

**BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

Case No. 10/449

SHONG-CHING TONG,

OAH No. 2011030835

Respondent.

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 13-14, 2011, in Los Angeles. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Neal P. Bucknell, Senior Commission Counsel, represented Roman G. Porter (Complainant).

Stefan Pancer, Esq., represented Shong-Ching Tong (Respondent), who was present.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant is the Executive Director of the Fair Political Practices Commission (Commission).
2. Respondent is an individual who Complainant contends made independent expenditures totaling approximately \$9,375 for two mass mailings in opposition to a candidate for the Arcadia City Council in the election held on April 13, 2010.
3. After an investigation, and allowing Respondent an opportunity to provide information, Complainant issued an order finding that there was probable cause to believe that Respondent violated provisions of the Political Reform Act (the Act).¹
4. Complainant thereafter filed the Accusation in his official capacity.

¹ The Act is contained in Government Code sections 81000 through 91014. All statutory references (Section) are to the Government Code. The regulations of the Commission are contained in California Code of Regulations, title 2, section 18110 through 18997. All regulatory references (Regulation) are to that portion of title 2.

5. Respondent timely submitted a Notice of Defense, which contained a request for a hearing to contest the charges of the Accusation.

Arcadia City Council Election of 2010

6. Paul Cheng was an incumbent candidate for the Arcadia City Council in the election that was held on April 13, 2010.

7. Mr. Cheng is also an attorney. In the scope of his legal practice, he filed a lawsuit against a business in the San Gabriel Valley area. Respondent became involved in helping to defend the defendants in that suit. Respondent viewed himself as being like "Bao Ching-Tan," a figure in the Taiwanese culture who fights against injustices.

8. In the fall of 2009, Respondent and Mr. Cheng became involved in a dispute over the handling of that lawsuit. Mr. Cheng submitted information to the Chinese-speaking media in the San Gabriel Valley, print, radio and television, which cast Respondent in a bad light. Friends, acquaintances and even strangers approached Respondent to tell him about what they saw, read or heard, and advised Respondent that he had to defend his honor and reputation.

9. In December of 2009, Respondent went to the Arcadia City Hall. He approached the staff about distributing information concerning Mr. Cheng. The staff believed that Respondent was asking about going door-to-door to hand out leaflets. Due to a city ordinance on door-to-door contacts, Respondent was required to obtain a business permit and then purchase a register listing the addresses of those who refused to accept door-to-door contacts. The Commission relies on the staff of local government entities to advise those involved in political activity about the requirements of the Act, including when they are required to file appropriate forms with a government entity holding an election. In this instance, because Respondent was not clear in what he planned to do concerning Mr. Cheng, nobody at the Arcadia City Hall told him that he had any requirement to file any forms required by the Act.

10. Respondent later decided to send out mass mailings to likely voters in the upcoming Arcadia City Council election about Mr. Cheng instead of going door-to-door. His purpose was to educate those voters on how he viewed Mr. Cheng to be a dishonorable person. Therefore, on March 15 and April 6, 2010, Respondent made independent expenditures totaling approximately \$2,800 and \$6,575, respectively, for two "Don't Vote for Cheng" mailers. Both mailers cast Mr. Cheng in a negative light and expressly advocated his defeat, including language such as, "Do Not Give Your Vote to Paul Cheng."

11. The first mailer was sent to 60 percent of the voters from the previous city election, or about 6,000 people. Respondent and friends put that mailer together. The second mailer was sent to approximately 26,000 people, using the services and bulk permit of another person. Respondent did not support any other candidate or committee and he did not create a committee or file as an independent expenditure committee.

12. The outside of the first mailer indicated that it was paid for by "S. TONG," and a secondary address used by Respondent was provided. There was no sender identification information on the outside of the second mailer.

13. In making the independent expenditures described above, Respondent became an independent expenditure committee. (Section 82013, subd. (b).) Since Respondent only opposed a single candidate in a single city, by becoming an independent expenditure committee Respondent also became a city general purpose committee. (Section 82027.5, subd. (d).)

14. After Respondent made the independent expenditure totaling approximately \$2,800 on March 15, 2010, he was required to report the expenditure by filing a preelection statement (Form 461) with the Arcadia City Clerk for the reporting period of February 28 through March 27, 2010, on or before the due date of April 1, 2010. (Sections 84200.5, subd. (g)(2), 84200.8, and 84215, subd. (e).) Respondent failed to do so.

15. After Respondent made the independent expenditure totaling approximately \$2,800 on March 15, 2010, Respondent also was required to report the expenditure by filing a supplemental independent expenditure report (Form 465) with the Arcadia City Clerk for the reporting period of February 28 through March 27, 2010, on or before the due date of April 1, 2010. (Sections 84200.5, subd. (c), 84200.8, 84203.5, subd. (a), and 84215, subd. (e).) Respondent failed to do so.

16. Respondent's second mailer was sent out on or about April 6, 2010. This was a mass mailing because it consisted of more than 200 substantially similar pieces of mail sent in a calendar month, and it was not a form letter or other mail sent in response to an unsolicited request, letter or other inquiry. (Section 82041.5; Regulation 18435, subd. (a).)

17. Respondent paid for the mass mailing. Accordingly, Respondent was the sender of the mass mailing. (Regulation 18435, subd. (b).)

18. At the time of sending the April 6, 2010 mass mailing, Respondent was an independent expenditure committee. As such, he was required to identify himself as the sender by displaying his name, street address, and city on the outside of each piece of mail in the mass mailing. (Section 84305, subs. (a) and (b).) Respondent failed to do so. The mass mailing was a brochure of several pages, folded in half. An interior page was a copy of a letter to an editor authored by Respondent. That letter contained Respondent's name and address, but that information was not visible to the recipient of the mass mailer unless and until they unfolded the document and found that part of the brochure. That material does not constitute the identifying information the Act requires to be on the outside of each piece of mass mail.

19. After Respondent made the independent expenditure totaling approximately \$6,575 on April 6, 2010, he was required to report the expenditure by filing a late independent expenditure report (Form 496) with the Arcadia City Clerk on or before the due

date of April 7, 2010. (Sections 82036.5, 84200.5, subd. (c), 84200.8, subd. (b), 84204, subds. (a) and (c), and 84215, subd. (e).) Respondent failed to do so.

20. After Respondent made the independent expenditure totaling approximately \$6,575 on April 6, 2010, Respondent also was required to report the expenditure by filing a semi-annual statement (Form 461) with the Arcadia City Clerk for the reporting period of March 28 through June 30, 2010, on or before the due date of August 2, 2010. (Sections 84200, subd. (b), and 82046, subd. (b).) Respondent failed to do so.

21. After Respondent made the independent expenditure totaling approximately \$6,575 on April 6, 2010, Respondent also was required to report the expenditure by filing a supplemental independent expenditure report (Form 465) with the Arcadia City Clerk for the reporting period of March 28 through June 30, 2010, on or before the due date of August 2, 2010. (Sections 84200.5, subd. (c), 84200.8, 84203.5, subd. (a), and 84215, subd (e).) Respondent failed to do so.

The Commission's Investigation

22. Mr. Cheng was ultimately defeated in the election. In April 2010, one of Mr. Cheng's employees filed a complaint with the Commission concerning Respondent's two mailers. The Commission's Enforcement Division began investigating. In early May 2010, Respondent was sent a copy of the complaint lodged by Mr. Cheng's employee. Respondent promptly responded in writing.

23. In June 2010, one of the Commission's investigators interviewed Respondent by telephone. Respondent was completely candid and forthright in explaining what he had done and why, including admitting the full extent of his involvement in the two mailers.

24. The investigator explained to Respondent what documents needed to be filed as a result of the two mailers. The investigator sent Respondent copies of the forms that needed to be filed along with instructions on how to file them. The investigator also described the resources that were available to Respondent should he have questions.

25. Respondent attempted to file the missing forms, but what he prepared was incorrectly filled out as described below. Moreover, instead of filing those documents with the Arcadia City Clerk, Respondent forwarded them to the Enforcement Division. Upon receipt, the Enforcement Division forwarded the documents to the Arcadia City Clerk for filing. Specifically:

A. Form 461 was filed on or before the above-described due date of August 2, 2010, but the document was for a stated reporting period of "12/22/09" through "4/13/10" (not 3/28/10 through 6/30/10), and the document was incomplete, as only the first page of the Form 461 (the signature page) was filled out and submitted by Respondent for filing.

B. Form 465 was filed on or before the above-described due date of August 2, 2010, but the document was for a stated reporting the period of "12/22/09" through "4/13/10" (not 3/28/10 through 6/30/10). Also, the document was unsigned; only the first page of the Form 465 (not the signature page) was filled out and submitted by Respondent for filing. An unsigned report is not considered filed within the meaning of the Act. (*In Re: Layton* (1975) 1 FPPC Ops. 113.) Additionally, although the document mentioned both mass mailings, Respondent omitted the required information regarding the names and addresses of the payees relative to the mass mailings. For example, Respondent did not provide the identity of the people who assisted him with the first mailer, or the identity of the business and person whose bulk permit was used in the second mailer.

C. Form 496 was also submitted. It was not established that this document was incorrectly completed by Respondent.

26. The Commission's investigator, and later the prosecutor of this case, tried to contact Respondent regarding the above-described deficiencies and other matter related to this case, but Respondent ignored their messages. By or about July 2010, after a settlement offer had been sent to Respondent by the prosecutor, Respondent became gravely offended and enraged by the actions of the Commission's investigator and prosecutor for reasons that are not entirely clear. Respondent believed that the Commission's staff was harassing him. In any event, it was not established that the Commission's staff did anything to warrant Respondent's refusal to cooperate with them. Although Respondent believed he could not trust the Commission's staff and insisted that all communications be in writing, Respondent still failed to respond to those inquiries, including his refusal to comply with an investigative subpoena served on him. Respondent refused to submit any corrections to the documents that were ultimately submitted to the Arcadia City Clerk's office, and otherwise refused to cooperate any further with Commission staff.

LEGAL CONCLUSIONS

1. In enacting the Act, California voters specifically found and declared, as stated at Sections 81001, subdivision (h), and 81002, subdivision (f), that previous laws regulating political practices had suffered from inadequate enforcement and it was their purpose to ensure the provisions of the Act are vigorously enforced.

2. Section 81003 requires the Act to be liberally construed to achieve its purpose.

3. Section 81002, subdivision (a), states that one purpose of the Act is to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed so that voters are fully informed, and improper practices are inhibited.

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Cause for Monetary Penalties

4. *Count 1.* On or about March 15, 2010, Respondent made an independent expenditure totaling approximately \$2,800 in opposition to an Arcadia City Council candidate for city election, but Respondent failed to report the expenditure by filing a preelection statement (Form 461) on or before the due date of April 1, 2010, in violation of Sections 84200.5, subdivision (g)(2), and 84200.8. (Factual Findings 1-15.)

5. *Count 2.* With regard to the independent expenditure made on or about March 15, 2010, Respondent also failed to report the expenditure by filing a supplemental independent expenditure report (Form 465) on or before the due date of April 1, 2010, in violation of Section 84203.5. (Factual Findings 1-15.)

6. *Count 3.* On or about April 6, 2010, Respondent sent a mass mailing in opposition to an Arcadia City Council candidate for city election without displaying the name, address, and city of the sender on the outside of each piece of mail, in violation of Section 84305, subdivisions (a) and (b). (Factual Findings 1-21.)

7. *Count 4.* On or about April 6, 2010, Respondent made an independent expenditure totaling approximately \$6,575 for mass mailings, but Respondent failed to report that expenditure by filing a late independent expenditure report (Form 496) on or before the due date of April 7, 2010, in violation of Section 84204. (Factual Findings 1-21.)

8. *Count 5.* Regarding the independent expenditure made on or about April 6, 2010, Respondent also failed to report the expenditure by filing a semi-annual statement (Form 461) on or before the due date of August 2, 2010, in violation of Section 84200, subdivision (b). (Factual Findings 1-21.)

9. *Count 6.* Regarding the independent expenditure made on or about April 6, 2010, Respondent also failed to report the expenditure by filing a supplemental independent expenditure report (Form 465) on or before the due date of August 2, 2010, in violation of Section 84203.5. (Factual Findings 1-21.)

Disposition

10. Each violation of the Act is punishable by imposition of a monetary penalty of up to \$5,000. (Section 83116, subd. (c).)

11. Regulation 18361.5, subdivision (d), provides that in framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the circumstances including but not limited to:

(1) The seriousness of the violation: This case does not involve serious violations, but rather modest ones that became more technical once Respondent was advised of his violations and he imperfectly attempted to remedy them.

(2) The presence or absence of any intention to conceal, deceive or mislead: There is a complete absence of any intention on Respondent's part to conceal, deceive or mislead. If anything, Respondent was completely candid with Commission staff when he chose to cooperate with them.

(3) Whether the violation was deliberate, negligent or inadvertent: The initial violations were inadvertent, as Respondent clearly had no knowledge of the Act or that he was engaging in any conduct that required him to file any documents with any government entity. Once advised of his duty to file appropriate documents, Respondent's failure to do so was the result of his neglect in following instructions he was given verbally and in writing. Thereafter, Respondent deliberately ignored the advisements of Commission staff that his documents were still technically deficient.

(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114, subd. (b): Respondent did not consult with the Commission or any other government agency before sending out the two mailers. He did have brief contact with the staff at the Arcadia City Hall, but he was discussing handing out leaflets and/or door-to-door canvassing with them, which did not necessarily trigger a duty for staff to educate Respondent about the Act.

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Act or similar laws: This was an isolated act. No evidence was presented that Respondent has ever engaged in such conduct before or after the events in question.

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure: To an extent, Respondent submitted the required documents. The documents were imperfectly completed and sent to the wrong entity. Thereafter, Respondent ignored Commission contacts to obtain technical compliance and refused to cooperate. The documents submitted contain most of the required information, although they have mistakes and do not contain all the required information.


12A. During the hearing, Complainant requested a fine of \$1,000 be imposed for each of the six violations. Based on the circumstances, that request is reasonable, with one exception. Count three of the Accusation pertains to Respondent's failure to include his identification information on the outside of the April mass mailer. That was purely a technical violation. Moreover, it would have been clear to anyone who read the mailer that Respondent was responsible for sending it. There was no way for Respondent to correct that violation once it happened. Thus, a fine of \$250 is warranted for that violation.

12B. However, the other five counts are a different matter. Although Respondent's initial violations were inadvertent, he thereafter failed to fully correct them, even after advice and information sent to him from Commission staff. After he initially cooperated, Respondent later completely ignored staff contacts. He could have easily corrected his deficient filings, but refused to do so. Under these circumstances, a fine of \$1,000 for each of those five violations is warranted. (Factual Findings 1-26.)

ORDER

Respondent Shong-Ching Tong shall pay a total monetary penalty of \$5,250 to the Fair Political Practices Commission pursuant to Government Code section 83116, subdivision (c).

DATED: October 26, 2011



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings