RCW 42.17, a floodgate of claims for damages did not materialize in the intervening twelve years. Perhaps this is because the only two sections in RCW 42.17 that provide some level of protection to individuals are §680 (*Nelson*) and §760 (*Davenport*). If the number of claimants should double in the next twelve years, to six, the narrow parameters of *Crisman*, affirmed by *Davenport*, will guide future courts in analyzing novel claims for damages under RCW 42.17.

The issues raised in the WEA's petition fall far short of implicating the public interest and certainly not a substantial interest. The public interest was ostensibly served when WEA paid penalties to the State to

⁵² WEA Petition, p. 8, fn. 16.

settle the PDC enforcement action. The Legislature amended §760 to exempt unions whose revenues from member dues exceed their political expenditures, which probably exempts all unions.⁵³ Thus, this is likely the last of any such challenge under §760. There is no substantial public interest at stake. WEA's petition for review should be rejected.

VI. IF REVIEW IS ACCEPTED, THIS COURT SHOULD CONSIDER OTHER CLAIMS DISMISSED BY THE COURT OF APPEALS

If this Court accepts review of *Davenport*, Teachers respectfully request it accept review of the Court of Appeal's dismissal of their private right of action and conversion claims.

A. The Trial Court Properly Ruled that Teachers Have an Implied Right of Action Under *Bennett*.

RCW 42.17.760 creates an implied private right of action to protect the interests of individual fee payers who suffer a direct monetary loss in light of the tripart test of *Bennett*.⁵⁴ Teachers are within a group of people the statute was designed to protect.

The statute explicitly identifies the class of individuals and their interests that it seeks to protect: "an individual who [is] not a member" of the union who pays "agency shop fees." It empowers the nonmember, not

⁵³ Current RCW 42.17.760 contains the following subsection: (2) A labor organization does not use agency shop fees when it uses its general treasury funds to make such contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury to fund such contributions or expenditures.

⁵⁴*Bennett v. Hardy*, 113 Wn.2d 912, 920-21 (1990). ("[F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.")

the public, with the right to withhold affirmative authorization. On its face, the statute seeks to provide protections greater than those secured by the First Amendment.⁵⁵

In *Davenport*, the Court of Appeals misconstrued the *Bennett* test and reasoned that if a statute protects the public interest it cannot be interpreted to protect an individual interest. However, the inquiry is whether from a plain reading of §760 it appears the voters created a class in which the Teachers are included. Undeniably, the statute protects agency fee payers' First Amendment interests not to fund the union's political agenda by requiring the union to obtain their affirmative consent.

In *Nelson*, this Court determined the public interest in fair campaigns was served by protecting the plaintiff against discrimination.⁵⁶ That a statute benefits the public at large is no impediment to a court finding an implied right of action.

When a statute protects a specific class of individuals, it implicitly grants a remedy to those individuals. "[T]he Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights."⁵⁷

It is not necessary that the legislature (or the voters) explicitly intend to create the right, the test requires only that at a minimum it implicitly support such a right and that right may be implied merely from

⁵⁵ *Davenport*, 127 S.Ct at 2379. The WEA's own legal counsel agrees "RCW 42.17.760 makes all agency fee payers into objectors for the limited purposes specified therein." CP 179 of *PDC v. WEA*.

⁵⁶ *Nelson*, 131 Wn.2d at 534.

⁵⁷ *Bennett*, 113 Wn.2d at 921.

the creation of the identifiable class.⁵⁸ Moreover, both the policy, RCW 42.17.620, and the findings, RCW 42.17.610, explicitly refer to increasing the power of “individuals” in the political process.

The *Davenport* court’s reliance on its earlier decision in *Crisman* is misplaced. In *Crisman*, Division Two correctly refused to imply a private right of action from RCW 42.17.130, enacted by Initiative 276. In *Crisman*, the defeated candidate contended §130 created a private tort action. No where in §130 is a defeated candidate “within the class for whose ‘especial’ benefit the statute was enacted.”

Teachers’ legal counsel served the requisite notice on the Attorney General and County Prosecutors.⁵⁹ They brought this suit after the AG filed its enforcement action and stated that she would not try to recover their agency fees. Teachers have complied with the enforcement mechanism of RCW 42.17 and are in a special class of persons that §760, on its face, was intended to protect.

B. The Trial Court Properly Ruled That Teachers’ Conversion Claim Is Valid.

As the United State Supreme Court clarified in this case, the WEA has no right to collect, retain or use agency fee payers’ money unless conferred by statute.⁶⁰ WEA may have the statutory right to collect agency shop fees but in light of *Hudson* or §760, it does not have an unfettered statutory right to retain and use them. Under *Hudson*, WEA

⁵⁸ *Id.*

⁵⁹ RCW 42.17.400(4).

⁶⁰ *Davenport*, 127 S.Ct. at 2379.

must return the amount it spends on nonchargeable activities to objecting nonmembers and under §760 return the political portion to those from whom it has failed to obtain their authorization. "One who is authorized to make particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated."⁶¹ Teachers respectfully request that should this Court accept review, it reverse the Court of Appeals and permit Teachers' conversion claim to go forward to trial.

VII. CONCLUSION

For the foregoing reasons, Teachers respectfully request that this Court deny WEA's petition for review. Alternatively, if this Court accepts review, Teachers request that it accept review of *Davenport's* dismissal of their private right of action and conversion claims and affirm the trial court's denial of WEA's CR 12 motion to dismiss.

RESPECTFULLY SUBMITTED this 11th day of February, 2009.

ELLIS, LI & McKINSTRY PLLC

By: 

STEVEN T. O'BAN, WSBA #17265
Attorneys for Respondents

⁶¹ *Restatement (Second) of Torts*, §228 (1963).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION
ASSOCIATION,

Petitioner,

vs.

GARY DAVENPORT, MARTHA
LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY
WOLCOT,

Respondents.

NO. 82615-3

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the
ANSWER TO WEA'S PETITION TO REVIEW, APPENDIX and
CERTIFICATE OF SERVICE on the following:

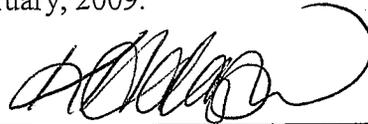
VIA MESSENGER:

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VIA FIRST CLASS MAIL:

Harriet K. Strasberg
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Dated this 11th day of February, 2009.



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Washington State County Prosecutors (See attached list.)

Re: Notice of Violation of Public Disclosure Act (RCW 42.17) by WA
School Districts and WEA

Dear Ms. Gregoire and County Prosecutors:

Our office represents the Evergreen Freedom Foundation (EFF) and public school employees. On their behalf, we hereby notify you that there is reason to believe that all public school employers have been, are and will continue to violate the Public Disclosure Act, RCW 42.17, and in particular RCW 42.17.680 and .760, by withholding dues and fees from their employees' wages that are used by the Washington Education Association (WEA) and National Education Association (NEA) for contributions to political campaigns. There is also reason to believe the WEA is violating RCW 42.17.760 by using the agency fees for contributions and expenditures without the affirmative authorization of non-members.

Interpreting RCW 42.17.680(3), the Washington Supreme court recently ruled that "[W]hen an employer has notice that the funds deducted [from employee wages] are for the use of a political committee or candidate, the employer may not then make that deduction without specific annual authorization." *State of Washington ex rel, Evergreen Freedom Foundation, et al., v. Washington Education Association, et al.* 140 Wn.2d 615; 999 P.2d 602 (2000).

In a concurring opinion, Justice Alexander wrote that when a district has been informed that "withheld money is being used for the benefit of political candidates or committees," then "the district has actual notice, or that, at the very least, it must assume a burden to make further inquiries." Employers have an affirmative duty to protect employees from the unauthorized use of their (employees) wages or salaries for political contributions. We concur with Justice Alexander's opinion that to conclude otherwise, "would be rendering the statute, which was passed by the people, a nullity, and would be placing too great a premium on the district's right to turn a blind eye to

Certified Mail, Return Receipt

August 11, 2000

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information it receives from an employee who claims he or she is affected by the deduction.”

Similarly, Justice Madsen, in a separate opinion concurring in the result but dissenting to the majority's affirmation of the employer's duty, wrote:

The majority says that where the employer has notice that the deducted funds are for the use of a political committee or candidate, the *employer must have the employee's written annual consent*.

In a separate opinion, Justice Sanders states the obvious- that WEA has, is and will continue to use members' dues for political purposes:

Now, if not then, (1996 election cycle) it is patently obvious to anyone of educable age that the WEA will continue to use dues money for political purposes in the future just as it has in the past. Therefore future unauthorized deductions from employee salaries for political use cannot be justified under the pretense that the employer did not know what was going on, at least short of some overt change in WEA policy.

Enclosed herewith are documents delivered by our client to each and every public school employer in the state (see attached list of employers) by first class and certified mail. The documents constitute actual notice to public school employers that the WEA is using member dues and the fees of most non-objecting agency fee payers for political contributions:

Letter dated June 27, 2000 sent to Public School Employers.

Attachment A: *Action* Newsletter articles, WEA President Lee Ann Prielipp speech to the May 2000 address to the Representative Assembly and other WEA documents regarding political expenditures.

Attachment B: Campaign Finance Reports filed with the Public Disclosure Commission (PDC) for Initiatives 708 and 732 Citizens for Quality Educators.

Attachment C: Campaign Finance Reports filed with the PDC for Initiative 728 K-12 2000.

Attachment D: L3C Reports filed by the WEA as a lobbyist employer with the PDC.

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Attachment E: L3 reports filed by WEA (lobbyist employer summary).

Attachment F: Documents showing agency fees used for political contributions unless non-members object (in violation of RCW 42.17.760).

These documents establish that the WEA is using general dues and the fees of non-members to make contributions to ballot-issue political committees and WEA-PAC, a political committee which contributes most of its funds to candidates. In addition to the political contributions discussed in the attached letter to the school districts, the WEA has contributed more than \$125,000 to political committees using dues and fees.

In the case of non-members, only those non-members paying agency fees who affirmatively *object*, obtain a refund from WEA. RCW 42.17.760 requires the affirmative *authorization* of non-members before their agency fees may be used for contributions or expenditures.

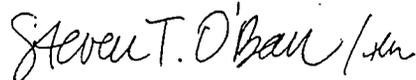
Please contact us immediately if it would assist you to meet with us to discuss this information.

There is no indication that public school employers have taken any steps toward obtaining the written authorizations required by RCW 42.17.680(3) and .760. Accordingly, with each payroll, public school employers are violating RCW 42.17.680(3) and assisting the WEA in the violation of .760.

We request that one or more of you immediately commence an action in the courts to address these apparent violations and protect the paychecks of public school employees. If you do not do so, our clients will seek appropriate legal and equitable relief pursuant to RCW 42.17.

Very truly yours,

ELLIS, LI & MCKINSTRY PLLC



Steven T. O'Ban

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BEFORE THE PUBLIC DISCLOSURE COMMISSION
STATE OF WASHINGTON

IN THE MATTER OF THE)
ENFORCEMENT ACTION AGAINST)

Washington Education Association)

Respondent.)
_____)

CASE NO 01-002

STIPULATION OF FACTS,
VIOLATIONS AND
RECOMMENDATIONS

The Washington Education Association (Respondent) and Public Disclosure Commission Enforcement Staff (Staff) agree to the following:

1. The Respondent is a labor organization.
2. The Respondent deposited into its general fund agency fee money from 4,194 individuals.
3. The Respondent's general fund money was used to make contributions and expenditures to influence an election and to operate a political committee.
4. The Respondent did not have affirmative authorization from agency fee payers to use their money for these purposes.
5. The Respondent contends that the number of 4,194 is over-inclusive in that it includes persons who were members of WEA and did not pay agency fees.
6. Staff contends that when Respondent submitted documents in response to a subpoena, a redacted list of 4,407 agency fee payers was presented. Names of the agency fee payers were redacted and replaced with a unique identification number for each agency fee payer. Of these 4,407 individuals, 213 either filed objections or challenges to their funds being used for 'non-chargeable' expenditures and received a refund of the portion of their fees being used for non-chargeable purposes. The funds from the remaining 4,194 individuals were then transferred from the agency fee escrow account to WEA's general operating fund.

7. Staff were unable to determine the amount of agency fees used to make the contributions and expenditures referred to in paragraph 3 because WEA's final revenue figures for FY 2000 (September 1, 1999 through August 31, 2000) are not yet available.

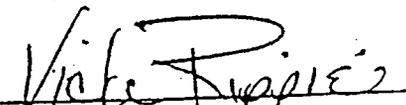
Violation

Respondent and Staff agree that Respondent committed multiple violations of RCW 42.17.760.

Recommendation

Staff recommends that this matter be referred to the Office of the Attorney General for further review pursuant to RCW 42.17.395(3). Respondent does not oppose the recommendation by staff.

Respectfully submitted this 25th day of September, 2000.


Vicki Rippie, Executive Director
PDC


Harriet Strasberg, Counsel
WEA

Superior Court of the State of Washington For Thurston County

Daniel J. Berschauer, Judge
Department No. 1
Paula Casey, Judge
Department No. 2
Richard A. Strophy, Judge
Department No. 3
Wm. Thomas McPhee, Judge
Department No. 4
Richard D. Hicks, Judge
Department No. 5
Christine A. Pomeroy, Judge
Department No. 6
Gary R. Taboe, Judge
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July 31, 2001

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Letter Opinion

**Re: State Public
Disclosure Commission
US.
Washington Education
Association**

**Thurston County Cause
00-2-01837-9**



LETTER OPINION [PDC vs WEA] July 31, 2001
Page 2

Dear Counsel:

On May 14-18th, this court presided over a trial in the above-entitled case and took the matter under advisement following closing arguments by the parties. Now, having considered the testimony presented at trial, the briefs and arguments of the parties and the applicable statutes and case authority, this court rules by way of this letter opinion.

BACKGROUND

The trial in this matter focused upon facts surrounding the collection of fees by the Washington Education Association [WEA] from non-union members called "fee payers" for a five year period [1995/1996 through 1999/2000]. These "fee payers" pay fees equal to the Union Dues paid by union members¹ unless they raise an objection. Those who object receive a refund based upon a formula that accounts for the ratio of "chargeable" to "nonchargeable" expenses.² The Public Disclosure Commission [PDC], plaintiff in this matter, claimed that portions of these fees were used for "political purposes" in violation of RCW 42.17.760³, that civil penalties⁴ and costs should be imposed by this court, and that this court should consider whether any violations that might be found were "intentional" which would allow the court to "treble" any penalties and costs.⁵

¹ These fees do not include the amount union members pay as "Community Outreach Project" [COP] assessments. COP funds were not a part of this lawsuit.

² This process is called the Hudson process, see *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 2641 (1988) and distinguishes expenses that are "chargeable" to collective bargaining purposes from those which are not.

³ RCW 42.17.760 Agency shop fees as contributions. A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

⁴ RCW 42.17.390 (3)

⁵ RCW 42.17.400(5)

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 3

The parties had previously agreed that the WEA had committed multiple violations of RCW 42.17.760.⁶ The agreement itself did not, however, specify what time period it covered. This court ruled, on March 23rd, 2001, at a pre-trial hearing, that the agreement time period would be the 1999-2000 school year and that alleged violations for the previous four years would be considered at trial. This court also ruled on summary judgment that RCW 42.17.760 is constitutional and requires an affirmative authorization from agency fee payers [as opposed to a passive failure to object] before the WEA may collect or use such fees for "political purposes".⁷

ISSUES

The court will rule on the following issues as a result of the evidence produced at trial and the positions of the parties:

1. Did the WEA use agency fees in fiscal [school] years 1995-96, 1996-97, 1997-98, and 1998-1999 for purposes forbidden in RCW 42.17.760?⁸
2. What is the appropriate amount of civil penalty to be imposed according to RCW 42.17.390(3)?
3. Were WEA's violations "intentional" and if so should penalties and costs be increased up to a treble amount as punitive damages under RCW 42.17.400(5)?
4. What other relief, if any should this court impose?

FINDINGS

I. THE WEA HAS USED AGENCY FEES IN VIOLATION OF RCW 46.17.760

The evidence produced at trial has convinced this court that the WEA did, in fact, use portions of the agency shop fees they received for "political purposes" that is, " . . . to make

⁶ Trial Exhibit 1, dated September 25, 2000.

⁷ This court ruled orally on May 4, 2001 and the written order was entered May 15, 2001.

⁸ Violations for 1999-2000 have been admitted by the WEA.

LETTER OPINION [PDC vs WEA] July 31, 2001

Page 4

contributions or expenditures to influence an election or to operate a political committee, . . .” as prohibited by RCW 42.17.760. While this court understands the position of the WEA to the effect that they had sufficient reserves each year to more than offset the fee payor amounts in question, and that amounts involved are quite small percentage wise [both the amounts received from agency fee payers and amounts expended for political purposes], this court disagrees with that logic. Any distinction between “collecting” an agency fee [on the revenue side] and “expending” monies for a particular purpose [on the expense side] are forever obscured when the funds collected are “commingled” into the general fund.

It is clear to this court that the WEA position was that agency fees were placed into the general fund and were spent each year as the WEA determined appropriate.⁹ Moreover, the WEA has further argued that even if the agency fees could have been separated, they would come back into the general fund at the end of the year as “surplus” funds. This reasoning is erroneous. This court could cite numerous examples of the unfairness of such a position, but in the interest of time and space will note only two:

First, the logical extension of such reasoning is that the WEA would, as a result of such fees, have more money to spend than if they had not collected them. If those funds could be construed to be spent only for non-political purposes, the WEA would still, obviously, have more monies to spend from other funds for political purposes. This is a clear-cut use of the total funds available for the given purposes in proportion to the source of the funds. While the percentage might be small, the agency fees are nevertheless used as a part of the over-all total expenditures, some of which were for prohibited purposes.

Second, if agency fee amounts are simply held, and not spent [part of the unexpended funds which existed each year] by the end of the fiscal year, WEA’s position that they then lose their character and are simple a part of the surplus that can be carried over, would obviously prompt a practice of just waiting a year and spending the money without restrictions. This flies in the face of the underlying problem that this court has previously identified - that of collecting fees from

⁹That is, unless a agency fee-payer affirmatively objected to the use of his or her funds for purposes other than collective bargaining. In that case a portion of the fees would be returned to the fee-payer under the Hudson process.

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 5

agency fee payers without first gaining their affirmative authorization to do so. There would be no incentive to do so if the court were only to consider what was spent in the year it was collected.

In short, the WEA violates RCW 42.17.760 when it collects agency fees and then spends them for prohibited purposes in ratio to the total agency fees and dues collected¹⁰ *without affirmative authorization*. While the amount spent for "political purposes" will be a component of the formula for assessing what portion of the agency fees are to be credited or returned to the agency fee payers, that amount need not be quantified for this court to rule as its initial finding that such fees are, indeed, being spent in violation of the statute. The issue of how the amount of political expenditures can be factored into a determination of the correct proportional adjustment to agency fees is best left to the "Other Court Remedies" discussion below.

II. THIS COURT ASSESSES A CIVIL PENALTY OF \$200,000 AGAINST THE WEA.

Having found that the WEA violated the law as set forth in RCW 42.17.760 by using agency fees for political purposes without affirmative authorization as set forth above, the court must next address appropriate civil penalties, if any, under RCW 42.17.390(3).¹¹ A fine of up to \$10,000 for each violation of the statute presents a broad number of options to this court. This court holds, first of all, that a civil penalty is appropriate in the present case aside from any amount of restitution or refund owed. While the WEA, during the 5 year period at issue, has collected and has had the benefit of monies it was not entitled to under the statute, this court is not addressing what, if any monies or damages any individual or group of fee payers would be entitled to.¹² Instead, this court notes that a penalty amount is appropriate to preserve the integrity of our system and promote public confidence: those violating statutes will be held to answer.

¹⁰ Again, COP assessments or dues are not included.

¹¹ (3) Any person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each such violation.

¹² The court notes that this action was filed by the Office of the Attorney General of the State of Washington under RCW 42.17.400 (1) and is on behalf of the State of Washington as distinguished from individual agency fee payers. No fee payer sought to intervene in this matter although several individuals did ask for permission to submit amicus pleadings, which this court denied.

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 6

This court accepts, in principle, the arguments submitted by the Plaintiff herein. First of all, there cannot be an absolute determination of the amounts involved¹³ either those lost to fee payers or gained by the WEA [costs avoided by not complying with the affirmative authorization requirement]. Secondly, the total number or even the identity of individuals involved cannot be determined since there were constant changes over the five-year period; nevertheless a penalty could be assessed as to each individual found to have been an agency fee payer if the court desired. Plaintiff proposed that the court consider a total of 8,000 individuals, [although the actual figure appears to be almost double that ¹⁴], and that a penalty of \$25 be assessed for each of those individuals for a total of \$200,000. This court accepts that proposal as being fair to both sides under the present facts.¹⁵

III. THIS COURT FINDS AN INTENTIONAL VIOLATION BY THE WEA IN FAILING TO FOLLOW THE LAW AND DOUBLES THE AMOUNT OF DAMAGES AS A PUNITIVE SANCTION. THE COURT CHOOSES NOT TO DOUBLE COSTS.

This issue has been the most difficult trial issue for this court. I have listened carefully to the testimony of the witnesses and concede that there was ambivalence and a lack of official direction as to the correct interpretation of the "affirmative authorization" language by leaders for both the WEA and the PDC. On the other hand, it is clear to this court that much of that indecision on the part of the WEA was a desire to not have to get involved in a laborious process to secure such affirmative authorizations if they didn't have to. Despite a clear communication

¹³ See *State v. WWJ Corp.* 138 Wn.2d 595, 980 P.2d 1257 (1999).

¹⁴ Exhibit 1 acknowledges that there were 4,194 agency fee payers in 1999/2000. The WEA argues that this number was over inclusive, so the Plaintiff has reduced that number to 3,200 per year; a total of 16,000 over five years. Plaintiff then cuts that figure in half [8,000] and asks for a penalty of \$25 for each. That results in the requested \$200,000 figure.

¹⁵ Even if the court were to accept Ms. Lonnquist's argument that the WEA stipulated to only 4 violations for the fiscal year 1999 [4 times each year that moneys were not segregated], 4 violations in each of 5 years would constitute 20 violations; if assessed at \$10,000 each that would still total \$200,000.

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 7

from the Washington State Labor Council in 1997,¹⁶ the WEA chose to take the easy road. This court will also observe that even when it became completely apparent that this obvious requirement had been ignored and the WEA stipulated to "multiple violations" in September of 2000¹⁷ the WEA could still not bring itself to acknowledge the obvious state of affairs and attempt to mitigate and negotiate the outcome of this dispute.

The PDC clearly did not move decisively to enforce this statute either; that is unfortunate. The PDC acted only when spurred to do so by citizen complaints. Any excuses that the PDC doesn't have to make regulations to explain statute compliance procedures serve no real purpose at this trial other than to further polarize the parties. The parties here are going to be required to work together in the future to accomplish what needs to be done in this case; this court would hope that previous communication problems will not be repeated. The fact remains however, a violation of statute is still a violation; for example a person who is speeding down a roadway does not have the right to speed just because a police officer does not make a traffic stop when the opportunity arises. The WEA argument that if the PDC had told them what was expected, they would have immediately complied, is not compelling to this court. The WEA clearly understood the PDC position leading to this trial and certainly did not immediately agree.

RCW 42.17.400(5) gives this court the discretion to treble the amount of judgment as punitive damages.¹⁸ For the reasons discussed above, I find that the WEA "intentionally" chose not to comply with the clear language of the statute; this court imposes a punitive sanction of \$400,000 [double the \$200,000 civil penalty assessed above]. The court will also award the Plaintiff an appropriate amount of costs of investigation and trial, including attorney's fees [to be determined upon further information from the plaintiff and further hearings, if required]. I will not, however double [or treble] these costs and fees for the reasons discussed above. The punitive

¹⁶ Exhibit 94 at trial.

¹⁷ Exhibit 1

¹⁸ (5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. . . .

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 8

civil penalty is to punish the illegal actions of the WEA and is not intended as a reward or bonus to the PDC.

IV. THIS COURT DIRECTS THE WEA TO DEVELOP PROCEDURES TO IMPLEMENT THE AFFIRMATIVE AUTHORIZATION REQUIREMENTS OF RCW 42.17.760

This court must not only concern itself with the past violations of the statute but must also insure that the statute is followed in the future. During the course of trial and argument, it has been suggested by the WEA that this is an extremely difficult task and that other issues make compliance nearly impossible. The WEA argues that they cannot determine, in advance, the amounts that they will spend in a given year so that agency fee payers will not be charged the proportional amount. The PDC argues that amounts determined to be "nonchargeable" under the **Hudson** analysis don't account for other amounts that are "political". The PDC has stated that it is not seeking to have the WEA seek repeated affirmative authorizations and does not ask for a separate political fund to be set up. This court has already ruled that an affirmative authorization does not necessarily have to be in writing. These issues, and others, do appear to be substantial in number and in substance. This court does not suggest that it has a sufficient understanding of either of the parties positions to fashion a remedy of its own at this point. On the other hand, this court is convinced that a procedure can be developed to assure compliance with the statute. Consequently, the court will give the WEA a period of 90 days from today's date to report back to the court with a proposal to assure compliance.

The PDC, in the court's opinion, must also bear some responsibility in this task. It must provide the WEA assistance and feedback as the procedures are contemplated. This court expects that the parties will discuss and negotiate, and that consensus will be reached on as many details as possible. If the parties cannot agree, each side should provide suggested solutions for this court's consideration in arriving at a final procedure.

At the time of trial, the parties agreed to bifurcate the trial as to certain issues concerning specific expenditures or dollar amounts. This court is not prepared to rule at this time as to the nature of certain contested expenditures which may or may not be "political". Likewise, as

LETTER OPINION [PDC vs WEA] July 31, 2001
Page 9

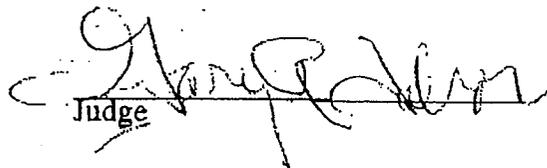
previously noted, this court declines to rule on issues involving repayment or restitution amounts owed to individual fee payers.

There are no other issues, so far as the court is aware, that are ripe for this court's decision today.

CONCLUSION

This court today holds that the WEA has violated RCW 46.17.760 by using agency shop fees without affirmative authorization. The Court assesses a civil penalty of \$200,000 against the WEA, finds that the violation was intentional, and doubles the penalty to \$400,000 as a punitive sanction. The court also orders that appropriate costs for investigation and trial and attorney's fees be paid by the respondent; these amounts are not doubled and shall be specifically determined after further information and argument, if necessary. Finally, this court directs the WEA to develop, within 90 days, a plan to comply with the affirmative authorization requirements of the statute in the future. Because the Petitioner is the prevailing party, the PDC is directed to prepare and present an order for filing that reflects this court's decision as set forth in this letter opinion.

Sincerely,


Judge

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ELLIS LI & MCKINSTRY PLLC

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GARY DAVENPORT, MARTHA LOFGREN,
WALT PIERSON, SUSANNAH SIMPSON,
And TRACY WOLCOTT,

Plaintiffs, individually and
on behalf of all other
nonmembers similarly
situated,

vs.

WASHINGTON EDUCATION
ASSOCIATION,

Defendant.

NO. C01-5191

NOTICE OF REMOVAL OF
CIVIL ACTION TO UNITED
STATES DISTRICT COURT
UNDER 28 U.S.C. §1441(b)
(FEDERAL QUESTION)

TO: The Clerk of the Court

AND TO: Ellis, Li & McKinstry, attorneys for Plaintiffs

PLEASE TAKE NOTICE that Defendant Washington Education Association
("WEA) hereby removes the above-captioned action from the Superior Court of the State
of Washington in and for Thurston County to this United States District Court for the
Western District of Washington pursuant to U.S.C. §1441(b) and §1446 *et seq.* Removal
is proper on the following grounds:

NOTICE OF REMOVAL - 1

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1. Plaintiffs commenced this action on March 19, 2001, alleging Defendant WEA violated their rights with respect to expenditures from agency fee payments, and seeking monetary and injunctive relief. True and correct copies of the Summons and Complaint are attached as Exhibit A to the Verification of Records for Removal.

2. The first date on which Defendant received a copy of said Summons and Complaint was March 20, 2001, when Defendant was served with a copy of same as was filed in the said State court. Defendant has filed this Notice of Removal within thirty (30) days after receipt of Summons and Complaint, and has met all the procedural requirements of 28 U.S.C. §1446.

3. On April 6, 2001, Defendant filed a Notice of Appearance with the Thurston County Superior Court, and also served same. Defendant has not yet filed an Answer. A true and correct copy of the Notice of Appearance is attached as Exhibit B to the Verification of Records for Removal.

4. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1331, and is one that may be removed to this Court by Defendant pursuant to 28 U.S.C. §1441(b) because the action arises under the Constitution and laws of the United States, as shown below:

a. Plaintiffs claim that they, and a class they claim to represent, are represented by Defendant for collective bargaining purposes and pay agency shop fees and that Defendant allegedly has made improper expenditures with said agency fees. *See*: Complaint, ¶11 and ¶21. Federal courts have held that the use of agency fees for political and other purposes determined by federal law to be

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“nonchargeable” implicates fee-payers’ First Amendment rights and have devised extensive procedures and standards governing such matters.

b. Plaintiffs expressly assert federal claims under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), a case based upon Free Speech and Associational rights in accordance with the First Amendment to the U.S. Constitution. See: Complaint, ¶21 and ¶22.

c. Plaintiffs allege violations of, and misrepresentations with respect to, Defendant’s “Hudson” notice and procedures (See: Complaint, ¶22-24) – which notice and procedures are expressly and exclusively established and governed by federal law and a Stipulation and Order entered by the U.S. District Court for the Western District of Washington at Seattle in *Jeff L. Leer, et al. v. Washington Education Association*, No. C96-1612Z (hereinafter “*Leer*”).

d. Plaintiffs “Second Cause of Action” is preempted by federal law and/or exclusively within the jurisdiction of the federal courts.

e. Plaintiffs “Third Cause of Action” is preempted by federal law and/or exclusively within the jurisdiction of the federal courts.

f. Plaintiffs “Fourth Cause of Action” is preempted by federal law and/or exclusively within the jurisdiction of the federal courts.

g. Plaintiffs seek certification of a class (Complaint, p. 8), many of whom, including named plaintiffs, on information and belief, were part of the class certified by the U.S. District Court in *Leer* and are thus barred from seeking recovery under the terms of the *Leer* settlement.

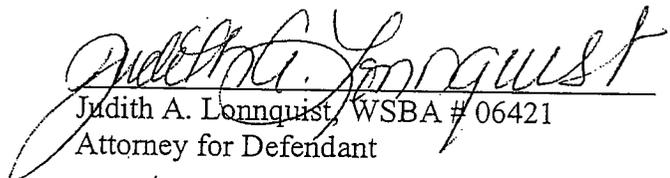
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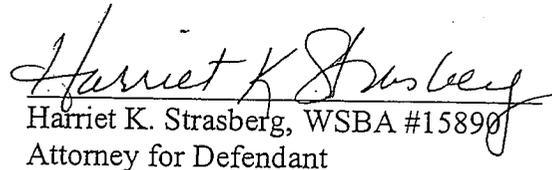
h. To the extent Plaintiffs seek class relief for alleged misappropriation of agency fees (Complaint, p. 9), their exclusive remedy is in the federal courts.

i. Plaintiffs' request for injunctive relief (Complaint p. 9) is governed exclusively by federal law and expressly by the settlement approved by U.S. District Court Judge Thomas Zilly in *Jeff L. Leer, et al. v. Washington Education Association*, Cause No. C96-1612Z.

WHEREFORE, Defendant respectfully requests that the action now pending against it in the Superior Court of Washington in Thurston County be removed to this Court.

Dated this 12th day of April, 2001.


Judith A. Lonquist, WSBA # 06421
Attorney for Defendant


Harriet K. Strasberg, WSBA #15890
Attorney for Defendant

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ELLIS, LI & MCKINSTRY PLLC

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WESTERN DISTRICT OF WASHINGTON AT TACOMA
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GARY DAVENPORT, MARTHA
LONGREN, WALT PIERSON, SUSANNAH
SIMPSON, and TRACY WOLCOTT,

Plaintiffs,

v.

WASHINGTON STATE EDUCATION
ASSOCIATION,

Defendant.

Case No. C01-5191 FDB

ORDER OF REMAND

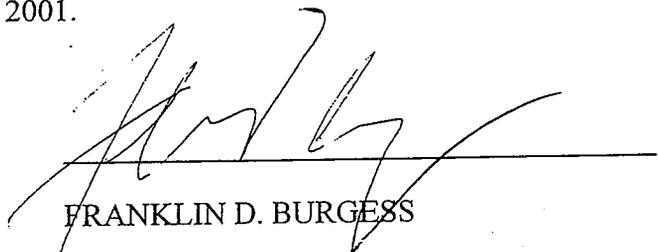
This matter is before the court on the removal from state court by defendant Washington Education Association (WEA) and a motion for remand by plaintiffs Davenport, Longren, Pierson, Simpson and Wolcott (Davenport).

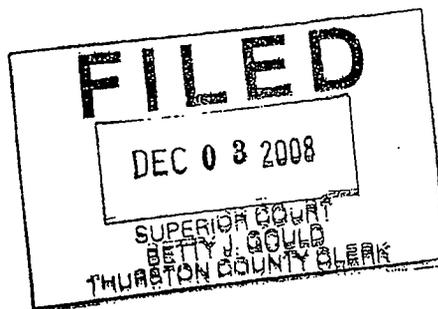
The plaintiff's complaint pleads causes of action for violation of RCW 42.17.760, conversion, breach of fiduciary duty and fraudulent concealment. These causes of action all relate to circumstances concerning the WEA's obligations to agency fee payers, some of which are described by the case *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). However, the

1 Washington State statute cited above creates an additional burden on the WEA which is not
2 prohibited by or contained within the notices required by *Hudson*. Plaintiffs seek determinations
3 under state law, and federal law is only tangential to the questions presented by this lawsuit.
4 Therefore, it is hereby ORDERED THAT THIS CASE BE REMANDED TO STATE COURT.

5 Plaintiffs have requested their attorneys fees for the defending against removal. While the
6 court has discretion to award such costs, it declines to do so in this case. The fact that plaintiff was
7 not able to proceed with this suit at precisely the same time as a similar matter went forward in state
8 court will not harm the plaintiffs' position. The state court matter is progressing in a bifurcated
9 posture and there is no reason that the instant questions of liability can not be presented to the state
10 court now that the question of removal is answered. Therefore, plaintiffs request for attorneys fees
11 is DENIED.

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13 DATED this 25 day of May, 2001.

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16 FRANKLIN D. BURGESS
17 UNITED STATES DISTRICT JUDGE
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STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON *ex rel.*,
WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION,

Plaintiff,

v.

WASHINGTON EDUCATION
ASSOCIATION,

Defendant.

NO. 00-2-01837-9

STIPULATION AND AMENDED
JUDGMENT

JUDGMENT SUMMARY (RCW 4.64.030)

- | | | |
|----|---------------------------------|--|
| A. | JUDGMENT CREDITOR: | State of Washington |
| B. | JUDGMENT DEBTOR: | Washington Education Association |
| C. | PRINCIPAL JUDGMENT AMOUNT | \$975,000 |
| D. | INTEREST | Principal judgment amount(s) due and owing shall bear interest at the rate of 12% per year, and only in the event that Judgment Debtor fails to make payments according to the terms listed below. |
| F. | ATTORNEYS FOR JUDGMENT CREDITOR | ROBERT M. McKENNA
Attorney General
D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
LINDA A. DALTON, WSBA #15467 |

Sr. Assistant Attorney General

G. ATTORNEYS FOR
JUDGMENT DEBTOR

JUDITH A. LONNQUIST, WSBA #6421
HARRIET K. STRASBERG, WSBA
#15890

STIPULATION

The parties to this stipulation, the Plaintiff, STATE OF WASHINGTON, *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION ("Commission") and the Defendant, WASHINGTON EDUCATION ASSOCIATION ("WEA"), being desirous of resolving claims arising out of this complaint, hereby enter into the following stipulation:

1. Release: This is a final, conclusive and complete release between the parties hereto, in and for consideration of the terms, covenants and obligations herein specified, of all claims, causes of action, damages, costs, fees, known and unknown, anticipated and unanticipated, that were or could have been raised by the Plaintiff under RCW 42.17.760 and related enforcement statutes, arising out of or in connection with circumstances addressed in the Complaint in this matter. The undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted, for the purpose of making a full and final compromise, adjustment and settlement of any and all claims, disputed or otherwise. The Stipulation and Judgment entered by the Court contains the entire agreement of the parties.

2. Non Admission of Liability: This agreement and compliance with this agreement shall not be construed as an admission by either party as to the merits of their respective claims or defenses. Specifically, it shall not be construed as an admission by the WEA of any liability, or an admission by the WEA of any violation of any order, law, statute, duty, or contract.

3. Total Payment: The parties agree that the WEA will pay a total of \$975,000 as follows:

- a) A civil judgment payable to the State of Washington in the amount of \$735,000, due and payable 30 days from entry of this Stipulation and Amended Judgment.

- 1 b) To fee payers as outlined below in paragraph 5 with interest in an amount up to
- 2 \$240,000. If, after the calculations for payment of rebates to identified fee payers
- 3 are completed, any balance remains, then the remainder shall be paid to the State of
- 4 Washington. The manner of handling this payment is outlined in paragraph 5
- 5 below. The parties stipulate that the process to be used in calculating refunds is
- 6 consistent with terms of the court's injunction.
- 7 4. Audit: The parties agree that the WEA will produce for the State an audit by Tremper &
- 8 Co. within 30 days of the signing of this agreement, which reviews the WEA's calculations
- 9 of the percentage of WEA's annual budget utilized for "760 expenses", as specified in
- 10 paragraph 1 of the Permanent Injunction, and the process used by the WEA to calculate the
- 11 total fee payer payment (paragraph 5 below), and that within 30 days of the receipt of the
- 12 Tremper & Co. audit, the State may retain and pay for an auditor to review and validate,
- 13 according to generally accepted accounting principles, the process used by the WEA's
- 14 auditor to audit and report as indicated above. This Tremper & Co. audit and the State's
- 15 review process will be completed no later than 60 days from the signing of this Stipulation.
- 16 5. Fee Payer Distribution Method: The parties agree to distribution of up to \$240,000 to fee
- 17 payers affected by the allegations in this action, unless the amount is adjusted pursuant to
- 18 paragraph 3, shall be made as described below:
- 19 a. For the WEA fiscal years 03-04, 04-05, 05-06, and 06-07, the WEA agrees to
- 20 identify all fee payers, such group to exclude any fee payer who has already
- 21 received refunds for nonchargeable expenditures through the WEA's *Hudson/Leer*
- 22 process. The identified fee payers shall be those employed during part or all of
- 23 WEA fiscal years 03-04, 04-05, 05-06, and 06-07.
- 24 b. The WEA shall provide the State with confirmation of the percentage of WEA
- 25 expenditures used for "760 expenses" for fiscal years 03-04, 04-05, 05-06, and 06-
- 26 07 to be refunded to the identified fee payers, subject to the audit and review
- specified in paragraph 4 above, with the percentage to be based on WEA
- expenditures occurring two years prior to each school year.
- c. The WEA agrees to issue a rebate check payable to each of the identified fee payers
- (paragraph 5(a) above) to the last known mailing address for each identified fee
- payer.
- d. The WEA shall calculate the rebate due each identified fee payer as a percentage of
- the fees paid by a fee payer to the WEA equivalent to the percentage of WEA's
- expenditures used for "760 expenditures" for the WEA fiscal years 03-04, 04-05,
- 05-06, and 06-07.

- 1 e. A rebate check payable to each identified fee payer shall be mailed by first class
2 mail to the last known address of such fee payer as reflected on the list described in
3 paragraph 5(a), (c) and (d) above. Such mailings, which shall be separate from any
4 other materials, will be prominently marked on the outside with the words
5 **"IMPORTANT LEGAL DOCUMENT ENCLOSED."** The WEA shall note on
6 each rebate check that it is valid for only six (6) months. The WEA shall bear all
7 costs and expenses associated with making payments to the fee payers.
- 8 f. Once the calculations have been made and the fee payer rebate checks issued, the
9 WEA shall send the State any difference between the \$240,000 and actual amount
10 needed for rebates to the identified fee payers.
- 11 g. The parties will agree on the content and terms of a joint written statement to the
12 fee payers for whom rebate checks are issued, which will be included with the
13 rebate checks that WEA will mail to the identified fee payers. The joint statement
14 shall also be posted to the WEA's website. The joint statement will include
15 language providing that fee payers who have a question about how their rebate was
16 calculated or the process for reviewing that individual calculation are to contact the
17 WEA for information and any calculation review process. The State has no
18 authority or obligation to mediate or sanction the rebate calculations.
- 19 h. The date for mailing the rebate checks to the identified fee payers shall be no later
20 than 120 days from the date of the completion of the audit and review process as
21 described in paragraph 2 above or no more than six (6) months after the agreement
22 is signed, whichever is earlier.
- 23 i. In the event that a fee payer's mailed rebate is returned to the WEA for any reason,
24 the WEA will first verify that the address to which the refund was mailed
25 corresponds with the last known address on file with the WEA. If not, then the
26 clerical error will be corrected and the rebate check and joint statement will be
mailed to the correct address. If the original address was correct, then the WEA
shall hold such rebate for a period of six (6) months. If no claim to the rebate is
made by the named fee payer, or his or her heirs, assigns or successors in interest,
then the WEA will follow the procedure outlined in paragraph 5(j) outlined below.
If a check payable to a fee payer is not returned but also not cashed within six (6)
months from the date the check was mailed, then the WEA, with respect to such
uncashed checks, will follow the procedure outlined in paragraph 5(j) below.
- j. Once six (6) months has elapsed after return to the WEA of a correctly addressed
rebate as undeliverable or refused, or after unreturned checks are mailed but remain
uncashed, the WEA agrees to deposit with the Unclaimed Property Section of the
state Department of Revenue ("DOR") the value of the returned or uncashed
rebates. To facilitate the reporting of any uncashed or returned checks as unclaimed
property to DOR, the WEA will provide, at a minimum, the following information
to DOR with respect to each uncashed or returned check: Last and first name of the
fee payer, last known address, payment amount, and check number. The
information will be provided in an electronic format using the National Association
of Unclaimed Property Administrators (NAUPA) Revised standard (NAUPA II)
file format. The information will be provided at the time the transfer of funds

1 representing uncashed or returned checks occurs. The transfer of any returned or
2 uncashed fee payer rebate to DOR shall be subject to the provisions of RCW 63.29.

3 6. Injunction: The parties agree that, upon the execution of this stipulation and judgment, the
4 Permanent Injunction filed in this matter on December 3, 2001 in the Thurston County
5 Superior Court should be dismissed.

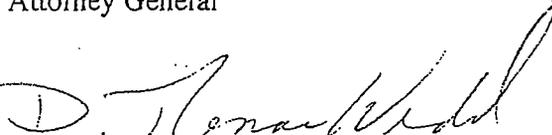
6 7. Joint Press Release: On or after the date the Amended Judgment is signed by this court, the
7 parties, through the undersigned, agree to issue a mutually agreed upon joint press release
8 announcing the resolution of this matter including the terms of the stipulation.

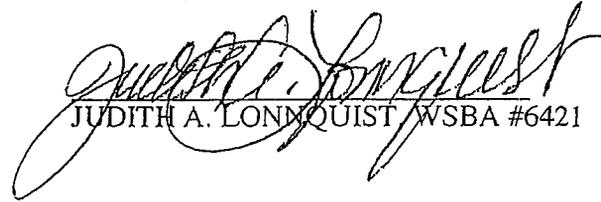
9 8. Disputes: The parties agree that in the event of disputes between the parties regarding the
10 terms of this Stipulation and Amended Judgment, they will first meet and confer in an
11 attempt to resolve the issue before initiating further proceedings.

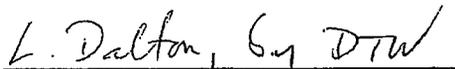
12 9. Judgment: The parties acknowledge that there has been no final adjudication of claims and
13 defenses in this case other than the issue of the statute's constitutionality and agree that the
14 Judgment, including the Findings of Fact and Conclusions of Law contained therein,
15 entered in this matter on December 3, 2001, should be vacated and this Amended Judgment
16 submitted in their place, superseding these documents in all respects.

17 DATED this 3rd day of December, 2008.

18 ROBERT M. McKENNA
19 Attorney General

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21 D. THOMAS WENDEL, WSBA #15445
22 Assistant Attorney General

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24 JUDITH A. LONMQUIST, WSBA #6421

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26 LINDA A. DALTON, WSBA #15467
Sr. Assistant Attorney General
Attorneys for Plaintiff


HARRIET K. STRASBERG,
WSBA #15890
Attorneys for Defendant

1 **AMENDED JUDGMENT**

2 THIS MATTER came on regularly before the undersigned judge of the above-entitled
3 Court, and the Plaintiff, STATE OF WASHINGTON, PUBLIC DISCLOSURE
4 COMMISSION, appearing through its attorneys of record, ROBERT M. McKENNA, Attorney
5 General, D. THOMAS WENDEL, Assistant Attorney General, and LINDA A. DALTON,
6 Senior Assistant Attorney General, and the Defendant, WASHINGTON EDUCATION
7 ASSOCIATION, appearing through its attorneys of record, JUDITH A. LONNQUIST and
8 HARRIET K. STRASBERG, and the parties having apprised the court of their agreement to
9 the entry of this revised judgment for the purpose of settling and compromising this action
10 brought under RCW 42.17. The terms of their resolution include payment of funds to the State
11 of Washington and rebates to fee payers under the provisions of RCW 42.17. The court,
12 having reviewed and considered the records and files herein, and the above Stipulation of the
13 parties, and having found the resolution to be a just and proper resolution of this matter, and
14 being otherwise fully advised in the premises, now, therefore:

15 IT IS HEREBY ORDERED that the Defendant, WASHINGTON EDUCATION
16 ASSOCIATION, shall be and is hereby assessed a total of Seven Hundred, Thirty Five
17 Thousand Dollars (\$735,000) to be paid within 30 days of the execution of this Judgment;

18 IT IS FURTHER ORDERED that the Defendant, WASHINGTON EDUCATION
19 ASSOCIATION, shall pay no more than \$240,000 in accordance with the provisions of
20 paragraphs 4 and 5 of the foregoing Stipulation, which are incorporated herein by reference
21 into this Judgment as though fully set forth;

22 IT IS FURTHER ORDERED that the prior Judgment entered in this matter on
23 December 3, 2001 is vacated and this Amended Judgment supersedes it in all respects;

24 IT IS FURTHER ORDERED that the Permanent Injunction previously entered in this
25 case on December 3, 2001 is dismissed; and
26

1 IT IS FURTHER ORDERED that in the event of a dispute between the parties
2 regarding this Stipulation and Amended Judgment, they shall first meet and confer in an
3 attempt to resolve the issue prior to initiating any further proceedings with this Court.

4 DONE IN OPEN COURT this 3 day of Dec, 2008.

5
6 
7 JUDGE / COMMISSIONER

8 Presented By:

9 ROBERT M. McKENNA
10 Attorney General

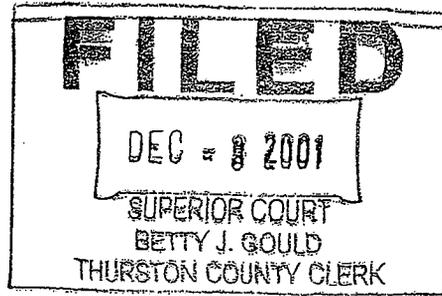
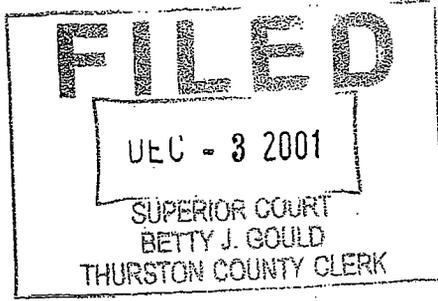
11 
12 D. THOMAS WENDEL, WSBA #15445
13 Assistant Attorney General

14 
15 LINDA A. DALTON, WSBA #15467
16 Senior Assistant Attorney General
17 Attorneys for Plaintiff

18 Stipulated to, and approved as to form; notice
19 of presentation is not waived:

20 
21 JUDITH A. CONNOUIST, WSBA #6421

22 
23 HARRIET K. STRASBERG, WSBA #15890
24 Attorneys for Defendant
25
26



COPY

The Honorable Gary R. Tabor
Hearing date: November 15, 2001

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

State of Washington ex rel. Public
Disclosure Commission,

NO. 00-2-01837-9

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

v.

Washington Education Association,

Defendant.

THIS COURT having conducted a trial of the above-captioned matter between May 14, 2001 and May 18, 2001, Plaintiff represented by its attorneys Christine O. Gregoire, Attorney General, D. Thomas Wendel, Assistant Attorney General, and Richard Heath, Special Assistant Attorney General, and Defendant represented by its attorneys, Judith Lonquist, Harriet Strasberg, Michael Gawley and Aimee Iverson, and the Court having received documentary and testimonial evidence, and having considered the arguments and authorities submitted by counsel for the parties, and having made certain rulings of law in an Order Regarding Cross Motions for Summary Judgment, entered on or about May 10, 2001, and having issued its Letter Opinion on or about July 31, 2001, both of which are incorporated herein by this

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

ATTORNEY GENERAL OF WASHINGTON
Torts Division
629 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126
(360) 459-6600

1 reference, now, therefore, the Court hereby enters the following findings of fact and
2 conclusions of law from the trial of this matter:

3
4 **FINDINGS OF FACT**

- 5 1. The Public Disclosure Commission, represented herein *ex rel.* by the State of Washington,
6 is an agency of the State of Washington.
- 7 2. Defendant Washington Education Association (WEA) is a labor organization that
8 represents public school employees in the State of Washington.
- 9 3. WEA manages its finances in fiscal years that begin on September 1 and end on August 31,
10 and fiscal years are referred to by reference to the second calendar year in the fiscal year
11 (e.g. the fiscal year from September 1, 1995 to August 31, 1996 is referred to as fiscal year
12 1996).
- 13 4. WEA, through the collective bargaining process, has negotiated contracts with various
14 school districts requiring collection of fees from non-members of the WEA who work in
15 bargaining units covered by the such contracts ("agency fee payers"), which are referred to
16 as "agency fees". Agency fee payers pay fees equal to the dues paid by WEA members,
17 except that fee payers do not pay Community Outreach ("COP") assessments. COP funds
18 were not part of this lawsuit.
- 19 5. Fee payers who object to the amount of agency fees receive a refund based upon the ratio
20 of "chargeable" to "nonchargeable" expenses – part of the so-called "Hudson" process
21 (*Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 2641 (1988)).
22 "Chargeable" fees are those expenditures that are germane to collective bargaining.
23 Expenditures to influence an election or to operate a political committee are included in
24 "nonchargeable" expenditures.
- 25 6. Only WEA members have voting rights within the WEA; as nonmembers, fee payers have

1 neither voting rights, nor any right to determine the amount or use of the agency fees that
2 they are required to pay to the WEA.

3 7. For each WEA fiscal year from 1996 to 2000, WEA received agency fees from between
4 3000 and 4000 agency fee payers.

5 8. For each WEA fiscal year from 1996 to 2000, the annual agency fees collected from fee
6 payers for WEA were the same amount as the annual dues collected from comparably
7 situated members.

8 9. For each WEA fiscal year from 1996 to 2000, WEA received no affirmative authorization
9 from any agency fee payer for the use of their agency fees for contributions or expenditures
10 to influence an election or operate a political committee; since 2001, WEA has held all
11 agency fees in escrow, without making expenditures therefrom.

12 10. The fees received from agency fee payers are quite small in amount and as a percentage of
13 WEA's total revenue.

14 11. The amounts expended by WEA to influence an election or to operate a political committee
15 are a small percentage of its overall expenditures.

16 12. In each WEA fiscal year from 1996 to 2000, WEA had sufficient reserves to more than
17 offset the fee payer amounts in question.

18 13. For each WEA fiscal year from 1996 to 2000, WEA commingled agency fees in its general
19 operating fund with member dues and other moneys.

20 14. Even if agency fees had been segregated, any surplus at the end of the fiscal year would
21 have reverted to the general fund.

22 15. For each WEA fiscal years from 1996 to 2000, WEA did not separately account for the use
23 of agency fees that were commingled in its general operating fund with member dues and
24 other moneys.

25 16. For each WEA fiscal year from 1996 to 2000, moneys were used from the WEA general

1 operating fund for expenditures or contributions to influence an election or operate a
2 political committee, such as direct and in-kind contributions to political committees, and
3 communications to support or oppose other political positions.

4 17. For each WEA fiscal year from 1996 to 2000, WEA made expenditures from the WEA
5 general fund for expenditures or contributions to influence an election or operate a political
6 committee.

7 18. Any distinction between collecting an agency fee on the revenue side, and expending
8 monies for a particular purpose on the expense side, is forever obscured when the funds
9 collected are commingled into a general fund.

10 19. Under the circumstances of this case, where fee payers must pay the same amount annually
11 as members pay in dues, and the agency fees are commingled with dues in the general
12 fund, it is unfair to use the fees, in whole or in part, in proportions and purposes different
13 from the use of dues.

14 20. For each WEA fiscal year from 1996 to 2000, WEA used agency fees, from each agency
15 fee payer who did not receive any refund of part of their fees, for expenditures or
16 contributions to influence an election or operate a political committee.

17 21. A total of approximately 8,000 fee-payers for the WEA fiscal years from 1996 to 2000, is a
18 fair and reasonable estimate of the number of fee-payers. A penalty of \$25 for each of said
19 fee payers is reasonable, and results in a penalty of \$200,000. In any event, for each WEA
20 fiscal year from 1996 to 2000, WEA used agency fees at least four times to make
21 expenditures or contributions to influence an election or operate a political committee,
22 which results in the same penalty amount: \$200,000.

23 22. For each WEA fiscal years from 1996 to 2000, WEA intentionally made multiple
24 expenditures from the WEA general operating fund for expenditures or contributions to
25 influence an election or operate a political committee.

- 1 23. For each WEA fiscal year from 1996 to 2000, WEA was aware of RCW 42.17.760 and that
2 the statute foreclosed the use of agency fees for contributions or expenditures to influence
3 an election or operate a political committee, without the affirmative authorization of the fee
4 payer.
- 5 24. After executing a Stipulation of Violations with the Plaintiff, WEA chose not to attempt to
6 mitigate or negotiate the outcome of the dispute. WEA clearly understood the PDC
7 position leading to this trial and did not immediately agree.
- 8 25. For each WEA fiscal year from 1996 to 2000, WEA could not reasonably have believed
9 that its use of agency fees complied with the requirements of RCW 42.17.760.
- 10 26. WEA stipulated and admitted, in September, 2000, that it had committed multiple
11 violations of RCW 42.17.760 during its fiscal year 2000.
- 12 27. A reasonable fine for multiple violations of RCW 42.17.760, for the WEA fiscal years
13 1996 – 2000, is two hundred thousand dollars (\$200,000.00).
- 14 28. For each WEA fiscal year from 1996 to 2000, WEA's use of agency fees for contributions
15 and/or expenditures to influence elections and/or operate political committees, without
16 affirmative authorization from any fee payers, was intentional.
- 17 29. WEA intentionally chose not to comply with RCW 42.17.760.
- 18 30. The intentional violations of RCW 42.17.760 justify a doubling of the fine to four hundred
19 thousand dollars (\$400,000.00).
- 20 31. Irreparable harm will result if WEA continues to use agency fees without affirmative
21 authorization from individual fee payers for expenditures or contributions to influence an
22 election or operate a political committee.
- 23 32. This Court did not have sufficient understanding of the parties' positions to fashion its own
24 remedy to assure compliance with the statute at the time of the Letter Opinion; however,
25 the parties are well suited to such task. The Court will consider suggested solutions

1 proposed by the parties.

2 33. The State of Washington should be awarded its reasonable costs and attorney fees for
3 prosecution of this action; however, the costs and fees should not be doubled or trebled due
4 to the intentional conduct of WEA.

5 CONCLUSIONS OF LAW

6 1. This Court has jurisdiction over the subject matter and the parties to this action.

7 2. RCW 42.17.760 prohibits a labor organization from using agency fees paid by an agency
8 fee payer for expenditures or contributions to influence an election or operate a political
9 committee, unless it first obtains affirmative authorization to do so from the individual fee
10 payer.

11 3. The plaintiff State of Washington, *ex rel.* Public Disclosure Commission, is authorized to
12 bring actions to enforce the provisions of RCW Chapter 42.17, including RCW 42.17.760.
13 RCW 42.17.390, and RCW 42.17.400.

14 4. The WEA is a labor organization as that term is used in RCW 42.17.760.

15 5. Under the circumstances presented by this case, when agency fees were commingled with
16 other funds in the general treasury, expenditure of any general treasury monies to influence
17 an election or support a political committee results in use of a proportionate share of
18 agency fees for such purposes.

19 6. The use of an individual fee payer's agency fees to influence an election or operate a
20 political committee, without the affirmative authorization of the individual, is a violation of
21 RCW 42.17.760.

22 7. An expenditure or contribution that is made to influence an election or operate a political
23 committee, using agency shop fees without the affirmative authorization of the individual
24 fee payer, is a violation of RCW 42.17.760.

25 8. For each WEA fiscal year from 1996 to 2000, WEA committed multiple violations of

- 1 RCW 42.17.760.
- 2 9. RCW 42.17.390(3) authorizes this Court to impose fines in the amount of up to ten
3 thousand dollars (\$10,000.00) for each violation of any provision of RCW Chapter 42.17,
4 including RCW 42.17.760.
- 5 10. This Court is authorized to impose a fine against WEA under the Findings above, in the
6 amount of two hundred thousand dollars (\$200,000.00) for violations of RCW 42.17.760.
- 7 11. RCW 42.17.400(5) authorizes this Court to impose up to treble the amount of the
8 judgment, if the violations have been found to be intentional, and the fine imposed upon
9 WEA is hereby doubled to four hundred thousand dollars (\$400,000.00).
- 10 12. RCW 42.17.400(5) authorizes this Court to award to the State all costs of investigation and
11 trial, and this Court hereby Orders the WEA to pay to the State all reasonable costs of
12 investigation and trial in an amount to be proven by the State at a later time.
- 13 13. RCW 42.17.390(6) authorizes this Court to enjoin any person to prevent the doing of any
14 act prohibited in RCW Chapter 42.17, or to compel the performance of any such act, and
15 the Court hereby Orders WEA to undertake measures to comply with RCW 42.17.760 as
16 will be specified by further Order of this Court.

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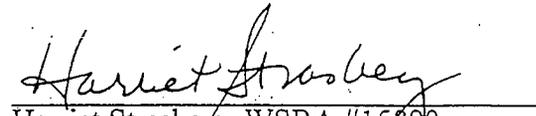
DONE IN OPEN COURT this 3 day of ^{Dec} November, 2001.


JUDGE GARY R. TABOR

Presented, without waiver of objections,
by:

APPROVED AS TO FORM; NOTICE
OF PRESENTATION WAIVED:

CHRISTINE O. GREGOIRE
Attorney General


Harriet Strasberg, WSBA #15890
Attorneys for Defendant


D. THOMAS WENDEL, WSBA#15445
Assistant Attorney General
Attorneys for Plaintiff

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON, SUSANNAH SIMPSON, and TRACY WOLCOT,

Respondents, individually and on behalf of all other nonmembers similarly situated,

v.

WASHINGTON EDUCATION ASSOCIATION,

Petitioner.

No. 28375-1-II

RULING GRANTING REVIEW AND DENYING CONSOLIDATION

FILED COURT OF APPEALS DIVISION II 02 MAR 28 PM 3:35 STATE OF WASHINGTON BY DEPUTY

RECEIVED ELLIS, LI & MCKINSTRY PLLC

MAR 29 2002

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Washington State Education Association (WEA) filed a motion for discretionary review of the Consolidated Order on Pending Motions (Consolidated Order) issued by the Thurston County Superior Court. Respondents Gary Davenport, et al. (Davenport) oppose discretionary review.

In August 2000, the Evergreen Freedom Foundation filed a letter of complaint with the Public Disclosure Commission (PDC), pursuant to RCW 42.17.400(4), alleging that WEA had violated RCW 42.17.760, which provides:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

In October 2000, on behalf of PDC, the State commenced an action against WEA, pursuant to RCW 42.17.400(1). That case was tried to Judge Gary Tabor, who ruled WEA

had collected and used agency shop fees in violation of RCW 42.17.760. In his letter opinion, dated July 31, 2001, Judge Tabor assessed a civil penalty of \$200,000 against WEA and doubled that penalty as a punitive sanction. WEA appealed Judge Tabor's ruling. *State ex rel. PDC v. WEA*, No. 28264-0-II. That appeal is in the briefing stage.

On September 26, 2001, Davenport, along with four other public school employees who were not members of WEA but had paid agency shop fees in amounts equal to union dues, filed an Amended Complaint alleging four causes of action: (1) violation of RCW 42.17.760 (First Cause of Action); (2) conversion (Second Cause of Action); (3) breach of fiduciary duty (Third Cause of Action); and (4) fraudulent concealment (Fourth Cause of Action). Davenport also sought class action status under CR 23.

WEA moved to dismiss, pursuant to CR 12(c), arguing: (1) Davenport has no private right of action regarding violations of RCW 42.17.760; (2) WEA did not convert Davenport's agency shop fees because those fees belong to WEA by statute; and (3) the claims of conversion, breach of fiduciary duty, and fraudulent concealment were subsumed under the duty of fair representation, which has a statute of limitations of six months. Davenport opposed the motion to dismiss and sought class certification.

Judge Daniel Berschauer ruled on the motions in his Consolidated Order as follows. He denied WEA's motion to dismiss, except as to the Third Cause of Action, ruling that Davenport had an implied right of action regarding violations of RCW 42.17.760. He ruled that the statute of limitations for the First Cause of Action was five years, pursuant to RCW 42.17.410, and that the statute of limitations for the Second and Fourth Causes of Action was three years, pursuant to RCW 4.16.080. He granted class

certification as to the First and Second Causes of Action, pursuant to CR 23(b)(3), but denied class certification as to the Fourth Cause of Action. He stayed the proceedings to allow WEA time to seek discretionary review of the Consolidated Order. Finally, he made the following certification, pursuant to RAP 2.3(b):

ACCORDINGLY, THE COURT HEREBY CERTIFIES THAT this Consolidated Order involves controlling questions of law as to which there are substantial grounds for differences of opinion and that immediate review of this Consolidated Order would materially advance the ultimate termination of this litigation.

Motion for Discretionary Review, Appendix at A5.

WEA argues that discretionary review is appropriate under RAP 2.3(b)(2) because “the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” Its primary contention is that the superior court erred in ruling that Davenport has an implied private right of action under which he can claim violation of RCW 42.17.760. WEA contends PDC and the State have the exclusive authority to enforce provisions of chapter 42.17 RCW, including RCW 42.17.760, RCW 42.17.360(5), RCW 42.17.360(7) and RCW 42.17.400(1). WEA notes that RCW 42.17.400(4) provides one exception to PDC’s exclusive enforcement authority:

Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen’s action) authorized under this chapter. This citizen’s action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will

commence a citizen's action within ten days upon their failure so to do, and the attorney general and prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

WEA argues the only possible private right of action regarding an alleged violation of RCW 42.17.760 is a citizen's action under RCW 42.17.400(4). WEA further argues Davenport cannot maintain a citizen's action under RCW 42.17.400(4) because he did not provide written notice of the alleged violations to the attorney general. Even if he had, WEA argues Davenport could not commence a citizen's action because PDC has already commenced an enforcement action against WEA for the alleged violations of RCW 42.17.760.

Davenport responds that he has an implied right of action to enforce RCW 42.17.760, because a cause of action will be implied from a statutory scheme if:

- a) the plaintiff is "within the class for whose 'especial' benefit the statute was enacted;" b) the "legislative intent, explicitly or implicitly, supports creating or denying a remedy;" and c) "implying a remedy is consistent with the underlying purpose of the legislation."

Wingert v. Yellow Freight Sys., Inc., 104 Wn. App. 583, 591 (2000), review granted, 144 Wn.2d 1009 (2001) (employees denied 10-minute rest periods during overtime hours have implied right of action under chapter 49.12 RCW to seek compensation because without an implied right of action, employers could deny rest periods with impunity), (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21 (1990) (employees allegedly terminated

because they were 60 years old have implied right of action under RCW 49.44.090 because without implied creation of a remedy, the statute would be meaningless)).

Davenport contends that as an employee, who is required to pay agency shop fees, he is within the especial class for whom RCW 42:17.760 was enacted. He contends the legislative intent of RCW 42.17.760 supports creating an implied right of action. Finally, he contends implying a right of action is consistent with the underlying purpose of RCW 42.17.760. He further contends that the Supreme Court has already created an implied right of action under chapter 42.17 RCW in *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 530-34, *cert. denied*, 522 U.S. 866 (1997).

Neither *Nelson*, *Wingert* nor *Bennett* clearly demonstrates that Davenport has an implied right of action to allege violations of RCW 42.17.760. In *Nelson*, the Supreme Court appears to have assumed that Nelson had a right of action to allege a violation of RCW 42.17.680(2), which provides in pertinent part that “[n]o employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for . . . supporting or opposing a candidate, ballot proposition, political party, or political committee.” Thus, *Nelson* does not necessarily stand for the proposition that implied rights of action exist as to all alleged violations of chapter 42.17 RCW. Further, in *Nelson*, *Wingert* and *Bennett*, the right of action was implied to allow an employee to allege violations of rights owed to them by their employers by statute or regulation. *Nelson*, 131 Wn.2d at 530-31 (RCW 42.17.680(2) “prohibits discrimination based on an employee’s ‘supporting or opposing a candidate, ballot proposition, political party, or political committee’”); *Wingert*, 104 Wn. App. at 587. (WAC 296-196-092(4) provides “no

employee shall be required to work more than three hours without a [10-minute] rest period"); *Bennett*, 113 Wn.2d at 921 (RCW 49.44.090 "makes it an unfair employment practice to discriminate against an employee who is between the ages of 40 and 70 based on her age"). In contrast, RCW 42.17.760 does not protect employees from improper actions of employers or labor organizations. Nor does it regulate when or how agency shop fees are paid to labor organizations. RCW 42.17.760 only regulates the spending of agency shop fees, prohibiting labor organizations from using such fees "to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

Davenport also responds that without an implied right of action, he would have no remedy for violations of RCW 42.17.760. He argues that bringing a citizen's action under RCW 42.17.400(4) would provide him no remedy (other than recouping his attorney fees) because any judgment he obtained in such a citizen's action would escheat to the State. He also argues that RCW 42.17.400 does not provide the sole means of enforcement of RCW 42.17.760, because RCW 42.17.400 was enacted as part of Initiative 276 in 1972, while RCW 42.17.760 was enacted as part of Initiative 134 in 1992.

Davenport's additional arguments do not provide clear support for an implied right of action to allege violations of RCW 42.17.760. As noted above, RCW 42.17.760 appears to be a limitation on how a labor organization can spend agency shop fees, not a limitation on how it collects agency shop fees. As such, it is not clear that the drafters of Initiative 134 intended to provide agency shop fee payers to have a private right of action. While the statement of intent in Initiative 134 includes "[r]educ[ing] the influence of large

organizational contributors," it does not address the rights of agency shop fee payers. Laws of 1993, ch. 2, § 2(2), codified as RCW 42.17.620(2). Davenport's argument that RCW 42.17.400 cannot be read as foreclosing an implied right of action under RCW 42.17.760 is undercut by two factors. First, Initiative 134 specifically placed RCW 42.17.760 (Laws of 1993, ch. 2, § 16) in chapter 42.17 RCW. Laws of 1993, ch. 2, § 33(1). RCW 42.17.400(4), which had been enacted 20 years prior (Laws of 1973, ch. 1, § 40(4)), appears to provide the enforcement mechanism for persons who have "reason to believe that some provision of *this chapter* is being or has been violated." (Emphasis added) Second, RCW 42.17.410, which provides the five-year statute of limitations upon which Davenport relies, was also part of Initiative 276 enacted 20 years prior. Laws of 1973, ch. 1, § 41. It appears to be inconsistent to argue that RCW 42.17.400(4) does not apply to RCW 42.17.760, but that RCW 42.17.410 does apply to RCW 42.17.760, when RCW 42.17.400(4) and RCW 42.17.410 were enacted at the same time.

In summary, it appears that the superior court committed probable error in ruling that Davenport has an implied right of action to allege violations of RCW 42.17.760. Further, the finding of an implied right of action substantially alters the status quo as between WEA and agency shop fee payers. Given the probable error, the alteration of the status quo, and the superior court's certification that immediate review of the Consolidated Order may materially advance the ultimate termination of this litigation, discretionary review is appropriate under RAP 2.3(b)(2).

WEA also argues the superior court committed probable error in refusing to dismiss Davenport's conversion claim, in adopting a five-year statute of limitations for the RCW

28375-1-II

42.17.760 claims, in adopting a three-year statute of limitations for the conversion and wrongful concealment claims, and in certifying classes for the First and Second Causes of Action. These rulings are subsidiary to or interconnected with the finding of an implied right of action under RCW 42.17.760, and so this court should review them in conjunction with the finding of an implied right of action. Accordingly, it is hereby

ORDERED that WEA's motion for discretionary review of the Consolidated Order is granted. WEA's request to consolidate this proceeding with *State ex rel. PDC v. WEA*, No. 28264-0-II, is denied without prejudice as premature.

DATED this 28 day of March, 2002.

Eric B. Schmidt

Eric B. Schmidt
Court Commissioner

cc: Judith A. Lonquist
Harriet K. Strasberg
Steven T. O'Ban
Jeanne Brown
Milton L. Chappell
Hon. Daniel J. Berschauer
Thurston County Superior Court
Cause number: 01-2-00519-4