

# TEXAS ETHICS COMMISSION

IN THE MATTER OF

LEE McLEOD,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-32009186

## ORDER and AGREED RESOLUTION

### I. Recitals

The Texas Ethics Commission (Commission) met on March 11, 2021, to consider sworn complaint SC-32009186. 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 adopted this resolution.

### II. Allegation

The complaint alleged that the respondent, as an officer or employee of a political subdivision, knowingly spent or authorized the spending of public funds for political advertising, in violation of Section 255.003 of the Election Code.

### III. Findings of Fact and Conclusions of Law

Credible evidence available to the Commission supports the following findings of fact and conclusions of law:

1. The respondent has served as Tomball Independent School District (TISD), Board of Trustees, Position 7, since June 2017. The respondent was a successful opposed candidate for the position in the November 3, 2020, election.

#### Use of Public Funds for Political Advertising

2. The sworn complaint alleged that the respondent spent or authorized the spending of public funds by assisting in the publication of an article that was posted to the TISD website and on TISD's Internet social media websites Facebook and Twitter. The article was titled "School Board Spotlight: Lee McLeod," and was published on September 4, 2020. The complaint alleged that the article constituted political advertising because it supported the respondent as a candidate and officeholder.

3. The article was subtitled “Get to know Lee McLeod of the Tomball ISD Board of Trustees” and consisted of a series of 12 questions and answers related to the respondent’s background and service on the TISD board. Some of the relevant portions of the questions and answers at issue are as follows:

- What year were you first elected for Tomball ISD Board of Trustees?

I was appointed in the Spring of 2017.

- What initially peaked [sic] your interest in running for School Board?

I have always had a heart of kids. Prior to my current work in the insurance industry, I spent 10 years working with teens and families as a youth minister. Back in the 90’s I even got a graduate degree in Social Work with an emphasis on Children and Family Services. So, in some ways, serving the students and families in this capacity is an extension of where my interests have always been...Tomball ISD has given my family a tremendous gift and I desire to give back in service on the Board.

- Why do you continue to run?

I love serving alongside other parents and educators committed to building up our community. I love it. At Lakewood Elementary, I was a homeroom dad. At Northpointe Intermediate, I was a Watchdog Dad. I’ve served on numerous committees and a been [sic] member of Booster Clubs at the high school level. My desire to serve at the district level continues to bring me joy.

- In your opinion, what makes Tomball ISD a Destination?

...

- What is the most rewarding part about being a School Board member?

...

- What would you consider a goal of yours to accomplish in your next term as School Board member?

I want to maintain much of the good that is happening in the district. A low property tax and continued strong fiscal discipline are of great importance. Staying ahead of the growth with proper planning for facilities and staffing and transportation needs. These are of great importance. Some of the recent innovations in the district are super exciting. For example the Energy and International Business Academy which is now on hold...that’s the sort of public / private partnership our community needs.

- What are the most challenging aspects of being a School Board member?  
...
  - List out 5 key attributes/qualities that you bring to the TISD Board of Trustees.  
...
4. The right column of the article featured four pictures of the respondent as a TISD trustee, including pictures of the respondent interacting with kids in a classroom and distributing a diploma at a high school graduation ceremony. No other board members or candidates in the election were featured or mentioned in the article, and there is no evidence to indicate that other candidates in the election, including the respondent's opponent, were provided the same opportunity to respond to the questions.
  5. The complaint stated that this was the first time TISD had published a "spotlight" article featuring a school board member.
  6. In response to the complaint, the respondent stated that he did not ask to be spotlighted and did not pay to be spotlighted. The respondent stated that he provided written responses to questions the District asked of him and that he did not provide pictures for the publication. The respondent stated that he was not provided with a timeline regarding when the article would be published and that he learned of the publication when a neighbor sent it to him electronically. The respondent claimed that the article was removed on or around September 11, 2020, shortly after the complaint was filed. The respondent also clarified that TISD had previously published another "spotlight" article earlier in the year that featured another board member who was not up for re-election, and that all board members would eventually be highlighted.
  7. In response to written questions, the respondent stated that the communications and marketing director for TISD was responsible for the publication and provided email communications from the director. One email from the director to the respondent dated August 19, 2020, stated:

Dr. Z and I have decided we want to profile you, Matt and Justin as you prepare for a Board Election in November. We are looking to highlight each of you over the next three Tomball Talk newsletters.

If you don't mind answering these 10 questions for a Q&A spotlight, that would be great! These don't have to be long-winded answers. This is more of a rapid-fire Q&A.

***If I could have these responses back by Wednesday, August 26, that would be great!!***
  8. Another email provided by the respondent shows he responded with his answers to the spotlight questions on August 27, 2020. The respondent stated that he also submitted a picture of his family, as requested by the director, but it doesn't appear that the picture

was used in the publication. The responses to the questions provided by the respondent were used verbatim in the article.

9. An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a).
10. The “spending” of public funds includes the use of a political subdivision employee’s work time or a political subdivision’s equipment or facilities. *See, e.g.*, Tex. Ethics Comm’n Op. No. 443 (2002) (placement of campaign flyers in a school district teachers’ lounge would involve the spending of public funds where school district employees were required to transport the flyers to an area of the school that was not accessible to the public); Tex. Ethics Comm’n Op. No. 45 (1992) (distribution of political advertising using school district equipment or school district employees on school district time would be the spending of public funds where an already existing internal mail system was used); Attorney General Opinion No. KP-177 (2018) (statute prohibits the use of school district staff, facilities, or other resources where school districts electronically distributed links to Internet websites that were partisan in nature).
11. In order to find a violation of Section 255.003 of the Election Code, the Commission must determine:
  - 1) the respondent was an officer or employee of a political subdivision;
  - 2) the respondent knowingly spent or authorized the spending of public funds (or the use of public resources) for the article; and
  - 3) the article constituted or contained political advertising.
12. “Political advertising” means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication, or on an Internet website. *Id.* § 251.001(16) (emphasis added).
13. Based on the statutory definition of “political advertising,” Section 255.003 prohibits an officer or employee of a political subdivision from spending or authorizing the spending of public money on a written communication that merely supports or opposes a candidate or officeholder. This is a lower threshold than the requirement that political advertising containing “express advocacy” include a disclosure statement. *Compare* Tex. Elec. Code § 255.003 (prohibiting the use of public funds for political advertising) *with id.* § 255.001 (requiring a disclosure statement for “political advertising containing *express advocacy*”) (emphasis added). This lower standard is constitutionally sound because “government speech” is generally not afforded First Amendment protection. *See, e.g., Walker v. Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). It is the Legislature’s prerogative to restrict the use of *public* funds and resources to fund political speech that is merely supportive of a candidate or officeholder.

*“Support or Oppose” Standard*

14. Whether a particular communication supports or opposes a candidate or a public officer depends on the specific facts. Tex. Ethics Comm’n Op. No. 102 (1992).
15. In advisory opinions, the Commission has determined:
  - 1) whether a particular communication supports or opposes a candidate or a public officer can only be answered when the communication is viewed as a whole; and
  - 2) self-promotional communications, especially those containing photographs and the name and title of the public officer in an unduly conspicuous way, will constitute political advertising.

*See* Tex. Ethics Comm’n Op. No. 102 (1992) (magazine advertisement congratulating a sports team that identified a candidate or public officer as such is political advertising); Tex. Ethics Comm’n Op. No. 211 (1994) (brochure that described the duties of the justice of the peace court and contained the name of the incumbent justice of the peace only in the letterhead and not in an unduly conspicuous way or in a way that would lead one to believe that the purpose of the brochure was to support the justice of the peace is not political advertising); Tex. Ethics Comm’n Op. No. 476 (2007) (newsletter that included one individual picture of a public officer, 22 other pictures in which the public officer appeared with other persons, the name of the public officer 22 times in print type that was bolded or larger than the main text, and pictures covering more than 50% of the newsletter is political advertising); Tex. Ethics Comm’n Op. No. 506 (2012) (refrigerator magnet that prominently displayed an individual photograph of a public officer standing in front of a representation of a city seal, the name of the public officer in a print type size that was larger than any other text on the magnet, the name of the office the public officer held, the public officer’s contact information, the Internet website address for information about the public officer, and the text “DEDICATION to (1) Timely Constituent Response! (2) Responsible City Spending! (3) Standing up for residents, businesses, and for what is right and just! Our #1 Priority” is political advertising).

16. The standards set out in the advisory opinions are reflected in Section 26.2 of the Ethics Commission Rules. Under Section 26.2, a newsletter of a public officer of a political subdivision is not political advertising if:
  - (1) It includes no more than two pictures of a public officer per page and if the total amount of area covered by the pictures is no more than 20 percent of the page on which the pictures appear;
  - (2) It includes no more than eight personally phrased references (such as the public officer’s name, “I,” “me,” “the city council member”) on a page that is 8½” x 11” or larger, with a reasonable reduction in the number of such personally phrased references in pages smaller than 8½” x 11”; and

- (3) When viewed as a whole and in the proper context:
- (A) is informational rather than self-promotional;
  - (B) does not advocate passage or defeat of a measure; and
  - (C) does not support or oppose a candidate for nomination or election to a public office or office of political party, a political party, or a public officer.

1 Tex. Admin. Code § 26.2.

17. The respondent is an officer or employee of TISD, a political subdivision. Credible evidence shows the respondent provided content for the article with knowledge that the article would be published in an upcoming TISD newsletter to profile him as he prepared for the November 2020 election. Accordingly, there is credible evidence that the respondent participated in the creation of the article and approved the content. The only remaining question is whether the article is political advertising.
18. While the article meets the first two prongs of the § 26.2 safe harbor, the most important question is whether it passes the third prong: “when viewed as a whole and in the proper context [the article]: (A) is informational rather than self-promotional; (B) does not advocate passage or defeat of a measure; and (C) does not support or oppose a candidate for nomination or election to a public office or office of political party, a political party, or a public officer.” *Id.* § 26.2(3).
19. The Commission has historically taken a broad view as to what constitutes self-promotion. *See, e.g.*, Tex. Ethics Comm’n Op. No. 102 (1992) (finding a magazine advertisement congratulating a sports team that identified a candidate or public officer as such to be political advertising).
20. The following aspects of the article are indicative of promotion and therefore advertising:
  - The article was published 60 days before an election;
  - Some questions imply the respondent is running for re-election, such as, “Why do you continue to run?”
  - One question implies the respondent will be re-elected, i.e., “What would you consider a goal of yours to accomplish in your next term as School Board member?”
  - Some questions are designed to elicit a positive response regarding the respondent’s qualifications to serve as trustee, such as, “List out 5 key attributes / qualities that you bring to the TISD Board of Trustees.”
  - The article contains four pictures of the respondent that take up almost one half of the page;
  - The opponent of the respondent was not mentioned in the article or provided a similar opportunity to be featured in the article; and
  - The article contains numerous personally phrased references that highlight the respondent’s qualifications for office.

21. The following militate against finding the article meets the definition of political advertising.
- There is no express advocacy (i.e. words such as “vote,” “support,” or “elect”);
  - The article contains biographical information about the respondent and his family;
  - The article mentions issues facing the district; and
  - Although the article implies the respondent is a candidate, it does not *clearly* identify him as a candidate for the election.
22. The article, when viewed as a whole, is self-promotional of the respondent as a school board trustee and supports the respondent as a candidate for re-election. Therefore, there is credible evidence of a violation of Section 255.003 of the Election Code.

#### **IV. 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 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 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 knowingly 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 nature, circumstances, and consequences of the violation described under Section III, and after considering the sanction necessary to deter future violations, the Commission imposes a \$250 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-32009186.

AGREED to by the respondent on this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Lee McLeod, Respondent

EXECUTED by the Commission on: \_\_\_\_\_.

Texas Ethics Commission

By: \_\_\_\_\_  
Anne Temple Peters, Executive Director