

TEXAS ETHICS COMMISSION

IN THE MATTER OF	§	BEFORE THE
CARLTON DEGENHARDT,	§	TEXAS ETHICS COMMISSION
RESPONDENT	§	SC-991137

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) met on December 10, 1999, and voted to accept jurisdiction of Sworn Complaint SC-991137 filed against Carlton Degenhardt, Respondent. The commission met again on March 10, 2000, to consider Sworn Complaint SC-991137. A quorum of the commission was present at both meetings. Based on the investigation conducted by commission staff, the commission determined that there is credible evidence of a violation of Section 255.006, 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

The complainant alleges that the respondent purchased and displayed political advertising signs that did not include the word “for” to indicate that the respondent did not hold the office that he sought.

III. Facts Supported by Credible Evidence

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

1. The complaint was filed against a candidate for city council in the May 1, 1999, election. The respondent was not the incumbent.
2. The complainant provided a photograph of a sign that states, “Elect Carlton Degenhardt Converse City Council.” The photograph does not show the word “for” preceding the position sought.
3. The complainant states that the signs were displayed beginning in about early April and continuing until the May 1 election.

4. The respondent asserted that he obtained the Ethics Commission Political Advertising pamphlet from the city secretary in February 1999 before filing for a place on the ballot.
5. The pamphlet provided by the respondent reflects an effective date of September 1, 1997, and a revision date of September 25, 1997.
6. The respondent states that the pamphlet never mentions a requirement to include the word “for” in political advertising. The respondent states that he reasonably relied on the incorrect information given to him by the Ethics Commission in the pamphlet and reasonably believed that he was complying with the law by following the directions in the pamphlet.
7. The copy of the pamphlet the respondent provided appears to have been printed from the commission’s web site and does not include the page pertaining to misrepresentation of office. An omission of at least one page from the pamphlet is obvious because the last page picks up in mid-sentence on an unrelated topic.
8. The respondent states that he substantially complied with the law by including the word “elect” in his political advertising and relies on Ethics Advisory Opinion 210 (1994), which states 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.”
9. The respondent asks the commission to dismiss the complaint under Section 12.69(d), Ethics Commission Rules. He argues that no penalty is necessary under the circumstances, he will not violate the provision in the future, and dismissal is in the public interest.
10. The respondent’s attorney asserts a constitutional argument, stating that the statute is unconstitutionally overbroad based on the Supreme Court’s holding in *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995).

IV. Findings and Conclusions of Law

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

1. A person commits an offense if the person knowingly represents in a campaign communication that a candidate holds a public office that the candidate does not hold at the time the representation is made. Section 255.006(b), Election Code.
2. A person represents that a candidate holds a public office that the candidate does not hold if the candidate does not hold the office sought and the campaign communication states the

- office sought but does not include the word “for” to clarify that the candidate does not hold that office. Section 255.006(c)(2), Election Code.
3. A campaign communication is defined in relevant part as a written or oral communication relating to a campaign for election to public office. Section 251.001(17), Election Code.
 4. The respondent’s signs constitute campaign communications because they are written communications that advocate the election of the respondent to a public office.
 5. The respondent did not hold the office named in his signs when the representation occurred. The signs indicate the respondent’s name and the office sought but do not contain the word “for” to clarify that the respondent did not hold that office. Therefore, there is credible evidence that the respondent violated Section 255.006(b), Election Code.
 6. The Ethics Commission’s September 1997 political advertising pamphlet that appeared on the commission’s web site is a complete copy and did contain the following statement: “If you are not the incumbent in the office you are seeking, you must make it clear that you are seeking election rather than reelection by using the word “for” to clarify that you don’t hold that office.”
 7. The respondent’s reliance on an obviously incomplete pamphlet obtained from the local filing authority does not constitute a defense under this section.
 8. It is a defense to prosecution or to imposition of a civil penalty that the person reasonably relied on a written advisory opinion of the commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved. Section 571.097, Government Code.
 9. Reliance on Ethics Advisory Opinion 210 was not reasonable because the opinion was issued in 1994, and the law was amended in 1997 to clarify the requirements of 255.006, Election Code. Thus, reliance on that opinion does not provide a defense to the imposition of a civil penalty.
 10. The *McIntyre* case is not on point as it involved an individual’s First Amendment right to engage in anonymous political speech. The Supreme Court recognized a societal interest in anonymous political speech and found that the state’s interest in preventing fraud did not justify the prohibition of all anonymous political speech. The same facts are not present in this complaint.

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 and 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 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, 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 violation described under 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 a violation that the commission has determined is neither technical nor *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 commission.

VII. No Sanction

After considering the seriousness of the violation described under Sections III and IV, including the nature, circumstances, consequences, extent, and gravity of the violation, after considering the fact that no previous violations by this respondent are known to the commission, and after considering the sanction necessary to deter future violations, the commission imposes no penalty for the violation described under Section IV, Paragraph 5.

VIII. Order

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondent;
2. that if the respondent consents to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-991137;
3. 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 April 7, 2000; and
4. that the executive director shall promptly refer SC-991137 to either the commission or to an administrative law judge to conduct hearings on the commission's behalf and to propose findings of fact and conclusions of law to the commission in accordance with law if the respondent does not agree to the resolution of SC-991137 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this _____ day of _____, 200__.

Carlton Degenhardt, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
Tom Harrison, Executive Director