

BILL BRADBURY
SECRETARY OF STATE



ELECTIONS DIVISION
JOHN LINDBACK
DIRECTOR
141 STATE CAPITOL
SALEM, OREGON 97310-0722
ELECTIONS—(503) 986-1518

BEFORE THE SECRETARY OF STATE
OF THE
STATE OF OREGON

In the matter of a Late Contribution and Expenditure Report) Final Order
by Cox for Oregon (Thomas B.), Thomas B. Cox,)
Candidate/Treasurer, for the Second Pre-Election for the) Case No. L7783
May 18, 2004, Primary Election)

August 27, 2004

Cox for Oregon (Thomas B.) (004809)
Thomas B. Cox, Candidate/Treasurer
12602 SW Farmington Rd
Beaverton , OR 97005

Dear Mr. Cox:

This is a Final Order issued by the Secretary of State (secretary) for your failure to file a timely second pre-election contribution and expenditure report for the May 18, 2004, Primary Election.

On June 18, 2004, the secretary notified Cox for Oregon (Thomas B.) (committee), pursuant to ORS 260.232(2), that it had failed to file the report and that the secretary may impose a civil penalty. An opportunity for a hearing was provided in that notice. The committee submitted written testimony in the form of a notarized statement in lieu of a personal appearance at a public hearing. Accordingly, after consideration of the applicable law and evidence presented, Jennifer Hertel, Hearings Officer with the Elections Division, is entering the following Order.

FINDINGS OF FACT

1. Thomas B. Cox filed an SEL 110, Filing of Candidacy for Minor Political Party by Certificate of Nomination for the November 2, 2004, General Election, for the office of State Representative, District 29, on January 26, 2004, as a Libertarian candidate, following the Libertarian Party's nominating convention held on January 24, 2004.
2. The committee's Statement of Organization (SEL 220), applicable during the reporting period, was filed with the secretary on February 2, 2004. The statement reported Thomas B. Cox, the candidate, as the treasurer and 12602 SW Farmington Rd, Beaverton , OR 97005 as the address to which all committee correspondence was to be sent.
3. The committee was required to file a second pre-election report with the secretary on May 6, 2004.

4. The secretary received the report on June 9, 2004, which is 23 business days after the date on which the report was due.
5. The committee reported total contributions of \$1,727.50 and total expenditures of \$10,327.87 during the accounting period for the report.
6. On June 18, 2004, the secretary sent the committee a Notice of Proposed Civil Penalty. The notice was sent by both certified and first class mail to the candidate/treasurer at the above-referenced address. The notice proposed a civil penalty of \$7,126.32 and allowed the committee 20 days to request a hearing. The notice sent by certified mail was received and signed for by Eric Sanelle on June 19, 2004.
7. On July 7, 2004, the secretary received a notarized letter from Tom Cox in lieu of a public hearing.
8. The letter—attached as Exhibit A—was reviewed, considered, and made part of the record.
9. The secretary has record of one previous late filing during the two-year period beginning September 15, 2003.

ULTIMATE FINDINGS OF FACT

Thomas B. Cox, Candidate/Treasurer, failed to file a timely second pre-election contribution and expenditure report for the May 18, 2004, Primary Election.

CONCLUSIONS OF LAW

Candidate/Treasurer Thomas B. Cox's failure to file a timely second pre-election contribution and expenditure report for the May 18, 2004, Primary Election violated ORS 260.044 and 260.058.

OPINION

Cox for Oregon (Thomas B.)'s second pre-election contribution and expenditure report, filed on June 9, 2004, was late. It was due by 5:00 p.m., May 6, 2004.

By statute, a maximum \$10,000 civil penalty may be imposed for this violation. The *2004 Campaign Finance Manual*, which contains a penalty calculation matrix on pages 101 and 102, is designated in OAR 165-012-0005 as the procedure manual for Oregon campaign finance regulations.

After reviewing and considering the evidence and information on file in this office, the hearings officer finds that there has been a violation of Oregon election law. The explanation provided in the notarized testimony does not mitigate the failure to file a report by the deadline. In a five-page affidavit submitted by the committee, Tom Cox states six arguments in his case for waiving the penalty.

Each of the specific concerns is addressed as follows:

Is Tom Cox required to file under ORS 260.044? ORS 260.044(5) states: "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."

Tom Cox is a person preparing to become a candidate in the general election, whose committee received a loan of \$50,000.00 from himself on March 24, 2004, before the date of the primary election and during the accounting period of the first pre-election report for the May 18, 2004, Primary Election. Even though he was not a candidate in the primary election, he was then required to file reports under ORS 260.058, as if he were a candidate in the primary election. The committee argues that this statute (ORS 260.044) does not apply to Tom Cox based on the last statement that it "does not apply to a candidate in the primary or nominating election." The committee's interpretation is that their Libertarian party's "nominating election" was held on January 24, 2004, and that Cox was a candidate in that election; therefore, this statute does not apply. However, a minor party's nominating convention is not an election. State statute establishes the "primary or nominating election" (basically, one and the same) as the third Tuesday in May of each even-numbered year to nominate major party candidates for the general election held that year. ORS 254.056(2). On rare occasions, a special primary election may be held at a different time; hence, the referral to primary or nominating election. Such an example is the December 5, 1995, Special U.S. Senate Primary Election, a special nominating election held because of a U.S. Senate vacancy. ORS 188.120. A minor party holds its own nominating convention under its party rules; however, minor parties do not hold primary or nominating elections. Therefore, ORS 260.044(5) does apply to Tom Cox.

Is the Elections Division using the wrong dates for these cases? The committee argues that Cox should report under ORS 260.058, the statute which cites filing periods for contribution and expenditure reports for candidates in elections other than the general election. The Elections Division establishes these dates based on the actual date of the election for that particular year. The committee argues that the dates based on this year's May 18, 2004, Primary Election are wrong for them, and they have created a schedule based on their January 24, 2004, nominating convention. If Cox had been allowed to report on these dates, instead of the dates established by the Election Division, he would not have exceeded \$2,000 before the date of "his" primary. ORS 260.058 does not apply to a minor party convention. The statutes do not establish separate "primary" dates for candidates of minor parties based on their own party conventions. The only primary election is the one held on May 18, 2004. Minor party candidates appear at only one election, the general election on November 2, 2004.

Did the Elections Division give erroneous information? The committee argues that Tom Cox had telephoned the Elections Division on two occasions and was given advice that Libertarian candidates do not have to file contribution and expenditure reports for the "Republican or Democratic primaries, but only for the Libertarian nominating election." The Elections Division has never received contribution and expenditure reports based on any minor parties' nominating convention. The Division has never established any reporting periods for

candidates based on any other dates than those for statewide primary, general, or special elections. In fact, the Libertarian candidate, Jay Bozievich, filed a post-election report for the May 21, 2002, Primary Election. He did this, after extensive email conversations with this office about proper reporting procedures, because he exceeded \$2,000 on May 9, 2002, before the date of the primary election of that year but during the post-election reporting period. The *2004 State Candidate's Manual, Minor Political Party*, specifically notes on page 11 that candidates who receive contributions or make expenditures exceeding \$2,000 before May 18, 2004, must file reports for the 2004 Primary Election. Also, the *2004 Campaign Finance Manual* states on page 49 that "a candidate whose name will appear only on the general election ballot and who exceeds \$2,000 in contributions or expenditures before the date of the primary election must file reports for the primary election."

While it is unfortunate that misunderstandings sometimes do occur over the phone, there is no documentary evidence to support the claim of filing officer error.

Cox's interpretation of Elections Division advice in the timing of his activities. The committee argues that Tom Cox would have delayed the deposit of his loan money to his committee or filed his second pre-election report timely had he not been given wrong advice. Once again, there is no documentation to support the allegation of filing officer error. The statement that the money had "no political effect" is irrelevant. What is relevant here is the date of the transaction, not the "effect" of the money.

Would any other interpretation of election law violate statute or constitute an undue burden? In this argument, the committee creates five scenarios in which they believe the Elections Division could administer the campaign finance contribution and expenditure reporting for both major and minor party candidates. The Elections Division follows the already established statutes in administering campaign finance reporting. There are only two elections conducted in each election cycle, the primary (nominating) election in May and the general election in November.

Candidates other than major party and nonpartisan candidates (minor party and independent candidates seeking a partisan office) only participate in the general election. They are the candidates who are subject to ORS 260.044(5), if they receive a contribution or make an expenditure exceeding \$2,000 before the date of the primary election. The reporting requirements revolve around elections, not nominating conventions of minor parties or assemblies of electors conducted to nominate independent candidates.

Cox made a good faith effort. The committee argues that Tom Cox, on becoming aware of the Elections Division's "desire" for him to file his reports, immediately did the necessary paperwork and filed the reports. While this is commendable, it is not a mitigating circumstance in which to waive or reduce the civil penalty.

Under the penalty matrix, the maximum statutory penalty of \$10,000 is reduced to 3% of the total contributions or total expenditures—whichever is greater—for each business day the report was late as this is the second late violation by the candidate.

ORDER

It is ordered that a penalty of \$7,126.32 ($\$10,327.87 \times 3\% \times 23$ days) is assessed. If your payment is not received within 60 days from the date of service noted below, this Order will be sent to our accounting division for collection and may be subsequently sent to the Oregon Department of Revenue.

Please refer to case number L7783 when mailing your payment.

RIGHT TO JUDICIAL REVIEW

You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served to you. Because this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

Jennifer Hertel, Compliance Specialist

DATE of Service: _____