

**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. L8106**
)

HISTORY OF THE CASE

On March 1, 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 post-election contribution and expense report for the November 2, 2004, General Election. (Ex. D) On March 6, 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 L8047. 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 \$420.24 against the Committee for the alleged late filing of the post-election report.

EVIDENTIARY RULINGS

Exhibits A through G 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 second-pre-election report reflected total expenditures and contributions greater than \$50,000, the committee was required to make an electronic filing of the post-election report. (Test. Ms. Ferry.) The Elections Division received a paper copy of the report on November 30, 2004. (Test. Ms. Ferry.) The Elections Division received an unreadable electronic copy of the report on December 2, 2004. (Test. Ms. Hertel.) The Elections Division received a readable copy of the report on December 3, 2004. (Test. Ms. Hertel.)
3. The greater of total contributions and total expenditures in the post-election report is \$8,404.84. (Ex. C.) This late filing was a third violation. (Test. Ms. Ferry.)

CONCLUSIONS OF LAW

The correct penalty against the Committee for late filing of the post-election report is \$105.06.

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 a 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 electronic copy of the report was filed before 5 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 December 3, 2004. (Test. Ms. Hertel.) 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:

“(1) A candidate, political committee or chief petitioner required to file a statement under ORS 260.058, 260.063, 260.068, 260.073, 260.102 or 260.118 shall file the statement in an electronic format if:

“(a) The filing officer for the candidate, political committee or chief petitioner is the Secretary of State; and

“(b) During the total period described in ORS 260.058, 260.063, 260.068, 260.073, 260.102 or 260.118, the aggregate amount of contributions received and expenditures made by the candidate, political committee or chief petitioner is \$50,000 or more.

“(2) The Secretary of State by rule shall specify when a candidate, political committee or chief petitioner required to file statements in an electronic format under subsection (1) of this section shall file the first statement in an electronic format.

* * * * *

“(4) Statements filed electronically under this section shall conform to the technical specifications for electronic filing prescribed by the Secretary of State by rule.”

Section 4 of the statute requires that electronic filings conform to technical specifications prescribed by the Secretary. The *2004 Campaign Finance Manual*, specifies that electronic filings contain

“an ASCII tab-delimited file that is formatted to match the Division’s reporting requirements. A committee intending to create its own method of filing electronically is advised to contact the Division for the technical specifications for electronic filing and a set of test reporting data or to download this information from the Division’s website....The test data must be entered into the committee’s

reporting software, exported into the required format and submitted to the Elections Division (via email or disk) for review.” *2004 Campaign Finance Manual* at 45.

There is no evidence in this record concerning whether the Committee’s unreadable filing contained ASCII tab-delimited file or whether the Committee intended to create its own method of filing. However, because both the statute and the manual require that the electronic filing be in a form specified by the Elections Division, a filing must be made in a form that is readable to the Elections Division. In this case, the filing made on the filing date was not readable by the Elections Division. Therefore, there was no actual filing of the electronic report on December 2, 2004.

The post-election report was filed on December 3, 2004. The penalty matrix provides that where a paper copy of a financing report is filed before the electronic report, the penalty is reduced by 75 percent for every day in which the Elections Division has a paper copy of the report, but the electronic copy is late. The Elections Division concedes that the penalty originally imposed by the Notice, \$420.24, should be reduced to \$105.06.

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 \$105.06 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
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Molalla, OR 97038

Friends of Jim Gilbert (L8047 – 004909)
Victoria Wertgen, Treasurer
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