



Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

March 5, 2007

The Honorable Representative Sam Hunt
Chair, State Government and Tribal Affairs Committee
Washington State House of Representatives
438B Legislative Building
PO Box 40600
Olympia, WA 98504-0600

Dear Chairman Hunt:

HB 2079, according to remarks made by Rep. McDermott during the Feb. 20 hearing in the Committee on State Government & Tribal Affairs, is intended to specify an acceptable accounting principle for compliance with 760. He also said the bill would not interfere with the Supreme Court's pending decision. However, it appears that the bill, as written, will have consequences that this characterization would suggest are unintended.

This bill has the potential to nullify a protection validated by a huge majority of Washington voters, as part of Initiative 134 in 1992. Attorney General McKenna argued to the US Supreme Court, in support of the statute this bill amends (42.17.760), that the initiative's purpose was to ensure that employees would not be required "to say 'no' twice" -- first to membership in a labor organization, and again to avoid financing the organization's politics through compelled payroll deductions for agency shop fees. This bill, as written, would not only require nonmembers to say "no" twice, it may have the effect of voiding the employee's second "no," because its language provides that, in effect, if there are member dues sufficient to pay for a union's election activities, then nonmembers' fees are not used to pay for those activities.

The different use of member dues and nonmember fees may even render the bill invalid under the US Constitution. Under established constitutional jurisprudence, agency shop fees may be imposed upon non-member employees by the state only to avoid "free riders" in the union workplace, and only to the extent necessary for the non-members to pay their "fair share." The US Supreme Court has stated that the nonmember may not be required to subsidize the members' political or other activities not related to collective bargaining by having their compelled agency shop fees used differently from dues -- dues for politics and fees for collective bargaining:

"If the union's total budget is divided between collective bargaining and institutional expenses [such as election expenditures] and if nonmember payments, equal to those of a



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member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share". *Aboud v. Detroit Board of Education*, 431 U.S. 209, 238 n.35 (1977). "The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses.... By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities." *Id.*

This bill states that agency shop fees are not used for politics, if there are "sufficient" revenues "other than agency shop fees" to fund the union's political agenda. Members' dues constitute "other" revenues under this amendment. Thus, members dues would be used for politics, and agency shop fees would not. This is disproportionate use of fees and dues -- subsidization by nonmembers -- which is constitutionally forbidden.

Even if the bill did not bring about an unconstitutional subsidization by nonmembers, it strips the existing statute of any effect whatsoever. A union's revenues from union members' dues will always be more than from agency shop fees, because a majority of employees must join together to form a union. Unless the union's politics cost more than the combined total of revenues from dues alone, which is unlikely, this bill makes it impossible for a union to ever use agency shop fees for politics. There would be no need for the affirmative authorization provided in subsection (1) and, at a minimum, this bill would have an effect equivalent to repealing the existing statute.

This bill may further authorize the use of agency fees exclusively for a union's election expenditures, in contrast to the original intent of the statute as passed in Initiative 134. The bill does not provide that agency shop fees it affects must be deposited and used from the "general treasury." Therefore, agency shop fees could be put into a separate fund, and used exclusively for elections, but this bill as written would nevertheless declare the legal fiction that the union does "not use" the fees for politics.

There are also issues of construction of the language in this bill that are likely to lead to litigation. First, the bill uses the term "general treasury", but provides no definition of what constitutes "general treasury" or "general treasury funds." This alone is likely to generate a great deal of confusion. Moreover, depending upon the meaning of this term, unions might be compelled to alter their accounting and/or banking practices to benefit from the bill.

The bill uses the term "other revenues", but fails to require that "other revenues" relied upon for political use are, in fact, permitted to be used for the union's politics. The problem with dues as another source of revenues is addressed above. Revenues other than dues and agency fees do exist. However, many funds received by unions have designated uses, which may not include politics. For example, a union may receive revenues designated for use only for construction, yet this bill would allow the union to artificially credit those revenues to its political expenditures.

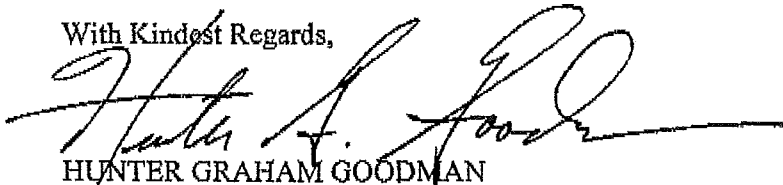
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Please let me know if you have any questions concerning the aforementioned. I can be reached at (360) 586-0729.

With Kindest Regards,

A handwritten signature in black ink, appearing to read "Hunter A. Goodman", written over a horizontal line.

HUNTER GRAHAM GOODMAN
Assistant Attorney General
Director of Governmental Affairs
Office of the Attorney General

cc: Legislative members of the State Government and Tribal Affairs Committee