



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 143

June 24, 1993

Whether a corporation makes a political contribution by contracting to provide a carnival for a political fundraiser. (AOR-158)

The Texas Ethics Commission has been asked about a proposed political fundraiser that would include, along with other entertainment, a carnival presented by a corporation pursuant to a contract between a candidate and the corporation.¹ The candidate would arrange and pay for the land rental, sanitation facilities, all necessary licensing, and all advertisement for the fundraiser. The proceeds from the carnival portion of the event would be contractually allocated between the carnival corporation and the candidate. The carnival would collect money at the fundraiser by selling tickets for the carnival attractions. The corporation would then remit a percentage of the gross proceeds collected to the candidate. The question raised is whether the candidate's share would be a prohibited contribution on the part of the carnival corporation under the provisions of title 15 of the Election Code.

It is illegal both for a corporation to make a political contribution to a candidate or officeholder and for a candidate or officeholder to knowingly accept a contribution he or she knows to be prohibited. Elec. Code §§ 253.003(b), 253.094. A political contribution is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement to make such a transfer *that is offered or given with the intent that it be used in connection with a campaign* or to defray officeholder expenses that are not reimbursable with public money. *Id.* § 251.001(2), (3), (5) (emphasis added).²

The allocation proposed here technically would involve a transfer of a thing of value--money from the ticket sales--from the corporation to the candidate. Moreover, the money would, in one sense, be given with the intent that it be used in connection with a campaign, since the whole purpose of the event is to raise funds for the candidate. In the most technical sense, therefore, the arrangement could be seen as resulting in a prohibited corporate contribution.

On the other hand, the transfer of money to the candidate represents the contractual consideration due the candidate for providing the carnival corporation with the space, services, licensing, and promotion necessary for the carnival to operate profitably. The definition of contribution in title 15 includes any transfer and, taken literally, does not except a transfer of a thing of value that is made as part of an arm's-length commercial transaction. However, we do not believe that the legislature intended that all commercial transactions involving political candidates, officeholders, or committees result in title 15 contributions when the transaction is connected with a campaign. If this were so, then a company that sells paper cups to a political committee for the going commercial rate, knowing that the goods are to be used for campaign purposes, might be making a political contribution. Such a result, in our opinion, runs counter to both the common understanding of "political contribution" and the legislature's intent.

Instead, we believe that by specifying that the transfer be made with the intent that it be used in connection with a campaign or to defray officeholder expenses, the legislature meant to exclude transfers made in connection with normal business transactions. Although a carnival corporation contracting to be part of a fundraiser in some sense "intends" that the candidate use the share of proceeds it remits to him in connection with a campaign, the

corporation's principal intent in making the contract is to take advantage of a situation that seems likely to yield an audience and profits for itself.

We stress that an exchange of consideration between a candidate and a corporation will not *by itself* change the character of the transfer from a prohibited political contribution to a permissible commercial transaction. It is critical that the terms of the transaction reflect the usual and normal practice of the industry, and be typical of the terms the commercial party offers to political and non-political entities alike.³ In this case, the requestor has stated that contracts such as the one he proposes are a common fundraising technique for non-political entities, such as charities. The Texas Ethics Commission is not in a position to determine what the usual and normal practice is in the carnival industry. If the usual and normal practice of the carnival business is in fact to enter into contracts under similar terms with non-political as well as political groups, remitting to the group a like percentage of gross ticket proceeds, the arrangement proposed in this request would not result in a prohibited corporate contribution to the candidate. We advise, however, that any purchases of tickets to the fundraiser and the carnival would be reportable political contributions under chapter 254 of the Election Code. Accordingly, corporate or labor union purchases of these tickets would be illegal.

SUMMARY

A candidate may contract with a carnival corporation for the corporation to present a carnival at the candidate's fundraiser and remit a portion of the proceeds to the candidate in exchange for the candidate's provision of land and services if such an arrangement reflects the usual and normal practice in the carnival industry for contracts with non-political as well as political entities. Purchases of carnival tickets would be reportable political contributions, and so could not be made by corporations or labor unions.

¹ The candidate would arrange other forms of entertainment to be included in the fundraiser as well, including musical bands, a dunking booth, etc.

² Loans made by an organization that has been legally engaged in the business of making loans for at least one year and lobby expenditures required to be reported under the lobby statute are exempted from the definition of contribution. Elec. Code § 251.001(2).

³ Our conclusion accords with the thrust of federal campaign finance law on the contribution consequences of commercial transactions involving political candidates and committees. Regulations and advisory opinions of the Federal Election Commission have made it clear that the payment of money or conveyance of other things of value as part of an ordinary arms-length business transaction does not constitute a contribution. See 11 C.F.R. § 100.7(a)(iii) ("the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution").