

TEXAS ETHICS COMMISSION

IN THE MATTER OF
DAVID LEIBOWITZ,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-200204

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on March 10, 2000, and voted to accept jurisdiction of Sworn Complaint SC-200204 filed against David Leibowitz, Respondent. The commission met again on July 14, 2000, to consider Sworn Complaint SC-200204. A quorum of the commission was present at both meetings. Based on the investigation conducted by commission staff, the commission determined that there is credible evidence of a violation of Section 254.031, Election Code, a law administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposes this agreed resolution to the respondent.

II. Allegations

The complainant alleges that the respondent, a candidate for state senator, failed to report political expenditures made for a political advertising mail-out and for a filing fee on his January 2000 semiannual report. The complainant also alleges that the respondent failed to include the required disclosure statement on a political advertising mail-out.

III. Facts Supported by Credible Evidence

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

1. The respondent was an unsuccessful candidate for state senator in the March 14, 2000, primary election.
2. The complainant submitted a copy of a Christmas greeting that he received from the respondent and that is addressed to "Resident." The greeting reads "Merry Christmas & Happy New Year from the David McQuade Leibowitz Family." The greeting also contains a picture of the respondent and his family with the family names appearing below the picture.

3. The greeting does not mention the respondent's candidacy and shows that it was printed and distributed by a corporation. The greeting does not state that it is political advertising nor does it provide the name or address of the person who contracted to have the greeting printed.
4. The complainant alleges that the greeting cards were sent to an intended audience, most of whom were eligible voters in the Primary Election, for the purpose of obtaining a political advantage because the respondent is "virtually unknown."
5. The respondent's application for a place on his party's general primary ballot reflects that the respondent signed the application and had it notarized on December 31, 1999.
6. The Secretary of State's office confirmed that the respondent, according to records filed by the county party chairperson, did pay a filing fee in the amount of \$1,000.
7. The respondent files his campaign finance reports with the Ethics Commission.
8. The respondent's campaign treasurer appointment is postmarked on October 4, 1999, and reflects that the respondent was seeking the office of State Senator.
9. The respondent's January 2000 semiannual report covers the period beginning October 4, 1999, through December 31, 1999, and discloses that the respondent had no reportable activity.
10. The respondent's 30-day before election report shows that a political expenditure for "advertising" was made on January 1, 2000, to the mail service that distributed the Christmas greeting. The report, however, does not indicate that the expenditure was for that particular mail-out.
11. The respondent stated that the Christmas card was committed to in early December before the respondent made a definitive decision to run for office. The respondent stated that he did not officially file to run for office until December 31, 1999.
12. The respondent also stated that the Christmas card was sent not only to residents of the senate district seat that the respondent sought, but was also sent to residents outside the district. To support his response, the respondent provided copies of a confirmation report for a mail-out from the mail service which shows that approximately 15,000 mailers were sent to residents of other senate districts.

IV. Findings and Conclusions of Law

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

1. A person may not knowingly enter into a contract or other agreement to print political advertising that does not indicate that it is political advertising and that does not provide the name and address of the person who entered into the contract or agreement to print the advertising, or the person that individual represents. Section 255.001, Election Code.
2. “Political advertising” is defined in relevant part as a communication that supports a candidate for nomination or election to a public office and that, in return for consideration, is published in a newspaper, magazine or other periodical, or that appears in a pamphlet, circular, flier, or similar form of written communication. Section 251.001(16), Election Code.
3. In Ethics Advisory Opinion No. 190 (1994), the commission concluded that it was permissible for an officeholder to use political contributions to purchase and mail Christmas cards because such activity “is a common practice among holders of public office, and we think it is connected with the activities of office.”
4. In Ethics Advisory Opinion No. 289 (1995), the commission assumed that holiday greeting cards sent by an officeholder and purchased with political contributions were political advertisements but went on to decide that they were not required to contain a political advertising disclosure statement if “the name and address of the officeholder sending the cards appear on the card itself or on the envelope.”
5. The respondent is not an officeholder and there is no evidence that the respondent purchased the cards with political contributions.
6. The respondent reported making an expenditure in January to the corporation which printed and distributed the Christmas greeting, but there is insufficient evidence to determine whether that expenditure was made for the Christmas greeting.
7. The Christmas greeting does not mention the respondent’s candidacy, was mailed to approximately 15,000 residents outside the district in which the respondent was seeking election, and thus does not support a candidate for public office. Therefore, the Christmas greeting does not constitute political advertising, and the political advertising disclosure statement is not required.
8. There is thus credible evidence that the respondent did not violate Section 255.001, Election Code.

9. A “campaign expenditure” is defined as an expenditure made by any person in connection with a campaign for an elective office or on a measure. Section 251.001(7), Election Code.
10. A candidate must report the amount of political expenditures, including campaign expenditures, that in the aggregate exceed \$50 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures. Section 254.031(3), Election Code.
11. The respondent’s January 2000 semiannual report does not disclose any expenditures made for the Christmas greeting. The respondent states that the expenditures for the Christmas greeting were made before the respondent definitively decided to run for public office.
12. The complainant provided no evidence that the Christmas greeting was purchased using political contributions, the Christmas greeting does not mention the respondent’s election, and the respondent provided evidence that the Christmas greeting was sent to residents who did not live within the district in which the respondent was seeking election.
13. Therefore, expenditures for the Christmas greeting were not campaign expenditures, and there is credible evidence that the respondent did not violate Section 254.031, Election Code, by failing to report expenditures for the Christmas greeting.
14. A filing fee for a place on the primary ballot is an expenditure in connection with a campaign for elective office and, therefore, any expenditure made to pay a filing fee would be a campaign expenditure.
15. The respondent states that he officially filed to run for office on December 31, 1999, a copy of the respondent’s application for a place on the ballot is dated December 31, 1999, and the Secretary of State’s office confirmed that the respondent, according to documents filed by the county party, did pay a filing fee for a place on the ballot.
16. The respondent’s January semiannual report, however, does not disclose an expenditure for a filing fee made on December 31, 1999.
17. There is credible evidence that the respondent violated Section 254.031, Election Code by failing to report payment of a filing fee as a political expenditure.

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 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 resolving and settling this sworn complaint.
2. The respondent consents to the entry of this Order before any adversarial evidentiary hearings or argument before the commission, and before any formal adjudication of law or fact by the commission. The respondent waives any right to a hearing before the commission or an administrative law judge, and further waives any right to a post-hearing procedure established or provided by law.
3. The respondent acknowledges that a candidate must report the amount of political expenditures, including campaign expenditures, that in the aggregate exceed \$50 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures. The respondent agrees to fully and strictly comply with this requirement of the law.
4. Notwithstanding any other provisions of this ORDER and AGREED RESOLUTION, the respondent understands and agrees that the commission will consider the respondent to have committed the violation described under Section IV, Paragraph 17, if it is necessary to consider a sanction to be assessed in any future sworn complaint proceedings against the respondent.

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, Government Code, and may be disclosed by members and staff of the commission.

VII. Sanction

After considering the seriousness of the violation described under Sections III and IV, including the nature, circumstances, consequences, extent, and gravity of the violation, after considering the fact that no previous violations by this respondent are known to the commission, and after considering the sanction necessary to deter future violations, the commission imposes a \$100 civil penalty for the violation described under Section IV, Paragraph 17.

VIII. Order

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondent;
2. that if the respondent consents to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-200204;
3. that the respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original and the \$100 civil penalty to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than September 25, 2000; and
4. that the executive director shall promptly refer SC-200204 to either the commission or to an administrative law judge to conduct hearings on the commission's behalf and to propose findings of fact and conclusions of law to the commission in accordance with law if the respondent does not agree to the resolution of SC-200204 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this _____ day of _____, 2000.

David Leibowitz, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
Tom Harrison, Executive Director