



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 472

September 22, 2006

Determination of the effective date of an order suspending certain limits issued under the Judicial Campaign Fairness Act. (AOR - 534)

The Texas Ethics Commission has been asked to determine the effective date of an order suspending the limits on contributions, expenditures, and reimbursement of personal funds issued under section 253.165(b) of the Election Code.

The Judicial Campaign Fairness Act (hereafter, JCFA) imposes contribution limits and imposes limits on the reimbursement of personal funds from political contributions that do not apply to non-judicial candidates and officeholders. Elec. Code §§ 253.155, 253.162. It also sets out voluntary limits on campaign expenditures. *Id.* § 253.168. A judicial candidate must file a declaration of intent to comply or not to comply with those expenditure limits. *Id.* § 253.164(a). Although compliance with the expenditure limits is voluntary, a candidate who files a declaration of compliance under section 253.164 of the Election Code but later exceeds the limits on expenditures is subject to certain negative consequences that may result in benefits for opponents. *See id.* §§ 253.164, 253.165, 253.166.

Section 253.165 of the Election Code provides, in relevant part, that a complying candidate is not required to comply with the limits on contributions, expenditures, and the reimbursement of personal funds prescribed by the JCFA if another person becomes a candidate for the same office and files a declaration to comply with the expenditure limits but later exceeds those limits. *Id.* § 253.165(a). A complying candidate is defined as a judicial candidate who files a declaration of compliance under section 253.164 of the Election Code. *Id.* § 253.152(1). A noncomplying candidate is defined, in relevant part, as a judicial candidate who files a declaration of compliance under section 253.164 of the Election Code but later exceeds the limits on expenditures. *Id.* § 253.152(4).

Section 253.165 of the Election Code also requires the executive director of the Texas Ethics Commission (hereafter, commission) to issue an order suspending the limits on contributions, expenditures, and reimbursement of personal funds for complying candidates not later than the fifth day after the executive director determines that a complying candidate for that office has exceeded the expenditure limits. *Id.* § 253.165(b). A candidate who exceeds the limits, however, remains subject to all limits on contributions and reimbursement of personal funds imposed by the JCFA. *Id.* § 253.164(b).

The facts in this request are as follows:

- Candidate A and Candidate B are the only two candidates seeking a particular office for state district judge.
- Both candidates filed a declaration of intent to comply with the voluntary expenditure limits.
- Candidate B exceeded the expenditure limits.

- Candidate A exceeded the expenditure limits after determining that Candidate B had first exceeded those limits.
- After exceeding the expenditure limits, Candidate A notified the commission's executive director that Candidate B exceeded the expenditure limits and requested that the executive director issue an order pursuant to section 253.165 of the Election Code.

Candidate A contends that the JCFA was designed to be self-enforcing and that the limits were automatically suspended for Candidate A after Candidate B exceeded the expenditure limits. Alternatively, Candidate A contends that if those limits are suspended only by an order issued by the commission's executive director, that the order should be effective as of the date that Candidate B exceeded the limits.¹

In our opinion, the JCFA was not designed to be self-enforcing. Title 15 of the Election Code does not generally follow accepted accounting principles for purposes of reporting expenditures. Therefore, making a determination as to whether the expenditure limits have been exceeded is often complicated. For example, under the title 15 reporting scheme, an expenditure made from loan proceeds is reported as an expenditure. Also reported as an expenditure is a payment to repay the loan from which the previous expenditures were made. Consequently, duplication of expenditures is not uncommon. We have said that an expenditure that is duplicated because of the title 15 reporting scheme is counted only once for purposes of the JCFA expenditure thresholds. [Ethics Advisory Opinion No. 429](#) (2000). Another example to demonstrate how making a determination as to whether the expenditure limits have been exceeded may be complicated is the fact the JCFA expenditure limits apply to "each election" in which a candidate is involved. Although the statute does not expressly state how expenditures are to be attributed for purposes of the expenditure limits, we have said that some expenditures are attributable to the next election for the officeholder's current office that occurs after the expenditure is made. [Ethics Advisory Opinion No. 451](#) (2003). Therefore, there are circumstances in which it may appear from a facial examination of one or more reports that a candidate exceeded the JCFA expenditure limits when, in fact, the candidate is actually in compliance with the expenditure limits.

Nothing in the JCFA indicates that the legislature intended the limits on contributions, expenditures, and reimbursement of personal funds to be suspended after a person subject to the JCFA expenditure limits makes a determination regarding another person's level of expenditures. Section 253.165(b) of the Election Code expressly requires the commission's executive director to issue an order suspending certain limits after making a determination that expenditure limits have been exceeded. To construct the statute to be "self-enforcing" as Candidate A suggests would render section 253.165(b) of the Election Code a nullity. Therefore, we conclude that the limits on contributions, expenditures, and reimbursement of personal funds are suspended only after the commission's executive director issues an order suspending those limits. This result gives a candidate an incentive to notify and seek a determination from the executive director regarding another candidate's expenditure limits and discourages what in essence would be a self-enforcing system. Furthermore, this result provides the general public, and other candidates, with an official order relevant to the election of a public official.

The remaining question is what is the effective date of an order issued by the executive director. The JCFA requires the executive director to issue an order not later than the fifth day after making a determination that a complying candidate has exceeded the expenditure limits. There is no statutory requirement that the order have a retroactive effect. However, we think it is reasonable to conclude that an order issued by the executive director is effective on the date of the filing of the report that discloses that the expenditure limits were exceeded. This result guarantees that the effective date of the order will not be impacted by the time needed by the executive director to make a determination and issue an order.

Furthermore, we do not believe the legislature intended the executive director to issue an order if the executive director determines that, at the time of the filing of the report that discloses that the expenditure limits were exceeded there were no complying candidates. Issuing such an order in that instance would be meaningless because there would be no candidates to whom the order applies.

SUMMARY

The limits on contributions, expenditures, and reimbursement of personal funds set by the Judicial Campaign Fairness Act may be suspended only by an order issued by the executive director of the Texas Ethics Commission. The effective date of an order suspending those limits is the date of the filing of the report that discloses that the expenditure limits were exceeded.

¹ The requestor asserts that this situation is analogous to the facts considered by the Supreme Court in *In re Francis*, 186 S.W.3rd 534 (Tex. 2006), which involved issues of the timing of official determinations and a ruling under a provision in the Election Code that is outside the commission's jurisdiction. The *In re Francis* case involved applications for a place on the ballot and resulted in candidates being permitted to correct deficiencies even though the filing deadline had passed. Both the facts and the law at issue in *In re Francis* were different from the facts and the law at issue before the commission.