

# TEXAS ETHICS COMMISSION

IN THE MATTER OF

CAROLA G. SERRATO,  
OSCAR CASTILLO,  
ALICE J. BLACK,  
ABEL GARZA,  
and KATHLEEN LOWMAN,

RESPONDENTS

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-220574

## ORDER and AGREED RESOLUTION

### I. Recitals

The Texas Ethics Commission (the commission) met on July 12, 2002, and voted to accept jurisdiction of Sworn Complaint SC-220574 filed against Carola G. Serrato, Oscar Castillo, Alice J. Black, Abel Garza, and Kathleen Lowman. The commission held a preliminary review hearing on November 14, 2003, and determined that there was credible evidence of a violation of a law administered and enforced by the commission. To resolve this complaint without further proceedings, the commission proposes this agreed resolution to the respondents.

### II. Allegations

The complainant alleges that the respondents violated section 255.003 of the Election Code by authorizing the use of public funds for political advertising. The complainant also alleges that the political advertising misrepresents its true source.

### III. Facts Supported by Credible Evidence

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

1. The complainant was a member of the city commission of the City of Kingsville at all times relevant to this complaint, and he was a candidate for re-election to that office in an election held on May 4, 2002.
2. The respondents are the executive director and four members of the board of directors of a conservation and reclamation district known as "South Texas Water Authority."

3. The complainant submitted a copy of a letter dated August 6, 2001, in which he recommended to the mayor and the other members of the city commission that they enter into negotiations with South Texas Water Authority regarding the terms of an existing contract.
4. The city commission appointed the complainant chairman of the city's negotiating committee. The respondents served as the negotiating committee for the water authority.
5. The complainant submitted copies of letters that the city and the water authority exchanged in regard to the contract negotiations. The correspondence addresses technical issues about the design of the authority's water rates, *i.e.*, the means by which it recovers costs associated with providing water to its nine wholesale customers, including the city. The chief sticking point in the contract dispute between the city and the water authority was a "take-or-pay" clause that required the city to pay for more water than it actually used, about 500 million gallons annually in excess of its historical needs. The city argued that the rate design required it to basically subsidize the authority's other customers. The authority argued that the rate design recovered its costs of allocating capacity to the city in the event that it was needed to meet the city's demands. The most recent letter is dated April 15, 2002, and it shows that the city and the water authority had not reached an agreement about the contract.
6. On May 1, 2002, an advertisement appeared in a local newspaper. It begins with this statement, "South Texas Water Authority (SWTA) Board of Directors would like to clarify information on the recent contract negotiations with the Kingsville City Council and Negotiation Committee." The newspaper advertisement states that the authority proposed a plan to lower the tax rate, to lower the monthly minimum, and to sell all water at one price as requested by the city council but that the city offered no counterproposal except to raise the tax rate and to raise the water rate for usage above the monthly minimum.
7. The text of the advertisement mentions the complainant's name four times but mentions no other names from the city's negotiating team and no names at all from the water authority's negotiating team.
8. The complainant alleges that the purpose of the advertisement was to oppose his re-election to the city commission and that the respondents misused water authority funds by paying for an advertisement intended to oppose a candidate. As the basis for his assertion that the advertisement was intended to oppose his re-election, the complainant points out that the advertisement appeared in the last edition of the local newspaper to be published before the May 4 election; that his name and no other name appeared in the advertisement; and that the brother of the chairman of the water authority was one of the candidates running against the complainant.
9. The complainant submitted a copy of an advertisement supporting the brother of the chairman of the water authority. The advertisement lists as one of his objectives: "Improve relations with the County, School District, and South Texas Water Authority."

10. The complainant also submitted a copy of his own transcription of a May 23, 2002, meeting of the water authority. According to that transcript, several board members who were not members of the negotiating committee questioned the propriety of publishing the advertisement just before the city election.
11. The complainant alleges that the advertisement misrepresents its source because the introductory sentence states that the “South Texas Water Authority (SWTA) Board of Directors would like to clarify” the contract dispute. He alleges that the advertisement “was not discussed nor approved by the entire STWA board.”
12. The respondents submitted affidavits that were nearly identical. Each of those affidavits states:

We proposed and approved the publication of the newspaper advertisement that is made the basis of [the complainant’s] complaint. We did not consider the newspaper advertisement to be political advertising because we did not consider it to be, and nor was it, a communication supporting or opposing a candidate for nomination or election to a public office . . . .

The advertisement set forth the history of the negotiations between the Authority and the City. It named [the complainant] because he was Chairman of the City’s negotiating committee and was the person with whom the Authority primarily dealt. It was intended to be a factual account of the Authority’s efforts to respond to the dispute. It took no position on [the complainant’s] candidacy for City Commissioner.

13. None of the respondents specifically addressed the allegation that the advertisement misrepresented its source.

#### **IV. Findings and Conclusions of Law**

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

1. An officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising. ELEC. CODE § 255.003.
2. The term “political advertising” includes a communication opposing a candidate for election to a public office that is published in a newspaper in return for consideration. ELEC. CODE § 251.001(16).
3. The respondents acknowledge that they took part in the decision to have the advertisement published.

4. The respondents do not deny that water authority funds were used to pay for having the advertising published.
5. Therefore, there is credible evidence that the respondents authorized the spending of public funds for the advertisement.
6. The evidence supports a finding that the advertisement in question was published in a newspaper in return for consideration.
7. The advertisement does not expressly oppose the complainant. The circumstances surrounding the advertisement, however, support a finding that the purpose of the advertisement was to oppose the complainant's re-election. The advertisement appeared in the last edition of the local newspaper to be published before the May 4 election. The advertisement outlined the disagreement between the city and the water authority and linked the complainant by name to that disagreement. Because the advertisement focuses on taxes and water rate hikes, the advertisement has the effect of associating the complainant with two issues that can be perceived as unpopular issues on the eve of an election. One of the other candidates for the complainant's seat on the city commission had made a campaign pledge to improve relations between the city and the water authority. That other candidate was the brother of the chairman of the water authority. Thus, there is credible evidence that the advertisement opposed a candidate.
8. Because there is credible evidence that the advertisement in question was published in a newspaper in return for consideration and credible evidence that it opposed a candidate, there is credible evidence that it is political advertising.
9. Because there is credible evidence that the advertising is political advertising and that the respondents authorized the spending of public funds for the advertising, there is credible evidence that the respondents violated section 255.003 of the Election Code.
10. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person enters into a contract or other agreement to publish, or broadcast political advertising that purports to emanate from a source other than its true source. ELEC. CODE § 255.004.
11. The political advertising in question here purports to emanate from the board of the water authority. The evidence shows that a committee consisting of the water authority's executive director and four members of the board, acting in the capacity as a negotiating team for the water authority, made the decision to place the advertisement. The evidence suggests that the committee was authorized to act on behalf of the board of directors in regard to the contract negotiations. Although three other board members later questioned the wisdom of the committee's decision to have the advertisement published, there is no evidence to suggest that the committee was not acting on behalf of the board when it made the decision to have

the advertisement published. Therefore, the evidence does not support a finding of a violation of section 255.004 of the Election Code.

### **V. Representations and Agreements by Respondents**

By signing this ORDER and AGREED RESOLUTION and returning it to the commission:

1. The respondents deny certain facts described under Section III and disagree with the commission's findings and conclusions of law described under Section IV. However, the respondents consent to the entry of this ORDER and AGREED RESOLUTION solely for the purpose of resolving and settling this sworn complaint.

#### Statement of Respondents

The respondents offer these additional statements in reference to Section III, Facts Supported by Credible Evidence and Section IV, Findings and Conclusions of Law:

Section III, Item 5: Respondents do not agree that the correspondence exchanged between the city and South Texas Water Authority is limited to that described in this statement. Respondents believe that the correspondence covers equally important issues such as tax rates and a proposed Transition Plan to avoid rate shock and adhere to future tax rates in accordance with information previously shared with the public in addition to the manner in which South Texas Water Authority recovers fixed costs. This is an important point since the purpose of the "advertisement" was to furnish information that the local newspaper failed to provide to the public.

Section III, Item 5 continued: Respondents do not agree with the Texas Ethic Commission's analysis of the chief "sticking point". Respondents assert that the contract dispute between the City and the Authority regarding a "take or pay" clause that required the City to pay 89.1% of all operating costs of the authority regardless of whether it accepted delivery of 5 million gallons per day as per Section 3(b) and 3(g) of the water supply contract which state:

Section 3 (b) The Parties to this Contract expressly understand that payment of the Authority's Bonds are from collections of ad valorem taxes of the Authority and the revenues from this Contract and contracts with other Contracting Parties and the City shall be obligated to pay the aforesaid water charges of Section 3(a) hereof in accordance with the provisions of the Contract, subject to the exceptions set forth in Section 6 hereof and subject to applicable credit for tax collections as provided in this Section, regardless of whether or not the Authority actually delivers or tenders delivery of said water, or whether or not the City actually receives or accepts said water, in which event the City is obligated to pay for 5 M.G.D., minimum usage after the first year of operation being 89.1% of the monthly Operating Charge and Debt Service Charge. It is further understood by the Parties to the Contract

that a special charge might be made at the end of each fiscal year to satisfy the Authority's annual budget and annual Debt Service Requirements to prevent a deficiency therein.

Section 3 (g) Any mistakes in any calculations or figures shall not alleviate the City's obligation to make payments to the Authority sufficient to pay the City's proportionate share of the principal of and interest on the Bonds and to pay the City's proportionate share of cost of operating the Authority which shall in no event shall be less than the percentage stated in Section 3 (b).

Section III, Item 5 continued: Respondents strongly object to the statement of fact which states that the contract included a “take or pay” clause that required the city to pay for more water than it actually used, about 500 million gallons annually in excess of historical needs”. The respondents consider that this finding of fact reinforces what the respondents contend—that the public had been misinformed and additional information was needed to arrive at an educated understanding of the matter. Respondents continue to assert that the rate design recovered its costs of operating the authority and did not charge the city for the “cost of goods” purchased from the City of Corpus Christi. The respondents assert that the city’s prorated share is based on the capacity that was built into the system to accommodate the city’s demands and that the demand data was provided by the city. The respondents consider that this is supported by evidence produced by the respondents from the American Water Works Association defining a “take or pay” clause and the fact that the contract is the pledge for \$17 million in bonds issued by South Texas Water Authority, a governmental entity, to construct the infrastructure necessary to serve the city.

Section III, Item 6: Respondents do not agree that the statement’s purpose was limited to that described in this statement. The respondents offer the following description of the advertisement. The notice is divided into three (3) sections. The first section outlines the history of the contract negotiation and differentiates between negotiations on the current and future contract as well as notifying the public about the Authority’s Transition Plan. The second section outlines the details of the Authority’s proposal to sell 10 times more water to the City for an additional \$115,000. The third section states the Authority’s position with regards to the validity of the contract and the City’s withholding of payments. The publication states that the Authority will continue to work towards a solution to insure future supplies.

Section III, Item 7: The respondents agree that the complainant’s name is listed in the advertisement four (4) times. However, the respondents disagree that the complainant is the only person referenced in the advertisement. The advertisement clearly shows that the city council and city are referred to twenty-two (22) times. Further, the respondents assert that the public was aware of the names of those city council members.

Section III, Item 9: The respondents acknowledge that the controversy surrounding the contract negotiations had caught the attention of the public and candidates in the City

Council election as is evidenced by numerous advertisements prior to the election. Copies of several other candidates' ads provide proof that the Authority became a campaign issue as seen in Charles E. Wilson election promise to secure "a clean safe water source at reasonable rates" and Cesar Romeo Garcia's in the May 1, 2002 issue promising to "Improve relations with the County Commissioners Court, School Board, and Southwest [sic] Water Authority. The respondents asserts that such ads were the result of a misinformed public regarding contract negotiations and the published notice was to educate its district residents. Further, the respondents assert that the ad was as a direct result of the newspaper failing to present all the necessary facts surrounding the issue.

Section III, Item 10: Respondents disagree with this finding of fact and consider that it truncates comments and messages derived from this transcript. With the exception of one board member, the members commenting indicated that the information was factual and represented the events as demonstrated by the City's and Authority's actions and correspondence.

Section III, Item 12: Respondents acknowledge that they submitted preliminary affidavits that were nearly identical and brief. However, respondents believe that subsequent evidence and correspondence to the Texas Ethics Commission support the respondent's assertions.

Section III, Item 13: Although initially the respondents did not address the allegation that the advertisement misrepresented its source, respondents believe that subsequent evidence and correspondence support the finding that the committee was acting on behalf of the authority's interests to notify the public as a result of the local newspaper's failure to present unbiased and nonpartisan information on the issues.

Section IV, Item 7: The respondents believe that since the publication does not explicitly or expressly oppose the complainant it can not be considered a political advertisement. The respondents contend that the advertisement was to provide the Authority's "side of the story" regarding contract negotiations and its Rate Transition Plan in response to the lack of such information being provided by the local newspaper.

Section IV, Item 7 continued: The respondents do not agree that the circumstances surrounding the advertisement support a finding that the purpose of the advertisement was to oppose the complainant's re-election. The respondents acknowledge that the contract negotiations had become a political issue. Respondents do not agree that the advertisement focuses on taxes and water rate hikes, and has the effect of associating the complainant with two unpopular issues. The respondents acknowledge that the publication includes rate and tax issues in association with the complainant and the other four city council members running for re-election in an "at large" race. The respondents contend that there are two statements in the "Negotiation Progress" section related to higher water and tax rates and in both statements the reference is to the *City Council* proposing a tax rate increase and the need to increase water rates. The respondents believe that reference to the City Council in eight statements related to higher water rates, tax rates, and failure to pay the full invoice supports their assertion that the publication is a factual statement only. The respondents admit that the

advertisement could have referred to each council member by name; however, they assert that voters were well aware—as evidenced by all the political advertisements—who comprised the Council. The respondents assert that the complainant’s quotes very clearly show that it is the City’s decision or position—again reflecting on the City Council as a whole. Respondents have provided evidence that numerous candidates for City Council made campaign pledges to improve relations between the city and the authority as well as securing water at reasonable rates. Therefore, the respondents believe that the fact that one of those candidates in an “at large” election was the brother of the chairman of the water authority should not be the basis to contend that there is credible evidence that the advertisement opposed a candidate.

Section IV, Item 8: Respondents acknowledge that the advertisement in question was published in a newspaper in return for consideration; however, respondents believe that the advertisement does not explicitly or expressly oppose either the complainant nor the City Council members that were referred to in the ad.

2. The respondents consent 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 respondents waive any right to a hearing before the commission or an administrative law judge, and further waive any right to a post-hearing procedure established or provided by law.
3. Notwithstanding any other provisions of this ORDER and AGREED RESOLUTION, the respondents understand that the commission will consider the respondents to have committed the violation described under Section IV, Paragraph 9 if it is necessary to consider a sanction to be assessed in any future sworn complaint proceedings against the respondents.

## **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 of the Government Code, and may be disclosed by members and staff of the commission.

## **VII. Sanction**

After considering the fact that no previous violations by these respondents are known to the commission, the commission imposes a \$300 civil penalty against each respondent for the violation described under Section IV.

## **VIII. Order**

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondents;

- 2. that if the respondents consent to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-220574;
- 3. that the respondents may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original and the \$300 civil penalty as to each respondent to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than December 12, 2003; and
- 4. that the executive director shall promptly refer SC-220574 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 respondents do not agree to the resolution of SC-220574 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondents on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Carola G. Serrato, Respondent

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Oscar Castillo, Respondent

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Alice J. Black, Respondent

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Abel Garza, Respondent

\_\_\_\_\_  
Kathleen Lowman, Respondent

EXECUTED ORIGINAL received by the commission on: \_\_\_\_\_

Texas Ethics Commission

By: \_\_\_\_\_  
Karen Lundquist, Executive Director