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Final Determination Case No. 16-C&E-14

The Elections Division received a written complaint on August 12, 2016, from Warren Bednarz, alleging a violation of Oregon Election Law. Specifically, the complaint alleged that you violated Election Law because you failed to register as an "independent expenditure filer" and disclose expenditures that were made for communications related to the Salem mayoral and city councilor races which were voted on at the May 18, 2016, Primary Election. Pursuant to ORS 260.345(3) the Elections Division opened an investigation into the allegation and on August 15, 2016, a copy of the complaint and a letter requesting a response to the allegation was mailed to you.

The complaint included screen shots of your Facebook post dated May 23, 2016, which stated "Thus I paid Facebook to "boost" six political posts between April 18 and May 10. I did this because I'd become aware of the limited reach of the organic non-boosted posts."¹ This particular post reported the following:

Date Paid	Amount Paid to Boost	Post Boosted
April 18	\$150	Chuck Bennett's shameful role in US Bank tree killings
April 25	\$175	Rage against Salem's machine
April 26	\$175	Chuck Bennett lobbied for a copper mine in the Opal Creek forest
April 28	\$175	End Salem's oligarchy
May 4	\$175	"Speak Up" or "Shut Up"
May 10	\$100	"Vote, By May 17, in Salem's primary election"

¹ The post also explained that "Organic" means how many people a post reaches by posting free on a Facebook page.

Response to Allegation in Complaint

On August 25, 2016, the Elections Division received your response to the allegation. You explained that you were unaware of the “Independent Expenditure filer” rule. Further, you stated that after familiarizing yourself with the “rule” that you disagree that the \$950 dollars that you spent to “boost” some previous posts on your Strange Up Salem Facebook page constituted an independent expenditure for the reasons set forth below:

- you did not pay Facebook to publish any election-related communication; and
- you did not buy an “ad.”

Included with your response was an internet article addressing the differences between Facebook newsfeed ads and boosted posts. Boosted Facebook posts are a type of Facebook News Feed ad that takes content in the form of a Facebook page post and amplifies it to a specific audience via Facebook’s News Feed advertising platform in order to target or increase visibility and boost post engagement. Creating an ad is similar except that one can send posts to people’s newsfeeds that encourage them to like your Page or to go to the “owner’s” website; in either instance, there is a cost associated for the boost or ad.

You asserted that because you didn’t make an expenditure for the original “communications” (posts) on Facebook, you did not make any independent expenditure that “fit within the definition in the Campaign Manual;” rather, you spent money to “share” an existing communication with more people. Further, you researched the internet to see if boosting a Facebook post would constitute a political expenditure, and you found no regulatory body that has considered that boosting a post is an independent expenditure.

Finally, you asserted that even if boosting Facebook posts is an independent expenditure, three of the six posts do not express clear words of advocacy and thus are not independent expenditures. The cost of boosting the posts made on April 18, April 26 and April 28, 2016 totaled \$500. The remaining three posts from April 25, May 4, and May 10, 2016, which you do concede express clear words of advocacy, were boosted on Facebook for a cost of \$450, which is under the \$750 threshold that requires disclosure. You believe you were not required to disclose these expenditures.

Elections Division’s Determination

Under Oregon law, an “independent expenditure” means an expenditure by a person for a communication in support of or in opposition to a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate, or any political committee or agent of a political committee supporting or opposing a measure. ORS 260.005(10).

Under ORS 260.005(10)(b), “clearly identified” means, with respect to a candidate:

- the name of the candidate involved appears;
- a photograph or drawing of the candidate appears; or
- the identity of the candidate is apparent by unambiguous reference.

Further, expressed words of advocacy in the communication are not required in order to meet the definition of independent expenditure. The standard is whether the communication:

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

ORS 260.005(10)(c); 2014 Campaign Finance Manual, adopted by OAR 165-012-0055, page 7.

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.

This list is not an all-inclusive listing of what constitutes an independent expenditure.

Under Oregon law, if a person makes independent expenditures in a total amount of more than \$750 in a calendar year, the person shall use the electronic filing system to file a statement of independent expenditures not later than seven calendar days after the total amount exceeds \$750 in a calendar year. ORS 260.044. The statute also requires continuous reporting of any additional expenditures that are made.

As discussed in more detail below, because of your independent expenditures, you were required to register as an independent expenditure filer and disclose your expenditures.

First, the Elections Division rejects your argument that boosting a Facebook post published at no charge does not constitute an expenditure subject to campaign finance reporting. Even though paying to boost a post is distinguishable from buying a Facebook ad in terms of the marketing reach, the result is similar – payment is made in order to promote an idea, or here, a post. While the original communications, the Facebook posts, were posted at no cost to you, by paying to boost a post you communicated your support and opposition of the candidates to a broader audience than what the original posts reached.

Second, the Elections Division has determined that you violated ORS 260.044 because all six of the expenditures you made to boost to your Facebook posts qualify as independent expenditures. You conceded that three posts contain clear words of advocacy: those made on April 25, May 4, and May 10. The posts made on April 25, May 4, and May 10 all urge a vote for clearly named candidates, Carole Smith, Cara Kaser, Matt Ausec and Sally Cook. The boosted posts were expenditures made by you in support of these candidates or in opposition to their political opponents.

The Elections Division disagrees with your assertion that posts made on April 18, April 26, and April 28 are not independent expenditures. As established, boosting of a Facebook post can be a reportable expenditure if the post is a communication that supports or opposes a clearly identified candidate. The post on April 18 states "before you vote for a new mayor, learn about candidate Chuck Bennett's role in the needless destruction of the five, large, beautiful, healthy U.S. Bank trees in 2013." It further states, "Meanwhile, Carole Smith, the other candidate for Mayor, was working hard along with many other citizens to save the trees." This post meets all the components of supporting or opposing a clearly identified candidate. Taken in its context, it clearly and unambiguously urges the election or defeat of a candidate, it seeks action rather than simply conveying information as a whole, and it is clear about what action the communication advocates.

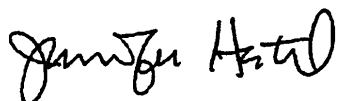
The post on April 26 states "Another reason to vote for Carole Smith to be Mayor. Her opponent, Chuck Bennett, was the lobbyist for a mining company that wanted to build a 32 acre mine in the middle of what would become the Opal Creek Wilderness after federal legislation preserved the area." Again, this statement urges a vote for a clearly named candidate. This post meets all the components of supporting or opposing a clearly identified candidate. Taken in its context, it clearly and unambiguously urges the election or defeat of a candidate, it seeks action rather than simply conveying information as a whole, and it is clear about what action the communication advocates.

The post on April 28 states, "End Salem's Oligarchy – rule by a few wealthy powerful people. Read a great Salem Weekly endorsement editorial, urging citizens to vote for Carole Smith, Mayor; Cara Kaser, Ward 1 city councilor; Matt Ausec, Ward 5 city councilor; Sally Cook, Ward 7 city councilor. Here's a right-on message from the editorial." This post meets all the components of supporting or opposing a clearly identified candidate. Taken in its context, it clearly and unambiguously urges the election or defeat of a candidate, it seeks action rather than simply conveying information as a whole, and it is clear about what action the communication advocates.

The Elections Division has determined that you violated ORS 260.044 because you made independent expenditures for a communication advocating the support of a candidate or opposition to the candidate's opponents, and the expenditures exceeded \$750 in 2016. Therefore, the Elections Division directs you to register as an independent expenditure filer and disclose the expenditures made to boost the Facebook posts using the online filing application ORESTAR. We urge you to take immediate action so that you are in compliance with the campaign finance regulations.²

This concludes the investigation into this matter. Please contact me at 503-986-1518 if you have any questions about the contents of this letter.

Sincerely,



Jennifer Hertel
Compliance Specialist

c: Warren Bednarz

² The independent expenditures will be filed late; a penalty will be assessed for the late filed independent expenditures approximately four months after the independent expenditures are filed. A maximum penalty of 10% for each late filing may be imposed.