

**BEFORE THE ELECTIONS DIVISION
OFFICE OF THE SECRETARY OF STATE
STATE OF OREGON**

IN THE MATTER OF) **FINAL ORDER**
)
FRIENDS OF JIM GILBERT (004909))
) **Case No. L8047**
)

HISTORY OF THE CASE

On February 7, 2005, the Elections Division of the Office of the Secretary of State (Elections Division) issued Notice of Proposed Civil Penalty to the Friends of Jim Gilbert (the Committee) for late filing of a second pre-election contribution and expense report for the November 2, 2004, General Election. (Ex. D) On February 18, 2005, the candidate, Jim Gilbert, requested a hearing. (Ex. E.) The Elections Division referred the matter to Ray Myers, Hearings Officer, to hold a hearing and to issue a Proposed Order.

Hearing convened April 13, 2005, in Salem, Oregon. This matter was consolidated for hearing with case number L8106. A separate proposed order was issued in that matter. The Elections Division was represented by Assistant Attorney General Steve Wolf. Katy Eymann, Campaign Manager, presented the case on behalf of the Committee. Mr. Gilbert and Campaign Treasurer, Victoria Wertgen, were present. Fred Neal, Nancy Ferry, and Jennifer Hertel, all employees of the Elections Division, were present. Nancy Ferry, Compliance Specialist with the Elections Division, testified on behalf of the Elections Division. Ms. Wertgen and Ms. Hertel testified on behalf of the Committee.

Following the hearing, the Hearings Officer issued a proposed order in this matter. The Committee submitted no exceptions to the proposed order in the time provided. Therefore, having considered the proposed order and the record in this case, the Secretary issues this Final Order.

ISSUE

The sole issue is whether the Elections Division properly assessed a civil penalty of \$497.47 against the Committee for the alleged late filing of the second pre-election report.

EVIDENTIARY RULINGS

Exhibits A through G and 1 were admitted into evidence without objection.

FINDINGS OF FACT

1. The second pre-election report was due on October 21, 2004. (Test. Ms. Ferry.)
2. The second pre-election report was faxed to the Elections Division at 4:29 PM on October 21, 2004. (Ex. 1; test. Ms. Wertgen.) The faxed report was not received in the Elections Division until after 5:00 PM on October 21, 2004. (Test. Ms. Ferry.)
3. The greater of total contributions and total expenditures in the second pre-election report is \$16,582.26. (Ex. C.) This late filing was a second violation. (Test. Ms. Ferry.)

CONCLUSIONS OF LAW

The Elections Division properly assessed a civil penalty of \$497.47 against the Committee for late filing of the second pre-election report.

OPINION

ORS 260.068 states in relevant part:

“(1) Except as otherwise provided in ORS 260.112 and subsection (4) of this section, each candidate seeking election at the general election or a candidate’s principal campaign committee at the general election shall file the following with each appropriate filing officer:

* * * * *

(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. The accounting period for the statement required by this paragraph begins on the 46th day before the date of the election and ends on the 16th day before the date of the election.

The Elections Division as the party asserting the position that the filing was late bears the burden of presenting evidence. ORS 183.450(2). The Elections Division has submitted evidence that the report was filed after 5 PM on October 21, 2004, the filing date. (Test. Ms. Ferry.) By administrative rule OAR 165-012-0005 the Secretary of State designated the *2004 Campaign Finance Manual* and associated forms as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations. The Manual provides that “the complete document must **physically be in the office of the appropriate filing officer no later than 5:00 p.m. on the final filing date.**” *2004 Campaign Finance Manual* at 5 (emphasis in original). Therefore, the uncontroverted evidence establishes that the second pre-election report was not filed on the filing date because it was not received in the Elections Division until after 5 PM on the filing date. The Manual establishes a matrix for assessing a penalty. Where, as here, a committee is late in filing a report for the second time in an election cycle, the penalty is set at 3 percent of the greater of contributions and expenditures in the report times the number of days the report is late. Here the formula is .03 times \$16,582.26 times 1 for a total of \$497.47.

The Committee does not contend that any of the mitigating circumstances applies in this case. Rather, it contends that it diligently made a good faith effort to make a timely filing. It argues that its good faith effort to make a timely filing should be considered in setting the amount of the penalty. The Campaign Finance Manual states that “the Secretary of State...may impose civil penalties for failure to file a timely...report.” *Campaign Finance Manual 2004* at 95. Similarly, ORS 260.232 states that the Secretary “may impose a civil penalty” for failing to file a report. This language gives the Secretary discretion whether to assess a civil penalty for such violations; however, the Secretary has limited that discretion by stating in the Manual that mitigating circumstances are limited to five types. *Id* at 97. Absent one of the specified mitigating circumstances, the civil penalty will be assessed based on the matrices found in the Manual. Accordingly, unless the Committee establishes one of the mitigating circumstances outlined in the Manual, a civil penalty must be assessed based on the matrix found in the Manual.

ORDER

Payment of the proposed civil penalty of \$497.47 was received in the office of the Secretary of State on May 23, 2005. This order will serve as your receipt and this matter is now considered closed.

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.

Bill Bradbury, Secretary of State

Date

CERTIFICATE OF SERVICE

I certify that on July 7, 2005, I served the attached Final Order by mailing in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

Friends of Jim Gilbert (L8047 – 004909)
Jim Gilbert, Candidate
28696 S Cramer Rd
Molalla, OR 97038

Friends of Jim Gilbert (L8047 – 004909)
Victoria Wertgen, Treasurer
418 Beaver creek Rd Ste 102
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