

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

Appeal

In the Matter of)	
)	
JAMES A. KAY, JR.)	WT DOCKET NO. 94-147
)	
Licensee of one hundred fifty two)	
Part 90 licenses in the)	
Los Angeles, California area)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1997; Released: October 2, 1997

By the Commission:

1. This Memorandum Opinion and Order denies an Appeal of Order Denying Motion to Disqualify filed April 15, 1997 by James A. Kay, Jr., as well as his May 19, 1997 and August 21, 1997 letters requesting a Commission investigation of possible violation of the Commission's ex parte rules.

Background

2. By Memorandum Opinion and Order, released February 20, 1997, 12 FCC Rcd 2898 (OGC) (Remand Order), the ALJ's summary decision was vacated and this revocation case was remanded for a full hearing on all issues originally designated for hearing by the Commission. 12 FCC Rcd at 2906, para. 22. In his summary decision the ALJ had found that the licensee Kay "set up his business records in a manner that would not record loading data [about the number of end users on each of his stations] that was sufficient to show compliance." Id., 2903, para. 14. The Remand Order held that this crucial finding was based upon factual representations made by the Bureau at an oral argument and that because "Kay was afforded no opportunity for cross examination or presentation of rebuttal evidence, ... there was no basis for grant of the Bureau's motion for summary decision." Id., 2905, para. 18.

3. A collateral request that a new judge be appointed to preside at the remand hearing was dismissed because Kay had never attempted to comply with the applicable Commission rule, 47 CFR § 1.245(b)(1), or the legal standards for disqualification discussed in WWOR-TV, Inc., 5 FCC Rcd 2845, para. 6 (1990), and Liteky v. U.S., 114 S.Ct.1147, 1157 (1994). See Remand Order at 2906, para. 23.

4. On March 26, 1997, Kay filed a detailed motion to disqualify the presiding officer which attempted to justify such relief. That motion was denied by the ALJ in a lengthy

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Memorandum Opinion and Order, FCC 97M-52, released April 14, 1997, which responded to all of Kay's contentions and concluded that:

The Presiding Judge was reversed on a summary decision on one of eight issues. There is new evidence to be received and considered on remand on all issues, including the issue which was held to have been erroneously decided as a matter of law. The Presiding Judge stated at the first conference held after the remand, before the disqualification Motion was filed, that he would look at the case in a "fresh new way." ... The Presiding Judge has responded to the points and matters raised in the disqualification Motion. Based on the Commission's standards, there has not been a basis shown for recusal or disqualification. The rulings cited for bias are not attributable ✓ to any outside source. And even though held on appeal to be erroneous, the [Summary Decision] does not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky, 114 S.Ct. at 1157. The testimony of Kay has not yet been heard. His testimonial demeanor has not yet been observed. The presiding Judge has not shown a predisposition against Kay's credibility. Therefore, the undersigned Administrative Law Judge is qualified to remain in the case as its Presiding Officer. [Footnotes omitted.]

Id., at para. 23.

5. On appeal Kay now urges that "the Presiding Officer maintains such a personal bias against Kay that he is unable to render an unbiased decision in this proceeding." Appeal, p. 1. Two major points are advanced to support disqualification: first, that the ALJ must have received and not disclosed, contrary to the Commission's ex parte rules, the "Pick Letter," which contained prejudicial information about Kay, id., pp. 3-5, and Exhibit A; and second, that at the conference immediately after the case was remanded the ALJ in effect made an admission that prior to the remand he was biased, id., pp. 2,5. The appeal also relies on other, allegedly similar findings and comments in the vacated summary decision. Id., pp. 2-3.

Discussion

6. In his motion for disqualification, at p. 9, Kay recognized that the Supreme Court in Liteky, held that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." Similarly, this Commission has consistently held that the presiding officer's personal bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." WWOR-TV, supra, 5 FCC Rcd at 2845 para. 5. See also Black Television Workshop of Los Angeles, Inc., 6 FCC Rcd 6525 (1991) (subsequent history omitted); KAYE Broadcasters, Inc., 24 RR 2d 772,

at para. 3 (1972) (explaining that comments and rulings of the judge during the course of the proceeding do not ordinarily afford a basis for a claim of personal bias; since such matters are subject to review, they can be corrected through the normal appellate process). Given these controlling legal principles, Kay places major reliance on two extra-record matters: (1) an alleged ex parte communication to the ALJ, and (2) the asserted admission of personal bias by the ALJ.

7. On the first point Kay alleges that in pending California litigation Mr. Robert Andary, formerly of the FCC's Office of Inspector General, produced the Pick Letter and attachments, Exhibit A to Appeal; that "[t]he Pick Letter apparently was sent, and received in violation of the FCC's ex parte rules (47 C.F.R. § 1.1200, et seq.)" by the presiding officer since it was addressed to him and was not produced until the California litigation. Appeal, p. 8. Kay then argues that:

Kay's Argument Although the Presiding Officer has denied receipt of the Pick letter and Kay admittedly cannot prove, at this time, that the Presiding Officer received and/or reviewed the Pick Letter, the Presiding Officer's actual receipt of the Pick letter is not the determining fact. The Pick letter was addressed to the Presiding Officer and must be presumed to have been delivered. Therefore, despite the Presiding Officer's "complete disagreement" with Kay's argument, the existence of the ex parte communication alone creates the appearance of impropriety, to the extent that the Presiding officer must be removed. [Emphasis added, footnotes omitted].

Id., pp. 4-5.

8. Significantly, in denying disqualification on this point the ALJ made three factual findings: (1) "On January 6, 1997, in response to Kay's FOIA request, the Presiding Judge responded by letter to Kay's counsel that he has not received the Pick letter. The Pick letter was not found in the Presiding Judge's log...." (2) "The Pick letter was not seen by the Presiding Judge until its submission by Kay as an attachment to the disqualification motion." (3) "[T]he Presiding Judge has a case log system that was checked twice and revealed no Pick Letter. Also, the Presiding Judge's file of pleadings and correspondence were checked and double checked and the Pick letter was not found." Memorandum Opinion and Order, supra, at paras. 11-12.

9. Despite the firm assurances by the ALJ that he did not receive the ex parte letter, and that it was not found in his files which were checked and double checked, Kay continues to insist that the Pick Letter "was addressed to the Presiding Officer and must be presumed to have been delivered." Appeal, p. 4. No legal authority is cited for this assumption, and our review of the relevant document, undermines Kay's assumption, and corroborates the ALJ's

representations.

10. The Pick letter was typed on stationery of GEORGE PICK for his signature, and begins with the salutation: "Your Honor - There seems to be a convention that you don't write to a Judge." Although the letter closes: "Respectfully, Gerard Pick," it was not signed by "Gerard" but by "Ann Pick," his wife. In a handwritten note to "Dear Bob" attached at the top of the GERARD PICK letter she reported that: "My husband passed away..." apparently before he could sign and mail that letter. A copy of the letter and the attached "Dear Bob" note was later produced by Robert Andary, from his file in the Office of Inspector General. The letter was addressed to "THE HON. L. RI," with the balance of the name covered by the handwritten note, and shows a Gettysburg, PA. mailing address.

11. Initially, it must be noted that the ALJ's name is Richard L. Sippel and that his mailing address is Washington, D.C. Moreover, since the handwritten "Dear Bob" note and the typed Pick letter were produced by Robert Andary, the more reasonable inference is that after Gerard Pick's death, his wife wrote the "Dear Bob" note attached to Gerard's letter which she signed and that the document was delivered only to Robert Andary, and later produced from his files. Thus, the documentary evidence harmonizes with the ALJ's factual representations that he never received the Pick letter until it was submitted by Kay in his disqualification motion. On this record there is no factual support for Kay's argument that: "the existence of the ex parte communication alone creates the appearance of impropriety, to the extent that the Presiding Officer must be removed." Appeal, p. 5. Under these circumstances, and for the same reasons, Kay's separate requests for an investigation of ex parte violation, which also refers to the Pick letter, will be denied without further consideration.

12. The second major argument advanced on appeal is that at the conference immediately following remand of the case for a further hearing:

the Presiding Officer volunteered that he would look at the case in a "fresh new way." This must be read as an admission that the Presiding Officer looked at the case in a far different way before [he] was reversed for the erroneous [summary decision]. This matter cannot be heard by an Administrative law Judge who acknowledged that he would examine this evidence in a "fresh new way" only after being overturned on appeal. What is needed is a presiding officer who is unprejudiced and able to handle this matter in an impartial manner.

Appeal, p. 2. A review of the record establishes that Kay has taken the ALJ's words out of context, and unfairly distorted their meaning. In his conclusion on the disqualification motion, quoted above in para. 4, the ALJ first focused on the fact that his summary decision on "one of eight issues" had been reversed, then stated that the Remand Order required the presentation of

new evidence on all issues, including the one he had erroneously resolved in the summary decision; and finally represented that "he would look at the case in a 'fresh new way.'" Read in this manner, the ALJ's words simply reflect a pledge that he is able to judge the case in the future uninfluenced by his prior erroneous ruling, not an admission of prior bias. Our interpretation is reinforced by the ALJ's additional assurance that Kay's testimony has not yet been heard; his demeanor has not yet been observed; and that the ALJ "has not shown a predisposition against Kay's credibility." Accordingly, the record does not support Kay's argument that the ALJ is prejudiced and unable to handle this case in an impartial manner.

13. The Appeal also relies on several findings and comments in the summary decision, but none of them establishes personal bias and prejudice. "With regard to Kay's loading records (the primary issue considered)," Kay argues that the ALJ found without any factual support that "Kay knew that such information could be requested" and that he "'deliberately' designed a business record system which does not permit the ready retrieval of loading data." Appeal, p. 2. However, Kay acknowledges elsewhere that this finding was vacated by the Remand Order because it was based on the Bureau's factual representations and because Kay had not been afforded an "opportunity for cross-examination or presentation of rebuttal evidence." *Id.* Moreover, as the ALJ noted, his remarks concerning Kay's business practices were made in a non-judgmental manner. See Memorandum Opinion and Order, *supra*, at para. 7. Kay's next objection is that the ALJ's summary decision stated in footnote 13 that "the complaints to the Bureau provided sufficient cause for issuing the Section 308 letter" and that this shows that the ALJ "is so biased against Kay that he will assume the veracity of 'extra record' documents." Appeal, p. 3. As the ALJ explained in his Memorandum Opinion and Order, at para. 5, there is no bias or prejudice in the recitation of the existence of sufficient written complaints to support the issuance of the Section 308 letter and he furnished at least four record references for this secondary finding. In this regard, the Appeal, p. 3, "acknowledges that the references to the record are accurate." Finally, Kay challenges the summary decision's footnote 18 "citation of twelve (12) pleadings filed by Kay's former counsel that the Presiding Officer found to be 'frivolous'" as additional evidence of the ALJ's "unwillingness to treat Kay fairly." *Id.* In this instance, the ALJ pointed out in his order denying disqualification, Memorandum Opinion and Order, at para. 6, that his action was based on the Commission's Public Notice, 11 FCC Rcd 3030 (1996), which instructed that such matters should be reported, and Kay has not shown that the ALJ erred in identifying any of the pleadings as frivolous, let alone that his statement indicated bias.

Conclusion

14. In this case, as in *KAYE*, *supra*, 24 RR 2d at 777-778 & n. 5, "[a]ny possible error" in the Presiding Officer's summary decision has been corrected by the Remand Order, and "these types of rulings do not show disqualifying bias since they stemmed from "'what the [ALJ] ... learned from his participation in the case,' *United States v. Grinnel Corp.*, 384 US 563 at 583

(1966), and since they are reviewable on appeal." Review by the Commission is a real and effective remedy because the Commission is not bound by a "clearly erroneous" rule, FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955), but is authorized "to draw its own inferences and reach its own conclusions for implementing the statutory mandate." See Lorain Journal Co., v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 US 967 (1966). Ultimately, the Commission will consider all of Kay's contentions and "carefully review the record to ensure that justice is done in this case." See Nancy Naleszkiewicz, 10 FCC Rcd 1083 at para. 4 (1995).

15. ACCORDINGLY IT IS ORDERED, That the Appeal of Order Denying Motion to Disqualify filed April 15, 1997, and the requests for investigation of ex parte violation filed May 19, 1997 and August 21, 1997 by James A. Kay. Jr. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary