

TEXAS ETHICS COMMISSION

IN THE MATTER OF

MICHAEL L. "MIKE" FOSTEL,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-31004105

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on June 9, 2011, to consider sworn complaint SC-31004105. A quorum of the commission was present. The commission determined that there is credible evidence of violations of sections 254.031 and 254.061 of the Election Code and section 20.61 of the Ethics Commission Rules, and credible evidence of technical or *de minimis* violations of section 254.031 of the Election Code, laws 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 did not properly disclose political contributions, political expenditures, outstanding loan totals, total political contributions maintained, and did not disclose the campaign treasurer's name, address, and telephone number in campaign finance reports. The complaint also alleged that the respondent accepted political contributions from corporations.

III. Facts Supported by Credible Evidence

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

1. The respondent was the district attorney of the 109th Judicial District. He was an opposed incumbent candidate for that office in the November 4, 2008, election.
2. The allegations were based on the respondent's July 2008 semiannual campaign finance report, 30-day and 8-day pre-election campaign finance reports for the November 2008 election, and January 2009, July 2009, and January 2010 semiannual campaign finance reports.

Campaign Treasurer's Name, Address, and Telephone Number

3. The complaint alleged that the respondent failed to disclose the campaign treasurer's name, address, and telephone number in the July 2008, July 2009, and January 2010 semiannual reports.
4. The fields on the cover sheet for "campaign treasurer name," "campaign treasurer address," and "campaign treasurer phone" were left blank in each report at issue. During the reporting periods at issue, the respondent had an active campaign treasurer appointment on file with the commission.

Political Contributions and Political Expenditures of \$50 or Less

5. The complaint alleged that the respondent failed to disclose the total amount of political contributions of \$50 or less and failed to disclose the total amount of political expenditures of \$50 or less in all six campaign finance reports at issue.
6. The fields in the totals section on the cover sheet for total political contributions of \$50 or less, unless itemized, and total political expenditures of \$50 or less, unless itemized, were left blank in each report at issue. The political contributions that were itemized in the reports included only political contributions of over \$50. The political expenditures that were itemized in the reports included political expenditures of over \$50, as well as those of \$50 or less. There were four expenditures less than \$50, two disclosed on the 30-day pre-election report for the November 2008 election, and two disclosed on the January 2009 semiannual report.
7. In response to the allegations, the respondent swore:

Regarding the allegations on all the reports that were named in the complaint, there were no political contributions under \$50.00. All contributions accepted were reported and possibly not totaled. I cannot recall any political expenditures under \$50.00. I just inadvertently failed to put 0's in the blanks and a total.

Total Political Contributions and Political Expenditures

8. The complaint alleged that the respondent failed to disclose the amount of total political contributions accepted and the amount of total expenditures made during the periods covered in all six campaign finance reports at issue.

9. The fields in the totals section on the cover sheet for total political contributions and total political expenditures were left blank in each report at issue.
10. In the July 2008, July 2009, and January 2010 semiannual reports, no political contributions were itemized on Schedule A (used for political contributions other than pledges and loans) and no political expenditures were itemized on Schedule F (used for political expenditures from political contributions).
11. The 30-day pre-election report for the November 2008 election disclosed four political contributions totaling \$1,150 on Schedule A and 12 political expenditures totaling approximately \$3,760 on Schedule F.
12. The 8-day pre-election report for the November 2008 election disclosed one \$1,000 political contribution on Schedule A and three political expenditures totaling approximately \$930 on Schedule F.
13. The January 2009 semiannual report disclosed six political contributions totaling \$2,650 on Schedule A and 16 political expenditures totaling approximately \$6,290 on Schedule F.
14. In response to the allegations, the respondent swore, "All contributions accepted were reported and possibly not totaled."

Total Political Contributions Maintained

15. The complaint alleged that the respondent failed to disclose the amount of total political contributions maintained as of the last day of the reporting period in all six campaign finance reports at issue.
16. The field in the totals section on the cover sheet for total political contributions maintained as of the last day of the reporting period was left blank in each report at issue.
17. The July 2008, July 2009, and January 2010 semiannual reports disclosed no political contributions and no political expenditures, and Ethics Commission records show that the respondent's reports filed prior to July 2008 also disclosed zero activity.
18. The 30-day and 8-day pre-election reports for the November 2008 election and the January 2009 semiannual report disclosed political contributions totaling \$4,800 and political expenditures totaling approximately \$10,980.

19. Although the respondent did not address the allegations in his response, based on the activity disclosed in the reports, the total political expenditures made during those reporting periods overall exceeded the total political contributions accepted during those reporting periods.

Total Outstanding Loans

20. The complaint alleged that the respondent failed to disclose the total principal amount of all outstanding loans as of the last day of the reporting period in all six campaign finance reports at issue.
21. The field in the totals section on the cover sheet for total outstanding loans was left blank in each report at issue.
22. The 30-day pre-election report for the November 2008 election disclosed a \$5,000 loan from a financial institution on Schedule E (used for loans). The respondent disclosed the loan date as "July, 2008." The January 2009 semiannual report disclosed the same loan on Schedule E. None of the reports at issue disclosed political expenditures for the purpose of loan repayment.
23. In response to the allegations, the respondent swore:

Only one loan was made, and that was in the alleged violations and that note was paid off at the end of the election. When the campaign was over and all the bills were paid, the money was applied against the loan and the remainder of the loan was paid in full by me personally.

Political Contributions from Corporations

24. The complaint alleged that the respondent accepted two political contributions totaling \$750 from two different corporations. The allegations are based on disclosures in the 30-day pre-election report for the November 2008 election and January 2009 semiannual report.
25. The evidence (based on public records) shows that the sources of the contributions were not corporations.

Timely Disclosure of Political Contributions

26. The complaint alleged that the respondent failed to timely disclose two political contributions because the dates of the contributions fall outside of the reporting periods covered by the reports in which the contributions were disclosed. The allegations are based on disclosures in the 30-day pre-election report for the November 2008 election and January 2009 semiannual report.

30-day Pre-election Report for the November 2008 Election

27. The 30-day pre-election report for the November 2008 election disclosed the period covered start date as a blank field and the end date as October 6, 2008. The report itemized on Schedule A, a June 4, 2008, political contribution of \$500, one of the political contributions at issue.
28. The July 2008 semiannual report, which preceded the report at issue, covered the period from January 1, 2008, through June 30, 2008, and disclosed no political contributions for the reporting period.

January 2009 Semiannual Report

29. The January 2009 semiannual report covered the period from October 23, 2008, through December 31, 2008. The report itemized on Schedule A, an October 9, 2008, political contribution of \$1,000.
30. The 8-day pre-election report for the November 2008 election, which preceded the report at issue, covered the period from October 7, 2008, through October 23, 2008, and disclosed the same political contribution.

Purpose Description of a Political Expenditure

31. The complaint alleged that the respondent failed to fully disclose the purpose description for a \$174 political expenditure made to a newspaper on August 27, 2008, itemized on the 30-day pre-election report for the November 2008 election. The respondent left blank the "Purpose of Payment" field on Schedule F.
32. In response to the allegation, the respondent swore:

Most of the funds went for advertising by poster and by newspaper. Therefore the political expenditures [sic] in the [newspaper] was for a political ad.

Corrections

33. The respondent has not filed corrections in response to the complaint.

IV. Findings and Conclusions of Law

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

Campaign Treasurer's Name, Address, and Telephone Number

1. The respondent had an active campaign treasurer appointment on file during the periods at issue. Thus, the respondent was a candidate for title 15 filing purposes. Each campaign finance report by a candidate must include the campaign treasurer's name, residence or business street address, and telephone number. ELEC. CODE § 254.061(2).
2. The respondent did not disclose the campaign treasurer's name, residence or business street address, and telephone number in the July 2008, July 2009, and January 2010 semiannual reports. Therefore, there is credible evidence of violations of section 254.061(2) of the Election Code.

Political Contributions and Political Expenditures of \$50 or Less

3. Each campaign finance report must include the total amount or a specific listing of the political contributions of \$50 or less accepted and the total amount or a specific listing of the political expenditures of \$50 or less made during the reporting period. ELEC. CODE § 254.031(a)(5).
4. The respondent disclosed all political contributions and expenditures in the reports at issue, including those that in the aggregate did not exceed \$50 during a reporting period. Although the respondent left blank the fields for disclosing total political contributions of \$50 or less, unless itemized, and total political expenditures of \$50 or less, unless itemized, it is apparent when viewing each of the reports at issue that the respondent detailed all of his political contributions and expenditures. However, the respondent did not disclose a zero in the fields in the totals section on the cover sheet for total political contributions of \$50 or less, unless itemized, and total political expenditures of \$50 or less, unless itemized, in the reports at issue. The total expenditures of \$50 or less were minimal. Therefore, there is credible evidence of a technical or *de minimis* violation of section 254.031(a)(5) of the Election Code.

Total Political Contributions and Political Expenditures

5. Each campaign finance report must include the total amount of all political contributions accepted and the total amount of all political expenditures made during the reporting period. ELEC. CODE § 254.031(a)(6).

6. The respondent disclosed blank fields for the amount of total political contributions accepted and the amount of total political expenditures made during the reporting periods in all six campaign finance reports at issue.
7. The July 2008, July 2009, and January 2010 semiannual reports did not itemize any contributions or expenditures and there is no evidence that there were unreported contributions or expenditures. Although there were no contributions or expenditures to disclose for the reporting periods, the respondent did not disclose a zero in the fields in the totals section on the cover sheet for total political contributions and total political expenditures in the reports at issue. Therefore, there is credible evidence of technical or *de minimis* violations of section 254.031(a)(6) of the Election Code in connection with the July 2008, July 2009, and January 2010 semiannual reports.
8. The respondent failed to disclose the amount of total political contributions accepted and the amount of total political expenditures made during the reporting periods in the 30-day and 8-day pre-election reports for the November 2008 election and the January 2009 semiannual report. The totals would not be readily apparent to someone viewing the report. Therefore, there is credible evidence of violations of section 254.031(a)(6) of the Election Code in connection with political contributions totaling \$4,800 and political expenditures totaling approximately \$10,980 in the 30-day and 8-day pre-election reports for the November 2008 election and the January 2009 semiannual report.

Total Political Contributions Maintained

9. A campaign finance report must include, as of the last day of a reporting period for which the person is required to file a report, the total amount of political contributions accepted, including interest or other income on those contributions, maintained in one or more accounts in which political contributions are deposited as of the last day of the reporting period. ELEC. CODE § 254.031(a)(8).
10. A *de minimis* error in calculating or reporting a cash balance under Subsection (a)(8) is not a violation of this section. ELEC. CODE § 254.031(a-1).
11. The total amount of political contributions maintained in one or more accounts includes balance on deposit in banks, savings and loan institutions and other depository institutions and the present value of any investments that can be readily converted to cash, such as certificates of deposit, money market accounts, stocks, bonds, treasury bills, etc. Ethics Commission Rules § 20.50(a).
12. The respondent failed to disclose the amount of total political contributions maintained as of the last day of the reporting period in all six campaign finance reports at issue. The respondent left blank the field for the amount of total political contributions maintained.

When viewing each of the reports at issue it appears that the respondent had a zero balance of total political contributions maintained. Therefore, there is credible evidence of no violation of section 254.031(a)(8) of the Election Code.

Total Outstanding Loans

13. Each campaign finance report must include the aggregate principal amount of all outstanding loans as of the last day of the reporting period. ELEC. CODE § 254.031(a)(2).
14. The respondent failed to disclose the total principal amount of all outstanding loans as of the last day of the reporting period in all six campaign finance reports at issue. Although there were no loans to disclose for the July 2008 semiannual reporting period, the respondent did not disclose a zero in the field in the totals section on the cover sheet for total outstanding loans in the report. Therefore, there is credible evidence of a technical or *de minimis* violation of section 254.031(a)(2) of the Election Code in connection with the July 2008 semiannual report.
15. The respondent disclosed a \$5,000 loan in the 30-day pre-election report for the November 2008 election and acknowledges that the loan was not paid off immediately. The respondent failed to disclose the total principal amount of all outstanding loans as of the last day of the reporting period in the 30-day pre-election report for the November 2008 election and the subsequent reports at issue. Therefore, there is credible evidence of a violation of section 254.031(a)(2) of the Election Code in connection with the 30-day and 8-day pre-election reports for the November 2008 election, and January 2009, July 2009, and January 2010 semiannual reports.

Political Contributions from Corporations

16. A person may not knowingly accept a political contribution that the person knows was made in violation of chapter 253 of the Election Code. ELEC. CODE § 253.003.
17. A corporation may not make a political contribution or political expenditure that is not authorized by subchapter D, chapter 253, Election Code. *Id.* § 253.094.
18. The prohibition applies to corporations that are organized under the Texas Business 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.
19. The political contributions at issue in the 30-day pre-election report for the November 2008 election and January 2009 semiannual report were from unincorporated entities. Therefore,

there is credible evidence of no violations of sections 253.003 and 253.094 of the Election Code.

Timely Disclosure of Political Contributions

20. Each campaign finance report must include the amount of political contributions from each person that in the aggregate exceed \$50 and that are accepted during the reporting period by the person or committee required to file a report, the full name and address of the person making the contributions, and the dates of the contributions. ELEC. CODE § 254.031(a)(1).
21. A determination to accept or refuse a political contribution that is received by a candidate, officeholder, or political committee shall be made not later than the end of the reporting period during which the contribution is received. ELEC. CODE § 254.034(a).
22. The respondent properly disclosed the \$1,000 political contribution at issue in the 8-day pre-election report. Therefore, there is credible evidence of no violations of section 254.031(a)(1) of the Election Code in connection with the political contribution.
23. The respondent failed to timely disclose the \$500 political contribution at issue, which remains on the 30-day pre-election report for the November 2008 election but should have been disclosed on the July 2008 semiannual report. Therefore, there is credible evidence that the respondent violated section 254.031(a)(1) of the Election Code in connection with the \$500 political contribution.

Purpose Description of a Political Expenditure

24. Each campaign finance report must include the amount of political 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. ELEC. CODE § 254.031(a)(3).
25. The report of a political expenditure for goods or services must describe the categories of goods or services received in exchange for the expenditure. Ethics Commission Rules § 20.61.
26. The respondent disclosed a blank field for the purpose description for a \$174 political expenditure in the 30-day pre-election report for the November 2008 election. Therefore, there is credible evidence of a violation of section 254.031(a)(3) of the Election Code and section 20.61 of the Ethics Commission Rules.

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: 1) each campaign finance report by a candidate must include the campaign treasurer's name, residence or business street address, and telephone number, 2) each campaign finance report must include the total amount or a specific listing of the political contributions of \$50 or less accepted and the total amount or a specific listing of the political expenditures of \$50 or less made during the reporting period, 3) each campaign finance report must include the total amount of all political contributions accepted and the total amount of all political expenditures made during the reporting period, 4) each campaign finance report must include the aggregate principal amount of all outstanding loans as of the last day of the reporting period, 5) each campaign finance report must include the amount of political contributions from each person that in the aggregate exceed \$50 and that are accepted during the reporting period by the person or committee required to file a report, the full name and address of the person making the contributions, and the dates of the contributions, and 6) each campaign finance report must include the amount of political 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 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 \$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-31004105.

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

Michael L. "Mike" Fostel, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director