TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 575

May 12, 2022

ISSUE

Whether a specific-purpose committee's contributions and expenditures trigger section 253.007's restrictions on the lobbying activity of candidates and officeholders. ***(AOR-662)***

SUMMARY

Yes, if the candidate or officeholder has the authority to control the contributions accepted and expenditures made by the specific-purpose committee.[1] Contributions accepted by a political committee controlled by a candidate or officeholder are accepted "as a candidate or officeholder." Tex. Elec. Code § 253.007(b). Furthermore, expenditures made by a political committee controlled by a candidate or officeholder are knowingly made or authorized by the candidate or officeholder. *Id*.

FACTS

The requestor is a state legislator who seeks guidance on the application of section 253.007(b) of the Election Code. First, the requestor asks if contributions accepted by a specific-purpose committee can ever amount to contributions "accepted by the person as a candidate or officeholder" for purposes of section 253.007(b). Second, the requestor asks whether a candidate or officeholder can ever "knowingly make or authorize" the contributions of a specific-purpose committee for purposes of the same statute.

The requestor acknowledges that some candidates create specific-purpose political committees and operate them as their campaigns. The requestor says that contributions received by such committees "are maintained in an account separate from those of the [candidate]" and are "payable to the" committee. However, he acknowledges that those same contributions to the

[1] Nearly 40 states have enacted restrictions on lobbying after government service. *Miller v. Ziegler*, No. 2:21-CV-04233-MDH, 2022 U.S. Dist. LEXIS 14774, *9 (W.D. Mo. Jan. 27, 2022); *see also* https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx . At least one such restriction has been successfully challenged as an unconstitutional restriction on the right to petition the government for redress of grievances. *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio 2010). But another has been upheld as a permissible exercise of the state's interest in preventing corruption and the appearance thereof. *Ziegler*, 2022 U.S. Dist. LEXIS 14774, *9-*11. When the law is unsettled, as it is here, the Commission presumes the constitutionality of a statute enacted by the Legislature.

committee are often "given in person to the candidate/officeholder," and are deposited by "campaign personnel."

ANALYSIS

The Legislature has limited the ability to use campaign funds for lobbying.

In response to concerns "about the revolving door of candidates and officeholders becoming lobbyists immediately after losing an election or retiring from office," the Texas Legislature sought to "prohibit[] a person who makes or authorizes certain political contributions and direct campaign expenditures from lobbying during the two-year period after the date the person makes or authorizes the contribution or expenditure."[2] The bill—HB 2677—was passed in 2019 without receiving a single nay in either the House or the Senate.[3]

Codified as section 253.007 of the Election Code, the law prohibits "a person who knowingly makes or authorizes" certain political contributions or expenditures from the political contributions "accepted by the person as a candidate or officeholder" from engaging in any activities that would require the person to register as a lobbyist under Chapter 305 of the Government Code for two years after the person makes or authorizes the contribution or expenditure. Tex. Elec. Code § 253.007(b). The contributions and expenditures that trigger this two-year prohibition include any "political contribution[s] or political expenditure[s] that [are] political contribution[s] to another candidate, officeholder, or political committee" and "direct campaign expenditure[s]." *Id*.

Importantly, the Legislature chose to trigger this restriction anytime a person makes or authorizes certain contributions or expenditures from the political contributions "accepted by the person as a candidate or officeholder." *Id*. This means that current and former candidates and officeholders cannot avoid the restrictions of section 253.007 by transferring the political contributions they accepted as a candidate or officeholder to political committees they control. Those funds, even after being transferred to a committee, were "accepted by the person as a candidate or officeholder." *Id*. And if the committee is controlled by the same person, then that person is also making or authorizing the expenditures of those funds. *Id*. Even if a person was to wait two years after transferring his political funds to a committee he controls, the *committee's* contributions and expenditures would trigger section 253.007 because the person would be making or authorizing political contributions or expenditures from the political contributions he accepted as a candidate or officeholder. *Id*. This prohibition includes any contribution to a general-purpose committee, as section 253.007(b) does not limit the term "political committee." *Id*.

Because the law was placed in Chapter 253 of the Election Code, it is also a violation for a person to knowingly accept a political contribution that the person knows to have been made in violation of section 253.007. *See* Tex. Elec. Code § 253.003(b) (creating a violation for accepting certain contributions made in violation of chapter 253). The Supreme Court of Texas has said that a violation of section 253.003(b) can only be established with evidence that a person had knowledge of not only the act of accepting the contribution but also that the

[2] https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB02677H.pdf#navpanes=0
[3] https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY58FINAL.PDF#page=53; https://journals.senate.texas.gov/sjrnl/86r/pdf/86RSJ05-20-F.PDF#page=13

contribution was made in violation of Chapter 253. *Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000).

Contributions accepted by a political committee controlled by a candidate or officeholder are accepted by the person as a candidate or officeholder.

The first question presented by this request is whether political contributions accepted by a specific-purpose committee are accepted by a person "as a candidate or officeholder." *See* Tex. Elec. Code § 253.007(b). In our opinion, the answer depends on whether a candidate or officeholder has the authority to exercise control over the acceptance of the committee's political contributions.

Last year, the Commission answered a very similar question, concluding that "political contributions putatively accepted by a candidate-controlled [general-purpose political committee] are, in effect accepted by a person 'as a candidate or officeholder'" for purposes of section 253.035(a) of the Election Code. Tex. Ethics Comm'n Op. No. 569 (2021). The laws considered by each opinion—sections 253.007(b) and 253.035(a) of the Texas Election Code—both refer to political contributions accepted "as a candidate or officeholder," and we see no reason to depart from our prior interpretation of that phrase. When a candidate controls a political committee, the contributions accepted by the committee are accepted by the controlling candidate "as a candidate or officeholder" for purposes of Chapter 253 of the Election Code.

Not all specific-purpose committees are controlled by candidates or officeholders. Many are operated independently from the candidates and officeholders they intend to support. Section 253.007 does not restrict candidates or officeholders from lobbying when an independently-operated political committee makes an expenditure. Such expenditures are not knowingly made or authorized by the candidate or officeholder, and the contributions these committees accept are not accepted by the candidate or officeholder.

But in practice, some specific-purpose committees not only coordinate with candidates, they operate as the campaigns of the candidates they support. The Commission has recognized that this has been the case for nearly thirty years. Tex. Ethics. Comm'n Op. No. 271 (1995) ("As a practical matter, the distinction between a candidate and a specific-purpose committee supporting the candidate may be maintained for little more than bookkeeping purposes."). Recent amendments to the Election Code demonstrate the Legislature's awareness as well. *See* Tex. Elec. Code § 252.003(a)(4)(A) (requiring a committee that intends to accept corporate contributions to file an affidavit with the Commission stating that the committee "is not established or controlled by a candidate or officeholder.").

The Commission has even adopted a different reporting standard for candidate-controlled committees. Specifically, expenditures by a committee that are coordinated with a candidate would typically need to be reported by the candidate as in-kind contributions, but the Commission has told candidates that they do not need to report an in-kind contribution each time a committee they control makes a political expenditure on their behalf. *See, e.g.*, *In the matter of Joe G. Rivera*, SC-31410218, at ¶ 12 (finding that as long as "direct contributions to and expenditures by the committee are properly disclosed by the committee, they need not be

reported by the candidate" because "such double-reporting for 'alter-ego' committees would be redundant and burdensome on the candidate or officeholder and therefore unnecessary.").

The Commission's decision in *Rivera* demonstrates that the Commission will ignore the legal distinction between a political committee and a candidate when the committee is operated as the "alter ego" of the candidate.[4] The Commission's use of the term "alter ego" was a reference to the "alter-ego doctrine," one of the common law standards for piercing a corporate veil, which applies when "there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986) (superseded by statute on other grounds); *see also SSP Partners v. Gladstrong Invs. Corp.*, 275 S.W.3d 444, 454 (Tex. 2008). The rationale is that if the shareholders of a corporation disregard the separation of the corporate enterprise, the law will also disregard it to avoid an unjust result or thwart an illegal purpose. *Id*.

Likewise, if a candidate disregards the separation between himself and a political committee, the law will also disregard it for purposes of the restrictions in Chapter 253 of the Election Code. One way in which candidates may disregard the separation between themselves and a political committee—blessed by the Commission in *Rivera*—is by not disclosing coordinated in-kind contributions from the committee on their personal filings. However, whether a candidate reports these contributions is not dispositive. When determining whether a committee is the alter ego of a candidate, we will take all of the traditional factors into consideration, including: (1) the degree to which the committee's legal formalities have been followed; (2) the degree to which the committee's property and the candidate's property have been kept separate; (3) the amount of control the candidate maintains over the committee; and (4) whether the committee has been used for campaign purposes. *See Castleberry*, 721 S.W.2d at 272.

The Texas Supreme Court has recognized several additional bases for piercing the corporate veil that are also relevant here, including "where the corporate fiction is resorted to as a means of evading an existing legal obligation," and "where the corporate fiction is used to circumvent a statute." *Id*. As we concluded in Ethics Advisory Opinion 569, candidates may not evade the Election Code's restrictions on their use of political funds by funneling their contributions and expenditures through political committees they control.

<u>Expenditures made by a political committee controlled by a candidate or officeholder are knowingly authorized by the candidate or officeholder.</u>

Similarly, expenditures made by a candidate-controlled political committee are knowingly made or authorized by the controlling candidate. It goes without saying that a person who exercises control over a political committee's expenditures knowingly makes or authorizes those expenditures. And when the person is also a candidate or officeholder that exercises control over the political committee's acceptance of political contributions, the person is knowingly making or authorizing political expenditures of funds accepted by the person as a candidate or officeholder. *See* Tex. Elec. Code § 253.007(b).

[4] This request asks about specific-purpose committees; however, we concluded last year that contributions accepted by a candidate-controlled general-purpose committee are also accepted "as a candidate or officeholder." Tex. Ethics Comm'n Op. No. 569 (2021).

To find otherwise would strip section 253.007 of any meaning. The Legislature sought to "prohibit[] a person who makes or authorizes certain political contributions and direct campaign expenditures from lobbying during the two-year period after the date the person makes or authorizes the contribution or expenditure."[5] It enacted such a prohibition without any dissent. Given the reality that candidates can operate their own specific-purpose committees "for little more than bookkeeping purposes," that prohibition must reach candidate-controlled committees. *See* Tex. Ethics. Comm'n Op. No. 271 (1995.) State law demands that we presume the Legislature intended to enact an effective statute. Tex. Gov't Code § 311.021(2) ("In enacting a statute, it is presumed that … the entire statute is intended to be effective").

[5] https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB02677H.pdf#navpanes=0