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January 12, 2023

Sent Via Email Only

Dr. Hai Pham

[REDACTED]
[REDACTED]

Re: Elections Division Case No. 22-219

Dr. Pham:

On November 8, 2022, you were informed that the Elections Division (“Division”) received a written complaint alleging possible violations of Oregon election law. The complaint alleged that you do not qualify for the office of State Representative District 36 because you reside in District 31, and that you made a false statement on your Declaration of Candidacy form when you attested to an incorrect residential address. Making a false statement on a declaration of candidacy form is a violation of ORS 260.715(1).

Pursuant to ORS 260.345(3), the Division investigated the allegation that you made a false statement on your declaration of candidacy form. The Division did not investigate whether you are qualified to hold the office based on the requirements of Article IV of the Oregon Constitution and the Oregon Supreme Court’s decision in *Kotek v. Fagan*, 367 Or 803 (2021).

For reasons set forth below, the Division has determined that you did not make a false statement on your declaration of candidacy when you attested to residing at [REDACTED] SE 81st Ave., Hillsboro, OR 97123, located in State Representative District 36.

Declarations of Candidacy and Residency

As Oregon’s chief elections officer, the Secretary of State is responsible for obtaining and maintaining uniformity in the application, operation and interpretation of state election laws. ORS 246.110. Among the Secretary’s responsibilities is the duty to receive declarations of candidacy for state offices, including for the office of State Representative. ORS 249.035. Pursuant to this authority, the Elections Division reviews declaration of candidacy filings for compliance with ORS 249.031, the State Candidates Manual (“Manual”) and to ensure that candidates will qualify for the office if elected.

ORS 249.031 outlines the information that must be included on a declaration of candidacy form. ORS 249.031(1)(b) requires the candidate to provide “[a]ddress information as required by the Secretary of State by rule.”

The Secretary adopted the Manual by administrative rule and directs candidates to include both a residence address and a mailing address for candidate correspondence. The Manual defines each as follows:

Candidate Residence Address: Residential address of the candidate, including the county must be used. This must be included even if the candidate has a non-disclosure order on file with the Elections Division.

Mailing Address for Candidate Correspondence: Include the address where the candidate wishes to receive correspondence from the Elections Division. Do not use an address included on a non-disclosure order on file with the Elections Division.

Manual at page 32. A candidate’s residence address is a key factor in determining whether the candidate meets the residency requirements for the office they seek.

ORS 249.052(1) provides that

For purposes of determining whether a candidate for the office of state Representative ... has been an inhabitant of the district from which the ... Representative may be chosen as required by section 8, Article IV of the Oregon Constitution, an elections official may consider, but is not limited to considering, the following factors:

- (a) Where the candidate receives personal mail;
- (b) Where the candidate is licensed to drive;
- (c) Where the candidate registers motor vehicles for personal use;
- (d) Where any immediate family members of the candidate reside;
- (e) The address from which the candidate pays for utility services;
- (f) The address from which the candidate files any federal or state income tax returns; and
- (g) The candidate’s voter registration, if any.

Pham’s Declaration of Candidacy and Qualification Determination

You filed a declaration of candidacy for the office of State Representative, District 36 on February 27, 2022. On that filing you stated that your residence address was [REDACTED] SE 81st Ave. Hillsboro, OR 97123. By signing the filing, you attested that you were a resident of District 36 and therefore qualified to run for State Representative based on the residence address provided.

The Division reviewed your filing using the same procedures and standards applied to all potential candidates running for state office. When the Division receives a candidacy filing, it first checks the potential candidate's Oregon voter registration. If the person has been registered as an Oregon voter in the district for the required residency period, then the Division determines that the person meets the residency requirement. If the potential candidate's voter registration is insufficient to establish residency for the required period, then the Division asks the potential candidate for more information.

On March 1, 2022, after reviewing your filing and your voter registration record, the Division informed you that additional information was needed to determine that you met the durational residency requirements for the office of State Representative. You were informed that you must have been a resident of State Representative, District 36 on or before January 1, 2022 and provided a list of examples that would help determine your qualifications, many of which are also outlined in ORS 249.052(1).

You responded on March 2, 2022, and stated that you "purchase[d] an intergenerational home for [your] parents at [REDACTED] SE 81st Ave., Hillsboro, OR 97123" and "[p]art of that decision was to prepare for a time where [you] would live with them to support them as they aged." You included a photograph of a mortgage closing letter listing you as one of the buyers of the home. The letter was dated October 25, 2019. The Division determined that you were qualified to run for office based on your response and the supporting documents you submitted. You were the only candidate printed on the May 17, 2022 Democratic Primary Election ballot for State Representative, District 36 and you won the party's nomination.

Investigation and Analysis

As previously explained, making a false statement on a declaration of candidacy form is a violation of ORS 260.715(1). Specifically, ORS 260.715(1) states that "[a] person may not knowingly make a false statement, oath or affidavit when a statement, oath or affidavit is required under the election laws."

In *State v. Huntley*, 25 Or 349, 35 P 1064 (1894), the Oregon Court of Appeals held that ORS 260.715(1) applies to varifiable facts which are not open to dispute or debate. The court opined that "[a] candidate who falsifies those facts is trying to mislead the voting public and would undermine the electoral process." To determine whether a statement is false under ORS 260.715(1), the Division asks whether any reasonable inference can be drawn from the evidence that the statement is factually correct. If the answer is in the affirmative the Division ends its inquiry at that point.¹ In other words, when a reasonable construction of the evidence would render a statement true, the Division will not pursue further action.²

¹ If no reasonable inference can be drawn from the evidence that the statement is true, the Division proceeds to ask whether the person making the false statement did so knowingly.

² Further action may include civil penalties and/or referral to the Oregon Department of Justice for possible criminal prosecution.

The Division's investigation focused on whether any reasonable inference could be drawn from the evidence to determine that you knowingly made a false statement about your residence address when you filed your declaration of candidacy for the office of State Representative, District 36 on February 27, 2022.

The guidance found in ORS 249.052(1) was central to the Division's investigation and determination. Accordingly, the Division obtained copies of your drivers' license, motor vehicle registration, utility service statements, your most recent state and federal income tax returns and your voter registration record.

Voter Registration Record

Your voter registration record indicates that you resided at [REDACTED] NW Jackson Quarry Rd., Hillsboro, OR 97124 between March 29, 2016 and January 25, 2022. You updated your voter registration on January 26, 2022 to indicate that you resided at [REDACTED] SE 81st Ave., Hillsboro, OR 97123. When changing your address you swore (or affirmed) that the information was true. You signed knowing that providing a false statement on that form was a crime punishable by up to \$125,000 and/or imprisonment for up to five years. In responses to the Division, you stated that you began taking "clear, objective steps to demonstrate which property [you] considered [your] residence" on January 26, 2022. You said that you still own the home on NW Jackson Quarry Rd., that your spouse and child primarily reside there and acknowledged that you spend some time there. However, you also stated that your spouse and child spend time with you at your home on SE 81st Ave.

The Oregon Supreme Court's recent decision in *State ex rel Kristof v. Fagan*, 369 Or 261 (2022), provides guidance for the Division when determining a person's residence for the purpose of being a candidate for public office. In that case the court held that "residence" in this context refers to the legal concept of "domicile" which requires "the fact of a fixed habitation or abode in a particular place, and an intention to remain there permanently or indefinitely[.] *Reed's Will*, 48 Or 500, 504, 87 P 763 (1906). The court explained that a person can only have one residence (or domicile) at a time and that domicile, once established, continues until there is "an intention, expressed or implied, to abandon the old domicile and acquire a new one." *Id.*

To determine a person's intent to remain indefinitely, thus being domiciled in a particular place, the court and the Division give considerable weight to where a person maintains a driver's license, the amount of time that a person spends in a place, where a person pays income taxes, and where they are registered to vote. In *State ex rel Kristof v. Fagan*, the court said that voter registration carries significant weight because "the choice of where to register is a meaningful one, as it provides evidence of the political community to which a person feels the greatest attachment -- the community in whose elections that person wishes to have a say." The court also recognized that a person does not lose residence in a particular place by spending time at another place; it held that a person "cannot gain or lose a residence by reason of his presence or absence when employed in the service, yet he can establish his domicile and gain a residence

at such a point as he may see fit, by taking the proper and appropriate steps to do so independently of his employment." *Wood v. Fitzgerald*, 3 Or 568, 573 (1870).

The court, referencing its decision in *Elwert v. Elwert*, 196 Or 256, 248 P2d 847 (1952), laid out principles for discerning intent in cases where a person has a connection to multiple places:

"The nature and location of a party's business with reference to his residence is an element for consideration. In general, it is held that merely being engaged in business, even on a large scale, in a state or municipality other than that in which one's family resides does not justify the claim of legal residence at the business location. The retention of an interest in a business in the locality from which one has removed weakens the proof of abandonment and requires some explanation. Evidence that the *main* place of a man's business is at the place from which he came may be indicative of an intention to maintain his domicile in that locality. If he has two residences, his domicile will be presumed to be the one which appears to be the center of his affairs. Therefore, one who has resided and carried on business for years in one jurisdiction cannot for his own purposes insist that his domicile is in another. The facts may belie the expressed intent to retain a domicile actually given up. The original domicile is favored and where the facts are conflicting, the presumption is strongly in favor of an original or former domicile as against an acquired one."

Drivers' License and Motor Vehicle Registration

As previously stated, the Division gives a person's drivers' license considerable weight when determining residency. The Oregon Department of Transportation's records indicate that you updated the address on your drivers' license on January 26, 2022. When updating your address you attested under penalty of law that the information was true and correct. You also attested that you understood making a false statement on an application for driving privileges is a class A misdemeanor and punishable by drivers' license suspension, jail time, and/or a fine. Further, your earliest motor vehicle registration documents showing your address at SE 81st Ave. indicate that they were issued on February 18, 2022.

Income Tax Returns, Utility Services and Personal Mail

In line with the ORS 249.052(1), the Division also considers the address from which a person files income tax returns, where they pay for utilities and where they receive personal mail. You provided the Division with documents showing that you received personal mail and paid for utility services for the home at SE 81st Ave. You also provided evidence showing that you listed SE 81st Ave. as your address on your personal income tax returns.

Immediate Family Members' Residency

The complaint specifically raised concerns about your residency because it appeared that your spouse and child continued to reside at the home on NW Jackson Quarry Rd. One of the factors

the Division considers in determining a person's residence is where members of their immediately family reside. Though the term "immediate family" typically includes a person's spouse, their children, and their parents, the Division understands that this is particularly true for you because of your cultural background. In your response you stated that because you are the eldest son, it is your "duty...honor and privilege...to care for [your] parents."

Determination

After considering all the evidence obtained as part of the investigation, the Division has determined that you did not knowingly make a false statement on your declaration of candidacy for the office of State Representative, District 36. By the time you filed your declaration of candidacy form on February 27, 2022 you had already established physical presence and, as outlined above, taken steps to indicate that you intended to remain at the home on SE 81st Ave. The evidence does not support the allegation that you made a false statement under ORS 260.715(1).

As previously outlined, the complaint alleged that you do not qualify to hold the office of State Representative for District 36 because you do not meet the durational residency requirements set forth in Article IV of the Oregon Constitution and the Oregon Supreme Court's decision in *Kotek v. Fagan*. The Division's investigation did not evaluate the merits of that allegation. The legislature has accorded the Secretary the responsibility of determining, in the first instance, whether a prospective candidate is qualified to appear on the ballot. The Division exercised this authority and determined that you were qualified to appear on the ballot based on the evidence obtained at that time.

This concludes the Division's investigation into this matter. You may appeal this decision in circuit court pursuant to ORS 246.910.

Sincerely,

Alma Whalen
Elections Program Manager