

BEFORE THE
CITY OF SAN DIEGO
ETHICS COMMISSION

In the Matter of:

B.D. HOWARD,

Respondent.

Case No. 2010-42

OAH No. 2012010621

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter in San Diego, California, on May 11, 2012.

Christina Cameron, General Counsel and Petitioner (petitioner), represented the City of San Diego Ethics Commission (Commission).

B.D. Howard (respondent) appeared in propria persona.

Oral and documentary evidence was received and the matter was submitted on May 11, 2012.

FACTUAL FINDINGS

Jurisdiction

1. On February 13, 2012, Christina Cameron filed the Final Administrative Complaint in her official capacity as general counsel for the Commission. The Final Administrative Complaint charged nine counts against respondent alleging he committed several campaign contribution violations both during and after his campaign for city council. The Final Administrative Complaint sought a monetary penalty and other relief.

Respondent appealed the penalty, requested an administrative hearing and this proceeding ensued.

Evidence Introduced At Hearing

2. Respondent ran as a candidate for City Council, District 8, in the June 8, 2010, primary election. He came in a close third, losing by only a few hundred votes. In order to

raise funds for his campaign, respondent formed the B.D. Howard for City Council Committee (Committee) which he registered with the state.

3. The City of San Diego (City) is governed by a municipal code. Article 7 contains the laws regarding elections, campaign finance and lobbying. Section 27.2901 states that, among other things, the purpose and intent of the campaign laws are to preserve an orderly political forum, to prevent corruption, and to ensure a broader base of political efficacy within the community by prohibiting contributions by organizations. The municipal code outlines the type of disclosures required of candidates. In the past, the city required candidates to submit two pre-election disclosure statements. However, the June 2010 primary election was the first time that the City required candidates to file three pre-election disclosure statements.

4. Denise Jenkins, the Elections Analyst in the City Clerks' Office, testified about the orientation and education program the City provides for candidates to explain the election requirements to them, including reviewing with them the types of documentation that is required and the filing deadlines. Jenkins described the voluminous municipal elections candidate information form her office provides to candidates which contains attachments and the steps she takes to review that document with candidates. Jenkins testified that because the June 2010 primary was the first time that three pre-election disclosure statements were required, she spent a great deal of time providing that information to candidates. Jenkins described how candidates must often file amended disclosure statements when they incorrectly file their statements, the typical errors being failure to put names in alphabetical order or accepting donations from organizations, the latter being something which is prohibited by the election laws. Jenkins testified about the inadequacy and untimeliness of the pre-election campaign disclosure forms filed by respondent. He did not timely file a statement for the period covering May 23, 2010, to June 3, 2010. He filed numerous amendments to his statements. He has never filed a disclosure statement covering the period from July 1, 2010, through December 31, 2010.

5. Lauri Davis, the investigator for the commission, testified that her investigation initially centered on respondent's failure to file his third pre-election disclosure form but that it broadened when she noticed numerous discrepancies which raised concerns. During her investigation she discovered that in addition to a credit union, there were two other bank accounts at the Bank of America being managed by respondent. Davis prepared extensive charts outlining her investigation. Davis' investigation uncovered the following:

- \$828.46 in expenditures that respondent failed to disclose between January 1, 2010, through March 17, 2010;

- \$110 in reported expenditures between March 18, 2010, and May 22, 2010, for which there is no supporting documentation;

- \$1,809.62 in expenditures that respondent failed to disclose between March 18, 2010, and May 22, 2010;

- \$500 in reported expenditures between May 23, 2010, and June 3, 2010, for which there is no supporting documentation;

- \$270.77 in expenditures that respondent failed to disclose between May 23, 2010, and June 3, 2010;

- \$261.34 in expenditures that respondent failed to disclose between June 4, 2010, and June 30, 2010; and

- Failing to maintain records of 39 expenditures totaling \$3,987.19.

During her investigation Davis also discovered that on June 30, 2010, respondent reported an ending balance of \$2,001.23 on his campaign disclosure statement when respondent's bank records actually indicated his balance was only \$6.25. Moreover, a review of the bank records indicated that on June 30, 2010, respondent had made a "balance inquiry" at an ATM to verify his balance, which demonstrated that he was well aware that he did not have the \$2000 he was reporting on his campaign disclosure form. Davis also discovered that at least two campaign contributions that respondent reported as being from individuals were from organizations. The checks were drawn on the organizations' letterheads and one was even signed by a company treasurer. Those prohibited donations totaled \$350.

6. Stacy Fulhorst, the Commission's Executive Director, described the extensive education outreach programs offered by the commission and the effort it makes to assist candidates. Respondent never attended any of the courses offered or consulted with any commission staff regarding his disclosure statements. Fulhorst reviewed the results of the investigation and explained her rationale for the fine amount being sought. She testified that she considered the factors outlined in the municipal code which must be considered when assessing a penalty.

When considering those factors, Fulhorst determined that given the pervasive nature of the discrepancies found, this was a severe violation. Fulhorst described a meeting with respondent during the early stages of the investigation wherein they discussed his paying a minimal fine. However respondent did not want to use his Bank of America account, instead stating he wanted to use another source. Fulhorst had never had a candidate not want to pay a minimum fine when their account showed sufficient funds, which caused her to be concerned about his disclosure statements. Later when the investigation revealed that respondent did not have \$2000 in that account, as he reported on his disclosure form, Fulhorst realized that he had lied to her during their meeting. She determined this was an attempt by him to deceive or mislead and it made his violations deliberate. Respondent never attended any of the education courses offered by the Commission and had not provided full disclosure or assisted with the investigation as repeated attempts were made to obtain information from him, some of which he has never provided. Given the pervasive nature of the discrepancies and the fact that 90 percent of respondent's expenditures remain unaccounted, she felt this was a pattern and not an isolated incident. As to the issue of the

non-individual campaign contributions, Fulhorst testified that never in her experience has she seen a candidate mistake a check that is written on an organization's letterhead to be a contribution from an individual. Given the level of respondent's education and his prior campaign experience, she found it difficult to believe that he thought the check was from an individual. In mitigation, Fulhorst took into account that respondent was a grassroots candidate and had only raised \$5000. Had that not been the case, she would have sought a fine for each violation, instead, she grouped all of them by type, resulting in there only being nine counts alleged against respondent.

Although petitioner asserted that respondent was uncooperative with the investigation, the evidence did establish that he agreed to provide authorization to obtain his bank records as he could not afford to do so, but notwithstanding the authorization, the bank required a subpoena. However, this did little to militate against the fact that both the Commission and the City Clerk's office had to make numerous requests to respondent in order to obtain any of the required documents from him. The evidence established that respondent cavalierly disregarded his obligation to honestly, timely and accurately disclose the required information.

7. Ruben Padilla, respondent's treasurer, testified that he only recalled one time that he helped complete disclosure forms, and that was after a meeting with the city when forms had been erroneously completed. Padilla was never involved with preparing any of the other documents filed. In fact, he performed such little treasurer work that he "wondered is this what a treasurer does, because I do not really do much." Padilla testified that he took respondent's "word" as to what items cost and paid them accordingly, but he never saw receipts or invoices and never verified any of the expenditures or campaign contributions. Padilla was unaware of the two Bank of America accounts and had no involvement in opening either one; he was only aware of the credit union account the campaign used.

8. Respondent ran for office seeking to help his community. He has a law degree and has worked on campaigns in the past, including working on George Stevens' City council campaign, being identified as the treasurer on Ben Hueso's successful 2005 City council campaign and most recently as the campaign director for Stephen Whitburn. Although this was his first time running for office, respondent was no novice to politics. During his testimony, respondent admitted to the campaign violations but argued that the fine being sought was extensive given that he had only raised \$5000. Respondent believed that a five percent fine, \$250, was fair and equitable. Respondent asserted that being a grassroots candidate he cannot be expected to maintain sophisticated records. Respondent asserted that issuing a penalty against him would have a chilling effect on other candidates and that the public was entitled to hear from a broad platform of individuals.

Respondent's demeanor both during his testimony and throughout this entire proceeding was cavalier. He failed at any point in the day to demonstrate even the slightest insight into why his inadequate recordkeeping might be problematic. What was most disturbing about respondent's testimony was his lack of insight and failure to appreciate that he was not being required to maintain any type of sophisticated records, having his receipts

in a shoebox would have sufficed; what the commission was seeking was any documentation to support his alleged expenses. As Ms. Fulhorst correctly summarized, because 90 percent of respondent's supporting documentation is missing, there is absolutely no way for the public to ever know whether or not respondent's campaign expenditures were legitimate. Moreover, respondent's testimony demonstrated that he failed to appreciate the fact that what the public is entitled to is an honest accounting and disclosure of campaign contributions and expenditures, something woefully missing in respondent's documents. Issuing a penalty against respondent will not "chill" candidates from running for office, but instead will put candidates on notice that inadequate and unlawful recordkeeping will not be tolerated.

Arguments

9. The petitioner argued that it met its burden of proof and that respondent's violations warranted a total fine of \$9,500 being assessed. Petitioner also requested that respondent be ordered to file the necessary paperwork that will close his campaign committee.

10. Respondent admitted to the violations but argued that it was unfair to require he pay a penalty that exceeded the funds he had raised, that he had no funds to pay the fine and that a five percent penalty of \$250 was equitable.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. This proceeding is brought under Chapter 2 of the San Diego Municipal Code. Section 26.0436, subsection (c), provides that "the petitioner bears the burden of proof to establish, by a preponderance of the evidence, the existence of a violation of governmental ethics laws."¹

The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)"² (1 Witkin, *Evidence, Burden of Proof and Presumptions* § 35 (4th ed 2000).)

¹ Section 26.0402 defines "governmental ethics laws" as local laws governing campaign contributions.

² BAJI 2.60 has since been replaced by CACI 200, which does not use the phrase "preponderance of the evidence," but instead refers to proof that a matter is "more likely to be true than not true."

Applicable San Diego Municipal Codes

2. San Diego Municipal Code section 27.2925 provides that every candidate or committee that accepts contributions shall maintain records in accordance with the requirements of California Code of Regulations, title 2, section 18401 and those records shall be maintained for a period of four years. The candidate or committee shall produce an authorization to obtain the records or produce the records on demand.

3. San Diego Municipal Code section 27.2930 provides that in addition to each candidate and committee filing campaign statements in the time and manner required by California Government Code sections 81000 *et seq.* and California Code of Regulations title 2, they shall also list contributors in alphabetical order, disclose contributions from general purpose recipient committees, report various disclosures, file pre-election statements, identify primary or general election donations and special or runoff election contributions, and disclose the cumulative amount of contributions from contributors. This section makes it unlawful to fail to comply with disclosure requirements.

4. San Diego Municipal Code section 27.2950 makes it unlawful for a candidate or committee to accept a contribution from a non-individual.

5. San Diego Municipal Code section 27.2991 provides that anyone who violates these municipal code sections is guilty of a misdemeanor and may be subject to administrative penalties.

Applicable Regulations

6. California Code of Regulations, title 2, section 18401, provides that a candidate has a duty to maintain detailed accounts, records, bills and receipts as necessary to prepare campaign statements and must comply with the provisions as outlined in Section 84100 *et seq.*

7. California Code of Regulations, title 2, section 18427, provides that a candidate "shall verify that to the best of his or her knowledge that his or her own campaign statements are true and complete and use all reasonable diligence in the preparation of the statements."

8. California Code of Regulations, title 2, section 84211, provides a list of required information which must be contained in campaign statements.

Factors to be Considered when Assessing a Penalty

9. San Diego Municipal Code section 26.0438 outlines the factors to be considered when evaluating a proposed penalty. Those factors include (1) the severity of the violation, (2) the presence or absence of any intent to conceal, deceive or mislead, (3) whether the violation was deliberate, negligent or inadvertent, (4) whether the respondent demonstrated good faith by consulting the commission staff for written advice, (5) whether

the violation was an isolated incident or part of a pattern, and whether the violator has a prior record of violations, (6) the existence of any mitigating information and (7) the degree to which the respondent cooperated with the commission staff by providing a full disclosure, remedying a violation or assisting with the investigation.

Cause was Established to Issue the Penalty Sought

10. Respondent's violations were severe, pervasive and deliberate. He intentionally filed false campaign disclosure documents and his cavalier attitude at this hearing was most disconcerting. His utter failure to appreciate the duty he owes to the public to honestly report his campaign contributions and expenditures was unsettling. Nothing "sophisticated" or "professional" was required of him; all he had to do was keep his receipts in a shoe box, but he was even incapable of that small feat. Moreover, respondent's using his ATM to conduct a balance inquiry and then submitting a disclosure statement he knew to be false were inexcusable. Clearly he was suspicious that this funds were lacking; hence the balance inquiry. Once confirming his suspicions, he did not act honestly, but instead attempted to mislead the public about his campaign funds by filing a false disclosure statement, all signs of a devious, dishonest individual.

Further, his cavalier dismissal of an accurate accounting of the \$5,000 raised and spent was all the more worrisome given the economic plight of large portions of the district he was seeking to represent. District 8 is historically one of the poorer areas of the City and \$5,000 is not the "small potatoes" that his attitude made it out to be. Absolutely no evidence in mitigation, other than his being a "grassroots" campaign was introduced at this hearing. And even a "grassroots" politician is still accountable to the public.

The evidence presented here convincingly and overwhelming established all nine of the violations charged. The \$9,500 fine sought is warranted. In fact, given the pervasive and devious nature of the evidence presented and the numerous aggravating factors, a greater fine would have been justified.

RECOMMENDATIONS

1. It is recommended that the Ethics Commission order respondent B.D. Howard to pay a monetary penalty of \$9,500. The Ethics Commission may permit respondent to make installments on a payment plan.

2. It is recommended that the Ethics Commission order respondent B.D. Howard to file a campaign disclosure statement covering the period from July 1, 2010, to December 31, 2010.

3. It is recommended that the Ethics Commission serve a copy of this Decision to the California State Bar given respondent's testimony that he is currently studying for the bar exam. Honesty, integrity, and good record-keeping are essential traits for an attorney; respondent is sorely lacking all three.

DATED: May 17, 2012



MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings