

TEXAS ETHICS COMMISSION

IN THE MATTER OF
NICK SANDERS,
RESPONDENT

§
§
§
§
§

BEFORE THE
TEXAS ETHICS COMMISSION
SC-2904102

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) held a preliminary review hearing on December 2, 2009, to consider sworn complaint SC-2904102. A quorum of the commission was present. The commission determined that there is credible evidence of a violation of section 255.003 of the Election Code, a law administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposed this resolution to the respondent.

II. Allegation

The complaint alleged that the respondent spent or authorized the spending of public funds for political advertising.

III. Facts Supported by Credible Evidence

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

1. At the time relevant to the complaint, the respondent was the mayor of Trophy Club. The complaint alleged that the respondent spent or authorized the spending of public funds for political advertising in connection with a May 9, 2009, measure election to abolish the Trophy Club Municipal Utility District No. 2 (MUD2) and transfer its powers and duties to the Town of Trophy Club.
2. The complaint alleged that the respondent spent or authorized the spending of public funds for the May 2009 edition of Trophy Club's monthly newsletter, titled "Around the Town." The single-page newsletter was posted to the city's website and included a column at the top of the page titled, "The Town's Plan for Proposition 2." The column states, in pertinent part:

Virtually every Trophy Club resident will agree that in the long term, the Town of Trophy Club should have only one government. Trophy Club residents will be given the opportunity to take the first step toward simplified

governance on May 9, Election Day. The plan that accomplishes this first step is Proposition 2 on the Town Ballot.

The McLain report (a full copy is available online at www.trophyclub.org), states that “at a minimum the MUDs should merge into one MUD”, but the “Best overall solution that would benefit the Trophy Club Entities as a whole should be to dissolve the MUDs and let the Town run all utility operations.”

The Town Council charted a course of action on April 6, 2009 to address the long range goals of community with a plan to dissolve MUD 2 and move towards a single government. The Town Plan provides for payment of existing MUD 2 debt obligations without redistributing the costs to MUD 1 residents. **It is important to make the point that no matter what formula is used to collect the necessary funds to make the MUD 2 debt payments, the total amount of funds needed to make MUD 2 debt payments are fixed.**

The important facts of the Town plan are as follows:

Residents of MUD 2 will continue to pay an amount equal to the funds needed to repay the MUD 2 debt
There will be NO IMPACT on MUD 1 citizens as a result of the passage of Proposition 2
Solana revenue will remain intact

...

The NET result is there is no additional cost to MUD 2 citizens or MUD 1 citizens.

...

The Town’s Plan would not REDISTRIBUTE debt obligations to MUD 1 or MUD 2, and our current governing bodies would be reduced from four entities to two.

In summary, the reason the Town plan is the BEST OVERALL solution is:

It will be easier to hire and retain highly qualified Town employees
Realtors from outside the town will no longer find it hard to market our homes
There will be less operating expenses of approximately \$100,000 per year
There will be two less governments with attorneys and accounting systems

The number of meetings our town staff is required to attend will be reduced by at least two per month

If you have any questions regarding our action plan, please do not hesitate to contact the Town Manager or myself.

Mayor Nick Sanders

(Emphasis in original.)

3. The newsletter also included information on the dates, times, and locations for voting in the election. The respondent had issued statements at the beginning of the monthly newsletter since May 2006, in which he stated that he had received many calls and e-mail messages and that the column in the newsletter would be “an adjunct to those lines of communications.” According to the town website’s registration information, the website (www.trophyclub.org) was first registered on March 20, 1998, and is registered to the Town of Trophy Club and administered by an employee in the town’s information systems department.
4. In response to the allegations, the respondent stated in an unsworn letter:

After the newsletter article in question was written, [the complainant] expressed to the Town Manager his dissatisfaction with the article citing a phrase in particular that he took exception to and felt it was “unfair”. While I did feel I was justified in merely stating the decision or the “action plan” the Town Council had made only days before (at the April 6th session) in an attempt to appease [the complainant], I modified the sentence the next day. Because the Proposition issues, both Prop 1 for the MUD and Prop 2 for the Town had become somewhat heated, I chose to modify the statement to circumvent any misconception.

The complaint states I misused city technology. The electronic newsletter includes the “Mayor’s Forum”. I have written this column for the past two terms (four years) that I have served. The column is not written by town employees but is written by myself monthly and is ready for download when turned in. The technology I am accused of using (internet) was not created by town technology as he indicates.

5. The respondent also swore:

I do not believe that I violated Title 15 of the Election Code under Section 255.003 by my statements included in a monthly Town of Trophy Club Newsletter that is published on the Town web site.

The Proposition on the ballot being discussed is a conditional proposition that was placed on the ballot by the Council that instructed the Council to implement an Ordinance if the citizens approved the Proposition. The referenced article in the Complaint communicates factual information about how the Town of Trophy Club would implement the dissolution of MUD 2 if approved. The terms used in my article of “The Town’s Plan for Proposition 2” and “Best Overall solution” are both direct quotes from a presentation made by the Town Manager at the April 20, 2009 council meeting and was unanimously approved by the council at the same meeting. The article did not advocate passage or defeat of the proposition, but did compare the “Town’s Plan” to a plan called for by the Municipal Utility District # 2 which was also on the May ballot.

The Council used the term “Best Overall solution” to express that the plan approved by Council as [sic] the “Best Plan” developed to date. The process of development of a plan had taken several months with numerous presentations to and by citizens of the town. This article was a summary of the specific points contained in the Towns [sic] plan if Proposition 2 were to pass.

I personally created my part of the newsletter in a Word file and emailed the file to a town employee who in turn copied the text and pasted it in the template for the newsletter. This is a process that has been done monthly for the past 4 years in our town. The newsletter template is then converted to a PDF format and copied to the web server. The total amount of time required by the town employee is less than 2 minutes per month to copy my text, paste it into the template and copy the template to the web server. There is no additional time required in this process no matter what my article may have contained. Nor is there any additional resource of equipment required to allow citizens to view the newsletter.

In my opinion, the facts and thoughts expressed in the Mayor’s remarks in the May Newsletter are no more expressing an advocate position than those expressed by the Municipal Utility District # 1 & 2 on the same web site when they expressed “This approach by the new MUD becomes vastly superior to the Town’s proposal . . .”

6. Article 4.05 of the town’s home rule charter provides that the town manager is the chief administrative officer and head of the administrative branch of the town. Article IX of the town charter provides that the town manager proposes the budget for the town, which requires subsequent approval by the town council.
7. The respondent provided sworn testimony before the commission regarding the allegations.

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(a). This section does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. *Id.* § 255.003(b).
2. “Political advertising” means, in pertinent part, a communication supporting or opposing a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id.* § 251.001(16).
3. In Ethics Advisory Opinion No. 45 (EAO 45), the commission determined that any method of distribution of political advertising that involved the use of school district employees on school district time or school district equipment would be within the prohibition. Ethics Advisory Opinion No. 45 (1992).
4. The complaint alleged that political advertising in the form of a column, concerning Proposition 2 and written by the respondent, appeared in a newsletter that was posted to a website registered to and administered by the town of Trophy Club. The respondent swore that the information included in the column was factual and that the “best overall solution” language was quoted directly from the report submitted to the town by a consultant in November 2008 and that the council “unanimously approved” of that solution. Section 255.003(b) of the Election Code provides that the prohibition does not apply to a communication that factually describes the purposes of a measure *if the communication does not advocate passage or defeat* of the measure. Thus, even if a communication factually describes the purpose of a measure, it is covered by the prohibition if it nevertheless advocates passage or defeat of a measure. The statements in the newsletter supported Proposition 2 by unequivocally stating that the proposition was the best course of action for the town and that it was the best measure to effectuate the residents’ desires for limited government. Thus, in its entirety, the newsletter constituted political advertising because it supported Proposition 2.
5. The respondent wrote the column and submitted it to a town employee to be included in the newsletter that was subsequently posted to the website, which routinely occurred for other newsletters. (It also appears that computer equipment owned by the town may have been used to prepare and publish the newsletter.) According to EAO 45, the distribution of political advertising that involves the use of school district employees on school district time or school district equipment constitutes the spending of public funds for political advertising. Thus, there is credible evidence that public funds were used for the publication of the newsletter.
6. Regarding whether the respondent spent or authorized the spending of public funds for the newsletter, the town charter provides that the town manager is the head of the administrative branch of the town and the town’s budget is proposed by the town manager and approved by

the town council as a body. However, it appears that the respondent had access to the newsletter by virtue of his office, created the content at issue for the newsletter that constituted political advertising, and provided it to another employee with the intent that it be included in the newsletter and published on the website, which appeared to follow a procedure for publishing the newsletter that had been in place for four years. Thus, the evidence indicates that the respondent spent or authorized the spending of public funds for publication of the newsletter. The newsletter constituted political advertising. Therefore, there is credible evidence that the respondent violated section 255.003 of the Election Code.

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 or 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 this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that an officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising. The respondent agrees to comply with this requirement of the law.

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 seriousness of the violation described under Sections III and IV, including the nature, circumstances, and consequences of the violation, and after considering the sanction necessary to deter future violations, the commission imposes a \$100 civil penalty.

VIII. Order

The commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-2904102.

AGREED to by the respondent on this _____ day of _____, 20__.

Nick Sanders, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director