

BILL BRADBURY
SECRETARY OF STATE



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

IN THE MATTER OF)	FINAL ORDER
)	
JIM BERNARD FOR CLACKAMAS)	
COUNTY COMMISSIONER)	
(005245))	
)	Case Nos. NT8643, NT8644, NT8645
)	NT8646, NT8647, NT8648

HISTORY OF THE CASE

On April 4, 2006, the Elections Division of the Office of the Secretary of State (Elections Division) issued Notice of Proposed Civil Penalty to Jim Bernard for Clackamas County Commissioner (the Committee) for the alleged insufficient filing of the first pre-election, second pre-election and post-election contribution and expenditure reports for the 2004 primary and general elections. The Notice alleged that the Committee failed to report an in-kind contribution for the use of a commercial billboard donated by Howard Dietrich or a business entity under his control that should have been apportioned between the applicable accounting periods beginning March 1, 2004 and ending November 2, 2004. (Ex. K.) On April 24, 2006, Marc Blackman, attorney for the Committee, requested a hearing. (Ex. L.) The Notice of proposed a civil penalty totaling \$11,550¹. The Elections Division referred the matter to Ray Myers, Hearings Officer, to hold a hearing and to issue a Proposed Order.

Hearing convened May 18, 2006 in Salem, Oregon. The Elections Division was represented by Assistant Attorney General Steve Wolf. Jennifer Hertel and Fred Neal of the Elections Division testified on behalf of the Elections Division. Mr. Blackman appeared on behalf of the Committee. Jim Bernard, Hasina Squires and Joe Keizur testified on behalf of the Committee. The record was left open for the parties to submit written closing argument. The record closed on June 12, 2006 with the Hearing Officer's receipt of the Elections Division's final closing argument.

¹ The Notice initially assessed a penalty of \$12,800. At hearing, the Elections Division amended the Notice to reduce the penalty to \$11,550.



The proposed order was mailed to the committee on July 7, 2006, with a request that written exceptions be filed within 16 days, by July 31, 2006. Written exceptions were timely received in the office of the Elections Division on July 27, 2006. The exceptions addressed the Findings of Fact for numbers 7, 8 and 12, the Conclusions of Law and Opinion in the proposed order. The Secretary has reviewed the exceptions and determined that they reiterate or restate issues raised at the hearing, and that the proposed order adequately addresses those issues. Therefore, having reviewed the record, the proposed order and the committee's exceptions, the Secretary adopts the Hearings Officer's proposed order as follows:

ISSUE

The issue is whether the Elections Division properly assessed a civil penalty of \$11,550 against the Committee for the alleged insufficient filings of the first pre-election, second pre-election and post-election contribution and expenditure reports for the 2004 primary and general elections.

EVIDENTIARY RULINGS

Exhibits A through L and 1, 2a, 2b, 2c, 2e, and 3 through 6 were admitted into evidence without objection.

FINDINGS OF FACT

1. On April 28, 2004, Ralph Hatley made a written complaint to the County Clerk of the Clackamas County Elections alleging several errors in the Committee's Contributions and Expenditures Report (C & E Report) of April 12, 2004. Among those complaints was that the Committee has "a large billboard on McLaughlin Boulevard" with no cash expenditure or in kind contribution shown on the C & E Report. (Ex. A.)
2. On July 6, 2004, Mr. Hatley made another complaint to Clackamas County Elections, again mentioning the "large billboard on McLaughlin Blvd." (Ex. B.) Mr. Hatley made a complaint directly to the Elections Division on July 23, 2004, raising the same issue. (Ex. C.)
3. On October 28, 2004, Ms. Hertel wrote to the Committee informing it that the only issue being investigated as a result of Mr. Hatley's complaints was the billboard issue. The letter informed the Committee that the C & E Reports submitted to that time did not contain any in-kind contributions or expenditures that relate to the billboard. (Ex. D.)
4. Joe Keizur, Committee Treasurer, responded in a letter received by the Elections Division on November 1, 2004. (Testimony of Ms. Hertel.) In the letter, Mr. Keizur informed the Elections Division that he had reported only the value of the art work on the billboard. He alleged that the billboard has no fair market value because it is not a marketplace billboard. (Ex. E.)

5. On December 19, 2004, Bill Kennemer, Mr. Bernard's opponent, responded to Mr. Keizur's letter. He alleged that a fair market value for the Billboard in question is \$400 per week. (Ex. F.)
6. On January 10, 2005, Mr. Kennemer made a formal complaint to the Elections Division. Although he made numerous complaints, his first complaint was concerning the billboard. (Ex. G.)
7. The billboard is a similar size to billboards in the area that are leased for advertising purposes by Clear Channel Outdoors. Clear Channel Outdoors has a lessor/lessee relationship with Howard Dietrich, who owns the property upon which the billboard in question is located. That relationship allows Mr. Dietrich to put whatever he wishes on the billboard. Mr. Dietrich also leases a second billboard on the same property. (Ex. H-2; testimony of Mr. Neal.)
8. The rental value of a similar billboard located in the same area is \$1,500 per month. (Testimony of Mr. Neal.)
9. On June 7, 2005, Mr. Neal wrote to the Committee directing it to amend its C & E reports for the primary and general election campaigns to include in-kind contributions for the fair market value of the billboard. It informed the Committee that the fair market value is \$1,500 per month. It warned that if the amendments were not filed by July 8, 2005, civil penalty notices would be issued. (Ex. H.)
10. The billboard in question was used to show an American Flag before the space was donated to the Committee. After the election, the billboard again showed an American Flag, which it continues to show today. (Testimony of Mr. Bernard.)
11. The Committee did not report on any of its primary or general election C & E reports or amendments for 2004, any in-kind contributions or expenditures relating to the billboard except \$125 for the value of the art-work on the billboard. (Exs. E, 1; testimony of Ms. Hertel.)
12. Mr. Keizur spoke with a representative of the Elections Division just before the first pre-election C & E for the primary was due. He posed a hypothetical to the employee saying that the committee had had a large sign donated that had no value because the owner did not rent out the sign. The representative told him that if the facts given in the hypothetical were correct, then reporting only the cost of making the sign needed to be reported. (Testimony of Mr. Keizur.)

CONCLUSIONS OF LAW

The Elections Division properly assessed a civil penalty of \$11,550 against the Committee for insufficient filings of the first pre-election, second pre-election and post-election contribution and expenditure reports for the 2004 primary and general elections.

OPINION

ORS 260.058 requires that the principal campaign committee for each candidate file a first pre-election, a second pre-election and a post-election C & E report for primary elections. Similarly, ORS 260.068 requires the same reports for general elections. A contribution, for purposes of the C & E reporting requirements is defined as: "The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value...." ORS 260.005(3)(a)(A).

The Secretary of State has adopted the *2004 Campaign Finance Manual*² as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations. OAR 165-012-0005. It defines "In-kind" as:

"A good or service, other than money, having monetary value. The value of this contribution is based on the fair market value of the good or service...."
2004 Campaign Finance Manual at 31.

The underlying issue in this case is whether the donation of the billboard in question has a fair market value, thus requiring that the fair market value be reported on the Committee's C & E reports. The secondary issue is whether the Elections Division has established what the fair market value of the billboard is.

The Elections Division as the party asserting the position that the filing was insufficient bears the burden of presenting evidence. ORS 183.450(2). Thus, the Elections Division has the burden of presenting evidence that the donation in question had a fair market value and that the fair market value it assigned is, in fact, the correct value that should have been assigned on the C & E reports.

The statutes and rules governing Elections Law reporting requirements give no further guidance on the meaning of "fair market value." The commonly accepted definition of the term is "what a willing buyer would pay a willing seller." *e. g. Department of Transportation v. Alf*, 165 Or App 162, 167 (2000).

² Although the *2006 Campaign Finance Manual* has been issued, the *2004 Campaign Finance Manual* was the one in effect at the time the alleged violations occurred. Consequently, the *2004 Campaign Finance Manual* is the one which applies to this case.

The case law in Oregon repeatedly uses this or a similar definition in discussing the term "fair market value" in connection with property valuation in property crimes, condemnation, divorce and tax cases. The committee relies on the following discussion in *State ex rel Juvenile Department of Washington County v. Depford*:

"Although 'market value' is not further defined by the statute... the term has its ordinary meaning: what a willing buyer will pay a willing seller. [citations omitted]. See generally, *Webster's Third New Int'l Dictionary*, 1383 (unabridged ed 1993) (defining 'market value' as "a price at which both buyers and sellers are willing to do business: the market or current price').

"Thus, "market value" is value of a particular kind. Fundamentally, for an item to have market value there must be a market for the item in which willing buyers and sellers engage in arm's-length transactions, in which the item is traded for value. See generally, *Campbell v. Karb*, 303 Or 592, 740 P2d 750 (1987) (evidence of price fixed by two parties dealing at arm's length is generally readily accepted as establishing fair market value); *PGE v. Taber*, 146 Or App 735, 740, 934 P2d 538, rev den 325 Or 438, 939 P2d 622 (1997) (where there is no market for a item, it cannot have market value). If there is no established market for an item, its market value--if any--becomes speculative. *Erickson Hardwood Co. v. North Pacific Lumber*, 70 Or App 557, 568, 690 P2d 1071 (1984, rev den 298 Or 705 (1985). Speculative worth, however, is not enough; "value," for purposes of the relevant definition of property, cannot be established in the abstract or by theoretical supposition. See, e.g., *State v. King*, 118 Or App 4, 7, 846 P.2d 412 (1993) (evidence that scrap metal value "varies" is not sufficient to prove market value for purposes of the statutory "property" definition)." *State ex rel Juvenile Department of Washington County v. Deford*, 177 Or App 555, 578-9 (2000).

The Committee's argument boils down to the assertion that because Mr. Dietrich did not market the billboard in question, there was no willing seller, so there is no market for the use of the billboard and, therefore, there is no fair market value for the billboard. Essentially, the Committee contends that because Mr. Dietrich chose not to market the billboard, there is no market for the billboard. The Elections Division counters that there are very similar billboards in the same area as this billboard. It contends that these billboards, like the one in question, are owned by Clear Channel. There is, in fact, a market for those billboards and the Elections Division was able to produce evidence of the comparable rental value of those similar billboards.

I conclude that the Elections Division's argument is correct. The generally accepted definition of fair market value requires not that the particular seller be a willing seller (for example in condemnation cases, the seller is rarely willing). Rather, fair market value is the amount that a hypothetically willing buyer would pay a hypothetically willing seller. Here, if Mr. Dietrich were a willing seller, it is probable that there would be a willing buyer because similar signs on the same street are, in fact, rented out at a commercial rate. Consequently, I conclude that the Elections Division has established that a fair market value exists for the billboard in question.

I also conclude that the Elections Division has established the fair market value by presenting evidence of the rate that comparable signs in the same area are actually leased for. Such an approach to valuation is accepted by the Supreme Court in tax cases where there is an issue over valuation of property. *Ward v. Dept. of Revenue*, 293 Or 506 (1982). The Committee argues that *Ward* is inapposite because in that case the parties agreed that there was a fair market value, they simply disagreed over what the fair market value was. Here, the parties do not agree that there is a fair market value. However, I have found that there is a fair market value for the billboard, accordingly, the issue becomes the same as the issue in *Ward*: what is the fair market value? Accordingly, I conclude that just as in tax cases, comparable sales is a valid way of determining fair market value. Comparable sales establish a fair market value of \$1,500 per month for lease of a similar billboard. Therefore, I conclude that the fair market value for the billboard donated to the Committee by Mr. Dietrich is \$1,500 per month.

The Committee also raises two affirmative defenses to the Notice of Proposed Civil Penalty. First, it contends that the term “in-kind contributions” must be construed narrowly to exclude contributions such as this billboard in order to avoid violating the Fourteenth Amendment to the United States Constitution and Article I Section 20 of the Oregon Constitution. Second, it contends that the Elections Division should be estopped from imposing a penalty. The Committee as the party asserting these affirmative defenses bears the burden of presenting evidence. ORS 183.450(2).

The Committee contends that applying the definition of in-kind contribution to require reporting donation of the billboard would infringe on free speech rights of either Mr. Dietrich or the Committee. The Oregon Court of Appeals has discussed the issue of how narrowly a disclosure requirement for election contributions that only provides for civil penalties must be construed:

“As do the federal courts, Oregon courts construe statutes to be constitutional if it is possible to do so. *See, Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 695 P2d 25 (1985); *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 687 P2d 785 (1984). When the issue is the relationship between a statute and the protections of expression in Article I, section 8, of the Oregon Constitution, we give the statute a narrowing construction when necessary to preserve its constitutionality, if it is possible to do so with reasonable fidelity to the legislature's words and apparent intent. *See, State v. Robertson*, 293 Or 402, 411-13, 649 P2d 569 (1982). A similar rule should apply when the First Amendment, rather than the Oregon Constitution, is involved. Before considering a narrowing construction of ORS 260.044(1), however, we must first determine the extent to which the statute may actually implicate the First Amendment concerns that the federal cases describe and, thus, the extent to which narrowing may be necessary.

“There are two significant aspects of the federal cases. First, the Supreme Court in *Buckley [v. Valeo]*, 424 US 1 (1976) clearly distinguished between limits on contributions and the disclosure of expenditures; the first it invalidated even after giving the statute a limiting construction, while the second it upheld. Of the federal

appellate cases that we have cited, which seem to include the leading appellate decisions in the area, [*Federal Election Com'n v. Furgatch*, [807 F2d 857 (9th Cir 1987)]] and *Central Long Island Tax Reform, Etc.* are the only ones that involved disclosure rather than limits. *Furgatch* is also the case that gave *Buckley* the broadest reading. It remains true, however, that the Supreme Court expressly applied the "express advocacy" standard to the disclosure requirement. More significant for our analysis is the Supreme Court's emphasis in *Buckley* that the criminal penalties that the Act provides as punishment for violators required it to adopt an extremely restrictive reading of the disclosure requirements of the Act. See, 424 US at 76-77, 96 S Ct 612. Unlike the federal act, a violation of ORS 260.044(1) leads only to civil penalties; there is no possible criminal liability. See, ORS 260.993 (providing criminal penalties for violation of specific election laws, not including ORS 260.044); ORS 260.995 (providing civil penalties for violation of election laws in general). In light of the Court's statements in *Buckley*, that difference in sanctions affects the extent to which a narrowing construction of the Oregon law is necessary.

"It is, thus, possible to resolve the Court's concern that persons engaged in issue advocacy not run afoul of the election laws without the necessity of the narrow, "magic words" approach that most federal courts seem to think the Court adopted in *Buckley*, an approach that, as the First Circuit noted, is not very satisfying as to either the realities of what an advertisement or flyer actually communicates or the purpose of the election laws. Those magic words do provide the certainty that a criminal statute requires, but when a statute that affects speech does not have criminal consequences, the constitutional requirements appear to be significantly less. See, e.g., *CSC v. Letter Carriers*, 413 US 548, 568-74, 93 S Ct 2880, 37 L Ed2d 796 (1973) (Hatch Act restrictions of political activity of federal employees, defined as those acts that were prohibited by Commission determinations before July 19, 1940, are sufficiently precise to overcome challenge on grounds of vagueness; restrictions are "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with" 413 U.S. at 579, 93 S Ct 2880; only sanctions for violation are suspension or removal from office). We conclude that, whether or not the Ninth Circuit's approach in *Furgatch* is correct as to the federal Act with its threat of criminal punishment, it provides a proper foundation for construing the expenditure reporting requirements of ORS 260.044(1), with their limited civil sanctions." *State ex rel Crumpton v. Keisling*, 160 Or App 406, 416-7 (1999).

Here, no criminal sanctions are provided for failure to report contributions. Thus, the contribution reporting statutes need not be as narrowly construed as would a reporting statute that provided for criminal sanctions. The Committee argues that failing to construe the statute so narrowly as to exclude in-kind contributions would impermissibly infringe on its free speech rights. The Committee then gives several hypothetical examples of in-kind contributions that would infringe on free speech rights. It provides no convincing argument, however, that reporting this particular contribution would infringe on its free speech rights. Consequently, I conclude that it has failed to

carry its burden of proving that the construction given by the Elections Division would infringe on its free speech rights under either the United States Constitution or the Oregon Constitution.

The Committee also contends that the Elections Division has selectively enforced the in-kind contribution regulation, thus violating the equal protection clause of the Fourteenth Amendment and Article I section 20 of the Oregon Constitution.

“To be constitutionally improper... selectivity of enforcement must be deliberately based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’ *Oyler v. Boles*, 368 US 448, 456, 82 S Ct 501, 505, 7 L Ed2d 446 (1962). Unless suspect classes are involved in the selective enforcement, the equal protection clause is violated only if there is no rational basis to justify the selective enforcement. *See Williamson v. Lee Optical Co.*, 348 US 483, 487-488, 75 S Ct 461, 464, 99 L Ed 563 (1955). For that reason, the mere fact that law enforcement agencies prosecute some violations of the law but not others does not of itself constitute prohibited discrimination. *Oyler v. Boles*, supra, 368 US at 456, 82 S Ct at 505.” *City of Eugene v. Crooks*, 55 Or App 351, 354 (1982).

I have found above that enforcement of the in-kind contribution reporting requirement does not implicate the Committee’s free speech rights. In addition, the Committee has provided no evidence that it is in any suspect classification. Thus, I conclude that no arbitrary or suspect classification is involved. The Committee has the burden of establishing that there is no rational basis for the alleged selective enforcement. According to the undisputed testimony of Mr. Neal and Ms. Hertel the Elections Division’s enforcement is complaint driven. That basis for enforcement is rational. The Committee has failed to sustain its burden of establishing that the Elections Division improperly engaged in selective enforcement.

Finally, the Committee contends that the Elections Division should be estopped from imposing this penalty because an Elections Division employee advised the committee that this in-kind contribution did not have to be reported. A variant of this argument is that the violation was the direct result of an error by the elections filing officer; therefore, under OAR 165-013-0010(3)(a) the violation should be waived and no penalty assessed.

The undisputed evidence is that Mr. Keizur posed a hypothetical question to an employee of the Elections Division saying that the Committee had had a large sign donated that had no value because the owner did not rent out the sign. The representative told him that if the facts given in the hypothetical were correct, then reporting only the cost of making the sign needed to be reported. The conversation took place before Mr. Neal’s letter advising the Committee to amend its C & E reports.

Thus, the Committee was given an opportunity to correct the violations before a Notice of Proposed Penalty was issued. I conclude therefore that the filing was not the direct result of an error by the elections officer and the mitigation rule under OAR 165-013-0010(3)(a) does not apply.

Likewise, I conclude that the doctrine of equitable estoppel does not apply to estop the Elections Division from assessing this penalty. Equitable estoppel has five elements:

“To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it[.]” *Coos County v. State of Oregon*, 303 Or 173 at 180-81, (1987) (quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, (1908)); accord *Bennett v. City of Salem et al.*, 192 OR 531, 541, (1951).

For equitable estoppel to apply, the false representation "must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law." *Welch v. Washington County*, 314 Or 707, 716 (1992) (internal quotations omitted).

Based on Mr. Keizur's testimony of his conversation with the Elections Division representative, it is not clear that there was any false representation. The representative was given a hypothetical in which Mr. Keizur stated that the billboard had no value because the owner did not rent out the sign. It is not clear that she was told that the billboard was the size of a commercial billboard, was owned by a commercial advertising company and that there were comparable billboards in the area owned by the same advertising company that had been leased for advertising. Thus, without a full knowledge of the facts, it is difficult to say that she misrepresented anything to Mr. Keizur. Furthermore, her statement was a conclusion from facts or a conclusion of law. Thus, the Committee has failed to prove that any misrepresentation occurred.

The *2004 Campaign Finance Manual at 106* sets forth the penalty matrix for insufficient filings of new transactions. The *Manual* defines new transactions as involving a type of insufficiency that could not have been discovered by a filing officer's examination of the C & E report. The insufficiencies in this case are all new transactions as they were undiscovered by the examination and were only revealed by complaints.

New transactions must be contained in amendments to the C & E reports filed within 28 days after the deadline for filing the report. The penalty is calculated at 1% of the dollar amount of the addition, but are limited to the number of days in the applicable accounting period and to 100 business days. The Elections Division followed those rules in calculating the civil penalty to be assessed for the violations. (Ex. J.) Accordingly, the proposed penalty of \$11,550 should be affirmed.

ORDER

The Committee to Elect Bernard is assessed a civil penalty of \$11,550 for insufficient filings of its first pre-election, second pre-election and post-election contribution and expenditure reports for the 2004 primary and general elections.

