BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF ENFORCEMENT ACTION AGAINST DON BIVINS, Respondent.	PDC CASE NO. 02-286[1] FINAL ORDER

The Washington State Public Disclosure Commission (Commission) conducted an adjudicative proceeding (enforcement hearing) in this matter on March 31, 2005 at the Commission Offices at the Evergreen Plaza Building, 711 Capitol Way, Room 206, Olympia, Washington. The hearing was held pursuant to chapter 34.05 RCW, chapter 42.17 RCW, WAC 390-37, and WAC 10-08. The Commissioners present included: Michael Connelly, Chair; Earl Tilly, Member; Jane Noland, Member; Bill Brumsickle, Member. Senior Counsel Nancy Krier, Commission counsel, was also present.

Appearing for the PDC staff were: Senior Assistant Attorney General Linda Dalton, and PDC staff member Suemary Trobaugh, Political Finance Specialist 2. Also present were: Vicki Rippie, PDC Executive Director.

[1] Three cases originally had this PDC case number for the purposes of investigation and hearing. For clarity, the cases have been assigned separate case numbers in the final orders. They are: Don Bivins (Case No. 02-286); Marilyn Westlake (Case No. 05-202); Marty James (Case No. 05-203).

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Licensing & Administrative Law Division
1125 Washington Street, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

Appearing for the Respondent Don Bivins[2] were: attorneys Brian Wolfe (on matters not directly related to Mr. Bivins' employment) and Vancouver Chief Assistant City Attorney Judith Zeider (on other matters). Mr. Bivins was also present. Mr. Bivins is the Fire Chief for the City of Vancouver Fire Department.

Mr. Wolfe and Ms. Zeider also represented Respondent Marilyn Westlake on different matters (Mr. Wolfe on matters not directly related to Ms. Westlake's employment, and Ms. Zeider on other matters). Ms. Westlake was also present. Ms. Westlake is the Education Outreach Coordinator for the Vancouver Fire Department.

Also present was: attorney Thomas Burke, representing Respondent Marty James. Mr. James was also present. Mr. James is the Administrator for Clark County Fire District No. 5.

PDC staff member Ruthann Bryant served as recorder/reporter of proceedings. The proceedings were recorded. The proceedings were open to the public.

The hearing concerned allegations that the Respondents violated RCW 42.17.130. The statute provides restrictions on the use of public facilities to support or oppose campaigns. The campaign at issue involved a February 5, 2002 Emergency Medical Services (EMS) levy for the Vancouver Fire Department and the Clark County Fire District No. 5.

I. PREHEARING PROCEDURAL MATTERS

Prehearing matters were governed by the procedures set out in a Prehearing Order dated February 3, 2005, as supplemented in discussions with the chair Michael Connelly during a prehearing conference on March 23, 2005 and subsequent procedures confirmed by the agreement of the parties by an email from Ms. Krier to the parties and chair that day.

II. OTHER PREHEARING MATTERS

Other prehearing matters were addressed on March 31, 2005, prior to the hearing. Those included:

[2] Mr. Bivins name is spelled correctly here but has been misspelled in some of the pleadings and other materials submitted to the Commission.

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1. Dismissal of allegations against Vancouver City Attorney Ted Gathe. The Commission unanimously dismissed the allegations.
2. Dismissal of allegations by the Respondents Bivins and Westlake concerning a press release issued February 5, 2002. The Commission unanimously dismissed the allegations.
3. A proposed Stipulation as to Facts (Stipulation), and agreement by the parties to waive oral reading of the Stipulation into the record. The Commission unanimously accepted the Stipulation, and waived oral reading. A copy of the Stipulation is attached to this Order and incorporated by reference.
4. Admission of exhibits. The parties' exhibits were admitted through the agreement of the parties (PDC Staff exhibits S-1 through S-3; and Respondents' exhibits 1-RJ through 23-RJ, 2-BW through 8-BW). Exhibits 1-BW, 9-BW and 10-BW were withdrawn by the agreement of the parties.
5. Time for presentation of case and argument. Following discussion, PDC staff were allotted 1.5 hours, and Respondents allotted 4 hours.

III. HEARING

Argument Considered

The Commission considered the briefs submitted by the parties and the oral argument of their counsel. Those briefs included: "Hearing Brief of Respondents Bivins and Westlake," "Hearing Brief of Respondent Marty James, Clark Fire District #5 Administrator," and "Staff Response to Brief of Respondents Bivens (sic) and Westlake."

Evidence Considered

The Commission considered the written and oral evidence offered by the parties. That evidence included the Stipulation, the written exhibits as stipulated for entry, and the testimony of witnesses as follows:

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Licensing & Administrative Law Division
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Stipulation: Stipulation as to Facts dated March 31, 2005.

Exhibits: PDC Staff exhibits S-1 through S-3 with attachments; and Respondents' exhibits 1-RJ through 23-RJ, and 2-BW through 8-BW.

Testimony: The Commission considered the oral testimony of the following persons. For the PDC Staff – Suemary Trobaugh and Phil Stutzman. For Respondents – Pat McDonnell, Jim Crawford, Jeff Williams, Jim Demmon, Keith Flewelling, Marilyn Westlake, Don Bivins and Marty James.

Based upon the above, the Commission makes the following findings and conclusions:

IV. FINDINGS OF FACT

1-16. All facts as stipulated to in the Stipulation will be designated as Findings of Fact 1-16.

17. The Commission finds that several of the written materials at issue were prepared by or with the direction of the Respondents and were prepared and distributed using public facilities. The Commission finds that several of the written materials at issue were promotional for the campaign seeking the public's vote to support the EMS levy in the election. Other written materials at issue were not promotional of the EMS levy campaign.

18. The Commission finds that Exhibits 18-RJ (*Lifeline* Summer 2001 edition) and 19-RJ (*Lifeline* Fall 2001 edition) were not promotional with respect to the EMS levy campaign.

19. The Commission finds that Exhibit 20-RJ (*Lifeline* Winter 2002 edition) was promotional and was intended to support the EMS levy campaign.

20. The Commission finds that Exhibit 9-D attached to Exhibit S-2 (the "fact sheet") was not promotional with respect to the EMS levy campaign.

21. The Commission finds that Exhibit 21-RJ (six web pages) contained information promotional of the EMS levy campaign, specifically on pages three and four.

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22. The Commission finds that Exhibits 10-RJ and 11-RJ (news releases) were not promotional with respect to the EMS levy campaign.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear this matter pursuant to RCW 42.17.350 et seq., including RCW 42.17.370(5).

2. RCW 42.17.130 provides:

> No elective official nor any employee of his 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 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: PROVIDED, That the foregoing provisions of this section shall not apply to the following activities:
>
> (1) Action taken at an open public meeting by members of an elected legislative body 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 proposition, and (b) members of the legislative body 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.

3. The PDC staff has the burden to establish a violation of RCW 42.17.130.

4. The PDC has adopted two rules regarding RCW 42.17.130, and they are at WAC 390-05-271 and –273.

5. The Commission unanimously concludes that the Respondent Bivins committed four violations of RCW 42.17.130 by using public facilities to support a levy campaign in

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authorizing the campaign brochure (the newsletter at Exhibit 20-RJ), by using his Vancouver Fire Department vehicle to store levy campaign materials and handing out the materials to campaign volunteers while on duty, by using his Vancouver Fire Department telephone on several occasions to discuss campaign related activities, and by using his Vancouver Fire Department computer to send campaign related e-mails on approximately six occasions. The Commission therefore enters the following order, and authorizes the Executive Director to sign on its behalf.

VI. ORDER

1. The Respondent committed four violations of RCW 42.17.130.
2. The Commission imposes a penalty of $1000 and suspends $500 if there are no future violations of RCW 42.17 by Respondent within two years of the date of this order.

VII. APPEALS

RECONSIDERATION OF FINAL ORDER - COMMISSION

Any party may ask the Commission to reconsider this final order. Parties must place their requests for reconsideration in writing, include the specific grounds or reasons for the request, and deliver the request to the Public Disclosure Commission Office within **TEN (10) days** of the date that the Commission serves this order upon the party. Pursuant to RCW 34.05.470(3), the Public Disclosure Commission is deemed to have denied the petition for reconsideration if, within twenty (20) days from the date the petition is filed, the Commission does not either dispose of the petition or serve the parties with written notice specifying the date by which it will act on the petition. Pursuant to RCW 34.05.470(5), the Respondent is not required to ask the Public Disclosure Commission to reconsider the final order before seeking judicial review by a superior court.

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FURTHER APPEAL RIGHTS – SUPERIOR COURT

Pursuant to RCW 42.17.395(5), a **final order** issued by the Public Disclosure Commission is subject to judicial review under the Administrative Procedures Act, chapter 34.05 RCW. The procedures are provided in RCW 34.05.510 - .598. Pursuant to RCW 34.05.542(2), a petition for judicial review must be filed with the superior court in Thurston County or the petitioner's county of residence or principal place of business. The petition for judicial review must be served on the Public Disclosure Commission and any other parties within **30 days** of the date that the Public Disclosure Commission serves this final order on the parties.

If reconsideration is properly sought, the petition for judicial review must be served on the Public Disclosure Commission and any other parties within thirty (30) days after the Commission acts on the petition for reconsideration.

ENFORCEMENT OF FINAL ORDERS

The Commission will seek to enforce this final order in superior court under RCW 42.17.395-.397, and recover legal costs and attorney's fees, if the penalty remains unpaid and no petition for judicial review has been filed under chapter 34.05 RCW. This action will be taken without further order by the Commission.

So ORDERED this 13th day of May, 2005.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION

Vicki Rippie

VICKI RIPPIE
Executive Director

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

Attachment: Stipulation as to Facts dated March 31, 2005

MAILING DATE OF THIS ORDER:

May 13, 2005 RB

Copies of this Order to:

Linda Dalton
Senior Assistant Attorney General
Washington State Attorney General's Office
Government Compliance and Enforcement Division
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504-0100

Nancy Krier
Senior Counsel
Washington State Attorney General's Office
Licensing and Administrative Law Division
1125 Washington St. SE
P.O. Box 40110
Olympia, WA 98504-0110

Judith Zeider
Chief Assistant City Attorney
P.O. Box 1995
Vancouver, WA 98668

Brian H. Wolfe
105 W. Evergreen Blvd, Suite 200
Vancouver, WA 98660

Thomas Burke
Snure, Regeimbal & Burke, PLLC
Attorneys at Law
612 South 227th Street
Des Moines, WA 98198

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702