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June 9, 2023

Executive Director Peter Lavallee
Washington State Public Disclosure Commission
Evergreen Plaza
711 Capitol Way S #206
Olympia, WA 98504

RE: Case No. 137263

Dear Mr. Lavallee:

I write on behalf of the Bob Ferguson for Governor Campaign (the "Campaign") in response to the complaint filed with the Commission by Michael Christophersen on May 19, 2023 (the "Complaint"). Starting on April 24 (and all prior to the Commission's May 11 special meeting), approximately 3,000 Washingtonians who had contributed to Bob Ferguson's 2016 and 2020 campaigns for attorney general (the "AG campaigns") gave written permission to transfer funds left over from their contributions to his gubernatorial Campaign. Under the Commission's longstanding guidance then in effect, such transferred contributions held in surplus neither were "attributed to their sources" for disclosure purposes "nor [did] they count against the contributor's limit for the new campaign." After the Campaign had transferred all funds, on May 11, the Commission voted to amend that guidance to reverse its earlier position. Under the new guidance, the Commission will advise that surplus contributions transferred to a later campaign for a different office be reported by and count towards contribution limits for the new campaign.

The Campaign understands and respects the Commission's interpretive change and has strictly followed its new policy since the May 11 vote. However, the Complaint's apparent request that the Commission apply its new guidance retroactively to the Campaign's earlier transfers defies basic principles of administrative and constitutional law, fundamental fairness, and common sense. It would have the unintended consequence of discouraging candidates and other regulated parties from relying on—and complying with—Commission guidance in the future. For those reasons, the Commission should confirm that its revised guidance applies prospectively only and dismiss the Complaint as "obviously unfounded or frivolous."[1]

[1] WAC 390-37-060(1)(a) ("If the executive director determines that any complaint is obviously unfounded or frivolous, or outside of the PDC's jurisdiction, the executive director will inform the complainant and, as appropriate, the respondent why no further action is warranted.").

I. BACKGROUND

State law allows candidates to transfer unspent surplus contributions to another campaign for a different office only if they receive "the written approval of the contributor."[2] When such approval is received, however, that statute (RCW 42.17A.490) does not specify whether the transferred funds are to be treated as contributions to the new campaign for the purposes of disclosure requirements and contribution limits. Thus, "longstanding guidance" from Commission staff has helped to fill the statutory gap.[3] That guidance advised campaigns that, when transferring funds from one campaign to another for a different office *within the same election cycle*, each contribution "is attributed to and counts against the contributor's limit for the office now being sought."[4] However, for transfers "from a *previously* completed election campaign to a new campaign for a different office," the unspent contributions "are NOT attributed to their sources, nor do they count against the contributor's limit for the new campaign."[5]

This guidance was, as the Commission recognized recently, "consistent with how transfers [of surplus funds] to a subsequent campaign for the *same* office are treated under a different section of law, RCW 42.17A.430."[6] It also reflected the principle that, "once campaign funds become surplus, they lose the character of being tracked as a contribution."[7] And it mirrored Federal Election Commission ("FEC") regulations interpreting campaign contribution limits under federal law.[8] Under the FEC rule, which has been in place since at least the 1980s, "[w]hen an individual seeks different offices in different election cycles, surplus funds from the earlier campaign that

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[2] RCW 42.17A.490(2).

[3] Public Disclosure Comm'n, *Commission meeting highlights: April 2023*, https://www.pdc.wa.gov/news/2023/commission-meeting-highlights-april-2023 (last visited June 9, 2023).

[4] Public Disclosure Comm'n, *Using Contributions for a Different Office*, https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/using-contributions-different-office (last visited June 6, 2023) (emphasis added).

[5] *Id.* (emphasis added).

[6] Public Disclosure Comm'n, *Commission adopts guidance on use of previous campaign funds*, https://www.pdc.wa.gov/news/2023/commission-adopts-guidance-use-previous-campaign-funds (last visited June 6, 2023) (emphasis added).

[7] Public Disclosure Comm'n, Memo from Sean Flynn to Commission Re: Candidate Surplus Fund Transfers to a Campaign for a Different Office (RCW 42.17A.490) at 2, Apr. 25, 2023, https://www.pdc.wa.gov/sites/default/files/2023-04/05.01%20Memo%20re%20interpretation%20of%20RCW%2042-17A-490.pdf (hereinafter "Staff Memo").

[8] *See* C.F.R. § 110.3(c)(4) (providing that contribution limitations do not apply to "[t]ransfers of funds between a candidate's previous Federal campaign committee and his or her current Federal campaign committee, or between previous Federal campaign committees, provided that the candidate is not a candidate for more than one Federal office at the same time, and provided that the funds transferred are not composed of contributions that would be in violation of the Act").

remain after the general election may be transferred to the later campaign without aggregating the contributions of the original contributor to the two committees."[9]

Bob Ferguson has held the office of attorney general since January 2013, having been first elected in 2012 and twice re-elected in 2016 and 2020. After the 2016 and 2020 elections, the AG campaigns transferred leftover funds into a separate "surplus funds" account.[10] In anticipation of Ferguson's run for governor this year, on April 24, 2023, his representatives began requesting written permission from AG campaign contributors to transfer their surplus contributions to the Campaign. On May 2, following Governor Jay Inslee's announcement that he would not seek reelection to a fourth term, Ferguson publicly announced his candidacy for governor.[11]

The same day, the Commission issued a notice seeking public comment on "two options for agency guidance regarding use of campaign money received for a different office than currently sought."[12] Option 1 reflected the "[c]urrent agency guidance," which had long allowed candidates to "simply move[] as a lump sum" contributions "left over from a previously completed election campaign" without them being "attributed to their sources" on C4 expenditure or new C3 contribution disclosure forms or "count[ing] toward the contributor's limit for the new campaign. Instead, the campaign would report them "as surplus funds from a previous campaign deposited into the new campaign account with permission from the donors."[13] Option 2 represented a "[p]roposed alternative to current guidance," which provided that such transferred contributions "must be attributed to their source" and "count toward the contributor's limit for the new campaign."[14]

The Commission set a special meeting for May 11, 2023, for consideration of the two options. In doing so, it gave no hint either that a reversal of the then-"current agency guidance" was a fait accompli or that any such a reversal might apply retroactively.[15] To the contrary, the

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[9] Fed. Election Comm'n, *Transfers between a candidate's committees*, https://bit.ly/3IWV37w (last visited June 3 2023); *see* 54 Fed. Reg. 34098-01, 34103 (1989) ("New § 110.3(c)(4) continues the overall approach taken by current § 110.3(a)(2)(iv), which permits transfers in either direction between a current campaign committee and a previous campaign committee of the same candidate, so long as the funds do not contain contributions in violation of the Act.").

[10] The term, "surplus funds," is defined (for a candidate) as "the balance of contributions that remain in the possession or control of that . . . candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts or expenses incurred by the committee or candidate with respect to that election." RCW 42.17A.005(51).

[11] *See, e.g.*, David Gutman & Jim Brunner, *WA Attorney General Bob Ferguson announces campaign for governor*, Seattle Times, May 2, 2023, https://www.seattletimes.com/seattle-news/politics/wa-attorney-general-bob-ferguson-announces-campaign-for-governor/.

[12] Public Disclosure Comm'n, *Commission seeks public comment on use of previous campaign funds*, May 2, 2023, https://www.pdc.wa.gov/news/2023/commission-seeks-public-comment-use-previous-campaign-funds.

[13] *Id.*

[14] *Id.*

[15] *Id.*

Commission's April 25 staff memo on this agenda item presents arguments for *both* options, and makes no recommendation to the Commission.[16] Furthermore, the memo recognized that the issue was "time-sensitive regarding potential 2024 campaigns," and that the "lengthy" process of formal rulemaking would "present a considerable delay for 2024 campaigns seeking clarity," as opposed to the Commission "address[ing] this issue as a statement of interpretation on the law."[17] Such "[i]nterpretive statements are advisory only and would guide the public on the Commission's *current* opinion and likely course of action, but would not be determinative in any compliance matter."[18]

Beginning April 24, 2023, over 3,000 contributors to the AG campaigns provided written authorization to transfer any leftover sums in surplus to the Campaign. The smallest transfer was $1. Over 1,000 of the contributions were for under $100. The total amount of the surplus funds transferred was approximately $1.2 million, not one dollar of which came from large corporations or corporate PAC money—which the Campaign does not accept.[19] The Campaign completed all transfers and reported the funds to the Commission before its May 11 meeting began. Consistent with the Commission guidance then in effect, the Campaign did not individually identify those 3,000 transferred contributions in its C3 reports, which would have imposed a significant burden in terms of staff time and easily thousands of dollars in expenses.

On May 11, 2023, the Commission held a special meeting to consider the two options for agency guidance on transfer of unspent contributions held in surplus from a previous campaign to a new campaign for a different office. The Commission voted to adopt Option 2, which provides in relevant part that such contributions "must be attributed to their sources, and count toward the contributor's limit for the new campaign."[20] The Commission directed its staff to "draft a formal interpretation for the Commission to review in the next two weeks pertaining to interpretation option two."[21] At the May 25 regular meeting, the Commission voted to adopt the staff's draft.[22]

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[16] Staff Memo at 3 (noting that the "current guidance has appeal in that it is consistent with how the disposition of surplus funds are not treated as contributions under section 430, including the transfer to a candidate's subsequent campaign for the same office," which contains "no reference . . . that any other uses of surplus funds may be treated differently," and is also "supported by the definition of surplus funds, which includes the balance of contributions after all campaign expenses have been paid") (citing RCW 42.17A.430, .005(51)).

[17] *Id.* at 4.

[18] *Id.* at 4 (emphasis added).

[19] *See, e.g.,* Wash. Sec'y of State, Bob Ferguson Candidate Statement Statewide – Attorney General, https://voter.votewa.gov/genericvoterguide.aspx?e=866&c=28#/candidates/60177/1532595 (last visited June 8, 2023).

[20] Public Disclosure Comm'n, Minutes – Special Meeting, May 11, 2023 (approved May 25, 2023), www.pdc.wa.gov/sites/default/files/2023-06/Minutes%2005.11.2023.pdf.

[21] *Id.*

[22] Public Disclosure Comm'n, *Regular Comm'n Meeting – May 25, 2023*, https://www.pdc.wa.gov/about-pdc/commissioners/commission-meetings/regular-commission-meeting-may-25-2023 (last visited June 5, 2023) (linking Public Disclosure Comm'n, [Draft] PDC Interpretation No. 23-01, https://www.pdc.wa.gov/sites/default/files/2023-

Also on May 25, 2023, the Commission received the Complaint. In lieu of any specific factual or legal allegations, the Complaint simply reproduces a hyperlink to a Seattle Times article.[23] Commission staff construed the Complaint to allege a "violation of RCW 42.17A.235 and .240 for failing to identify the names and other required information for contributors who gave their written approval to use their contributions, originally given to further Ferguson's campaigns for Attorney General, to further [his] 2024 campaign for Governor."[24]

II. ANALYSIS

When the Campaign transferred surplus funds from the AG campaigns, it did so in reliance on the Commission's longstanding guidance expressly approving such "lump-sum" transfers. Of course, this same guidance was also in effect when the transferred contributions were made and when the AG campaigns opted to save—rather than spend—such sums. The Complaint asks the Commission to retroactively apply a new interpretive rule to sanction Campaign actions that followed the agency guidance in effect when those actions occurred. Such a bait-and-switch would disregard settled principles of constitutional and administrative law, which preclude retroactive application of regulatory reversals. It would also undermine future compliance with Commission guidance, for campaigns could no longer depend on that guidance as representing the current view of the Commission. Unless compliance with existing Commission guidance provides campaigns a presumptive safe harbor from adverse enforcement actions, such guidance would be meaningless, useless, and irrelevant.

A. Retroactive Application is Disfavored, Unjust, and Unconstitutional

Both Washington and federal law strongly "disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions."[25] As the U.S. Supreme Court has explained, "the presumption against retroactive legislation is deeply rooted in our jurisprudence,"[26] and "[e]lementary considerations of fairness dictate that individuals

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05/05.01.Transfer%20Surplus%20to%20Different%20Office%20Interpretation%20FINAL.pdf); *see also* Public Disclosure Comm'n, *Transfer of Surplus Contributions to a Candidate's Campaign for a Different Office* (Issued May 25, 2023); https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/transfer-surplus-contributions-candidates-campaign-different-office.

[23] *See* Jim Brunner, *Before rule change, AG Bob Ferguson moves $1.2M 'surplus' to campaign*, Seattle Times, May 11, 2023, https://www.seattletimes.com/seattle-news/politics/ahead-of-possible-rule-change-ag-bob-ferguson-moves-1-2m-surplus-to-gubernatorial-campaign/.

[24] Email from PDC Support to bob@electbobferguson.com Re: PDC - Ferguson, Bob . . . (May 25, 2023). The two statutes cited require campaigns to "file with the commission a report of all contributions received and expenditures made" consistent with an established "timeline." RCW 42.17A.235(1)(a); *see also* RCW 42.17A.240 (specifying contents of the report).

[25] *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997); *accord In re Det. of Durbin*, 160 Wn. App. 414, 430, 248 P.3d 124 (2011); *Landgraf v. USI Film Products*, 511 U.S. 244, 268, 114 S. Ct. 1483 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468 (1988).

[26] *Landgraf*, 511 U.S. at 265.

should have an opportunity to know what the law is and to conform their conduct accordingly."[27] In Washington, the presumption against retroactivity is rebutted only if "(1) the legislature intended to apply the amendment retroactively, (2) the amendment is curative and 'clarifies or technically corrects ambiguous statutory language,' or (3) the amendment is remedial in nature."[28]

The Commission has recognized this same presumption against retroactivity in its own adjudicative proceedings. In one case, for example, the Commission refused to retroactively apply a statutory amendment raising the maximum penalty amount.[29] The Commission correctly noted that "Washington courts 'disfavor retroactive application of a statute,'" and that "'an amendment [may be applied] retroactively'" only if one of the above factors applies.[30] Here, neither the Commission's new draft guidance nor RCW 42.17A.490 contain language suggesting an "inten[t] to apply the amendment retroactively."[31] Nor does the change "clarif[y] or technically correct[]" the Commission's previous guidance.[32] To the contrary, it represents a complete reversal of earlier guidance that had been in effect for many years. Finally, the change also does not "remed[y]" any harm.[33] For those reasons, the presumption against retroactivity is not overcome, and the Commission should refuse to apply its new guidance retroactively to conduct by the Campaign predating the change.

The presumption against retroactivity applies with equal if not greater force in the administrative context.[34] In "the interests of justice," Washington courts equitably estop agencies

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[27] *Burns*, 131 Wn.2d at 110 (quoting *Landgraf*, 511 U.S. at 265).

[28] *Durbin*, 160 Wn. App. at 430 (quoting *In re Det. of Elmore,* 162 Wn.2d 27, 35–36, 168 P.3d 1285 (2007)).

[29] *In re the Matter of Enforcement Action Against Aaron Reardon*, PDC Case No. 12-160, Order Denying Motion to Dismiss and Motion for Summary Judgement, and Amending the Prehearing Conference Order at 5 (April 6, 2016). The *Reardon* Order is attached as an **Appendix**.

[30] *Id.* (quoting *Durbin*, 160 Wn. App. at 430).

[31] *Elmore*, 162 Wn.2d at 35.

[32] *Id.* at 36.

[33] *Id.*

[34] *See, e.g.*, *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 79–80, 178 P.3d 936 (2008) (noting that "we presume prospective application of newly amended administrative regulations, particularly where the amendments change substantive rights" and holding that a regulatory change should be applied "prospectively only" because enforcement "would have violated the plain language of the previous rule"); *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007) (four-justice plurality opinion) ("Although the Department [of Labor and Industries] may prospectively apply its new, broader interpretation of what wages must be paid for delivery of fill material under WAC 296–127–018, it may not apply this interpretation retroactively."); *id.* at 154 (J.M. Johnson, J., concurring in part) ("[A] retroactive increase in wages already paid by the Suppliers after completion of contracts, is blatantly unfair. Thus, I agree with the majority that L & I is estopped from enforcing its new interpretation . . . ."); *Arkema Inc. v. EPA*, 618 F.3d 1, 9 (D.C. Cir. 2010) (where EPA rule change removed previous allowance for companies participating in cap-and-trade program, holding that agency "cannot, without Congress' express authorization, use its new statutory interpretation to undo [companies'] completed transactions" consistent with earlier rule).

from retroactively applying interpretation or policy changes when (1) a statement or act by the governmental entity "is inconsistent with its later claims," (2) "the asserting party acted in reliance upon the statement or action," (3) "injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action," (4) "estoppel is necessary to prevent a manifest injustice," and (5) "estoppel will not impair governmental functions."[35]

In *Silverstreak v. Washington State Department of Labor and Industries*, a contractor preparing a project bid relied on and complied with a publicly available Department of Labor and Industries ("L&I") interpretation memorandum providing that certain truck driving activities were subject to market rate wages and not the higher "prevailing wage." After project completion, L&I issued a notice of violation—despite the contractor's compliance with its then-operative memorandum—and simultaneously withdrew that guidance.[36]

A majority of the Washington Supreme Court agreed that L&I "may not apply [its] interpretation retroactively," concluding that: (1) the prior memorandum contradicted the L&I's later interpretation of the relevant regulation, (2) the contractor relied on the memorandum, as it would have paid drivers more in the bid had it not understood market wages to apply, (3) retroactive enforcement of the agency change would subject the contractor to a financial penalty, (4) if contractors "cannot rely on the consistency of clear department interpretations," it would "not only [be] manifestly unjust, but [also be] unconstitutional" by violating "due process," and (5) holding L&I to its previous interpretation would impair no governmental functions.[37]

So too here. First, the Commission's new understanding of RCW 42.17A.490(2) directly contradicts its prior official and publicly available guidance. Second, the Campaign relied on the Commission's official guidance, as the Commission is the sole administrative agency legislatively charged with enforcement and construction of state campaign finance laws.[38] Third, the Campaign would incur financial and reputational injury if the Commission imposes penalties based on any retroactive application of its interpretive change. Fourth, if campaigns, candidates, and Washington political donors cannot rely on current and official Commission guidance as representing the considered judgment of the Commission itself with respect to the meaning of the statutory provision in question,[39] it would be manifestly unjust and violate basic notions of due process. And fifth, applying the Commission's new guidance prospectively only would not impair

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[35] *Silverstreak*, 159 Wn.2d at 886–87 (plurality opinion).

[36] *Id*.

[37] *Id*. at 887–91 (plurality opinion) (refusing to "sanction a government agency's . . . decision to change its interpretation of rules and enforce such change"); *id.* at 897 (J.M. Johnson, J., concurring) (agreeing with majority that the "Department is estopped from enforcing its new interpretation").

[38] "The Commission sets PDC policy and interprets and enforces the campaign finance and disclosure laws found in RCW 42.17A and WAC 390. We help political candidates, committees, lobbyists, elected officials, and others report timely and accurate financial disclosure data so the public can remain informed." Public Disclosure Comm'n, *About the PDC*, https://www.pdc.wa.gov/about-pdc (last visited June 6, 2023).

[39] As discussed above, the staff memo on the interpretation states that the existing interpretation is sound and consistent with other provisions of Chapter 42.17A RCW. *See* Staff Memo at 2.

any government function. If there were any such risk, presumably the Commission staff's April 25 memo on the issue would have recommended a change from the existing guidance and that it be applied retroactively—but it did neither. Moreover, as explained below, solely prospective application would foster *greater* respect for and compliance with Commission guidance going forward.

Notably, federal law is equally if not more disapproving of unfair retroactive application of agency policy change. Interpretation changes may be "impermissibly retroactive" when they "change the legal landscape" by "attach[ing] new legal consequences to events completed before [their] enactment."[40] In such cases, federal courts reject retroactive applications of agency interpretations as contrary to fairness principles and due process.[41]

Here, too, basic due process and fairness principles prohibit the Commission from applying its change to a longstanding statutory interpretation retroactively to the Campaign. The Commission's interpretive change attaches new legal consequences to campaign actions and decisions predating the change. For those reasons, the Commission should decline the Complaint's request that it violate established principles of due process and administrative practice by applying its new guidance retroactively.

B. Retroactive Application Would Chill Speech, Create Administrative Chaos, Upset Campaigns' Settled Expectations, and Undermine Commission Guidance

As a regulated party, the Campaign "should know what is required of [it] so [it] may act accordingly."[42] "When speech is involved"—and campaign expenditures and contributions implicate First Amendment speech protections—"rigorous adherence to [this] requirement[] is necessary to ensure that ambiguity does not chill protected speech."[43] The Commission regulates campaigns, candidates, and campaign donors. These parties should know the requirements and legal consequences of their transfers, expenditures, and contributions—arguably at the time the *prior* campaign makes the contributions or forgoes the expenditures, and at minimum no later than

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[40] *Arkema*, 618 F.3d at 7.

[41] *See, e.g.*, *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 257, 272 (D.D.C. 2018) (applying Pentagon's change in interpretive guidance on expedited citizenship for service members to those who enlisted prior to the new guidance was an "impermissible retroactive change in policy or practice" and further forbidden under "'second-order constitutional protections sounding in due process and equal protection'") (quoting *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171–72 (10th Cir. 2015) (Gorsuch, J.)).

[42] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307 (2012).

[43] *Id*. (unconstitutional to sanction broadcaster for content, where at the time of broadcast broadcaster lacked "sufficient notice of what is proscribed"); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191, 134 S. Ct. 1434 (2014) (plurality opinion) ("The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.").

when the *new* campaign receives the transfer of surplus contributions. Retroactively applying different guidance to prior contributions would chill protected political speech by creating administrative chaos, confounding campaigns' settled expectations, and undermining the role of Washington's campaign disclosure regulator.

Retroactive application here would place an unjust administrative penalty on prior speech. The Campaign made all of the disputed surplus transfers prior to the Commission's decision to adopt the interpretive change. In doing so, the Campaign followed existing law and guidance to process transfer permissions from over 3,000 contributors. The Campaign incurred financial costs to obtain these permissions consistent with the Commission's "first in, first out" rule,[44] including for staff and Campaign treasurer time and database and software licensing. Were the Commission to apply its interpretation change retroactively, the Campaign would, at minimum, need to reprocess those transfers, reprocess C3 reports, identify names of over 3,000 individuals and organizations, and attribute contribution amounts to those donors. These administrative hurdles would come at a significant cost of both time and money. Specifically, amending and re-publishing C3 reports will cost the Campaign thousands of dollars. Retroactive application would thus impose the equivalent of a financial penalty on the Campaign simply for following existing agency guidance as to the governing law.

Further, retroactive application against campaigns is inequitable, as it unsettles their fair and reasonable expectations regarding campaign operations. The AG campaigns, like all Washington political campaigns, made strategic spending decisions based on the Commission's guidance, balancing the short-term benefit of additional expenditures with potential long-term gains of converting unspent contributions to surplus funds. Under different guidance, the AG campaigns may have opted to make expenditures which they did not. Due process and basic fairness principles should protect entities from such an unfair bait-and-switch.

Relatedly, a major danger of retroactive application is the lack of any sound limiting principle. If the Commission applies its guidance change retroactively to transfers predating even its May 11, 2023 vote to adopt new guidance, there is no principled basis to prevent its application to transfers occurring months—or even years—in the past. Thus, retroactive application would require either that the Commission establish an arbitrary date of applicability or invite scrutiny of transfers occurring in election cycles long ago. Neither represents a fair, just, or practicable solution.

On the one hand, restricting the new rule's retroactive application to a particular date—say, transfers after May 2, 2023 only (when the Commission first invited comment on the two potential options)—would be arbitrary and, worse, strike any reasonably informed neutral observer as unfairly and improperly targeting one Campaign in particular. On the other hand, extending the

[44] Public Disclosure Comm'n, *Using Contributions for a Different Office*, https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/using-contributions-different-office (last visited June 6, 2023).

new guidance to *all* past transfers would open the floodgates to complaints over transfers to campaigns from the distant past that, like the Campaign here, had relied on the Commission's longstanding prior guidance. The Commission would need to devote its own administrative resources to resolving such complaints, which would drastically undercut the Commission's "policy . . . to facilitate the resolution of compliance matters in a fair and expeditious manner."[45] The only fair, principled, and efficient approach is to apply the change prospectively only.

Finally, retroactive application would undermine the Commission's credibility, discourage adherence to staff guidance, and thereby create regulatory chaos. If campaigns understand that they may be penalized despite their strict compliance with existing Commission guidance published on its website, they will have little reason to follow it going forward. This unintended consequence would deeply damage Washington's 50-year practice of strong public disclosure. To effectively advance its goal to inform the public, the Commission must remain a credible source of campaign finance law information and interpretation.[46] Applying the new interpretation retroactively would have just the opposite effect. The Commission should not punish campaigns when they follow its own guidance.

III. CONCLUSION

For the reasons above, the Campaign respectfully requests that the Commission definitively rule that its new interpretation of RCW 42.17A.490(2) does not apply retroactively and dismiss the Complaint as unfounded or frivolous.

Sincerely,

PACIFICA LAW GROUP LLP

Zachary J. Pekelis

cc: Bob Ferguson

[45] WAC 390-37-010.

[46] *See* Public Disclosure Comm'n, *About the PDC*, https://www.pdc.wa.gov/about-pdc (last visited June 6, 2023).

APPENDIX

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

In re the Matter of Enforcement Action Against Aaron Reardon, Respondent.	PDC Case No. 12-160 ORDER DENYING MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGEMENT, AND AMENDING THE PREHEARING CONFERENCE ORDER.

I. MOTION HEARING:

In accordance with the schedule set out in the Prehearing Conference Order dated February 23, 2016, the Respondent Aaron Reardon (Respondent) filed a Motion to Dismiss and in the alternative a Motion for Summary Judgment on March 10, 2016. Public Disclosure Commission Staff filed their response to Reardon's motions on March 17, 2016. Respondent filed his Reply on March 21, 2016. The Commission heard argument at a regularly scheduled Commission meeting on March 24, 2016.

II. ISSUE SUMMARY:

1. Whether the Commission should dismiss PDC Case No. 12-160 because the Notice of Charges and Notice of Hearing did not provide adequate notice?

2. Whether the Commission should dismiss PDC Case No. 12-160 because the Notice of Charges cited to the wrong penalty amount?

3. Whether the penalty amount may be retroactively applied?

4. Whether Respondent established that no material facts at issue, and he was entitled to judgment as a matter of law?

III. ORDER SUMMARY:

1. No. Respondent had adequate notice as to the charges against him.

2. No. Respondent had adequate notice that he was subject to a penalty and he was not prejudiced by citing to an incorrect penalty amount.

3. No. The penalties in RCW 42.17A.755 may not be retroactively applied. Respondent is subject to the penalties which were in effect at the time of the alleged violation.

4. No. The Respondent failed to establish that there were no material facts at issue, and as such, this matter may not be decided on summary judgment.

IV. DOCUMENTS CONSIDERED:

The Commission considered the following documents:

1. Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment. The Motions consisted of 23 pages. Attached to the Motions were Exhibits R1, R2, R6(a) parts 1 through 3, R8, R9 R10, R10(a), R11, R11(a), R12, R12(a) and R13. Also attached was a CD with the interviews conducted by William Lemp, Lead Political Financial Investigator for the PDC.

2. Commission Staff's Response to the Motion to Dismiss and Alternative Motion for Summary Judgment. The Response consisted of 11 pages. Attached to the Response were the Report of Investigation in the Reardon matter and 30 attached exhibits. Also attached to the Response was the Report of Investigation in the Hulten matter and 13 exhibits.

3. Respondent's Reply Re PDC's Response to Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment. The Reply consisted of 16 pages and no exhibits were attached.

V. FINDINGS OF FACT:

Motion to Dismiss

1. The PDC staff issued a Notice of Administrative Charges on December 2, 2015. The Notice of Administrative Charges alleged that Respondent Aaron Reardon violated RCW 42.17A.555 by:

    a. Misusing Snohomish County facilities to assist his 2011 re-election campaign;

    b. Hiring Kevin Hulten (Hulten) outside of normal practice, and Hulten spent a significant amount of his county compensated work time working on Respondent's 2011 re-election campaign, and;

    c. Using his county issued cell-phone to make and receive campaign related calls and texts, and used his county office space to meet with his political consultants.

In a footnote to the RCW 42.17A.555 citation, the Notice of Administrative Charges noted that effective RCW 42.17.130 was re-codified as RCW 42.17A.555.

2. On December 2, 2015, PDC staff also issued a Notice of Enforcement Hearing which was sent with the Notice of Administrative Charges to Respondent. The Notice of Enforcement Hearing indicated that the Commission would hold a hearing concerning the allegation that Respondent violated RCW 42.17.130 by using Snohomish County facilities to assist his 2011 re-election campaign. A footnote after the citation to RCW 42.17.130 indicated that effective January 1, 2012, RCW 42.17.130 was re-codified as RCW 42.17A.555. The Notice of Enforcement Hearing also indicated that the Commission had the authority to assess a penalty up to $10,000.

3. A prehearing conference was held on January 19, 2016 in which the hearing was continued to April 28, 2016.

4. RCW 42.17.130 was amended effective January 1, 2012 as follows:

> No elective official nor any employee of his ~~((~~[~~or her~~]~~))~~ or her office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:
>
> (1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view
>
> (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
>
> (3) Activities which are part of the normal and regular conduct of the office or agency.
>
> <u>(4) This section does not apply to any person who is a state officer or state employee as defined in RCW 42.52.010.</u>

Laws of 2010, ch. 204, § 701.

5. The Legislature re-codified RCW 42.17.130 as RCW 42.17A.555, effective January 1, 2012, pursuant to the Laws of 2010, ch. 204, § 1102.

6. Former RCW 42.17.395(4), was amended as follows, effective January 1, 2012:

> (4) The person against whom an order is directed under this section shall be designated as the respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in RCW 42.17A.750 (((~~(2) through (5)~~))) (1) (b) through (e). ((~~No individual penalty assessed by the commission may exceed one thousand seven hundred dollars, and in any case where multiple violations are involved in a single complaint or hearing, the maximum aggregate penalty may not exceed four thousand two hundred~~)) The commission may assess a penalty in an amount not to exceed ten thousand dollars.

Laws of 2011, ch. 145, § 7.

7. RCW 42.17.395 was separately recodified by the Legislature as RCW 42.17A.755, effective January 1, 2012, pursuant to the Laws of 2010, ch. 204, § 1102.

VI. CONCLUSION OF LAW

Based upon the facts above, the Commission makes the following conclusions:

Motion to Dismiss

1. Procedural due process requires notice which is reasonably calculated, under all circumstances, to apprise interested parties on the pendency of the action and afford them an opportunity to present their objections. *Mullane v, Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 St. Ct. 652, 94 L. Ed. 865 (1950). Notice must be sufficient to enable the recipient to determine what is being proposed and how the person may object to the action. *Goldberg v. Kelly*, 397 U.S. 254, 267-268, 90 S. Ct. 1011, 25 L. Ed. 287 (1970).

2. RCW 34.05.434(2) (h) requires an agency to include a short and plain statement of the matters asserted. *See also, US West Communications, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wn.2d 74, 111, 949 P.2d 1337 (1997). The notice must be sufficient to put the parties on notice of the issues to be litigated. *McDaniel v. State Dep't of Soc. & Health Servs.*, 51 Wn. App 893, 898, 756 P.2d 143 (1988).

3. Respondent's alleged misconduct occurred prior to 2012 and as such RCW 42.17.130 applies.

4. There was no material change in the relevant portions of RCW 42.17.130 and RCW 42.17A.555. Regardless of the citation, the law clearly indicated that an elected official could not use or authorize the use of any public facility of a public office or agency, directly or indirectly, for purpose of assisting in the election of any person to any office.

5. Respondent had adequate notice of the nature of charges against him which provided him sufficient notice of his alleged wrong doing to prepare a response.

6. Respondent did not suffer prejudice by the PDC staff's citing to RCW 42.17A.555.

7. Ex Post Facto prohibition of the U.S. Constitution applies only to criminal actions and not civil actions. *Peterson v. State*, 104 Wn.App 283, 286, 36 P.3d 1053 (2000); *In re Young*, 122 Wn.2d 1, 24, 857 P.2d 989 (1993).

8. The 2012 amendment to former RCW 42.17.395(4) does not violate the Ex Post Facto clause of the U.S. Constitution as it is civil in nature.

9. Washington courts "disfavor retroactive application of a statute but may apply an amendment retroactively if (1) the legislature intended to apply the amendment retroactively, (2) the amendment is curative and 'clarifies or technically corrects ambiguous language,' or (3) the amendment is remedial in nature." *In re Detention of Durbin*, 160 Wn. App. 414, 430, 248 P.3d 124 (2011) (citations omitted.)

10. There is no evidence that the Legislature intended its changes to the penalty amount in RCW 42.17.395(4), later recodified as RCW 42.17A.755 to apply retroactively.

11. There is no evidence that the amendment to RCW 42.17.395(4) which increased the amount of penalty is curative and clarified or technically corrected ambiguous language.

12. An amendment will be considered remedial when it relates to a practice, procedure or a remedy. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992).

13. The 2012 amendment to RCW 42.17.395 (4) was not remedial in nature and should not be applied retroactively.

Summary Judgment

14. The Administrative Procedure Act (APA), chapter 34.05 RCW, governs this adjudicative proceeding. RCW 42.17A.755. Pursuant to RCW 34.05.250 and WAC 10-08-135, the Washington Model Rules of Procedure provide that a motion for summary judgment may be granted and an order issued if "the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135; *see also Granton v. Washington State Lottery Comm'n*, 143 Wn. App. 225, 177 P.3d 745 (2008).

15. A "material fact" for summary judgment purposes, is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). When determining whether an issue of material facts exits, the court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce Co.* 164 Wn.2d 545,552, 192 P.2d 886 (2008).

16. The party moving for summary judgment has the burden of showing the absence of any issue of material fact. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing that there is a genuine issue

for trial. *McGough v. City of Edmonds*, 1 Wn. App. 164, 168, 460 P.2d 302 (1969).

17. Respondent alleged that he did not use his office to meet with political consultants. Staff alleged that two Snohomish County employees observed a political consultant meeting with Reardon in his Snohomish County office. Respondent failed to establish that there were no genuine issues of material facts with regard to the use of his office.

18. Respondent alleged that he did not use his cell phone to make campaign calls in 2011. Staff alleged that Reardon made extensive calls on his county issued cell phone and that Reardon made significantly more calls to consultants in an election year than the previous non-election year. Staff also alleged Reardon paid political consultants thousands of dollars in fees and that the consultants did not have any contracts or business with the county. Respondent failed to establish that there were no genuine issues of material facts with regard to the use of his office.

19. Respondent alleged that he hired more than 20 individuals, including Kevin Hulten. Reardon further alleged that Hulten did not work on Reardon's campaign using Snohomish County resources. Staff alleged that documents relating to Reardon's campaign were found on Hulten's Snohomish County computer and that they were created during work hours. Respondent failed to establish that there were no genuine issues of material facts with regard to the use of his office.

IT IS HEREBY ORDERED THAT

1. Respondent's Motion to Dismiss is DENIED.

2. The penalty in this case is limited to the amounts set out in former RCW 42.17.395(4). Specifically, no individual penalty may exceed one thousand, seven hundred dollars ($1,700.00), and in the case of multiple violations, the maximum aggregate penalty may not exceed four thousand, two hundred dollars ($4,2000.00).

3. Respondent's Motion for Summary Judgement is DENIED.

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4. The Prehearing Conference Order and Notice of Hearing is hereby amended per agreement of the parties to include the following new deadlines:

a. Respondent may, at his option, submit evidence on his own behalf or in mitigation in lieu of appearing at the April 28, 2016 hearing. Any submission must be in writing and filed and served no later than April 12, 2016 at 1 pm.

b. Should Respondent opt to file materials in lieu of appearing at the April 28, 2016 hearing, Staff may submit written materials in rebuttal. Any submission must be in writing and filed and served no later than April 25, 2016 at 1 pm. Staff remains obligated to appear at the hearing on April 28, 2016 to present this matter to the Commission.

So ORDERED this 5th day of April, 2016.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION

Katrina Asay

KATRINA ASAY, Chair

Mailing Date of this Order (by email):

April 6, 2016

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