

BILL BRADBURY
SECRETARY OF STATE



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ELECTIONS — (503) 986-1518

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

IN THE MATTER OF) **FINAL ORDER**
)
FRIENDS OF DAVE HUNT (004247))
) **Case No. L8092**
)

HISTORY OF THE CASE

On August 19, 2005, the Elections Division of the Office of the Secretary of State (Elections Division) issued a Notice of Proposed Civil Penalty to the Friends of Dave Hunt (the Committee) for late filing of a post-election contribution and expense report for the November 2, 2004, General Election. (Ex. D) On September 16, 2005, the candidate, Dave Hunt, requested a hearing. (Ex. C.) The Elections Division referred the matter to Ray Myers, Hearings Officer, to hold a hearing and to issue a Proposed Order.

Hearing convened October 17, 2005, in Salem, Oregon. This matter was consolidated for hearing with case numbers L7950, L8162 and L8163. A separate proposed order was issued in each of those matters. The Elections Division was represented by Assistant Attorney General Steve Wolf. Nancy Ferry, compliance specialist with the Elections Division testified on behalf of the Elections Division. Fred Neal and Jan Flowers, were also present on behalf of the Elections Division. Representative Hunt represented the committee and testified on its behalf.

The proposed order was mailed to the committee on November 4, 2005, with a request that written exceptions be filed within 30 days, by December 4, 2005. Written exceptions were timely received in the office of the Elections Division on December 5, 2005 (the first business day after the deadline, which was a Sunday). Having reviewed the proposed order and the committee's exceptions, the Elections Division adopts the Hearings Officer's Evidentiary Rulings, and Conclusions of Law as set forth in the proposed order. The Elections Division accepts statement of the Issue, the Findings of Fact and Order as corrected below, and adopts the Hearings Officer's Opinion as amended below to address the committee's exceptions.

ISSUE

The sole issue is whether the Elections Division properly assessed a civil penalty of \$1,176.55 against the Committee for the alleged late filing of the post-election report.



EVIDENTIARY RULINGS

Exhibits A through H and I were admitted into evidence without objection.

FINDINGS OF FACT

1. The post-election report was due on December 2, 2004. (Test. Ms. Ferry.)
2. Because the committee had previously made electronic filings, it was required to make an electronic filing of the post-election report. (Test. Ms. Ferry.) The Elections Division received an unreadable electronic copy of the report shortly before 5:00 pm on December 2, 2004. (Test. Ms. Ferry.) The Elections Division received a readable copy of the report on December 3, 2004. (Test. Ms. Ferry)
3. The greater of total contributions and total expenditures in the post-election report is \$23,530.90. (Ex. F.) This late filing is a fourth violation. (Test. Ms. Ferry.)

CONCLUSIONS OF LAW

The Elections Division properly assessed a civil penalty of \$1,176.55 for the Committee's late filing of the post-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:

“(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. The accounting period for the statement required by this paragraph begins on the 15th day before the date of the election and ends on the 20th day after 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 uncontroverted evidence establishes that the committee was required to file an electronic copy of the post-election report by December 2, 2004. An unreadable electronic copy of the report was filed before 5:00 pm on

December 2, 2004 (Test. Ms. Ferry.) The evidence also establishes that a readable copy of the electronic report was not filed with the Elections Division until after 5:00 pm on December 2, 2004. (Test. Ms. Ferry.) The Elections Division argues that unless an electronic report is readable, it has not been received. The committee argues that the report was received on the filing date, whether it was readable or not.

ORS 260.159 requires electronic filing of certain reports. It states in relevant part:

“(3) If a candidate, political committee or chief petitioner is required to file statements electronically under subsection (1) of this section, the candidate, political committee or chief petitioner shall continue to file all subsequent statements required under ORS 260.058, 260.063, 260.068, 260.073, 260.102 or 260.118 in an electronic format, unless the Secretary of State determines that extraordinary and unforeseeable circumstances have made it impracticable for the candidate, political committee or chief petitioner to continue filing electronically.”

The evidence is uncontroverted that the committee was required to file electronically under this statute.

Section 4 of the statute requires that electronic filings conform to technical specifications prescribed by the Secretary. OAR 165-012-0230 is the administrative rule adopted by the Elections Division. It states in relevant part:

“The purpose of this rule is to adopt standards and procedures for contribution and expenditure reports filed electronically under ORS 260.159.

* * * *

“(5) Candidates and committees filing electronically must have their own software that they use to enter data. The software must be capable of generating final data for detailed contribution and expenditure reports, including forms PC 1, PC 2, PC 3, PC 4A, PC 4B, PC 5, PC 6, and PC 9. The information provided on the forms must fully comply with ORS Chapter 260 and the current Campaign Finance Manual. To file reports electronically, the committee or candidate must export the data of the final contribution and expenditure report generated in its software into an ASCII tab-delimited file that is formatted with the following file format specifications. Reports not corresponding to the required file format will not be considered filed.

* * * *

“(8) Reports must be submitted in one of the following formats, and **must be received by 5:00 p.m. on the filing deadline to be considered filed timely:**

- (a) 3-1/2-inch high-density MS DOS-formatted diskette, or
- (b) PC-readable CD; or
- (c) Attached to an e-mail to elecfile.sos@state.or.us .

“(12) Unless the committee or candidate required to file electronically is excused by the Secretary of State under subsection (3), **a report is not considered filed until it is successfully filed electronically.** Attachment 1 contains the required file format specifications for electronic filing.” (Emphasis added.)

The uncontroverted evidence establishes that the required report was not successfully filed electronically until after 5:00 pm on the filing date, because the file that was submitted did not load successfully in the Elections Division database. Consequently, it was not considered filed until it was successfully received and loaded the next business day. Representative Hunt’s first assertion in his written exceptions is that his report was timely filed because the Elections Division received all the information (the data) that he was required to file on the filing deadline day. He asserts that even though the file did not load into the Elections Division database that does not mean that his report was “unreadable”. However, reports that do not correspond to the required file format specifications will not load into the Elections Division database, thus are not considered filed. The committee’s data contained an extra line on the PC 2 form, not just a single extraneous character, which means it was not filed with the correct file format specifications, preventing it from loading, causing the report to be filed late.

The Secretary has adopted the *2004 Campaign Finance Manual* as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations. OAR 165-012-0005. The Penalty Matrix adopted by the Elections Division in the *2004 Campaign Finance Manual* specifies that the penalty for a third or subsequent violation is calculated by determining the greater of total expenditures or total contributions multiplied by 5 percent multiplied by the number of days late. In this case, the greater of contributions and expenditures is \$23,530.90 and the report was one day late. This is a fourth late violation for the committee in the two year period beginning September 15, 2003. The first late case was L7950 for the first pre-election for the November 2, 2004, General Election, the second late case was L8162 for the first supplement to the second pre-election for the November 2, 2004, General Election, and the third late case was L8163 for the second supplement to the second pre-election for the November 2, 2004, General Election. In addition, the Committee has

conceded the violation in case L8162 and has withdrawn its challenge to a proposed civil penalty in case L8163. Accordingly, the civil penalty of \$1,176.55 was properly assessed.

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 Committee also argues that given the fact that it attempted to file timely, the failure was due to a scrivener's error and the fact that it was not attempting to hide any information, the amount of the penalty is excessive. As noted above, the Secretary has adopted a matrix for assessing civil penalties. By adopting this matrix, he has limited his own ability to reduce penalties except in the mitigating circumstances set forth in the *Campaign Finance Manual*.

The *2004 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 his own discretion by stating in the manual that mitigating circumstances are limited to five types. *Id* at 97. Consequently, absent one of the specified mitigating circumstances, the civil penalty will be assessed based on the matrix found in the Manual.

Representative Hunt's second assertion in his written exceptions is that the Secretary has the authority to consider "all grounds for mitigation". However, through rulemaking the Secretary has limited the mitigating circumstances available to petitioners, and may therefore consider only those five types adopted in the Manual. The Oregon Court of Appeals has explained:

It is, of course, axiomatic that an agency must follow its own rules. * * * Even if an agency is not required to adopt a rule, once it has done so it must follow what it adopted. * * * The rule may limit what an agency would otherwise be able to do. "An agency which is vested with discretion by statute may limit its own discretion in its regulations."

Peek v. Thompson, 160 Or App 260, 264-265, 980 P2d 178 (1999) (citations omitted).

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

The Friends of Dave Hunt is assessed a civil penalty of \$1,176.55 for filing its post-election statement one day late.

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

1/11/06

CERTIFICATE OF SERVICE

I certify that on January 12, 2006, 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 Dave Hunt
Dave Hunt, Candidate
PO Box 68445
Milwaukie, OR 97268

Friends of Dave Hunt
Lawrence Martin, Treasurer
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