

TEXAS ETHICS COMMISSION

IN THE MATTER OF
DEREK J. AVERY,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-32403192

FINAL ORDER

I. Recitals

The Texas Ethics Commission (TEC) held a preliminary review hearing on September 24, 2024, to consider sworn complaint SC-32403192. A quorum of the TEC was present. The respondent received legally sufficient notice of the hearing but did not appear at the hearing. The TEC proceeded with the hearing in the respondent's absence and found credible evidence of violations of Sections 254.063 and 254.064 of the Election Code and Section 571.1242(c) of the Government Code, laws administered and enforced by the TEC.

The TEC voted to issue this final order imposing a \$10,000 civil penalty. If the respondent does not pay the \$10,000 civil penalty within 30 days of the date of this Order, then the TEC orders that an additional \$2,500 civil penalty be imposed pursuant to Section 571.173 of the Government Code for delay in complying with this Final Order, and that the agreed-upon penalty and the additional \$2,500 penalty be referred to the Office of the Attorney General of Texas for collection.

II. Allegations

The respondent was an opposed candidate for Dallas County Commissioner, Precinct 3, in the March 5, 2024 election. The complaint alleges that the respondent failed to file a 30-day pre-election report, an 8-day pre-election report, and a January 2024 semiannual campaign finance report in violation of Sections 254.063 and 254.064 of the Election Code.

The TEC also considered whether the respondent failed to file a response to the sworn complaint, in violation of Section 571.1242(c) of the Government Code.

III. Findings of Fact and Conclusions of Law

Credible evidence available to the TEC supports the following findings of facts and conclusions of law:

1. The respondent was an opposed candidate for Dallas County Commissioner, Precinct 3, in the March 5, 2024 election. The respondent lost the election.

The Respondent Failed to File Reports

2. The respondent filed his campaign treasurer appointment on March 15, 2023. TEC staff submitted a Public Information Act request for all of the respondent's campaign finance reports, which revealed that the respondent had not filed any campaign finance reports as of June 4, 2024.
3. The respondent did not select modified reporting when he filed his campaign treasurer appointment. Therefore, as an opposed candidate, the respondent was required to file the 30-day pre-election report by February 5, 2024, and the 8-day pre-election report by February 26, 2024. *See* Tex. Elec. Code § 254.064.
4. The respondent has not filed his 30-day pre-election report or his 8-day pre-election report for the March 5, 2024 election. Therefore, there is credible evidence that the respondent failed to file his pre-election reports, in violation of Section 254.064 of the Election Code.
5. Further, because the respondent filed his campaign treasurer appointment on March 15, 2023, he was required to file a January 2024 semiannual report. *See* Tex. Elec. Code §§ 251.001(1), 254.063(c).
6. The respondent has not filed a January 2024 semiannual report. Therefore, there is credible evidence of a violation of Section 254.063 of the Election Code.

The Respondent Failed to Respond to the Sworn Complaint

7. At the time the TEC accepted jurisdiction over the complaint, TEC staff sent a notice of the sworn complaint to the respondent by certified mail at the mailing address that the complainant provided. *See* Tex. Gov't Code § 571.1242; 1 Tex. Admin. Code § 12.21(b). According to the United States Postal Service's (USPS) tracking records, the respondent picked up the notice on March 21, 2024. Based on this delivery date, the respondent was required to respond to the sworn complaint by April 4, 2024.
8. The respondent did not submit a written response to the complaint, despite receiving notice from the TEC that he was required to respond within 10 business days and that failure to respond constituted a separate violation for which a separate civil penalty could be assessed. *See* Tex. Gov't Code § 571.1242; 1 Tex. Admin. Code § 12.52. Therefore, there is credible evidence of a violation of Section 571.1242(c) of the Government Code.

IV. Default Judgment

1. The preliminary review hearing was held on September 24, 2024, at 10:30 a.m., in person at the State Capitol Extension, Room E2.014, in Austin, Texas. The respondent was also given the option to appear remotely.

2. A notice required to be sent to the respondent under Chapter 571 of the Government Code shall be sent to the address provided by the complainant or the address most recently provided by the respondent. 1 Tex. Admin. Code § 12.21(b).
3. After the initial written notice regarding the filing of a sworn complaint has been sent to a respondent by registered or certified mail, restricted delivery, return receipt requested, the TEC may send the respondent any additional notices regarding the complaint by regular mail unless the respondent has notified the TEC to send all notices regarding the complaint by registered or certified mail, restricted delivery, return receipt requested. Tex. Gov't Code § 571.032.
4. If a respondent fails to appear at a hearing, the TEC may proceed in the respondent's absence and may find credible evidence of the violations alleged in the complaint and may issue a final order imposing a civil penalty. 1 Tex. Admin. Code § 12.23.
5. The first notice of hearing was sent to the respondent on August 5, 2024, by USPS first class mail with delivery confirmation, to the physical address provided by the respondent and by email to the email address provided by the respondent. The notice provided the date, time, and place of the hearing, and notified the respondent of the option to appear by video teleconference. The notice also stated that if the respondent failed to appear at the hearing, the allegations may be deemed admitted as true and the relief sought may be granted by default. USPS records confirm the notice was delivered on August 7, 2024. A second notice of hearing was sent to the respondent on August 21, 2024, by the same methods of delivery as the first notice. Included with the second notice of hearing was TEC staff's motion to find credible evidence, copies of all documents expected to be used at the hearing, and a list of all witnesses that TEC staff proposed to call at the hearing. USPS records confirm the notice was delivered on August 23, 2024. The respondent responded to the second notice of hearing that was sent to his email address. He indicated that he planned on attending the preliminary review hearing.
6. The TEC finds that the respondent received legally sufficient notice of the sworn complaint and the September 24, 2024 preliminary review hearing for this case. The respondent failed to appear at the hearing despite acknowledging the second notice of hearing and indicating that he planned on attending the hearing. The TEC proceeded in the respondent's absence and issued this final order in accordance with Section 12.23 of the TEC Rules. By failing to appear at the preliminary review hearing, the respondent forfeited his right to further proceedings before the TEC in this matter. This final order is a final and complete resolution of this sworn complaint before the TEC, except for the issue of collection of the civil penalty.
7. The TEC finds credible evidence of violations of Sections 254.063 and 254.064 of the Election Code and Section 571.1242(c) of the Government Code.

V. Sanction

The TEC may impose a civil penalty of not more than \$5,000 or triple the amount at issue, whichever amount is more, for each violation of a law administered and enforced by the TEC. Tex. Gov't Code § 571.173. The TEC shall consider the following factors in assessing a sanction: 1) the seriousness of the violation, including the nature, circumstances, consequences, extent and gravity of the violation; 2) the history and extent of previous violations; 3) the demonstrated good faith of the violator, including actions taken to rectify the consequences of the violation; 4) the penalty necessary to deter future violations, and 5) any other matters that justice may require. *Id.* § 571.177.

Factor 1: The Seriousness of the Violation

The respondent was a candidate in a heated local election and failed to file any campaign finance reports to disclose his campaign financial activity. This completely deprived the public of financial disclosure. County commissioner candidates in populous counties like Dallas County can attract tens of thousands of dollars in political contributions, and so the undisclosed activity may have been very substantial.

Factor 2: The History and Extent of Previous Violations

The respondent has no previous violations.

Factor 3: The Demonstrated Good Faith of the Violator

The respondent failed to file any campaign finance reports during his campaign. Further, the respondent failed to file the reports at issue even after the complaint was filed, despite receiving notice of the complaint and acknowledging the complaint in telephone discussions with TEC staff.

Factor 4: The Penalty Necessary to Deter Future Violations

The respondent failed to comply with his filing obligations. He has not filed the required reports after repeated urging by TEC staff, even in the face of the pending complaint. The respondent's persistent failure to file the reports suggests indifference. Further, as noted above, the undisclosed activity could have been substantial. Therefore, a major penalty is necessary to ensure future compliance by the respondent and by other willful non-filers.

Factor 5: Any Other Matters that Justice May Require

TEC staff contacted the respondent by telephone on April 2, 2024, to give him a courtesy reminder that the response was due in two days. The respondent understood that he needed to submit a response. However, the respondent failed to submit a response. TEC staff contacted the respondent again by telephone on April 23, 2024, and left a voicemail. The respondent did not answer the telephone call or contact TEC staff. On June 7, 2024, TEC staff again contacted the respondent to inquire about the response. The respondent answered and claimed that he became occupied with other matters and forgot about submitting a response. TEC staff confirmed the respondent's email

address over the telephone and sent him a follow-up email shortly after the telephone call. In the email, TEC staff asked the respondent to confirm receiving the email and encouraged the respondent to respond directly to the email with his response so that TEC staff could receive his response in a timely manner. However, the respondent did not respond to the email. Yet another follow-up email was sent on June 20, 2024, but the respondent did not respond to this email either.

Despite these repeated reminders from TEC staff, the respondent failed to file the missing reports. The respondent's indifferent response to the sworn complaint and to TEC staff's concerns about disclosure further requires a substantial penalty.

Conclusion

After considering the nature, circumstances, and consequences of the violations described under Section III, the TEC orders that the respondent pay to the TEC, within 30 days of the date of this order, a civil penalty in the amount of \$10,000. If the respondent does not pay the \$10,000 civil penalty within 30 days of the date of this Order, the TEC orders that an additional \$2,500 civil penalty be imposed pursuant to Section 571.173 of the Government Code for delay in complying with this Final Order, and that the agreed-upon penalty and the additional \$2,500 penalty be referred to the Office of the Attorney General of Texas for collection.

Order Date: 9/27/24

FOR THE TEC

James Tinley

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James Tinley
General Counsel for
J.R. Johnson
Executive Director
Texas Ethics Commission