

TEXAS ETHICS COMMISSION

IN THE MATTER OF

HUBERT H. CUNNINGHAM,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-96024

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on May 9, 1997, to consider sworn complaint SC-96024 filed against Hubert H. Cunningham (the respondent). A quorum of the commission was present. The commission voted to accept jurisdiction of the allegations relating to the respondent's political advertising signs and the respondent's campaign finance reports, and to refuse jurisdiction of the allegation relating to the representation made to a store clerk. Based on the investigation conducted by commission staff, the commission determined that there was credible evidence of a violation of Section 254.063, 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

1. The complainant alleges that the respondent, a candidate for constable, violated Section 255.006, Election Code, by representing in political advertising and to a store clerk that he held an office he did not hold at the time the representation was made.
2. The complainant also alleges that the respondent failed to include the right-of-way notice required by Section 255.007, Election Code, on his political signs.
3. The complainant also alleges that the respondent failed to file the required campaign finance reports.

III. Facts Supported by Credible Evidence

Credible evidence available to the commission would support the following findings of fact:

1. At all times relevant to this complaint, the respondent was seeking election to the position of constable, but did not hold that position.
2. The complainant submitted a newspaper article in which he accuses the respondent of misrepresenting to a store clerk that the respondent held an office he did not hold at the time the representation was made in order to get the clerk to accept a personal check.
3. The complainant also submitted five photographs of five of the respondent's signs. The signs contained the candidate's name in large type. Under the name in smaller type are the words, "CONSTABLE PRECINCT 4." The word "for" does not precede the office. The photographs show the signs posted on the side of a road. Only one side of each of the signs was photographed. The photographed sides do not include the right-of-way notice.
4. The respondent had a campaign treasurer appointment on file in July 1993 and did not file a final report until March 27, 1997. The respondent failed to timely file semiannual reports in July 1994, January and July 1995, January and July 1996, and January 1997 (a total of six reports), but has filed the reports in response to this complaint. Additionally, the respondent filed a final report. The reports do not disclose any activity.
5. The respondent's attorney states that the respondent did not file the reports when they were originally due because he was informed that the reports were not required if there was no reportable activity. The attorney also states that the respondent was unable to file the reports immediately after the complaint was filed (March 1996) due to his serious diabetic condition. The attorney explains that the respondent has been in and out of the hospital because of that condition and underwent major surgery. The attorney explains that he had to obtain powers of attorney from the respondent in order to conduct some of the respondent's personal affairs. The respondent is presently confined to a wheelchair. The attorney explains that these circumstances contributed to the delay of the completion of the reports in question.

IV. Conclusions of Law

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

1. Section 255.006, Election Code, prohibits a person from knowingly representing in political advertising that a candidate holds a public office he does not hold at the time the representation is made.

2. The respondent's signs constitute political advertising because they support a candidate for election to public office. *See* Section 251.001(16), Election Code.
3. The respondent's signs do not use the words "elect," "vote," or "for." Although the commission has cautioned in Ethics Advisory Opinion No. 210 (1994) that a candidate who is not an incumbent in the office sought should avoid uncertainty about the application of Section 255.006 by using words such as "for" before the name of the office sought, or "elect" before the candidate's name, the law does not require those words. There is credible evidence that the respondent did not violate Section 255.006, Election Code.
4. Section 255.007, Election Code, requires a right-of-way notice on all political advertising signs designed to be seen from a road. Since the respondent's signs constitute political advertising and they were posted on the side of a road, they were required to include the right-of-way notice. The photographed sides of the signs do not include the required notice, however, there is insufficient evidence to determine whether the notice was included on the sides that were not photographed. There is insufficient evidence to determine whether the respondent violated Section 255.007, Election Code.
5. Section 254.063, Election Code, requires all candidates to file semiannual reports. For filing purposes, the respondent has been a candidate at least since July 1993. (Reports required to be filed prior to that date are not within the commission's jurisdiction. *See* Section 12.5(3), Ethics Commission Rules.) The respondent failed to timely file a total of six semiannual reports. There is credible evidence that the respondent violated Section 254.063, Election Code.
6. Sections 571.061 and 571.121(b), Government Code, limit the commission's sworn complaint jurisdiction to Chapters 302, 305, and 572, Government Code, and Title 15, Election Code. The commission does not have jurisdiction over the representation made to the store clerk.

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 detailed under Section III and the commission's findings and conclusions of law detailed 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 appointed by the commission, and further waives any right to a post-hearing procedure established or provided by law.

3. 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 violations detailed in Section IV, Paragraph 5, 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 alleged violations that the commission has determined are neither technical or *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 Texas Ethics Commission.

VII. Sanction

After considering the seriousness of the violations described under Section IV, including the nature, circumstances, consequences, extent, and gravity of the violations; that no previous violations by this respondent are known to the commission; that the reports at issue disclose that the respondent had no reportable activity; and the sanction deemed necessary to deter future violations, the commission does not impose a civil penalty for the violations described under Section IV, Paragraph 5.

VIII. Order

The Texas Ethics Commission hereby ORDERS:

1. that the portions of this sworn complaint that allege violations under Section IV, Paragraphs 3, 4, and 6, are dismissed;
2. that this proposed AGREED RESOLUTION be presented to the respondent;
3. that if the respondent consents to the proposed AGREED RESOLUTION, this *ORDER and AGREED RESOLUTION* is a final and complete resolution of SC-96024;
4. that the respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than June 6, 1997; and

5. that the executive director shall promptly refer SC-96024 to the commission or an administrative law judge to conduct hearings and to propose findings of fact and conclusions of law in accordance with law if the respondent does not agree to the resolution of SC-96024 as proposed in this *ORDER and AGREED RESOLUTION*.

AGREED to by HUBERT H. CUNNINGHAM, on _____, 1997.

HUBERT H. CUNNINGHAM, RESPONDENT

EXECUTED ORIGINAL received by the commission on _____, 1997.

TOM HARRISON, EXECUTIVE DIRECTOR