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July 24, 2019

VIA EMAIL: PDC@PDC.WA.GOV

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

Re: Complaint Filed by Maxford Nelson (Freedom Foundation)
PDC Case No. 54324
Response of JH Kelly, LLC

Dear Public Disclosure Commission Staff:

Stoel Rives LLP is counsel for JH Kelly, LLC ("JH Kelly"). JH Kelly submits this response to the complaint submitted by Maxford Nelson of the Freedom Foundation. Mr. Nelson asserts that JH Kelly has made payroll deductions for contributions to the United Association of Plumbers and Pipefitters Local 598 ("UA 598") without authorization. Based on this allegation, Mr. Nelson asks the Public Disclosure Commission to direct an investigation or enforcement action, or to refer the matter to the attorney general. Neither is necessary or appropriate. In light of the facts and law, and in light of JH Kelly's good faith commitment to compliance, an alternative remedy and dismissal of the Complaint is warranted.

ANALYSIS

This matter stems from Mr. Nelson's allegation that JH Kelly has deducted contributions to UA 598's Political Action Committee from "hundreds" of employees without first obtaining authorizations that comply with RCW 42.17A.495(3) and WAC 390-17-100. *See* Complaint at 7. Since receiving the Complaint, however, JH Kelly has gathered and reviewed authorizations on file involving employees associated with UA 598 to ensure compliance.¹

¹ Mr. Nelson repeatedly asserts that JH Kelly improperly deducted over \$40,000 from employees' wages. *See* Complaint at 1, 6, 8, 10. This assumes, however, that every single signed authorization on file is noncompliant, and that remedial measures taken to address any alleged noncompliance should be disregarded. Mr. Nelson's position is inconsistent with the PDC's encouragement to consider corrections to address compliance issues.

A. JH Kelly's Alleged Errors Should be Categorized as a "Minor Violation."

JH Kelly's alleged errors in payroll deductions should be categorized as a "minor violation." WAC 390-37-061 defines a minor violation as one that occurs:

- (a) When required information is not timely disclosed, but the public is not deprived of critical information;
- (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; or
- (c) When any other violation of chapter 42.17A RCW has occurred that does not materially affect the public interest.

The circumstances presented here constitute a minor violation under subsection (c). Subsection (a) deals with untimely disclosure of information, such as reporting requirements. Subsection (b) deals with partial disclosure of information coupled with an attempt to make full disclosure. Subsection (c) is applicable here. JH Kelly's alleged errors in ensuring signed authorizations on updated forms before making payroll deductions is "any other violation of chapter 42.17A RCW . . . that does not materially affect the public interest."

In an attempt to show JH Kelly's payroll deductions are an issue of substantial public concern, Mr. Nelson cites to contributions by UA 598 to "at least 12 candidates and two other PACs in 2018" as evidence that UA 598 was able to "significantly influence . . . dozens of elections around the state." *See* Complaint at 11. The report Mr. Nelson cites, however, reflects political contributions made by UA 598 based on payroll deductions from all applicable employers, not specifically JH Kelly. Further, the report reflects political contributions in the 2018 election year, not the time period Mr. Nelson contends is at issue in the Complaint (commencing March 2019). Finally, in total, the report reflects less than \$20,000 in political contributions for the 2018 election, without reference to any portion allegedly attributable to deductions from JH Kelly employees, let alone deductions allegedly lacking sufficient authorization.

In sum, while JH Kelly does not seek to minimize the errors at issue, given the scope and actions to address them, including JH Kelly's disclosure of records upon request by Mr. Nelson, they do not raise an issue materially affecting the public interest. As such, the errors are properly characterized as minor. This is consistent with the PDC's prior assessment as well. *See* Case No. 43692, Case No. 51814.

B. The Governing Regulations Do Not Conflict.

In an attempt to avoid the PDC's categorization of JH Kelly's payroll deductions as involving minor violations, Mr. Nelson asks the PDC to find that its own authority and rules are in conflict. Mr. Nelson argues that two of the Washington Administrative Code provisions

governing the PDC's response to complaints (WAC 390-37-060(1)(d) and WAC 390-37-061) are somehow in conflict with statutory provisions, RCW 42.17A.755 and RCW 42.17A.001(1). Mr. Nelson contends the statutory scheme no longer allows the PDC to categorize something as a "minor violation" to be resolved by a warning letter. Mr. Nelson's argument lacks merit.

First, there is no conflict between the PDC's options in responding to a complaint, outlined in RCW 42.17A.755, and the more detailed enforcement procedures outlined in WAC 390-37-060 and 390-37-061. Mr. Nelson appears to believe that the lack of specific reference to a "minor violation" in RCW 42.17A.755(1) means that the categorization is now invalid. That is simply not the case. A review of the full statutory scheme confirms that the "minor violation" categorization remains and is valid.

Indeed, in 2019, the Legislature updated the definitions under RCW 42.17A.005. *See* SHB 1195.SL. In doing so, the Legislature removed the definition of "actual violation" (used by Mr. Nelson in his Complaint) and replaced the definition with "violation." "Violation" means "a violation of this chapter that is not a remediable violation, minor violation, or an error classified as appropriate to address by a technical correction." RCW 42.17A.005(53). The Legislature thus clearly had in mind at least three types of violations/errors (remediable, minor, and technical corrections) that do not rise to the level of a "violation" as otherwise used in the regulations.

The defined term is wholly consistent with RCW 42.17A.755(1), which calls for the PDC to "dismiss a complaint or otherwise resolve the matter in accordance with subsection (2) of this section, as appropriate under the circumstances after conducting a preliminary review." The reference to subsection (2) (addressing remediable violations and technical corrections) is not the sole means of addressing a complaint; a plain reading of the statutory provision is that it allows the PDC to: (a) dismiss a complaint as appropriate under the circumstances after conducting a preliminary review; or (b) otherwise resolve a complaint in accordance with subsection (2) – also as appropriate under the circumstances after conducting a preliminary review. Thus, under the plain language of the statute, a complaint alleging a minor violation may be subject to dismissal under this provision.

Second, there is no conflict between the regulations and RCW 42.17A.001. RCW 42.17A.001 sets forth the Legislature's declaration of public policy regarding political campaign and lobbying contributions. Mr. Nelson specifically asserts a conflict with RCW 42.17A.001(1), which provides that "political campaign and lobbying contributions and expenditures [are to] be fully disclosed to the public and that secrecy is to be avoided." Mr. Nelson offers no evidence, let alone argument, that JH Kelly has stood in the way of required public disclosures. Indeed, the evidence shows just the opposite.

Mr. Nelson himself concedes that on June 6, 2019, the Freedom Foundation sent a letter to JH Kelly seeking an opportunity to inspect employee authorization forms and in response, on

June 27, 2019, JH Kelly timely responded. *See* Complaint at p. 6, Complaint App. at 418-589.² There is simply no basis for Mr. Nelson's suggestion that the Legislature's public policy guidance directing full disclosure has not been met. JH Kelly has nothing to hide. The company readily acknowledges the facts as they stand, and is committed to working with the PDC to address any compliance concerns.

C. An Alternative Response to Noncompliance is the Appropriate Remedy.

In considering the appropriate response to JH Kelly's alleged errors, the PDC considers whether an investigation or adjudicative proceeding would be an efficient and effective use of public funds or "whether an alternative response better meets the PDC's mission and public expectations by allowing the expedited resolution of minor violations, and the focusing of resources on more significant violations of chapter 42.17A RCW and Title 390 WAC." WAC 390-37-061(1). Here, an investigation or adjudicative proceeding would not be an efficient or effective use of public funds. The key facts are limited in scope and are undisputed, and JH Kelly is committed to compliance.

In authorizing an alternative response to alleged noncompliance, under WAC 390-37-061(3), the PDC may consider the nature of the alleged violation and "any relevant circumstances" including, without limitation, factors described in WAC 390-37-061(4). Numerous circumstances and factors weigh in favor of permitting an alternative response to noncompliance, not an investigation or adjudicative hearing. They include:

- Mr. Nelson concedes that "[t]his situation is somewhat unique in that the [alleged] violations of the FCPA committed by JH Kelly may largely result from the actions of UA 598." *See* Complaint at 11. Indeed, the PDC previously determined that the withholding authorization form was developed by UA 598. *See* PDC Letter dated February 15, 2019 re 37 complaints by Freedom Foundation. JH Kelly's alleged noncompliance thus resulted from good faith errors or omissions involving an authorization form prepared by UA 598, not JH Kelly directly. That said, JH Kelly recognizes its role as employer and the need for better coordination with UA 598 to ensure compliance.
- In response to the PDC's warning letter issued on February 14, 2019, on information and belief, authorization forms used by UA 598 with respect to JH Kelly employees after that date met PDC requirements. *See, e.g.* Ex. A.
- JH Kelly permits employees to revoke their written authorization.

² After making the disclosure, JH Kelly continued, in good faith, to review records to confirm whether further responsive documents existed. JH Kelly has since identified additional documents, which are pending disclosure now.

- In response to the PDC's warning letter issued on February 14, 2019, UA 598 agreed to acquire annual notice using an authorization form that meets all PDC requirements. *See* PDC Letter dated February 15, 2019 re 37 complaints by Freedom Foundation ("United Association of Plumbers and Pipefitters Local 598 has stated that they will make staff's suggested changes to the written authorization form, and that they will send the annual notifications on behalf of the employer/contractors, and will provide a copy of the annual notifications they send, to the respective employers.").
- JH Kelly has not had full opportunity to address alleged noncompliance but is committed to doing so.
 - JH Kelly did not have actual notice of the Freedom Foundation's first complaint (Case No. 43692) or the PDC's closure of the case and related written warning letters dated February 14 and 15, 2019, until, at the earliest, May 24, 2019, when JH Kelly's Vice President & General Counsel was notified of the Freedom Foundation's second complaint (Case No. 51814).
 - The PDC's notices to JH Kelly in November 2018, February 2019, and May 2019 were sent solely by email to "mail@jhkelly.com." It is JH Kelly's understanding that this email address was provided to the PDC by the Freedom Foundation. JH Kelly did not provide this email address to the PDC for notice purposes, nor would JH Kelly have done so because the email address is not routinely monitored and is not used for legal notices. While RCW 42.17A.055 established email as the PDC's official means of communication as of June 7, 2018, JH Kelly is not a filer with the PDC so until May 2019 when JH Kelly had actual notice of prior complaints and PDC determinations, JH Kelly was unaware that the PDC had an incorrect email address for legal, notice purposes.
- The Freedom Foundation's prior complaints against JH Kelly should not be used to compound the evidence in the current case because JH Kelly lacked sufficient notice and opportunity for compliance (see above) and the prior complaints are closed. Case No. 43692 was closed with a written warning. Case No. 51814 was closed for lack of evidence.
- Consistent with RCW 42.17A.495(4), JH Kelly was timely and responsive in providing information in response to the Freedom Foundation's request for information. *See* Complaint at p. 6.
- JH Kelly's compliance history does not reflect systemic or ongoing problems.
- The impact of noncompliance on the public was minimal.

- There is no evidence that any person benefited politically or economically from the noncompliance.
- JH Kelly has taken corrective action and initiated remedial measures, in conjunction with UA 598, when noncompliance was brought to its attention.
- JH Kelly has made a good faith effort to comply with all laws and regulations, and is committed to compliance.

Weighing all the relevant factors and circumstances, and taken as a whole, an alternative response to noncompliance is warranted in this instance.

Under WAC 390-37-060(1)(d), the PDC may resolve a complaint that alleges minor violations of RCW 42.17A by issuing a formal written warning. That is the appropriate remedy here. To the extent the PDC conditions resolution on JH Kelly reaching or maintaining compliance, JH Kelly is committed to taking appropriate action, including working with relevant third-parties, to do so.

CONCLUSION

JH Kelly has not intentionally violated RCW 42.17A.495 or WAC 390-17-100. Consistent with RCW 42.17A.495(s) and WAC 390-17-100(4), JH Kelly recognizes its role as employer and the need for better coordination with UA 598 to ensure compliance with authorization requirements. JH Kelly thus asks that the Complaint be dismissed.

JH Kelly's request for dismissal is consistent with WAC 390-37-010, which provides that the "policy of the PDC is to facilitate the resolution of compliance matters in a fair and expeditious manner." To that end, the PDC "encourages parties to consider corrections, alternative resolution, partial resolution" and other options "whenever appropriate." Such alternative resolution is appropriate here. JH Kelly is happy to provide any further information or supporting information as requested by the PDC.

Thank you for your consideration of JH Kelly's position. Please note that for purposes of formal notification, notice from the PDC to JH Kelly should continue to be directed to JH Kelly's Vice President and General Counsel Craig Yabui at cyabui@jhkelly.com.

Very truly yours,



Vanessa Soriano Power

1328 Road 28
Pasco, WA 99301

U.A. LOCAL 598 DISPATCH FORM

Phone : (509) 545-1446
Fax : (509) 547-2139

Contractor : J H Kelly
Site Name : Project Trident - Lamb Weston
Site Address : 78153 Westland Road
Hermiston, OR 97838

Report Date : 03/11/19
Report Time : 06:00 PM

Job Steward : Gary Clouse
Assigned To : Barney, Doug M xxx-xx-7451
Comments : NIGHT SHIFT. 5-8'S W/OT. DRUG TEST ON SITE. \$100 PER DAY
TRAVEL.

Pay Rate : \$55.52
Job Desc : Pipefitter
Job Type : List Call
Hiring List : Book B - Fitter

Site Notes:

Imy Nights

PAC Authorization

So that the common interest of Local 598 members to secure jobs, fair wages, and safe working conditions can be heard by state and federal candidates for office, I voluntarily authorize and direct the above-named employer and any signatory to the Collective Bargaining Agreement for whom I work to deduct the suggested 0.70% (0.0070) as ratified by the Local 598 Membership, each week from my pay for transfer to the Local 598 Political Action Committee, where funds will be used for federal or state races as deemed necessary by PAC leadership. I understand that I have a right to refuse to so contribute without any reprisal. Furthermore, I recognize that the contribution guideline is just that, and that I may contribute any amount or not at all to the Political Action Committee - although only the suggested amount is supported by the paycheck deduction process. Contributing an alternative amount will require contacting the Local's staff. Note: No employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (i) the failure to contribute to, (ii) the failure in any way to support or oppose, or (iii) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee. Furthermore, I understand that to comply with the Federal law, the PAC must use its best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year. I understand that my contribution is not tax-deductible. I understand that I may revoke my authorization at any time in writing.

Signature : *D. met Barney* Date : *3/11/19*

Work Assessment Check-Off Authorization

I authorize the Employer to withhold and to pay working dues on my behalf at the current rate of 3% and IAP at 2.25% of gross pay to Local Union 598. This authorization shall be valid for the period of one year or the balance of the term of the current agreement, whichever is sooner, and shall automatically renew itself for successive one-year periods. This authorization is subject to cancellation by written notice to the Employer and Local 598 given within the 60-day period preceding an automatic renewal date.

Signature : *D. met Barney* Date : *3/11/19*

Member Copy

EXHIBIT A