

May 15, 2019

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

Re: PDC Case No. 47303

Mr. Lavalley,

I am in receipt of the Public Disclosure Commission's (PDC) notice of resolution of the Freedom Foundation's February 18, 2019 complaint against the Service Employees International Union Political Education and Action Fund (SEIU PEAFF).¹

I understand reasonable people often reach differing conclusions on matters of policy and law, particularly in areas as charged as campaign finance law enforcement. In some previous cases, the PDC has come to conclusions and issued decisions I disagreed with but could nonetheless comprehend.

Unfortunately, such is not the case in the matter at hand. After careful review and reflection, I cannot help but conclude that the PDC's resolution of Case No. 47303 was factually and legally flawed for the following reasons:

1. The PDC under-calculated by nearly half the amount of contributions SEIU PEAFF failed to disclose.

According to the PDC's notice of resolution, "SEIU PEAFF failed to timely report \$1,534,947 in contributions received from SEIU in Washington, DC for the 2018 elections..." This is incorrect. The correct amount not disclosed is \$2,770,463.

The original complaint alleged SEIU PEAFF failed to disclose:

- A \$1,235,207 contribution it received on January 10, 2018;
- A \$180,000 contribution it received on June 8, 2018;
- A \$203,499 contribution it received on July 26, 2018; and,
- A \$1,355,256 contribution it received on August 21, 2018.

¹ The PDC's notice of resolution is available online at: <https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/2109/SEIU%20PEAFF%20Complaint%20Return%20with%20Warning%20%28Nelson%20complaint%29%20PDC%20Case%2047303.pdf>

- Total allegedly not disclosed: \$2,973,962²

In its response, SEIU PEAFF acknowledged the contributions should have been disclosed but pointed out it did, in fact, disclose the July 26 contribution on its form C5 submitted (three days late) on August 13, 2018,³ which I acknowledged in my complaint supplement of March 20, 2019.⁴

The amended forms C5 filed by SEIU PEAFF filed on March 12, 2019 disclosed the other three contributions, however, totaling \$2,770,463 (\$1,235,207+\$180,000+\$1,355,256), not \$1,534,947.

2. The PDC understated the severity of SEIU PEAFF's violations by describing its failure to disclose contributions as a failure to timely disclose.

In its notice of resolution, the PDC describes SEIU PEAFF's disclosure deficiencies noted above as merely a "[failure] to *timely* report" (emphasis added). This is incorrect.

None of the above contributions had been disclosed as of the time the original complaint was filed on February 18, 2019. SEIU PEAFF filed its amended forms C5 disclosing the contributions several weeks later — only after receiving notice of the complaint — on March 12. This is properly categorized as a failure to disclose, not merely failure to *timely* disclose.

However, it bears reiterating that SEIU PEAFF *did* fail to timely report other expenditures and contributions, as noted in the original complaint. Specifically,

- SEIU PEAFF's form C5 for May 2018 was submitted seven days late, thus failing to *timely* disclose a \$206,562.19 expenditure and eight contributions totaling \$2,043,932.43.
- Its June 2018 form C5 was submitted one day late, thus failing to *timely* disclose a \$148,072.73 expenditure and two contributions totaling \$328,072.73.
- SEIU PEAFF filed its form C5 for July 2018 three days late, thus failing to *timely* disclose a \$203,498.75 expenditure and a \$203,498.75 contribution.

The distinction between (1) disclosing contributions and expenditures on a report filed late and (2) failing to disclose contributions and expenditures at all until after the start of formal enforcement proceedings is surely a difference of kind, not merely degree.

Thus, to summarize, SEIU PEAFF failed to disclose receipt of three contributions totaling

² The original complaint is available online at: <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/2109/47303%20SEIU%20Political%20Education%20and%20Action%20Fund%20Complaint.pdf>

³ SEIU PEAFF's response to the original complaint is available online at: <https://pdc-case-tracking.s3-us-gov-west-1.amazonaws.com/2109/47303%20SEIU%20Political%20Education%20and%20Action%20Fund%20Response.pdf>

⁴ The supplemental complaint is available online at: <https://www.freedomfoundation.com/wp-content/uploads/2019/05/PDC-Case-47303-Complaint-supplement.pdf>

\$2,770,463 while also failing to timely disclose three expenditures totaling \$558,133.67 and 11 contributions totaling \$2,575,503.91.

3. If the PDC’s resolution treated SEIU PEAFF’s violations as “remedial” or “technical,” despite the admitted factual record proving SEIU PEAFF committed “actual” violations, then it violated the law and its own regulations.

In its notice of resolution, the PDC stated, “the facts in this instance do not amount to a finding of an actual violation warranting further investigation...” This is simply incorrect as a matter of law. SEIU PEAFF did commit “actual violations” of the FCPA.

RCW 42.17A.755(1) requires the PDC take one of several courses of action when presented with a complaint. It “must”:

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

The PDC did not begin an investigation “to determine whether an actual violation has occurred” under (b), nor did it refer the complaint to the Attorney General under (c). The PDC dismissed under (a) the allegations that SEIU PEAFF had violated RCW 42.17A.405 and RCW 42.17A.442 by failing to receive contributions of at least \$10 from at least 10 Washington voters.

It is unclear how the PDC believes it processed the allegations regarding SEIU PEAFF’s late filing of forms C5 and failure to disclose contributions. The PDC may have proceeded under RCW 42.17A.755(1)(a) “in accordance with subsection (2)” which provides:

- “(2)(a) For complaints of remedial violations or requests for technical corrections, the commission may, by rule, delegate authority to its executive director to resolve these matters in accordance with subsection (1)(a) of this section, provided the executive director consistently applies such authority.”

However, SEIU PEAFF’s violations were neither “remedial” nor “requests for technical corrections.” They were “actual violations” as defined by the law.

a. SEIU PEAFF’s violations were “actual violations.”

RCW 42.17A.005(2) defines an “actual violation” as one “that is not a remedial violation or technical correction.” Thus, violations are considered “actual violations”

by default unless they meet the criteria to be considered lesser “remedial” or “technical” violations. Since SEIU PEAFF’s late reporting and failure to report contributions are neither “remedial violations” nor “technical corrections,” they are, by definition, “actual violations.”

b. SEIU PEAFF’s violations were not “remedial”

As defined by RCW 42.17A.005(45), a “remedial violation” is one that meets all of the following criteria:

- “(a) Involved expenditures totaling no more than the contribution limits set out under RCW 42.17A.405(2) per election, or one thousand dollars if there is no statutory limit;
- (b) Occurred:
 - (i) More than thirty days before an election, where the commission entered into an agreement to resolve the matter; or
 - (ii) At any time where the violation did not constitute a material violation because it was inadvertent and minor or otherwise has been cured and, after consideration of all the circumstances, further proceedings would not serve the purposes of this chapter;
- (c) Does not materially affect the public interest, beyond the harm to the policy of this chapter inherent in any violation; and
- (d) Involved:
 - (i) A person who:
 - (A) Took corrective action within five business days after the commission first notified the person of noncompliance, or where the commission did not provide notice and filed a required report within twenty-one days after the report was due to be filed; and
 - (B) Substantially met the filing deadline for all other required reports within the immediately preceding twelve-month period; or
 - (ii) A candidate who:
 - (A) Lost the election in question; and
 - (B) Did not receive contributions over one hundred times the contribution limit in aggregate per election during the campaign in question.”

The largest contribution limit specified in RCW 42.17A.405(2) and updated by WAC 390-05-400 is \$2,000 for state and special purpose district elections. The \$558,133.67 in late reported expenditures by SEIU PEAFF exceeds this threshold by several orders of magnitude, so prong (a) above is not satisfied.

SEIU PEAFF’s form C5 submitted July 11, 2018 was one day late and failed to disclose a \$180,000 contribution. These violations were committed within 30 days of the state primary election on August 7, 2018. Similarly, SEIU PEAFF’s failure to disclose a \$1,355,256 contribution on its form C5 on October 10, 2018 occurred within 30 days of the state general election on November 6, 2018, so prong (b) is also not satisfied.

Given that the primary purpose of the Fair Campaign Practices Act is to ensure “that political campaign... contributions and expenditures be fully disclosed to the public,”⁵ SEIU PEAFF’s failure to disclose \$2,770,463 in contributions materially affected the public interest. Accordingly, prong (c) is not satisfied.

The PDC opened Case No. 47303 on February 19, 2019. SEIU PEAFF filed its amended forms C5 21 days later, on March 12, 2019. Thus, it did not take corrective action within five days of being notified of its noncompliance. Further, as three of its five forms C5 for 2018 were submitted late, SEIU PEAFF cannot be said to have “substantially met the filing deadline for all other required reports” during the prior 12 months. Therefore, prong (d)(i) is not satisfied. Because SEIU PEAFF is not a candidate, (d)(ii) is inapplicable.

In short, SEIU PEAFF’s violations meet none of the criteria to be considered “remedial.”

c. SEIU PEAFF’s violations did not involve “requests for technical corrections.”

RCW 42.17A.005(51) defines “technical correction” as:

“...a minor or ministerial error in a required report that does not materially impact the public interest and needs to be corrected for the report to be in full compliance with the requirements of this chapter.”

SEIU PEAFF’s violations do not meet this definition.

First, given that the primary goal of the FCPA is to ensure “that political campaign... contributions and expenditures be fully disclosed to the public,”⁶ SEIU PEAFF’s failure to disclose receipt of three contributions totaling \$2,770,463, failure to timely disclose three expenditures totaling \$558,133.67, and failure to timely disclose 11 contributions totaling \$2,575,503.91 over the course of a major election year had a materially negative impact on the public interest.

Second, filing a required report late does not constitute an “error *in* a required report” (emphasis added). By definition, filing a report late is not a “technical correction,” primarily because lateness cannot be corrected.

Some of the inaccuracies on SEIU PEAFF’s forms C5 do qualify as technical. For example, SEIU PEAFF checked the “yes” box on item 10 of its March 7, 2018 form C5, falsely indicating its year-to-date expenditures in Washington represented “20% or more of the committee’s nationwide campaign activity.” Had SEIU PEAFF *actually* made 20 percent of its expenditures in Washington, WAC 390-16-049 would have required it to register as an in-state political committee with additional disclosure obligations. But because the “yes” box was checked in error, SEIU PEAFF did not

⁵ RCW 42.17A.001(1).

⁶ *Ibid.*

actually have a legal obligation to register as an in-state political committee, the public interest was not affected, and a “request for technical correction” would have been appropriate.

However, SEIU PEAFF’s late reporting and failure to disclose millions of dollars in contributions most certainly do not meet the definition of “technical correction.”

Nevertheless, the PDC appeared to resolve the complaint as though the violations involved were not “actual violations,” but merely a matter of “technical correction.”

It issued a warning letter to SEIU PEAFF “pursuant to WAC 390-37-060(1)(b),” which provides:

“(1) Upon receipt of a complaint, the PDC staff will conduct an initial review of the complaint pursuant to WAC 390-37-005...

(b) The executive director may resolve a matter as a technical correction pursuant to RCW 42.17A.755. PDC staff will notify the respondent of the need to make a correction and the deadline by which that correction must be made. The deadline will be no less than five days and no more than thirty days from the date of the notification. The failure to make the requested correction may result in the initiation of an investigation or other enforcement action.”

As has been established, SEIU PEAFF’s violations did not involve “technical corrections.” Further, WAC 390-37-060(1)(b) makes no provision for the PDC to resolve a matter involving a “technical correction” via a warning letter.

- 4. If the PDC intended to resolve the complaint as a “minor violation” under WAC 390-37-061, it did so in violation of RCW 42.17A.755 and RCW 42.17A.001(1) which conflict with and supersede the regulation and, even if the regulation did not conflict with the FCPA, SEIU PEAFF’s violations were not “minor” for the purposes of WAC 390-37-061.**

It is possible the PDC’s notice of resolution mistakenly referenced WAC 390-37-060(1)(b), and that it actually intended to reference WAC 390-37-060(1)(d), which provides:

“The executive director may resolve any complaint that alleges minor violations of chapter 42.17A by issuing a formal written warning. If the resolution is conditioned upon the respondent reaching or maintaining compliance, specific expectations and any deadlines will be clearly explained in the written warning. A respondent’s failure to meet conditions may result in a complaint being reopened.”

What constitutes a “minor violation” is not specified in statute, but in PDC regulations. If the PDC intended to resolve the complaint as pertaining to a “minor violation,” which it did not indicate in its notice of resolution, it would have had to do so in accordance with WAC 390-37-061, which provides:

“(1) In considering appropriate responses to actual violations, as that term is used in the act, the PDC staff considers whether an investigation or adjudicative proceeding constitutes an efficient and effective use of public funds; or whether an alternative response better meets the PDC’s mission and public expectations by allowing the expedited resolution of minor violations, and the focusing of resources on more significant violations of chapter 42.17A RCW and Title 390 WAC.

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

(a) When required information is not timely disclosed, but the public is not deprived of critical information; or

(b) When incomplete information is disclosed, but a good faith effort to comply with disclosure is made, and the public is not deprived of critical information.

(c) When any other violation of chapter 42.17A RCW has occurred that does not materially affect the public interest.”

a. WAC 390-37-061 conflicts with and is preempted by RCW 42.17A.755 and RCW 42.17A.001(1).

While the PDC has been granted authority to engage in rulemaking, any rules it adopts must “carry out the policies and purposes” of the FCPA.⁷

WAC 390-37-061 may have been valid at the time the regulation was first adopted by the PDC in 2016,⁸ but passage of HB 2938 in 2018 rendered it largely unenforceable.⁹

As a result of this legislation, RCW 42.17A.755(1) now requires the PDC to take one of several actions after a complaint has been submitted. It “must” either: (1) dismiss the complaint; (2) resolve it as a remedial violation or request for technical correction; (3) initiate an investigation, conduct hearings and issue an enforce an appropriate order; or (4) refer the complaint to the Attorney General.

The PDC dismissed the part of the complaint alleging violations of RCW 42.17A.405 and RCW 42.17A.442 as those statutes have been held unconstitutional by Washington courts. But the PDC took none of the other actions it “must” take regarding SEIU PEAFF’s actual violations of late reporting and disclosure deficiencies. Neither RCW 42.17A.755 nor any other statute permits the PDC to designate some “actual violations” as merely “minor” and resolve them with a warning letter.

Accordingly, WAC 390-37-061 conflicts with RCW 42.17A.755, does not “carry out the policies and purposes” of the FCPA established by RCW 42.17A.001(1), and is of no legal effect.

⁷ RCW 42.17A.110(1).

⁸ WSR 16-01-015.

⁹ <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2938-S.SL.pdf>

b. SEIU PEAFF's violations were not "minor" for the purposes of WAC 390-37-061.

Even if the enforcement process for "minor violations" established by WAC 390-37-061 was valid and statutorily authorized, SEIU PEAFF's violations still would not qualify as "minor" for purposes of the regulation.

While "critical information" for the purposes of WAC 390-37-061 is not defined, it is unreasonable to conclude that SEIU PEAFF's failure to disclose three contributions totaling \$2,770,463 during an election year did not consist of "critical information" and did not "materially affect the public interest," especially in light of the FCPA's goal "that political campaign... contributions and expenditures be fully disclosed to the public."¹⁰ Even the PDC's resolution notice acknowledged (despite dramatically understating the contribution amounts SEIU PEAFF failed to disclose), that "the amount of [not] reported contributions was significant."

SEIU PEAFF's explanation for its failure to report the contributions is that the funds "were not deposited into the particular bank account that SEIU PEAFF uses for its Washington State expenditures...", though it admits that the receipt of the funds "should have been reported by SEIU PEAFF on its C-5 filings." The PDC described this as a "mitigating factor."

But *any* out-of-state political committee — which, by definition, makes less than 20 percent of its expenditures in Washington — could make a version of this argument and claim that its violations involved the other 80-percent-plus of its funds not involving Washington expenditures. Under the PDC's view, merely operating as an out-of-state political committee and being less engaged in Washington politics than an in-state political committee may be considered a "mitigating factor."

State law has clearly established reporting requirements for out-of-state political committees, and all parties involved admit SEIU PEAFF violated these requirements repeatedly over the course of an election year involving millions of dollars. As a matter of law, the violations cannot be described as "minor."

Under the FCPA, a "mitigating factor" is something to be taken into consideration when determining the severity of a penalty; it is not determinative of whether a violation occurred. In other words, the existence of a "mitigating factor" does not transform an actual violation into a non-violation.¹¹

Lastly, SEIU PEAFF provided no excuse or explanation for the lateness of three of its five 2018 forms C5.

¹⁰ *Ibid.*

¹¹ *See, e.g.,* RCW 42.17A.750(1)(d).

5. If the PDC intended to dismiss the entire complaint pursuant to RCW 42.17A.755(1) while acknowledging SEIU PEAFF broke the law, it did so in violation of PDC regulations which only grant the executive director authority to dismiss “obviously unfounded or frivolous” complaints.

The PDC’s letter to the Freedom Foundation acknowledged that SEIU PEAFF committed at least some of the significant violations of the FCPA alleged in the complaint, but resolved those with a mere warning letter, while dismissing the other aspects of the complaint pursuant to RCW 42.17A.755(1).

However, the PDC’s shorter letter to SEIU PEAFF warned it about compliance with C5 disclosure requirements and concluded by stating, “the PDC has dismissed this matter in accordance with RCW 42.17A.755(1).”

It is possible that, for legal purposes, the PDC considers the entirety of its resolution of Case No. 47303 as a “dismissal” under RCW 42.17A.755(1). If this is the case, the PDC’s position should have been expressly articulated. Nevertheless, such a dismissal would violate the PDC’s own rules.

When presented with a complaint, WAC 390-37-005 requires the PDC to review and categorize it accordingly:

- “(2) Upon initial review, a matter may be preliminarily categorized as:
- (a) Unfounded or frivolous, pursuant to WAC 390-37-060;
 - (b) A remedial violation, pursuant to RCW 42.17A.005;
 - (c) Appropriate for resolution as a technical correction, pursuant to RCW 42.17A.005;
 - (d) A minor violation, appropriate for alternative resolution alternatives, pursuant to WAC 390-37-061;
 - (e) Appropriate for investigation as to whether or not there has been a material actual violation eligible for resolution pursuant to RCW 42.17A.005(2);
 - (f) Appropriate for referral to the attorney general, pursuant to WAC 390-37-042;
- or
- (g) Other status as authorized and appropriate under chapter 42.17A RCW or Title 390 WAC.”

The only option provided for complete dismissal is if the complaint is “unfounded or frivolous” pursuant to (a).

Under WAC 390-37-060(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.”

However, in this case SEIU PEAFF *admitted* it violated the law and the PDC itself described its violations as “significant.” In short, the complaint was not “obviously unfounded or frivolous,” based on the PDC’s own statements, and complete dismissal would be in violation of PDC-adopted regulations.

In light of these facts, the only legal and proper course of action for the PDC to take would be to “initiate an investigation to determine whether an actual violation has occurred, conduct hearings, and issue and enforce an appropriate order” as required by RCW 42.17A.755(1)(b) and in accordance with RCW 42.17A.755(3). As it has technically closed Case No. 47303 at this time, it may be necessary for the PDC to initiate a new complaint against SEIU PEAFF, an action it is empowered to do by RCW 42.17A.755(1). Alternatively, if preferable to the PDC, the Freedom Foundation would happily re-submit its complaint for proper processing and resolution.

In addition, further rulemaking may be required to ensure the PDC’s regulations governing the handling of citizen complaints align with the statutory requirements of the FCPA.

I was somewhat reluctant to write so comprehensively on this issue and hesitated as to whether to raise it at all, given that a certain degree of discretion is inherent and necessary in all day-to-day administrative operations. However, given the increasingly singular role the PDC plays in interpreting and applying Washington’s campaign finance laws, I believe it is more important than ever, both for the sake of the rule of law and the PDC’s standing as an institution, that the PDC’s decision-making be firmly grounded in fact and law.

If any of the foregoing analysis is, in the PDC’s view, incorrect, I would respectfully request and welcome a written explanation setting forth its faults in order that my understanding of the FCPA may be further enlightened and my future efforts to aide in its enforcement more productively directed.

Sincerely,



Maxford Nelsen
Director of Labor Policy
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
(360) 956-3482
MNelsen@FreedomFoundation.com

Copied:

Anne Levinson, Chair, Public Disclosure Commission
David Ammons, Vice Chair, Public Disclosure Commission
William Downing, Member, Public Disclosure Commission
Russell Lehman, Member, Public Disclosure Commission
Fred Jarrett, Member, Public Disclosure Commission