

August 9, 2019

Ms. Tabatha Blacksmith
Public Disclosure Commission
711 Capitol Way S. #206
P.O. Box 40908
Olympia, WA 98504

Re: PDC Case No. 54324, complaint supplement

Ms. Blacksmith,

This is a supplement to our complaint against JH Kelly, Inc. of July 8, 2019, addressing several issues raised by JH Kelly's response to our complaint. As requested in your email of July 10, 2019, I am providing the supplemental information within 30 days.

In brief, JH Kelly concedes it has violated the Fair Campaign Practices Act (FCPA). And despite claiming that it "does not seek to minimize the errors at issue," JH Kelly focuses the bulk of its response seeking to do just that. Rather than defend the legality of its actions or even state its intention to bring its practices into alignment with RCW 42.17A.495 and WAC 390-17-100, JH Kelly instead spends its response defending various pathways to leniency from the Public Disclosure Commission (PDC).

In this case, however, JH Kelly's violations cannot be resolved as "minor violations," both because there is no legal pathway to do so and because, even if there were, JH Kelly's actions have too significant an effect on the public to be considered minor. Further, JH Kelly has attempted to improve its situation by producing a second batch of authorization forms to the Freedom Foundation. This second disclosure, delayed until after the Foundation's filing of a formal complaint, means that JH Kelly failed to comply with the public inspection requirements of RCW 42.17A.495(4). Further, the additional documents do nothing to change the fact that all of the deductions from employees' wages made by JH Kelly for the United Association of Plumbers and Pipefitters Local 598's (UA 598) political committee during the complaint period were improper.

- 1. JH Kelly still has not a single authorization which complies with the statute and implementing regulations. It makes no effort to argue authorizations based on a percentage of salary are legal, implicitly conceding they are not.**

JH Kelly takes issue with the assertion in the complaint that it "improperly deducted over \$40,000 from employees' wages." It contends that this calculation "assumes... every single signed authorization on file is noncompliant" and argues that "remedial measures taken to address any alleged noncompliance" should be taken into account. But the scope

of the violations and the severity of any penalties are two separate issues. The complaint does not merely “assume” that none of the deductions made from employees’ wages by JH Kelly from March-May 2019 were properly authorized; it *specifically provides* full documentation and legal authority to argue JH Kelly violates the FCPA. If these allegations are correct, which JH Kelly would surely dispute if it could, then determining appropriate penalties is the next step and the point at which consideration of any mitigating factors becomes relevant.

- 2. JH Kelly’s violations of the FCPA cannot be resolved by labeling them “minor” violations. The 2019 FCPA amendments did away with “actual violations,” and therefore even if the legislature has obliquely accepted that there may be “minor” violations, WAC 390-37-061(2) remains ineffective because it defines a “minor” violation as a subset of “actual violations,” which no longer exist. In addition, the actions the PDC is required to take under RCW 42.17A.755(1) do not include any option to deal with a “minor” violation.**

JH Kelly contends its violations should be categorized as “minor violations,” which are defined by WAC 390-37-061 in the following way:

“(2) A minor violation is an *actual violation* that occurs:

- (a) When required information is not timely disclosed, but the public is not deprived of critical information; or
- (b) When incomplete information is disclosed, but a good faith effort to comply with disclosure is made, and the public is not deprived of critical information.
- (c) When any other violation of chapter 42.17A RCW has occurred that does not materially affect the public interest.” (Emphasis added)

- a. However, the FCPA no longer recognizes “actual violation” as a category of violation. The definition of the term and references to it throughout the FCPA were repealed by HB 1195 in 2019. As such, WAC 390-37-061’s definition of “minor violation” as a type of “actual violation” no longer has statutory grounding.

- b. Further, RCW 42.17A.755(1) continues to require the PDC to take one of three actions when presented with a complaint:

- “(a) Dismiss the complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review;
- (b) Initiate an investigation to determine whether a violation has occurred, conduct hearings, and issue and enforce an appropriate order, in accordance with chapter 34.05 RCW and subsection (3) of this section; or
- (c) Refer the matter to the attorney general, in accordance with subsection (4) of this section.”

None of these options acknowledge “minor violations,” much less permit the PDC

to dismiss complaints of undefined “minor violations” or resolve them with a warning letter.

- c. JH Kelly contends that “a complaint alleging a minor violation may be subject to dismissal under” RCW 42.17A.755(1)(a), but this is incorrect. Actions taken under paragraph (a) must be “in accordance with subsection (2),” which governs only “complaints of remediable violations or requests for technical corrections.” The Freedom Foundation contends, and JH Kelly does not dispute, that the company’s violations do not meet the criteria to be considered remediable violations or technical corrections, so (a) is inapplicable to the present complaint.
- d. Even if, as JH Kelly contends, RCW 42.17A.755(1)(a) permits the PDC to dismiss certain complaints other than those involving remediable violations or requests for technical correction, PDC regulations do not permit the dismissal of the present complaint.

WAC 390-37-060(1)(a) only permits the PDC to dismiss a complaint if it “is obviously unfounded or frivolous, or outside of the PDC’s jurisdiction...” The PDC clearly has jurisdiction over the present complaint, having already issued a warning letter to JH Kelly for similar violations earlier this year. And the present complaint is neither unfounded nor frivolous. JH Kelly’s violations of a longstanding FCPA statute were well-documented in the complaint, largely undisputed by JH Kelly, and the PDC itself has previously found that JH Kelly’s political deductions from employees’ wages were made without proper authorization.

- e. Even if the PDC may satisfy its obligations under RCW 42.17A.755(1) by resolving a complaint as pertaining to “minor violations,” PDC regulations dictate that actions other than dismissal, including the issuance of a formal warning or assessment of a penalty, be taken in such cases.

WAC 390-37-060(1)(d) permits the PDC to resolve complaints of minor violations “by issuing a formal written warning” — an action which the PDC has already taken and JH Kelly already ignored.

Further, if an alternative response to noncompliance is deemed appropriate, WAC 390-37-062 sets forth a penalty schedule listing various types of violations “that may be agreed to by a respondent pursuant to a stipulation prior to an investigation...” While the list includes “[failure] to maintain open for public inspection, during normal business hours, documents and books of accounts showing a copy of each employee's request for funds to be withheld for transfer to a political committee,” in violation of RCW 42.17A.495(4), it does not include withholding political contributions from employee wages in violation of RCW 42.17A.495(3).

WAC 390-37-062(2) does permit violations not listed in the penalty schedule to

be resolved via stipulation, so long as the penalty amounts are in line with those in the penalty schedule.

3. Even if there was something labeled as a “minor” violation in WAC 390-37-061, JH Kelly’s violations do not meet the definition’s third prong because they do materially affect the public interest.

JH Kelly admits that its deduction of political contributions from employees’ wages without proper authorization does not meet the first or second prongs of the definition of “minor violation” provided by WAC 390-37-061(2), as these violations do not relate to the disclosure of required information.

Instead, JH Kelly argues that its actions should be considered “minor violations” under the third prong, as not materially affecting the public interest. This argument strains credulity and should be rejected.

What is now codified as RCW 42.17A.495 was first passed by 73% of Washington voters in 1992 as part of Initiative 134. The people’s intent, as expressed in the initiative, was to, in part, “Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes.” RCW 42.17A.400(2)(a). Further, the FCPA’s provisions “are to be liberally construed to effectuate [its] policies and purposes...” RCW 42.17A.904.

When an interest group, such as UA 598, convinces a network of employers, such as JH Kelly, to implement a scheme to deduct political contributions illegally from the wages of thousands of employees to enrich its political war chest, it gains an *unfair* ability to “influence elective and governmental processes” that other law-abiding interest groups do not *equally* share, in contradiction of the intent of the voters expressed in RCW 42.17A.400(2)(a).

JH Kelly attempts to downplay its role in this scheme by pointing out that, since multiple employers are involved, it is only partly responsible for UA 598’s ability to unfairly influence Washington elections with illegally deducted political contributions. It also dismisses the examples of UA 598’s influence in the 2018 elections because these elections did not occur during the March-May 2019 period specifically at issue in the present complaint.

It is of course true that JH Kelly is not the only employer illegally deducting political contributions benefitting UA 598 from employees’ wages. Yet, every other employer involved in this illegal scheme could say the same. If this alone proves a sufficient defense against any penalty, no employer will face meaningful accountability for its actions and the scheme will continue unabated, as it has since the time of the PDC’s previous warning letters.

Further, JH Kelly plays a far larger role in this scheme than nearly all other employers. During the March-May 2019 period that is the subject of the complaint, UA 598’s

political committee reported receiving 2,343 contributions transmitted by 27 different employers. JH Kelly was responsible for transmittal of 584 (25%) of these contributions, second only to Waste Treatment Completion Company's 744 (32%).

It is also true, but entirely meaningless, that none of the funds withheld by JH Kelly from employees' wages illegally in March-May 2019 were used to make political expenditures in the 2018 elections cited as examples in the complaint. While elections and related expenditures are cyclical and (mercifully) not perpetual, JH Kelly's illegal deductions occur every pay period, allowing UA 598's political committee to aggregate funds that will necessarily be expended on influencing Washington elections eventually.

The 2018 elections were cited in the complaint as the most recent examples available of how the illegal scheme in which JH Kelly participates on an ongoing basis permitted UA 598 to unfairly and improperly influence Washington elections. As there are relatively few elections on the ballot in 2019, UA 598 may not end up using most or all of the funds improperly collected by employers like JH Kelly until the 2020 elections.¹ But that hardly means that the funds illegally collected now by JH Kelly are not still a matter of significant public concern.

4. **JH Kelly received the Foundation's request to inspect employees' authorization forms and responded by June 28. However, it admits facts proving its response was neither timely nor responsive, because *long afterwards* its vice president and general counsel e-mailed well over 100 pages of additional documents. Moreover, review of this additional information indicates that of the 577 contributions, at most 19 were made pursuant to a signed version of the newest form. In addition, this Response admits facts proving a new, independent violation for which the PDC should impose additional penalties.**

JH Kelly claims that it "has nothing to hide" and that it was "timely and responsive in providing information in response to the Freedom Foundation's request for information." At the same time, JH Kelly effectively admits this is not true, as it "has since identified additional documents, which are pending disclosure [to the Freedom Foundation] now."

On July 30, 2019, JH Kelly's Vice President and General Counsel Craig Yabui emailed me a link to two PDF documents. *See Appendix page 2.* The documents consisted mostly of additional UA 598 dispatch forms for JH Kelly employees. *See App. 3-116.* However, the additional documents do little to improve JH Kelly's position. A review of all documents produced to the Freedom Foundation by JH Kelly leads to the following conclusions:

- From March-May 2019, JH Kelly withheld at least \$40,288.08 from its employees' wages for UA 598's PAC.
- UA 598's PAC reported receiving 584 contributions from JH Kelly employees. Typically, 1-4 contributions per person were recorded during this period.

¹ UA 598's political committee has made at least one political contribution since the March-May 2019 period in the complaint. On June 14, 2019, the committee made a \$2,000 contribution to James Millbauer's campaign for Kennewick City Council. <https://web.pdc.wa.gov/rptimg/default.aspx?batchnumber=100915710>

- Of these, 577 contributions (99%) came from an employee for whom JH Kelly produced a dispatch form. The remaining seven contributions (1%) came from employees for whom JH Kelly was unable to produce a dispatch form (Edwin Bradshaw) or for whom JH Kelly produced a document other than a dispatch form that made no mention of authorizing political deductions and/or was unsigned by the employee (Sean Reid, Kenneth Wiest, Peter Wilkinson, Aric Isom, and Samuel Abramov).
- Of the 577 contributions from employees for whom JH Kelly produced a dispatch form:
 - 162 (28%) were made pursuant to version one forms the PDC has already determined to be invalid. Of these, 75 contributions (46%) were made pursuant to version one forms that lacked an employee signature.
 - 390 (68%) were made pursuant to version two forms the PDC has already determined to be invalid. Of these, 315 contributions (81%) were made pursuant to version two forms that lacked an employee signature.
 - 25 (4%) were made pursuant to version three forms. Of these, six (24%) were made pursuant to version three forms that lacked an employee signature.

See App. 117-134.

In short, as originally alleged in the complaint, none of the deductions processed by JH Kelly from employees' wages in March-May 2019 were made pursuant to signed authorization forms that complied with the FCPA.

JH Kelly admits it received the Foundation's request to inspect employees' authorization forms and, although JH Kelly provided some documents by the requested date of June 28, it did not produce many additional documents until a month later. It's failure to produce all of the PAC deduction authorization forms originally requested by the Freedom Foundation until *after* the filing of a formal complaint with the PDC violates the public inspection requirements of RCW 42.17A.495(4).

Though this allegation was not raised in the original complaint, as the Freedom Foundation had no reason to believe at the time that JH Kelly's disclosure was incomplete, it is willing to file an additional complaint on this point if necessary. However, the PDC also has authority under RCW 42.17A.755(1) to initiate a complaint on its own, which would seem appropriate in situations such as this in which an investigation of a complaint uncovers additional violations.

5. Even the newest form violates PDC regulations, because it does not designate specific dollar amounts to be contributed, but percentages. This may seriously mislead employees by minimizing the size of the contributions.

In its response, JH Kelly claims that, "on information and belief, authorization forms used by UA 598 with respect to JH Kelly employees after [February 14, 2019] met PDC requirements." Presumably, JH Kelly is referring to the version three dispatch forms.

It is worth reiterating, however, that the version three forms developed by UA 598 inappropriately restrict employees' ability to determine how much to contribute to the political committee, instead fixing the deduction rate at 0.7% of wages.²

The template authorization form set forth in WAC 390-17-100, however, permits the employee to designate the specific dollar amount they wish to contribute. WAC 390-17-100(2)(d) further indicates that PAC deduction authorizations must allow the employee to designate the dollar amount of the contribution by clarifying that, if the form authorizes contributions to multiple candidates or political committees, the form must specify "*the total dollar amount per pay period (or per week, month or year) to be withheld for each...*" (emphasis added).

JH Kelly may contend that WAC 390-17-100(2)(d) only applies to situations in which the authorization involves contributions to two or more recipients and that a percentage-based deduction is permissible when only one recipient benefits from the deduction. But if the PDC permits deductions based on a percentage of wages when only one recipient is involved, it would make no sense to require deductions for multiple recipients to be designated in dollar amounts. In other words, if an employee can designate 0.7% of their wages be withheld for a single recipient, there is no reason an employee could not specify 0.5% of their wages be withheld for one recipient and 0.2% be withheld for another. Either percentage-based deductions are permissible in all circumstances, or they are permissible in none.

However, the only proper way to understand WAC 390-17-100 is that employee authorizations must permit the designation of a specific dollar amount(s) to be withheld for any and all recipients.

The default position, as indicated by the PDC's template authorization form, is that the authorization must designate a specific dollar amount to be withheld, and WAC 390-17-100(2)(d) merely clarifies that, when multiple recipients benefit from the deductions, the employee's authorization must designate the specific dollar amount to be withheld "for each," which is also reflected in the template form. Deducting political contributions based on a percentage of employee wages simply is not sanctioned by the FCPA and PDC regulations.

This requirement protects employees from being manipulated into contributing amounts larger than they otherwise would. UA 598's dispatch forms, for example, intentionally attempt to make the deduction amount appear insignificant, describing it as "0.70% (0.0070)." In reality, the deductions often amount to \$100 or more per employee per month, hardly an insignificant sum and likely more than many employees would agree to contribute if they were permitted to designate the amount of the deduction.

In conclusion, JH Kelly's response does nothing to change the fact that its violations of the FCPA have been ongoing and extensive, despite warnings from the PDC. Accordingly, we

² See Exhibit A of JH Kelly's response to the complaint.

respectfully request that the PDC initiate enforcement proceedings sufficient, at minimum, to ensure future compliance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Maxford Nelsen', with a stylized, cursive script.

Maxford Nelsen
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