

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS \_\_\_\_\_

NORTH CAROLINA STATE BOARD OF  
ELECTIONS,

Petitioner,

v.

AL PISANO FOR NC GOVERNOR,

Respondent.

**PETITION FOR  
JUDICIAL REVIEW**

NOW COMES Petitioner, the North Carolina State Board of Elections (the “State Board” or “Petitioner”), by and through undersigned counsel, pursuant to N.C.G.S. § 150B-43, *et seq.*, to petition this Court for judicial review of the June 22, 2022 Final Decision by Summary Judgment (“Final Decision”) and the July 15, 2022 Order Denying Respondent’s Motion to Amend the Final Decision (“Rule 59 Decision”), both issued by the Administrative Law Judge Selina Malherbe (“ALJ”) in the underlying contested case petition before the Office of Administrative Hearings (“OAH”), *Al Pisano for NC Governor v. North Carolina State Board of Elections*, 22 BOE 5088. A copy of the Final Decision is attached to this petition as Exhibit A, and a copy of the Rule 59 Decision is attached to this petition as Exhibit B. The State Board seeks review and reversal of these decisions.

In support of this petition, the State Board shows the following:

**Parties, Jurisdiction, and Venue**

1. Petitioner is an agency of the State of North Carolina with responsibility for administering elections, and regulating contributions and expenditures in political campaigns. N.C.G.S. § 163-278.5, *et seq.*

2. Respondent is a political committee known as Al Pisano for NC Governor (“Pisano”). As a political committee, Pisano was required to file campaign finance reports with the State Board during the 2020 election cycle, including quarterly reports. N.C.G.S. § 163-278.9(a)(3).

3. The Court has jurisdiction over this matter pursuant to N.C.G.S. § 150B-43 *et seq.* The State Board is entitled to judicial review of the Final Decision pursuant to N.C.G.S. § 150B-43 *et seq.* because the State Board is a party aggrieved by the final decision in the underlying contested case, and because the State Board exhausted all administrative remedies available to it.

4. Venue is proper in Mecklenburg County pursuant to N.C.G.S. § 150B-45(b)(2)<sup>1</sup> as upon information and belief, Pisano resides outside of the state but filed the contested case which resulted in the final decision in Mecklenburg County.

### **Facts and Procedural History**

#### **A. The Agency Action Contested.**

5. The agency action at issue in the contested case before OAH was the State Board’s November 21, 2021 imposition of civil penalties on Pisano for late filed quarterly campaign finance reports pursuant to N.C.G.S. § 163-278.5, *et seq.*, and the only issue before the ALJ was whether the imposition of civil penalties by the State Board was proper. *See* Pisano’s Petition for Contested Case Hearing, Pisano’s Prehearing Statement, and the State Board’s Prehearing Statement.<sup>2</sup>

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<sup>1</sup> Recent amendments to N.C.G.S. § 150B-45 became effective on July 8, 2022. Subsection (b)(2) contains the same language as former subsection (a)(2), the prior controlling subsection for determining venue. Newly added subsection (b)(3) states, “[i]f a petition is filed in an improper county, the superior court of that county may order a change of venue consistent with G.S. 1-83 but shall not dismiss the petition on the ground of improper venue.” N.C.G.S. § 150B-45(b)(3).

<sup>2</sup> All records in the underlying administrative action before OAH are transmitted to the Superior Court by OAH pursuant to N.C.G.S. § 150B-47.

6. Pursuant to General Statute 163-278.34(a), a report must be manually delivered or sent by mail addressed to the Board. N.C.G.S. § 163-278.34(a). The report is deemed filed either by the (1) date it was manually delivered, (2) the date it was postmarked, or (3) if it is mailed but the container envelope bears no postmark, or other indicia of when it was mailed, the date it was received by the State Board. *Id.*; see also Larimore Aff., ¶ 8.

7. Under N.C.G.S. § 163-278.9, during even-numbered years during which there is an election for that candidate “the treasurer of each candidate and of each political committee shall file with the Board” various reports including “Quarterly Reports.” N.C.G.S. § 163-278.9(a)(3). This statute further states that for quarters not involving an election, a political committee shall file quarterly reports “no later than seven working days after the end of each calendar quarter covering the prior calendar quarter” *Id.*

8. Pursuant to N.C.G.S. § 163-278.9(a)(3), Pisano’s 2020 Second Quarter Report was due Friday, July 10, 2020, seven working days after the end of the second quarter. *Id.*

9. However, the report was not filed until three business days later on Wednesday, July 15, 2020.

10. The statute sets a modified deadline for the third quarter report as it ended close to an election day. *Id.*, -278.9(a)(3)(a) and (b). The statutory language that sets the deadline is as follows:

The report for the third quarter shall also cover the period in October through the seventeenth day before the election, the third quarter report shall be due seven days after that date, and the fourth quarter report shall not include that period if a third quarter report was required to be filed.

N.C.G.S. § 163-278.9(a)(3)(b).

11. Applied to the 2020 election cycle, and utilizing the November 3, 2020 general election day, the 2020 Third Quarter Report was due on October 27, 2020. *See id.*

12. Pisano's report was not filed until eight business days later on November 9, 2020 when it was received by the State Board.

13. Pursuant to N.C.G.S. § 163-278.34(e), the State Board is required to "calculate and assess the amount of the civil penalty due under subsection (a) or (b) of this section . . ." N.C.G.S. § 163-278.34(e).

14. Pursuant to N.C.G.S. § 163-278.34(a)(1), the State Board calculated and assessed penalties of \$250.00 per day for each day that a report was late up to a maximum of \$10,000.00. *Id.*, -278.34(a)(1).

15. For the 2020 Second Quarter Report, the State Board assessed the statutorily prescribed penalty of \$250.00 per day for three days, for a total penalty of \$750.00.

16. For the 2020 Third Quarter Report, the State Board assessed against Pisano the statutorily prescribed penalty of \$250.00 per day for eight days, for a total penalty of \$2,000.00.

17. As a result, on September 8, 2021, the State Board properly issued a Notice of Penalty Assessment to Pisano assessing total penalties of \$2,750.00 against him. *Id.*

18. Pisano's Petition contesting this agency action before OAH was filed on December 7, 2021.

**B. Subsequent Agency Action Not Contested.**

19. Separate from the contested case petition before OAH, Pisano sought a waiver from the State Board for the penalties imposed pursuant to N.C.G.S. § 163-278.34(a) and (d).

20. Pisano's waiver request came before the State Board at a meeting on January 20, 2022. Finding that Pisano had failed to demonstrate good cause for a waiver, the State Board denied his waiver request. The State Board served Pisano with notice of the denial on January 24, 2022. The State Board is under no obligation to provide a written decision, findings of fact, or conclusions of law to support this decision. N.C.G.S. § 163-278.34. The decision to grant or

deny a waiver is a matter left in the discretion of the State Board. *Id.* (“The State Board of Elections may waive a civil penalty in whole or in part if it determines there is good cause for the waiver.”)

21. That subsequent agency action to deny the waiver request was not pled by Pisano in his initial Petition submitted to OAH, his Prehearing Statement, or as an amendment to either of those pleadings. That agency action was not the subject of a separate petition for contested case. The time within which to contest that agency action expired on or about March 28, 2022. *See* N.C.G.S. §§ 150B-23(f); and 163-278.34(f).

### **C. Procedural History.**

22. On May 27, 2022, the State Board filed a motion for summary judgment asserting that no genuine issue of material fact remained in dispute regarding whether the agency action at issue in this contested case – the State Board’s assessment of penalties for late filed reports – was properly assessed. The State Board’s motion focused entirely on the factual burden applicable to this case. *See* N.C.G.S. § 150B-25.1(b) (“In a contested case involving the imposition of civil fines or penalties by a State agency for violation of the law, 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.”) (emphasis added).

23. On June 13, 2022, Pisano filed his response to the motion for summary judgment. For the first time, Pisano raised the denial of a waiver as grounds for relief from the imposition of penalties by the State Board. This argument was irrelevant to the agency action contested in this matter and bore no relation to the State Board’s burden of proof.

24. On June 22, 2022, the ALJ issued the Final Decision in the form of an order granting summary judgment in Pisano’s favor. In the Final Decision, the ALJ disregarded the issue presented and the evidentiary burden as found in by N.C.G.S. §150B-25.1(b) for assessing

the imposition of penalties by a State agency and instead substituted it with the Court's assessment of the Pisano's newly raised claim that the subsequent agency action involving his waiver was improperly denied. *See* Final Decision, p. 1, statement of the Issue, attached as Ex. A.

25. The Final Decision then went on to adopt irrelevant and inadmissible evidence submitted by Pisano without providing the State Board with notice or an opportunity to respond to this separate agency action not before OAH. *Id.*, pp. 2-4.

26. On July 1, 2022, the State Board filed a motion to alter or amend the Final Decision pursuant to Rule 59. The State Board argued relief should be granted per Rule 59 for many of the same reasons raised in this petition, including that the ALJ committed multiple errors of law, relied upon insufficient evidence to support its ruling, engaged in irregularity that prevented a fair proceeding, and created a surprise for which the State Board could not guard against. The State Board also argued that the ALJ failed to follow proper procedure when it issued a decision without notice of its redefinition of the issues and without a hearing to allow for the presentation of further argument or evidence in response thereto.

27. In relief, the State Board requested that the ALJ (1) amend its Final Decision to strike all references to notice regarding the agency action at issue, and (2)(a) amend its Final Decision to strike all references to the subsequent agency action not made part of the contested case, or (2)(b) in the alternative, reopen the judgment and allow for the presentation of additional argument and evidence as permitted under Rule 59 to address the newly raised issues.

28. On July 15, 2022, the ALJ issued its Rule 59 Decision summarily denying the State Board's motion. *See* Ex. B.

### **Grounds for Judicial Review**

29. The State Board's substantial rights have been prejudice by the Final Decision of the ALJ, and by the ALJ's refusal to amend that order, because the findings, inferences, and conclusions contained in the decision are (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the ALJ; (3) made upon unlawful procedure; (4) affected by other errors of law; (5) unsupported by substantial evidence admissible under N.C.G.S. § 150B-29(a) in view of the entire record as submitted; and (6) arbitrary, capricious, and an abuse of discretion. *See* N.C.G.S. § 150B-51(b)(1) to (6).

30. With regard to any asserted errors under subsections (b)(1) to (4), review of the final decision is de novo. With regard to errors asserted under subsection (b)(5) to (6), review is conducted under the whole record test. *Id.*, 150B-51(c)

31. In reviewing this summary judgment decision, this Court may enter any order allowed by N.C.G.S. § 1A-1, Rule 12(c) or Rule 56, fully or partially adjudicating the case or remanding the case to the ALJ for further proceedings. *Id.*, 150B-51(d).

#### **I. STATE BOARD'S EXCEPTIONS TO THE FINAL DECISION**

Pursuant to N.C.G.S. §§ 150B-46 and 150B-51(b), the State Board submits the following exceptions to the Final Decision:

##### **A. General Exceptions to Findings of Fact 8 and 10, and Conclusions of Law 5 to 13.**

32. The State Board takes exception generally to the Findings of Fact 8 and 10, and Conclusions of Law 5 to 13 because consideration by the ALJ of the State Board's denial of a waiver to Pisano was not the agency action before the OAH. As further expanded below, (1) this constitutes an error of law in violation of N.C.G.S. § 150B-23(a); (2) an error of law in violation of N.C.G.S. § 150B-25.1(b); (3) it exceeded the ALJ's jurisdiction; (4) was made upon unlawful

procedure in violation of the notice requirements of Rule 8; (5) violated the State Board's constitutional due process rights; (6) all findings and conclusions based upon it were unsupported by substantial evidence, as all such evidence was irrelevant and inadmissible; and (7) the adjudication of this agency action was arbitrary, capricious, and an abuse of discretion.

33. Exception: The State Board takes exception generally to the consideration by the ALJ to the State Board's denial of a waiver to Pisano, as adjudication of that agency action was never contested in violation of N.C.G.S. § 150B-23(a). In order to contest an agency decision, an aggrieved person must actually file a petition for a contested case challenging that agency decision. N.C.G.S. § 150B-23(a). The petitioner must state facts supporting that claim, serve the petition, and the parties *shall* be given an opportunity for a hearing. *Id.* This never occurred with respect to the State Board's decision to deny a waiver to Pisano. Therefore, consideration by the ALJ of this agency action violated N.C.G.S. § 150B-23(a).

34. Exception: The State Board takes exception generally to the consideration by the ALJ to the State Board's denial of a waiver to Pisano, as adjudication of that agency action exceeded the jurisdiction of the ALJ. Because Pisano did not follow the mandatory statutory requirements in N.C.G.S. § 150B-23 for commencing a contested case to challenge the Board's decision to deny the waiver, the ALJ did not have jurisdiction to determine the propriety of that agency action. *See Nailing v. UNC-CH*, 117 N.C. App. at 324, 451 S.E.2d at 355; *cf. Gray v. N.C. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002) (providing that the timely filing of a contested case petition as dictated by N.C.G.S. § 150B-23(f) "is necessary to confer subject matter jurisdiction on the agencies as well as the courts").

35. Exception: The State Board takes exception generally to the ALJ adjudicating the subsequent agency action not before OAH, because it was not properly pled, that adjudication thus violates the minimum notice requirements of Rule 8(a), which require the pleader to "state a



claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial.” *Plasman ex rel. Bolier & Co. v. Decca Furniture (USA), Inc.*, 257 N.C. App. 684, 689, 811 S.E.2d 616, 621 (2018) (quoting *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985)) (citing Rule 8(a)(1)). The ALJ’s Final Decision adjudicated a claim that was not properly pled by Pisano in his contested case petition or in his Prehearing Statement, and at no point were those pleadings amended to include the subsequent agency action. This deprived the State Board of notice and an opportunity to respond, thus eliminating its opportunity to understand the nature of the claim, answer it, or prepare to defend it. *See id.*

36. Exception: The State Board takes exception generally to the ALJ adjudicating the subsequent agency action not before OAH. In so doing, the ALJ committed an error of law when it substituted the statutorily defined evidentiary burden on the State Board for contested cases arising out of the imposition of penalties in violation of N.C.G.S. § 150B-25.1(b). When Pisano filed a contested case challenging the State Board’s imposition of civil penalties, North Carolina law required the State Board to prove that the penalties imposed were proper by submission of evidence that the person fined did in fact file late reports for which penalties were imposed. *See* N.C.G.S. § 150B-25.1(b) (“In a contested case involving the imposition of civil fines or penalties by a State agency for violation of the law, 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.”) (emphasis added). This was the burden to be met by the State Board, but the ALJ imposed a new burden based on a different agency action without providing the State Board with a notice and opportunity to defend that action.

37. Exception: The State Board takes exception generally to all of the ALJ’s findings regarding the subsequent agency action because each was unsupported by substantial admissible evidence, as all evidence related to the denial of the waiver was irrelevant and inadmissible as

that decision was not before OAH. The ALJ should have rejected all arguments and evidence related to it as wholly irrelevant, immaterial, and inadmissible. Failure to do so also constitutes an error of law in violation of N.C.G.S. § 150B-29.

38. Exception: The State Board takes exception generally to the ALJ adjudicating the subsequent agency action not before OAH, as it violated the State Board's due process rights because the State Board was denied notice and opportunity to defend this action. As stated above, in a contested case arising out of the imposition of penalties, the State Board's burden is defined in N.C.G.S. § 150B-25.1(b). This was the action the State Board was defending, and the waiver process remained a separate proceeding resulting in a separate agency action that was never contested below. The waiver denial action was raised for the first time in response to a motion for summary judgment, not as part of the pleadings, and therefore it was irrelevant to the issues in the matter before the ALJ. Rather than disregard it as such, the ALJ, without notice or an opportunity to respond, granted summary judgment in favor of the non-moving party based upon an agency action not contested. When the ALJ chose to alter the State Board's statutorily defined burden by substituting in a new claim focused on the denial of Pisano's waiver by the State Board, the ALJ committed an error of law in violation of the State Board's right to due process.

39. Exception: The State Board also takes exception to the ALJ defining the issue before as "[w]hether [the State Board] failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law when it denied [Pisano]'s request for a waiver of civil penalties for late filing?" Ex. A, p. 1. This redefining of the issue before the ALJ was based upon an agency action Pisano never contested; violated the State Board's due process rights; exceeded the ALJ's jurisdiction; was based on unlawful procedure because it violated Rule 8's pleading requirements; was an error of law because it disregarded the statutorily defined

burden placed on the State Board; required the ALJ to consider inadmissible and irrelevant evidence in order to support all findings related to it; and was arbitrary, capricious, and an abuse of discretion because that agency action was not before OAH.

**B. Findings of Fact**

40. Exception: The State Board takes exception to Finding of Fact 8, which relates to Pisano’s waiver request to the State Board, as it is unsupported by substantial admissible evidence in view of the entire record, and for the reasons stated above.

41. Exception: The State Board takes exception to Finding of Fact 10, which relates to the State Board’s denial of Pisano’s waiver request, as it is unsupported by substantial admissible evidence in view of the entire record, and for the reasons stated above.

42. The remaining Findings of Fact are undisputed and support granting summary judgment in favor of the State Board.

**C. Conclusions of Law**

43. Exception: The State Board takes exception to Conclusion of Law 4 finding that “[t]he 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 [Pisano] of the late filings as required by N.C. Gen. Stat. § 163-278.34(a).”

44. The ALJ committed an error of law when it improperly relied upon a lack of immediate notice by the State Board of a late filing to reach the conclusion that the penalties imposed herein were improper. The State Board does not dispute that immediate notice was not provided; however, this still constitutes an error of law because the statute dictating the issuance of such notice, N.C.G.S. § 163-278.34, has no bearing on whether the underlying penalties previously calculated and assessed were proper.

45. The purpose of providing notice is to trigger the rights and obligations of the person against whom the penalties are imposed. N.C.G.S. § 163-278.34(e) triggers the late filer's options to (1) pay the penalty, (2) file a waiver request consistent with G.S. 163-278.34(d), or (3) file a contested case petition. N.C.G.S. § 163-278.34(e). Thus, failure to provide notice of a late report does not impact in any way the determination of whether penalties were properly calculated or assessed, and for that reason, it could not prejudice Pisano. Moreover, the ALJ failed to make any finding that the timing of the notice of assessment impacted the State Board's decision to impose penalties or prejudiced Pisano in any way.

46. Exception: The State Board takes exception to Conclusion of Law 5 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38.

47. Exception: The State Board takes exception to Conclusion of Law 6 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38.

48. Exception: The State Board takes exception to Conclusion of Law 7 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, the sufficiency of the notice provided for an agency action not before OAH is entirely irrelevant to the proceeding. But even if it were relevant, this finding would constitute an error of law because the State Board is under no obligation to provide a written decision, findings of fact, or conclusions of law to support this decision. N.C.G.S. § 163-278.34.

49. Exception: The State Board takes exception to Conclusion of Law 8 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, this conclusion states that the State Board's denial letter

does not contain a reference to the civil penalties imposed, which is directly contradicted by the document it cites.

50. Exception: The State Board takes exception to Conclusion of Law 9 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, this conclusion states that the State Board denied the waiver without first making a determination of whether good cause existed to do so. This agency action was not before OAH, and if it had been, evidence would have been presented to demonstrate that the State Board did make a finding that good cause did not exist to grant the waiver request at the State Board meeting held on January 20, 2022. More importantly, if this matter was before the ALJ, this conclusion would still be an error of law because the decision to grant or deny a waiver is a discretionary decision left to the State Board, not a mandatory action that must be taken. *See* N.C.G.S. § 163-278.34(d) (“The State Board of Elections may waive a civil penalty in whole or in part if it determines there is good cause for the waiver.”) (emphasis added).

51. Exception: The State Board takes exception to Conclusion of Law 10 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, this conclusion states that the State Board denied the waiver without first making a determination of whether good cause existed to do so. This agency action was not before OAH, and if it had been, evidence would have been presented to demonstrate that the State Board did make a finding that good cause did not exist to grant the waiver request at the State Board meeting held on January 20, 2022. More importantly, if this matter was before the ALJ, this conclusion would still be an error of law because the decision to grant or deny a waiver is a discretionary decision left to the State Board, not a mandatory action that must be taken. N.C.G.S. § 163-278.34(d)

52. Exception: The State Board takes exception to Conclusion of Law 11 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, even if this agency action was before the ALJ, this conclusion would still be an error of law because the decision to grant or deny a waiver is a discretionary decision left to the State Board, not a mandatory action that must be taken. N.C.G.S. § 163-278.34(d).

53. Exception: The State Board takes exception to Conclusion of Law 12 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38. Additionally, even if this agency action was before the ALJ, this conclusion would still be an error of law because the decision to grant or deny a waiver, or to take any other action in lieu of or in addition to imposing a civil penalty under N.C.G.S. § 163-278.34(c), is a discretionary decision left to the State Board, not a mandatory action that must be taken. N.C.G.S. § 163-278.34(d); *see also* N.C.G.S. § 163-278.34(c) (“The State Board of Elections, 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.”) (emphasis added).

54. Exception: The State Board takes exception to Conclusion of Law 13 for all of the reasons stated above in Part A because it relates to a subsequent agency action not before OAH. *See* Paragraphs 32 to 38 and 48 to 53.

## **II. STATE BOARD EXCEPTIONS TO THE RULE 59 DECISION.**

Pursuant to N.C.G.S. §§ 150B-46 and 150B-51(b), the State Board submits the following exceptions to the Rule 59 Decision:

55. The State Board raised these same arguments through a Rule 59 motion to the ALJ. The ALJ issued a summary denial of that motion. *See* Ex. B.

56. Exception: The summary denial contained no findings of facts or conclusions of law with which the State Board can take a specific exception. Nonetheless, the State Board generally takes exception with the denial of the Rule 59 Decision for the same reasons asserted above in Part I above. Those same arguments contained in the State Board's Rule 59 motion, and incorporated here by reference, detailed how that decision contained multiple errors of law, relied upon insufficient evidence to supports its ruling, engaged in irregularities that prevented a fair process, and created surprise for which the State Board could not guard against despite ordinary prudence.

57. Exception: The State Board takes exception to the ALJ's Rule 59 Decision to the extent that Rule 59 empowers the ALJ to grant relief that could have diminished the errors caused by its redefining of the issue in the case to focus on the subsequent agency action. Had the ALJ reopened the case to allow for the presentation of evidence and argument in order to develop a full record, the State Board could have responded either in writing, at oral argument, or at a hearing, with argument and evidence to dispute Pisano's claims regarding the waiver denial. This would have at least partially eliminated the errors highlighted above, and ensured that the Court's decision was based on a full and complete record as required by 26 N.C.A.C. 03 .0115(b). Although the State Board maintains that the waiver denial was never properly before OAH, reopening the matter in response to the Rule 59 motion would have permitted the State Board to demonstrate sufficient evidence to supports its denial of Pisano's waiver request, thus preventing the prejudice to its substantial rights.

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**Conclusion**

For the foregoing reasons, it is respectfully requested that the Court:

1. Reverse the ALJ's Final Decision and grant summary judgment in favor of the State Board; or
2. In the alternative, strike those portions of the Final Decision related to the subsequent agency decision to deny a waiver as that agency action was not before the OAH; or
3. Alternatively, reverse the Final Decision and/or the Rule 59 Decision and remand for further proceedings before OAH to develop a full record consistent with this Court's findings; and
4. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted this the 21<sup>st</sup> day of July, 2022.

JOSHUA H. STEIN  
Attorney General



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Terence Steed  
Special Deputy Attorney General  
N.C. Bar No. 52809  
Email: [tsteed@ncdoj.gov](mailto:tsteed@ncdoj.gov)  
N.C. Department of Justice  
Post Office Box 629  
Raleigh, NC 27602  
Telephone: (919) 716-6567  
Facsimile: (919) 716-6932  
*Counsel for the North Carolina State Board  
of Elections*



CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document has been served on Petitioner in this action via United States Postal Service and via email as follows:

Albert Lawrence Pisano  
217 Hydrangea Street  
Summerville, SC 29483  
pisano4ncgovernor@gmail.com

This the 21<sup>st</sup> day of July, 2022.



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Terence Steed  
Special Deputy Attorney General

# Exhibit A

# EXHIBIT A

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
06/22/2022 10:56 AM

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
21 BOE 05088

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| <p>AL Pisano for NC Governor<br/>Petitioner,</p> <p>v.</p> <p>NC State Board of Elections<br/>Respondent.</p> | <p><b>FINAL DECISION<br/>GRANTING<br/>SUMMARY JUDGMENT<br/>FOR PETITIONER</b></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?

# EXHIBIT A

## 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.

# EXHIBIT A

## 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.

## EXHIBIT A

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.

## EXHIBIT A

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

# EXHIBIT A

## 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



# Exhibit B

**EXHIBIT B**

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
07/15/2022 11:05 AM

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

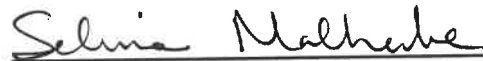
IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
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|---|--|
| <p>AL Pisano for NC Governor<br/>Petitioner,</p> <p>v.</p> <p>NC State Board of Elections<br/>Respondent.</p> | <p><b>ORDER DENYING<br/>RESPONDENT'S MOTION TO ALTER<br/>OR AMEND THE FINAL DECISION</b></p> |
|---|--|

Respondent has filed a Motion to Alter or Amend the Final Decision Pursuant to Rule 59. The Undersigned has reviewed Respondent's motion papers, legal authorities cited, and the entire record herein. After careful consideration, the Undersigned determines that oral argument is not necessary for a complete record to decide the motion. Respondent's motion is hereby **DENIED**.

**IT IS SO ORDERED.**

This the 15th day of July, 2022.



Selina Malherbe  
Administrative Law Judge

## EXHIBIT B

### 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](mailto:pisano4ncgovernor@gmail.com)  
Petitioner

Terence Steed  
North Carolina Department of Justice  
[tsteed@ncdoj.gov](mailto:tsteed@ncdoj.gov)  
Attorney For Respondent

This the 15th day of July, 2022.



---

Lisa J Garner  
North Carolina Certified Paralegal  
N. C. Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC 27609-6285  
Phone: 984-236-1850