

# TEXAS ETHICS COMMISSION

<b>IN THE MATTER OF</b>	§	<b>BEFORE THE</b>
<b>JOHN MILAM,</b>	§	<b>TEXAS ETHICS COMMISSION</b>
<b>RESPONDENT</b>	§	<b>SC-200416</b>
	§	
	§	

## **ORDER and AGREED RESOLUTION**

### **I. Recitals**

The Texas Ethics Commission (the commission) met on June 16, 2000, and voted to accept jurisdiction of Sworn Complaint SC-200416 filed against John Milam, Respondent. The commission met again on June 8, 2001, to consider Sworn Complaint SC-200416. 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 that no violation of a law or rule administered and enforced by the commission occurred with respect to five of the charges, and that there is credible evidence of a violation of a rule or law administered by the commission with respect to one of the charges. The commission ordered a \$300 civil penalty with respect to the charge for which a violation was found, for the reasons set forth in this order.

### **II. Allegations**

The complainant alleges that the respondent, the general manager of a metropolitan transit authority, violated Section 255.003, Election Code, by using public funds for political advertising.

### **III. Facts Supported by Credible Evidence**

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

1. The respondent is the General Manager of the VIA Metropolitan Transit Authority, a political subdivision of the State of Texas.
2. The transit authority held a measure election on May 6, 2000, asking voters to approve a ¼cent sales tax increase to fund light-rail.
3. Before the election was ordered, a survey of voters was conducted at the request of the transit authority.

4. Promotional messages in the form of cinema advertising, "Fact Sheet" brochures, newspaper advertising, an art contest flier, and a Power Point presentation were paid for using transit authority funds.
5. The promotional messages included statements identified by the survey as being positive in favor of passage of the light-rail measure.
6. The respondent, in a sworn response, contended that he has authority and responsibility over "studying, recommending, and implementing any long range plan," with any plan subject to approval by the transit authority's board. The transit authority's staff and board developed a light-rail plan. The respondent believed that before calling an election and committing the authority's funds to holding an election it was prudent to conduct a survey of potential voters to gauge their attitudes about sales tax funding of light-rail. The respondent swore that no decision had been made to hold an election on the light-rail measure at the time the survey was conducted and the results reported to the transit authority. The respondent swore that the decision to ask for an election on the light-rail measure was based on staff recommendations that were in part based on the survey results. The respondent swore that the survey was not intended to induce voters to support a sales tax increase for funding light-rail, but was conducted before the election to inform the respondent and board about voter attitudes with regard to the light-rail measure. The respondent swore that his actions in connection with the survey constituted the due diligence required of responsible management.
7. The respondent was a defendant in a district court case that arose out of the same set of facts that made the basis of the sworn complaint. In that case, an agreed order was entered into prohibiting the respondent from using public funds to engage in political advertising. The respondent agreed that any materials it published would comply with the agreed order and include the names and addresses of light-rail opponents.

#### **IV. Findings and Conclusions of Law**

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

1. An officer or employee of a "political subdivision" may not spend or authorize the spending of public funds for political advertising. Section 255.003, Election Code. A "political subdivision" is a county, city, or school district or any other governmental entity that (a) embraces a geographic area with a defined boundary, (b) exists for the purpose of discharging functions of government, and (c) possesses authority for subordinate self-government through officers selected by it. Section 1.005, Election Code. The VIA Metropolitan Transit Authority is a political subdivision.

2. The prohibition against the use of public funds for political advertising does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Section 255.003(b), Election Code.
3. "Political advertising" is a communication that supports or opposes a measure 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). A "measure" is a question or proposal submitted in an election for an expression of the voters' will. Section 251.001(19). Holding an election for voters to approve or disapprove of light-rail is a measure election.
4. The survey does not appear to be a push poll, as alleged by the complainant, but appears to be a survey to determine voter attitudes toward light-rail. The survey did not advocate passage or defeat of the light-rail measure. Even if the survey was a push poll that advocated passage of the light-rail measure, the evidence submitted with the complaint does not support the complainant's contention that the survey was political advertising. The survey was conducted over the phone, and was not published in a newspaper, magazine, or other periodical or broadcast by radio or television in return for consideration, nor was it distributed as a written communication to the people who responded to the survey. Since the survey does not meet the definition of political advertising, there is credible evidence of no violation of Section 255.003, Election Code, with respect to the survey.
5. The communications in the cinema advertising, "Fact Sheet" brochures, newspaper advertisements, and art contest fliers appeared in a pamphlet, circular, flier, sign, or similar form of written communication. The statements in those materials may have been intended to make light-rail appealing to voters, but the materials are not within the prohibition of Section 255.003, Election Code, because they did not advocate passage or defeat of the measure. Therefore, there is credible evidence of no violation of Section 255.003, Election Code, with respect to the cinema advertising, "Fact Sheet" brochures, newspaper advertisements, and art contest fliers.
6. The Power Point presentation was a sign or similar form of written communication and included a number of endorsements from community organizations. One of the endorsements stated "we support [the light-rail measure] 100-percent." The Power Point presentation taken as whole advocated passage of the light-rail measure, and thus, constituted political advertising. The Power Point presentation was paid for using public funds. Therefore, there is credible evidence of a violation of Section 255.003, Election Code, with respect to the Power Point presentation.

## 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 an officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising. The respondent agrees to fully and strictly comply with this requirement 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 violation described under Section IV, Paragraph 6, 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 a violation that the commission has determined is 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 violation described under Sections III and IV, including the nature, circumstances, consequences, extent, and gravity of the violation, after considering the fact that no previous violations by this respondent are known to the commission, after considering the fact that the respondent had previously entered into an agreed order in district court that addressed the issues raised by the complaint, and after considering whether additional sanctions are necessary to deter future violations by this respondent, the commission imposes a \$300 civil penalty for the violation described under Section IV, Paragraph 6.

**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-200416;
- 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 \$300 civil penalty to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than July 6, 2001; and
- 4. that the executive director shall promptly refer SC-200416 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-200416 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_  
John Milam, Respondent

EXECUTED ORIGINAL received by the commission on: \_\_\_\_\_.

Texas Ethics Commission

By: \_\_\_\_\_  
Tom Harrison, Executive Director