

TEXAS ETHICS COMMISSION

IN THE MATTER OF

GARY W. SPIVEY,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-210312

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on April 6, 2001, and voted to accept jurisdiction of Sworn Complaint SC-210312 filed against Gary W. Spivey, Respondent. The commission met again on February 8, 2002, to consider Sworn Complaint SC-210312. 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 a violation of Section 254.063, Election Code, a law 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

1. The complainant alleges that the respondent failed to use proper campaign finance report forms, failed to keep proper records, failed to itemize campaign contributions and campaign expenditures, failed to transfer a campaign treasurer appointment, and failed to file timely campaign finance reports.
2. The complainant also alleges that the respondent knowingly and illegally allowed a political committee to accept political contributions, make political expenditures, and convert political contributions to his personal use.

III. Facts Supported by Credible Evidence

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

1. The respondent was elected alderman in a May 6, 2000, city election in Liberty Hill, Texas.

2. In support of his allegations, the complainant submitted a copy of the campaign treasurer appointment filed by the respondent in connection with his candidacy for alderman. The campaign treasurer appointment was not stamped with a receipt date by the city secretary. The complainant also submitted a copy of the respondent's January 2001 semiannual report, which consisted only of coversheet pages one and two. The report was not stamped with a receipt date by the city secretary but was sworn to by the respondent on January 22, 2001. The complainant also submitted a summary of a bank account that appears to belong to the committee that allegedly accepted illegal political contributions on behalf of the respondent. The complainant contends that the contributions raised by the political committee were converted to the respondent's personal use.
3. In July 2000, the complainant filed a tort assault lawsuit against the respondent. The lawsuit raised a claim that on June 26, 2000, the respondent assaulted the complainant when the respondent stormed out of a city council executive session. The respondent filed a general denial and alleged that the lawsuit was brought for purposes of harassment and to run the respondent out of office. On February 28, 2001, an Order for Nonsuit was issued after the respondent and complainant filed a Joint Motion for Nonsuit.
4. In response to this complaint, the respondent submitted a sworn statement in which he swears that when he became a candidate in the May 6, 2000, election, he properly filed a campaign treasurer appointment appointing himself as the treasurer and selecting the modified reporting option. He also swears to the following:

There is no date on [the campaign treasurer appointment] in the city secretary's file, but there also are no dates showing when these forms were received from other candidates in that election. Apparently it was not the practice of the city secretary at the time, [name of city secretary], to fill in the "date received" space in the section for "OFFICE USE ONLY."

In the City of Liberty Hill's infancy, compliance with the campaign finance reporting law has been generally poor, apparently due to misunderstanding of the law by city officials and candidates.
5. The respondent also swears that there was "no change of treasurer to report" and that the campaign treasurer of the committee that allegedly accepted contributions on his behalf was never his campaign treasurer.
6. City records show that the respondent filed the July 2000 semiannual report on May 29, 2001. The report disclosed that the respondent did not accept any contributions and that he made political expenditures from personal funds totaling \$318.36. The respondent admits that he failed to file a timely July 2000 semiannual report but states that the city secretary told the respondent that the report was not required if the respondent spent less than \$500.

The respondent states that other candidates were similarly advised and did not file the report either. The respondent swears that he now understands that the semiannual report was required even if he spent less than \$500.

7. The respondent also swears that around January 17, 2001, he called the Ethics Commission and spoke with an attorney who told the respondent that he was required to file the January 2001 semiannual report. He swears that he filed the report with the city secretary a few days later when the city secretary located the forms. Coversheet page two of the report disclosed political contributions totaling \$11,502.31 and political expenditures totaling \$11,502.31. The respondent also swears that he did not itemize the expenses because the city secretary did not provide him with the “additional pages of the form showing I needed to itemize them.” The respondent also swears that the notary failed to sign the report, but the notarization is recorded in her notary book. That is corroborated by a statement from the notary and a copy of a page from her notary book, which was included with the respondent’s response.
8. As to the allegation that he failed to report contributions, the respondent swears that he did not accept any *campaign* contributions. He swears that the January 2001 semiannual report disclosed \$7,207.52 in contributions from a general-purpose committee to help him pay for legal expenses for defending the civil suit filed against him by the complainant in connection with the alleged assault. He further swears that the \$11,502.31 in political contributions included the \$7,207.52 contribution as well as his own personal funds that he paid to his defense lawyer, and that a total of \$11,502.31 was paid to his defense lawyer.
9. On October 2, 2001, the respondent filed a corrected January 2001 semiannual report itemizing political contributions totaling \$7,207.52 (which he described as in-kind contributions from a general-purpose committee to defray legal expenses) and political expenditures made from personal funds totaling \$6,500 (for legal expenses).
10. As to the allegation that the respondent knowingly and illegally allowed a general-purpose committee to accept political contributions, make political expenditures, and convert political contributions to his personal use, the respondent says that he does not believe that he converted the payments made by the general-purpose committee to a personal use and that all the funds disbursed by the general-purpose committee went directly to his attorney.
11. The respondent describes the events leading up to the filing of charges in connection with the alleged assault as follows:

The mayor and the council majority froze me out of decision-making by withholding from me information other council members received and by making decisions before ever coming to council meetings.

They set out on a course of criticism of me with the apparent intent to cause me to resign.

Finally, they called a council meeting with an executive session on the agenda but giving no specific reason for the executive session, as is required by law. The rumor all over town before the meeting – word spread by supporters of the ruling majority – was that the closed session was going to be held to deal with me. When I asked the council to make the meeting a public one if it was to be about me – as I understand is my right under the Open Records Act – I was told that the executive session was not to be about me. With the city attorney’s coaching, the mayor denied my request to open the session to the public.

When the closed session was held a few minutes later, however, IT WAS ABOUT ME. ([The complainant], who obviously had foreknowledge of that, says in his complaint that “on that night, the city council called (me, Spivey) into executive session.”) After determining that the session really was about me, I left the meeting, upset and angry. It was then that [the complainant] and I had an encounter just outside the City Hall as the result of which he filed an assault charge and a civil suit against me.

IV. Findings and Conclusions of Law

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

Allegations relating to improperly filed campaign finance report forms:

1. A report filed pursuant to Chapter 254, Election Code, is required to be on a form prescribed by the commission. Section 254.036, Election Code.
2. During the time in question, the respondent was a candidate for alderman and therefore was required to file campaign finance reports with the city on a form prescribed by the commission. Sections 252.005 and 254.066, Election Code.
3. The complainant alleges that the respondent’s campaign treasurer appointment form “is improper” because it has “no date filled out that it was received by the City Secretary.” The respondent’s campaign treasurer appointment was filed on a form prescribed by the commission. Additionally, all of the respondent’s campaign finance reports submitted by the complainant and the respondent in connection with this complaint were filed on forms prescribed by the commission. The respondent is not responsible for ensuring that the city

secretary stamps a report with a receipt date. There is no evidence that the respondent filed any campaign finance reports on forms other than forms prescribed by the commission. Therefore, there is credible evidence of no violation of Section 254.036, Election Code.

Allegations relating to failure to transfer or amend campaign treasurer appointment:

4. A candidate who files a campaign treasurer appointment and who decides to seek a different office that would require the appointment to be filed with another authority is required to transfer the campaign treasurer appointment pursuant to Section 252.010, Election Code.
5. The complainant alleges that the respondent “failed to transfer appointment of campaign treasurer.” The complainant also appears to allege that the campaign treasurer of the committee that allegedly accepted contributions on the respondent’s behalf is the respondent’s campaign treasurer and that the respondent failed to amend his campaign treasurer appointment to reflect that.
6. The respondent’s campaign treasurer appointment shows that he is his own treasurer and that he is seeking the office of “alderman/city councilman.” The respondent swears that there was “no change of treasurer to report” and that the campaign treasurer of the committee that allegedly accepted contributions on his behalf was never his campaign treasurer. Additionally, there is no evidence that the respondent decided to seek an office other than alderman/city councilman. Therefore, there is credible evidence of no violation of Section 252.010, Election Code.

Allegations relating to failing to timely file campaign finance reports:

7. An officeholder who files a campaign treasurer appointment is required to file a report not later than the 15th day after the filing date of the campaign treasurer appointment. Section 254.094, Election Code. A person who has a campaign treasurer appointment on file is required to file two campaign finance reports each year due by January 15 and July 15. Section 254.063, Election Code. Additionally, an opposed candidate is required to file reports by the 30th day and the 8th day before the election unless the candidate chooses to file under the modified reporting schedule. If the candidate chooses modified reporting, the candidate is not required to file pre-election reports if the candidate does not exceed either \$500 in contributions or \$500 in expenditures in connection with an election. Section 254.064, Election Code; Section 20.217, Ethics Commission Rules.
8. The respondent was not an officeholder when he filed a campaign treasurer appointment and therefore he was not required to file the 15th day after campaign treasurer appointment report. There is thus credible evidence of no violation of Section 254.094, Election Code.

9. Because the respondent chose to file under the modified reporting schedule and he did not exceed \$500 in either contributions or \$500 in expenditures in connection with the May 6, 2000, election, he was not required to file the pre-election reports due before that election. There is thus credible evidence of no violation of Section 254.064, Election Code, and Section 20.217, Ethics Commission Rules.
10. The respondent was, however, required to file semiannual reports. The first report was due by July 17, 2000,¹ and the second was due by January 16, 2001². The January 2001 semiannual report was filed on January 22, 2001, and the July 2000 report was filed on May 29, 2001. There is thus credible evidence that the respondent violated Section 254.063, Election Code.

Allegations relating to failure to itemize campaign contributions and campaign expenditures and failure to keep proper records:

11. Each report filed under Title 15, Election Code, must include the amount of political contributions accepted during the reporting period from each person that in the aggregate exceed \$50, as well as the name and address of the contributor and the date of the contribution. Section 254.031(a)(1), Election Code. Each report must also include the amount and purpose of political expenditures made during the reporting period that in the aggregate exceed \$50 to any person, as well as that person's name and address and the date of the expenditure. Section 254.031(a)(3), Election Code. A candidate is required to maintain a record of all reportable activity. The report is required to contain information necessary for filing the reports required by Chapter 254, Election Code. Section 254.001, Election Code.
12. The January 2001 semiannual report filed by the respondent on January 22, 2001, did not include the contribution and expenditure schedules. Subsequently, the respondent filed a corrected report and good-faith affidavit to provide that information. The respondent swears that he did not initially provide the information because the city secretary did not provide him with the "additional pages of the form showing I needed to itemize them." The corrected report disclosed in-kind contributions for legal fees totaling \$7,207.52 and expenditures made from personal funds to pay legal fees totaling \$6,500.
13. A filer may correct a reporting error at any time by filing a corrected report. Section 18.43, Ethics Commission Rules. No fine is assessed for a corrected report, other than one correcting a report due eight days before an election, if the filer submits an affidavit establishing that the report was filed because of a good-faith error. Sections 18.49 and 18.83,

¹ The July 15 deadline was extended because the regular deadline fell on a Saturday.

² The January 15 deadline was extended because the regular deadline fell on a holiday.

Ethics Commission Rules (as those rules existed when the corrected report was filed). Thus, because the January 2001 semiannual report is not an 8-day before election report, it is not subject to a fine for failure to include the required information.

14. Furthermore, the activity reported on the corrected report was not required to be reported because, as discussed below, the expenses of defending the lawsuit do not constitute political contributions.
15. As to the allegation that the respondent failed to keep proper records, there is no evidence that the respondent has failed to maintain a record of all reportable activity. Therefore, there is no credible evidence that the respondent violated Section 254.001, Election Code.

Allegation relating to personal use of political funds:

16. A person who accepts a political contribution as a candidate or as an officeholder may not convert the contribution to personal use. Section 253.035, Election Code. Similarly, a specific-purpose committee that accepts a political contribution may not convert the contribution to the personal use of a candidate or officeholder. *Id.* “Personal use” means a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of public office. *Id.* Personal use does not include the use of contributions for defending a criminal action or civil action brought against the person in the person’s status as a candidate or officeholder. *Id.*
17. The respondent reported that he accepted in-kind contributions from a general-purpose committee to help him defray legal expenses for defending a civil action brought against him by the complainant. The general-purpose committee did not give money directly to the respondent but rather made payments to the respondent’s attorney. The civil lawsuit raises a claim that on June 26, 2000, the respondent assaulted the complainant when the respondent stormed out of the city council executive session. The respondent swears that the lawsuit arose out of his “service on the City Council.”
18. A preliminary issue is whether the in-kind contributions from the general-purpose committee constitute political contributions. A political contribution is defined as a campaign contribution or an officeholder contribution. Section 251.001(5), Election Code. A campaign contribution is defined in relevant part as a thing of value that is offered or given with the intent that it be used in connection with a campaign for an elective office. Section 251.001(7), Election Code.
19. At the time the lawsuit was filed, the respondent was an officeholder and was not a candidate for any office. The in-kind contributions from the political committee were in the form of payments directly to the respondent’s attorney to defray legal fees. There is no evidence to

suggest that the in-kind contributions were made with the intent that they be used in connection with a campaign for an elective office and therefore no evidence that the contributions were campaign contributions.

20. An officeholder contribution is defined in relevant part as a thing of value that is offered or given to an officeholder with the intent that it be used by the officeholder to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and that are not reimbursable with public money. Section 251.001(9), Election Code.
21. In Ethics Advisory Opinion No. 276 (1995), the commission determined that, “As a general rule, it would be impermissible for an officeholder to use political contributions to pay the expenses of a lawsuit alleging malfeasance by the officeholder in a private professional capacity since such a suit would not be brought against the person in his status as an officeholder.”
22. In Ethics Advisory Opinion No. 363 (1997), the commission determined that a contribution to a legal defense fund would be an officeholder contribution only if the officeholder incurred the expenses “in performing a duty or engaging in an activity in connection with the office.”
23. In this case, the expenses were to defend against a civil lawsuit for assault. The lawsuit was brought against the respondent in his private status, not in his status as a candidate or as an officeholder. The fact that the alleged assault occurred when the respondent stormed out of a city council meeting that he was attending in his official capacity does not mean that the expenses of defending the lawsuit are expenses incurred “in performing a duty or engaging in an activity in connection with the office” of alderman. Therefore, the in-kind contributions from the general-purpose committee to defend the civil lawsuit do not constitute officeholder contributions because they were not given with the intent that they be used by the respondent to defray expenses he incurred in performing an officeholder duty or activity.
24. Therefore, because the in-kind contributions do not meet the definition of either campaign contributions or officeholder contributions, they are not political contributions. Because the in-kind contributions are not political contributions, there is no issue regarding a conversion of political contributions to personal use. Therefore, there is credible evidence of no violation of Section 253.035, 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 Section 254.063, Election Code, requires a person who has an active campaign treasurer appointment to file two campaign finance reports each year by January 15 and July 15. 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 violations described under Section IV, Paragraph 10, 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, 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 \$100 civil penalty for the violations described under Section IV, Paragraph 10.

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-210312;
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 \$100 civil penalty to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than March 8, 2002; and
4. that the executive director shall promptly refer SC-210312 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-210312 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this _____ day of _____, 2002.

Gary W. Spivey, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
Tom Harrison, Executive Director