

TEXAS ETHICS COMMISSION

IN THE MATTER OF
MELINDA WHEATLEY,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-2606164

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on June 28, 2007, to consider sworn complaint SC-2606164. A quorum of the commission was present. The commission determined that there is credible evidence of violations of sections 305.0063 and 305.007 of the Government Code, laws administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposes this resolution to the respondent.

II. Allegations

The complaint alleges that the respondent failed to timely file lobby activities reports, failed to properly disclose information in a lobby registration, and failed to file a required lobby registration.

III. Facts Supported by Credible Evidence

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

1. The respondent is an individual who registered with the commission as a lobbyist for calendar years 1997, 1998, 2003, 2004, and 2005. The respondent registered as an annual filer in 2003 and 2004.
2. Since 1997, the commission has administratively assessed \$8,500 in penalties against the respondent in connection with 33 lobby activities reports that were either filed late or not filed at all. The respondent has submitted five \$100 payments for late penalties in connection with five lobby activities reports.
3. On June 16, 1999, the Office of the Attorney General (AG) filed suit against the respondent to collect \$1,500 in late penalties assessed by the commission in connection with 15 activities reports that were due between June 1997 and January 1999. The AG obtained a default judgment in the suit on August 19, 1999, based on the respondent's failure to appear or answer the suit. The respondent was ordered to pay \$1,500 for civil penalties and \$750 for

- court costs and attorney fees. No payments have been submitted to the AG pursuant to the judgment.
4. The complaint alleges that the respondent failed to timely file lobby activities reports covering calendar year 2003. Commission records show that the respondent filed a lobby registration for 2003 on March 3, 2003, and indicated in the registration that she intended to file one report for the entire calendar year as an annual filer.
 5. The complaint alleges that the respondent failed to timely file lobby activities reports covering calendar years 2004 and 2005. The respondent filed a lobby registration as an annual (modified) filer for calendar year 2004 on September 10, 2004, and did not file a lobby activities report for 2004 by its due date, January 10, 2005. In response to the complaint, the respondent filed a lobby activities report for 2004 on August 1, 2006. The report indicates that the respondent made no lobby expenditures.
 6. The respondent electronically filed a lobby registration as a monthly (regular) filer for calendar year 2005 on February 25, 2005, and did not file any of the eleven monthly lobby activities reports due for 2005 until July 18, 2006, after the complaint was filed. The 2005 report indicates that the respondent made no lobby expenditures.
 7. The complaint alleges that the respondent failed to disclose in her 2005 registration, filed on February 25, 2005, that she was to receive \$30,000 in 2005 from the City of Austin for lobbying. The respondent's 2005 registration discloses that she had earned between \$10,000 and \$24,999.99 in compensation from the City.
 8. A contract, which was agreed to on January 11, 2005, between the City and the respondent states that the respondent agreed to represent the City before the Texas Legislature and the Texas executive branch "on matters of concern to the City." The terms of the contract stated that the respondent was to provide numerous services for the City, including lobbying the Texas Legislature. Under the contract, the City agreed to pay the respondent \$6,000 per month between January 11 and June 10, 2005, "for a total contract amount not to exceed \$30,000." The contract also stated that expenses incurred by the respondent in providing services to the City under the contract were the respondent's responsibility.
 9. In response to the complaint, the respondent swore that she believed she checked the appropriate compensation box regarding her lobby activity for the City. The respondent swore that more than \$5,000 of her compensation would be paid for activities that were not lobby activities and that she believed she made a reasonable allocation between compensation for lobby activity and compensation for other activities.
 10. The respondent also swore that the majority of her compensation from the City was for assisting Austin-Bergstrom International Airport in increasing the number of flights that flew into and out of Austin and for similar "local" activities that did not constitute lobbying state

government. She further swore that the only lobbying activities in which she engaged for the City was to introduce City officials to individuals at the Texas Department of Transportation, that this was a very limited activity, and that her compensation did not approach \$25,000.

11. The complaint alleges that the respondent failed to disclose in her 2004 lobby registration that she was to be paid \$7,000 a month, plus expenses, from JP Morgan Securities, Inc. (JP). The allegation is based on a March 2005 report from the office of the Comptroller of Public Accounts, which stated that the respondent's business performed lobbying work for JP around March 2004 for \$7,000 per month, plus expenses.
12. The respondent swore that her compensation from JP "did not involve lobby activities in any way" and that the "compensation was unrelated to lobbying." She also swears that she "never participated in any lobby activity for [JP]" and that "[her] activities primarily consisted of helping JP develop a strategy for conducting business in Texas." Further, she swears that her activities "included introducing [JP] employees to various municipal leaders in the Valley and other places."
13. The complaint alleges that the respondent "has failed to register for the year 2006." The complaint did not include any other statements regarding the allegation that a registration for 2006 was actually required. The respondent did not file a registration for 2006.

IV. Findings and Conclusions of Law

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

1. Each registrant shall file a report between the 1st and 10th day of each month. GOV'T CODE § 305.007(a).
2. A registrant may, when filing a registration, elect to file an activities report under section 305.0063 of the Government Code instead of section 305.006 of the Government Code if the person does not intend to make reportable lobby expenditures of more than \$1,000 during a calendar year, not including the person's own travel, food, or lodging expenses or the person's own membership dues. *Id.* § 305.0063(a). A registrant filing under section 305.0063 of the Government Code shall file the activities report not later than January 10 and must cover the activities occurring during the previous calendar year. *Id.* § 305.0063(c). To be entitled to file reports under section 305.0063 of the Government Code, the registrant must file with the registration form a written declaration of intent not to exceed \$1,000 in expenditures during each calendar year in which that registration is effective. *Id.* § 305.0063(b).
3. An expenditure is a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or any other thing of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. *Id.* § 305.002(5).

4. The complaint alleges that the respondent violated section 305.0063(c) of the Government Code by failing to file a lobby activities report for 2003, which was due on January 12, 2004. Ethics Commission rules prohibit the commission from considering, in a sworn complaint proceeding, an allegation barred from criminal prosecution by operation of the applicable statute of limitations. Ethics Commission Rules § 12.5(3). The criminal offense for a violation of section 305.0063 of the Government Code is a Class A misdemeanor. GOV'T CODE § 305.031(a). The statute of limitations for a Class A misdemeanor is two years from the date of the commission of the offense. Code of Criminal Procedure, Article 12.02. Therefore, an allegation relating to the filing of a lobby activities report that was due on January 12, 2004, is based on conduct that occurred more than two years before the complaint was filed (June 27, 2006), and is therefore not within the commission's sworn complaint jurisdiction.
5. The respondent filed a registration on September 10, 2004, and indicated that she did not intend to make reportable lobby expenditures of more than \$1,000 during the calendar year. Thus, the respondent was required to file a lobby activities report by January 10, 2005. The respondent did not file such a report until August 1, 2006. Therefore, there is credible evidence that the respondent violated section 305.0063(c) of the Government Code in connection with the annual lobby activities report covering 2004.
6. The respondent filed a registration on February 25, 2005, and did not indicate in her registration that she did not intend to make reportable lobby expenditures of more than \$1,000 during the calendar year. Rather, the respondent marked the registration to indicate that she was filing under the regular (monthly) reporting schedule. A registrant who does not indicate in a registration the intent not to exceed \$1,000 in reportable lobby expenditures is required to file lobby activities reports according to the monthly schedule. Thus, the respondent was required to file a lobby activities report by the 10th day of each month after the registration was filed, which includes eleven months due from March 2005 through January 2006. The respondent did not file any of the activities reports until July 18, 2006, in response to the complaint. Therefore, there is credible evidence that the respondent violated section 305.007(a) of the Government Code in connection with eleven lobby activities reports.
7. A registration must contain the amount of compensation or reimbursement paid by each person who reimburses, retains, or employs the registrant for the purpose of communicating directly with a member of the legislative or executive branch or on whose behalf the registrant communicates directly with a member of the legislative or executive branch. GOV'T CODE § 305.005(f)(6). Compensation or reimbursement required to be reported shall be reported in the following categories unless reported as an exact amount: (1) \$0 if no compensation or reimbursement is received; (2) less than \$10,000; (3) at least \$10,000 but less than \$25,000; (4) at least \$25,000 but less than \$50,000; (5) at least \$50,000 but less

- than \$100,000; (6) at least \$100,000 but less than \$150,000; (7) at least \$150,000 but less than \$200,000; and (8) \$200,000 or more. *Id.* § 305.005(g).
8. Compensation a person receives for preparing to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action is included in calculating compensation. Examples of preparation for lobby communications include participating in strategy sessions, review and analysis of legislation or administrative matters, research and communication with the employer/client. 1 T.A.C. § 34.3.
 9. A person shall make a reasonable allocation of compensation between compensation for lobby activity and compensation for other activities. *Id.* § 34.43(c).
 10. There is insufficient evidence that the respondent violated section 305.005(f)(6) of the Government Code in connection with her 2005 registration.
 11. A registration must contain the full name and address of each person who reimburses, retains, or employs the registrant to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action, and on whose behalf the registrant has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action. *Id.* § 305.005(f)(3).
 12. The available evidence does not sufficiently establish that the respondent was reimbursed, retained, or employed by JP to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action, or that any such communication occurred, during 2004. Therefore, there is insufficient evidence that the respondent violated section 305.005(f)(3) of the Government Code in connection with her 2004 registration.
 13. A person must register with the commission if the person makes total expenditures of more than \$500 in a calendar quarter, not including expenditures for the person's own travel, food, lodging, or membership dues, on activities described in section 305.006(b) of the Government Code to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action. GOV'T CODE § 305.003(a)(1), 1 T.A.C. § 34.41(a).
 14. A person must register with the commission if the person receives more than \$1,000 in a calendar quarter in compensation and reimbursement, not including reimbursement for the person's own travel, food, lodging, or membership dues, from one or more other persons to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. GOV'T CODE § 305.003(a)(2), 1 T.A.C. § 34.43(a).
 15. The allegation that the respondent did not file a registration for 2006 is based on the respondent's employment as a lobbyist during several years before 2006. The complaint did

not state any facts or provide any evidence that the respondent received compensation or made expenditures for lobbying in 2006. Therefore, there is no credible evidence that the respondent violated section 305.003 of the Government Code by not filing a registration for 2006.

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 or 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 this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that each registrant shall file a lobby activities report between the 1st and 10th day of each month unless the registrant has elected to file an activities report under the annual reporting schedule; that, if the registrant has elected to file an activities report under the annual reporting schedule, the report must be filed not later than January 10 and must cover the activities occurring during the previous calendar year. The respondent agrees to comply with these requirements of the law.

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, and consequences of the violations, and after considering the sanction necessary to deter future violations, the commission imposes a \$10,000 civil penalty for the violations described under Sections III and IV. The \$10,000 civil penalty consists of:

1. A payment to the Office of the Attorney General necessary to satisfy the default judgment order obtained by the Office of the Attorney General against the respondent on August 19, 1999, including but not limited to attorney fees, court costs, accrued interest, and all other charges in connection with efforts by the Office of the Attorney General to collect payment pursuant to the default judgment order; and

- 2. An additional payment to the Ethics Commission in the amount equal to \$10,000 minus the amount paid to the Office of the Attorney General to satisfy the default judgment order.

If the respondent does not pay the \$10,000 civil penalty in accordance with this proposed resolution, the commission imposes a civil penalty of \$6,500, none of which would be applied to satisfy the default judgment order.

VIII. Order

The commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-2606164.

The commission further orders that the respondent's consent to the proposed resolution and payment of the \$10,000 civil penalty as set forth under Section VII, also satisfies all outstanding administrative penalties in connection with lobby activities reports filed with the Ethics Commission.

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

Melinda Wheatley, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director