

Brian Hines

10371 Lake Drive SE • Salem, Oregon 97306 USA • (503) 371-8892
brianhines1@gmail.com • www.hinesblog.com • www.churchofthechurchless.com

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Jennifer Hertel
Compliance Specialist
Elections Division
255 Capitol Street NE, Suite 501
Salem, OR 97310-0722

Case No. 16-C&E-14

Dear Ms. Hertel:

This is in response to your August 15 letter where you shared the complaint filed against me by Warren Bednarz, who lost his Salem City Council seat to Sally Cook in last May's primary election.

First, I was unaware of the "Independent Expenditure Filer" rule. I'm politically active and frequently contribute to political candidates/campaigns. I had no idea that "boosting" Facebook posts so they reach more people could be considered a political expenditure that needed to be reported via the ORESTAR system.

Having now familiarized myself with the Independent Expenditure Filer rule, I heartily disagree that the \$950 I spent to boost some posts on my Strange Up Salem Facebook page constituted an "independent expenditure."

Below I've copied in the relevant portion of the 2016 Campaign Finance Manual. I boldfaced passages that relate to the definition of an independent expenditure.

First, it is "an expenditure or account payable that is incurred to make a communication..." (second paragraph). This communication obviously is made up of words: "clear words of advocacy" (third paragraph). Examples include: "paying for an argument in a voter's pamphlet," or "purchasing a newspaper ad, poster or other political material" (fourth paragraph).

I did not expend any money for a communication of this sort. Repeat: none, nothing, no money. I'll explain below, after the copied-in portion of the Manual.

Independent Expenditure Filer

A person who makes independent expenditures of more than \$750 in a calendar year to support or oppose any candidate or measure must register as an Independent Expenditure Filer and disclose the independent expenditures using ORESTAR. The \$750 includes all political expenditures, not expenditures for a single candidate or measure. The Filer is not a political action committee.

An independent expenditure is an expenditure or account payable that is incurred to make a communication in support of or in opposition to a clearly identified candidate or measure. The expenditure is not made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, a candidate, agent, authorized committee of the candidate, any political committee, or agent of a political committee supporting or opposing a measure.

Expenditures for a communication expressing clear words of advocacy, such as “vote for” or “defeat” are expenditures that must be reported. However, these words are not required to make the expense for the communication a reportable expenditure. The standard is whether the communication:

- clearly identifies the candidate or measure;
 - taken in its context, clearly and unambiguously urges the election or defeat of the candidate or passage or defeat of the measure;
 - seeks action rather than simply conveying information as a whole;
- or
- is clear about what action the communication advocates.

Examples of independent expenditures include:

- a person independently paying for an argument in a voters’ pamphlet; or
- a person independently purchasing a newspaper ad, poster, or other political material supporting or opposing a candidate or measure.

Mr. Bednarz’ complaint fails to distinguish between Facebook ads and Facebook boosts. I’ve attached a 2016 piece from the Vendasta company that explains the difference between an “ad” and a “boost.” URL is:

<https://www.vendasta.com/blog/facebook-sponsored-posts-boosting-vs-ads/>

I did not pay Facebook to publish any election-related communication. I did not buy an “ad.” Rather, among many other election-related posts I wrote for my Strange Up Salem page, I “boosted” six posts after they were written and published on Facebook for no charge.

So as noted above, the \$950 I spent on Facebook “boosts” were not expenditures for a communication in support of or in opposition to a clearly identified candidate or measure. The posts in question were published on Facebook at no charge. By contrast, Facebook “ads” do cost money to publish. But again, I did not purchase any ads. I boosted already-published posts that had been written and published for free.

Mr. Bednarz obviously isn’t challenging the many other similar posts I wrote around the May election. These, like the six posts in question, reflected my personal opinion about the primary election here in Salem. Thus, the question here is whether paying to “boost” a Facebook post so it reaches more people is a “communication expressing clear words of advocacy.”

I am strongly arguing, “No, it isn’t.” To repeat: I did not pay Facebook to publish a communication. I already had published the communication for free when I paid Facebook to “boost” the post so it reached more people than it would otherwise.

Here’s a good analogy: I am standing before a crowd, exercising my First Amendment right to speak to them about a political issue. This is analogous to me writing a post on my Strange Up Salem Facebook page. Mr. Bednarz obviously is not challenging my right to do this. I did this with the six posts in question, just as I did with other posts around the time of the May election that were not “boosted.”

Returning to the analogy, I realize that my unamplified voice isn’t strong enough to reach people on the edges of the crowd. Conveniently, a guy approaches me with a battery-powered megaphone. “Want to use this for \$5?” he asks me. “Sure,” I tell him. Now people in the back of the crowd can hear me.

I haven’t altered my freely spoken communication in any way. I haven’t paid the guy to write a speech, print posters, make a radio/TV ad, or anything of that sort. I’ve simply paid him for a means to amplify my freely-composed communication so more people can hear it.

This is what “boosting” a Facebook post does. It isn’t an expenditure to make a communication. It is a payment to reach more people with an existing free, no-charge communication.

The Independent Expenditure Filer rule refers to just that: expenditures to make a communication. It talks about payments for “making” a communication. I paid Facebook *nothing* to make a communication, such as a political ad. Rather, I paid Facebook to amplify the communication that I freely made on my own.

I have Googled the question of whether boosting a Facebook post can constitute a political expenditure. I’m pretty good at finding stuff on Google. I found no indication that any regulatory body has considered that boosting a post written by someone like me, an individual expressing his/her personal opinion via a free Facebook account, is an “independent expenditure” in the sense of the Elections Division definition.

So this is my first objection to Mr. Bednarz’ complaint against me: I have not made any independent expenditures that fit with the definition in the Campaign Manual. I did not expend any money for a communication. I spent money to share an existing communication with more people.

Now, I realize it could be argued that amplifying personal free speech, again, akin to renting a megaphone rather than speaking with one’s own voice power, somehow is payment for a political “communication” — rather than a means to extend the reach of speech that, as with the case of my Facebook posts, is clearly outside the bounds of what the Elections Division can regulate.

Thus even though I believe that Mr. Bednarz' complaint should be dismissed because I haven't made any expenditures that fall under the definition of an "independent expenditure," **I'll also submit to you another argument in favor of dismissal:**

Three of the Facebook posts that I boosted did not meet the definitional standard of a communication "expressing clear words of advocacy."

I've attached two pages that have the three posts cut out and taped on. You'll see yellow highlighting where I've singled out the strongest "words of advocacy." In my view, none of the posts meet the definitional standard in the Campaign Manual.

The April 18 post included in Mr. Bednarz's complaint definitely does not. I simply told people that before they vote for a new Mayor, they should learn about the roles Chuck Bennett and Carole Smith played in the destruction of the U.S. Bank trees by the City of Salem. I didn't urge people to take any sort of action, or to vote for one candidate or the other. This post was boosted for \$150.

The following April 26 post did say "Another reason to vote for Carole Smith to be Mayor." However, it also said, "Me, I don't think Bennett should be Salem's Mayor. Read the post. Decide for yourself." So the only action urged was to read the post and decide for yourself who to vote for. This post was boosted for \$175.

The last April 28 post asked people to "Read a great Salem Weekly endorsement editorial." Like so many posts on Facebook, I simply was sharing a link to a newspaper's story — in this case, an editorial about the Salem primary election. The editorial urged a vote for certain candidates, not me. This post was boosted for \$175.

Together, these three posts constitute \$500 of the \$950 I spent on boosting the six Facebook posts in question. As previously noted, my contention is that all of the \$950 fell outside the definition of an "independent expenditure," since this money was not spent on purchasing a communication that advocated for a candidate, but rather on boosting the number of people reached by a clearly-allowable personal free communication.

However, taking out any two of the three posts that I argue are farthest outside the definition of a reportable expenditure reduces the amount I spent to \$500, beneath the \$750 threshold. The \$150 spent to boost the April 18 "tree killing" post clearly is not a reportable expenditure, since it is merely informational, with no call for any sort of action. Taking just this money out of the total reduces the amount to \$800, only \$50 above the threshold of a requirement that I wasn't even aware existed, and don't believe I violated.

In summary, I reject Mr. Bednarz' contention that I violated the independent expenditure rule for the reasons stated above: (1) Boosting a Facebook post published at no charge does not constitute a political "communication," rather it is a way to extend a clearly-allowable personal statement so it can be heard by

more people; and (2) Even if someone were to argue that boosting a Facebook post falls under the independent expenditure rule, the content of three of the six posts in question did not fall under the definition of a reportable expenditure.

Sincerely,

Brian Hines

Attachments:

- (1) "Facebook Sponsored Posts: Boosting vs Ads," Vendata Technologies
- (2) Highlighted copies of three Strange Up Salem Facebook page posts