

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FCC 13M-15

In the Matter of)	
)	
GLENN A. BAXTER)	WT Docket No. 11-7
)	FCC File No. 0002250244
Application to Renew License for Amateur)	
Radio Service Station K1MAN)	

MEMORANDUM OPINION AND ORDER

Issued: August 8, 2013

Released: August 8, 2013

Preliminary Statement

1. This Ruling addresses Glenn A. Baxter's Motion to Dismiss Hearing Designation Order ("Motion") submitted to the Presiding Judge on July 2, 2013.¹ For reasons stated below, Mr. Baxter's Motion is denied.

Background

2. On January 12, 2011, the Wireless Telecommunications Bureau's Mobility Division ("Division") designated Mr. Baxter's license renewal application for hearing on five specified issues:
- a. Whether Mr. Baxter willfully or maliciously interfered with radio communications in violation of Section 333 of the Communications Act of 1934 and Section 97.101(d) of the Commission's Rules;
 - b. Whether Mr. Baxter broadcasted one-way communications on amateur frequencies in violation of 97.113(b) of the Commission's Rules;
 - c. Whether Mr. Baxter repeatedly and/or willfully failed to ensure immediate proper operation of his station in violation of 97.105 of the Commission's Rules;
 - d. Whether, in light of the evidence adduced pursuant to the foregoing issues, Mr. Baxter is qualified to be and remain a Commission licensee; and

¹ On July 3, 2013, Mr. Baxter submitted a Petition to the Federal Communications Commission seeking to "cancel" monetary forfeitures that have been issued to him. In an additional pleading filed on July 12, 2013, Mr. Baxter clarified that he submitted his Petition for consideration by the Commission, not for consideration by the Presiding Judge. Accordingly, the Presiding Judge will treat Mr. Baxter's submission solely as a courtesy copy.

e. Whether the captioned application filed by Mr. Baxter should be granted.²

3. Mr. Baxter contends that the Hearing Designation Order should be dismissed because it “accuses” him of committing “a felony, and therefore an infamous crime” for which he may not, under the indictment clause of the Fifth Amendment to the United State Constitution, be “held to answer” except upon grand jury indictment.³ In its Opposition to Motion to Dismiss Hearing Designation Order (“Opposition”) submitted on July 11, 2013, the Enforcement Bureau (“Bureau”) argues that Mr. Baxter’s argument does not meet the procedural requirements for petitioning for reconsideration of a hearing designation order.⁴ The Bureau also argues that Mr. Baxter’s pleading is “nonsensical” because the Bill of Rights’ indictment clause relates only to criminal trials.⁵

Discussion

4. Mr. Baxter’s Motion is ambiguous, as it is unclear whether he petitions for the Presiding Judge to reconsider the Hearing Designation Order issued by the Division, requests the deletion of all issues in the Hearing Designation Order, or seeks summary decision. As a *pro se* litigant, it is understandable that Mr. Baxter may not have a clear view of how these motions differ. In deference to his *pro se* status, the Presiding Judge has opted to read Mr. Baxter’s motion liberally, to the extent the law permits and fairness requires.

5. Section 1.106 of the Commission’s Rules provides that a petition for reconsideration of a hearing designation order will only be considered if it relates to “an adverse ruling with respect to [the] petitioner’s participation in the proceeding.”⁶ Since Mr. Baxter’s participation in this hearing has not yet been the subject of an adverse ruling, his motion, if it is intended to be read as a petition for reconsideration, must be dismissed.

6. The Motion would also necessarily fail if it was read to request the deletion of all the issues designated for hearing. Although an Administrative Law Judge may dismiss an application under certain circumstances, such as failure to prosecute, “only the Commission has authority to review the propriety for issuing [an] order.”⁷ The Commission has stated that

[s]ubordinate officials should look to see whether specific reasons were stated for [the Commission’s] action or inaction in a designation order; and that if the designation order contained a reasoned analysis of a particular matter, the subordinate officials were to be bound by that analysis, in the absence of additional information on the subject previously unknown to the Commission.⁸

² *In the Matter of Glenn A. Baxter*, Hearing Designation Order, WT Docket No. 11-7, FCC File No. 0002250244, 26 FCC Rcd. 231, 235 ¶ 14 (Mob.Div. 2011) (“Hearing Designation Order”).

³ Mr. Baxter’s Motion at 1.

⁴ Enforcement Bureau’s Opposition at 1-2 ¶ 2.

⁵ *Id.* at 2 ¶ 3.

⁶ 47 C.F.R. § 1.106(a)(1).

⁷ *In Re Applications of Anax Broad. Inc.*, Memorandum Opinion and Order, 87 F.C.C.2d 483, 486 ¶ 11 (1981).

⁸ *In the Matter of Revised Procedures for the Processing of Contested Broadcast Applications*, Report and Order, 72 F.C.C.2d 202, 216 ¶ 43 (1979).

Where a question is thoroughly considered in a designation order, “presiding hearing officials . . . may not reconsider the matter or take any action inconsistent with the designation order.”⁹ The Hearing Designation Order, issued by the Division under authority delegated by the Commission,¹⁰ provides specific reasons for setting the above-listed issues for hearing. It specifies that the Bureau has received numerous detailed complaints alleging rule violations by Mr. Baxter’s station,¹¹ that Mr. Baxter was repeatedly warned by the Bureau to refrain from engaging in conduct prohibited by Commission rules,¹² and that, in the Division’s view, evidence indicates that Mr. Baxter continues to act “in flagrant and intentional disregard” of those rules.¹³ Finding that this conduct “raises questions as to whether [Mr. Baxter] possesses the requisite character qualifications to remain a Commission licensee,” this case was set for hearing.¹⁴ Because the Division provided a thorough, reasoned analysis for setting the above-listed issues for hearing, the Presiding Judge may not (i.e. has no authority to) delete those issues to effectively dismiss the Hearing Designation Order.

7. Mr. Baxter’s Motion fails as a matter of procedure, whether it is considered as a motion for reconsideration of the hearing designation order or as a motion to delete issues. It is determined that for Mr. Baxter’s benefit, the Motion is best read as a motion for summary decision, as that will allow the Presiding Judge to review the merits of the argument.

8. The so-called “indictment clause” of the Fifth Amendment of the Bill of Rights provides that “(n)o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” The scope of the indictment clause has been established by the Supreme Court to include two central principles: first, the indictment clause applies in cases where the accused is in danger of being convicted of an infamous crime—a crime that attaches an infamous punishment upon conviction;¹⁵ second, if the sentencing court is authorized to impose an infamous punishment, regardless of whether the punishment actually imposed is an infamous one, the prosecution must be initiated by indictment.¹⁶

9. The inclusion of the indictment clause in the United States Constitution was originally sought by two states, Massachusetts and New Hampshire, to protect the accused from wrongfully incurring an infamous punishment or loss of life.¹⁷ In 1789, when the Amendments to the Constitution were introduced as the Bill of Rights to the House of Representatives, infamous punishment was defined as “all crimes punishable with loss of life or member,” and thereby required “presentment or indictment by a grand jury.”¹⁸ Early decisions by the Supreme Court held that “infamous crimes” were punishable by “hard labor,”¹⁹ or “imprisonment in a

⁹ *In Re Applications of Algreg Cellular Eng’g*, Decision, 9 FCC Rcd. 5098, 5122-23 ¶ 37 (Rev.Bd. 1994) (quoting *Fort Collins Telecasters*, 103 FCC.2d 978, 983-84 (Rev.Bd. 1986)).

¹⁰ See Hearing Designation Order at 236 ¶ 20.

¹¹ *Id.* at 231 ¶ 2.

¹² *Id.* at 234 ¶ 12.

¹³ *Id.*

¹⁴ *Id.* at 234 ¶ 13.

¹⁵ *United States v. Ramirez*, 556 F.2d 909, 910 (9th Cir. 1976).

¹⁶ *Id.*

¹⁷ *Id.* at 912 (citing 1 Elliot’s Debates 323, 326 (2d ed. 1907)).

¹⁸ *Id.* (citing 1 Annals of Congress 435 (1789)).

¹⁹ *Id.* at 910-11 (citing *Ex Parte Wilson*, 114 U.S. 417, 428 (1885)).

State prison or penitentiary,”²⁰ but noted that the list of punishments *de jour* classified as “infamous” were influenced by a fickle public opinion and changed from one age to another.²¹ In Colonial America, a range of favorite punishments included branding and whipping, which were inflicted publicly so that a person’s criminal status became known²². It was the rawest form of publicity. Until the late eighteenth and early nineteenth centuries, imprisonment was merely an “intermediate step in the punishment process.”²³ Today, a crime is considered infamous if it is punishable by either death or imprisonment for a term of over one year.²⁴

10. Mr. Baxter’s motion must be denied as he has not been charged with an infamous crime. “The class of inherently infamous crimes, if it exists at all, would encompass only the most serious *mala in se*. *Regulatory crimes . . . are not inherently infamous.*”²⁵ It would be “extremely rare for [an offense] by an individual that did not carry infamous punishment to be made infamous by some other factor.”²⁶ Certainly, no such factors exist here. Mr. Baxter is not considered to be a felon, has not been treated like a felon in the course of this proceeding, and will not be branded a felon as a consequence of this proceeding. The Hearing Designation Order does not threaten to sentence Mr. Baxter to death or to more than a year of imprisonment. It merely instructs the Presiding Judge to conduct a hearing on the ultimate issue of whether Mr. Baxter’s application to renew his license for Amateur Radio Service Station K1MAN should be granted.²⁷ Accordingly, it is found that the indictment clause is not applicable here.

Conclusion

11. Mr. Baxter’s Motion appears to be yet another exercise in stonewalling the progress of this proceeding. Mr. Baxter’s manner of participation reflects a continuous failure to review Commission rules and orders, resulting in pleadings devoid of relevancy or historical, legal, or equitable support. Mr. Baxter is cautioned to refrain from such frivolity in the future so as not to waste judicial resources and time.²⁸

²⁰ *Id.* at 911 (citing *Mackin v. U.S.*, 117 U.S. 348, 354 (1886)).

²¹ *Id.* (citing *Wilson*, 258 U.S. at 427).

²² *Id.* at 912.

²³ *Id.* at 911.

²⁴ See Fed.R.Crim.P. 7(a). “The most severe non-capital punishment imposed . . . is the deprivation of liberty and the subjection of the convict to supervision and control by the Attorney General and prison authorities.” *Id.* at 920. See *United States v. Driscoll*, 612 F.2d 1155 (9th Cir. 1980) (finding that a willful failure to file an income tax return was not an infamous crime because the defendant could not be sentenced to imprisonment for more than one year and confined in a penitentiary without his consent); *Ramirez*, 556 F.2d at 909 (finding that a defendant sentenced under the Federal Youth Corrections Act was subject to an “infamous punishment” because the act sentenced him to an indeterminate term but with the proviso that he would be unconditionally released within six years of a conviction date).

²⁵ *U.S. v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1254 (9th Cir. 1980) (emphasis added).

²⁶ *Id.* at 1254 n.7.

²⁷ While the Hearing Designation Order asks the Presiding Judge to determine whether Mr. Baxter violated Section 333 of the Communications Act of 1934, as amended, and Sections 97.101(d), 97.105, and 97.113(b) of the Commission’s Rules, the Presiding Judge has not been directed to determine whether punishment for these violations, in the form of monetary forfeitures or imprisonment, is warranted.

²⁸ Mr. Baxter is reminded that the Presiding Judge will hold a prehearing conference at 10:00 am on August 13, 2013, in OALJ’s courtroom at Commission headquarters to ensure that this proceeding continues moving forward. Mr. Baxter is required to participate, either in person or by telephone. If Mr. Baxter intends to participate by

RULING

12. Accordingly, **IT IS ORDERED**, for reasons discussed above, that Glenn A. Baxter's Motion to Dismiss Hearing Designation Order, filed on July 2, 2013, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Chief Administrative Law Judge

telephone, he must notify Ms. Gosse by e-mail, with copy to Mr. Randazzo, of his intention to do so no later than 12 Noon on August 12, 2013. Ms. Gosse will then give appropriate directions to Mr. Baxter.