

TEXAS ETHICS COMMISSION

IN THE MATTER OF

CARL JOINER,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-31605137

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (Commission) met on March 30, 2017, to consider sworn complaint SC-31605137. A quorum of the Commission was present. The Commission determined that there is credible evidence of a violation of section 255.003(a) of the Election Code, a law administered and enforced by the Commission. To resolve and settle this complaint without further proceedings, the Commission proposed this resolution to the respondent.

II. Allegations

The complaint alleged that the respondent: 1) spent or authorized the spending of public funds for political advertising; and 2) spent or authorized the spending of public funds for a communication describing a measure that contained information he knew was false and that was sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure.

III. Facts Supported by Credible Evidence

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

1. The respondent is the Mayor for the City of Kemah, Texas.

Spending Public Funds for Political Advertising

2. The complaint alleged that the respondent spent or authorized the spending of public funds for political advertising. The complaint relates to a May 7, 2016, special election on a ballot measure pertaining to the City of Kemah, Texas, adopting a city manager form of government under Chapter 25 of the Local Government Code.
3. On November 18, 2015, a petition was filed with the City of Kemah to hold a special election and put on the ballot a proposition to decide whether to change the city from their current

Mayor-Council form of government to a Council-Manager form of government. On February 9, 2016, the Kemah city council ordered the election.

4. The communication at issue is an April 2016 city newsletter titled "From the Desk of the Mayor." The newsletter contained statements from the respondent about the election and included as an insert a copy of a letter written by the Kemah city attorney. The newsletter was mailed to city residents on or about April 11, 2016, and within 30 days of the election date. The complaint alleges that the statements made by the respondent in the newsletter oppose the measure and therefore constitute political advertising. The complaint also alleges that the letter from the city attorney that was attached to the newsletter constitutes political advertising.

5. The respondent made the following statement that is at issue in the newsletter:

One item on our ballot is a proposition to change our form of government. Some Kemah residents gathered signatures on a petition to put this idea to a vote to the citizens. The City is therefore required to hold a Special Election on this topic with our May elections. This could lead to a significant increase in the number of ordinances to change our form of government so I want everyone to be informed before they vote. I, therefore, have asked our City Attorney and our City Administrator to put together a fact sheet for you to review.

Things are GREAT in Kemah! I invite everyone to work with me to unify our city and make it better.....together!

6. The second communication at issue is a two-page letter that was included with the city newsletter. The first page merely cites section 25.025 of the Local Government Code and contains general information about the city manager form of government under Chapter 25 of the Local Government Code. The second page is a letter from Kemah's city attorney dated January 29, 2016, and addressed to the city administrator, mayor, and council. According to the first sentence of the letter, the letter was written upon request by the city administrator. The letter appears to have been written as an internal legal opinion to provide information about the election to the municipal officers, and it does not appear that the letter was created for public dissemination.
7. Although the letter provides some factual information about a city manager form of government under Chapter 25 of the Local Government Code, the letter also contains discussion and legal opinions. The Commission found the following statements in particular to be problematic: "The code chapter sheds faint light on what power rests with the city manager," "Little guidance," "It is sketchy," "lack of clarity," "should take away the mystery and set forth the powers," "It probably should have what is a common home rule charter

provision," "it should prohibit individual 'investigations' (as many charters do)," "The grant of power should be a bright line," "the weakness of Chapter 25 is that..." and "Chapter 25 has no mechanism for charters so we are to operate in an environment that can change with the politics, if this passes."

8. In response to the complaint, the respondent acknowledged that the city newsletter at issue involved the use of public resources such as paper, staff time, city equipment, and postage. The respondent denied the allegations and stated that the communications did not advocate the passage or defeat of the measure. The respondent stated that the letter from the city attorney was a legal opinion and is not subject to a test of its truth or falsity.

Communication Containing False Information

9. The complaint alleged that the respondent spent public funds for a communication describing a measure that contained information that he knew was false and that was sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure.
10. The complaint specifically referenced the statement made by the respondent that the measure "could lead to a significant increase in the number of ordinances to change our form of government." The complainant stated that the statement is false because the change could be completed with one and only one ordinance. The complaint stated that there are versions of this kind of ordinance which exist to use as templates or one can be borrowed from another city to use.
11. Chapter 25 of the Local Government Code states that, under a city manager form of government, the governing body by ordinance may delegate to the city manager any additional powers or duties the governing body considers proper for the efficient administration of municipal affairs. LOCAL GOV'T CODE § 25.029(b). Chapter 25 of the Local Government Code also requires that the city manager's salary be set by ordinance. *Id.* § 25.026.
12. The City of Kemah does not have a city manager and does not have any ordinances defining the powers and duties of a city manager. The statement that the measure "could lead to a significant increase in the number of ordinances to change our form of government" is somewhat speculative in that it is prefaced with the word "could," meaning that such an increase in the number of ordinances was possible. The statement is not false because, if the measure had passed, then the governing body would potentially have to adopt one or more ordinances to define the powers and duties of the city manager and set the city manager's salary. The complaint did not allege that any other information in the newsletter was false.

IV. Findings and Conclusions of Law

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

Spending Public Funds for Political Advertising

1. An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. ELEC. CODE § 255.003(a). Subsection (a) 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.* § 255.003(b).
2. A city is a political subdivision. *Id.* § 1.005(13).
3. "Political advertising" is defined, in relevant part, as a communication supporting or opposing a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id.* § 251.001(16).
4. "Measure" means a question or proposal submitted in an election for an expression of the voters' will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will. *Id.* § 251.001(19).
5. Any method of distribution of political advertising that involves the use of political subdivision employees on political subdivision time would be within the prohibition in section 255.003 of the Election Code. *See* Ethics Advisory Opinion No. 45 (1992).
6. The critical question in determining whether a communication constitutes "political advertising" is whether it is a communication supporting or opposing a measure. Whether a particular communication supports or opposes a measure is a fact question. A factor in determining whether a particular communication supports or opposes a measure is whether the communication provides information and discussion of the measure without promoting the outcome of the measure. Ethics Advisory Opinion No. 476 (2007). Whether a violation of section 255.003(a) of the Election Code has occurred depends on an examination of the overall content of the advertising.
7. The respondent is an officer or employee of a city, which is a political subdivision. Credible evidence indicates that city resources were used to create both the newsletter and the letter from the city attorney. Credible evidence also indicates the respondent authorized the creation and distribution of the newsletter with the letter from the city attorney.
8. Regarding the newsletter, the statements made by the respondent in the newsletter exceed a factual description of the purposes of the measure. However, the statements by themselves do not promote the outcome of the measure and therefore are not political advertising.

9. Regarding the letter from the city attorney that was attached to the newsletter, the statements in the letter, when viewed as a whole, cast doubt and uncertainty about what powers the city manager would have if the measure passed. The letter points out weaknesses in the statutes authorizing the adoption of the city manager form of government, and also explains ways in which the statutes could be improved. The letter exceeds a factual description of the purposes of the measure, and the letter, when viewed as a whole, opposes the measure. Thus, the letter, within the context of the newsletter, is political advertising.
10. The respondent was acting in his capacity as an officer of the city at the time he authorized the creation and distribution of the newsletter at issue including the letter from the city attorney. The newsletter was created and distributed with city resources and contained political advertising. Therefore, there is credible evidence that the respondent violated section 255.003(a) of the Election Code by using or authorizing the use of city employee work time and city resources to create and distribute the newsletter with the letter from the city attorney.

Communication Containing False Information

11. An officer or employee of a political subdivision may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that the officer or employee knows is false, and is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure. ELEC. CODE § 255.003(b-1).
12. The newsletter did not contain information that was false. Therefore, there is credible evidence of no violation of section 255.003(b-1) 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 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 an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. The respondent agrees to 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. Sanction

After considering the nature, circumstances, and consequences of the violation described under Sections III and IV, 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-31605137.

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

Carl Joiner, Respondent

EXECUTED ORIGINAL received by the Commission on: _____.

Texas Ethics Commission

By: _____
Seana Willing, Executive Director