

TEXAS ETHICS COMMISSION

IN THE MATTER OF
FRANK GUTIERREZ,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-2809324

FINAL ORDER

The Texas Ethics Commission, having heard this case and voting to find a violation of a law under its jurisdiction, made the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The respondent is Frank Gutierrez, whose last known mailing address is 2610 Amherst Street, Lubbock, Texas, 79415-2834. A sworn complaint was filed with the Texas Ethics Commission against the respondent on September 22, 2008. The Notice of Hearing for a preliminary review hearing was mailed to the respondent on June 18, 2009, by certified mail, return receipt requested, restricted delivery, and by delivery confirmation. According to records of the United States Postal Service, the Notice of Hearing was delivered on June 20, 2009.
2. The Texas Ethics Commission held the preliminary review hearing on August 6, 2009, in Austin, Texas.
3. The respondent did not file a reply to the Notice of Hearing and did not appear at the hearing.
4. The respondent was a candidate for county commissioner of Lubbock County, Precinct 3, in the November 2008 general election.
5. The complaint alleged that the respondent represented in a campaign communication that the communications emanated from a source other than its true source. The basis of the allegation was the use of the phrase "Democrats for Frank Gutierrez" on signs. The complaint indicated that the signs contained a political advertising disclosure statement which included the names of the respondent and his campaign treasurer.
6. In response to the allegation, the respondent swore that the phrase on the sign "Democrats for Frank Gutierrez" was only meant to imply that he received support from many residents in Precinct 3 who are Democrats.

7. The complaint also alleged that the respondent represented in a campaign communication that he held a public office that he did not hold at the time the representations were made. The signs at issue stated: "Elect Frank Gutierrez, County Commissioner, Precinct 3."
8. The respondent was not the incumbent for the position of county commissioner of Lubbock County, Precinct 3, at the time he ran for office. The signs at issue did not include the word "for" before the office sought to clarify that the respondent did not hold that office.
9. On February 12, 2009, the commission considered the complaint and found that there was insufficient evidence of a violation of section 255.004(b) of the Election Code and credible evidence that the respondent violated section 255.006 of the Election Code. On February 20, 2009, the commission mailed a proposed order and agreed resolution to the respondent that imposed a \$300 civil penalty. On March 13, 2009, the commission mailed another copy of the order to the respondent that included a revision to accommodate the respondent's request for more time to pay the penalty. The respondent did not sign the proposed order and agreed resolution.

Conclusions of Law

1. Disposition of this case is within the jurisdiction of the Texas Ethics Commission. GOV'T CODE § 571.061.
2. The respondent received legally sufficient notice of the hearing in this case. GOV'T CODE § 571.032 and 1 TAC § 12.21. The hearing was held in accordance with section 12.23, 1 Texas Administrative Code.
3. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person knowingly represents in a campaign communication that the communication emanates from a source other than its true source. ELEC. CODE § 255.004(b).
4. The complaint alleged that the respondent placed signs that purported to be a communication from Democrats because of the use of the phrase "Democrats for" the respondent. A candidate is not prohibited from printing or distributing signs that imply that he has supporters affiliated with a particular political party. If the respondent and his campaign treasurer were the sources of the signs at issue, then using the names of the respondent and his campaign treasurer in the disclosure statement would not be a misrepresentation of the true source of the political advertising. However, there is insufficient evidence of who paid for the signs at issue or what the disclosure statement actually stated on the signs. Therefore, there is insufficient evidence that the respondent violated section 255.004(b) of the Election Code.
5. A person commits an offense if the person knowingly represents in a campaign communication that a candidate holds a public office that the candidate does not hold at the time the representation is made. ELEC. CODE § 255.006(b).

6. A person represents that a candidate holds a public office that the candidate does not hold if the candidate does not hold the office that the candidate seeks and the political advertising or campaign communication states the public office sought but does not include the word “for” in a type size that is at least one-half the type size used for the name of the office to clarify that the candidate does not hold that office. ELEC. CODE § 255.006(c).
7. The respondent was not the incumbent in the election. The respondent’s campaign signs did not include the word “for” before the office sought to clarify that the respondent did not hold that office. Therefore, there is credible evidence that the respondent violated section 255.006 of the Election Code.
8. The Texas Ethics Commission may impose a sanction against the respondent of not more than \$5,000 or triple the amount at issue, whichever amount is greater. GOV’T CODE § 571.173.

Therefore, the Texas Ethics Commission orders that:

1. The respondent pay to the Texas Ethics Commission, within 30 days of the date of this order, a civil penalty in the amount of \$1,000.

Order Date: _____

FOR THE COMMISSION

David A. Reisman
Executive Director
Texas Ethics Commission