

TEXAS ETHICS COMMISSION

IN THE MATTER OF
KENNETH RAY JONES,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-200207

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on April 14, 2000, and voted to accept jurisdiction of Sworn Complaint SC-200207 filed against Kenneth Ray Jones, Respondent. The commission met again on October 12, 2001, to consider Sworn Complaint SC-200207. A quorum of the commission was present at both meetings. Based on the investigation conducted by commission staff, the commission determined that there is credible evidence of violations of Sections 253.003(b), and 255.006, Election Code, laws administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposes this agreed resolution to the respondent.

II. Allegations

The complainant alleges that the respondent, a candidate for constable, unlawfully accepted corporate contributions, represented in a campaign communication that the respondent held an office he did not hold, failed to include a proper political advertising disclosure statement on political advertising, and misused government property.

III. Facts Supported by Credible Evidence

Credible evidence available to the commission supports the following findings of fact:

1. This case involves allegations related to a primary election held March 14, 2000, in Harris County.
2. The respondent was a candidate for constable in the primary election and was not the incumbent. The respondent won both the primary and the general election.
3. The complainant submitted a large number of exhibits, including copies of various pages from the respondent's website, and copies of the respondent's contribution and expenditure reports. The respondent submitted a sworn response.

4. The complainant alleges that during the primary election campaign the respondent displayed peace officer insignias, uniforms, patrol automobiles, and government equipment in campaign advertising. The complainant alleges that such use constituted a misuse of government property under Section 39.02, Penal Code. In his sworn response, the respondent denies that government property was used.
5. The complainant alleges that the respondent's campaign literature, including photographs and information on the respondent's website, was misleading because it did not contain the word "for" before the name of the office the respondent sought, or the type size of the word "for" was too small. The complaint included copies of numerous pages from the respondent's website showing the respondent's campaign materials without the word "for." The respondent swears that his materials either contained the word "for" or the word "elect" before the office sought.
6. The complainant alleges that the respondent improperly used the state seal in political advertising because photographs used in political advertising show police vehicles bearing an official state seal. The respondent swears that the seal that appears in the photographs is not the official state seal.
7. The complainant alleges that the respondent accepted political contributions from a labor union and a number of corporations. The complaint included copies of the respondent's contribution and expenditure reports that purport to show the receipt of \$2,040 in corporate contributions. The semiannual report due July 15, 1999, shows contributions from a school district, a labor union, and various business entities on the following dates: three contributions totaling \$600 on June 10, 1999, from a school district; \$400 on May 20, 1999, from a business; \$100 on June 11, 1999, from a business; \$500 on June 8, 1999, from a labor union; \$300 on March 15, 1999, from a cemetery company; \$100 on February 12, 1999, from a business; and a \$40 contribution from a business that was returned on July 10, 1999. The respondent swears that he returned the corporate contributions when he found out the contributors were corporations. The respondent swears that the contribution from the labor union was from the union's PAC and was therefore legal.
8. The complainant alleges that the respondent's semiannual report due July 15, 1999, was incomplete because the cover sheet for the report indicated that the report consisted of 49 pages, but only 48 pages were filed. In his sworn response, the respondent swears that he filed 49 pages, and that the complainant miscounted the number of pages filed. Later, in a telephone conversation with staff, the respondent stated that he might have miscounted the number of pages he actually filed, but that he had disclosed all of his campaign finance activity in the report.
9. The complainant alleges that the respondent did not report the acceptance of a \$40 corporate contribution. The respondent swears that since the contribution was less than \$50 it was reported in the aggregate total for contributions of \$50 or less.

10. The complainant alleges that the respondent failed to include the political advertising disclosure statement on political advertising displayed on the respondent's website. The complainant submitted copies of what purport to be web pages from the respondent's website. The respondent swears that the political advertising disclosure statement was included on the first page of his website. The respondent swears that the exhibit submitted by the complainant was altered to exclude the political advertising disclosure statement. The respondent also contends that since the disclosure statement was included on the first page of the website he was not required to include the disclosure on every web page.

IV. Findings and Conclusions of Law

The facts described in Section III support the following findings and conclusions of law:

Misuse of Government Property

1. The complainant alleges violations under Section 39.02 (Abuse of Official Capacity), Penal Code. The Ethics Commission does not have the authority to enforce the Penal Code. Therefore, the commission refuses jurisdiction with regard to the Penal Code allegations.

Misleading Use of Office Title

2. A person commits an offense if the person knowingly enters into a contract or other agreement to print, publish, or broadcast political advertising with the intent to represent to an ordinary and prudent person that a candidate holds a public office that the candidate does not hold at the time the agreement is made. Section 255.006(a), Election Code.
3. A person represents that a candidate holds a public office that the candidate does not hold if the candidate does not hold the office that the candidate seeks and the political advertising states the public office sought, but does not include the word "for" in a type size that is at least one-half the type size used for the name of the office to clarify that the candidate does not hold that office. Section 255.006(c), Election Code.
4. A person other than an officeholder may not use the state seal in political advertising. Section 255.006(d), Election Code.
5. "Political advertising" is defined in relevant part as a communication that supports or opposes a candidate and that, in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast on radio or television, or that appears in a pamphlet, circular, flier, sign, or similar form of written communication. Section 251.001(16), Election Code.
6. The campaign signs support the respondent's candidacy, and are therefore political advertising. Photographs of the respondent's campaign signs submitted by the complainant clearly show that the word "for" is not present.

7. The respondent, who was not the incumbent, contends that all of his literature contained the word "for" or "elect" before the name of the office sought. Further, the respondent contends that he did not have to include the word "for" because the signs had the word "elect" before the candidate's name. The respondent cites Ethics Advisory Opinion No. 210 (1994) in support of this contention. However, Section 255.006, Election Code, has been amended since 1994. Prior to September 1, 1997, Section 255.006, Election Code, did not contain subsection (c), which specifies that the use of the word "for" is required when a person seeks election to an office the person does not currently hold. Because the respondent's political advertising signs do not contain the word "for," there is credible evidence that the respondent violated Section 255.006, Election Code.
8. With regard to using the official state seal in political advertising, the complainant alleges that the state seal was contained within the official peace officer's badge and emblems of the constable's office. Exhibits submitted by the complainant show what the complainant alleges are photographs and depictions of the official constable's badge and emblem. The badge and emblem depicted in the photographs do not appear to contain the official state seal, and the respondent swears that they do not include the official state seal. Therefore, there is credible evidence that the respondent did not violate Section 255.006(d), Election Code.

Incomplete Report

9. A candidate is required to disclose detailed information about contributions and expenditures that in the aggregate exceed \$50 in a reporting period. Section 254.031, Election Code.
10. The respondent swears that the \$40 contribution at issue in this complaint was included in the aggregate total for contributions of \$50 or less. That method of reporting is the method required by law. Section 254.031(a)(5), Election Code. Therefore, there is credible evidence of no violation of Section 254.031, Election Code, with respect to reporting the \$40 contribution.
11. As to the number of pages of the July 1999 semiannual report, the law does not require a filer to list the number of pages filed. Additionally, the respondent swears that all contributions and expenditures were reported. Therefore, there is credible evidence of no violation of Section 254.031, Election Code.

Corporate Contributions

12. Corporations organized under the Texas Business Corporations Act or the Texas Non-Profit Corporation Act may not legally make political contributions to a candidate for elective office. Sections 253.091 and 253.094, Election Code. Additionally, a cemetery company is considered to be a corporation for purposes of the prohibition against corporate contributions. Section 253.093, Election Code.

13. A candidate may not knowingly accept a political contribution that the candidate knows was made in violation of Chapter 253, Election Code. Section 253.003(b), Election Code.
14. As to the contributions from a school district, the prohibition on corporate contributions does not apply to a school district because a school district is not organized under the Texas Business Corporations Act or the Texas Non-Profit Corporation Act, and is not included in the list of entities that are considered corporations under Section 253.093, Election Code. Therefore, there is credible evidence that the respondent did not violate Section 253.003(b), Election Code, with regard to the contribution from the school district.
15. As to the contribution from a labor organization, the respondent swears that the contribution actually came from the organization's political committee. Campaign finance reports filed with the Ethics Commission by the labor organization's general-purpose committee show a \$500 contribution to the respondent on June 8, 1999. Therefore, there is credible evidence that the respondent did not violate Section 253.003(b), Election Code, with regard to the contribution from the labor union committee.
16. As to the \$100 contribution received on June 11, 1999, the respondent swears that the contribution was returned on June 25, 1999, upon learning that the contributor was a corporation. The respondent swears that the contribution was received as part of a fundraiser and he had no knowledge that it was a corporate contribution at the time it was deposited.
17. As to the political expenditure for \$40 on July 10, 1999, reported as "Return of Inc. check," the respondent swears that the contribution was included in the aggregate total for contributions of \$50 or less that were accepted during that reporting period. The respondent swears that he returned the contribution before the end of the period covered by the July 1999 semiannual report.
18. The fact that the \$100 contribution returned on June 25, 1999, and the \$40 contribution returned on July 10, 1999, were returned within the period stated on the cover page of the respondent's semiannual report, coupled with the respondent's affidavit, supports the conclusion that the respondent *received* but did not intend to *accept* the corporate contributions. Thus, there is credible evidence that the respondent did not violate Section 253.003(b), Election Code, with regard to the \$100 contribution returned on June 25, 1999, and the \$40 contribution returned on July 10, 1999.
19. As to the \$400 contribution received from a company on May 20, 1999. The respondent swears that he called the company twice and was assured by an employee that the business was not a corporation. The respondent swears that the company's owner later stated the company was a corporation. The respondent swears that he returned the contribution on May 5, 2000. Because the respondent swears that he contacted the company and was told that the company was not incorporated, there is credible evidence that the respondent did not violate Section 253.003(b), Election Code, with respect to the May 20, 1999, contribution.

20. As to the \$100 contribution from a business on February 12, 1999, the respondent admits to accepting the contribution. The respondent swears that the contribution was returned on March 7, 2000, after learning the contributor was a corporation.
21. During the same semiannual reporting period in which the February 12, 1999, contribution was accepted, the respondent learned that two of the contributions from businesses that are discussed above, and that were made during the July 1999 semiannual reporting period, were actually from corporations. The respondent returned those contributions. According to the Office of the Texas Secretary of State, the company that made the February 12, 1999, contribution has been incorporated since April 4, 1998, and that information was readily available to the public at the time the contribution was accepted on February 12, 1999. The respondent knew that corporate contributions were illegal, but the respondent did not determine whether the contribution from the business was in fact a corporate contribution prior to accepting it.
22. The respondent swears that he did not know the February 12, 1999, contribution was from a corporation when he accepted it. However, the mere denial of knowledge does not end the inquiry into whether the respondent knew a contribution was from a corporation. If, in the face of facts that suggest a high probability of improper conduct, the respondent failed to determine whether the contributions were from corporations, the knowledge requirement may be satisfied under the principle of "deliberate indifference" (also referred to as "willful blindness" and "deliberate ignorance," *inter alia*).
23. The principle of deliberate indifference most often arises in cases as a way to show subjective knowledge when a person denies knowledge of certain conduct, and the evidence supports an inference of deliberate indifference. *U.S. v. Wisenbaker*, 14 F.3d 1022, 1027 (5th Cir. 1994).
24. Here, the respondent knew that corporate contributions were illegal, and he had found that other businesses from which he had received contributions were in fact corporations. The evidence shows that the respondent returned contributions that he found were from corporations.
25. The information about whether or not a business was incorporated was readily available at the time the respondent received the February 12, 1999, contribution, yet prior to accepting the contribution, and in the year between accepting the contribution and the date the complaint was filed, the respondent does not indicate he took any action to find out whether or not the contribution at issue was from a corporation. Therefore, there is at least some evidence that the respondent's lack of action falls under the rubric of deliberate indifference.
26. The fact that the respondent had found and returned corporate contributions during the July 1999 semiannual reporting period would tend to indicate the respondent had a subjective awareness that there was a high probability that checks from businesses might be corporate contributions. In addition, the respondent's failure to avail himself of readily available

information concerning the contributor is at least some evidence the respondent was deliberately indifferent with regard to the status of the contributor. Thus, there is credible evidence that the respondent violated Section 253.003(b), Election Code, with regard to the February 12, 1999, contribution.

27. As to the contribution from a cemetery company, a cemetery company, whether incorporated or not, is considered a corporation for the purpose of the prohibition on corporate contributions. Section 253.093(a), Election Code.
28. The respondent accepted a contribution from a cemetery company on March 15, 1999. According to the Texas Secretary of State's office, the cemetery company that made the contribution was incorporated at one time, but the corporation was dissolved in 1993. Therefore, if the respondent had checked the records of the Secretary of State he would have been told that the cemetery company was not incorporated. Given the knowledge requirement in the statute, the respondent would have to have known of the specific inclusion of cemetery companies as corporations in order to be in violation of Title 15, Election Code. The evidence included with the complaint does not show that the respondent had this prior knowledge.
29. The respondent swears that he returned the contribution from the cemetery company on May 5, 2000, after learning that the cemetery company was considered a corporation. Based on the respondent's statement that he learned well after accepting the contribution from the cemetery company that it was prohibited, there is credible evidence that the respondent did not violate Section 253.003(b), Election Code, a law administered and enforced by the commission, with respect to the \$300 contribution from the cemetery company.

Political Advertising Disclosure Statement

30. The complainant alleges that the respondent's website did not include the political advertising disclosure statement required by Section 255.001, Election Code. A person may not enter into an agreement to print or publish political advertising that does not indicate that it is political advertising, and that does not indicate the full name and address of the person who entered into the agreement with the printer or publisher, or the full name and address of the person that individual represents. Section 255.001, Election Code.
31. The complainant submitted over 250 pages of exhibits that are purportedly downloaded pages from the respondent's website and that do not contain political advertising disclosure statements.
32. The respondent swears that the political advertising disclosure statement was included on the main web page. The respondent swears that the copy of the first page of the website submitted by the complainant has been altered to exclude the political advertising disclosure statement. In a telephone conversation with staff, the respondent said that the website at issue at all times contained a political advertising disclosure statement. The respondent

submitted a copy of a recent version of the web page showing a political advertising disclosure statement. The respondent indicated that this copy of the web page is different from the web page that was the focus of the complaint, but that the political advertising disclosure statement is the same as the one the respondent swore was included on the first page of the website at issue.

33. Although the content of the website supports a candidate for public office and thus constitutes political advertising, the statements of the complainant and respondent conflict as to whether a political advertising disclosure statement was included. Therefore, there is insufficient evidence to show a violation of Section 255.001, Election Code.

V. Representations and Agreement by Respondent

By signing this ORDER and AGREED RESOLUTION and returning it to the commission:

1. The respondent neither admits nor denies the facts described under Section III and the commission's findings and conclusions of law described under Section IV, and consents to the entry of this ORDER and AGREED RESOLUTION solely for the purpose of resolving and settling this sworn complaint.
2. The respondent consents to the entry of this Order before any adversarial evidentiary hearings or argument before the commission, and before any formal adjudication of law or fact by the commission. The respondent waives any right to a hearing before the commission or an administrative law judge, and further waives any right to a post-hearing procedure established or provided by law.
3. The respondent acknowledges that a person may not knowingly enter into a contract or other agreement to print, publish or broadcast political advertising with the intent to represent to an ordinary and prudent person that a candidate holds a public office that the candidate does not hold at the time the agreement is made. The respondent acknowledges that a person represents that a candidate holds a public office that the candidate does not hold if the candidate does not hold the office that the candidate seeks, and the political advertising states the office sought but does not include the word "for" in a type size that is at least one-half the type size used for the name of the office sought to clarify that the candidate does not hold that office. The respondent further acknowledges that a candidate may not knowingly accept a political contribution from a corporation. The respondent agrees to fully and strictly comply with these requirements of the law.
4. Notwithstanding any other provisions of this ORDER and AGREED RESOLUTION, the respondent understands and agrees that the commission will consider the respondent to have committed the violations described under Section IV, Paragraphs 7 and 26, if it is necessary to consider a sanction to be assessed in any future sworn complaint proceedings against the respondent.

VI. Confidentiality

This ORDER and AGREED RESOLUTION describes violations that the commission has determined are neither technical nor *de minimis*. Accordingly, this ORDER and AGREED RESOLUTION is not confidential under Section 571.140 of the Government Code, and may be disclosed by members and staff of the commission.

VII. Sanction

After considering the seriousness of the violations described under Sections III and IV, including the nature, circumstances, consequences, extent, and gravity of the violations, after considering the fact that no previous violations by this respondent are known to the commission, and after considering the sanction necessary to deter future violations, the commission imposes a \$200 civil penalty for the violations described under Section IV, Paragraphs 7 and 26.

VIII. Order

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondent;
2. that if the respondent consents to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-200207;
3. that the respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original and the \$200 civil penalty to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than November 9, 2001; and
4. that the executive director shall promptly refer SC-200207 to either the commission or to an administrative law judge to conduct hearings on the commission's behalf and to propose findings of fact and conclusions of law to the commission in accordance with law if the respondent does not agree to the resolution of SC-200207 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondents on this _____ day of _____, 200__.

Kenneth Ray Jones, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
Tom Harrison, Executive Director