

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
FAMILY BROADCASTING, INC.
Order to Show Cause Why The Licenses For
Stations WSTX(AM) and WSTX-FM,
Christiansted, U.S. Virgin Islands
Should Not Be Revoked
EB Docket No. 01-39

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2002

Released: October 2, 2002

By the Commission:

1. This Memorandum Opinion and Order denies the Appeal from Refusal of Presiding Officer To Disqualify Himself, filed May 21, 2002 by Family Broadcasting, but grants Family's Request for Waiver of Page Limit. For the reasons set forth below we do not find the requisite showing of bias to warrant the ALJ's disqualification from this adjudicatory proceeding.

2. Family is the licensee of Stations WSTX(AM) and WSTX-FM in Christiansted, U.S. Virgin Islands. This revocation proceeding was initiated in February 2001, when the Commission directed the licensee to show cause why the licenses for these stations should not be revoked for misrepresentation and/or lack of candor and for repeated and/or willful violations of the Commission's Rules. Thereafter, Family filed an application seeking Commission authorization to transfer control of Family from Gerard and Asta Luz James to their four adult children. Barbara James-Petersen replaced her father as president of Family as of March 14, 2001.

3. Before any hearings were held, the licensee and Enforcement Bureau filed motions for summary decision. The ALJ granted the Bureau's motion and revoked Family's licenses. He did so without regard to the transfer of control applications. These applications had not been consolidated into the revocation proceeding and, at the time of the ALJ's Summary Decision, were awaiting processing by the Mass Media Bureau (now the Media Bureau).

4. Family filed exceptions and the Commission set aside in part the ALJ's Summary Decision. It agreed with the ALJ that revocation would be warranted if conceded wrongdoer and former president, Gerard Luz James, remained in control of the licensee. But it determined that the proposed

1 Family Broadcasting, Inc., 16 FCC Rcd 4330 (2001), recon dismissed, 16 FCC Rcd 12801 (2001).

2 Family Broadcasting, Inc., 16 FCC Rcd 15619 (ALJ 2001).

3 Family Broadcasting, Inc., 17 FCC Rcd 6180 (2002). (Hereafter the Consolidation Order).

transfer of control applications raised genuine issues of material fact as to whether the revocation proceeding should be resolved in the licensee's favor in order to permit the transfer. The Commission, concluding that these issues warranted consideration at a hearing, designated the transfer of control applications involving Stations WSTX(AM) and WSTX-FM for consolidated hearing before the ALJ in this revocation proceeding.

5. In the Consolidation Order, the Commission directed the ALJ to make findings of fact and conclusions of law on ten issues relating to the proposed transfer of control of the stations from Asta and Gerard Luz James to their four children. In particular, the ALJ was to determine whether proposed transferee Barbara James-Petersen will operate the stations independently of any control or influence from her parents and in a manner that does not financially benefit either parent; to determine whether she was involved in any misconduct that had occurred during her tenure as general manager since at least July 1998; to determine whether she will have sufficient financial and managerial capacity to ensure the stations' future operation in accordance with all statutory and regulatory requirements; and to determine whether approval of the transfer of control applications will serve the public interest.

6. On May 6, 2001, Family Broadcasting filed a Motion To Disqualify the Presiding Judge, pursuant to 47 C.F.R. § 1.245, requesting that the presiding judge withdraw from this proceeding on grounds of personal bias. The ALJ denied Family's Motion to Disqualify that had alleged bias based on statements in the ALJ's original Summary Decision and his remarks during the April 23, 2002 pre-hearing conference. Noting that Family had not alleged any extrajudicial source of bias and that his allegedly biased remarks merely reflected an effort to gauge the scope and extent of discovery for scheduling purposes, the ALJ held that Family had not established the requisite showing of bias to warrant disqualification.<sup>4</sup> Family has appealed the ALJ's refusal to disqualify himself and the ALJ has certified Family's Appeal to the Commission.<sup>5</sup>

## DISCUSSION

7. We will deny Family's Appeal. In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *WWOR-TV*, 5 FCC Rcd 2845 ¶ 6 (1990), *citing*, *Berger v. United States*, 255 U.S. 22, 33-35 (1921) (“[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment”). *See also Metropolitan Council of NAACP Branches*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (“[i]n an adjudicatory proceeding, recusal is required only where ‘a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it’”) (internal citations omitted). The burden is on the party alleging bias, and it is a heavy one that, pursuant to section 1.245(b)(1), must be corroborated by “an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification.” To support its claim of bias, Family does not allege bias stemming from an extrajudicial source, *Grinnell Corp. v. United States*, 384 U.S. 563, 584 (1966), but relies exclusively on the ALJ's actions in the course of this proceeding, including his remarks at the pre-hearing conference and statements in his decisions granting Summary Decision and denying the Motion to Disqualify.

8. The Supreme Court has indicated that “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Litky v. United States*, 510 U.S. 540, 555

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<sup>4</sup> *Family Broadcasting, Inc.*, FCC 02M-37 (rel. May 16, 2002).

<sup>5</sup> *Family Broadcasting, Inc.*, FCC 02M-39 (rel. May 23, 2002).

(1994).<sup>6</sup> Absent such a showing, matters arising during the proceeding, including “judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel” are deemed to be extrajudicial in nature and to warrant recusal on that basis, only if they “rel[y] upon knowledge acquired outside such proceedings.” *Id.* at 556. Motions to disqualify administrative law judges, filed pursuant to 5 U.S.C. § 556(b) and 47 C.F.R. § 1.245, are subject to these standards. *See, e.g., James A. Kay*, 12 FCC Rcd 15662 ¶ 4 (1997).

9. As Family has not alleged that any of the cited remarks show reliance upon knowledge acquired outside of this proceeding, the pertinent standard is whether they reveal the degree of deep-seated favoritism or antagonism required when no extrajudicial source is involved. Many of the challenged remarks pertain to Ms. James-Petersen’s complicity for misconduct predating her becoming station manager in July 1998 or president in March 2001, or to the pertinence of the FM renewal proceeding terminated by the 1997 Summary Decision of Administrative Law Judge Edward Luton. There has been no showing, however, that these remarks represent anything other than preliminary impressions based on knowledge properly acquired in this proceeding. The essence of Family’s claim, moreover, is that the remarks demonstrate bias, because they purportedly reflect a view that is unsupported by the record or is otherwise erroneous. If the ALJ’s allegedly erroneous views result in rulings on the merits that are adverse to Family, however, it may, pursuant to 47 C.F.R. § 1.276 of the Commission’s rules, appeal such rulings upon release of the Initial Decision, and any errors of fact or law may be corrected through the normal appellate process.<sup>7</sup>

10. We are not persuaded that the remaining matters challenged by Family manifest “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky*, 510 U.S. at 555. Rather, they reflect a fair and open discussion of the designated transfer issues, by which the ALJ tried to guide the case through to hearing as instructed by the Commission. Thus, the ALJ, responding to the Bureau’s suggestion that the misrepresentation issue might be capable of resolution through a further motion for summary decision, observed that “[b]eing as how I already tried that and lost any way [sic], I think we are going to have a hearing.” (Transcript at 21) From this remark Family infers that the ALJ, having been reversed by the Commission, is now determined to revoke the licenses. But the remark merely acknowledged the Commission’s reversal and reflected an entirely proper commitment to implement the Commission’s ruling that the transfer of control applications raised issues warranting resolution at a hearing. There is therefore no basis for disqualification. *Webster-Fuller Communications Associates*, 4 FCC Rcd 4952 ¶ (1989) (ALJ’s strong language to the effect that he would not make same mistake as he had made in another case in which he was reversed by the Review Board was not evidence of bias).

11. Moreover, the comment was in the context of a broader discussion of the nature of proof required on the misrepresentation issue, directed solely to scheduling the hearing, in which the ALJ had stated that he was “not prejudging the merits of that allegation [that Ms. James-Petersen was guilty of misrepresentation] ... just offering some ideas [about how counsel might proceed].” (Tr. at 21) The Commission accords its administrative law judges discretion in regulating the course of evidentiary hearings, *Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419 ¶ 3 (1987), and presumes they will discharge

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<sup>6</sup> *Liteky* involved a motion to disqualify a federal judge, pursuant to 28 U.S.C. §§144 and 455. The standards articulated in *Liteky*, however, have been applied widely to encompass administrative proceedings. *See generally Bieber v. Dept. of Army*, 287 F.3d 1358, 1361-62 (Fed. Cir. 2002) (noting applicability of *Liteky* in the administrative context and to both due process claims and disqualification requests).

<sup>7</sup> Procedures providing for the disqualification of a judge on grounds of bias were “never intended ... to enable a discontented litigant to oust a judge because of adverse rulings made, for rulings are reviewable.” *Berger v. United States*, 255 U.S. at 31 (internal citations omitted).

their duties in a fair and impartial manner, *WWOR-TV, Inc.*, 5 FCC Rcd 2845 ¶ 6 (1990), citing, *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501-02 ¶ 6 (1977). The Supreme Court has recognized that “[a] judge’s ordinary efforts at courtroom administration – even a stern and short-tempered judge’s ordinary efforts at court administration – remain immune” in terms of establishing prejudgment of the merits or an improper prejudice as to any party. *Liteky*, 510 U.S. at 555. It was in the spirit of openness and candor, and in an effort to focus the hearing, that the judge at the outset of the pre-hearing conference helpfully cautioned counsel against relying solely on Ms. James-Petersen’s testimony to meet all the specified issues. Read in context, these remarks did not reflect an assessment of her credibility in advance of hearing her testify but were instead proper efforts to regulate the course of the hearing on the designated transfer issues. See *Center For Study and Application of Black Economic Development*, 7 FCC Rcd 3101, 3104 ¶ 9 (Rev. Bd. 1992) (finding that the ALJ’s efforts to “focus” a pre-hearing conference were consistent with his broad discretion to direct the course of the proceeding and did not show personal bias).

12. We are persuaded by the ALJ’s explanation that remarks to the effect that the Bureau could request additional hearing issues and re-inspect the stations were intended solely to gauge the scope of discovery and evidence for the purpose of deriving a realistic hearing schedule. Family does not object to a further inspection of the stations or dispute the Bureau’s authority to seek additional issues under the Commission’s Consolidation Order. It instead alleges that the ALJ overstepped his role as an impartial decision-maker in urging that the Bureau take such actions. Based on our review of the transcript, however, we discern only appropriate inquiries as to matters directly affecting the extent of discovery and, thus, the timing as well as the duration of the hearing. We perceive no effort by the ALJ to direct that the Bureau pursue any particular course in prosecuting its case. The ALJ’s “suggestion” that the Bureau seek further issues merely echoed what is set forth in the Consolidation Order. By that time, moreover, and without any prompting from the ALJ, the Bureau had already sought additional information as to the transfer of control applications, pursuant to the Commission’s suggestion that the Mass Media Bureau (now the Media Bureau) “avail itself of the opportunity to have the Enforcement Bureau formally request that the ALJ add any further issues deemed appropriate by its processing staff.”<sup>8</sup> As to the possibility of a further inspection, the ALJ clearly stated that “[he was] not going to require, or order that there be an inspection,” (Tr. 24), and, given this unequivocal caveat, the mere suggestion that the Bureau consider the possibility of another inspection in light of the designated issues would not exceed the ALJ’s broad authority to regulate the course of the hearing.

13. Also not manifesting the requisite degree of favoritism to require recusal are the ALJ’s comments pertaining to the financial difficulties possibly affecting the Bureau’s hearing preparation. It was in response to the ALJ’s perfectly appropriate inquiry as to the Bureau’s deposition plans that counsel indicated that budget constraints might restrict the Bureau’s participation in discovery. This provoked a presumably sympathetic reaction from the ALJ. The allegation of bias, however, stems from the ALJ’s failure to also comment on the allegedly greater financial difficulties facing the licensee. But the licensee’s financial situation was not mentioned at the pre-hearing conference. The ALJ plausibly explained, moreover, that he was genuinely surprised by the comments of the Bureau’s counsel and that his concern was not with the Bureau’s predicament, but with ensuring that a complete hearing record was compiled on the designated hearing issues. This concern was entirely legitimate given the ALJ’s assigned responsibility to make findings of fact and conclusions of law on the designated transfer issues and his broad discretion to regulate the course of the proceeding for that purpose.

14. Family’s remaining allegations of bias – the unseemly haste with which the ALJ prepared the decision denying the motion, the listing in that decision of all ten issues specified in the Consolidation Order, the ALJ’s purported record in other cases of always ruling in favor of the government, the number

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<sup>8</sup> See Enforcement Bureau’s Request for Additional Information Concerning Family Broadcasting Inc.’s Transfer of Control Applications, filed on April 12, 2002, at ¶ 1, citing *Memorandum Opinion and Order and Hearing Designation Order*, 17 FCC Rcd 6180, 6197 ¶ 34 (2002).

of disqualification motions lodged against this ALJ, and the characterization of this licensee as a family business -- fall far short of establishing the degree of deep-seated favoritism or antagonism as to warrant the ALJ's disqualification. What may have occurred in other cases is not at all probative of the ALJ's attitudes toward these parties or of any preconception as to the designated transfer issues. Nor is it relevant that his detailed decision refusing recusal was issued without delay. And, despite Family's claim, the ALJ's recitation of the designated transfer issues does not indicate that he expects Family will be unable to meet them. Finally, the pejorative meaning Family attributes to the comment that the licensee is a "family" business is not apparent from the written transcript, and the ALJ has categorically denied that he was intimating any association with organized crime. This meaning, Family submits, is evident from the tone of voice used by the ALJ. It is, however, the written transcript, not the tape recording made solely to facilitate its preparation by the stenographer, that is the official record of what occurred at the pre-hearing conference.<sup>9</sup> Furthermore, the family relationships among the proposed transferors and transferees are clearly pertinent to the designated transfer issues. In these circumstances, and based on our review of the written transcript, we find no evidence of bias that would warrant the ALJ's disqualification. *Center For Study and Application of Black Economic Development*, 7 FCC Rcd 3101, 3104 n. 13 (Rev. Bd. 1992) (declining to conduct subjective review of the tone of the ALJ's voice in evaluating allegations of bias). *See also United States v. Edmond*, 52 F.3d 1080, 1103 (D.C. Cir. 1995) (recognizing that non-verbal communication, including the judge's tone of voice, may be relevant to a claim of bias in a criminal case but finding no bias despite the impossibility of being certain from the paper record that the judge had never glowered improperly in response to the defense's objections, where the paper record reflected the judge often had reason to be angry with counsel and where the judge and/or prosecutor specifically disagreed with counsel's characterization of the judge's demeanor in various instances cited to show bias).

15. ACCORDINGLY, IT IS ORDERED, That the Request for Waiver Of Page Limit, filed on May 21, 2002 by Family Broadcasting, Inc. IS GRANTED and the attached Appeal IS ACCEPTED for filing.<sup>10</sup>

16. IT IS FURTHER ORDERED, That the Appeal from Refusal of Presiding Officer To Disqualify Himself, filed on May 21, 2002 by Family Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>9</sup> Section 1.203 of the Commission's rules, 47 C.F.R. § 1.203, specifies that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision."

<sup>10</sup> Family seeks a waiver of Section 1.301(c)(5) of the Commission's Rules, 47 C.F.R. § 1.301(c)(5), specifying that such appeals may not exceed 5 double-spaced typewritten pages. To support its claim of bias Family relies on a series of incidents allegedly too numerous to describe in a 5-page pleading. We take very seriously a licensee's right to a fair hearing before an impartial administrative law judge. We waive the 5-page limitation and accept the Appeal so as to afford an adequate opportunity for Family to present its case. Given that Family relies on numerous remarks, many set forth in the ALJ's 7-page single-spaced Order denying the disqualification request, we do not find that Family's 13-page Appeal is excessively long.

