

Arguments for Waiving the Penalty in L7782 and L7783

1. Cox is not required to file under ORS 260.044, but under ORS 260.058.
2. The Elections Division is using the wrong dates for these cases. Using the correct dates, the reports were not late.
3. The Elections Division gave inaccurate information to Cox which directly caused the lateness.
4. The inaccurate information provided by the Elections Division was relied upon by Cox in the timing of his reportable activities. Had Cox been given correct information, he would not have loaned the \$50,000 to his campaign until later in the election cycle. This loan was the only reportable transaction referenced in L7782. Therefore L7782 should be dismissed or the penalty waived.
5. Any other interpretation of election law will place an undue reporting burden on minor party candidates such as Cox and could throw major party reporting into chaos.
6. Cox has made good faith efforts at all times to comply with Elections Division wishes.

1. Cox is not Required to File the Described Reports on the Stated Deadlines

The Elections Division contends that Cox must file reports for the Major Party Primary Election held on May 18, 2004 because of obligations arising from ORS 260.044. This is incorrect. Cox was not a candidate in that election and is not a Major Party nominee. Cox's name did not appear on the Major Party Primary Election ballot. 260.044 requires some candidates to file reports for the Major Party Primary Election, but Cox is specifically exempt from that requirement.

Cox was a candidate in his party's nominating election on January 24, 2004. Cox won that nominating election and filed SEL 110, "Filing of Candidacy for Minor Political Party by Certificate of Nomination." The Elections Division received this filing along with its statement of organization, and acknowledged both. The Elections Division assigned him a committee number, 004809, at that time.

Generally, every candidate in the General Election has two reporting periods – one during which he gets or attempts to get on the General Election ballot, and another during the General Election itself.

The purpose of 260.044 is to define who is and who is not a "principal campaign committee" and thus who must file statements with the Elections Division. The goal is to prevent a candidate from pretending to not be a candidate prior to the General Election and thus evade filing during more than one reporting period. (Cox stipulates that he is a candidate and that Cox for Oregon is his principal campaign committee.) It is not the purpose of this section to provide the dates that reports are due. Elections Division counsel was perhaps misled by the title of the section, "When person required to file..." This would be better understood as "Whether person required to file..." or "Under what circumstances person required to file..." since the subsections describe the circumstances under which persons are, or are not, considered political committees; see for example 260.044(4)(c).

The text of ORS 260.044(5) reads:

ORS 260.044(5) A person shall be a principal campaign committee if the person, in preparing to become a candidate in the general election, receives a contribution, receives a loan, whether repaid or not, or makes an expenditure in a total amount of more than \$2,000 before the date of the primary election. A

person described in this subsection shall file the statements required by ORS 260.058 as if the person were a candidate in the primary election. This subsection does not apply to a candidate in the primary or nominating election.

According to ORS 260.044(5), this filing requirement "does not apply to a candidate in the primary or nominating election." Cox was clearly "a candidate in the ... nominating election" for the office he is seeking – a nominating election that occurred on 24-Jan-2004 – therefore "this subsection does not apply" to him.

2. Elections Division is Using the Wrong Dates

Cox should report on the dates required under ORS 260.058, which are not the dates cited by the Elections Division.

ORS 260.058 defines Cox's times of filing. This applies to Cox because he is a member of the class of persons defined therein: he was a "candidate seeking nomination... at any election other than the general election..."

In 260.058(1) these filing dates are defined:

(a) A first preelection statement of contributions received and expenditures made by or on behalf of the candidate or the candidate's principal campaign committee, not sooner than the 46th day and not later than the 36th day before the date of the election.

For Cox the "date of the election" was not May 18, 2004. It was January 24, 2004, the date his party held its nominating convention. Therefore Cox's deadlines were December 9, 2003 and December 19, 2003. Cox had no reportable campaign contributions or expenditures at that time and had not even decided to seek nomination.

(b) A second preelection statement of contributions received and expenditures made by or on behalf of the candidate or the candidate's principal campaign committee, not sooner than the 15th day and not later than the 12th day before the date of the election.

Cox's second report would have been due between January 12 and January 15, 2004. Again Cox had no reportable activity and was not yet a candidate for the nomination.

(d) A post-election statement of contributions received and expenditures made by or on behalf of the candidate or the candidate's principal campaign committee, not sooner than the 21st day and not later than the 30th

day after the date of the election.

Cox's third report would have been due between February 14 and 23, 2004. Again Cox had no reportable activity. He was by now a candidate and should have filed a zero-balance Post Election Report. He did not do so.

It is particularly important to note that Cox could have spent more than \$2,000 in support of his candidacy at his party's nominating convention. It is Cox's contention that, had he done so, he would have been obliged to file C&E reports for that period, as described in ORS 260.058.

3. Elections Division gave Erroneous Information

On or about January 20th and again on or around March 1st Cox telephoned the Elections Division to verify which reports he would need to file and when. On both occasions he was given the same advice that the Elections Division has previously given to such Libertarian candidates as Richard Burke (1998), Mitch Shults (2000), and Cox himself (2002), as well as to the party's officers on numerous occasions – namely, that Libertarian candidates did not have to file C&E reports for the Republican or Democratic primaries, but only for the Libertarian nominating election. Cox believes that on one of these occasions he spoke with Summer, but doesn't recall the other person and cannot prove who he spoke with on either occasion. These conversations were not memorialized in writing at that time.

Independent corroboration of the Elections Division's prior advice to the above named committees can be found by examining the filings, filing dates, and penalties or lack thereof for those committees.

As a prudent person Cox sought verification of this advice by reading the relevant statutes and consulting with other candidates as named, as well as such noted experts as Bernard Bachand of Capitol On-Ramp. Cox was in discussions with Bachand as early as 2003 to acquire C&E reporting software. Cox and Bachand agreed there was no need for Cox to acquire the software too early, thus incurring unnecessary monthly fees. Bachand's advice was identical to that given by the Elections Division, namely that no reports by Cox would be due related to major-party primaries.

4. Cox Relied on Elections Division Advice in the Timing of His Activities

Based on the advice of the Elections Division, Cox chose to place his \$50,000 initial personal loan into his campaign bank account on March 24. That money was not used in any way during the first reporting period, as the filed report indicates – that deposit was the only transaction in the entire Major Party Primary First Pre-Election period. The same deposit delayed a few days, to April 2, would reduce Cox's fine in L7782 from \$10,000 to \$0.

Cox was and is fully aware of the relevant law and deadlines. Had the Elections Division not assured him he was exempt from Major Party Primary Election reporting requirements, he would have delayed the deposit, filed the First Pre-Election Report, or both. For this reason alone, the entire fine for L7782 should be waived, since the monies involved had no political effect whatever.

5. Any Other Interpretation of Election Law will Violate Statute or Constitute an Undue Burden

Based on the above discussion, the Elections Division has several options with regard to C&E reports by minor party (and major party) candidates. These are:

- A: **Report Based on the Party Nominating Process** – each minor party candidate will have to file a “Primary” report based on the date of his election at his party's nominating convention. This is directly analogous to the reporting required of major party candidates and would seem to be the clear intent of ORS 260.044 and .058.
- B: **Report Based on the Major Party Primary** – each minor party candidate will NOT file based on the timing of his own party's nominating process, but based on the major party primary date. This is nonsensical and flies in the face of the plain meaning and intent of ORS 260.058, but it would give Elections Division staff a single set of dates to be aware of. It would also shield from public scrutiny all candidate spending surrounding the seeking of a minor party nomination.
- C: **Report Twice Based on Both the Party Nominating Process and the Major Party Primary** – each minor party candidate would have to file two sets of reports, one for the period surrounding the Major Party Primary, and the other for the period surrounding his party's nominating process. In cases such as the Libertarian Party's recent May 8 nominating convention, 10 days prior to the Major Party Primary, this will involve potentially overlapping reporting periods and will be nightmarish to implement. Further, by doubling the reporting requirements of minor party candidates the Elections Division will be imposing an undue burden on such candidates – a burden not supported by statute.
- D: **Require all Candidates from All Parties to File Multiple Times** – the ultimate in fairness, this interpretation would require all major and minor party candidates to file C&E reports for the periods around all major and minor party primaries, conventions, and nominating processes, without regard for whether they are candidates in those nominating processes. In 2004 that would involve at least five different dates (one each for Green and Constitution and three for Libertarian) as well as the Major Party Primary. This interpretation would not place an extra burden on minor party candidates as compared to major party candidates, and would treat all candidates equally, but it would impose burdens not authorized by statute.
- E: **Implications if either Major Party switches to a Caucus Nominating Process** – an unstated assumption of the Elections Division in its reading of statute is that there is a single monolithic Major Party Primary election that all parties, major and minor, must report around. This is a misreading of the law. In several other states one or both major parties choose not to utilize the primary election provided by the state and instead conduct caucus meetings – nominating elections – just as the Libertarians did this year. Nothing prevents either major party from making this switch in Oregon. The current Elections Division reading of the law would require all candidates of both major parties to file multiple times around the dates of each others' caucus nominating elections (since these will be on different dates for the different parties) – a complication that only arises due to the misunderstanding of the candidate exclusion clause of 260.044(5). If 260.044 is read correctly, it only applies to persons who are attempting to be candidates in the general election but who attempt to avoid the reporting requirements of 260.058.

6. Cox has made good faith efforts at all times to comply with Elections Division wishes

It should be noted that Cox became aware of the Elections Division's desire for him to file C&E reports for the Major Party Primary only on June 7th. On that day he immediately acquired a laptop computer, drove to Salem, obtained C&E software from Capitol On-Ramp, and began entering his meticulously maintained paper records. Cox filed his first report with the Elections Division on June 8th and the second on June 9th. This indicates that Cox was entirely willing and able to comply with Elections

Division wishes whenever they were made clear, and it was only contrary advice from the Elections Division that caused these reports to be late.

Summary

It appears that some Elections Division staff and its counsel, having spent the vast majority of their time dealing with Major Party candidates, may perhaps be unfamiliar with the way in which reporting requirements apply to minor parties in Oregon. That unfamiliarity may be the source of either erroneous advice, mis-application of filing deadlines, or both. In either event complete relief from the civil penalties in L7782 and L7783 is justified under either of two grounds – first, that the lateness was caused by an error by the elections filing officer, namely in giving inaccurate advice, or second that there was no lateness at all because the wrong dates have been used by the Elections Division in this case.