

TEXAS ETHICS COMMISSION

IN THE MATTER OF

BILLY JOE MCCUTCHEON,

RESPONDENT

§
§
§
§
§

BEFORE THE

TEXAS ETHICS COMMISSION

SC-2209110

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on October 11, 2002, and voted to accept jurisdiction of Sworn Complaint SC-2209110 filed against Billy Joe McCutcheon. The commission held a preliminary review hearing on September 12, 2003, to consider Sworn Complaint SC-2209110. A quorum of the commission was present at both meetings. 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 entered into a contract or agreement to print or publish political advertising that did not contain a political advertising disclosure statement, that misrepresented the true source of the political advertising, and that misrepresented the respondent's identity. The complainant also alleges that the respondent failed to properly report an expenditure for political advertising.

III. Facts Supported by Credible Evidence

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

1. This complaint involves political advertising published in connection with an April 9, 2002, primary run-off in an election for county commissioner in Cherokee County.
2. The complainant submitted copies of two items that were published on successive days in a newspaper. The complainant also submitted a copy of a flier.
3. One of the newspaper items appears to be a letter to the editor that was published on April 5, 2002, from a candidate in the primary election who did not make the primary run-off election. The other newspaper item was very similar to the letter to the editor but appeared as an advertisement the following day.

4. The evidence shows that the author of the letter gave the respondent permission to use the letter.
5. The complainant alleges that both newspaper items are political advertising and that, in regard to both of them, the respondent: (1) entered into a contract or agreement to print or publish political advertising that did not contain a political advertising disclosure statement; (2) misrepresented the true source of the political advertising; and (3) misrepresented the respondent's identity. The complainant alleges that the respondent failed to report a payment to the newspaper to publish the letter as an advertisement on April 6, 2002.
6. In regard to the flier, the complainant alleges that the respondent entered into a contract or agreement to print or publish political advertising that did not contain a political advertising disclosure statement.
7. The evidence indicates that the letter that was published as a letter to the editor in the newspaper on April 5, 2002, was not published in exchange for consideration.
8. The item that was published in the newspaper on April 6, 2002, contained a disclosure indicating that it was political advertising paid for by the candidate who lost in the primary, and who was the author of the letter.
9. Through his attorney, the respondent filed a sworn response.
10. The respondent acknowledges that he was responsible for the letter, that his wife contacted the newspaper to have it published, and that the respondent paid for the advertisement.
11. The evidence shows that the newspaper only published the letter after speaking with its author and obtaining his permission to publish it.
12. In his affidavit, the respondent swears that the advertisement "was set up and composed by the newspaper, not by me or my wife" and that neither he nor his wife "set up the ad or put the tag line on the ad."
13. The respondent submitted his wife's affidavit in which she explains that she placed the ad.
14. The respondent's wife swore that she had dealt with the newspaper before and knew that the newspaper knew a disclosure statement was required. She swore that she did not tell the newspaper to violate the law. The respondent's wife swore that she contacted the newspaper about correcting the advertisement and was told they did not run corrections to political advertisements.
15. The evidence shows that the respondent had the April 6, 2002, advertisement placed on either April 4, 2002 or April 5, 2002, but the expenditure was not reported on the report for that period.

16. The complainant alleges that the respondent filed an incomplete campaign finance report because he failed to report the payment to the newspaper for the April 6, 2002, advertisement.
17. On October 7, 2002, the respondent filed a correction to the July 2002 semiannual report.
18. The complainant submitted a copy of a flier that opposes a candidate based on an allegation that the candidate had filed for bankruptcy.
19. The flier does not have the required political advertising disclosure statement.
20. The complainant alleges that the respondent and his supporters printed and distributed the flier, which attacked the respondent's opponent with regard to alleged bankruptcies. The complainant also submitted a list of names of people that he believed were present at a meeting to discuss distributing the flier.
21. The evidence does not show a link between the flier and the respondent.

IV. Findings and Conclusions of Law

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

Political disclosure statement, misrepresentation, and true source

1. "Political advertising" is defined in relevant part as a communication supporting a candidate for election to a public office that, in return for consideration, is published in a newspaper, or that appears in a pamphlet, circular, or flier or similar form of written communication. ELEC. CODE § 251.001(16).
2. A "campaign communication" is defined in relevant part as a written communication relating to a campaign for nomination or election to public office. *Id.* § 251.001(17).
3. A person may not enter into a contract or agreement to print or publish political advertising that does not indicate that it is political advertising and that does not contain the full name and address of the person who entered into the contract or agreement with the printer or publisher or the full name and address of the person that individual represents. *Id.* § 255.001.
4. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person enters into a contract or other agreement to print, publish, or broadcast political advertising that purports to emanate from a source other than its true source or knowingly represents in a campaign communication that the communication emanates from a source other than its true source. *Id.* § 255.004.

5. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person misrepresents the person's identity or, if acting or purporting to act as an agent, misrepresents the identity of the agent's principal, in political advertising or a campaign communication. *Id.* § 255.005(a).
6. There is no evidence that the letter published April 5, 2002, as a letter to the editor was printed in exchange for consideration. In that case it was not political advertising and was not required to contain a disclosure statement. Therefore, there is credible evidence that the respondent did not violate section 255.001 of the Election Code in regard to that letter.
7. The April 5, 2002, letter was a campaign communication. However, the evidence shows that the author gave the respondent permission to use the letter. The true author's name appeared on the letter. Therefore, there is credible evidence that the respondent did not violate section 255.004 or section 255.005 of the Election Code.
8. The April 6, 2002, letter was published in a newspaper in return for consideration and supported a candidate for election to office. Thus, it was political advertising.
9. The respondent's wife was acting on behalf of the respondent when she placed the April 6, 2002, advertisement.
10. The evidence does not show that the respondent intended to print political advertising that did not contain a disclosure statement. The evidence shows that the newspaper knew who the source of the advertisement was but nonetheless included an incorrect disclosure statement. Therefore, the evidence is insufficient to show that the respondent knowingly entered into a contract or agreement to publish political advertising without a disclosure statement in violation of section 255.001 of the Election Code.
11. The April 6, 2002, advertisement was also a campaign communication.
12. The evidence does not show that at the time the respondent's wife entered into the agreement to publish the letter that the respondent intended or knew that the advertising would be attributed to the wrong person.
13. Further, the evidence submitted with the complaint does not show that the respondent was responsible for the inclusion of the wrong name in the disclosure statement. The complainant and the respondent both swear that the newspaper knew that the respondent was responsible for the advertisement. Therefore, there is credible evidence that the respondent did not violate section 255.004 or section 255.005 of the Election Code in regard to the April 6, 2002, advertisement.
14. The flier is political advertising because it opposes a candidate for election to public office.

15. There is no evidence that the respondent was responsible for the flier or that the respondent entered into a contract or agreement to print or publish the flier. Therefore, there is no evidence that the respondent violated section 255.001 of the Election Code with respect to the flier.

Reporting

16. An expenditure must be reported on the report covering the period in which the expenditure was made, but the expenditure is not considered to have been made until the amount is readily determinable by the person making the expenditure. ELEC. CODE §§ 254.031, 254.035.
17. The expenditure for the April 6, 2002, advertisement was made during the reporting period for the July 15, 2002, semiannual report. *Id.* § 254.063.
18. In the respondent's correction affidavit and sworn response, he avers that the amount of the expenditure was not readily determinable, but the respondent acknowledges that the amount of the expenditures may have been readily determinable and the expenditure probably should have been included in the July 2002 semiannual report.

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 and waives any right to a post-hearing procedure established or provided by law.
3. The respondent acknowledges that an expenditure must be reported on the report covering the period in which the expenditure was made. ELEC. CODE § 254.031. The respondent agrees to fully and strictly comply with this requirement of the law.

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. No Sanction

Because of the minor nature of the violation, the commission imposes no penalty.

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-2209110;
- 3. that the respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than October 10, 2003, and
- 4. that the executive director shall promptly refer SC-2209110 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-2209110 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this _____ day of _____, 20__.

Billy Joe McCutcheon, Respondent

EXECUTED ORIGINAL received by the commission on: _____.
Texas Ethics Commission

By: _____
Karen Lundquist , Executive Director