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September 12, 2006

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VIA CERTIFIED MAIL

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0532-GA

RE: Request for Opinion

Dear General Abbott:

I am requesting an opinion on the following question: Does Section 255.003, Texas Election Code, which prohibits the use of public funds for political advertising, prohibit an officeholder from displaying or distributing campaign material in his or her official office?

FACTS:

The position of Justice of the Peace is on the ballot in the 2006 General Election. Jeff Davis County has a single Justice of the Peace, with county-wide jurisdiction. The incumbent is running for re-election and has drawn an opponent. The opponent is employed by Jeff Davis County on its maintenance staff, under the direct supervision of the Commissioners Court.

The incumbent has, in his courthouse office, a number of giveaway campaign items, such as drink holders, magnetic football schedules, and similar items. There is no allegation that these items have been designed, printed, or purchased using public funds. Office employees do not distribute the items.

These items sit on a shelf in the office, and may be picked up by persons coming into the office. Frequently, voters do pick up this material. The opponent, who is prohibited from conducting campaign activities while on duty, has objected to these items being present in the incumbent's official office.

Both the incumbent and the opponent have contacted the Texas Ethics Commission in regard to this issue, and have received conflicting answers. The incumbent was told there was not a problem with this practice. The opponent was told this practice is unacceptable under Texas Election Code §255.003. Neither obtained a written opinion.

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The undersigned personally contacted the Texas Ethics Commission on September 8, 2006, for guidance. The verbal opinion was that this practice was "not a good idea" in light of Advisory Opinion 443. A subsequent phone call to an attorney for the Texas Association of Counties yielded the opinion that there was "no problem."

LEGAL ANALYSIS

Section 255.003 specifically prohibits an officer or employee of a political subdivision from expending public funds for political advertising. Political advertising includes any communication which "appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication." Texas Election Code §251.001(16)(B).

Drink holders, magnets, and similar items which are imprinted with "Re-Elect . . . Justice of the Peace" would seem to constitute political advertising under this definition. If such items had been purchased with public funds, there would be a clear violation of §255.003.

The Texas Ethics Commission has opined that the distribution of campaign material by a public employee on duty would constitute a violation of §255.003. *See* Texas Ethics Commission Advisory Opinion 443, May 10, 2002. This conclusion is entirely logical. A public employee on duty is paid with public funds. To utilize an employee's official work time for the distribution of campaign material would divert those public funds to that purpose. (For this very reason, the opponent is prohibited from campaigning while on duty.)

There is, however, no allegation that the incumbent purchased the campaign items with public funds, nor is there any allegation that he has used public employees to distribute them. The entire issue rests on the fact that the items are located in the incumbent's official office.

Advisory Opinion 443 seems to extend the prohibition of §255.003 to this situation. It states that, "the 'spending' of public funds includes the use of facilities maintained by a political subdivision." *Id.* This would seem to be a bit of a stretch. Had the Legislature intended this prohibition to apply to the mere use of an office, it could easily have specified such. Indeed, it has done so in other areas. *See* Texas Election Code §253.039 (Prohibiting political contributions in the Capitol).

The text of §255.003 itself seems to indicate that it was not intended to be construed in this manner. The section "does not apply to a communication that factually described the purposes of a measure, if the communication does not advocate passage or defeat of the measure." §255.003(b). This would seem to indicate that §255.003 was intended to prevent, for example, a commissioners court from using public funds to fight off a rollback election, rather than to cover the circumstances presented here.

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The extension of §255.003 to this degree would require that all elected officials remove campaign items from their official offices - including members of the Legislature itself. This seems unlikely.

In any event, the Advisory Opinion is distinguishable from the present situation. Advisory Opinion 443 involves a bulletin board located in the teachers' lounge of a school. *Id.* A school board candidate's flyer was posted on that bulletin board. *Id.* The area was restricted to school employees. The opinion presumes that the only way the flyer could have been posted in the restricted area was by a school employee on duty. *Id.*

None of the above circumstances are present here. The campaign materials are present in the office, but were carried there by the elected official himself, relying upon the verbal opinion of the Texas Ethics Commission. There is no question as to whether the elected official was on duty when the items were carried in, as elected officials set their own duty hours. The incumbent's only employee does not distribute the materials and had no role in placing them in the office.

CONCLUSION

The sole basis of the complaint is the mere location of the material in the official office of an elected official. There is no allegation that public funds were spent on creating the materials, nor is there any allegation that public employees are distributing the materials.

It seems highly unlikely that the Legislature intended to require the removal of every campaign button, bumper sticker, hat, pencil, drink holder, or magnet from the office of every elected official in the state - including their own offices - simply because the offices themselves are maintained with public funds.

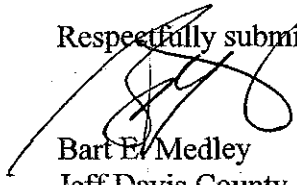
Research by the undersigned has produced no court decision, Attorney General opinion or Secretary of State opinion which covers these circumstances. From the Texas Ethics Commission, we have Advisory Opinion 443, two conflicting verbal opinions to the candidates, and a verbal opinion to the undersigned that this practice is "not a good idea." There are any number of things which are "not a good idea" but are perfectly lawful.

I have attached a copy of Advisory Opinion 443 to this request for your convenience. Due to the short period of time between today and the November election, I ask that this matter be given expedited consideration. Everyone concerned has expressed their desire to conform to the law; however, it is unclear what the law requires in this situation.

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I appreciate your assistance in resolving this matter. Should you need more information regarding this matter, I will be happy to assist in any way. I can be reached at (432)426-4434 or by fax at (432)426-4431. Please note that this fax number differs from that printed above.

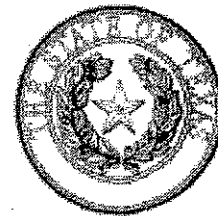
Respectfully submitted,



Bart E. Medley
Jeff Davis County Attorney



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 443

May 10, 2002

Whether a school district may allow candidates for election to the school district's board of trustees to have campaign flyers placed in an area of a school that is not accessible to the public. (AOR-495)

The Texas Ethics Commission has been asked about the application of section 255.003 of the Election Code to a situation in which a school district allows any candidate for election to the school district's board of trustees to have campaign flyers placed in a teachers' lounge that is not accessible to the public.

Section 255.003 of the Election Code prohibits an officer or employee of a political subdivision such as a school district from spending or authorizing the spending of public funds for political advertising. The question presented raises two separate issues: whether the situation described involves the "spending" of public funds and, if so, whether the public funds would be spent "for" political advertising.

In a 1992 advisory opinion, we concluded that the "spending" of public funds included the use of school district employees' work time as well as the use of existing school district equipment. Ethics Advisory Opinion No. 45 (1992). Because the situation described in the request letter involves the placement of campaign flyers in an area of a school restricted to school employees, the placement presumably requires school district employees to transport the flyers to the restricted area on work time. Furthermore, in our opinion, for purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision. Therefore, the placement of campaign flyers in a teachers' lounge would involve the "spending" of public funds for purposes of section 255.003 of the Election Code.

The remaining question is whether, in the situation described in the request letter, public funds would be spent "for" political advertising. Individual campaign flyers are, in most circumstances, political advertising. See Elec. Code § 251.001(16) (defining "political advertising"). The use of school district resources to disseminate political advertising is a use "for" political advertising. The requestor argues, however, that the restriction in section 255.003 should not apply in a case in which any candidate has the same opportunity to make use of school district resources for the dissemination of political advertising.¹ That interpretation assumes that the only purpose of section 255.003 is to prevent a political subdivision from favoring one candidate or one political point of view over another. It is likely that prevention of such favoritism was at least one purpose of section 255.003. The broad language of section 255.003, however, applies to any use of a political subdivision's resources for political advertising, and there is no language to suggest that a political subdivision may use public resources for political advertising if the political subdivision itself does not show a preference for political advertising from a particular source.

We note that this opinion is not intended to address the use of the facilities of a political subdivision in a situation in which the facilities function as a "public form." See generally *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (cases discussing permissible restrictions on use of public forum). Whether a particular area of a school or other public facility is a public form is a fact question, but in this case

it is clear from the request letter that the teachers' lounge in question is not a public forum.

SUMMARY

For purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision.

The prohibition in section 255.003 of the Election Code applies to any use of a political subdivision's resources for political advertising.

This opinion does not apply to the use of the facilities of a political subdivision in a situation in which the facilities function as a public forum.

¹ In a 1996 opinion, we concluded that a broadcast on a city television station was not itself "political advertising" because all candidates in the relevant election were invited to participate. Ethics Advisory Opinion No. 343 (1996). In that case, the fact that the opportunity to participate in the broadcast was available to all candidates led to the conclusion that the broadcast itself was not political advertising. In contrast, in this case, there is no question that the flyers are political advertising. Rather, the issue here is whether school resources may be used for political advertising if all candidates have the same opportunity to make use of school resources for political advertising.