

TEXAS ETHICS COMMISSION

IN THE MATTER OF
KATHRYN HUBENER,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-2410169 and SC-2410172

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission met on January 13, 2005, and July 14, 2005, to consider sworn complaints SC-2410169 and SC-2410172. A quorum of the commission was present. The commission determined that there is credible evidence of violations of sections 254.031(a)(8) and 254.0612 of the Election Code, laws administered and enforced by the commission. To resolve these complaints without further proceedings, the commission proposes this resolution to the respondent.

II. Allegations

The complaints allege that the respondent accepted a political contribution from a corporation, converted political contributions to personal use, failed to report occupation and employer information in connection with political contributions, failed to report cash on hand, and failed to timely file a pre-election report.

III. Facts Supported by Credible Evidence

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

1. The respondent was an opposed candidate for state representative in the November 2004 election. She submitted sworn responses to the complaints.
2. Both complaints allege that the respondent accepted a contribution from a corporation.
3. On her 30-day pre-election report, the respondent reported an in-kind contribution of \$2,200 from Kym Grant for office space. The complaints allege that Dallas County tax records show that a corporation owns the property that contains the office space. The respondent swears that the current lessee of the space is a partnership in which Kym Grant's husband is a partner.

4. SC-2410169 alleges that the respondent converted political contributions to personal use. The complaint bases the allegation on the fact that the respondent reported a loan of \$5,000 to herself on September 3, 2003, and also a \$5,000 contribution to herself on the same date. The respondent swears that both entries represent the same transaction, a transfer of personal funds to her campaign.
5. Both complaints allege that the respondent failed to report political contributions on her January 2004 semiannual report. On the report she reported contributions of more than \$13,000 and expenditures of more than \$4,000. She reported cash on hand in the amount of "\$9,0166.60." The complainants interpret this to mean that she had over \$90,000 in cash on hand and therefore conclude that she failed to report contributions. The respondent swears that she inadvertently typed in an extra "6" and that the correct amount of cash on hand was \$9,016.60.
6. SC-2410169 alleges that the respondent failed to report the total amount of cash on hand on a special session report due in June 2004, on the July 2004 semiannual report, and on the 30-day and 8-day pre-election reports in connection with the November 2004 election. The 8-day pre-election report discloses cash on hand. The other reports in question do not disclose cash on hand. The respondent states that a staff member responsible for completing the reports thought the software automatically calculated the cash on hand.
7. The respondent filed corrected reports to disclose cash on hand of \$29,789.09 on the July 2004 semiannual report; and cash on hand of \$20,636.43 on the 30-day pre-election report.
8. SC-2410169 alleges that the respondent failed to disclose the occupation and employer of individuals that contributed \$500 or more to the respondent during the period covered by the July 2004 semiannual report and during the periods covered by the pre-election reports in connection with the November 2004 election.
9. The respondent's July semiannual report lists individuals who contributed \$500 or more. The respondent did not provide employer or occupation information for three of them.
10. The respondent's 30-day pre-election report lists individuals who contributed \$500 or more. The respondent did not provide employer or occupation information for five of them.
11. The respondent's 8-day pre-election report lists individuals who contributed \$500 or more. The respondent did not provide employer or occupation information for any of them.
12. The respondent swears that she had made best efforts to obtain the information through "phone calls, emails, and online sources." The evidence does not show, however, that the respondent took the steps that are considered to be "best efforts" under section 254.0312 of the Election Code.

13. Both complaints allege that the respondent filed the 30-day pre-election report after the filing deadline. The report was due on October 4, 2004; the respondent filed it with the Ethics Commission on October 5. The commission waived the late-filing penalty because the respondent submitted an affidavit stating that the late filing was attributable to problems with the filing software.
14. In her response, the respondent alleges that the complainant filed a frivolous complaint. Section 571.176 of the Government Code defines a frivolous complaint as “a complaint that is groundless and brought in bad faith or is groundless and brought for the purpose of harassment.”

IV. Findings and Conclusions of Law

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

1. A corporation organized under the Texas Business Corporations Act may not make a political contribution to a candidate. ELEC. CODE § 253.094.
2. A candidate may not knowingly accept a contribution that the candidate knows was made in violation of section 253.094 of the Election Code. ELEC. CODE § 253.003(b).
3. The evidence shows that a professional corporation made the contribution in question. A professional corporation is not subject to the prohibition in section 253.094 of the Election Code. ELEC. CODE § 253.091. Therefore, there is credible evidence that the respondent did not violate section 253.094 of the Election Code.
4. A person who accepts a political contribution as a candidate or officeholder may not convert the contribution to personal use. ELEC. CODE § 253.035(a).
5. When a candidate makes a political expenditure from personal funds, the candidate must report the expenditure either on the schedule for reporting loans or on the schedule for reporting political expenditures from personal funds. ELEC. CODE §§ 254.031(a)(3), 253.035(h), and 253.0351.
6. The candidate should not report the expenditure as a contribution to herself. Ethics Advisory Opinion No. 230 (1994). Although the evidence shows that the respondent improperly reported a \$5,000 political expenditure from personal funds as both a contribution to herself and as a loan to herself, there is no evidence that the respondent converted a political contribution to personal use.
7. There is no evidence to support a finding that the respondent failed to report political contributions.

8. As a general rule, a campaign finance report must include the total amount of political contributions maintained as of the last day of the reporting period. ELEC. CODE § 254.031(a)(8). This requirement to report “cash on hand” does not apply to special session reports.
9. The evidence shows that the respondent violated section 254.031(a)(8) of the Election Code by failing to report cash on hand on the July 2004 semiannual report and on the 30-day and 8-day pre-election reports in connection with the November 2004 election.
10. Each report by a candidate for a legislative office must include the principal occupation or job title and the full name of the employer of each individual from whom the person filing the report has accepted political contributions that in the aggregate equal or exceed \$500 during the reporting period. ELEC. CODE § 254.0612.
11. The respondent did not provide that information for a number of contributors. Therefore, there is credible evidence that the respondent violated section 254.0612 of the Election Code.
12. An opposed candidate in an election is required to file a report 30 days before the election. ELEC. CODE § 254.064(b).
13. The respondent filed the 30-day pre-election report one day after the filing deadline. Because the late filing was attributable to problems with Ethics Commission software, however, the evidence does not support a finding of a violation of section 254.064(b) of the Election Code.
14. Because the complaint made allegations that were supported by the evidence, the complaint is, by definition, not groundless, and thus not frivolous.

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 a campaign finance report must include the total amount of political contributions maintained as of the last day of the reporting period. The respondent further acknowledges that each report by a candidate for a legislative office must include the principal occupation or job title and the full name of the employer of each

individual from whom the person filing the report has accepted political contributions that in the aggregate equal or exceed \$500 during the reporting period. The respondent agrees to fully 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 \$3,000 civil penalty.

The commission will reduce the civil penalty to \$1,000 if the respondent files a corrected July 2004 semiannual report and corrects the 30-day and 8-day pre-election reports due before the November 2004 general election to report the occupation and employer information in connection with political contributions. The reduction in penalty is contingent on the respondent filing the corrections by August 18, 2005.

VIII. Order

The commission orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-2410169 and SC-2410172.

The commission further orders that the respondent's consent to the proposed resolution and payment of the \$1,000 civil penalty also satisfies the outstanding administrative penalties in connection with the January and July 2004 semiannual reports and the 30-day and 8-day reports due before the November 2004 general election.

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

Kathryn Hubener, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director