

TEXAS ETHICS COMMISSION

IN THE MATTERS OF
HERBERT GEARS,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-31709142CI AND SC-31806250CI

FINAL ORDER

I. Recitals

The Texas Ethics Commission (Commission) held a preliminary review hearing on December 13, 2018, to consider sworn complaints SC-31709142CI and SC-31806250CI. After the completion of the preliminary review hearing, the Commission determined that there was credible evidence of a violation of sections 255.001, 255.004, 254.261, and 254.153 of the Election Code. The respondent, Herbert Gears (Gears), did not agree to the resolution proposed at the conclusion of the preliminary review hearing. The Commission set the matters for a formal hearing to be held on June 27, 2019. On June 26, 2019, Gears, in writing, waived his right to a formal hearing. The Commission held the formal hearing on June 27, 2019. A quorum of the Commission was present.

II. Findings of Fact

1. The respondent is Herbert Gears. The Commission mailed the notice of the formal hearing by delivery confirmation and emailed the notice to Gears on March 28, 2019. Gears received the mailed notice on March 30, 2019.
2. Gears submitted a written waiver of a formal hearing to the Commission on June 26, 2019, and did not appear at the hearing on June 27, 2019. The formal hearing proceeded in default pursuant to section 12.173 of the Ethics Commission Rules.
3. Gears is the former mayor of Irving, Texas, but was not a candidate or officeholder at any time relevant to these complaints.
4. The complaints allege Gears: 1) knowingly caused to be published, distributed, and/or broadcast political advertising containing express advocacy that did not indicate the full name of the person who paid for the political advertising by publishing and distributing fliers regarding the May 6, 2017, Irving mayoral election, in violation of section 255.001 of the Election Code; 2) with the intent to injure a candidate or influence the result of an election, entered into a contract or other agreement to print, publish, or broadcast political advertising that purported to emanate from a source other than its true source; or with the intent to injure a candidate or influence the result of an election, knowingly represented in a campaign communication that the communication emanated from a source other than its

true source by publishing mailers regarding the May 6, 2017, Irving mayoral election that purported to emanate from a source other than Gears, in violation of section 255.004 of the Election Code; 3) made a direct campaign expenditure that exceeded \$100 in connection with the May 6, 2017, Irving mayoral election, and did not file the 8-day pre-election report, as required by sections 254.261 and 254.154 of the Election Code; and 4) made a direct campaign expenditure that exceeded \$100 and did not timely file the July 2017 semiannual report as required by sections 254.261 and 254.153 of the Election Code.

Misrepresentation of the True Source of Political Advertising or Campaign Communication

5. On September 27, 2017, the Commission initiated sworn complaint SC-31709142CI against Gears alleging he was responsible for a mailer sent days before the mayoral election for the City of Irving that purported to emanate from “Irving Opportunity Counsel,” a fictitious name that closely resembles the name of a politically active non-profit corporation “Irving Opportunity Council.”
6. A candidate (the candidate) for Irving mayor in the May 2017 election was the subject of the mailer that was sent in the days before the election by Gears. Gears admitted that he is solely responsible for the mailer in question.
7. On May 2, 2017, Gears received an invoice from a print shop for a “campaign mailer” to be completed in “a 24-hour turnaround” and to be sent to 2,500 addresses. The total cost was \$2,934.58.
8. Gears agreed to the terms contained in the invoice and the mailers appeared throughout Irving before the May 6, 2017, election. Gears paid the invoice in cash.

9. The mailer included the phrase “Pol. Adv. Pd. for By Irving Opportunity Counsel” and included a P.O. Box address in Irving. The front of the mailer is reproduced below.

Pol. Adv. Pd. for By
Irving Opportunity Counsel
P.O. Box 140863
Irving, Texas 75014

FIRST-CLASS MAIL
PRESORTED
U.S. POSTAGE PAID
IRVING, TX
PERMIT NO. 291


ATTENTION IRVING VOTERS!
Irving Mayor Election May 6th

Official Public Documents
Do Not Lie!

Recently discovered public documents reveal:

- Multiple Arrests for Drugs and Theft
- Evictions and Foreclosure
- Lawsuits and City Fines
- Failed Businesses
- Multiple Federal Income Tax Liens

Kristi Pena Can't Hide from Public Records!

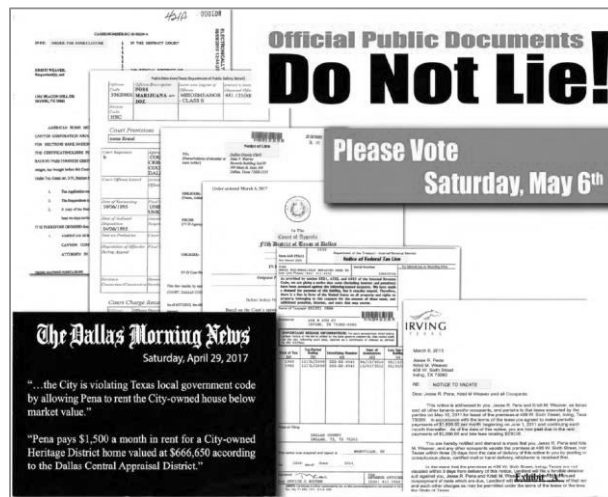


char·la·tan
/ˈʃhɑrlətɑn, ˈʃhɪlətɑn/
noun – a person falsely claiming to have a special knowledge or skills.
synonyms: quack, sham, fraud, impostor, hoaxer, cheat, deceiver, double-dealer, swindler, fraudster, mountbait, blarney.

Current Resident
1142 _____ AVONDALE DRIVE
JAMES HANCOCK JENSEN
1120 Terry Way
Irving, TX 75061-0105

Exhibit "A"

10. The mailer states “Attention Irving Voters!” and identifies the election date; contains a picture of the candidate; calls the candidate a “charlatan;” and implies that, among other things, the candidate was arrested for drugs and theft and was evicted and foreclosed upon, which are untrue. In response to the complaint, Gears asserted that “all of the information on the flier, although seemingly harsh, was true and accurate and was documented in public records.” However, during the preliminary hearing Gears testified that the candidate was never arrested for drugs and theft and the lawsuit referenced in the mailer was the candidate suing to ensure her place on the ballot.
11. The reverse side of the mailer states: “Official Public Documents Do Not Lie! Please Vote Saturday, May 6th.” The reverse side of the mailer also contains what appear to be official documents including an order of foreclosure, an arrest record with the name of the arrestee obscured, two notices of liens with the name of the person against whom the lien was obtained obscured, a court opinion from the Fifth District Court of Appeals in Dallas, with the case name obscured, a notice of a federal tax lien, and a “notice to vacate” from the City of Irving.



12. At the preliminary review hearing, Gears testified that the candidate had not been arrested for drugs or theft and had not been evicted from a residence. He also testified that the lawsuit referenced in the mailer involved whether the candidate would be allowed on the ballot.
13. Gears' name does not appear anywhere on the mailer. Instead, the mailer purports to have been paid for by "Irving Opportunity Counsel."
14. There is no such entity as "Irving Opportunity Counsel" registered as a business organization with the Secretary of State, as a d/b/a filed with Dallas County, or as a political committee with the Commission.
15. However, a non-profit corporation registered with the Secretary of State's office named Irving Opportunity Council does exist. Irving Opportunity Council was the subject of public discussion, as evidenced by news articles, in Irving in 2015 when it sent mailers to influence the Irving City Council election. The Irving Opportunity Council appeared as the subject of a *Dallas Morning News* front-page story on June 8, 2015.¹ The group was prominent enough in Irving politics that, following the 2015 election, its directors were questioned about whether they put out a survey regarding an Irving high school student, who made national news after he was arrested and charged with making a "hoax bomb" when he brought a home-made clock to school.²
16. In an interview the *Dallas Morning News* published on June 23, 2017, Gears admitted that he was responsible for the mailer at issue in the complaint. He maintained throughout the complaint proceedings that "Irving Opportunity Counsel" is based on a nickname of his. However, Gears produced no credible evidence that he was ever referred to as Irving Opportunity Counsel, let alone widely known by that name.

¹ Avi Selk, "Dark money" shakes up race, *The Dallas Morning News*, June 08, 2015 at A1.

² Avi Selk, *Residents surveyed on Ahmed*, *The Dallas Morning News*, Oct 29, 2015 at B1.

17. A LexisNexis search of its Texas newspaper database shows no news articles published with the words “Irving Opportunity Counsel” or “Opportunity Counsel” and “Gears” before Gears published the mailer. Several articles appear with the words “Irving Opportunity Council.” In one article in which the *Dallas Morning News* questioned the funding sources of the corporation Irving Opportunity Council, Gears was not mentioned. However, a search of the same database for the term “Herbert Gears” yields more than 2,000 records.
18. The Commission finds that “Irving Opportunity Counsel” is not a widely-known nick name of Gears. Instead, Gears intended to represent that the mailer was distributed by the existing organization Irving Opportunity Council in order to escape scrutiny and responsibility for the mailer.

Political Advertising Disclosure Statement

19. The Commission initiated sworn complaint SC-31806250CI on June 26, 2018, alleging Gears violated section 255.001 of the Election Code by distributing the political advertising mailer without a proper political advertising disclosure statement. In response to the second complaint, Gears stated: “I failed to put my full name on the election mail piece I distributed in the May 2017 Irving Election. I apologize for that error and I ask for your forgiveness.”
20. Gears stipulated that he violated section 255.001 of the Election Code by failing to include his full name on the mailer.

Timeliness of Direct Campaign Expenditure Report

21. On July 20, 2017, Gears filed a direct campaign expenditure (DCE) report with the Commission (required to be filed by a person not acting in concert with another person who spends more than \$100 on one or more direct campaign expenditures during a reporting period). The report disclosed a \$2,934.58 political expenditure to oppose the candidate made by Gears on May 2, 2017.
22. A political expenditure for the May 6, 2017, election that was made between March 28, 2017, and April 26, 2017, would need to be included in the 8-day pre-election report.
23. Any expenditure made on or after April 27, 2017, but before July 1, 2017, would need to be included in the July 2017 semiannual report. The July 2017 semiannual report was due by July 17, 2017 (deadline extended due to weekend).
24. Gears stated in response to the complaint that he made the expenditure on May 2, 2017, and was therefore not required to file a campaign finance report before the May 6, 2017, election.

25. Gears stated he attempted to comply with his filing requirements by filing a DCE report with the Irving City Secretary. (He included a date-stamped copy of the DCE report he filed with the city secretary with his response to the complaint that shows a DCE report filed with the Irving city secretary on July 13, 2017). Gears swore that he was unaware that all DCE reports must be filed with the Commission regardless of the election and that he did not learn of the proper filing authority until after the July 17, 2017, filing deadline. He swore “[t]he report was thus available to the public on the city’s website in a timely manner, though it was not filed with the Ethics Commission until July 20, 2017.”
26. Gears stipulated that he failed to timely file the July 2017 semiannual report in violation of sections 254.261 and 254.153 of the Election Code.

III. Conclusions of Law

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

1. Disposition of this case is within the jurisdiction of the commission. GOV’T CODE § 571.061.
2. The respondent received legally sufficient notice of the formal hearing, which met the requirements of section 12.173(b) of the Ethics Commission Rules. *Id.* §§ 571.126, 571.032, 2001.051, 2001.052; ETHICS COMMISSION RULES §§ 12.103, 12.173.
3. Gears waived his right to a formal hearing and did not appear at the June 27, 2019, formal hearing.
4. The Commission proceeded in default pursuant to section 12.173 of the Ethics Commission Rules.

Misrepresentation of the True Source of Political Advertising or Campaign Communication

5. A person can violate section 255.004 of the Election Code (misrepresenting the true source of communication) in two ways. Subsection (a) involves misrepresenting the true source of “political advertising.” Subsection (b) involves misrepresenting the true source of a “campaign communication.”
6. “Political advertising” means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that, in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television, or that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication, or on an Internet website. ELEC. CODE § 251.001(16).

7. “Campaign communication” means a written or oral communication relating to a campaign for nomination or election to public office or office of a political party or to a campaign on a measure. *Id.* § 251.001(17).
8. The elements necessary to prove a violation under section 255.004(a) are a person:
 - A) with intent to injure a candidate or influence the result of an election,
 - B) enters into a contract or other agreement to print, publish, or broadcast political advertising that
 - C) purports to emanate from a source other than its true source.

ELEC. CODE § 255.004(a).

9. The elements necessary to prove a violation under section 255.004(b) are a person:
 - A) with intent to injure a candidate or influence the result of an election,
 - B) knowingly represents in a campaign communication that
 - C) the communication emanates from a source other than its true source.

Id. § 255.004(b).

10. The first two elements under 255.004 subsections (a) and (b) are both met easily and not subject to serious dispute. It is clear from the face of the mailer that it is designed to influence the result of the Irving mayoral election and to injure the candidate, satisfying element one of subsections (a) and (b). Gears entered into a contract with the print shop to produce the mailer, which clearly meets the definition of “political advertising” and “campaign communication” as it relates to the mayoral election and opposes the candidate. It is also not susceptible to any reasonable interpretation but as an appeal to vote against the candidate.
11. During the course of the proceedings, Gears disputed that the mailer purported to emanate from a source other than its true source, which is necessary to find a violation of section 255.004 under both subsections (a) and (b). Gears claims that he was widely known by “Irving Opportunity Counsel” and therefore, while not his actual name, the mailer did not purport to emanate from someone other than him. Gears produced no credible evidence to support his claim.
12. There is ample credible evidence that the name “Irving Opportunity Counsel” was used to represent that the mailer came from the already-established corporation, Irving Opportunity Council.
13. Unlike the “Irving Opportunity Counsel,” Irving Opportunity Council exists as a corporate entity. The corporation was also the subject of several articles that appeared in the *Dallas Morning News*, among other publications, regarding its activity in an Irving election. The

corporation sparked public debate when it filed as a direct-campaign expenditure filer rather than registering as a political committee after the 2015 Irving city council election.³ The publicity Irving Opportunity Council received indicates that the corporation was known in the community. It is within this context that Gears decided to send a last-minute mailer under a name that sounds identical to, but is spelled differently than, the already-established entity. The content of the Gears' mailer is of dubious veracity, which provides a likely motive for why Gears wanted to escape responsibility by using a false name.

14. During the preliminary review hearing, Gears had no answer for why he would use a "nickname" rather than his actual name if he had no problem being identified as the source of the mailer. First, the law already requires that political advertising include a disclosure statement that includes the full name of the person who paid for the political advertising. Gears' omission of his actual and full name is a separate violation. Considering Gears violated section 255.001 of the Election Code by employing a pseudonym, not using his real name can plausibly be explained by a desire to completely avoid responsibility or at least avoid responsibility long enough to sow confusion in the days before the election.
15. In summary, Gears admits he was the true source of the mailer, which was both political advertising and a campaign communication. The mailer purported to emanate from the fictitious Irving Opportunity Counsel, which is a homophone of the politically active corporation, Irving Opportunity Council. There is no credible evidence that Gears has ever been known by "Irving Opportunity Counsel." Therefore, the Commission finds by the preponderance of the evidence that Gears violated section 255.004 of the Election Code with respect to the mailer.

Political Advertising Disclosure Statement

16. It is a violation of section 255.001 of the Election Code to knowingly cause to be published, distributed, or broadcast political advertising containing express advocacy that does not indicate in the advertising:
 - (1) that it is political advertising; and
 - (2) the full name of:
 - (A) the person who paid for the political advertising;
 - (B) the political committee authorizing the political advertising; or

³ Avi Selk, "Dark money" shakes up race, The Dallas Morning News, June 08, 2015 at A1.

(C) the candidate or specific-purpose committee supporting the candidate, if the political advertising is authorized by the candidate.

ELEC. CODE § 255.001(a).

17. “Political advertising” means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that, in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television, or that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication, or on an Internet website. *Id.* § 251.001(16).
18. The mailer in this case featured the picture and name of a clearly identified candidate, included the word “vote,” identified the election day, attacked a candidate’s character and fitness for office, was targeted to the voting public of Irving, and arrived in voter’s mailboxes the day before election day. The mailer therefore expressly advocated for a candidate’s defeat and required the political advertising disclosure statement. The disclosure statement did not include Gears’ full name. Instead, it states “Pol. Adv. Pd. for By Irving Opportunity Counsel.”
19. Gears admitted that he violated section 255.001 of the Election Code in his initial response to the allegation, during the preliminary review hearing, and in a stipulation.
20. Therefore, the Commission finds by the preponderance of the evidence that Gears violated section 255.001 of the Election Code with respect to the mailer.

Timeliness of Direct Campaign Expenditure Report

21. A person not acting in concert with another person who makes one or more direct campaign expenditures in an election from the person’s own property must file reports as if the person were the campaign treasurer of a general-purpose committee. ELEC. CODE § 254.261.
22. “Direct campaign expenditure” means a campaign expenditure that is made without the prior consent or approval of the candidate or officeholder on whose behalf it was made. *Id.* § 251.001(8); ETHICS COMMISSION RULES § 20.1(5).
23. A political expenditure is generally considered to have been made when the amount is readily determinable by the person making the expenditure. ELEC. CODE § 254.035.
24. DCE filing is event-based, with the timing of the expenditure determining which report is required to be filed. Unlike political committee filing obligations, there is no registration or continuing obligation to file DCE reports under section 254.261 of the Election Code.

25. Depending on when a direct campaign expend is made, a DCE filer, filing as if the person were a treasurer for a general-purpose committee, must file with the Commission: 1) pre-election reports due 30-days and 8-days before each election in which the committee is involved, and 2) semiannual reports due by January 15 and July 15 of each year. *See id.* §§ 254.154; 254.153. A direct campaign expenditure for the May 2017 election made between March 28, 2017, and April 26, 2017, would trigger the responsibility to file the 8-day pre-election report. Any expenditure made on or after April 27, 2017, but before July 1, 2017, would need to be included in the July 2017 semiannual report. The July 2017 semiannual report was due by July 17, 2017 (deadline extended due to weekend).
26. The DCE report Gears filed on July 20, 2017, disclosed an expenditure date of May 2, 2017. In his response to the complaint, he said the amount of the expenditure was not readily available until May 2, 2017, when he received the invoice. Based on the timing of the expenditure, Gears was required to file a DCE report with the Commission by July 17, 2017. Therefore, the Commission finds by the preponderance of the evidence that no violation of sections 254.261 and 254.154 of the Election Code occurred because Gears was not required to file the 8-day pre-election report.
27. Although Gears filed a report prior to the July 17, 2017, deadline with the Irving city secretary, he did not file a report with the proper filing authority until three days after it was due. Therefore, the Commission finds by the preponderance of the evidence Gears violated sections 254.261 and 254.153 of the Election Code by filing the July 2017 semiannual report late.

IV. Confidentiality

This final order entered by the Commission after the completion of a formal hearing on these complaints describes violations that the Commission has determined are neither technical nor *de minimis*. Accordingly, this final order is not confidential pursuant to Section 571.140 of the Government Code, and may be disclosed by members and staff of the Commission.

V. Sanction

The Commission imposes a \$5,000 civil penalty against the respondent. The Commission orders that the respondent pay the penalty within six months of the date of this order.

Date: August 16, 2019

FOR THE COMMISSION



Chad M. Craycraft
Chair
Texas Ethics Commission