

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

IN THE MATTER OF) **FINAL ORDER**
)
MULTNOMAH COUNTY REPUBLICAN)
) Case No. L8746
CENTRAL COMMITTEE (000336))

HISTORY OF THE CASE

On December 28, 2007, the office of the Secretary of State, Elections Division issued a Notice of Proposed Civil Penalty; Opportunity to Request Hearing to the Multnomah County Republican Central Committee (the Committee) for late filing of a Second Pre-Election contribution and expenditure report for the May 16, 2006, Primary Election.(Exhibit J). On January 17, 2008, Laurence B. Oeth, current Treasurer of the Committee, requested a hearing. (Exhibit K.) The Elections Division referred the matter to Ray Myers, Hearings Officer, to hold a hearing and to issue a Proposed Order.

Hearing convened February 26, 2008 in Salem, Oregon. The Elections Division was represented by Assistant Attorney General, Lynn Rosik. Mr. Oeth appeared on behalf of the Committee. In addition, Mae Huston, former treasurer of the Committee appeared by telephone. Candy Broucek and Jennifer Hertel, both Compliance Specialists with the Elections Division, testified on behalf of the Elections Division. Dick Osborne, former Committee Director (Exhibit A2), and Mr. Oeth testified on behalf of the Committee. The record closed on February 26, 2008. Hearing officer issued his proposed order on March 21, 2008. The Secretary of State, Elections Division issued its proposed order on April 18, 2008. The Committee submitted its written exceptions on May 8, 2008. Based on a review of the record of hearing and the preponderance of the evidence the Division enters the following:

ISSUE

The primary issue is whether the Elections Division properly assessed a civil penalty of \$50.00 against the Committee for the alleged late filing of the Second Pre-Election report for the May 16, 2006, Primary Election (260.159, 260.063 and 260.232).

The Committee contends that the paper report it faxed to the Elections Division on May 4, 2006 (Exhibit B) was sufficient because the Elections Division had waived the Electronic filing requirement. Finally, the Committee contends that there were mitigating circumstances for the late filing.

EVIDENTIARY RULINGS

Exhibits A through O, submitted by the Elections Division and Exhibit 1, submitted by Mr. Oeth were admitted into evidence. Exhibits C1 and C2 were admitted over the objection of the Committee.

FINDINGS OF FACT

1. Before the May 16, 2006 Primary Election, the Committee had been filing its Contribution and Expenditure reports electronically. (Testimony from Ms. Broucek and Ms. Hertel).
2. The May 16, 2006, Second Pre-Election Report was due no later than May 4, 2006 (Exhibit L).
3. On May 4, 2006, the Committee faxed to and the Elections Division received a paper filing of the second pre-election report for the May 16, 2006, Primary Election. (Exhibit B).
4. On May 5, 2006, Ms. Broucek sent a letter to Ms. Huston to the mailing address for committee correspondence (Exhibit A1-A2) (PO Box 301125 Portland OR 97294-9125) notifying her that the second pre-election report was late and discussing the electronic filing requirement.(Exhibit C1). The Committee did not receive the notice. Testimony from Mr. Osborne).
5. On October 20, 2007, the Committee successfully filed its Second Pre-Election report for the May 16, 2006, Primary Election electronically (Exhibit G)
6. The Committee's Second Pre-Election report for the May 16, 2006, Primary Election listed no contributions or expenditures for the relevant period (Exhibit B).

CONCLUSIONS OF LAW

The Elections Division properly assessed a civil penalty of \$50.00 against the Committee for late filing of the Second Pre-Election report for the May 16, 2006, Primary Election.

BACKGROUND

In April 2006, Ms. Huston had resigned as Treasurer with the Committee; however the Committee had not notified the Elections Division (by filing an amended Statement of Organization form SEL 221) of this resignation or of the fact that Jacob Write had taken over Ms. Huston's duties. On April 10, 2006, Mr. Write telephoned the Committee Chairman, Dick Osborne, and informed him that he was not finished with the May 16, 2006 Primary Election First Pre-Election report and that he would not be finishing it because he was also resigning¹.

¹ The committee contends that "extraordinary and unforeseeable circumstances" caused the committee to file a paper report because the Committee's Treasurer resigned on the date the report was due. This mitigating circumstance in ORS 260.159 and OAR 165-012-0230 is applicable to the treasurer of record at the time the report was due; in this case, the treasurer was Mae Huston. The "resignation" that the Committee's refers to is that of Jacob Write; this 'treasurer' was never certified as the treasurer to the Elections Division. Therefore, the Secretary rejects the Committee's contention that there was a mitigating circumstance that the Secretary should have taken into consideration.

At some point between April 10 and May 4 of 2006, Mr. Osborne spoke with Ms. Broucek at the Elections Division and she told him that he should fax in a paper report. Mr. Osborne understood this to mean that a faxed paper report would be sufficient. Ms. Broucek did not state that it would be sufficient. Ms. Broucek testified that she told Mr. Osborne that filing a paper report would reduce the penalty considerably and that the committee would still be required to file an electronic report.

Mr. Osborne contacted the state Republican office for assistance. An employee of the state office, Cindy Wolf, assisted the Committee in preparing a paper report for the First and Second Pre-Election. Ms. Wolf told Mr. Osborne she spoke to Ms. Broucek and reported to Mr. Osborne that a paper filing alone would be sufficient. According to Ms. Broucek's notes of the conversation, she spoke to Ms. Wolf on June 16, 2006 (Exhibit E). She told Ms. Wolf that a paper filing was not acceptable because the Committee was required to file an electronic copy. When Mr. Osborne faxed paper copy of the second pre-election report to the Elections Division on May 4, 2006 he understood this to be a sufficient filing of the report².

On June 23, 2006, the Committee filed an amended Statement of Organization form SEL 221 with the Elections Division naming a new Treasurer, Glenn Pelikan (Exhibit A3-A4) this amendment showed a mailing address for committee correspondence as PO Box 301125 Portland, OR 97294-9125.

On June 30, 2006, Ms. Broucek sent a second notice to Ms. Huston again to the mailing address for committee correspondence (Exhibit A1-A2) (PO Box 301125 Portland OR 97294-9125) notifying her that the second pre-election report was still late. The letter discussed the electronic filing requirement (Exhibit C2).

Mr. Oeth subsequently became the Committee Treasurer on November 28, 2006 (Exhibit A5-A8). This change was reported to the Elections Division. On July 17, 2007, Ms. Broucek spoke with Mr. Oeth and Ms. Huston. That same date, she mailed a third notice to the Committee. Mr. Oeth filed an electronic second pre-election report on October 22, 2007.

² The Elections Division posted a "paper" report on its website, form PC 7, Certificate of Limited Contributions and Expenditures, filed by the committee for the 2006 General Election on September 28, 2006. A committee may file a PC 7 in lieu of detailed contribution and expenditure reports if a committee does not expect to receive or spend more than \$2,000 for an election. See ORS 260.112. A committee that is eligible to file a PC 7 in lieu of detailed reports must file the paper form because the PC 7 is not a form which can be filed electronically. OAR 165-012-0230(1) sets forth which reports must be filed electronically; the rule states that "For each election, the following reports shall be filed electronically by state committees and candidates required to file electronically: First Pre-Election report; Second Pre-Election report, Post-Election report, September Supplemental report; and reports required under ORS 260.118. " The PC 7 is not a report that may be filed electronically, therefore the acceptance of the PC 7 was not because the Secretary had determined that the committee had demonstrated extraordinary and unforeseeable circumstances, but because the committee certified that it was not going to exceed the \$2,000 threshold, thus allowing the paper filing of the PC 7 form.

OPINION

ORS 260.063 states in relevant part: (1) Except as otherwise provided in ORS 260.112, each political committee, other than a candidate's principal campaign committee, supporting or opposing one or more candidates or measures at the primary election or any election other than the general election shall file the following with each appropriate filing officer:“(a) A first preelection statement of contributions received and expenditures made by or on behalf of the political committee, not sooner than the 46th day and not later than the 36th day before the date of the election.”

ORS 260.159 was in effect at the time of the alleged violation. It required committees with aggregate contributions and expenditures of \$50,000 or more to file electronically. Once a committee begins filing electronically under this statute, it may only cease filing electronically if the “Secretary of State determines that extraordinary and unforeseeable circumstances have made it impracticable for the committee to file electronically.”

OAR 165-012-0230(3), which was in effect at the time the alleged violations was due, states: “Once a committee begins filing reports electronically, all subsequent reports must be filed electronically (other than the reports that this rule requires to be filed in a paper format) unless the committee demonstrates to the Secretary that extraordinary and unforeseeable calamitous circumstances have made it impracticable to file electronically.”

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 first complete filing is the paper filing the Committee made on May 4, 2006. The real issue is whether the paper filing was sufficient or whether the Committee was required to file electronically so that the paper filing only serves to reduce the amount of the penalty.

Pursuant to OAR 165-012-0230(3), because the Committee had begun filing reports electronically, it was required to file all subsequent reports electronically unless the Committee demonstrated to the Secretary that extraordinary and unforeseeable calamitous circumstances made an electronic filing impracticable³.

³ In its exceptions, the Committee states that the word “calamitous” does not appear in ORS 260.159 and the administrative rule may not change the clear intent of the Legislature. The Secretary does not concur with the Committee’s assertion that including the word “calamitous” to the rule is inconsistent with ORS 260.159. The Secretary interprets the phrase “extraordinary and unforeseeable” to encompass calamitous events. Nonetheless, this point is irrelevant because the sudden disappearance of Mr. Write on the first pre-election filing deadline could not be an extraordinary and unforeseeable event within the meaning of ORS 260.159 and the rule 165-012-0230 because he was not the treasurer of record.

The Committee argues that under ORS 260.159 it was allowed to stop filing because the secretary had determined there were extraordinary and unforeseeable circumstances. There is no evidence in this record that establishes that the Committee was required to file electronically under ORS 260.159. Rather, the evidence establishes that it was required to file electronically under OAR 165-012-0230. Consequently, the Committee may only be excused from filing electronically if it meets the requirements found in OAR 165-012-0230. In other words, it must prove that extraordinary and unforeseeable calamitous circumstances made an electronic filing impracticable.

The Committee has proven that it was experiencing difficult circumstances due to changes in the office of Treasurer at the time this report was due. It has not proven, however, that these circumstances are extraordinary, unforeseeable and calamitous. A calamitous circumstance is in the nature of a natural event such as a flood. A change in Treasurers is not a calamitous circumstance. Moreover, the Division is not convinced that it is even an extraordinary circumstance or even an unforeseeable circumstance. Therefore, the Committee has failed to prove that it should have been excused from making an electronic filing.

The Committee also argues that there are mitigating circumstances because it relied on Ms. Broucek for the proposition that it did not need to file electronically. The Secretary of State has designated the *2006 Campaign Finance Manual* and associated forms as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations. The *2006 Campaign Finance Manual* at page 102 states that the only mitigating circumstances that may be considered are those specifically outlined in the *Campaign Finance Manual*. The Elections Division interprets this to mean that absent one of the specified mitigating circumstances; the civil penalty will be assessed based on the matrices found on pages 104-110 in the Manual. The hearing officer properly deferred to the agency's interpretation of its own rules. Thus, to the extent that the Committee argues for mitigating circumstances that are not outlined in the Manual, those "mitigating circumstance" will not be considered. 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.

The five mitigating circumstances are: (1) the lateness is directly due to criminal activity against the Committee or its treasurer; (2) the lateness is directly due to a calamitous event resulting in destruction or inaccessibility of the Committee's records; (3) the lateness is directly due to a failure of a professional delivery service to deliver in the time guaranteed in writing; (4) the lateness is directly due to an error by the elections filing officer; and (5) the lateness is directly due to a valid personal emergency of the Treasurer or candidate.

Arguably, if Ms. Broucek had, in fact, told the Committee that it did not need to file an electronic copy, then the lateness in filing the electronic copy would be due to an error of the filing officer. However, Ms. Broucek testified that she never told the Committee or its representatives that a paper copy was sufficient. Her notes from the conversation with Ms. Wolf confirm her testimony. Consequently, the Committee has failed to prove that Ms. Broucek caused the Committee to file its electronic report late.

The Committee also argues that the Elections Division lead it to believe that the paper report was sufficient by posting the report on its website. (See, Ex. 1.) A close review of that posting reveals that the Second Pre-Election Report for the May 16, 2006 Primary Election is listed as unavailable. Therefore, the factual basis for this argument is lacking.

The Elections Division calculated the penalty at \$50.00 because there were no contributions or expenditures for the relevant period. The penalty would be calculated as zero under the matrix; however the minimum penalty under the matrix is \$50.00. Therefore, the \$50.00 penalty was correctly calculated.

FINAL ORDER

The Multnomah County Republican Central Committee is assessed a civil penalty of \$50.00 for filing its May 16, 2006, Primary Election, Second Pre-Election Contribution and Expenditure Report late.

Bill Bradbury, Secretary of State

ISSUANCE AND MAILING DATE: _____

NOTICE OF RIGHT TO APPEAL

You are entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within sixty (60) days from service of the final order. Judicial review is pursuant to the provisions of ORS 183.482.