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TEXAS ETHICS COMMISSION

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IN THE MATTER OF
JEFFREY BROWNING,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-3240126

RECEIVED

JUN 5 2024

Texas Ethics Commission

ORDER
and
AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (TEC) met on June 18, 2024, to consider sworn complaint SC-3240126. A quorum of the TEC was present. The TEC determined that there is credible evidence of a violation of Section 254.031 of the Election Code. To resolve and settle this complaint without further proceedings, the TEC adopted this resolution.

II. Allegations

The complaint alleged that the respondent: 1) accepted campaign contributions and/or made or authorized campaign expenditures at a time when a campaign treasurer appointment was not in effect, in violation of Section 253.031(a) of the Election Code; 2) did not disclose on his 30-day and 8-day pre-election reports for the November 7, 2023 election, political contributions from the Wichita Falls Fire PAC and/or the Wichita Falls Professional Fire Fighters Association, in violation of Section 254.031 of the Election Code; and 3) accepted political contributions from the Wichita Falls Professional Fire Fighters Association, a non-profit corporation or labor organization, in violation of Sections 253.003 and 253.094 of the Election Code.

III. Findings of Fact and Conclusions of Law

Credible evidence available to the TEC supports the following findings of facts and conclusions of law:

1. The respondent was a successful incumbent candidate for Wichita Falls City Council, District 3, in the November 7, 2023 election.

Filing of Campaign Treasurer Appointment

2. The complaint alleged that the respondent did not file a campaign treasurer appointment until eight days before the election and that the respondent accepted campaign

- contributions and/or made or authorized campaign expenditures without a treasurer appointment on file.
3. In response to the complaint, the respondent denied the allegation and provided a copy of his campaign treasurer appointment, which showed that it was filed with the city clerk on May 25, 2023. According to the respondent's campaign finance reports, the respondent did not accept any political contributions or make any political expenditures prior to filing a treasurer appointment.
 4. A candidate may not knowingly accept a campaign contribution or make or authorize a campaign expenditure at a time when a campaign treasurer appointment for the candidate is not in effect. Tex. Elec. Code § 253.031(a).
 5. Credible evidence indicates that the respondent did not accept any political contributions or make or authorize any political expenditures prior to filing a treasurer appointment. Therefore, there is credible evidence of no violation of Section 253.031 of the Election Code.

Failure to Disclose In-Kind Contributions

6. The respondent was endorsed in the November 2023 election by the Wichita Falls Professional Fire Fighters Association ("the Association"). The Association controls and operates the Wichita Falls Fire PAC ("the PAC"), a general-purpose committee.
7. On August 29, 2023, members of the Association conducted interviews with the respondent and other candidates to determine which candidates to endorse. On September 4, 2023, the Association, along with the Wichita Falls Police Officers Association, announced that they were endorsing the respondent and three other candidates. The Association and its PAC hired a political consultant to engage in a political advertising campaign in support of the four endorsed candidates. The respondent used a printing company that is owned by the same consultant who was hired by the PAC and Association.
8. The complaint included copies of various political advertisements that were paid for and distributed by the PAC in support of the four candidates, including yard signs, fliers, and social media posts. Some of the political advertisements included each candidate's name and picture. The respondent did not disclose receiving any in-kind contributions from the PAC in his campaign finance reports. The PAC did not provide written notice of the expenditures to the respondent within the period covered by the 30-day pre-election report.
9. The PAC identified the four candidates in its campaign finance reports as candidates that were supported by the PAC. The PAC disclosed in its 30-day pre-election report filed October 10, 2023, a \$61,200 political expenditure to the political consultant for "Campaign data and direct mail." The PAC did not indicate that the expenditure was made as a direct campaign expenditure.

10. In response to the complaint, the respondent stated that his prior consent or approval was not sought for any of the political advertising, and that at no time did he receive written notice from the PAC that it had made in-kind contributions to his campaign. Further, the respondent swore that he did not review or have any involvement in the creation of the political advertising. The respondent also provided a sworn statement from the political consultant, in which the consultant swore that he did not make any expenditure on behalf of the Association or the PAC with the prior consent or approval of any candidate. However, the respondent did state that, on September 4, 2023, he was notified that the Association was endorsing him, and sometime prior to the election, he was aware that the PAC was going to provide political advertising in support of his campaign.
11. In response to discovery requests, the respondent provided copies of text message and email communications with the consultant, the president of the Association, and two of the other endorsed candidates. One of the emails dated September 28, 2023 was sent from the consultant to the respondent and two other candidates, with the president of the Association copied, in which the candidates were notified that the PAC was endorsing their campaigns and that they would be receiving signs. The respondent was included on another email dated September 29, 2023 regarding a script for an endorsement video; however, the respondent did not participate in the video. Aside from the endorsement video script, the evidence did not show that the respondent specifically reviewed any of the other political advertising from the PAC or the Association.
12. In response to the complaint, the respondent sought details from the PAC relating to the in-kind expenditures. The respondent filed corrections to his pre-election reports to disclose in-kind contributions from the PAC totaling \$10,469.
13. A campaign finance report must include the amount of political contributions from each person that in the aggregate exceed \$50 (\$100 as of January 1, 2023) and that are accepted during the reporting period by the person or committee required to file the report, the full name and address of the person making the contributions, and the dates of the contributions. Tex. Elec. Code § 254.031(a)(1); 1 Tex. Admin. Code § 18.31(a).
14. A 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. Tex. Elec. Code § 254.031(a)(6).
15. “Contribution” means a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. *Id.* § 251.001(2).
16. “Political contribution” means a campaign contribution or an officeholder contribution. *Id.* § 251.001(5).

17. “Campaign contribution” means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution. *Id.* § 251.001(3).
18. “In-kind contribution” means a contribution of goods, services, or any other thing of value that is not money, and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make the contribution. The term does not include a direct campaign expenditure. *Id.* § 251.001(21).
19. “Direct campaign expenditure” means a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. A campaign expenditure does not constitute a contribution by the person making the expenditure to a candidate or officeholder if the expenditure is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made. *Id.* § 251.001(8).
20. A person using the same vendor as a candidate, officeholder, or political committee established or controlled by a candidate or officeholder is not acting in concert with the candidate, officeholder, or committee to make a campaign expenditure unless the person makes the expenditure using information from the vendor about the campaign plans or needs of the candidate, officeholder, or committee that is: (1) material to the expenditure; and (2) not available to the public. *Id.* § 251.0016.
21. For reporting purposes, the value of an in-kind contribution is the fair market value. 1 Tex. Admin. Code § 20.51(a). If political advertising supporting or opposing two or more candidates is an in-kind contribution, each person benefiting from the contribution shall report the amount determined by dividing the full value of the political advertising by the number of persons benefited by the political advertising. *Id.* § 20.51(c).
22. The difference between an in-kind contribution and a direct campaign expenditure depends on whether a candidate gives his prior consent or approval to the person making the expenditures. If a candidate gives prior consent or approval to a third party to make political expenditures on behalf of the candidate, the third party has made an in-kind contribution to the candidate, and the candidate has accepted the in-kind contribution and must report it on the campaign finance report covering the period in which he accepted the contribution. Tex. Ethics Comm’n Op. No. 331 (1996) (“EAO 331”).
23. The definition of a “contribution” includes an agreement to make a transfer of a thing of value, which can include an agreement to make a transfer to a third party for the benefit of a candidate. *See* Tex. Elec. Code § 251.001(2). Therefore, when a third party coordinates with a candidate to make an expenditure, the resulting “contribution does not necessarily pass into the candidate’s possession.” EAO 331.

24. Courts have consistently equated the state term “direct campaign expenditure” with the federal term “independent expenditure.” *E.g. Osterberg v. Peca*, 12 S.W.3d 31, 36 n.2 (Tex. 2000); *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 416 (5th Cir. 2014). In *Catholic Leadership*, the court stated, “the Texas Supreme Court has explained that ‘direct campaign expenditures’ constitute the equivalent of ‘independent expenditures’ under federal campaign finance law.” *Catholic Leadership*, 764 F.3d at 428 (5th Cir. 2014) (citing *Osterberg*, 12 S.W.3d at 36 n.2); *see also Texans for Free Enter.*, 732 F.3d at 537 (stating a Texas direct campaign expenditure only committee cannot make campaign expenditures with “prearrangement and coordination” with a candidate) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).
25. Just as the Fifth Circuit in *Texans for Free Enterprise* explained that a direct campaign expenditure by definition cannot be made with “prearrangement and coordination” with a candidate, “[b]y definition, an independent expenditure is political speech presented to the electorate *that is not coordinated with a candidate.*” *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (emphasis added) (citation omitted).
26. The Texas Supreme Court and Fifth Circuit treating a “direct campaign expenditure” as the equivalent of an “independent expenditure” fits comfortably with the definition of direct campaign expenditures found in the Election Code and the TEC’s rules. While the federal term focuses on “coordination” and the state term focuses on “prior consent or approval,” courts use the terms interchangeably because an expenditure coordinated with a candidate must be with the prior consent or approval of the candidate. If the candidate participates in the production of the ad for a particular election, the candidate cannot plausibly claim he did not consent to its use in that election.
27. This is not a new standard. *See, e.g. EAOs 331 (1996), 336 (1996); In re Roy Santoscoy*, SC-3110483 (2011). *In re Roy Santoscoy*, a candidate who was verbally notified that a political committee was going to endorse his campaign. The candidate and political committee had prior discussions about the various ways in which the political committee could assist the campaign. *Id.* The political committee ultimately provided assistance by posting signs, distributing fliers, and calling voters. The TEC held that since the candidate had prior knowledge that the political committee was going to support his campaign, and since the candidate approved the activities of the political committee, there was a verbal agreement between the parties that constituted an in-kind contribution to the candidate. *Id.* The TEC further held that because the activities and expenditures made on behalf of the candidate by the political committee were in-kind political contributions, the candidate had the burden of determining the fair market value and reporting those contributions. *Id.*
28. The respondent had communications with the same consultant who was hired by the PAC and Association, and the respondent was notified in September 2023 that the PAC endorsed his campaign and was going to provide political advertising. The evidence indicates that the respondent was directly provided with political advertising that was paid for by the

PAC. Therefore, the respondent accepted in-kind contributions from the PAC and was required to report the fair market value of those contributions. The fact that the respondent did not receive written notice from the PAC did not exempt him from the requirement to report the in-kind contributions when the contributions were accepted.

29. The respondent did not disclose any in-kind contributions from the PAC in his campaign finance reports as originally filed. The PAC provided written notice of the in-kind contributions to the respondent on April 21, 2024. In response to the complaint, the respondent corrected his reports to disclose in-kind contributions from the PAC totaling \$10,469. There is credible evidence of a violation of Sections 254.031(a)(1) and 254.031(a)(6) of the Election Code.

Prohibited Contributions

30. The complaint alleged that the respondent accepted one or more political contributions from the Association. The allegation was based on the fact that some of the political advertising contained a disclosure statement indicating that it was paid for by the “Wichita Falls Fire Fighters Association.”
31. In response to the complaint, the respondent stated that he did not knowingly accept any political contributions from the Association and that he believed all of the political advertising was produced by the PAC. The respondent stated that, because the PAC had supported his previous campaign in 2020 and had noted such support on its campaign finance reports, he believed that any expenditures would be made by the PAC. The documents produced in response to discovery support the respondent’s statements and do not indicate that the respondent knowingly accepted a political contribution from the Association.
32. A person may not knowingly accept a political contribution the person knows to have been made in violation of Chapter 253 of the Election Code. Tex. Elec. Code § 253.003(b). Under Section 253.094(a) of the Election Code, a corporation or labor organization may not make a political contribution that is not authorized by Chapter 253, Subchapter D, of the Election Code. *Id.* § 253.094(a). Chapter 253, Subchapter D, of the Election Code does not authorize a corporation or labor organization to make a political contribution to a candidate or officeholder.
33. In order to find the respondent violated Sections 253.003(b) and 253.094 of the Election Code, there must be credible evidence to show the respondent: a) knowingly accepted a political contribution from an entity that the respondent knew was a corporation or labor organization; and b) knew that the law prohibited corporations or labor organizations from making political contributions.
34. To the extent the Association is considered a prohibited corporation or labor organization,

the available evidence does not show the respondent knowingly accepted a political contribution from the Association. Therefore, there is no credible evidence of a violation of Sections 253.003 and 253.094 of the Election Code.

IV. Representations and Agreement by Respondent

By signing this order and agreed resolution and returning it to the TEC:

1. The respondent neither admits nor denies the findings of fact and conclusions of law described under Section III, and consents to the entry of this order and agreed resolution solely for the purpose of resolving the sworn complaint.
2. The respondent consents to this order and agreed resolution before any adversarial evidentiary hearings or argument before the TEC, and before any formal adjudication of law or fact by the TEC. The respondent waives any right to a hearing before the TEC or an administrative law judge and consents to TEC staff presenting this order and agreed resolution to the Commissioners outside of the respondent's presence. The respondent further waives any right to a post-hearing procedure established or provided by law. The TEC and respondent agree that the entry of this order and agreed resolution will be a full and complete resolution of sworn complaint SC-3240126.
3. The respondent acknowledges the requirement of candidates to disclose in-kind contributions under Section 254.031 of the Election Code. The respondent agrees to fully and strictly comply with this requirement of law.
4. The respondent understands and agrees that the TEC will consider this order and agreed resolution in any future sworn complaint proceedings against the respondent regarding a similar violation that occurs after the date this agreement is executed.

V. Confidentiality

This order and agreed resolution describes a violation that the TEC 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 TEC.


VI. Sanction

After considering the nature, circumstances, and consequences of the violation described under Section III, and after considering the sanction necessary to deter future violations, the TEC imposes a \$500 civil penalty.

VII. Order

The TEC hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-3240126.

AGREED to by the respondent on this 5th day of June, 2024.

DocuSigned by:

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Jeffrey Browning, Respondent

EXECUTED by the TEC on: June 20, 2024.

Texas Ethics Commission

By: J.R. Johnson
J.R. Johnson, Executive Director