

TEXAS ETHICS COMMISSION

IN THE MATTER OF

MATTHEW D. WIGGINS,

RESPONDENT

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-32009187, SC-32010205, SC-32011255

FINAL ORDER

I. Recitals

The Texas Ethics Commission (Commission) met on February 24, 2022, to consider sworn complaints SC-32009187, SC-32010205, SC-32011255 at a formal hearing held in accordance with Sections 571.061, 571.121, 571.126 through 571.132, 571.137, and 571.139 of the Government Code. A quorum of the Commission was present.

II. Allegations

Sworn Complaint SC-32009187 alleged that the respondent, as an officer of a political subdivision, knowingly spent or authorized the spending of public funds for political advertising in the form of two newsletters dated March 10, 2020, and April 9, 2020, in violation of Section 255.003(a) of the Election Code.

Sworn Complaint SC-32010205 alleged that the respondent, as an officer of a political subdivision, knowingly spent or authorized the spending of public funds for political advertising in the form of a newsletter dated September 8, 2020, in violation of Section 255.003(a) of the Election Code.

Sworn Complaint SC-32011255 alleged that the respondent, as an officer of a political subdivision, knowingly spent or authorized the spending of public funds for political advertising in the form of a newsletter dated October 8, 2020, in violation of Section 255.003(a) of the Election Code.

III. Findings of Fact

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

1. The respondent is, and was at all times relevant to the complaint, the president of Galveston County Water Control and Improvement District #12 (WCID #12). WCID #12 was formed on June 11, 1951, to provide water and sewer service to the City of Kemah, City of Clear Shores, Lazy Bend Subdivision and portions of unincorporated Galveston County.
2. The complainant, Carl Joiner, is the current and former mayor of Kemah, and was a candidate for Place 3 of the Kemah City Council in the November 2020 election. WCID#12

- had its own election in 2020 for board directors. There were no bond issues or any other ballot items or measures related to WCID#12 on the November ballot.
3. Joiner filed his campaign treasurer appointment and application for a place on the ballot for Kemah City Council, Position 3 on or about February 14, 2020.
 4. The complaints alleged that the respondent was politically aligned with the complainant's opponent in the November 2020 election.
 5. Since its formation in 1951, WCID #12 has sent water and sewer invoices to its customers using the U.S. Mail. Currently the District has just over 1,800 accounts. The invoice consists of one page. The respondent testified that WCID #12 can add an additional two pages without incurring additional postage cost to use for water quality reports, newsletters, and other announcements and fliers of community interest.
 6. The respondent has the practice of including a newsletter with water bills sent to WCID #12 customers.
 7. In his response to the complaints, the respondent swore that WCID #12 sent the newsletters to approximately 1,800 customers with their water bills, but that he did not know the exact postage and printing costs. The respondent testified at the formal hearing that he did not know the exact number of customers who received the newsletter, but estimated it was closer to 1,300 than 1,800. The respondent contends he keeps his newsletters to both sides of a single-sheet of paper to avoid having to pay for additional postage. The respondent testified that 50 cents per letter was a "fair estimate" for the cost of postage.
 8. Sworn complaints SC-32009187, SC-32010205, and SC-32011255 allege that four newsletters (Communications 1 - 4) sent by the respondent contained political advertising because they opposed the complainant and/or supported his opponent.
 9. All communications at issue are critical of the complainant. Communications 1, 2, and 4 referenced the complainant by name, but did not identify him as a candidate. In Communication 3, the respondent referenced the complainant by name, stated the complainant was running for office, stated the complainant was trying to "silence" people who know of his record, and stated that he wished to "retract" his two previous votes for the complainant. Each communication is detailed more fully below.
 10. The respondent does contest that he was an officer of a political subdivision WCID #12, which is a political subdivision. He also does not contest that he used public funds to send the newsletters. However, the respondent contends he sends newsletters with every water bill and these newsletters did not require the WCID #12 to incur additional costs. He also denies that the newsletters met the definition of political advertising. Instead, the respondent contends that he was defending himself and WCID #12 against statements made by the complainant about WCID #12 business.

11. The respondent testified that the comments about Carl Joiner in the newsletters were made in response to video posts about the WCID #12 that Joiner made. During 2020, Joiner personally and through his agent posted on YouTube a number of videos attacking WCID #12. The respondent contends the videos contained false accusations about the WCID #12 Board actions and the Kemah Volunteer Fire Department. The respondent stated in his sworn response:

When Mr. Joiner attacks the Water District with his usual lies and BS then the Water District will respond with the truth. The citizens of our Water District deserve to know what the truth is about any situation. Mr. Joiner will be whacked for every lie he tells. It is Mr. Joiner's choice to continue playing "Whack a Mole" with the Water District. Mr. Joiner would not have been mentioned in any newsletter if there were no corresponding attacks on YouTube.

Communication 1 (SC-32009187)

12. Communication 1 is a newsletter dated March 10, 2020. The newsletter is signed by the respondent as President of WCID #12 and was included in WCID #12 customer's water bills. The newsletter concerns fees included in water bills to fund the operations of the Kemah Volunteer Fire Department. The portions that reference the complainant and are alleged to be political advertising are as follows:

FIRE FEE MESS. Historically the KVFD had a person that notified the Water District concerning the number of units per connection. Easy for residential uses but much more difficult for commercial buildings. At some point, that process was abandoned. I attended a number of ESB meetings starting in 2018 and this subject was discussed at almost every meeting. **The ESB under former Mayor Carl Joiner took no action.**

[...]

The Fire Fee was raised from \$7.00 to \$10.00 by the Water Board in March, 2018 at the request of former Mayor Carl Joiner, the President of the Emergency Services Board at the time. The Water Board implemented the requested Fire Fee rate increase. When elected President of the ESB last summer I discovered the KVFD had over \$1,300,000.00 in debt which is entirely too much. \$1,000,000.00 of that is for a new ladder truck Mr. Joiner wanted that were not needed or necessary. Once we have a workable financial model for the KVFD as part of our 20 year plan the Fire Fee will be reduced.

[...]

Due to the misguided, erroneous and outright lies in the video post, I asked the WCID#12 Board to hire an outside accounting firm or law firm to examine all of my accounts for the last 10 years to determine if there has been any wrongdoing associated with my accounts.

Communication 2 (SC-32009187)

13. Communication 2 is a newsletter dated April 9, 2020. The newsletter is signed by the respondent as President of WCID #12 and was included in WCID #12 customer's water bills. The newsletter starts by thanking the fire department, but is mostly dedicated to "defending" WCID #12 from the complainant's "falsehoods, misinformation and outright lies." The rest of the newsletter states one of "CARL JOINER'S FALSEHOODS" or "JOINER'S BIG LIE" and provides a statement made by the complainant. The newsletter then provides the "FACT" describing why the respondent believes each quoted statement to be false.

Communication 3 (SC-32010205)

14. Communication 3 is a newsletter dated September 8, 2020. The newsletter is signed by the respondent as President of WCID #12 and was included in WCID #12 customer's water bills. The first page of the newsletter is dedicated to water rates, tax rates, and other water district business. The entire second page is dedicated to the complainant and states (emphasis added):

The Joy of Public Service: In the past year the City of Kemah, the Kemah Volunteer Fire Department and the WCID#12 have been inundated by Open Records Requests from Carl Joiner, Colleen Joiner and others. Over \$35,000.00 in attorney fees have been spent complying with these requests, not counting the many hours that staff and our elected officials have had to spend gathering the information. Typical of the requests are every email or text message from May 7 to July 31 having to do with official business.

What led to this situation? After the elections of May, 2019, the defeated Carl Joiner took to YouTube and has to date published 23 videos on YouTube labeled "Kemah Connection" attacking the Water Board, the Fire Chief, the Kemah Volunteer Fire Department, ESB, the City of Kemah, Mayor Gale and just about everybody else involved in government in our community. Concurrently, a former ABC Channel 13 News reporter started publishing hit pieces on YouTube attacking the same group of people. Mr. Joiner has previously hired this "investigator" a few years ago.

Enclosed are the two letters that the Water Board received from the lawyer

for former Mayor Carl Joiner. The City of Kemah received a similar letter demanding retractions.

Mr. Joiner's lawyer claims that he is but a "private citizen" and should be left alone. *In fact, Mr. Joiner is a public official currently running for office and publicly published defamatory information on YouTube. Why would Mr. Joiner like to silence those that know of the details of his public record as he attempts to get elected to the Kemah City Council?* Carl's lawyer demanded retractions by September 25, 2020.

My Retractions:

1. *I hereby retract my two votes for Carl Joiner for Mayor.*
2. I hereby retract my "get along" vote to expand Kemah City Hall when our population was still only 75% of what it was before Hurricane Ike.

Carl: The Courthouse is located at 600 59th Street in Galveston. See you there!

Communication 4 (SC-32011255)

15. Communication 4 is a newsletter dated October 8, 2020. The newsletter is signed by the respondent as President of WCID #12 and was included in WCID #12 customer's water bills. The newsletter starts by questioning why a payment allegedly owed to WCID #12 from the City of Kemah had been withheld by the "Joiner Administration," and the respondent complained in the newsletter that the complainant had not returned his text message about the issue. The respondent also thanks the complainant's opponent and another director who was leaving the board for their service.
16. Communication 4 contains a post script that states:

PS--Former Mayor Joiner just posted a new online video attacking the Water Board about Water Bills: **"I don't know about you, but mine has gone up 5 times over the course of several months."** Carl's Usage: 8/19--9,800; 4/20--6,900; 6/20--7,200; 7/20--7,300; 8/20--5,800 gallons. Well-Well! Sometimes FACTS ARE INCONVENIENT!

IV. Conclusions of Law

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

1. Section 255.003(a) of the Election Code prohibits an officer or employee of a political subdivision from knowingly spending or authorizing the spending of public funds for political advertising.
 2. In order to find a violation of Section 255.003(a) 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 communications; and
 - 3) the communications constituted or contained political advertising.
 3. The first two elements are not in question. A water control and improvement district is a political subdivision. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 550 (Tex. 2004). The respondent is an officer of WCID #12 and used the public funds of the political subdivision to print and mail the communications at issue with customer's water bills.
 4. The only remaining question is whether one or more of the newsletters constituted political advertising.
 5. "Political advertising" means, in relevant part, a communication supporting or opposing a candidate for nomination or election to a public office, that:
 - (A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or
 - (B) appears:
 - (i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or
 - (ii) on an Internet website.
- Tex. Elec. Code § 251.001(16).
6. Whether a particular communication supports or opposes a candidate or a public officer is a fact question. Tex. Ethics Comm'n Op. No. 476 (2007). "The critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer." *Id.* (citing Tex. Ethics Comm'n Op. No. 102 (1992)).

7. Political advertising is a communication that merely “supports or opposes” a candidate for election, regardless of whether it contains express advocacy or its functional equivalent. *See, e.g., In re Smith Purcell*, SC-31804181 (2018). Unlike the requirement that “political advertising containing express advocacy,” include a disclosure statement, Section 255.003 restricts the spending of public funds for “political advertising” without reference to express advocacy or its functional equivalent. *Compare* Tex. Elec. Code § 255.003 with *id.* § 255.001. Therefore, the Commission has rejected an “express advocacy” standard that would limit the definition of political advertising to communications that include certain words or phrases like “vote for,” “support,” “vote against,” “defeat,” “reject,” or “cast your ballot for.” *See* Tex. Ethics Comm’n Op. Nos. 559 (2021), 560 (2021).
8. 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*, 135 S.Ct. 2239, 2245 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009); *see also Vargas v. City of Salinas*, 205 P.3d 207, 209 (Cal. 2009) (holding a communication can “support or oppose” a measure in an election even without express advocacy when the “style, tenor and timing” of communication demonstrates the communication constitutes traditional campaign activity); *see also Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 160-162 (Conn. 1999); *Anderson v. Boston*, 380 N.E.2d 628 (Mass. 1978); *Smith v. Dorsey*, 599 So.2d 529, 540-544 (Miss. 1992); *Burt v. Blumenauer*, 699 P.2d 168, 171-181 (Ore. 1985); *Dollar v. Town of Cary*, 569 S.E.2d 731, (N.C.App. 2002).
9. The U.S. Supreme Court has long recognized that mentioning a candidacy, election, a challenger, or taking a position on a candidate’s character, qualifications, or fitness for office are all indicia of electoral advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of C.J. Roberts & J. Alito).

Communication 1

10. In Communication 1, although the complainant is not identified as a candidate, he is identified by name and as the former mayor and director of an Emergency Services Board (ESB). The respondent accuses the complainant of incurring \$1,000,000 in debt for an unneeded ladder truck when he was in charge of the ESB, which resulted in an increase in water fee rates. The respondent also accuses the complainant of making “misguided, erroneous and outright lies” in a video post.
11. The complainant was a candidate when the respondent sent Communication 1 to water customers in the district. The respondent not only attacks the complainant’s record in office, but also attacks his character by accusing him of lying in a video post. Communication 1 therefore extends beyond commentary on board business and personally attacks the complainant.

12. The style and tenor of Communication 1, naming the complainant, attacking his record in office, and attacking his character for truthfulness are all indicative of opposing the complainant as a candidate. Therefore, commission finds by a preponderance of the evidence that the respondent violated Section 255.003(a) of the Election Code for authorizing the spending of public funds for the publication of Communication 1.

Communication 2

13. In Communication 2 the respondent attacks the complainant by name and labels him a liar. Communication 2 contains point-by-point refutations of the complainant's alleged "falsehoods" and one "big lie." The respondent is also again critical of the complainant's decision to purchase a ladder truck for the ESB.
14. The complainant was a candidate when the respondent sent Communication 2.
15. Like Communication 1, the style and tenor of Communication 2, naming the complainant, attacking his record in office, and attacking his character for truthfulness are all indicative of opposing the complainant as a candidate. Therefore, commission finds by a preponderance of the evidence that the respondent violated Section 255.003(a) of the Election Code for authorizing the spending of public funds for the publication of Communication 2.

Communication 3

16. Communication 3 unambiguously opposed the complainant in an election and is therefore political advertising. In Communication 3 the respondent states that the complainant is "currently running for public office" and accuses the complainant of "silenc[ing] those that know of the details of his public record as he attempts to get elected to Kemah City Council." The respondent also states that he "retracts" his votes for the complainant when the complainant ran for mayor. In sum, the respondent references a clearly identified candidate, attacks him for posting "defamatory" videos, accuses him of trying to hide his public record in advance of an election and expresses regret for previously voting for him. Taken together, the second page of the letter is susceptible of no reasonable interpretation other than to vote against the complainant, and thus the communication constitutes political advertising. Therefore, commission finds by a preponderance of the evidence that the respondent violated Section 255.003(a) of the Election Code for authorizing the spending of public funds for the publication of Communication 3.

Communication 4

17. The respondent sent Communication 4 approximately one month before the complainant's election. The newsletter begins with questioning why an approximately \$60,000 payment from the City of Kemah was not made to the WCID #12 from when the complainant was

mayor of Kemah. The newsletter refers to the “Joiner Administration” “holding [the money] hostage” with no legal justification.

18. The respondent also thanks the complainant’s opponent for city council, who was ending his service as a WCID #12 director, for his service. Communication 4 also includes a postscript that includes the exact water usage of the complainant apparently prompted by the complainant questioning increases in his water bills.
19. The proximity to the election, the statement of support for the complainant’s opponent, and the accusation of holding money hostage all amount to opposing a clearly identified candidate in an election, and thus the communication constitutes political advertising. Therefore, commission finds by a preponderance of the evidence that the respondent violated Section 255.003(a) of the Election Code for authorizing the spending of public funds for the publication of Communication 4.

V. Confidentiality

This order and agreed resolution describes violations that the Commission has determined are 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.

VI. Sanction

After considering the nature, circumstances, and consequences of the violations described under Section III, and after considering the sanction necessary to deter future violations, the Commission imposes a \$1,000 civil penalty.

Date: _____

FOR THE COMMISSION

Mary K. “Katie” Kennedy
Chair
Texas Ethics Commission