

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 BOE 05088

<p>AL Pisano for NC Governor Petitioner,</p> <p>v.</p> <p>NC State Board of Elections Respondent.</p>	<p>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR PETITIONER</p>
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This matter comes before the Undersigned upon Respondent's Motion for Summary Judgment brought pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(b) and 26 NCAC 03 .0115. Petitioner has filed a Response.

STANDARD OF REVIEW

For a motion for summary judgment, the judgment sought "shall be rendered forthwith if ... there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. §1A-1, Rule 56(c).

"When appropriate, summary judgment may be rendered against the party moving for such judgment." *Blades v City of Raleigh*, 280 N.C. 531, 544 (1972).

BURDEN OF PROOF

Pursuant to N.C. Gen. Stat. 150B-25.1(b) "[i]n a contested case involving the imposition of civil fines ... the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed rests with the State agency."

Respondent North Carolina State Board of Elections ("State Board") has the burden of proof in this contested case. (*See*, Resp. motion, p. 6.)

ISSUE

Whether Respondent failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law when it denied Petitioner's request for a waiver of civil penalties for late filing?

LEGAL AUTHORITIES

N.C. Gen. Stat. Chapter 150B and § 163-278.34

UNDISPUTED FACTS

1. Petitioner was a political committee required to file quarterly campaign finance reports during the 2020 election cycle.
2. Petitioner's 2020 Second Quarter Report was due on Friday, July 10, 2020. It bears a postmark of July 15, 2020 and was deemed filed on July 15, 2020. (Resp. Ex. B)
3. Petitioner's 2020 Third Quarter Report was due on October 27, 2020. It did not bear a postmark and was deemed filed when it was received on November 9, 2020. (Resp. Ex. C)
4. The State Board assessed penalties of \$250 per day for each day that a report was deemed to be filed late.
5. For Petitioner's 2020 Second Quarter Report, the State Board assessed a penalty of \$250.00 per day for three days, for a total penalty of \$750.00.
6. For Petitioner's Third Quarter Report, the State Board assessed a penalty of \$250.00 per day for eight days, for a total penalty of \$2,000.00.
7. On September 8, 2021, the State Board sent an invoice to Petitioner for the assessed penalties for late filing for the Second and Third Quarters for a total amount of \$2,750.00. (The invoice also notes the waiver of civil penalties for the 2020 First Quarter Report.) (Resp. Ex. A)
8. Petitioner submitted an Affidavit To Request A Waiver Of Civil Late Penalties for the 2020 First, Second and Third Quarter Reports, signed on November 12, 2021, in which he states "[t]his is the first time I was notified of any fines and these fines are from over a year ago." (Resp. Ex. D)
9. Petitioner filed a Petition for contested case hearing with the NC Office of Administrative Hearings on November 29, 2021.
10. On January 24, 2022, Respondent sent a letter to Petitioner, informing him of the State Board's decision to deny his request for a waiver of penalties for "failure to submit campaign finance report" for the Second and Third Quarter Reports. (Resp. Ex. E)
11. The State Board filed the within Motion for Summary Judgment on May 27, 2022 and Petitioner filed a Response on June 13, 2022.

CONCLUSIONS OF LAW

1. N.C. Gen. Stat. § 163-278.34 subparagraph (a) mandates that “... The State Board shall immediately notify, or cause to be notified, late filers, from which reports are apparently due, by mail, of the penalties under this section. The State Board of Elections may waive a penalty if it determines there is good cause for the waiver.”

2. There is no showing or representation made by the State Board that it notified Petitioner of late filing or that, if made, any such notification was “immediate”. Instead, the State Board has provided a copy of one invoice dated September 8, 2021 which includes late filing fees for the First, Second and Third Quarter Reports to Petitioner ten months after the Third Quarter Report deadline had passed and more than a year had passed for the Second Quarter Report filing deadline. (Resp. Ex. D, p. 8)

3. The State Board does not dispute its failure to immediately notify Petitioner of late filing and has not provided any explanation or justification for its tardiness.

4. The State Board failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law when it failed to immediately notify Petitioner of the late filings as required by N.C. Gen. Stat. § 163-278.34(a).

5. Pursuant to N.C. Gen. Stat. § 163-278.34 subparagraph (d), the “State Board of Elections may waive a civil penalty in whole or in part if it determines there is good cause for a waiver.”

6. In his affidavit in support of the State Board’s motion, the affiant states that at a public meeting the State Board denied Petitioner’s “waiver request” and a letter (hereafter “denial letter”) was sent to Petitioner. (Affidavit, para. 16).

7. A review of the State Board’s denial letter reveals that it is unsigned, there is no name for the person sending the letter on behalf of the State Board or the sender’s title, and no explanation is given to support the denial or the lack of good cause for the requested waiver of civil penalties for late filing. The entire body of the letter states, to wit: “[a]t the January 20, 2022 meeting of the North Carolina State Board of Elections, the State Board denied your request for a waiver of the following penalties: ... Failure To Submit Campaign Finance Report [Statewide].” (emphasis in original) (Resp. Ex. E).

8. Nowhere in the State Board’s denial letter is there a reference to civil penalties for late filing for either the Second Quarter Report or the Third Quarter Report.

9. The State Board acted erroneously, failed to follow proper procedure, acted arbitrarily and capriciously, and failed to act as required by N.C. Gen. Stat. § 163-278.34(d) when it did not make a determination concerning whether there was good cause for Petitioner’s request for waiver of civil late filing penalties for the Second Quarter Report or the Third Quarter Report.

10. Assuming *arguendo*, that the State Board’s denial letter contains a clerical error that is not substantive and that it was Petitioner’s request for waiver of civil late filing penalties that was denied (and not a failure to submit a campaign finance report as stated in the State Board’s denial letter), the State Board acted erroneously, failed to follow proper procedure, acted arbitrarily and capriciously, and failed to act as required by law when it denied Petitioner’s request for waiver of civil late filing penalty without a determination that good cause did not exist for the waiver as required by N.C. Gen. Stat. § 163-278.34(d).

11. In points 5 and 7 of Petitioner’s appeal, he discusses how the pandemic affected election campaigns in this state, how it affected the State Board and specifically identifies actions taken by the State Board in response to the pandemic. (Resp. Ex. D) The State Board acknowledges in paragraphs 19-22 of its motion that Petitioner raised issues caused by the pandemic and in paragraph 22, states that: “[w]hile understandable, nothing in the governing statutes permits the State Board to grant exceptions or waives penalties based upon the relative size and scope of a political campaign, such as Petitioner. N.C.G.S. §§ 163-278.9 -278.34.”

12. The State Board’s motion addresses only two of the eight enumerated points of Petitioner’s argument and fails to acknowledge other actions it could have taken as provided by the very statute upon which it relies. N.C. Gen. Stat. § 163-278.34 subparagraph (c) states that the State Board “in lieu of or in addition to imposing a civil penalty under subsection (a) or (b) of this section, may take one or more of the following actions with respect to a violation for which a civil penalty could be imposed: ... [such as] ... (3) Issue an order requiring the violator to take any remedial action appropriate by the Board. (4) Issue an order requiring the violator to file any report, statement, or other information as required by this Article or the rules adopted by the Board... .”

13. The State Board acted erroneously, failed to follow proper procedure, acted arbitrarily and capriciously, and failed to act as required by law when it denied Petitioner’s request for waiver of civil late penalties.

FINAL DECISION

It appearing to the Undersigned that there is no genuine issue as to any material fact; and based upon the foregoing, the Petitioner is entitled to Summary Judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment is granted in favor of PETITIONER.

Judgment hereby is entered for Petitioner.

This decision is made under the authority of N.C. Gen. Stat. §150B-34(e).

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 22nd day of June, 2022.



Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Albert Lawrence Pisano
pisano4ncgovernor@gmail.com
Petitioner

Terence Steed
North Carolina Department of Justice
tsteed@ncdoj.gov
Attorney for Respondent

This the 22nd day of June, 2022.



Viktoriya Tsuprenko
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850