

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

In the Matter of)
)
ARM & RAGE, LLC) MB Docket No. 22-122
)
WJBE(AM), Powell, TN) Facility ID No. 59693

ORDER

Issued: July 12, 2022

Released: July 12, 2022

1. On May 18, 2022, the FCC’s Enforcement Bureau filed a motion in the above-captioned matter, asking that licensee Arm & Rage, LLC, be directed to submit complete responses to its May 2 Request for Admissions.¹ The Bureau indicates that Arm & Rage declined to respond to a number of requests related to the circumstances of the felony for which Joseph Armstrong, sole member of Arm & Rage, was convicted. On May 23, 2022, Arm & Rage filed a response to the Enforcement Bureau’s motion to compel, arguing that because Mr. Armstrong was acquitted of charges relating to fraud and tax evasion, discovery should be restricted to exclude references to the conduct that led to those charges.² Concurrently, on May 23, Arm & Rage filed a Motion in Limine and for a protective order, asking the Presiding Judge to rule that evidence of any intent on Mr. Armstrong’s part to defraud the Internal Revenue Service or evade taxes is irrelevant to this proceeding.³ The Enforcement Bureau filed an opposition to the Arm & Rage Motion in Limine on June 6, 2022.⁴

2. Arm & Rage indicates that Mr. Armstrong, a former member of the Tennessee House of Representatives, purchased cigarette tax stamps in 2007, which he sold at a profit after the legislature voted to raise the cigarette tax. Arm & Rage submits that this action was legal but that Mr. Armstrong was charged with three felonies related to this transaction by not reporting the profit on his 2008 income tax return, namely, conspiracy to defraud the United States, attempted tax evasion, and making a false statement in a tax return. Arm & Rage indicates that he was acquitted of the former two offenses and was convicted of making a false statement on his 2008 tax return.⁵ Accordingly, Arm & Rage argues, allegations of fraud and tax evasion are irrelevant to this proceeding.⁶ Pursuant to the Commission’s policy that only adjudicated felonies will be considered in evaluating character, Arm & Rage contends that the Presiding Judge should exclude evidence or argument regarding allegations of fraud and tax

¹ Enforcement Bureau’s Motion to Compel Complete Responses to its Request for Admissions to Arm & Rage, LLC, MB Docket No. 22-122 (filed May 18, 2022) (EB Motion to Compel).

² Arm & Rage’s Response to the Enforcement Bureau’s Motion to Compel, MB Docket No. 22-122 (filed May 23, 2022) (Arm & Rage Response to EB Motion to Compel).

³ Arm & Rage’s Motion in Limine and For a Protective Order, MB Docket No. 22-122 (filed May 23, 2022) (Arm & Rage Motion in Limine).

⁴ Enforcement Bureau’s Opposition to Arm & Rage, LLC’s Motion in Limine and for a Protective Order, MB Docket No. 22-122 (filed June 6, 2022) (EB Opposition to Motion in Limine).

⁵ Arm & Rage Motion in Limine at 2-3.

⁶ *Id.* at 4-5.

evasion from discovery in this proceeding.⁷ To that end, it asks that the Presiding Judge issue a protective order prohibiting discovery as to whether Mr. Armstrong acted to avoid paying his taxes when he made a false statement on his 2008 return.⁸

3. In opposition to the Motion in Limine, the Enforcement Bureau reiterates the assertion from its May 18 motion to compel that it will limit its discovery requests to information directly relevant to the felony for which Mr. Armstrong was convicted.⁹ EB submits that Arm & Rage has acknowledged this, and argues that the requested restriction on discovery would exclude relevant evidence and argument regarding Mr. Armstrong's state of mind when he filed his 2008 tax return.¹⁰ Further, the Bureau submits that the use of the word "fraud" or "fraudulent" should not be read to infer that it intends to seek discovery or rely on evidence beyond the one felony count of which Mr. Armstrong was convicted. Rather, it argues, many of the documents from the underlying criminal action use the word "fraud" or "fraudulent" repeatedly in describing Mr. Armstrong's felony conviction.¹¹ The Bureau also contends that the objections to its Request for Admissions raised by Arm & Rage belie an assumption that the Bureau intends to relitigate the felonies of which Mr. Armstrong was acquitted. Instead, however, the Bureau posits that the admissions requested are relevant to the circumstances of the crime for which he was convicted.¹² It indicates that, "there is ample opportunity for Arm & Rage to challenge specific discovery requests it believes are improper in the future and to seek a focused exclusionary ruling at that time."¹³

4. *Arm & Rage Motion in Limine.* Arm & Rage asks the Presiding Judge to limit discovery in this proceeding by barring inquiries or allegations regarding fraud and tax evasion. The sole member of Arm & Rage, LLC, Joseph Armstrong, was convicted by a jury on August 8, 2016, of filing a false tax return in violation of 26 U.S.C. § 7206. He was acquitted by the jury of conspiracy to defraud the United States and tax evasion.¹⁴ The section of the Internal Revenue Code of which Mr. Armstrong was convicted is entitled "Fraud and False Statements." As pointed out by Arm & Rage, the Media Bureau order designating this matter for hearing refers to this title in describing Mr. Armstrong's criminal conviction, as does the Enforcement Bureau in its pleadings thus far.¹⁵ Arm & Rage is correct that the title of a statute does not take precedence over the actual elements of the crime.¹⁶ It is reasonable, however, to use that title as a shorthand way of referring to the offense. Indeed, the defense in Mr. Armstrong's criminal case did so when it indicated in its sentencing memorandum that he was convicted

⁷ Arm & Rage Motion in Limine at 5-9 (citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252 (1990) (*1990 Character Policy Statement*), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *further recon. granted in part*, 7 FCC Rcd 6564 (1992)).

⁸ Arm & Rage Motion in Limine at 9.

⁹ EB Opposition to Motion in Limine at 2.

¹⁰ *Id.* (citing Arm & Rage Motion in Limine at 10).

¹¹ *Id.* at 3-4.

¹² *Id.* at 5-6.

¹³ *Id.* at 7.

¹⁴ Arm & Rage Motion in Limine at 3; Arm & Rage Response to EB Motion to Compel at Exh. 1 (U.S. v. Joseph E. Armstrong, No. 3:15-CR-91, E.D. Tenn., United States' Sentencing Memorandum at 2).

¹⁵ See *Arm & Rage, LLC*, Hearing Designation Order, Order to Show Cause, and Notice of Opportunity for Hearing, MB Docket No. 22-122, DA 22-285 (MB Mar. 21, 2022) (*Arm & Rage HDO*); Enforcement Bureau's Request for Admissions to Arm & Rage, LLC, MB Docket No. 22-122 (filed May 2, 2022) (EB Request for Admissions).

¹⁶ Arm & Rage Motion in Limine at 7.

of “Filing a False or Fraudulent Income Tax Return.”¹⁷

5. Arm & Rage argues that in designating this matter for hearing, the Media Bureau appears to have assumed that Mr. Armstrong was convicted of fraud, and it highlights the reference in the *Arm & Rage HDO* to the Commission’s past analysis of “fraudulent representations to another governmental unit” as being relevant to a licensee’s character.¹⁸ That reference appears to be simply a recitation of past legal standards for revoking a Commission license. When the order describes Mr. Armstrong’s specific crime, it refers to “dishonesty” directed at a federal agency rather than fraud.¹⁹ In any event, the Media Bureau’s wordsmithing is irrelevant. When a licensee is convicted of any felony, it is the Commission’s usual practice to open a hearing proceeding for further consideration of that licensee’s character qualifications. To the extent that Arm & Rage believes that there is a misperception regarding the offense for which Mr. Armstrong was convicted, that can easily be rectified in a less draconian way than banning references to fraud from discovery. Arm & Rage is free to provide clarification when it sees fit throughout this proceeding. At the same time, it is expected that going forward the Enforcement Bureau will avoid using the term “fraud” in the colloquial sense when not referring to the title of the statute in question.

6. Arm & Rage also submits that because Mr. Armstrong was acquitted of tax evasion, discovery in this proceeding should “exclude evidence of, or argument based on, Mr. Armstrong’s having had an intent or purpose to avoid paying his taxes.”²⁰ Arm & Rage is correct, and the Enforcement Bureau does not dispute, that the Commission’s character qualifications policy considers only adjudicated felonies as relevant to a licensee’s character.²¹ As a result, this proceeding will not relitigate the two offenses of which Mr. Armstrong was acquitted. It is impractical, however, to limit discovery in the manner requested by Arm & Rage, as the felony of which he was convicted stems from the same activities and circumstances as the felonies of which he was acquitted. The Commission’s general rule for discovery in administrative hearings, 47 CFR § 1.311, provides that information is discoverable regardless of whether it will be deemed admissible in the hearing as long as it “appears reasonably calculated to lead to the discovery of admissible evidence.” The Presiding Judge concludes that discovery seeking full information about the facts and circumstances underlying Mr. Armstrong’s conviction is appropriate, even if it could be argued – or it was argued during the criminal trial – that such information demonstrates intent or other elements of crimes of which Mr. Armstrong was acquitted. Further, information regarding Mr. Armstrong’s intent in filing a false tax return may lead to evidence relevant to his propensity to be forthcoming when interacting with the Commission. The Presiding Judge is capable of assessing the admissibility and probative value of such evidence while keeping in mind the specific crime for which Mr. Armstrong was convicted and those of which he was acquitted.

7. *Requests for Admissions.* Both the Enforcement Bureau and Arm & Rage have served requests for admissions and, as noted above, the Enforcement Bureau has filed a motion to compel Arm & Rage to respond to its requests. Section 1.246 of the Commission’s rules, 47 CFR § 1.246, allows parties to file requests for admission as to the genuineness of documents and the truth of relevant matters of fact. Matters are deemed admitted unless the party at which the request is directed files either (1) a denial or a statement why it cannot admit or deny the matter, or (2) written objections that some or all of

¹⁷ Arm & Rage Response to EB Motion to Compel at Exh. 2 (U.S. v. Joseph E. Armstrong, No. 3:15-CR-91, E.D. Tenn., Motion for Downward Departure and/or Variance and Sentencing Memorandum of Defendant Joseph E. Armstrong at 1).

¹⁸ Arm & Rage Motion in Limine at 4 (quoting *Arm & Rage HDO* at para. 4).

¹⁹ *Arm & Rage HDO* at para. 6.

²⁰ Arm & Rage Motion in Limine at 9.

²¹ *1990 Character Policy Statement* at 3252.

the requested admissions are privileged or irrelevant or that the request is otherwise improper. Requests for admission are not part of the discovery process but instead serve as a preliminary tool used to narrow the scope of discovery by more precisely defining the issues to be litigated. It is therefore antithetical to get bogged down in admissions disputes; if a party won't admit something it can be further explored in discovery.²² Accordingly, exercising the broad authority to manage hearings afforded to her by the Commission's rules, the Presiding Judge declines to compel responses to any of the requested admissions in this case. She does, however, offer the following guidance to clarify the extent of discovery that will be permitted.

8. The admissions sought by the EB Motion to Compel fall into two categories. The first set of requests focuses on the purchase and sale of the tax stamps in question, including who paid for them and who received the proceeds when they were sold. The second set concerns financial disclosures that may have been required of Mr. Armstrong when he was a member of the Tennessee House of Representatives.²³ Arm & Rage argues that the requested admissions are irrelevant and outside the scope of the *Arm & Rage HDO*, which is limited to analysis of the one felony of which Mr. Armstrong was convicted and not the two for which he was acquitted.²⁴ Arm & Rage notes that the judge in the criminal case indicated that details of the transaction were directed at the counts of which Mr. Armstrong was acquitted and were not relevant in considering the appropriate sentence to impose.²⁵ This hearing proceeding has a completely different purpose from sentencing, however. As explained above, it is consistent with the Commission's discovery procedures to examine the totality of the circumstances of Mr. Armstrong's crime. Accordingly, discovery along the lines of the subjects addressed in the Enforcement Bureau's Requests for Admissions 25-27 and 31-33 will likely be permitted.

9. On the other hand, information regarding Mr. Armstrong's financial disclosures during his time as a state legislator does not appear sufficiently related to the felony of which he was convicted to be deemed reasonably calculated to lead to the discovery of admissible evidence. The Enforcement Bureau cites the recent decision in *Auburn Network, Inc.* for the proposition that the content of an elected representative's financial disclosures are probative of that individual's propensity to be forthcoming with the Commission.²⁶ In that case, however, the felonies being considered involved violation of state ethics laws, and the way the public official reported his income had been a significant part of the prosecution's argument in the criminal proceeding. This matter only tangentially involves Mr. Armstrong's activities as a legislator. It is difficult to see how his financial disclosures would inform his motivation for filing a false statement on his tax return. Accordingly, objections to discovery seeking information about Mr. Armstrong's financial disclosures while a member of the Tennessee House of Representatives, similar to the Enforcement Bureau's Requests for Admissions 36-41, will likely be sustained.

10. Finally, in addition to addressing the felony conviction, the *Arm & Rage HDO* directed the Presiding Judge to determine the effects, if any, of the failure of Arm & Rage to timely report Mr. Armstrong's conviction to the FCC, to upload required information to its online public inspection file,

²² See, e.g., *Nat'l Semiconductor Corp. v. Ramtron Int'l Corp.*, 265 F.Supp.2d 71, 74 (D.D.C. 2003) ("Requests to Admit are not a discovery device" but "are designed to narrow the issues for trial").

²³ The Motion to Compel seeks more complete responses to EB Requests for Admission Nos. 25-27, 31-33, 36, and 39-41, which are attached as Exhibit A thereto.

²⁴ Arm & Rage's Objections and Responses to the Enforcement Bureau's Request for Admissions, MB Docket No. 22-122 (filed May 12, 2022) at 5-9; Arm & Rage Response to EB Motion to Compel at 2-5.

²⁵ Arm & Rage Response to EB Motion to Compel at 4 (citing Sentencing Tr. 9:2-15, *United States v. Armstrong*, No. 3:15-CR-91, (E.D. Tenn. Jan. 25, 2017), available as Exh. 1 to the Arm & Rage Motion in Limine).

²⁶ EB Motion to Compel at 3 (citing *Auburn Network, Inc.*, MB Docket No. 21-20, Initial Decision, FCC 22D-01 (ALJ May 9, 2022)).

and to file timely ownership reports on its qualifications to be a Commission licensee.²⁷ Most of the admissions requested by Arm & Rage focus on these questions in that they involve the station's history of compliance with FCC rules, or ask for affirmation that the rule violations recounted in the *Arm & Rage HDO* were harmless error.²⁸ Not only do those requests seek information that may not be immediately available to the trial staff of the Enforcement Bureau, but Arm & Rage generally requests the Enforcement Bureau to stipulate to legal conclusions that can only be borne out by further discovery and argument. Objections to these types of questions will likely be sustained if raised in discovery.

11. Accordingly, **IT IS ORDERED** that Arm & Rage's Motion in Limine and for a Protective Order, filed May 23, 2022, **IS DENIED** to the extent indicated herein.

12. **IT IS FURTHER ORDERED** that the Enforcement Bureau's Motion to Compel Complete Responses to its Request for Admissions to Arm & Rage, LLC, **IS DENIED** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION



Jane Hinckley Halprin
Administrative Law Judge

²⁷ *Arm & Rage HDO* at para. 24.

²⁸ Arm & Rage's Request for Admissions to the Enforcement Bureau, MB Docket No. 22-122 (filed May 27, 2022).