

BILL BRADBURY
SECRETARY OF STATE



ELECTIONS DIVISION
JOHN LINDBACK
DIRECTOR
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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)
by the Defense of Marriage Coalition PAC, Raphael Antico,) Final Order
Treasurer, for the Second Supplement to the Second)
Pre-Election for the November 2, 2004, General Election) Case No. L8146
)

August 5, 2005

Defense of Marriage Coalition PAC (004947)
Raphael Antico, Treasurer
PO Box 30536
Portland, OR 97294

Dear Mr. Antico:

This is a Final Order issued by the Secretary of State (secretary) for your failure to file a timely second supplement to the second pre-election contribution and expenditure report for the November 2, 2004, General Election.

On March 11, 2005, the secretary notified the Defense of Marriage Coalition PAC (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. The committee's Statement of Organization (SEL 221), applicable during the reporting period, was filed with the secretary on September 27, 2004. The statement reported Raphael Antico as the treasurer and PO Box 30536, Portland, OR 97294 as the address to which all committee correspondence was to be sent.

2. The committee submitted a timely second supplement to the second pre-election report on October 29, 2004; however, additional contributions should have been included on the report. Contributions totaling \$26,611.00 that were required to be included on the second supplement to the second pre-election report were first disclosed on your post-election report filed on December 2, 2004. This portion of the second supplement to the second pre-election report is considered filed on December 2, 2004, making it 22 business days late.
3. On March 11, 2005, the secretary sent the committee a Notice of Proposed Civil Penalty. The notice was sent by both certified and first class mail to the treasurer at the above-referenced address. The notice proposed a civil penalty of \$10,000.00 and allowed the committee 20 days to request a hearing. The notice sent by certified mail was received and signed for by Angela Ober on March 16, 2005.
4. On April 1, 2005, the secretary received a letter from Kelly Clark, attorney for the committee, and an affidavit from Raphael Antico, Treasurer in lieu of a public hearing.
5. The letter and affidavit—attached as Exhibit A—were reviewed, considered, and made part of the record.
6. The secretary has record of one previous late filing during the two-year period beginning September 15, 2003.

ULTIMATE FINDINGS OF FACT

Raphael Antico, Treasurer, failed to file a complete second supplement to the second pre-election contribution and expenditure report for the November 2, 2004, General Election.

CONCLUSIONS OF LAW

Treasurer Raphael Antico's failure to file a complete second supplement to the second pre-election contribution and expenditure report for the November 2, 2004, General Election violated ORS 260.073.

OPINION

The Defense of Marriage Coalition PAC's second supplement to the second pre-election contribution and expenditure report was late. That late portion of the report was received on December 2, 2004, when it filed its post-election report. It was due by 5:00 p.m., October 29, 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 filed with 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 adequately mitigate the failure to file a report by the deadline. The argument submitted by the committee's attorney, Mr. Clark and the testimony submitted by the committee treasurer, Rafael Antico, identified several factors which they contend resulted in the late filing of the second supplement to the second pre-election report.

Mr. Antico discovered that the database of contributor information was "missing some contributions and included some inaccuracies." He states in his testimony that he made this determination between October 29 and December 2. Based on his discovery, a full internal audit of all contributions entered into the database was launched. During the audit he found that some contributions were under and over reported, and some were missing from the database. He also states that many of the mistakes were typographical errors in which the amount of the contribution was incorrect, or in some cases, the wrong contribution receipt date was recorded. In each of these situations, there was no intent by Mr. Antico to purposefully report the incorrect amount, or fail to report any of the missing contributions.

The other issue raised by the committee and Mr. Antico, relates to their contention that there is no process in which a committee can file amendments to the supplement to the second pre-election reports. The committee cites page 91 of the *2004 Campaign Finance Manual* which in part states that reports can only be amended pursuant to "the appropriate amendment form." Additionally, the committee points out that there is no amendment form for the PC 8A, Supplement to Second-Pre/Post-Election – Contributions.

The committee also states that "with other contribution reports required under the campaign finance reporting laws, a committee has the ability to provide notice of the need to amend a report within 10 business days, amend the report in a timely fashion, and have the amendment relate back to the original filing." The committee contends that supplements to the second pre-election reports are uncorrectable once they are filed with a filing officer. Therefore, Mr. Antico 'corrected' the information at the next earliest opportunity, which was the filing of the post-election report, filed on December 2, 2004.

ORS 260.073(1)(3) requires in part that a committee file a second supplement to the second pre-election report if it receives aggregate contributions from a single source exceeding \$500.00. It further requires that the report be filed no later than the fourth day before the date of the election, in this case no later than October 29, 2004.

We will first address the issue of unintentional typographical or clerical errors. Although the typographical errors are unfortunate and as stated in the testimony were unintentional good faith mistakes, these are not mitigating circumstances in which the secretary can reduce or waive a penalty. See page 97 of the *2004 Campaign Finance Manual* for mitigating circumstances accepted by the secretary. The penalty matrix does not distinguish deliberate from non-deliberate errors, and does not require the secretary to determine if the errors were intentionally made. And while the testimony provided some detail regarding contributions which were not required to be disclosed because the contribution amount did not exceed the threshold for disclosure, or that the date the contribution was received was incorrectly reported, thus not required to be disclosed, the committee did not submit any amendments to its post-election report to correct any of the specific entries. Therefore no change in the calculated penalty can be made.

The argument from the committee and Mr. Antico discusses the process for filing amendments for insufficient reports and references page 91 of the *2004 Campaign Finance Manual*. This is relevant to the assertion that there is no mechanism for amending a supplement to the second pre-election report. This section of the manual explains that after the deadline for filing a contribution and expenditure report, the filing officer has 10 business days to review the report.

The review consists of checking for computation errors and to determine if there are entries that do not include all of the information required by law. The treasurer is then sent an exam letter that either indicates that the report is sufficient or identifies the items that need to be corrected. The exam letter also includes a deadline for providing the amendments to correct the insufficient information without being subject to civil penalty. This review is required by ORS 260.205(1), which specifically **excludes** (in part) statements filed under ORS 260.073(1)(c); therefore Oregon Election law does not require the examination of supplements to the second pre-election reports. This case is not about the sufficiency of the second supplement to the second pre-election report, but concerns the timeliness of the filing.

Oregon Election law does not provide a similar examination mechanism for the supplements to the second pre-election report because the supplements are not complete reports. They are supplements, and the post-election report contains the same information in a format that is examined.

The committee contends that the supplements are not amendable once filed and this fact makes the law penalizing inaccuracies arbitrary and capricious. The Secretary disagrees for several reasons. First, as discussed above, there are logical reasons why the supplements to the second pre-election report are different from the full reports, such as the second pre-election report and the post-election report. Second, supplements can be amended. No evidence was submitted by the treasurer to suggest that he was unable to file corrections at any time after the due date for the supplement. Mr. Antico claimed there was "no process" to correct the incomplete supplement, but he submitted no evidence that he contacted the Elections Division to ask what he should do, or how to amend the PC 8A. In fact the Division accepts copies of the PC 8A with the new information. Because no evidence is in the record that Mr. Antico attempted to file an amendment and was prevented from doing so, the penalty is not arbitrary or a violation of "due process."

Secondly, the committee appears to claim that the very first opportunity to provide the accurate information to the Secretary was December 2, 2004, the date the committee filed its post-election report, containing all of the expenditure and contribution information from the same period covered by the second supplement to the second pre-election report. In fact, the post-election report can be filed as early as November 23, 2004. If the committee had filed its report on that day, the information it contained that should have been on the second supplement would have been only 16 business days late rather than 22 days late. The calculated penalty would have been reduced from \$17,563.26 to \$12,773.28. However, because the maximum penalty for this late supplement is \$10,000, the actual penalty does not change. The Secretary does not accept the contention that the first opportunity to provide the omitted information was on the post-election report, in fact the committee did not take the opportunity to file the post-election report until the last possible day. It is apparent from the committee's decision to delay filing until December 2 that there was no particular concern at that time to provide the omitted information as quickly as possible, in order to stop the daily accrual of civil penalties. This is consistent with the treasurer's testimony, which contains no information about any attempt to confirm with the Elections Division how to correct the incomplete second supplemental to the second pre-election report.

To conclude, the Secretary finds insufficient evidence in the record to show that the committee was unable to correct its second supplement before December 2, 2004. Thus there is no "error by the filing officer" justifying mitigation of the 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 treasurer.

Although the calculated penalty for the late report is \$17,563.26 ($\$26,611.00 \times 3\% \times 22$ days), the penalty matrix sets a maximum penalty of \$10,000 when the total contributions or total expenditures for the accounting period—whichever is greater—is over \$10,000.

ORDER

It is ordered that a penalty of \$10,000 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 L8146 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: _____

c: Kelly Clark