

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

MM Docket No. 93-176

In re Application of

RICHARD RICHARDS File No. BRTTL-921116IG

For Renewal of License of
Low Power Television
Station K33CG,
Sierra Vista, Arizona

Appearances

Thomas Schattenfield, Esq. and Gerald P. McCartin, Esq. on behalf of Richard Richards; Charles E. Dziejcz, Esq. and Robert A. Zauner, Esq. on behalf of the Mass Media Bureau.

DECISION

Adopted: March 30, 1995; Released: April 11, 1995

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Richard L. Sippel, 9 FCC Rcd 3604 (1994) (*ID*), which denies the license renewal application of Richard Richards for a low power television station in Sierra Vista, Arizona. Also before the Board are Richard Richards' Exceptions to this *Initial Decision* and the Mass Media Bureau's Reply. The Board heard oral argument on January 20, 1995. For the reasons set forth below, we are granting Richards' exceptions and reversing the *ID*.

BACKGROUND

2. Richards was convicted of the felony of possessing with intent to distribute less than 50 kilograms of marijuana (Marijuana, I) and cultivating marijuana on federal property in violation of Title 21, United States Code, sections 841(a)(1), 841(b)(1)(D) and 841(b)(5). Bureau Exh. 3. This conviction followed his May 4, 1992 guilty plea to one count of an indictment brought in the United States District Court for the District of Arizona. Bureau Exh. 2. In his plea agreement, Richards stated:

[O]n or about July 25, 1991, defendant Richard Richards was in knowing possession of between 37 and 41 marijuana plants, some plants being grown on his property and some plants being grown on National Park Service property. Richards was the owner of these plants, he knew them to be marijuana plants and he intended to distribute the plants or the processed marijuana derived from these plants to another person or persons.

Id. at 6, quoted in *ID*, 9 FCC Rcd at 3605 ¶ 7. For first offenders like Richards, the maximum sentence for this offense is five years incarceration; there is no minimum. 21 U.S.C.S. § 841(b)(1)(D) (Law. Co-op Supp. 1994). Richards was placed on probation for five years with the following conditions: that he serve seven months under house arrest and participate in such substance abuse and mental health counseling and substance abuse testing as directed by the U.S. Probation Office. As a further condition, Richards was directed to refrain from violating any laws. Bureau Exh. 3. As part of the plea agreement, Richards also consented to a judgment in a concurrent civil forfeiture action and forfeited his 82.5 acre ranch known as the Montezuma Ranch, including his house. Bureau Exh. 2 at 2; Richards Exh. 1 at 4 ¶ 8. In September, 1992 the Court issued an order "that the Court's sentence in the above-captioned matter is not intended to affect the defendant's ability to apply for or receive federal benefits, including but not limited to the federal benefit of owning and operating television stations licensed by the Federal Communications Commission (F.C.C.)." Richards Exh. 28.¹

3. While under house arrest, on November 16, 1992, Richards applied to renew the license for station K33CG. The Commission set this application for hearing to determine whether Richards possesses the necessary qualifications to be a licensee in light of his conviction and, in light of the evidence adduced, whether grant of his renewal application would serve the public interest. The Commission assigned the burdens of proceeding and proof to Richards. *Hearing Designation Order, Richard Richards*, 8 FCC Rcd 4339 (1993) (*HDO*).

4. Richards was the only witness at the hearing. He explained in his written direct testimony:

I would like to make clear that I have never sold marijuana or any other illegal drug. I did grow some marijuana on my property and on adjacent federal property, but this was solely for personal use. Some of the marijuana plants seized in connection with my arrest were transplanted plants of a friend of mine. My friend had asked me to tend some of his plants and to return them to him when they had matured. I agreed to do this. I understand that this agreement constitutes an intent to "distribute" marijuana.

Richards Exh. 1 at 3-4 ¶ 7. On cross examination, Richards testified he had been buying and using marijuana for about twenty-five years, tr. 73, 109, and admitted that he had taken marijuana on a trip sometime before his 1991 arrest for himself and a traveling companion. Tr. 90. He testified

¹ The Court was explicit, however, that this order would not prohibit any federal agency from taking action it deemed appropriate in light of Richards' conviction. Richards Exh. 28.

he had grown marijuana in the amounts stated in his plea agreement "one time. Prior to that, the only time throughout the twenty years were isolated incidences of a plant here in this year, two plants in this year, a plant here, a plant there over the years. The majority of time, I purchased marijuana." Tr. 76. He said he first grew marijuana on the National Park Service land adjacent to his ranch during the summer of 1991 "so I wouldn't subject the property to be lost in case anything ever happened and I grew it in that volume to supply my needs because the price of marijuana had more than doubled and tripled from my older purchases in prior years." Tr. 154.² He explained that, as a heavy user, he had developed a tolerance to marijuana, so potency was important to him. Richards Exh. 30. When the plants would have matured, he had planned to discard the male plants to prevent pollination and to remove many of the leaves of the female plants. *Id.*; Joint Exh. 1. In his view, this would maximize the potency of the female plants. Richards Exh. 30. He intended to give his friend ten of the mature female plants and keep the rest, about nine, for himself. *Id.* From his testimony that he smoked about four pounds a year (tr. 78) and the Joint Stipulation that one plant would produce about 5/8 of a pound of usable marijuana composed of about equal amounts of buds and leaves, it appears that these plants would have supplied him for well over a year.

5. At the time of his arrest Richards grew vegetables on the Montezuma Ranch, where he was then living, and on three rented parcels of land. *Id.*, 9 FCC Rcd at 3604 ¶ 5; tr. 146-47. Richards testified on cross-examination that, when the police searched his ranch at the time of his arrest, he had approximately 18 scales, including a scale for measuring very light weight items exactly, and a heat sealer for sealing items in plastic. Tr. 46. He had a pager in his car that belonged to his cousin, Terrence Clemmons, from whom he had bought marijuana over the years and an additional pager belonging to the salesman of a pager company. Tr. 47, 75. Also at the ranch were a mobile telephone belonging to Clemmons, to which Richards had access, and another belonging to a girlfriend residing at the ranch. Tr. 48-49. Marijuana debris from what Richards described as fallen leaves from the one-time drying of one plant were found in a half bathroom in a part of the house where renovations had not been completed. This was closed off pursuant to a court order issued during his divorce proceeding to protect his children from accidents when they visited. Tr. 52-53.

6. In addition to admitting his marijuana use prior to his conviction, Richards says he has been rehabilitated: "I have not used [marijuana] since December 31, 1991. I have never used any other illegal drug." Richards Exh. 1 at 4 ¶ 10. On cross-examination, he explained his last marijuana use was on New Years Eve, some five months after he was arrested and charged by the County, because he had

found out they were filing on me federally They hadn't done it yet, but I mean, the word was they're dropping the case in the county and they're filing on me on the Federal level and then I was told I would be under urine analysis and New Year's Eve of that

day was the last day of -- my blowout day of consumption of all I could ingest for that New Year's Eve.

Tr. 112. At his arraignment, the judge "told me not to use marijuana and to return at all court dates or otherwise a warrant would be issued for my arrest." Tr. 106. All subsequent urinalysis tests other than two reflecting the New Year's Eve blowout have been negative. *Id.*, 9 FCC Rcd at 3606 ¶ 14; Richards Exh. 27. Richards submitted to several tests before his conviction and nine random tests thereafter. According to Richards' Probation Officer, the results of nine randomly submitted urinalysis samples "have all been negative (meaning no evidence of drug use by Mr. Ricahrds [sic]). Currently, Mr. Richards appears to be complying with his conditions of probation and has posed no significant supervision problems to date." Letter from DiMaria to McCartin of 11/26/93, Richards Exh. 27.

7. To support his claimed rehabilitation, he also explained that he "became born again" in the religious sense in the mid-1980's.

Since that time, as my faith has grown and deepened, I have come to realize that my use of marijuana, while strictly for personal purposes, was wrong. I had justified marijuana use by the fact that it did not harm anyone else or myself. . . . I regret my marijuana use, but I am now focused on the present and future, not on the past.

Richards Exh. 1 at 4-5 ¶ 11. According to members of the community who know him through religious, broadcasting or other activities and who share his interest in religious broadcasting, Richards has acknowledged his past conduct was wrong. "He knows that he did wrong and has so stated. He is doing everything in his power to rectify that." Statement of Dwight Collins, Richards Exh. 4 at 1. "The point is that he has admitted to himself and others that what was done was wrong and is willing to take his medicine." Statement of Claude R. Fowler, Richards Exh. 7 at 2. "Everyone has hidden secrets that he doesn't share. However, Mr. Richards has been very truthful and honest since I first met him. He never tried to cover up his past problems with marijuana and how he had convinced himself it was alright to use it. He admits that being on the drug had an effect on his decisions. He is off the drug and is one of the hardest working, almost driven, people I have ever met." Statement of James L. Hawk, Jr., Richards Exh. 8 at 2. "I appreciated the fact that Mr. Richards didn't lead me to believe he was perfect when he could have said nothing and I would have never known anything about him." Statement of Evelyn W. Love, Richards Exh. 16 at 2. "The good part is that Mr. Richards confesses his past and is working hard doing right in the present." Statement of James L. Mitchell, Richards Exh. 17 at 2. "We are convinced he regrets his past actions and has no intention to repeat them." Statement of Earl W. Shannon, Richards Exh. 19 at 1. "He uses himself as an example and the mistakes he has made in his life -- marijuana plants -- as to how the Lord and the religious television network has helped him grow." Statement of Greg D. Rowles, Richards

² Richards understood that his property would be jeopardized if marijuana were found growing there. Tr. 77, 155.

Exh. 23 at at 2. "He [Richards] believed that marijuana had a purpose in the natural scheme and he used it accordingly. He told me that he has not used marijuana for one and one-half years and that he has come to the understanding that nothing created by God is inherently evil or wrong and that any act that violates the law is always wrong. . . . Richard has not always been honest about everything, as honesty relates to marijuana and the law; however, he has always been honest in his dealings with me and others in the community and church. Richard has repented of his transgression of the law and has allowed God to use the ordeal of being arrested and losing his ranch to increase his zeal to proclaim the love, mercy and forgiveness of God to his fellow man." Statement of Lawrence H. Wicke, Richards Exh. 25 at 1-2.

8. Richards submitted a total of twenty-six statements, including those cited above, given under penalty of perjury from persons in the community who attest to his good character.

In its cumulative effect, these unrebutted statements establish that even after the conviction, Richards has a reputation for truthfulness and honesty among the listeners of Station K33CG. They also show that Richards has a religious orientation which is reflected in the station's programming. Those religious interests are also shared by the persons submitting the testimonials.

ID, 9 FCC Rcd at 3605 ¶ 11. *See, e.g.*, Statements of Leona Erber, Richards Exh. 6 at 1 (Richards "has a reputation for honesty in the community"); Curtis Quick, Richards Exh. 18 at 1-2 (Richards "is well known in this area for his honesty and integrity").

9. Richards and the Bureau stipulated that there is no record at the Commission of any complaints or citations for rule violations involving the operation of station K33CG, and the *ID* so found. Tr. 177-78; 9 FCC Rcd at 3605-06 ¶ ¶ 10, 12. The station retransmits the programming of the Trinity Broadcasting Network, a religious network with affiliates throughout the United States. *Id.* at 3605 ¶ 10. There are no employees.

INITIAL DECISION

10. The *ID* concluded that Richards had not met his burden of proof and denied Richards' renewal application for three reasons: (1) Richards' uncontested felony conviction, which was treated as "multiple felony convictions," 9 FCC Rcd at 3604 ¶ 3, 3610 ¶ 30; (2) "egregious conduct" related to the drug conviction, *id.* at 3608 ¶ 25; and (3) the Commission's grave concern about drug trafficking. *Id.* According to the *ID*, Richards' conduct was egregious because he misused federal land for his criminal enterprise; he was himself a heavy marijuana user; and he dried leaves in his home where children visited and he had boarded off a room. *Id.* at 3608 ¶ 24. Also according to the *ID*, "The evidence of record establishes that Richards was engaged in a systematic criminal enterprise in the growing and harvesting of marijuana on federal property" and was con-

victed on strong evidence of trafficking, including possession of the "tools of the trade." *Id.* at 3609 ¶ 26 (footnote omitted). Indeed, the *ID* said that, although "[t]he evidence of record would not support a finding of a distribution of marijuana beyond the admitted distributions of marijuana to a friend and to the traveling companion," *id.* at 3606 ¶ 16, "circumstantial evidence in the aggregate support the equally plausible inference that Richards, his friend and his companion were not the only users, or intended users, of the marijuana that was grown by Richards." *Id.* at 3607 ¶ 17. "For example," the *ID* reads in the footnote to this point, "Richards has denied that there were any sales of marijuana to his cousin and there was no direct proof of any such sales. However, there was ample opportunity for Richards to have also supplied his cousin with marijuana that was grown on the ranch. And Richards did not produce his cousin as a corroborating witness." *Id.* n.9 (record citations omitted).

11. The *ID* gave minimal weight to Richards' mitigation showing regarding station operations. *Id.* at 3606 n.5. It discounted Richards' rehabilitation showing about his discontinued marijuana use, never having used other illegal drugs, and stronger religious beliefs. Although "[t]here is no evidence to rebut Richards' assertion that he has not used marijuana since December 31, 1991, or that Richards has ever used any illegal substance other than marijuana," *id.* at 3606 ¶ 14, the *ID* found this unpersuasive in light of Richards' past heavy use of marijuana and his failure to give it up, even after his arrest, until forced to do so by the threat of imprisonment. *Id.* The *ID* faulted Richards for failing to provide probative evidence from a drug counselor on the status of his rehabilitation. *Id.* It also discounted Richards' character evidence because the statements Richards submitted came from listeners who share Richards' religious beliefs and did not establish his reputation for truthfulness and honesty in the general community. *Id.* at 3605 ¶ 11 and n.3.

12. The *ID* also found that Richards lacked credibility in his testimony. "Richards has a clear motive to attempt to fabricate business needs or to offer seemingly innocent reasons for otherwise incriminating evidence that was found at the scene of the crime" in order "to put [his] drug trafficking conviction in the most favorable light." *Id.* at 3607 ¶ 18. During cross-examination Richards was asked the purpose of one of his scales, the triple beam scale. He explained that it is "designed to, as close as possible, measure the weights of something very light-weight or very exactly." Tr. 46. He later explained that the scale is to establish accurate weights for the packaging into which light weight items such as garlic might be placed. Tr. 80. He also answered, "That's right," when asked whether he was in the business of packaging small packages of garlic and explained he packaged many items such as herbs for personal use "so that the bugs didn't get into it" or for sale. Tr. 80-81. The *ID* found that, while marijuana was measured in gram weights and Richards was a heavy user, there were no business records or other corroboration for Richards' explanation of a legitimate business purpose requiring gram measurements. 9 FCC Rcd at 3607 ¶ 20. "Finally, the record does not establish that the gram scale was used exclusively for the verifying of garlic shipments

³ The *ID* found, "Richards had control of more than thirty seven [sic] marijuana plants. Also considered is the evidence of the scales that are designed to measure small amounts, the

marijuana debris, the mobile telephones, the pagers, the heat sealers and the admission that other plants had been grown by Richards." *ID* at 3606-07 ¶ 17.

and was never used for the weighing of marijuana in connection with a purchase or sale. Therefore, there is no reasonable basis for accepting the truth of Richards' testimony that the gram scale was used solely for innocent purposes," *id.* (emphasis added), a circumstance which might have been exculpatory.

13. The *ID* found that "Richards also lacked credibility in his testimony about a ledger that was under his control and that was seized at the time of his arrest." *Id.* at 3607 ¶ 21. According to the *ID*, Richards first said he was not aware of any ledger or record showing sales of marijuana but, when shown Bureau Exh. 4, testified he had seen it when his criminal lawyer showed it to him around the time of his arrest. Richards testified he had never before been asked about the handwriting on the document and was not sure whether it was his:

I mean, I had this question in the beginning and I would -- I don't -- for the record, I don't want to say that it's not mine, but I don't want to be too quick to say that it was mine because I'm not sure.

Id. at 3607 ¶ 21, quoting from tr. 58. He then testified he was more than fifty percent sure the entries were in his handwriting (tr. 71) and that they showed what he had paid his cousin for marijuana. Tr. 75. With respect to Bureau Exh. 5, a supplement to Bureau Exh. 4, the *ID* found Richards "flippantly" said to assume the handwriting was his. 9 FCC Rcd at 3608 ¶ 21. The *ID* also found, "Richards insisted that he only purchased marijuana and that he never sold marijuana." *Id.* Based on Richards' testimony appearing between tr. 54 and 82, the *ID* said:

It was a patent disregard of his duty to be forthright as a witness for Richards to hedge the identification of his handwriting. Such circumventing of the truth in this hearing is empirical evidence that supports the finding of future unreliability that is inferred from the criminal convictions. Thus, we see that Richards' future communications with the Commission cannot be trusted.

Id. at ¶ 22.

14. The *ID* also found evidence in the record that tended to negate mitigation. One matter concerns Richards' use of federal land for growing marijuana to avoid forfeiture of his own land if he were caught. This was characterized as "a propensity to deal dishonestly with government property for his own advantage." *Id.* at 3607 ¶ 19. The other concerns what the *ID* treated as "Richards' uncorroborated testimony" about the origin and use of about one hundred marijuana plants Richards had disposed of shortly before his arrest. *Id.* Richards testified that he had worked with the U.S. Drug Enforcement Administration (DEA) around 1988-89 in an effort to apprehend Mexican drug smugglers. The smugglers were apprehended in an operation that took just a few days, and twenty-some marijuana bales left on Richards' land were confiscated. In 1991 Richards found plants five to twelve inches high growing in the area where the bales had been. He speculated that seeds had dropped from the plants and lain dormant until he began farming newly-cleared land close to the area and water from his sprinklers caused them to sprout. Tr. 155-56. Richards said he found the plants about the first of July and dug them out on the fourth because he wasn't sure of the quality and

didn't want the risk. Tr. 155-57, 160, 162, 164. After giving "[n]o credence . . . to this imaginative, uncorroborated and self-serving account," 9 FCC Rcd at 3606 n.7, the *ID* further found that Richards' account of this incident adversely affected his credibility because, if Richards had worked with the DEA, he did so at a time when he was heavily using marijuana and growing it on federal land and there was no record evidence he had disclosed his activities to the DEA. "Richards has thus shown a capacity to grow marijuana on federal property and to use marijuana heavily while he is engaged in a government related enterprise or activity." *Id.* at 3607 ¶ 19. From these incidents, the *ID* concluded, "This is substantial evidence of a negative trait for truthfulness and reliability." *Id.*

15. From all the facts, the *ID* concluded:

But there is not substantial evidence in the record showing that Richards will not return to using marijuana while he holds a Commission license or that he will be a truthful and reliable licensee. His felonious activities with respect to using federal land to provide a source for marijuana, his continued use of marijuana after arrest, his failures to disclose to the DEA, a federal agency, his incredible uncorroborated testimony, and his adamant refusal to identify his own handwriting on Bureau exhibits outweigh the character testimony and reinforce the adverse inferences that flow from Richards' felony conviction.

Id. at 3610 ¶ 28. It found no mitigation under the evaluation factors set forth in the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1227-28 (1985) (*Character Policy Statement*) (subsequent history omitted). The *ID* closed by saying that Richards'

multiple felony convictions while a Commission licensee coupled with his demonstrated propensity to use federal property in a criminal enterprise . . . demonstrate a propensity for untruthfulness and dishonesty in dealing with federal property. That conclusion is further supported by Richards' continual use of marijuana while a Commission licensee for six months after his arrest and the incredible, uncorroborated and uncooperative testimony in this case. . . . [I]t is concluded that it would not be in the public interest for Richards to be trusted further with a broadcasting license.

9 FCC Rcd at 3610 ¶ 30 (citation omitted).

EXCEPTIONS

16. Richards takes strong exception to the *ID* on both factual and legal grounds, documenting several factual errors in the *ID* and challenging its legal analysis. He takes particular exception to the speculation that he was involved in a more serious dereliction than that shown in the record and that for which he was convicted and sentenced by the United States District Court. Richards also excepts to the emphasis placed on his marijuana use, for which he was not convicted because this, too, was before the court and is subsumed by the judge's orders.

17. Richards complains about the treatment of his mitigation and rehabilitation evidence, arguing that the opinions of his character witnesses were inappropriately

devalued simply because they share a religious belief with him. He emphasizes that he is not relying on religious belief to enhance his credibility but on "the opinions of members of the community who know him and have dealt with him, who also happen to be religious people." Brief at 10. He calls "outrageous" the finding that there is no evidence of his substance abuse cure when the record contains the statement of his probation officer showing that random drug tests have been negative and that Richards appears to be complying with his conditions of probation. Brief at 10-11.

18. Richards takes strong exception to the characterization of his explanation about the 100 destroyed plants as "imaginative, uncorroborated and self-serving" and to the adverse credibility findings flowing therefrom. He says that the Bureau actively investigated this case and confirmed to Richards' counsel, if not clearly to the presiding officer, that Richards did work for the DEA, which corroborates his explanation about how the plants came to grow on his land. Brief at 11 n.15.

19. Richards also criticizes the treatment of his testimony about what appeared to be two ledger sheets dating from circa 1977-80, Bureau Exhs 4, 5, which been found among Richards' papers at the ranch. At oral argument, counsel for Richards argued that, because of their age, the ledgers had nothing to do with the offense for which Richards was convicted and should not have been introduced into evidence. Tr. 259. In exceptions, Richards complains that too much attention was directed to Richards' uncertainty about whether the handwriting was his and not enough attention was given to his effort to reconstruct what the ledgers represented, which Richards characterizes as "forthcoming." Brief at 15. He also faults the adverse credibility findings based on these ledgers, including the implication that these ledgers impeach his testimony about being a buyer, not a seller, and the speculation that there was ample opportunity for Richards to supply his supplier with marijuana.

20. According to Richards, his conviction, standing alone, does not warrant denial of his renewal application under the Commission's character policy, including its policy about drugs. Contrasting his circumstances to the applicant's in *Williamsburg County Broadcasting Corp.*, 5 FCC Rcd 3034 (1990), *license revoked in South Carolina Radio Fellowship*, 6 FCC Rcd 4823 (1991), he argues that his conduct does not involve the "'systematic devotion to a criminal enterprise' or reflect a 'callous disregard for the welfare of fellow citizens' . . . [or] amount to 'an egregious crime against society'" found there. Brief at 18. From Richards' point of view, only in the most technical sense does his conduct, growing a friend's plants with intent to return them for no consideration, constitute an agreement to distribute marijuana. Possession of the small number of marijuana plants for which he was convicted is treated relatively leniently under the statute to reflect the legislative judgment that, "at the 50-plant level the defendant was likely operating as a trafficker in illegal drugs." *U.S. v. Holmes*, 961 F.2d 599, 602 (6th Cir.), *cert. denied*, 121 L. ed. 2d 168, 113 S. Ct. 232 (1992), and his own lenient sentence reflects the *de minimis* nature of his crime. "If he were the danger to society targeted by the Commission's drug policy, he would have served significant time. Moreover, the additional weapon in the district court's arsenal -- recommendation of deprivation of federal benefits -- was not invoked against Richards." Brief at 20. "[*South Carolina Radio Fellowship* presents a classic case of preying on

fellow citizens through drug trafficking, the specific evil targeted by the *Public Notice*. Richards' case does not." Brief at 22.

21. Richards also argues that the record contains ample evidence of mitigation and rehabilitation:

Richards has not been involved in any wrongdoing since December 31, 1991. His low power television station has not been cited for any FCC violations. (Tr. 177-78). Twenty-six members of the Sierra Vista community, all of whom had knowledge of his marijuana offense, unequivocally testified as to Richards' good character and outstanding reputation in the Sierra Vista community for truthfulness and honesty.

Brief at 22-23. In addition, "As a result of his conviction, Richards has lost his home and the ranch on which he grew produce to make a living. He has been punished enough. . . . Given the presence of these mitigating factors, the fact that Richards regrets his use of marijuana and has broken the habit, and the nature of the misconduct, the renewal application must be granted." Brief at 23.

22. The Bureau disagrees with Richards' analysis. Although agreeing at oral argument that "many of the things that were in the initial decision were probably not necessary to be in the initial decision," tr. 269, the Bureau does not see these as affecting the outcome. The case is straightforward: "Richards' conviction, regardless of the number of plants involved or the number of persons to whom he intended to distribute his illegal drugs, standing alone, warrants his disqualification under this [drug policy] *Public Notice*." Reply Brief at 6. As part of his plea agreement, Richards agreed he owned the plants, knew them to be marijuana, and intended to distribute the plants or the processed marijuana from them to another. This is trafficking, and, while trying to minimize his offense, Richards has never denied trafficking in marijuana. Thus, the Bureau sees no distinction between the facts in *Williamsburg* or *Radio Fellowship* and the instant case.

23. In addition, the Bureau disagrees that the record contains ample evidence of mitigation and rehabilitation. Pointing to the relevant factors from the *Character Policy Statement*, the willfulness, frequency, currentness, and seriousness of the misconduct, the Bureau argues:

Here there can be no dispute. Richards willfully cultivated marijuana with the intent to distribute it and was, himself, a heavy user of marijuana Every time Richards "lit-up" he knowingly violated the law. Furthermore, Richards' violations are current. He was arrested on July 25, 1991 and convicted in July 1992. Finally, it is clear that the Commission considers "drug trafficking" by its licenses to be a serious matter. Thus, on every element that the Commission has said it will consider in evaluating the likelihood of future misconduct, Richards' conduct is wanting.

Reply Brief at 7-8. The Bureau also disagrees that Richards' claim to rehabilitation has merit.

While it is true that he has not used drugs since [December 31, 1991], the motivation for his forbearance may be other than his rehabilitation. . . . [T]he

evidence here is that Richards did not give up his use of marijuana until compelled to do so under the threat of going to jail.

Id. at 8. Thus, it recommends that Richards' renewal application be denied.

DISCUSSION

24. The ultimate issue before the Board is whether, in light of his 1992 conviction for possessing marijuana with the intent to distribute it, Richard Richards has the requisite character qualifications to be a licensee. See 47 U.S.C. § 308(b). We find that he does on the basis of the facts of this case.

25. The Commission in its *Character Policy Statement* has made clear that our purpose is not to pass moral judgment on applicants but, instead, to determine whether the public interest will be served by granting the application before us. This is the standard of the Communications Act. See 47 U.S.C. § 309(a). Because the Commission's rules and policies give flesh to the public interest standard, the Commission has generally narrowed its interest in an applicant's character to evaluating "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [Commission] rules and policies" if granted a license. *Character Policy Statement*, 102 FCC 2d at 1183. Traits that are predictive of an applicant's truthfulness and reliability are ordinarily the focus of inquiry. *Id.* at 1189, 1190-91; see *id.* at 1196 n.40, 1197 n.42. Felony convictions are relevant, for any felony conviction reflects on an applicant's propensity to obey the law, a trait predictive of reliability as a licensee. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3252 ¶ 4 (1990) (*Modified Character Policy Statement*). Convictions for offenses involving false statement, dishonesty or fraudulent conduct additionally reflect on an applicant's propensity for truthfulness. See *Character Policy Statement*, 102 FCC 2d at 1196-97 & n.40 (analogizing the FCC's concern with truthfulness to the concern with witness credibility in Rule 609 of the Federal Rules of Evidence).

26. The Commission has also posited that "nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation . . . might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee . . ." *Id.* at 1205 n.60. Drug trafficking may fall into this category. *Radio Fellowship*, 6 FCC Rcd at 4823 ¶ 5; see Public Notice, Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking, 4 FCC Rcd 7533, 7533 & n.1 (1989) (drug trafficking is "a matter of the gravest concern"). The Commission has explained:

Felonious drug trafficking, which involves systematic devotion to a criminal enterprise, . . . is within the category of egregious' non-FCC offenses entailing such callous disregard for the welfare of fellow citi-

zens as to place at issue the perpetrator's qualifications to be or remain a broadcaster. A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of the vast and important discretion that this agency entrusts to licensed broadcasters.

Williamsburg County Broadcasting, 5 FCC Rcd at 3035 § 14 (footnote omitted); see *HDO*, 8 FCC Rcd at 4339 ¶ 3. Thus, where the conduct is egregious, the Commission may find a lack of character without specifically finding a nexus between the felony conviction and the applicant's truthfulness and reliability. *Williamsburg* at 3037 n.4.⁴

27. Whether or not a felonious drug conviction reflects egregious misconduct, the Commission will entertain and weigh a significant showing of mitigating circumstances or rehabilitation. See generally *Radio Fellowship*, 6 FCC Rcd at 4824 ¶ 6; cf. *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642, 644 (1990). The relevant factors include the willfulness, frequency and currency of the misconduct; the seriousness of the misconduct; the nature of participation of managers and owners; the efforts made to remedy the wrong; the applicant's record of compliance with the Commission's rules and policies; and rehabilitation. *Modified Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5; *Character Policy Statement*, 102 FCC 2d at 1227-28; see Public Notice, 4 FCC Rcd at 7533 4th ¶ and n.1 (extenuating and mitigating circumstances are relevant; *Policy Statement* factors cited). Factors relevant to an applicant's rehabilitation include whether the applicant has been involved in significant wrongdoing since the alleged misconduct occurred; the elapsed time since the misconduct; the applicant's reputation for good character in the community; and meaningful measures taken by the applicant to prevent the future occurrence of misconduct. *Modified Character Policy Statement*, 5 FCC Rcd at 3254 n.4. Deterrence of future misconduct is also a consideration. *Character Policy Statement* at 1228 ¶ 103; see *KQED, Inc.*, 5 FCC Rcd 1784, 1785 ¶ 7 (1990) (loss of station will deter recurrence of broadcast-related misconduct); *recon. denied*, 6 FCC Rcd 625, 626 ¶ ¶ 9-10 (1991) (same); *United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1585 ¶ 24 (1985) (deterrence from massive loss calculated to impress on licensee the seriousness of misconduct should be weighed); *WIOO, Inc.*, 95 FCC 2d 974, 984 (1983) (lost opportunity to acquire uncontested FM was significant deterrent); *Faulkner Radio, Inc.*, 88 FCC 2d 612, 618 (1981) (nonrenewal had substantial deterrent impact).

28. Permeating the *ID* in this case is the view that Richards' misconduct transcended the single criminal count to which he pleaded and was, instead, "a systematic criminal enterprise in the growing and harvesting of marijuana on federal property" that involved distribution beyond growing some marijuana plants for a friend, for which he was convicted, and sharing marijuana with a traveling companion, which he admitted.⁵ Richards complains that the *ID* made overly broad findings by considering details about his conviction that were sub-

⁴ Repeated, willful adjudicated violations of law "amounting to a flagrant disregard for complying with the law" also might indicate that an applicant lacks the requisite traits. *Character*

Policy Statement, 102 FCC 2d at 1205 n.61. Although much is made of Richards' long-term use of marijuana, the Bureau has not argued and the *ID* does not rely on footnote 61.

⁵ 21 U.S.C. § 841(b)(4) (Law. Co-op Supp. 1994) provides that

sumed by the sentencing order in the District Court and speculating about the breadth of Richards' activities beyond what is shown on the record. Richards would limit inquiry to the sentencing order, which prescribed less than the maximum possible sentence, and the judge's order stating that the sentence imposed was not intended to affect Richards' ability to receive federal benefits, including a Commission license. Bureau Exh. 3; Richards Exh. 28. In Richards' view these orders reflect the judge's evaluation of the seriousness of Richards' conduct, which the Commission should not second-guess. We agree that we are not here to relitigate Richards' guilt or innocence or redetermine his sentence. Nonetheless, just as the sentencing court can consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction"⁶ if supported by reliable and specific information,⁷ this Commission can consider the context of Richards' misconduct in making the evaluation under the public interest standard. See generally *Radio Fellowship*, 6 FCC Rcd at 4823 ¶ 2 (support found from Initial Decision findings re applicant's criminal activities); see also Public Notice, 4 FCC Rcd at 7533 (extenuating circumstances relevant); *Modified Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5 (mitigation factors); *Character Policy Statement*, 102 FCC 2d at 1227-28 (same). Conduct of a similar nature demonstrating a pattern of continuous activity, as was the case in *Radio Fellowship*, is relevant to the Commission's evaluation of Richards' character, if findings are supported by a preponderance of the record evidence.

29. In this case, however, the *ID* finds a pattern of conduct on the basis only of speculation or possibility. This is not sufficient. Richards was convicted of a single count of possessing marijuana with intent to distribute. There were no multiple felony convictions, contrary to the *ID*, 9 FCC Rcd at 3604 ¶ 3, 3610 ¶ 30, and no charges of additional drug-related misconduct.⁸ Without any nexus in time to Richards' conviction or any record evidence whatsoever, the *ID* hypothesizes that Richards could have supplied his cousin, his own source, with marijuana he grew. The *ID* also relies on Richards' "admission that other plants had been grown." 9 FCC Rcd at 3606-07 ¶ 17. If this

is based on Richards' admission that he occasionally grew a plant or two for his personal use, it does not show a pattern of trafficking, which involves distributing a controlled substance to others.⁹ If this is based on Richards' acknowledgment that he destroyed the 100 or so plants he found growing on his property, it is not based on sufficient evidence that Richards was responsible for the plants or even knew about them until a few days before he destroyed them. The *ID* characterizes Richards' testimony about the plants as "imaginative, uncorroborated and self-serving" and gives it "[n]o credence." 9 FCC Rcd at 3606 n.7; see *id.* at 3607 ¶ 19 ("uncorroborated testimony"), 3609-10 ¶ ¶ 28, 30 ("incredible uncorroborated" testimony). The Commission should not accept representations that are "at best highly implausible and at worst utterly ridiculous." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). But, according to Richards, Bureau counsel was in contact with officials in Arizona and confirmed to Richards' counsel that Richards did, indeed, work for the Drug Enforcement Administration. Brief at 11 n.15.¹⁰ The Bureau agreed in its Reply Brief at 9 that it had confirmed Richards' DEA involvement with DEA officials but apparently made this point below only through its hearing strategy, namely, that it did not seek to impeach Richards' testimony about his DEA cooperation and the origin of the 100 plants.¹¹ This constructive stipulation that Richards' DEA involvement is unchallenged removes his explanation from the realm of the imaginative and uncorroborated. Furthermore, Richards destroyed the plants before being surprised by the police during the search and seizure which led to his conviction. We find merit to Richards' argument that his destruction of the immature plants was not consistent with knowing involvement in a systematic criminal enterprise involving growing marijuana on federal land or anywhere else. From this record, the fact that Richards found these plants on his land does not establish a pattern of felonious drug-related misconduct on his part.¹²

30. The *ID* also relies on what it characterizes as circumstantial evidence from the "tools of the trade" as further support for the view that Richards was engaged in a systematic criminal enterprise. However, Richards was a

anyone who distributes a small amount of marijuana for no remuneration shall be treated as provided by the statutory provisions governing simple possession, a misdemeanor, not under the felony provisions of § 841.

⁶ 18 U.S.C.A. U.S.S.G. § 1B1.3(a)(2) (West Supp. 1995). See *United States v. Lawrence*, 915 F.2d 402, 406-408 (8th Cir. 1990); *United States v. Ykema*, 887 F.2d 697, 700 (6th Cir. 1989), cert. denied, 493 U.S. 1062 (1990). See generally 18 U.S.C.A. U.S.S.G. § 1B1.2(a) and comment. (n.1) (West Supp. 1995), which provide that, where a plea agreement contains a stipulation that specifically establishes a more serious crime than the offense of conviction, the sentence is to be based on the guidelines for the more serious offense up to the maximum prescribed by statute for the offense of conviction. The court may also "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." 18 U.S.C.A. U.S.S.G. § 1B1.4 (West Supp. 1995).

⁷ See generally *United States v. Holmes*, 961 F.2d 599, 603 (6th Cir. 1992), cert. denied, -- U.S. --, 113 S. Ct. 232, 121 L. Ed. 2d 168 (1992); *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir. 1991); *United States v. Phillippi*, 911 F.2d 149, 151 (8th Cir. 1990), cert. denied, 498 U.S. 1036 (1991).

⁸ One count dealt with using his ranch in connection with the

count to which he pleaded, pursuant to which the Government proposed to seize his property. This count was dismissed, but the ranch was forfeited pursuant to an agreement in the plea.

⁹ The misdemeanor nature of possession without an intent to distribute and the lack of any adjudication of the misconduct would preclude consideration of this as a separate and unrelated offense under the *Character Policy Statement*. Further, sharing a small amount of marijuana for no remuneration is not a felony. See note 5, *supra*.

¹⁰ Richards also argues that Bureau counsel was in touch with the U.S. Attorney in Arizona but presented no facts contradicting the facts as presented by Richards. Brief at 13 n. 17.

¹¹ At oral argument, counsel agreed with the Board Chairman's suggestion that this matter could have been better handled by a stipulation so as to avoid any confusion on the ALJ's part. Tr. 266-67.

¹² Had these plants been known to the judge at sentencing and considered relevant, Richards would have been subject to mandatory imprisonment under the Federal Sentencing Guidelines. See 18 U.S.C.A. U.S.S.G. Ch.1, Pt.A, intro. comment. (n.4 (d)) (West Supp. 1995); 18 U.S.C.A. U.S.S.G. § 2D1.1(c)(14) and comment. (n.18) (West Supp. 1995); see generally *United States v. Lawrence*, 915 F.2d at 408. Richards argues that all of this information was before the judge at sentencing. Brief at 12.

farmer who grew and sold herbs as well as weightier crops, and whose testimony that these "tools" had farming-related uses is undisputed, although, as the *ID* also notes, uncorroborated by business records. In an urban environment, tools like these might create a stronger presumption of drug trafficking when found in the vicinity of a controlled substance,¹³ but where these same tools have a legitimate use, more than their mere presence on the ranch is required to support an adverse presumption that Richards' felonious misconduct is more serious than that for which he was convicted. This record does not show any scales or packaging equipment in the boarded off room where the debris from a single marijuana plant had been found, and no marijuana plants or debris were said to have been found near the location of the scales or packaging equipment.

31. Other than the single incident for which Richards was convicted, there is no reliable evidence that Richards knowingly grew more than a plant or two for his personal use and, perhaps, shared it for no remuneration. This would not be treated as a pattern of felonious misconduct under the criminal statute and is not so egregious as to create the very strong presumption that Richards cannot be trusted to be truthful or reliable as a licensee under footnote 60 to the *Character Policy Statement*. Although the *ID* characterized Richards' trespass on federal land to grow the plants for which he was convicted, his personal heavy consumption of marijuana, and his boarded-up room where the debris of a marijuana plant was found as acts of egregious misconduct, 9 FCC Rcd at 3608 ¶ 24, we must disagree. There is no record contradiction and no impeachment to Richards' testimony that the marijuana debris was from a single plant, and the room where it was found was boarded up pursuant to a court order to protect his visiting children from construction hazards. The use of federal land does not change Richards' basic offense, that of possessing marijuana with intent to distribute, although it could have subjected him to a greater fine than otherwise prescribed for the offense. See 21 U.S.C.S. § 841(b)(5) (Law. Co-op Supp. 1994). Richards' personal marijuana use, regardless of the length of time and amount consumed, is not treated as a felony unless there has been a prior conviction, see 21 U.S.C.S. § 844 (Law. Co-op Supp. 1994), so cannot be considered part of a pattern of felonious drug misconduct here. Furthermore, because the amount of marijuana involved in the offense for which Richards was convicted and sentenced was less than fifty plants, Richards was not presumed to be a major trafficker under 21 U.S.C.S. § 841

(Law. Co-op Supp. 1994). See *United States v. Holmes*, 961 F.2d 599, 602 (6th Cir. 1992); *United States v. Osburn*, 955 F.2d 1500, 1508 (11th Cir. 1992) (this cut-off point in sentencing reflects Congress' belief "that growing a large number of plants (capable of large scale distribution) is an exponentially more severe offense than growing a small number), *cert. denied*, -- U.S. --, 113 S. Ct. 223, 121 L. Ed. 2d 160, and *cert. denied*, -- U.S. --, 113 S. Ct. 290, 121 L. Ed. 2d 215 (1992); *United States v. Webb*, 945 F.2d 967, 969 (7th Cir. 1991), *cert. denied*, 502 U.S. 1116 (1992). Simply stated, this record does not establish a "systematic devotion to a criminal enterprise" and "callous disregard for the welfare of fellow citizens," the bases for finding drug-related misconduct to be egregious in *Williamsburg*, 5 FCC Rcd at 3035 ¶ 14, and *Radio Fellowship*, 6 FCC Rcd at 4823-24 ¶ 6.¹⁴

32. However, we disagree with Richards that his conviction should be taken lightly, for "any felony conviction is relevant to character qualifications." *Radio Fellowship*, 6 FCC Rcd at 4824 ¶ 6, citing *Modified Character Policy Statement*, 5 FCC Rcd 3252 ¶ 4. Richards' violation of the law reflects adversely on his reliability for he knowingly and willfully violated 21 U.S.C.S. § 841 (Law. Co-op Supp. 1994), and he did so when he was the licensee of K33CG. He used federal land to grow his marijuana to avoid the repercussions of his wrongdoing, an adverse reflection on his personal candor.¹⁵ His conviction was only about two and one-half years before his renewal hearing and three years before the *ID*, so our post-conviction experience is limited and there has been no opportunity to observe his post-probation conduct. On the other hand, we do have a record of his actual stewardship of K33CG during the period of his marijuana problems. That record shows no complaints and is entitled to weight as a mitigating factor. *Modified Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5; *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642, 644 ¶ 20 (1990); *Character Policy Statement*, 102 FCC 2d at 1227-28. Indeed, the Commission's actual experience with Richards as a licensee is a good predictor of Richards' future stewardship. We also have the recommendation of the judge that Richards not be denied federal benefits because of his conviction. Although this recommendation is not binding on the Commission, it reflects the judge's evaluation of the seriousness of Richards' misconduct and in that respect is entitled to note as we weigh Richards' misconduct under the public interest standard.¹⁶

¹³ See, e.g., *U.S. v. Echeverri*, 982 F.2d 675 (1st Cir. 1993), cited in *ID*, 9 FCC Rcd at 3609 ¶ 26.

¹⁴ In *Radio Fellowship*, the Commission revoked the license of a daytime AM station whose president and 50 % owner had been convicted of possessing cocaine with intent to distribute and conspiring to commit the offense and sentenced to five years imprisonment under the statutory provision applicable to intended distribution of five or more kilograms of cocaine or 1,000 or more marijuana plants. See 21 U.S.C.S. § 841(b)(1)(A)(ii) (Law. Co-op Supp. 1994). The principal had turned to drug selling to cover his living expenses when he experienced financial difficulties with the station. He entered into a joint venture to sell cocaine, bringing to the venture access to inside information about police drug raids, and his advance warnings of drug raids twice saved his partner from apprehension. He reimbursed law enforcement officials for these tips. On at least one occasion he used the radio station as the place to meet his drug customers. Drug users called him at the

station telephone number. This went on for a period of 8 or 9 months. 6 FCC Rcd 340, 341-42 (ALJ), *aff'd* 6 FCC Rcd 4823 (1991). The principal also admitted he had deliberately misrepresented a fact to a judge to reduce his prison sentence. 6 FCC Rcd at 4824 ¶ 7.

¹⁵ Under F.R.E. 609(a)(2), a witness' credibility can be attacked with evidence that the witness has been convicted of a felony or misdemeanor involving dishonesty or false statement. This usually involves some element of deceit, untruthfulness, or falsification. According to McCormick on Evidence § 42, a physical attempt to remain undetected does not alone make a crime one of dishonesty, although there may be a showing that the crime rested on facts establishing deceit, untruthfulness, or some other element of active misrepresentation.

¹⁶ Judicial authority to recommend denial of federal benefits under the Anti-Drug Abuse Act of 1988 is noted in Policy

33. We are concerned, however, that Richards broke the law to further his personal marijuana habit. Thus, his control of his marijuana use is very important in predicting whether he will have the same incentive to engage in felonious misconduct in the future and whether he can be expected to exercise the discretion expected of a licensee. While Richards' personal marijuana use does not support a finding of egregious misconduct,¹⁷ it is highly relevant to assessing Richards' future operation in the public interest.

34. Richards challenges the *ID*'s failure to credit his claim that he has been cured or has his habit under control. The *ID* faulted Richards for failing to provide expert evidence from a drug counselor,¹⁸ but there is evidence in the form of a letter from his probation officer stating that Richards had been tested several times up until the time of the hearing and that "[t]he results of these tests have all been negative (meaning no evidence of drug abuse by Mr. Richards (sic))." Richards Exh. 27. While an expert opinion might have assisted the Commission in predicting the future, the actual drug test results show that, at present (at least until the hearing record closed), Richards is not using marijuana. Further support is found in statements that Richards has told people familiar with his marijuana use of his changed attitude about using a prohibited substance and his intent to obey the law. See ¶ 7, *supra*. The *ID* and the Bureau make the good point that Richards' reform involuntarily resulted from the threat of incarceration if he continued using marijuana while under the jurisdiction of the federal criminal justice system. But, many changes in life are brought about by involuntarily facing the consequences of one's lifestyle. Richards' sincerity is supported by the fact that he can change, as shown by the drug test results, and his statements to others about his intent. It is buttressed by the substantial price he has already paid for his misconduct, i.e., the loss of his 82.5 acre ranch, which has had a strong deterrent impact.¹⁹ See generally *Character Policy Statement*, 102 FCC 2d at 1228 ¶ 103; *KQED, Inc.*, 5 FCC Rcd at 1785, 6 FCC Rcd at 626; *United Broadcasting Co.*, 100 FCC 2d at 1585; *WIOO, Inc.*, 95 FCC 2d at 984; *Faulkner Radio, Inc.*, 88 FCC 2d at 618. It is reinforced by the provision for a mandatory minimum sentence of imprisonment for 15 days if he is convicted of even simple marijuana possession in the future. See 21 U.S.C.S. § 844 (Law. Co-op Supp. 1994).

35. The *ID* gave little weight to Richards' evidence of his reputation for good character in the community because most of the statements Richards submitted addressed his reputation in the community of people among whom he is well known rather than the community where he lives. Richards points out that these statements come from people who know him, have dealt with him, and who know of his conviction, and, he argues, they should not be dis-

counted simply because these people also listen to his programming and share his religious beliefs. We agree with Richards. The *Modified Character Policy Statement* allows evidence of an applicant's character reputation in the community as part of a rehabilitation showing but does not define "community." See 5 FCC Rcd at 3254 n.4. F.R.E. 608(a) allows a showing of a witness' general and established reputation in any substantial community of people among whom he is well known, and it additionally allows opinion evidence based on experience with the witness and observation of his conduct. See McCormick on Evidence, 4th Ed. § 43. We see no reason for a more restrictive approach here.²⁰

36. The *ID* also gave little credence to Richards' testimony about mitigation and rehabilitation because of findings that Richards lacked credibility, and it included adverse credibility findings about Richards' propensity for truthfulness. Richards' testimony about the 100 plants, which he gave on cross-examination, played a large part in this credibility assessment. Given that this testimony is unchallenged and that Bureau counsel had verified Richards' DEA involvement with DEA officials, we must disregard the finding that Richards' explanation lacked credibility. We also must disregard the additional finding that Richards' account lacked credibility because, if he had worked with the DEA, he was at the same time using marijuana and growing it on federal park land. Richards admitted he was using marijuana at the time -- he admitted he had been a long-time user -- but the only evidence that he grew marijuana on federal land is his conviction for growing it two years later. Credibility findings must have support in substantial record evidence. *Sun Over Jupiter Broadcasting, Inc.*, 8 FCC Rcd 8206, 8207-08 ¶ 7 (Rev. Bd. 1993), and cases cited therein.

37. The finding that Richards lacked credibility in his testimony about two ledger pages, the other major basis for the *ID*'s adverse credibility finding, also does not withstand scrutiny. The sheets of paper were introduced into evidence apparently to impeach Richards' overall credibility as a witness, including his mitigation and rehabilitation testimony. Because of their age -- Richards' testimony that they date back to the 1977-80 time period was unchallenged -- they have no discernible connection to the conviction before us other than that they were found among Richards' papers when his house was searched. Under rule 608(b) of the Federal Rules of Evidence, they would not be admissible to prove an act of misconduct back then, and they are themselves not probative of Richards' truthfulness or untruthfulness as a witness because the misconduct they are said to reflect does not involve any dishonesty or false statement, the criterion for probing a witness' credibility on the basis of unadjudicated miscon-

Statement, 4 FCC Rcd at 7533, as part of the national effort to eradicate illicit traffick in narcotics, drugs, and other controlled substances.

¹⁷ In Public Notice, the Commission encourages licensees to offer drug rehabilitation programs and directed them to prohibit the use of drugs by employees while at work. It does not require that licensees fire employees for using drugs. See 4 FCC Rcd at 7533.

¹⁸ There is no evidence in this record as to whether Richards was required to see a counselor by his probation officer or whether he saw one on his own.

¹⁹ The *ID* minimized the impact of the forfeiture because Richards' mortgages on the ranch were likely honored by the

government after forfeiture. 9 FCC Rcd at 3605 n.1. When considering the deterrent effect of the loss of a broadcast station, the Commission does not diminish the impact by the amount the former licensee can recover for the physical plant. The deterrent effect of the loss of Richards' ranch because of his wrongdoing should be treated comparably.

²⁰ However, the opinion expressed in Richards Exh. 16 is based on insufficient observation to be credited.

duct. McCormick on Evidence, 4th Ed. § 41. Nonetheless, they were admitted into evidence and Richards' credibility was found lacking not only because he denied ever having sold marijuana but also because of his testimony about the ledgers themselves. In the first place, that the ledgers reflect anything other than what Richards said they reflect, i.e., his purchases of marijuana, cannot be concluded from the face of the two sheets of paper. The suggestion that Richards may have sold marijuana in the remote past has no place in this proceeding absent a showing by a preponderance of the record evidence of a pattern of misconduct, which, as discussed above, is not supported on this record. In addition, although Richards never said conclusively that the handwriting was his, he neither denied it nor disavowed responsibility for the sheets of paper. Instead, he explained them and their contents to the presiding officer. The finding that Richards breached his duty of forthrightness because he hedged identifying handwriting as his on thirteen-year-old papers is an overstatement. It does not support the finding of Richards' future unreliability that is drawn from it.

CONCLUSION

38. When this case is stripped of the unsupported adverse credibility findings in the *ID* and the unsupported view that Richards' misconduct was part of a broader criminal enterprise, the decision must turn on Richards' compliance with Commission requirements during the past license term and on the sufficiency of his rehabilitation showing to overcome the adverse impact of his conviction. The call is a close one, for the Commission has made clear its concern about felonious drug trafficking, and at least with respect to supporting his marijuana habit, Richards has been willing to violate the law. Nonetheless, on balance, we conclude that Richards has met his burden of persuading the Commission that he is qualified for renewal of the K33CG license and that renewal would serve the public interest. He has an unblemished broadcast record. His wrongdoing, while serious, did not involve the station, did not include preying on others, and was not considered serious enough by the District Court to warrant a recommendation that any federal benefits be denied. Although Richards used marijuana for a few months after his arrest, he has not used it since realizing the consequences of his habit. He has paid the heavy price of the loss of his ranch. He has admitted his wrongdoing to the Commission and members of his community. He has a good reputation for truthfulness in the community. We caution Richards, however, that future adjudicated misconduct may require a different result.

39. ACCORDINGLY, IT IS ORDERED That the license renewal application of Richard Richards (File No. BRTTL-921116IG) for station K33CG, Sierra Vista, Arizona, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board