

TEXAS ETHICS COMMISSION

IN THE MATTER OF
DEVIN BATES,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-280251 AND 2803117

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on October 13, 2008, to consider sworn complaints SC-280251 and SC-2803117. A quorum of the commission was present. The commission determined that there is credible evidence of violations of sections 253.003 and 253.094 of the Election Code, laws administered and enforced by the commission. To resolve and settle these complaints without further proceedings, the commission proposes this resolution to the respondent.

II. Allegations

The complaints allege that the respondent made unlawful political contributions to a candidate, made unlawful political expenditures to support a candidate, and failed to properly disclose direct campaign expenditures.

III. Facts Supported by Credible Evidence

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

1. The respondent is the chief information officer and senior vice president of Susser Holdings, Inc., the corporate owner of TCFS Holdings, Inc. TCFS Holdings is the parent corporation of Town & Country Food Stores, Inc. (T&C), a corporation headquartered in Corpus Christi, Texas.
2. The complaints concern two letters that were distributed in support of an incumbent candidate (“the candidate”) for police chief of San Angelo, Texas, in a uniform election held on May 10, 2008. The complaints allege that the respondent made political contributions or political expenditures using corporate funds by distributing the letters.
3. One letter at issue was dated January 29, 2008, and included in its letterhead T&C’s corporate logo, address, and phone number. The letterhead also identified the respondent as “Senior Vice President/CIO” and included a T&C e-mail address. A copy of the envelope in

which the letter was distributed also included the T&C logo and address. The letter was postmarked on February 1, 2008, and indicates that it was mailed from ZIP code 76903.

4. The letter requested support for the candidate's re-election campaign and provided the date and location of a political fundraiser for the campaign. The respondent's name, signature, and title of treasurer for the candidate appeared in the signature of the letter.
5. In response to the allegations concerning the letter dated January 29, 2008, the respondent swears that he prepared approximately 240 of the letters on stationery bearing the T&C logo on January 29, 2008. He also swears that the letterhead was "personalized," including his name, office, and title, and that the letters indicated that they were sent by him in his capacity as treasurer for the candidate "and were not intended to lead to any inference that they were sent on behalf of T&C."
6. The respondent swears that the letterhead was purchased in 1999 or 2000 when he was acting senior vice president and chief information officer of T&C, but that he does not remember if he or T&C purchased the letterhead.
7. The respondent swears that letterhead would have become obsolete for any business purpose when he was promoted to executive vice president and chief financial officer of T&C in 2004 and that the letterhead included a previous telephone number for T&C. He also swears that T&C "had traditionally permitted employees to take obsolete inventory and goods as a minor perk of employment" and that the letterhead served no useful T&C business purpose in 2003 or 2004, held no value to the corporation, and was not a corporate asset at the time the letters were mailed.
8. The respondent swears that a salaried T&C employee assisted him in preparing the letters after ordinary business hours, for which the respondent personally paid \$60. Supporting documentation indicates the respondent paid \$60 to an individual by a check from his personal account dated February 13, 2008, and drawn from the respondent's personal account in the amount of \$60.
9. The respondent swears that the T&C employee used a T&C postage meter to create postage stamps for the letters and that T&C has had the practice of allowing company postage meters to be used for postage for personal matters, for which T&C provides statements to employees "around the beginning of each month" to indicate the amount due and is later reimbursed. He swears that he instructed the employee "to let the mailroom know that these letters [were] to be charged to me personally." He submitted a copy of a "petty cash statement" for February 2008 and part of March 2008, which states that the respondent's "petty cash balance" as of March 13, 2008, was \$129.54. He also submitted a copy of a check "used to pay the balance," which was addressed to T&C, dated March 13, 2008, and drawn from what

- appears to be the respondent's personal account in the amount of \$129.54. Handwriting on the statement states that \$97.71 was for postage related to the letter.
10. The respondent also swears that he requested the candidate to reflect the expenses as an in-kind donation from him and his spouse. The candidate's 30-day pre-election report filed with the City of San Angelo discloses an in-kind contribution in the amount of \$208.98 from the respondent and the respondent's spouse for "fundraiser mailing" on January 29, 2008.
 11. According to records of the United States Post Office, the respondent received the commission's notice of sworn complaint SC-280251 on February 21, 2008.
 12. In an article dated February 8, 2008, the San Angelo Standard-Times reported that the respondent stated that the letter does not qualify as a political expenditure because he plans to reimburse T&C for the letterhead, postage, and secretarial time compiling the letters. The article also quotes the respondent as stating, "That's my stationery here at Town and Country, and I paid for the postage."
 13. According to documents filed with the Secretary of State, T&C successfully applied for a certificate of trademark or service mark registration on May 22, 1998, related to retail sales. The trademark is T&C's corporate logo that was included in the letterhead at issue. The application for the certificate of trademark states that the logo was used in advertising, letterhead, signs, and business cards. The respondent signed an application for renewal of the registered trademark, which was received by the Secretary of State on January 9, 2008.
 14. The second letter at issue in the complaints was dated May 22, 2007, and included letterhead identical to the letter dated January 29, 2008. The letter requested support for the candidate's campaign. The respondent's name, signature, and title as treasurer of the candidate appeared in the signature of the letter.
 15. In response to the allegations concerning the letter dated May 22, 2007, the respondent swears that he prepared approximately 98 letters using the stationery at issue and that the letterhead was "personalized letterhead" that reflected his name, office, and title. He also swears that the letters indicated they were sent by him in his capacity as treasurer for the candidate and "were not intended to lead to any inference that they were sent on behalf of T&C." He also swore that the letterhead was purchased in 1999 or 2000, that he does not remember if he or T&C purchased the letterhead, and that it was not a corporate asset because it held no value to T&C. Furthermore, the respondent swears that the only T&C personnel who were sent, or who received, a letter were seven business partners.
 16. The candidate's semiannual campaign finance report that covered the period from January 1 to June 30, 2007, disclosed, in pertinent part, a \$500 monetary political contribution from the respondent and the respondent's spouse on May 10, 2007. The report also disclosed a

political expenditure of \$149.77 to a business on June 7, 2007, for “postage” and a political expenditure of \$41 to “UPS Store” on June 29, 2007, for “stamps.” The report also disclosed \$10 in political contributions of \$50 or less that were not itemized. The respondent disclosed no other political contributions or political expenditures for fundraising letters during the reporting period.

IV. Findings and Conclusions of Law

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

1. A corporation may not make a political contribution or political expenditure that is not authorized by subchapter D, chapter 253, Election Code. ELEC. CODE § 253.094(a). Subchapter D, chapter 253, Election Code, does not authorize a corporation to make a political contribution to a candidate or to make a political expenditure to support a candidate by providing assets or resources to a candidate for campaign purposes.
2. This prohibition applies to corporations that are organized under the Texas Non-Profit Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation. *Id.* § 253.091.
3. A person may not knowingly make a political contribution in violation of this chapter. *Id.* § 253.003(a).
4. A political contribution means a campaign contribution or an officeholder contribution. *Id.* § 251.001(5).
5. A campaign contribution means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* § 251.001(3).
6. A contribution means, in pertinent part, a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. *Id.* § 251.001(2).
7. A political expenditure means a campaign expenditure or an officeholder expenditure. *Id.* § 251.001(10).
8. A campaign expenditure means, in pertinent part, a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment in connection with a campaign for an elective office. *Id.* § 251.001(6), (7).

9. “Expenditure” means a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment. *Id.* § 251.001(6).
10. For purposes of reporting, a political expenditure is not considered to have been made until the amount is readily determinable by the person making the expenditure. *Id.* § 254.035(a). If the character of an expenditure is such that under normal business practice the amount is not disclosed until receipt of a periodic bill, the expenditure is not considered made until the date the bill is received. *Id.* § 254.035(b).
11. In Ethics Advisory Opinion No. 249 (EAO 249), the commission addressed whether a legislator may use political contributions to pay for using an airplane owned by a corporation in which the legislator has an interest. Ethics Advisory Opinion No. 249 (1995). The commission stated:

[I]n a situation in which a payment from political contributions is subject to both the restriction in section 253.041 and also the prohibition on corporate political contributions, the payment to the corporation must be in the amount reasonably necessary to reimburse the corporation for its expenses, neither more nor less.

Id. The commission also stated that a discount from an incorporated business may result in a prohibited corporate contribution. *Id.*
12. In Ethics Advisory Opinion No. 143 (EAO 143), the commission addressed whether it would constitute a political contribution from a corporation if a candidate entered into a contract with a corporation for a political fundraiser. Ethics Advisory Opinion No. 143 (1993). The commission stated that a political contribution does not include a transfer between a corporation and a candidate if the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms the commercial party offers to political and non-political entities alike. *Id.* The commission also noted that an exchange of consideration between a candidate and a corporation will not *by itself* change the character of the transfer from a prohibited political contribution to a permissible commercial transaction. *Id.*
13. The evidence indicates that the respondent used letterhead and envelopes to make a political contribution to the candidate in the form of solicitations for campaign contributions on or about January 29, 2008, and that the solicitations were made with letterhead and envelopes that included T&C’s name, corporate logo, and contact information.

14. The name and logo of T&C held value at the time they were distributed, which is reflected in the measures taken by T&C to protect its interests by applying for a registration of a trademark in 1998. The respondent filed an application to renew the trademark in December 2007, before the letters at issue were distributed, which indicates that the respondent was aware that the logo held value. Thus, T&C's logo in the letterhead and envelopes was a valuable asset belonging to T&C for which T&C was not reimbursed. Therefore, there is credible evidence that the respondent made an unlawful political contribution using corporate property in violation of sections 253.003(a) and 253.094(a) of the Election Code.
15. The respondent used T&C's postage meter to distribute the letters dated January 29, 2008, and personally reimbursed T&C for its costs, amounting to \$97.71. At the time, the respondent used T&C's assets with the specific intent to support the candidate. Based on the candidate's campaign finance report that disclosed the respondent's contribution, it also appears that the respondent was aware of the amount that T&C incurred for the postage on or about January 29, 2008. The respondent's sworn statements indicate that he intended to reimburse T&C for the postage at the time the postage meter was used. However, the reimbursement occurred on March 13, 2008, which was three weeks after he received the commission's notice of the complaint, approximately five weeks after the San Angelo Standard-Times contacted him regarding the complaint, and approximately six weeks after the letters were distributed on February 1, 2008. It also appears that the reimbursement was not made in accordance with T&C's normal procedures, as described by the respondent. Thus, there is credible evidence that the respondent used T&C's assets to make a political contribution to the candidate's campaign in the form of postage without making a proper reimbursement. Therefore, there is credible evidence that the respondent made an unlawful political contribution using corporate property in violation of sections 253.003(a) and 253.094(a) of the Election Code.
16. An individual not acting in concert with another person may make one or more direct campaign expenditures in an election from the individual's own property that exceed \$100 on any one or more candidates or measures if the individual complies with chapter 254 of the Election Code as if the individual were a campaign treasurer of a political committee and the individual receives no reimbursement for the expenditures. ELEC. CODE § 253.062(a).
17. "Direct campaign expenditure" means a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. *Id.* § 251.001(8).
18. The evidence indicates that the respondent's expenditures in connection with the letters dated January 29, 2008, were campaign contributions to the candidate, not direct campaign expenditures. Therefore, there is credible evidence that the respondent did not violate section 253.062(a) of the Election Code because he was not required to file a campaign finance report.

19. The evidence indicates that the respondent used the letters dated May 22, 2007, to make a political contribution to the candidate in the form of solicitations for campaign contributions on or about May 22, 2007, and that the solicitations were made with letterhead that included T&C's corporate logo and contact information.
20. The letterhead was purchased for business purposes in 1999 or 2000 by either T&C or the respondent. The name and logo of T&C held value at the time they were distributed, as reflected in the measures taken by T&C to protect its interests by applying for a registration of a trademark in 1998. Thus, T&C's logo in the letterhead was a valuable asset belonging to T&C for which T&C was not reimbursed. Therefore, there is credible evidence that the respondent made an unlawful political contribution using corporate property in violation of sections 253.003(a) and 253.094(a) of the Election Code.
21. A corporation may not make a loan to a candidate, officeholder, or political committee for campaign or officeholder purposes unless the corporation has been legally and continuously engaged in the business of lending money for at least one year before the loan is made and the loan is made in the due course of business. ELEC. CODE § 253.103(a).
22. The evidence indicates that the respondent did not make a loan to the candidate concerning the letter dated May 22, 2007. Therefore, there is credible evidence that the respondent did not violate section 253.103(a) of the 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 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 these sworn complaints.
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 a corporation may not make a political contribution to a candidate. The respondent agrees to comply with this requirement 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 \$500 civil penalty.

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-280251 and SC-2803117.

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

Devin Bates, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director