

TEXAS ETHICS COMMISSION

IN THE MATTER OF

JOHN WILLIAMS, PAT ELFRINK,
DEWEY MARKUM,
DAVID AVERITT, JR.,
ROBERT HURLEY, JOHN PATINO,
TRACY HENDERSON,
and PHILLIP JENNINGS,

RESPONDENTS

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BEFORE THE

TEXAS ETHICS COMMISSION

SC-211170

FINAL ORDER

I. Findings of Fact

1. A sworn complaint was filed on December 5, 2001. The Texas Ethics Commission (the commission) voted to take jurisdiction on January 11, 2002. The respondents are John Williams, Pat Elfrink, Dewey Markum, David Averitt, Jr., Robert Hurley, John Patino, Tracy Henderson, and Phillip Jennings.
2. The complainant alleges that the respondents spent or authorized the spending of public funds for political advertising in connection with an election held on January 20, 2001, and in connection with an election held on November 6, 2001.
3. The Ethics Commission held a preliminary review hearing on September 12, 2003, and determined that there was credible evidence of violations of a law administered and enforced by the commission. The respondents waived the right to further proceedings before the Ethics Commission. The commission met on July 16, 2004, and adopted this final order.
4. On January 20, 2001, the city of Haltom City (the city) held an election on whether to continue a crime control and prevention district.
5. Materials were included in city water bills in November 2000 and January 2001 that encouraged voters to continue the crime control and prevention district.
6. At the time those materials were included in city water bills, respondent John Williams was the city's mayor pro tem; respondent Pat Elfrink was the city's finance director; and respondents Dewey Markum, David Averitt, Jr., Robert Hurley, John Patino, and Phillip Jennings, were city council members. All of those respondents swear they had no involvement with the materials included in city water bills regarding the January 2001 election.

7. Respondent Tracy Henderson was not a member of the city council at the time of the January 2001 election.
8. The city held an election on November 6, 2001, to ask voters to approve bonds for street and sidewalk improvements; for a central fire station facility; for a library; for park facilities; and for flood control and other drainage improvements. The voters were also asked to approve a local sales and use tax to provide revenue for maintenance and repair of city streets.
9. Upon the recommendation of the interim city manager, the city council hired a political consulting firm to develop a “public education program” with regard to the propositions on the ballot in the November 6, 2001, election. The cost of the program was approximately \$12,000. The purpose of the program, according to the proposal signed by the firm’s president and vice-president, was to explain the upcoming referendums “from an educational, non-advocacy perspective.” The proposal for the program was approved by the city council and it includes the following statement:

Timing is critical for any campaign to be a success. If, in fact, you are going to give a series of informational programs to civic groups and the election is coming up in November, we must begin immediately. We believe that elections are won or lost in early voting, not on election day.

The public education program involved the preparation and distribution of three brochures and the preparation of a Power Point slide presentation.

10. At all times relevant to the approval, preparation, and distribution of the brochures and the Power Point presentation, respondent John Williams was the city’s mayor pro tem; respondent Pat Elfrink was the interim city manager; and respondents Dewey Markum, David Averitt, Jr., Robert Hurley, John Patino, Tracy Henderson, and Phillip Jennings were members of the city council.
11. Two of the brochures describe the bond propositions, state that they would require no property tax increase, give the election date, and list polling places. The third brochure goes further. It describes problems with city streets and states, “That is why voters are also being asked to approve a new 1/4 cent sales tax dedicated to continually fund street improvements for the next four years.” In regard to the library, the brochure states, “Everyone enjoys the knowledge and entertainment found in books.” In regard to the flood control measure, the brochure states, “Passage of this proposition, coupled with the trails option of Proposition 4, will create an attractive amenity for all of Haltom City’s residents to enjoy.”
12. The visual portion of the Power Point presentation was broadcast over the city’s cable television channel. The narrated portion of the presentation was not broadcast.

13. The city has access to the cable channel by virtue of its franchise agreement with a cable television company under which the city has granted the company a cable television franchise in consideration of, among other things, the company's making a governmental access channel available to the city upon request.
14. The Power Point presentation contains 37 slides. The slides include the following segments of text:
 - Improve our parks and recreation areas simultaneous with flood control
 - Make needed street improvements
 - Add a hike, bike and nature trail along the flood improvements on Little Fossil Creek
 - Work with the Corps to alleviate flooding and save property and lives
15. In his affidavit, respondent Pat Elfrink states that in his dealings with the consulting firm "it was made very clear that only factual information would be disseminated and that the City would not take an advocacy position for the passage or defeat of the propositions on the ballot." He also states, "The information contained in the draft brochures, as prepared by the consultant, was carefully reviewed and edited to ensure its objectivity and informational basis, by three senior staff members including myself, prior to release of the final copy." He also states that the Power Point presentation was carefully reviewed and that it "was not designed to persuade a vote one way or the other."
16. All of the respondents submitted affidavits in which they state that it was their understanding that the brochures produced by the consultant would be factual and that any expenditures for the brochures would be legally permissible.

II. Conclusions of Law

1. Disposition of this case is within the jurisdiction of the Texas Ethics Commission. GOV'T CODE § 571.061.
2. 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). 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. *Id.* § 255.003(b).
3. Political advertising is defined in relevant part as a communication that supports or opposes a measure and (a) in return for consideration, is broadcast by television, or (b) appears in a pamphlet, circular, flier, or similar form of written communication. ELEC. CODE § 251.001(16). The ballot propositions are measures because they are proposals submitted in an election for an expression of the voters' will. *Id.* § 251.001(19).

4. All of the respondents swear that they had no personal involvement with the materials about the January 2001 election that were included with city water bills. Respondent Tracy Henderson was not even a member of the city council at the time of that election. Therefore, there is credible evidence that none of the respondents spent or authorized the spending of public funds for the materials that were included in the city's water bill. Accordingly, there is credible evidence that none of the respondents violated section 255.003 of the Election Code in connection with those materials.
5. Two of the brochures regarding the November 2001 election do not encourage voters to vote for or against the propositions. Thus they are not political advertising. Therefore, there is credible evidence that none of the respondents violated section 255.003 of the Election Code as to those two brochures.
6. The overall message of the third brochure regarding the November 2001 election supports passage of the bond propositions by including promotional statements such as, "Passage of this proposition, coupled with the trails option of Proposition 4, will create an attractive amenity for all of Haltom City's residents to enjoy." It supports passage of the sales tax proposition by describing "attractive amenities" and then stating that voters are being asked to approve a new sales tax. Thus, this brochure constitutes political advertising.
7. The Power Point presentation was broadcast over the city's cable television channel in return for consideration because the city has access to the channel by virtue of its franchise agreement with a cable television company and under that agreement the city has granted the company a cable television franchise in consideration of, among other things, the company's making a governmental access channel available to the city. The presentation includes statements in the imperative such as "improve our parks and recreation areas" and "make needed street improvements." The presentation makes clear that voting for the bond and sales tax propositions is the means by which these things are to be done. Thus, the visual portion of the broadcast constitutes political advertising advocating passage of the propositions.
8. The mayor pro tem and the council members voted to hire the consulting firm that prepared the brochure and the Power Point presentation, and the interim city manager reviewed and approved each of the communications that the firm prepared. The firm was paid for its work in preparing those communications. Therefore, there is credible evidence that all of the respondents spent or authorized the spending of public funds for the brochure described in paragraph 6 of this section and the Power Point presentation. Accordingly, there is credible evidence that all of the respondents violated section 255.003 of the Election Code as to the brochure described in paragraph 6 of this section and as to the Power Point presentation.

III. Sanction

The commission imposes a \$1,000 civil penalty against the respondents, jointly and severally. The commission orders that the respondents pay the penalty within 30 days of the date of this order.

Date: _____

FOR THE COMMISSION

Sarah Woelk, Acting Executive Director
Texas Ethics Commission