

Respondent Names
Washington Federation of State Employees/AFSCME Council 28
Complainant Name
Maxford Nelsen
Complaint Description
<p><u>Maxford Nelsen</u> reported via the portal (<i>Wed, 14 Apr 2021 at 5:35 PM</i>)</p> <p>See attached.</p> <p>PDC complaint - WFSE - Appendix.pdf 20.25 MB</p> <p>PDC complaint - WFSE.pdf 365.66 KB</p>
What impact does the alleged violation(s) have on the public?
See attached.
List of attached evidence or contact information where evidence may be found
See attached.
List of potential witnesses with contact information to reach them
See attached.
Certification (Complainant)
I certify (or declare) under penalty of perjury under the laws of the State of Washington that information provided with this complaint is true and correct to the best of my knowledge and belief.

April 14, 2021

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

Public Disclosure Commission Staff,

In accordance with RCW 42.17A.755(1) and RCW 42.17A.775, the Freedom Foundation submits the following complaint alleging that the Washington Federation of State Employees/American Federation of State, County and Municipal Employees Council 28 (WFSE)¹ has violated the Fair Campaign Practices Act (FCPA), Chapter 42.17A RCW, by failing to register and file reports with the Public Disclosure Commission (PDC) as a political committee.

In brief, WFSE received a \$200,000 contribution in September 2016 from the “Special Account” operated by the Washington, D.C.-based American Federation of State, County and Municipal Employees (AFSCME), which reported to the expenditure to the PDC as an out-of-state political committee. Within days of receiving the funds, WFSE gave \$100,000 to the “Washington State Democratic Committee – Exempt” political committee and \$100,000 to the “New Direction PAC” political committee. WFSE received another contribution of \$15,000 from AFSCME in August 2018 and, within days, contributed \$15,000 to the “Retired Public Employee Council of Washington” political committee.

In addition to receipt of these two contributions from out-of-state, WFSE collects dues from its members, segregates part of the funds for use on candidate elections in Washington in its “separate, segregated fund,” and its members know or reasonably should know of WFSE’s actions.

Despite satisfying the contributions prong of the FCPA’s definition of “political committee,” WFSE has failed to file a statement of organization with the PDC and disclose the hundreds of thousands of dollars in contributions it receives and expenditures it makes each year.

Background and prior complaints

Headquartered in Olympia, Wash., WFSE is a large labor union representing about 46,000 state employees in Washington.² See **Appendix page 2**. It is a tax-exempt labor organization under 26

¹ Address: 1212 Jefferson Street SE #300, Olympia, WA 98501. Executive director: Leanne Kunze, (360) 352-7603, leannek@wfse.org.

² Washington Federation of State Employees. “About Us.” <https://wfse.org/about-us>

U.S.C. § 501(c)(5) with employer identification number (EIN) 91-0607853. *See App. 3*, a copy of WFSE’s Form 990 submitted to the Internal Revenue Service (IRS) for fiscal year 2018.

WFSE spends prolifically to influence the outcome of Washington state elections, both for candidates and ballot measures. Its political expenditures are structured to avoid incurring federal tax liability.

Federal tax law permits labor organizations to directly expend funds for “exempt function” activity, defined as,

“...influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.”³

However, any funds directly expended by an otherwise tax-exempt 501(c)(5) labor organization to influence candidate elections are subject to tax.⁴ A labor organization may avoid tax liability for “exempt function” expenditures by setting up a “separate segregated fund”⁵ (SSF) which is “treated as a separate organization” for the purposes of federal tax law.⁶ A labor organization’s contributions to its SSF do not count as taxable “exempt function” activity.⁷ As long as the SSF’s primary purpose is to receive contributions and/or make expenditures to engage in “exempt function” activity, it qualifies as a “political organization” under 26 U.S.C. § 527(e)(1) and, as long as its expenditures are confined to such activity, it also can avoid federal taxes. In other words, only by creating and funding an SSF can a union make contributions to political candidates without incurring federal tax liability.

Accordingly, WFSE maintains an SSF that is registered with the IRS as a “political organization” under 26 U.S.C. § 527. The SSF is designated simply the “Washington Federation of State Employees SSF” and its EIN is 27-4746485. *See App. 54*, a copy of the SSF’s IRS Form 8871.

Forms 8872 filed with the IRS by WFSE’s SSF indicate that WFSE transferred at least \$1,181,800 to the SSF between July 2016 and December 2020,⁸ which the SSF spent on exempt function activity involving candidate elections in Washington state. *See App. 62*, a summary of WFSE’s contributions to the SSF, and *App. 63-102*, the SSF’s Forms 8872 covering 2020.

³ 26 U.S.C. § 527(e)(2).

⁴ 26 U.S.C. § 527(f)(1).

⁵ 26 CFR § 1.527-6(f).

⁶ 26 U.S.C. § 527(f)(3).

⁷ 26 CFR § 1.527-6(e).

⁸ Federal law requires political organizations to disclose both contributions received and expenditures made on IRS Forms 8872. However, the forms filed by WFSE’s SSF since its formation in 2011 disclosed only expenditures and consistently left the contributions section of the forms blank. The Freedom Foundation brought this disclosure failure to the attention of the IRS via a formal complaint filed in December 2017. After a lengthy IRS investigation, WFSE’s SSF filed amended forms 8872 in July 2020 disclosing the contributions received by the SSF in preceding years.

Notably, because supporting or opposing ballot measures does not fall within the scope of “exempt function” activity, 501(c)(5) labor organizations like WFSE need not route funds through an SSF to avoid federal tax liability; they may simply make expenditures on ballot measure elections directly from their general fund, and such is WFSE’s practice.

Reports filed with the PDC by recipients of WFSE contributions indicate that the union, via both its general fund and SSF, has contributed at least \$2,741,043 since 2016 to Washington candidates and political committees. *See App. 103-109*, a list of WFSE contributions reported to the PDC by recipients on Forms C3.⁹ The union expended \$915,400 for the 2020 election year alone, enough to place it among the top twenty (20) largest continuing political committees and in the top five (5) union political committees that year.

On prior occasions, the Freedom Foundation has alleged that WFSE’s SSF satisfied the FCPA’s definition of “political committee” and should have registered with the PDC.¹⁰ However, to date, neither WFSE nor its SSF have registered with the PDC as a political committee.

1. PDC Case No. 14266 – WFSE’s SSF not a “person” distinguishable from WFSE

The first complaint alleged WFSE’s SSF was a political committee because of the significant political contributions it received and expenditures it made on electoral political activity in Washington. The complaint originated as a January 2017 citizen action notice to the Attorney General’s Office (AGO) and was subsequently referred to the PDC.¹¹

WFSE responded that the SSF was “merely a separate bank account” that is “managed, operated, funded and directed entirely by WFSE itself” and, as such, could not be considered a “person” separate from WFSE under the FCPA.¹²

PDC staff concluded that, “WFSE AFSCME Council 28 is not required to register and report its Separate Segregated Fund as a political committee with the PDC.”¹³ However, this ignored the Washington State Supreme Court’s holding in *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm’n*, 161 Wash. 2d 470, 491, 166 P.3d 1174, 1186 (2007). In that case, the Court noted the strong similarity between the definition of “political committee” in RCW 42.17A.005(41) and the definition of “political organization” in 26 U.S.C. § 527(e), and determined that, if a political organization engages in electoral political activity in Washington

⁹ Forms C3 are used by political committees to report contributions received to the PDC.

¹⁰ *See* PDC Case Nos. 14266 and 62411.

¹¹ A copy of the complaint and AGO’s referral to the PDC is available online at: [https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Complaint%20with%20exhibits%20%28Freedom%20Foundation%29%20PDC%20Case%2014266.pdf)

[1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Complaint%20with%20exhibits%20%28Freedom%20Foundation%29%20PDC%20Case%2014266.pdf](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Complaint%20with%20exhibits%20%28Freedom%20Foundation%29%20PDC%20Case%2014266.pdf)

¹² Dmitri Iglitzin, counsel for WFSE. Letter to Walter Smith, assistant attorney general. February 8, 2017.

[https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf)

[1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20and%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf)

¹³ Kurt Young, PDC compliance officer. Memorandum to PDC members regarding PDC Case 14266. March 17, 2017. [https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20Investigative%20Review%20Memo%20%28PDC%20Case%2014266%29.pdf)

[1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20Investigative%20Review%20Memo%20%28PDC%20Case%2014266%29.pdf](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20Investigative%20Review%20Memo%20%28PDC%20Case%2014266%29.pdf)

without registering as a political committee, it is “a persuasive fact” indicating the organization “was seeking the tax benefits of section 527 while disingenuously seeking to avoid the disclosure requirements of the FCPA.”

PDC commissioners, however, rejected the staff’s recommended finding of “no apparent violation” and instead referred the matter back to the AGO with “no recommendation.”¹⁴

Despite the fact that WFSE and the SSF have separate legal identities, EIN numbers, and even differing purposes, the AGO subsequently concluded in April 2017 that,

“WFSE's creation and maintenance of a bank account, considered a Separate Segregated Fund under the Internal Revenue Code, which is used for political activity in Washington, does not create a separate person distinct from WFSE itself under Washington's campaign finance laws.”¹⁵

At the time, the Freedom Foundation had not alleged that WFSE, as a whole, was a political committee, and no further action was taken by the AGO.

2. PDC Case No. 54145 – AFSCME’s SSF is a “person” distinguishable from AFSCME, and made a \$200,000 expenditure under the FCPA to WFSE

In July 2019, the Freedom Foundation filed a complaint with the PDC alleging that the “Special Account” operated by WFSE’s national affiliate, the Washington, D.C.-based American Federation of State, County and Municipal Employees (AFSCME), had failed to disclose three (3) expenditures on electoral political activity in Washington state totaling \$250,000 and receipt of more than four hundred (400) contributions totaling \$81,293,134.¹⁶

Of significance to the present complaint, in reports filed with the IRS as a “political organization” under 26 U.S.C. § 527, the Special Account disclosed making a \$200,000 contribution to WFSE/“AFSCME Washington Council 28” in September 2016.

The Special Account initially responded to the complaint by reiterating the argument made by WFSE’s SSF in PDC Case No. 14266: Though registered with the IRS as a political organization, it was merely a bank account solely funded and controlled by, and indistinguishable from, its parent entity, AFSCME, which had not been alleged to be a political committee under the FCPA.¹⁷

¹⁴ Evelyn Fielding Lopez, PDC executive director. Letter to Attorney General Bob Ferguson regarding PDC Case 14266. March 28, 2017. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20AGO%20%20No%20Recommendation%20Ltr%20%28PDC%20Case%2014266%29.pdf>

¹⁵ Walter Smith, assistant attorney general. Letter to Maxford Nelsen regarding citizen action notice. April 10, 2017. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WFSE%20AG%20Not%20Filing%20Action.pdf>

¹⁶ A copy of the complaint is available online at: <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/3079/54145%20American%20Federation%20of%20State%20County%20and%20Municipal%20Employees%20Special%20Account%20Complaint.pdf>

¹⁷ Danielle Franco-Malone, counsel for AFSCME. Letter to PDC compliance officer Kurt Young. August 5, 2019. [https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/3079/54145%20American%20Federation%20of%20State%20County%20and%20Municipal%20Employees%20Special%20Account%20Complaint.pdf)

This time, however, the PDC rejected the argument that the Special Account was not its own “person” under the FCPA. The Special Account subsequently disclosed the \$200,000 contribution to WFSE on a C5 report¹⁸ and, in a stipulated agreement between AFSCME and the PDC, the Special Account acknowledged it violated the FCPA by failing to timely disclose the contribution to WFSE and agreed to a \$5,250 penalty.¹⁹

3. PDC Case No. 62411 – WFSE, not its SSF, was the recipient of the \$200,000 contribution from AFSCME’s Special Account

Finally, the Freedom Foundation filed a complaint with the PDC in January 2020, again alleging that the SSF was a political committee.²⁰ This time, however, the complaint alleged that the SSF had received the \$200,000 contribution from AFSCME’s Special Account in September 2016, which the Special Account was fined for failing to disclose in PDC Case No. 54145.

The complaint documented how, in statements before the September 26, 2019, meeting of the PDC, the Special Account’s counsel in PDC Case No. 54145, Danielle Franco-Malone, explained that the Special Account’s \$200,000 expenditure went to the SSF and not WFSE’s general fund. According to Ms. Franco-Malone,

“The three [unreported Special Account] contributions went to AFSCME-affiliated entities — to political committees and separate, segregated funds of councils that are affiliated with AFSCME. As I understand it, two of the contributions went to a council that had a registered political committee [AFSCME Council 2] and one of the contributions went to a council that has a separate, segregated fund [AFSCME Council 28/WFSE].”²¹

(Emphasis added).

The complaint explained,

- “AFSCME Council 2 maintains a political committee registered as such with the PDC which reported receipt of the two 2015 contributions from AFSCME’s Special Account... However, because WFSE’s SSF does not report to the PDC as a political committee, the Special Account’s \$200,000 contribution was not previously disclosed to the PDC by any party.”

1. [amazonaws.com/3079/American%20Federation%20of%20Federal%2C%20State%2C%20County%2C%20and%20Municipal%20Employees%20Special%20Account%20Response%20%28Freedom%20Foundation%29%20PDC%20Case%2054145.pdf](https://www.amazonaws.com/3079/American%20Federation%20of%20Federal%2C%20State%2C%20County%2C%20and%20Municipal%20Employees%20Special%20Account%20Response%20%28Freedom%20Foundation%29%20PDC%20Case%2054145.pdf)

¹⁸ A copy of the C5 form is available online at: <https://web.pdc.wa.gov/rptimg/default.aspx?docid=4825740>

¹⁹ *American Federation of State, County and Municipal Employees, AFL-CIO*, Stipulation as to facts, violations and penalty. PDC Case No. 54145. September 2019. <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/3079/AFSCME%2C%20AFL-CIO%20Signed%20Stipulation%20Final%20%28Freedom%20Foundation%29%20PDC%20Case%2054145.pdf>

²⁰ A copy of the complaint is available online at: <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/3428/62411%20Washington%20Federation%20of%20State%20Employees%20%28AFSCME%20Council%2028%29%20Separate%20Segregated%20Fund%20Complaint.pdf>

²¹ Video footage of Ms. Franco-Malone’s remarks before the September 26, 2019 meeting of the PDC is available online at: <https://youtu.be/flGVzVNSBZE?t=15222>

- “...Ms. Malone implied, but didn’t state directly, that the contribution to the SSF was disclosed to the PDC when, in fact, it was not, due to the SSF’s failure to report as a political committee. The calculated nature of her remarks, however, lends credence to her factual claim that the SSF, not WFSE itself, received as a contribution the \$200,000 expenditure from her client, the Special Account.”

(Emphasis added).

Receipt of a \$200,000 political contribution from an outside entity would not only render the SSF a political committee as a receiver of contributions but would mean that WFSE’s previous representation to the PDC in Case No. 14266 that “all of WFSE’s SSF’s funding has come to it from WFSE” was false.²²

WFSE’s response to the complaint reiterated nearly verbatim the arguments it raised in PDC Case No. 14266 and that AFSCME raised in PDC Case No. 54145, claiming,

“...there is no evidence that the SSF was anything other than ‘a bank account belonging to and operated by a single organization,’ something that... is not and cannot be a ‘person’ subject to registration and reporting requirements under the Fair Campaign Practices Act.”²³

Regarding the \$200,000 contribution from AFSCME’s Special Account, WFSE ignored the comments made to the PDC by Ms. Franco-Malone and cited by the Freedom Foundation about the funds being deposited in the SSF, claiming,

“...the Foundation has provided no evidence, and we are aware of none, indicating that this \$200,000 was in fact deposited into WFSE’s SSF. The SSF’s records relating to the time period in question show no deposits other than money that has been ‘transfer[red] from dues.’”²⁴

Whereas the PDC in Case No. 14266 reached *no conclusion* about the SSF’s status as a political committee under the FCPA, and determined that AFSCME’s identically-structured Special Account *was* a political committee in Case No. 54145, the PDC in Case No. 62411 determined the SSF *was not* a political committee.²⁵ Further, the PDC apparently accepted, without

²² Dmitri Iglitzin, counsel for WFSE. Letter to Walter Smith, assistant attorney general. February 8, 2017.

[https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20%26%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf)

[1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20%26%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20%26%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf)

²³ Dmitri Iglitzin, counsel for WFSE. Letter to Fox Blackhorn, PDC compliance coordinator. February 12, 2020.

[https://pdc-case-tracking.s3-us-gov-west-](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/3428/62411%20Washington%20Federation%20of%20State%20Employees%20%28AFSCME%20Council%2028%29%20Separate%20Segregated%20Fund%20Response.pdf)

[1.amazonaws.com/3428/62411%20Washington%20Federation%20of%20State%20Employees%20%28AFSCME%20Council%2028%29%20Separate%20Segregated%20Fund%20Response.pdf](https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/3428/62411%20Washington%20Federation%20of%20State%20Employees%20%28AFSCME%20Council%2028%29%20Separate%20Segregated%20Fund%20Response.pdf)

²⁴ *Ibid.*

²⁵ The fact that, between these three cases, the PDC reached every possible conclusion regarding the status of a union-operated and funded “political organization” as a “political committee” under the FCPA is made more mystifying by the fact that: (1) the applicable provisions of the FCPA — such as its definitions of “person” and “political committee” — did not change during this period; (2) the same law firm represented the respondents in

investigation or explanation, WFSE’s representation that the \$200,000 contribution was deposited in its general fund and rejected AFSCME’s previous representation that the contribution was deposited in WFSE’s SSF. The PDC dismissed the complaint without taking any enforcement action.²⁶

Applicable law regarding “political committees” under the FCPA

RCW 42.17A.205 requires every “political committee” to “file a statement of organization” with the PDC “within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier.”

RCW 42.17A.005(41) defines “political committee” as:

“...any person... having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.”

Washington courts have determined this definition contains two prongs.

In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association (“EFF”)* 111 Wn. 586 (2002), the Court of Appeals interpreted the definition of “political committee” to mean,

“...a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.”

See *EFF*, 111 Wn. App. at 598.

1. Expenditures prong

State courts have developed a “primary purpose” test when determining whether a person is a political committee under the expenditures prong.

In *State of Washington v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 509 (1976), the Washington State Supreme Court determined that a person satisfies the expenditures prong if affecting, “directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions” is “the primary or one of the primary purposes” of the entity.

In *Utter v. Bldg. Indus. Ass’n of Washington*, 182 Wn.2d 398, 415 (2015), the Washington State

each case and presented the PDC with arguments that copied each other almost verbatim; and (3) the same PDC compliance officer handled each of the three complaints.

²⁶ Kurt Young, PDC compliance officer. Letters to Dmitri Iglitzin and Maxford Nelsen. May 19, 2020. <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/3428/WSFE%20Complaint%20Return%20Letter%20with%20Cover%20Letter%20%28Freedom%20Foundation%29%20PDC%20Case%2062411.pdf>

Supreme Court further clarified that an entity may be considered a “political committee” if *one* of its primary purposes is to engage in electoral political activity; electoral political activity need not be *the* primary purpose of the entity for it to fulfill the definition of “political committee.”

Finally, the Court of Appeals in *EFF* provided the most comprehensive guidance on applying the primary purpose test and recognized that, while an entity could be a political committee on an ongoing basis, it could also qualify as a political committee intermittently, for a particular period of time, based on its activity. *See EFF*, 111 Wn. App. 586, 599-600 (2002).

2. Contributions prong

Unlike the expenditures prong, Washington courts have repeatedly declined to apply a primary purpose test to the contributions prong, meaning that receipt of *any* contribution²⁷ is sufficient to qualify a person as a political committee under the FCPA.

Most recently, in *State v. Grocery Mfrs. Ass'n*, (“*GMA*”), the Washington Supreme Court specifically rejected the contention that a “primary purpose” test should be added to the contributions prong of the FCPA’s definition of “political committee.” *See GMA*, 195 Wn.2d 442, 461 P.3d 334 (2020).

Further, a person need not actually receive contributions in order to become a political committee; simply *expecting* to receive a contribution is sufficient. In *Utter*, the Washington Supreme Court held,

“...[T]he contribution prong... asks whether an organization ‘expects to receive *or* receives contributions toward electoral goals.’ Not whether it expects to receive *and* receives. That interpretation is in line with the statutory language... ‘Expectation’ clearly applies to ‘contributions’ (and also ‘expenditures’).”

See Utter, 182 Wn.2d at 416 (internal citations omitted, emphasis in original).

Finally, Washington courts have determined that a labor union may be rendered a political committee by virtue of the dues it receives from members if funds from the dues are segregated for use on electoral political activity and the members know – or reasonably should know – their dues are being so used.

In 1973, then-Attorney General Slade Gorton addressed when a union may become a political committee under the FCPA, concluding,

“If the only revenues of such groups... are dues and/or assessments to fund the general operations of the organization, and no portion of these revenues are set aside, with the actual or constructive knowledge of the contributors, for use in supporting or opposing political candidates or ballot propositions, then the organization is not to be deemed a ‘political committee.’ If on the other hand - either as a part of their regular dues or in addition thereto - the members of such an organization are called upon to make payments

²⁷ “Contribution” is defined at length by RCW 42.17A.005(15).

to it which are thus segregated and used for those purposes under circumstances whereby the contributors know (or should know, if reasonably observant) of that practice, then those payments will in our judgment be ‘contributions’ within the meaning of that statutory definition and the organization, hence, will be a political committee as therein defined.”²⁸

The Court of Appeals in *Evergreen Freedom Foundation* specifically adopted the Attorney General’s reasoning, finding that, “Dues are political ‘contributions’ if the organization’s members intend or expect their dues to be used for electoral political activity.” *See EFF*, 111 Wn. App. at 602.

Allegation: WFSE has failed to register with the PDC as a “political committee”

1. Receipt of contributions from out-of-state

WFSE has received at least two (2) contributions from an out-of-state source — a \$200,000 contribution in 2016 and a \$15,000 contribution in 2018 — rendering it a political committee in at least each of those election cycles.

AFSCME’s Special Account expended \$200,000 to WFSE on September 9, 2016. The expenditure is reflected on four (4) official government reports filed by AFSCME.

First, the annual LM-2 report filed by AFSCME with the U.S. Department of Labor (DOL) pursuant to the Labor-Management Reporting and Disclosure Act for calendar year 2016 records the expenditure to WFSE/“AFSCME Washington Council 28” under “Schedule 16 – Political Activities and Lobbying.”²⁹ *See App. 209.*

DOL directions for completing Schedule 16 of forms LM-2 explain that,

“A political disbursement or contribution is one that is intended to influence the selection, nomination, election, or appointment of anyone to a Federal, state, or local executive, legislative or judicial public office, or office in a political organization, or the election of Presidential or Vice Presidential electors, and support for or opposition to ballot referenda. It does not matter whether the attempt succeeds.”³⁰

AFSCME’s LM-2 describes the “purpose” of the expenditure as, “State & Local Political Program Support.”

Second, the \$200,000 expenditure to WFSE/“AFSCME Washington Council 28” was disclosed

²⁸ Attorney General Legal Opinion 1973 No. 114, December 28, 1973. <https://www.atg.wa.gov/ago-opinions/contributions>

²⁹ AFSCME’s 2016 LM-2 is available online at:
<https://olmsapps.dol.gov/query/orgReport.do?rptId=639834&rptForm=LM2Form>

³⁰ U.S. Department of Labor, Office of Labor-Management Standards. “Instructions for Form LM-2 Labor Organization Annual Report.” Revised March 2020.
https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/GPEA_Forms/2020/efile/LM-2_instructionsRevised2020.pdf

on the Form 8872 AFSCME’s Special Account filed with the IRS on October 13, 2016. The “purpose” of the expenditure was described simply as “grant.” *See App. 306.*

Third, the expenditure to “AFSCME Washington Council 28” was disclosed to the PDC by AFSCME’s Special Account on an amended Form C5 filed on November 27, 2019 pursuant to PDC Case No. 54145. The “purpose” of the expenditure was described as a “grant to an affiliate.”³¹ *See App. 325.*

Finally, WFSE’s Form LM-2 for fiscal year 2017 — filed with DOL on September 27, 2017, a full year after the transaction occurred — recorded receipt of a \$200,000 “grant” from “AFSCME International” on September 14, 2016.³² *See App. 362.*

While WFSE previously claimed — and the PDC accepted — in Case No. 62411 that the \$200,000 contribution from AFSCME was not deposited in the SSF but rather in WFSE’s general fund, the \$200,000 contribution still should have been reported under the FCPA. AFSCME’s LM-2 indicated the expenditure was to support WFSE’s “political program,” AFSCME’s Special Account was fined by the PDC for its failure to report the expenditure on a C5 form,³³ which it ultimately did, and the Special Account would have been subject to federal tax had the expenditure been for a purpose other than influencing candidate elections.³⁴

Further, it appears that WFSE immediately put the contribution toward electoral political activity. A C3 report filed with the PDC by the “Washington State Democratic Committee – Exempt” political committee disclosed receipt of a \$100,000 contribution from WFSE on September 22, 2016, just six (6) days after WFSE received the \$200,000 from AFSCME.³⁵ *See App. 398.* Further, a C3 report filed with the PDC by the “New Direction PAC” — another prominent political committee affiliated with Washington State Democrats³⁶ — disclosed receipt of another \$100,000 contribution from WFSE on September 23, 2016.³⁷ *See App. 399.*

However, despite receiving a \$200,000 contribution from an out-of-state entity — and immediately contributing the funds to political committees supporting candidates for election in Washington state — WFSE has never filed a statement of organization as a political committee nor any related C3 reports with the PDC disclosing receipt of this \$200,000 contribution.

Disturbingly, the \$200,000 contribution is not an isolated case.

³¹ A copy of the Form C5 filed by AFSCME’s Special Account with the PDC on November 27, 2019 is available online at: <https://web.pdc.wa.gov/rptimg/default.aspx?docid=4850111>

³² A copy of WFSE’s LM-2 for FY 2017 is available online at: <https://olmsapps.dol.gov/query/orgReport.do?rptId=656444&rptForm=LM2Form>

³³ Forms C5 are used by out-of-state political committees to disclose contributions and expenditures to the PDC.

³⁴ *See generally*, 26 U.S.C. § 527.

³⁵ A copy of the Form C3 filed by the Washington State Democratic Committee – Exempt with the PDC on September 26, 2016 is available online at: <https://web.pdc.wa.gov/rptimg/default.aspx?batchnumber=100722871>

³⁶ The following election cycle, on August 28, 2018, AFSCME’s Special Account contributed \$200,000 directly to the New Direction PAC. <https://web.pdc.wa.gov/rptimg/default.aspx?docid=4751765>

³⁷ A copy of the Form C3 filed by the New Direction PAC with the PDC on September 26, 2016 is available online at: <https://web.pdc.wa.gov/rptimg/default.aspx?batchnumber=100722650>

Under “Schedule 16 – Political Activities and Lobbying,” AFSCME’s LM-2 for calendar year 2018 disclosed a \$15,000 expenditure to “AFSCME Washington Council 28” on August 27, 2018, for the “purpose” of “State and Local Political Program Support.”³⁸ See **App. 493**. This is identical to how AFSCME’s LM-2 categorized the \$200,000 expenditure from September 2016.

On the receiving end, WFSE’s Form LM-2 for fiscal year 2019 — filed with DOL on September 20, 2019 — disclosed receiving a \$15,000 contribution from “AFSCME International” on August 31, 2018, which it also described as a “State and Political Program Grant.”³⁹ See **App. 623**.

As before, it appears WFSE promptly expended the funds on electoral political activity. In a C3 report filed with the PDC on September 6, 2018, the “Retired Public Employee Council of Washington” political committee disclosed receipt of a \$15,000 contribution from WFSE on September 4, 2018.⁴⁰ See **App. 650**.

2. Receipt of contributions from WFSE members

Even if WFSE was not a political committee due to its receipt of the \$215,000 in contributions discussed above — which it is — WFSE would nevertheless qualify as a continuing political committee by virtue of the dues it collects from members.

Under *Evergreen Freedom Foundation*, union dues are political contributions — and the receiving union a political committee — if any portion of the dues are “set aside” or “segregated” to “use in supporting or opposing political candidates or ballot propositions” and the members have “actual or constructive knowledge” or “should know, if reasonably observant,” of the practice. See *EFF*, 111 Wn. App. at 602-03. All elements are present in WFSE’s case.

WFSE’s SSF — its *separate, segregated fund* — exists for the express purpose of providing “[f]inancial support for candidates responsive to the interests of working people,” according to the Form 8871 it filed with the IRS. See **App. 55**. According to WFSE, the SSF is “a separate bank account” within WFSE’s “total control” and relies entirely on funds “transfer[red] from dues” paid by WFSE members.⁴¹

The Forms 8872 filed by the SSF with the IRS — which are publicly available online — show that WFSE is the SSF’s only contributor and that the SSF expends the funds it receives on electoral political activity in Washington. See **App. 62-102**.

³⁸ A copy of AFSCME’s LM-2 for 2018 is available online at: <https://olmsapps.dol.gov/query/orgReport.do?rptId=696340&rptForm=LM2Form>

³⁹ A copy of WFSE’s LM-2 for FY 2019 is available online at: <https://olmsapps.dol.gov/query/orgReport.do?rptId=710032&rptForm=LM2Form>

⁴⁰ A copy of the Form C3 filed by the Retired Public Employee Council of Washington with the PDC on September 6, 2018 is available online at: <https://web.pdc.wa.gov/rptimg/default.aspx?batchnumber=100856509>

⁴¹ Dmitri Iglitzin, counsel for WFSE. Letter to Walter Smith, assistant attorney general. February 8, 2017. <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/1485/WA%20Federation%20of%20State%20Employees%20%26%20AFSCME%2028%20Response%20to%20Complaint%20%28PDC%20Case%2014266%29.pdf>

Further, recipients of WFSE contributions report receipt of these contributions on C3 reports publicly available online from the PDC. *See App. 103-109.*

Lastly, the very reason unions like WFSE are required by the LMRDA to annually file Forms LM-2 — which are publicly available online and itemize political expenditures exceeding \$5,000 — is to “better inform workers...”⁴²

Indeed, WFSE’s own communications to its members describe and emphasize the importance of the union’s political activity.

- From December 3, 2012 through at least June 29, 2015, a page on WFSE’s website explained the union’s political program, stating:

“The purpose of the political action program of the Washington Federation of State Employees/AFSCME is to promote the legislative goals of our union at the state and national level and to provide support for the legislative goals of the Washington State Labor Council and the national AFL-CIO.

Strategic Goals...

2. Implement a political action program that helps advance our public policy agenda.

- i. Make political contributions in a manner that effectively raises the awareness of our public policy agenda.
- ii. Emphasize member-based political action programs that help build the union...

The legislative and political action process is crucial for state employees. Many decisions that affect our jobs and working conditions are made by the Legislature. WFSE/AFSCME works the legislative process to win and maintain our rights and benefits...

Does the union get involved in politics?

Any union representing public employees and workers in the public service must have an effective political and legislative program.

WFSE/AFSCME has such a program, with many politically active members participating. The reality is that public employees and public service workers are funded with public money controlled by elected officials.”⁴³

See App. 651 (bold in original; underline added).

⁴² U.S. Department of Labor, Office of Labor-Management Standards. “About.” <https://www.dol.gov/agencies/olms/about>

⁴³ Washington Federation of State Employees. “Council 28 Political Action Program.” December 3, 2012. <https://web.archive.org/web/20150629025856/http://wfse.org/council-28-political-action-program/>

- During the relevant time period in 2016, WFSE’s monthly newsletters routinely touted the union’s political activity, influence and the importance of the upcoming state elections.

WFSE’s May 2016 newsletter described the union as a “political, lobbying, and organizing powerhouse.” *See App. 659.*

- The union’s August 2016 newsletter described in detail the immense significance of the upcoming elections to the union’s ability to accomplish its goals:

“This is the summer of contract negotiations when we have a real opportunity to make significant improvements around pay, workload, and recruitment and retention next year--but only if we elect a friendly Legislature this year. The Legislature has to fund the compensation, health care package and other negotiated economic parts of our contracts. If we sit out the election, we may end up with a Legislature that wants to cut our pay, limit our ability to negotiate and reduce funding for the services we provide. Our voice and vote matters. Vote in the Primary Election by filling out your mail ballot by Aug. 2. It will determine which candidates advance to the General Election. In less than a month WFSE/AFSCME members and staff have registered nearly 200 state employees to vote. This election we expect a huge voter turnout, where many races will be determined by just a few hundred votes or less.”

See App. 660.

- Similarly, WFSE’s September 2016 newsletter stated,

“Every year, important decisions are made in Olympia that affect our pay, health care, livelihood, our environment and our quality of life. That’s why using your voice and vote is so important.

A few reasons why:

- Through contract negotiations we have a real opportunity in 2017 to make significant improvements around pay, workload, and benefits - but only if we elect a state employee-friendly Legislature in 2016.
- As of today, the Washington State Legislature’s makeup is at an even split between legislators who proudly support state employees, and those who want to cut our pay, limit our ability to negotiate, and reduce funding for the services we provide.”

See App. 670 (bold in original; emphasis added)

- The point was driven home again in WFSE’s October 2016 newsletter:

“Do you think it’s time for fair and competitive wages for state employees? In our

upcoming contract negotiations we have a chance to make real improvements for our families, coworkers, and the public we serve - but only if we elect a friendly legislature.

Do you believe in safe and strong communities? Public services help build safe and strong communities. We must work to elect legislators who support public service and creating a strong economy for all Washingtonians.”

See App. 677 (emphasis added).

- An article on WFSE’s website posted on October 6, 2016 stated:

“With your help we can ensure that the legislators we send to Olympia this year share our values- and we defeat the ones that hope to cut our pay and outsource our work...

Just a few key races will be determine if we have a 2017 legislature that values public service employees. These key races will likely be decided by fewer than 100 votes. Help us change the outcome of this election by joining us for one of our WFSE Super Saturday GOTV events in Tacoma, Vancouver, or Spokane! Your efforts could help us build a pro-state-employee majority in the legislature, and ultimately win the best contracts in our union’s history.”⁴⁴

See App. 684 (emphasis added).

- Finally, WFSE’s “Member Orientation Guide,” which solicits membership from new employees, contains a section titled, “Where does our dues money go?” It claims that “70% stays with Council 28 (WFSE)” and that, of this amount 4 percent is used for “legislative and policy advocacy for public services.”⁴⁵ (Emphasis added). *See App. 695.*

Because a “reasonably observant” WFSE member could and can ascertain WFSE’s segregation and use of part of their dues for electoral political activity from multiple, publicly available online government sources — not to mention, learn it from WFSE’s own communications — most WFSE members have “actual knowledge” and all have “constructive knowledge” of the union’s use of their dues for political expenditures and “should know” that they are used in that way. Accordingly, the dues paid by WFSE members are “contributions” under the FCPA and WFSE, as a receiver of such contributions, is a political committee.

Conclusion

Given that the Washington State Supreme Court has held there is no primary purpose test for the contributions prong of the FCPA’s definition of “political committee,” a person who receives

⁴⁴ WFSE. “WFSE Walks get out the vote!” October 6, 2016.
<https://web.archive.org/web/20161104095414/http://wfse.org/wfse-walks-get-out-the-vote/>

⁴⁵ Washington Federation of State Employees. “All About WFSE: Member Orientation Guide.”
https://wfse.org/system/files/awwbooklet-2018-103017_0.pdf

any contribution(s) becomes a political committee with the attendant obligation to file a statement of organization with the PDC and report all funds received and disbursed. WFSE has received two (2) political contributions from AFSCME headquarters in Washington, D.C. — \$200,000 in 2016 and an additional \$15,000 in 2018 — but has failed to file a statement of organization with the PDC.

Further, WFSE both segregates part of the dues paid by members into its SSF — which is registered with the IRS as a “political organization” for tax purposes — and by its own account expends the funds on electoral political activity in Washington. Because the union’s members must have at least constructive knowledge of these facts, their payments of dues to WFSE amount to “contributions” under the FCPA, and receipt of these contributions transforms WFSE into a political committee.

Despite receiving repeated scrutiny via multiple administrative complaints in recent years, WFSE has steadfastly refused to disclose its political activity to the PDC and to the voters of Washington state. The Freedom Foundation has previously refrained from alleging that WFSE was, itself, a political committee. However, given that the PDC has now indicated the SSF cannot be treated as a “person” distinct from WFSE for purposes of the FCPA, the inescapable legal conclusion is that WFSE, as a whole, is a political committee as a receiver of contributions.

Accordingly, we respectfully request that the PDC investigate WFSE’s lack of compliance with the FCPA and issue an appropriate enforcement order pursuant to RCW 42.17A.755(1)(b).

Please let us know if we can be of any further assistance to the PDC in resolving this matter.

Sincerely,

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

Maxford Nelsen
Director of Labor Policy
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