

August 12, 2019

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

Re: PDC Case No. 54818, reply to Intermech's response to original complaint

Mx. Blackhorn,

This is a supplement to our complaint against Intermech, Inc., of July 15, 2019, addressing several issues raised by Intermech's response to our complaint. As requested in your email of July 17, 2019, I am providing the supplemental information within 30 days.

If obtuse bluster, hubris and deliberate unrepentance can absolve an entity of egregious campaign finance violations, then Intermech has little to worry about. If, on the other hand, fidelity to the law is what matters, Intermech should be quite worried, as nothing in its response to the Freedom Foundation's complaint justifies its continued illegal seizure of political contributions from the wages of its employees even after receiving two warnings from the Public Disclosure Commission (PDC).

Before addressing the legal arguments raised by Intermech in its defense, a few clarifications are needed.

First, in an attempt to shift the focus from its own illegal actions, Intermech defensively accuses the Freedom Foundation of "[seeking] to undermine the right of Intermech employees to voluntarily contribute to a political action committee..." That is nonsense. RCW 42.17A.495 is written to *protect* employees from being taken advantage of by unions and employers who might seek to pressure or coerce them into making political contributions against their will. It is ridiculous for an entity, such as Intermech, that has disregarded these employee protections to accuse those who seek to uphold them of undermining employees' rights.

Second, Intermech claims that the Foundation's original complaint "included allegations irrelevant to Intermech." This is not so. As evidence, Intermech cites a reference in the complaint to seven contributions "from employees for whom *JH Kelly* was unable to produce a dispatch form" (emphasis added). The reference to "JH Kelly" in the original complaint is an obvious typographical error, as the rest of the complaint correctly references Intermech.¹ The actual

¹ As the PDC is aware, multiple employers participate in the United Association of Plumbers and Pipefitters Local 598's (UA 598) scheme to illegally collect political contributions from employees' wages, and the Freedom Foundation has filed complaints against several, including JH Kelly.

allegation — that Intermech deducted seven contributions to UA 598’s PAC from employees for whom it failed to produce a dispatch form — was stated accurately and unaddressed by Intermech. The summary sheet provided on page 430 of the original complaint’s appendix clearly lists the seven employee contributions to UA 598’s PAC processed by Intermech without any kind of employee authorization. Rather than attempt to defend why it deducted political contributions from several employees’ wages without any kind of authorization, Intermech appears content to rest its position on a single, typographical error.

As for the more substantive matters, Intermech’s primary legal arguments are: (1) That its provision to employees of the annual notices required by RCW 42.17A.495(2) satisfies its obligations under RCW 42.17A.495(3) to get proper authorization from employees before deducting political contributions from their wages; (2) that the version three dispatch forms do not violate WAC 390-17-100 by fixing employees’ contributions at 0.7% of wages; and, (3) that the PDC should dismiss the complaint as frivolous and/or resolve it via another warning letter as pertaining to minor violations.

Each argument will be dealt with in turn.

1. Intermech has failed to satisfy RCW 42.17A.495(3) and WAC 390-17-100 by simply issuing, for the first time, the annual notices required by RCW 42.17A.495(2) and WAC 390-17-110.

The four subsections of RCW 42.17A.495 impose independent requirements; compliance with one subsection does not prove compliance with the other three subsections. For instance, complying with subsection (4) (maintaining records open for public inspection) does not prove compliance with subsection (1) (prohibiting salary increases intending the employee in turn use for political contributions).

Similarly, complying with subsection (2) and providing employees with an annual notice of their rights does not prove compliance with subsection (3)’s requirement that employers receive proper authorization *before* deducting political contributions from an employee’s wages.

Intermech cannot plausibly defend its continued political deductions from employees pursuant to the version one and version two dispatch forms, as the PDC has already recognized these forms are out of compliance with RCW 42.17A.495(3) and WAC 390-17-100.

Instead, Intermech contends that its issuance to employees, after the Freedom Foundation’s first complaint and the PDC’s first warning letter, of the annual notices required by RCW 42.17A.495(2) and WAC 390-17-110 absolves it from having to obtain authorization that complies with RCW 42.17A.495(3) and WAC 390-17-100 before deducting political contributions from employees’ wages. While acknowledging that the version one and version two forms lacked the required disclosures, Intermech contends the annual notices acted as “supplements” to the authorization forms that cured their obvious defects.

Intermech rests this strained argument on a fundamental misreading of WAC 390-17-100(2), which provides:

“Forms used for payroll deduction may either conform to the suggested format below or be in a different format including an electronic format if it provides the following information...” (emphasis added).

Relying solely on the fact that the regulation refers to plural “forms,” Intermech contends that an employee’s political contribution authorization “may consist [of] several documents, each with some other piece of required information.” This is nonsense. Under Intermech’s view of the law, an employer could satisfy its legal obligations by splitting the employee deduction authorization into multiple documents, each containing merely a piece of the information required by RCW 42.17A.495(3) and WAC 390-17-100(2). This clearly deprives employees of the protections these provisions are meant to provide.

In the present complaint, Intermech’s conduct is even worse than merely obscuring employees’ rights by distributing information across multiple notices. The annual notification Intermech provided to employees actually conflicts with the terms of the version one and version two forms. While the annual notice correctly informs employees that PAC deduction authorizations can be rescinded “at any time,”² both the version one and version two forms incorrectly state the deductions may only be cancelled “within the 60-day period preceding an automatic [annual] renewal date.”

Further, even the annual notice is internally inconsistent. While the notice informs employees of their protections against discrimination based on their decisions regarding political contributions, it is ambiguous about whether the employee is currently having deductions from their wages. The same notice contains both of the following statements: (1) *“If you have voluntarily authorized PAC contributions, you may rescind that authorization at any time”*; and, (2) *“...you have previously voluntarily authorized your employer to deduct 0.70% (0.0070) of your weekly gross pay to be contributed to the PAC”* (emphasis added). A reasonable employee reading this notice would be unsure as to whether they had, in fact, previously authorized such deductions.

Thankfully, the law does not permit such gamesmanship.

WAC 390-17-100(2) permits employers to either use the template form provided by the PDC or develop an alternate form. However, the regulation is quite clear that any alternate form must contain *all* of the listed components, including both: (1) “A statement specifying that the authorization may be revoked at any time and such revocation shall be in writing”; and, (2) “A statement that reads: ‘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

² See the appendix to Intermech’s response.

political committee’; or a statement that informs the employee of the prohibition against employer and labor organization discrimination described in RCW 42.17A.495...”

The regulation refers to plural “forms” because it contemplates multiple different versions of forms that all satisfy the listed criteria, not because it permits a single employer to distribute the information required by WAC 390-17-100(2) across multiple forms in an attempt to prevent employees from seeing required disclosures about their rights at the time they authorize the deductions.

This obvious conclusion is bolstered by the fact that WAC 390-17-100(2) notes payroll deduction forms may either conform to the PDC’s template “or be in a different format... if it provides the following information...” (emphasis added). This singular reference clearly signals that all required information and disclosures must be included on a single form voluntarily signed by the employee, though multiple versions of such a form can satisfy the FCPA’s requirements. The required information is specified in sections (a) through (g), *and* (h), again indicating that *all* the information must be included on a single form.

Thus, to comply with the law, Intermech must first obtain a single authorization from employees that complies with RCW 42.17A.495(3) and WAC 390-17-100 before deducting political contributions from their wages. It cannot simply put a band-aid on the defective authorizations and continue utilizing these invalid forms. As *reminders*, it must subsequently provide authorizing employees with annual notices of their rights that comply with RCW 42.17A.495(2) and WAC 390-17-110. Though they act in concert to protect employees’ ability to make free and voluntarily decisions regarding political contributions, these are two distinct requirements; Intermech cannot satisfy the former by complying merely with the latter.

2. WAC 390-17-100 requires forms authorizing political deductions to permit employees to designate the specific dollar amount to be withheld.

The Freedom Foundation maintains that all of the dispatch forms developed by UA 598 and utilized by Intermech, including the version three forms, inappropriately restrict employees’ ability to determine how much to contribute to the political committee, instead fixing the deduction rate at 0.7% of wages.

Intermech points out, correctly, that the PDC has not yet specifically addressed whether these forms may present employees with a take-it-or-leave it proposition to have 0.7% of their wages withheld or whether the law requires that employees be permitted to specify the amount of the deduction. However, we submit that the PDC should settle the matter and find that the FCPA not only protects employees’ right to choose whether to make political contributions but protects their right to choose how much to contribute to political causes as well.

The template authorization form set forth in WAC 390-17-100 permits employees to designate the specific dollar amount they wish to contribute. WAC 390-17-100(2)(d)

further indicates that PAC deduction authorizations must allow employees 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).

Intermech contends 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 benefits 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 envisioned or 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.

3. Intermech’s violations of the FCPA cannot be dismissed as frivolous or resolved as minor violations.

Intermech contends any violations the PDC determines it has committed 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. Intermech requests that the PDC dismiss the allegations involving versions one, two and four of UA 598’s dispatch form under RCW 42.17A.755(1)(a), but this is not possible. 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 Intermech has not disputed, 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 Intermech 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...”

Intermech contends that the challenge to the version three forms is “frivolous” and should be dismissed, but the invalidity of the version three forms has already been addressed above.

Further, the PDC clearly has jurisdiction over the present complaint, having already issued a warning letter to Intermech for similar violations earlier this year. Intermech's violations of a longstanding FCPA statute were well-documented in the complaint and the PDC itself has previously found that Intermech's political deductions from employees' wages were made without proper authorization. The present complaint — that Intermech continues to deduct contributions to UA 598's PAC from employees' lawfully earned wages pursuant to purported authorizations the PDC already has determined are insufficient — is neither unfounded nor frivolous.

- 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 Intermech already ignored.

Further, if an alternative response to noncompliance is deemed appropriate, WAC 390-37-062 sets forth a penalty schedule for various types of violations “that may be agreed to by a respondent pursuant to a stipulation prior to an investigation...” While the penalty schedule 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.

- f. Even if the PDC may satisfy RCW 42.17A.755(1) by resolving complaints of minor violations via dismissal, warning letter, or stipulated penalty, Intermech's violations at issue in the present complaint are not “minor violations” eligible for resolution in this way.

Intermech's 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 its violations do not relate to the disclosure of required information. Further, because Intermech's violations have materially affected the public interest, they cannot be considered minor violations under WAC 390-37-061(2)(c).

Intermech's defense to this argument is to state flatly that “the deductions harmed

no one.” But this is demonstrably untrue. In addition to harming employees by providing them with false information, depriving them of information about their rights, implying political deductions are mandatory, and preventing employees from choosing how much to contribute to UA 598’s PAC, which has been discussed above, Intermech’s illegal practices have an additional effect on the public at large.

What is now codified as RCW 42.17A.495 was first passed by 73 percent 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, including Intermech, 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).

Further, Intermech plays a far larger role in this scheme than most 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. Intermech was responsible for transmittal of 199 (8%) of these contributions, the fourth highest share among the 27 employers involved.

While elections and related expenditures are cyclical and (mercifully) not perpetual, Intermech’s illegal deductions occur every pay period, allowing UA 598’s political committee to aggregate funds that will necessarily be expended eventually on influencing Washington elections. As documented in the complaint, Intermech’s illegal deductions resulted in nearly \$10,000 in contributions to UA 598’s PAC from May-March 2019 alone.

The 2018 elections were cited in the complaint as the most recent examples available of how the illegal scheme in which Intermech 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 Intermech until the 2020 elections.³ But that hardly means that the funds illegally collected now by Intermech are not still a matter of significant public concern.

³ 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>

In conclusion, Intermech's violations of the FCPA have been ongoing and extensive, despite warnings from the PDC. In fact, Intermech appears to have mistaken the leniency it has received from the PDC following previous complaints as somehow endorsing its illegal actions. In light of Intermech's cavalier approach to its legal obligations, we 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.

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