

TEXAS ETHICS COMMISSION

IN THE MATTER OF

JOHN DOERFLER,
MIKE HEILIGENSTEIN,
GREG BOATRIGHT,
DAVID HAYS and
FRANK LIMMER,

RESPONDENTS

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-2212141

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on April 10, 2003, and voted to accept jurisdiction of Sworn Complaint SC-2212141 filed against John Doerfler, Mike Heiligenstein, Greg Boatright, David Hays, and Frank Limmer. The commission met again on July 11, 2003, to consider Sworn Complaint SC-2212141. The commission determined that there is credible evidence of a violation of section 255.003 of the Election Code, a law administered and enforced by the commission. To settle the complaint without further proceedings, the commission proposed an agreed resolution. The respondents declined to accept the proposed resolution and requested a preliminary review hearing. The commission conducted the preliminary review hearing on November 13, 2003, and January 9, 2004. After the preliminary review hearing, the commission reaffirmed its determination that there is credible evidence that the respondents violated section 255.003 of the Election Code. The commission therefore proposes this agreed resolution to the respondents.

II. Allegation

The complainant alleges that the respondents, four county commissioners and the county judge, authorized the spending of public funds for political advertising in connection with a county road bond program.

III. Facts Supported by Credible Evidence

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

1. The respondents are the incumbent county judge and four incumbent county commissioners in a county with a population of 203,428.
2. The complainant submitted a copy of a flier that the complainant swears he received on November 4, 2002, which was the day before the general election.
3. The flier states that it is a communication from the Williamson County Road Bond Program. The flier contains the county seal. It also contains a website address, www.roadbonds.org. The website contains information about the road bond program and appears to be updated frequently.
4. The county judge and the four commissioners are quoted by name on the flier. The county judge is quoted as saying:

In November of 2000, the voters of Williamson County overwhelmingly approved \$350 million to construct and improve roads throughout the County. Because of this local support and control, we are rapidly improving mobility and safety in our community.

5. The county commissioner who was an opposed candidate in the November 2002 election is quoted as saying:

My priority in using bond funds has been to make travel safer in eastern Williamson County. We began by realigning the dangerous intersection at US 79 and County Road 122 and then replaced the hazardous old bridges. Currently County Roads 368 and 369 are being reconstructed to take out sharp turns and widened for safer travel. The Hutto By-Pass will also help accommodate the tremendous growth in the area and keep local travelers from using US 79 which reduces congestion and decreases the potential for accidents by providing an additional east-west corridor.

6. The quotes from the other county commissioners are similar.
7. The respondents submitted a joint sworn response to the complaint, in which they swear:

Williamson County has passed a very large bond issue to build roads and parks. During the campaign, the Commissioners Court promised to keep the public informed of how they were handling some hundreds of millions of dollars of the taxpayer's money. During the summer of 2002, the county's road consultants reported that they were planning to send out an informational leaflet reporting on the projects' progress. To manage costs,

they proposed that the mailing not be sent to every household in the county, but only to those with one or more residents who had evidenced their interest in the bonds by voting in the authorization election. The Commissioners Court acquiesced in this, but had no direct involvement in the preparation or mailing of the brochure.

The brochures were originally planned to be sent out in August. A series of delays postponed the actual mailing of the leaflets until shortly before the general election. The primary problem was that the map detailing the various projects had to be repeatedly updated as progress occurred. The leaflets were sent as soon as they came back from the printer. The Court had no part in the timing of the mailing, and the county employees and consultants who did have a role were not concerned about the proximity of the election because they saw the contents as educational, not promotional.

As it turned out, the only readily available list of voters was from the primary election, not the bond election, but the consultants figured that there would be a high degree of overlap between the two concerned taxpayer populations.

The primary voter lists were essentially nonpartisan, as they included both Democrats and Republicans, and were available to the County free of cost.

The brochure mostly consisted of maps, other graphics, and descriptions of the various projects. It also included quotations from all the members of the Court, who are the public officials who directly supervise the bond projects. It gave equal prominence to the quotation from each one, including those who were not up for reelection or were running unopposed. [One commissioner] (who did have an opponent) was on the outside of the leaflet, but only because that is where Precinct Four fell in numerical order.

The quotes contained factual information, not “self-promotion.” The road bond program has been very successful and Williamson County has been able to expedite construction and improve safety in a timely and cost-efficient manner. That is certainly good news that the taxpayers were entitled to hear. However, if the news had been bad, the leaflet would still have been mailed at exactly the same time, because the taxpayers had a right to be informed of everything that was happening, good or bad. The political impact, or lack thereof, was not a consideration. This is simply not a case of the misuse of public funds to promote a private political purpose.

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. ELEC. CODE § 255.003. That prohibition 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. *Id.*
2. “Political advertising” includes a communication supporting or opposing a candidate, officeholder, or measure that appears in a flier or similar form of written communication. ELEC. CODE § 251.001(16).
3. The respondents do not deny that county funds were used to pay for having the advertising published and distributed.
4. The content and the circumstances surrounding the advertisement support a finding that the purpose of the advertisement was to support the five county officeholders, including the two commissioners who were candidates in the November 2002 election.
5. The advertisement was mailed just before the general election. The advertisement was also mailed only to county residents who had voted in the March 2002 primary election, not to the general population, an action in which the respondents acquiesced.
6. Because of the context and content of the flier, there is credible evidence that the purpose of the flier was to support the respondents as officeholders and to support one of the respondents as a candidate. There is credible evidence that the flier constitutes political advertising. Therefore, there is credible evidence of a violation of section 255.003 of the Election Code by the five respondents.

V. Representations and Agreement by Respondent

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

1. The respondents neither admit nor deny 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 settling this sworn complaint.

2. The respondents consent to the entry of this ORDER and AGREED RESOLUTION before any adversarial evidentiary hearings or argument before the commission, and before any formal adjudication of law or fact by the commission. The respondents waive any right to a hearing before the commission or an administrative law judge, and further waive any right to a post-hearing procedure established or provided by law.
3. The respondents acknowledge that an officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising. The respondents agree to fully comply with this requirement of the law.
4. Notwithstanding any other provisions of this ORDER and AGREED RESOLUTION, the respondents understand and agree that the commission will consider the respondents to have committed the violation described under Section IV if it is necessary to consider a sanction to be assessed in any future sworn complaint proceedings against the respondents.

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

The commission imposes a civil penalty of \$400 against each respondent for the violation described under Section IV.

VIII. Order

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondents;
2. that if the respondents consent to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-2212141;
3. that each respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original and a \$400 civil penalty for each respondent to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than February 6, 2004; and

- 4. that the executive director shall promptly set SC-2212141 for the next hearing in the sworn complaint process if the respondents do not agree to the resolution of SC-2212141 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondents on this _____ day of _____, 20____.

John Doerfler, Respondent

Mike Heiligenstein, Respondent

Greg Boatright, Respondent

David Hays, Respondent

Frank Limmer, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
Karen Lundquist, Executive Director