

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 BOE 02787

Charles H Farley Petitioner, v. State of North Carolina Board of Elections Respondent.	FINAL DECISION GRANTING SUMMARY JUDGMENT FOR PETITIONER
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This matter comes before the Undersigned upon Respondent's Motion for Summary Judgment brought under N.C.G.S. §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.G.S. §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

"Except as otherwise provided by law . . . Petitioner in a contested case has the burden of proving the facts alleged in the petition by a preponderance of the evidence." As such, Petitioner must establish by a preponderance of the evidence facts showing Respondent has deprived the Petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following: (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; (5) Failed to act as required by law or rule. N.C.G.S. §150B-23(a).

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.G.S. Chapter 150B and § 163-278.34

UNDISPUTED FACTS

1. On July 27, 2022, Petitioner Charles Farley filed a Petition for a Contested Case Hearing, challenging the North Carolina State Board of Elections' ("State Board") denial of a request he made to waive a civil penalty assessed against him for the untimely filing of a campaign finance report.

2. Petitioner was a candidate for the 2021 Oak Island, North Carolina, Town Council election, a nonpartisan plurality race. Petitioner also served as a treasurer for a political committee he organized, the Committee to Elect Charles Farley ("the Committee"), which is registered with the Brunswick County Board of Elections.

3. Because the Oak Island Town Council race is a nonpartisan plurality race, as treasurer, Petitioner, on behalf of the Committee, was required to file with the State Board a pre-election report. N.C.G.S. §163-278.40E(2).

4. Under N.C.G.S. §163-278.40E(2), the Committee's Pre-election Report was due ten days before the 2021 Oak Island Town Council election, which was held on November 2, 2021. Accordingly, the Committee's pre-election report was due to be filed by October 25, 2021.

5. Each campaign finance report must be signed and certified as true and correct by the treasurer required to file it. N.C.G.S. §163-278.32. When a treasurer files an electronic report, in addition to emailing the data file to the State Board, he must also file a signed Disclosure Report Cover on the committee's behalf. *See* 08 NCAC 21.0106; N.C.G.S. §163-278.9(i). Both components must be filed timely to avoid a penalty.

6. Petitioner submitted both components of his report late, filing his electronic report with the State Board on November 4, 2022, after the election, and submitting the companion Disclosure Report Cover to the County Board on November 8, 2022, after the October 25 deadline.

7. Under N.C.G.S. 163-278.34, if a report, statement, or other document is not filed within the time required in Article 22A of Chapter 163, then the individual, person, media, candidate, political committee, referendum committee or treasurer responsible for filing the report shall pay to the State Board of Election elections enforcement costs and a civil late penalty of fifty dollars (\$50.00) per day for each day the filing is late for a report that affects only nonstatewide elections, not to exceed a total of five hundred dollars (\$500.00). Section 163-278.34(e) requires that the "State Board shall calculate and assess the amount of the civil penalty due under subsection (a) or (b) of this section and shall notify the person who is assessed the civil penalty of the amount."

8. Section 163-278.34 requires 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.”

9. On February 25, 2022, Respondent issued a Notice of Penalty Assessment to Petitioner, as treasurer for the Committee, assessing a \$500.00 penalty for the Committee’s failure to timely file its 2021 Pre-election Report. (Resp. Ex. A).

10. Petitioner thereafter submitted an Affidavit to Request a Waiver of Civil Late Penalties.

11. On May 20, 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.”

12. Petitioner filed a petition for contested case hearing in the Office of Administrative Hearings on July 27, 2022.

13. Respondent filed a Motion for Summary Judgment on November 28, 2022, and Petitioner filed his response on December 19, 2022.

CONCLUSIONS OF LAW

1. N.C.G.S. § 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. The evidence before the Tribunal is that the State Board did not notify Petitioner of late filing or that, if it did, any such notification was “immediate.” Instead, the evidence proffered is solely that of a copy of one invoice dated February 25, 2022, which includes the late filing fees of \$500.00, months after the filing deadline had passed and Petitioner had filed its report.

3. 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.G.S. §163-278.34(a).

4. Pursuant to N.C.G.S. §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.”

5. 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. Larimore Aff., para 14.

6. 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 May 12, 2022, meeting of the North Carolina State Board of Elections, the State Board denied the request for a waiver of the following penalties: . . . Failure to Submit Campaign Finance Report [Non-Statewide]." (emphasis in original) (Resp. Ex. B)

7. Nowhere in the State Board's denial letter is there a reference to civil penalties for late filing.

8. The State Board acted erroneously, failed to follow proper procedure, acted arbitrarily and capriciously, and failed to act as required by N.C.G.S. § 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.

9. 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 considering "additional mitigating factors" in addition to the express factors considered by the State Board.

10. According to the State Board, the factors considered in determining a waiver request are:

(1) Whether the late report was the first late report of the committee or the first late report within the last 10 years;

(2) Whether the late report was due prior to or after the election, *in addition to other mitigating factors*;

(3) Whether the late report resulted in any contribution or expenditure not being disclosed to the public, *in addition to other mitigating factors*;

(4) Whether the late report resulted from a family emergency, severe illness or hospitalization;

(5) Whether the committee received insufficient guidance from the State Board office or a county board office in attempting to file reports; and

(6) Whether documented issues with the U.S. Postal Service or other delivery service inhibited the committee from filing a timely report.

Larimore Aff., para 17; Ross-Miranda Aff., para 15 (emphases added).

11. In his affidavit in support of the State Board's motion, the affiant states that Petitioner's waiver request was reviewed based "on its contents and these factors," thereafter reciting factors one through six without consideration of additional mitigating factors. (Larimore Aff., para 17-24). No affiant for Respondent addresses whether it considered "additional mitigating factors" in making its decision or in failing to acknowledge other actions it could have taken as provided by the very statute upon which it relies. N.C.G.S. §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"

12. 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 Summary Judgment is granted in favor of Petitioner.

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 29th day of December, 2022.



Samuel K Morris
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.

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This the 29th day of December, 2022.



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