

FCC MAIL SECTION

INITIAL DECISION OF ADMINISTRATIVE LAW
JUDGE JOSEPH CHACHKIN

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

FEB 9 3 29 PM '93

Issued: February 2, 1993;

Released: February 9, 1993

PR Docket No. 92-119

In the Matter of

Revocation of License of

SANDRA V. CRANE
Amateur Radio Station
N6TFO
Marina Del Ray, California

and

Suspension of License of

SANDRA V. CRANE
Amateur Extra Class
Radio Operator License

and

Revocation of License of

CHARLES P. PASCAL
Amateur Radio Station
WB6CIY
Carson City, Nevada

and

Suspension of License of

CHARLES P. PASCAL
Amateur Extra Class
Radio Operator License

Appearances

George L. Lyon, Jr., Marjorie K. Conner, and Martin J. Barab on behalf of Sandra V. Crane and Charles P. Pascal; and *Eric Malinen and Thomas D. Fitz-Gibbon*, on behalf of the Chief, Private Radio Bureau.

Preliminary Statement

1. Sandra V. Crane (Crane) and Charles P. Pascal (Pascal), respondents in the above captioned proceeding, by their counsel, pursuant to Section 1.1501 et. seq. of the Commission's Rules, apply for an award of fees and costs pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504. The Chief, Private Radio Bureau, by his attorney, opposes grant of the relief sought under the EAJA.¹

Findings Of Fact

2. By Order to Show Cause and Suspension Order released April 24, 1992, the Chief, Private Radio Bureau ordered the respondents to show cause why the radio station licenses shown in the caption should not be revoked, and suspended their Amateur Extra Class Operator licenses for the remainder of their terms.² The Order to Show Cause and Suspension Order designated the following issues:

- (a) To determine whether the respondents willfully or repeatedly violated Section 97.17(e)³ of the Commission's Rules in connection with examinations administered on August 4, August 24, or September 14, 1991, or on any combination of these dates.
- (b) To determine whether respondent Sandra V. Crane willfully or repeatedly violated Section 97.17(e), 97.515(d),⁴ or 97.517,⁵ or any combination of these sections, of the Commission's Rules in connection with examinations administered on November 12, 1990, January 6, 1991, or April 12, 1991, or on any combination of these dates.
- (c) To determine whether respondent Charles P. Pascal willfully violated Section 97.17(e) or 97.517, or both, of the Commission's Rules in connection with an examination administered on November 12, 1990.
- (d) To determine whether each respondent is qualified to remain a Commission licensee.
- (e) To determine whether one or both of the captioned radio station licenses should be revoked.
- (f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified, or dismissed.

¹ Pending before the Presiding Judge are "Request For Award Under Equal Access To Justice Act" filed November 4, 1992 by Crane and Pascal; "Bureau's Reply To EAJA Application" filed December 4, 1992; and "Reply To Answer To Application For Award Under Equal Access To Justice Act" filed December 21, 1992 by Crane and Pascal.

² The suspension was held in abeyance, pending the outcome of this proceeding.

³ Section 97.17(e) provides in pertinent part that no person

shall obtain or attempt to obtain or assist another person to obtain or attempt to obtain, an operator license by fraudulent means.

⁴ Section 97.515(d) provides in pertinent part that no Voluntary Examiner (VE) may administer an examination to a family member of the VE.

⁵ Section 97.517 provides in pertinent part that no VE may administer or certify an examination by fraudulent means.

3. The respondents requested a hearing which was set for Washington, D.C. on September 29, 1992. Hearing conferences were held in Washington, D.C. on September 18, 23 and 24, 1992. The latter two sessions were "Admission Sessions" where the Bureau and Respondents identified their respective direct case exhibits and the Presiding Judge ruled on objections to receipt in evidence of such exhibits. On September 24, following a lunchtime recess, the parties' counsel announced on the record that they had reached a settlement.

4. On September 30, 1992, the parties filed a joint motion for approval of a Consent Agreement, "Consent Agreement," and a draft "Consent Order." The joint motion recited that approval of the Consent Agreement and issuance of the Consent Order was in the public interest. In this regard, the parties stated that the attached documents satisfactorily resolved the issues set forth in the Order to Show Cause Order and Suspension Order, eliminated the need for a hearing, and that no further enforcement or public benefit would be gained from this proceeding.

5. On October 1, 1992, the Presiding Judge issued a "Consent Order." See FCC 92M-987. Under the "Consent Order," the respondents agreed to a 3-month suspension of their Amateur Extra Class Operator licenses. Also, as a result of the suspension, the respondents lost their eligibility to be Voluntary Examiners within the Volunteer Examiner Coordination and Novice Class testing systems, a privilege both respondents had exercised in the past.⁶ In addition the respondents agreed to

the establishment of a "wall" between their teaching functions and the selection of volunteer examiners (VEs) to test their students. The VEs who administer examinations in conjunction with classes taught by or with the assistance of either respondent or in conjunction with classes at any radio school that either respondent is affiliated with must be selected by a "contact" VE designated by the American Radio Relay League (ARRL) or another Volunteer Examiner Coordinator having no affiliation with the respondents and approved by the Commission. Neither the respondents nor anyone connected with any school that the respondents are affiliated with shall have any role in selecting the "contact" VE or the administering VEs.⁷

CONCLUSIONS

6. Section 1.1501 of the Rules which implements the EAJA provides for the award of attorney's fees and other expenses to an eligible party "when it prevails over the Commission, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust." The EAJA is applicable because the captioned proceeding sought to revoke licenses held by Crane and Pascal. In addition, Crane and Pascal meet the eligibility requirements denoted in Section 1.1504 of the

Rules. In this regard, the Bureau does not contest the net worth statements of Crane and Pascal showing net worths substantially less than the allowable 2 million dollars.

7. However, while Crane and Pascal meet the conditions of eligibility, they have failed to meet their burden of demonstrating they are the prevailing parties in this proceeding. Parties may be considered prevailing parties for purposes of the EAJA "if they succeed on any significant issue in litigation which achieves some of the benefits sought in bringing suit." *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983). See also *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Cir. 1985). This test was reaffirmed in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, _____, 109 S.Ct. 1486, 1492-93 (1989). In *Garland*, the Supreme Court held that "the touchstone of the prevailing party inquiry must be the alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at _____, 109 S. Ct. at 1493.

8. Crane and Pascal argue they are the prevailing parties because the consent order does not require the revocation of their amateur radio station licenses. The contention is without merit. It ignores what the Bureau sought in bringing this proceeding and what it achieved in settling this action. The Bureau alleged in its *Order to Show Cause and Suspension Order* (OSC) that Pascal and Crane were operators of an Amateur Radio School; that they gave instructions to students of the school prior to the administration of amateur service license examinations on certain specified dates; and that Pascal and Crane had information that they used to tailor the content of their instructions to include answers to all or most of the questions which were on the examinations. The OSC also alleged that Crane had improperly administered amateur service license examinations to her daughter.

9. In settling this action, Crane and Pascal agreed to a 3 month suspension of their Amateur Extra Class Operator licenses. Also, by agreeing to the suspension of their licenses, Crane and Pascal are no longer eligible to be Volunteer Examiners within the Volunteer Examiner Coordinator and Novice Class testing systems, a privilege both had exercised in the past. Most important, Crane and Pascal agreed to the establishment of a "wall" separating their teaching functions from the selection of volunteer examiners who test their students. This provision, which could not have been obtained by the Bureau except by settlement, obviated the Bureau's concern that the amateur service license examinations given to students were being compromised. It is thus clear that the Bureau achieved by settlement substantially all the benefits it sought in bringing this proceeding.⁸ Crane and Pascal's retention of their amateur radio station licenses, a necessary consequence of settling this case and avoiding further litigation, is unimportant.⁹ In this connection, in the joint motion for approval of consent agreement, Crane and Pascal agreed with the Bureau that the consent order satisfactorily resolved the issues and eliminated the need for a hearing and that no further enforcement or public benefit would be gained

⁶ Section 97.515(c) provides: "No person may be a VE if that person's amateur station license or amateur operator license has ever been revoked or suspended."

⁷ Consent Order at 3, para. 3(f).

⁸ It is axiomatic that the law looks with favor upon settlements, as the Commission recognizes in its consent order rules.

See Section 1.93 of the Rules.

⁹ Even assuming the hearing had proceeded and resulted in the revocation of Crane and Pascal's amateur licenses, the Rules permit them to reapply for a new license one year after revocation. See Section 1.916 of the Rules.

from this proceeding. It is thus plain that Crane and Pascal have failed to satisfy either the *Hensley* or *Garland* tests and their claim that they are the prevailing parties cannot be sustained.¹⁰ Their request for an award of fees and costs pursuant to the EAJA is denied.¹¹

IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,¹² the "Request For Award Under Equal Access To Justice Act" filed November 4, 1992 by Sandra V. Crane and Charles P. Pascal IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

¹⁰ *SEC v. Conserv Corp.*, 908 F. 2d 1407, 1409, 1412-1413 (8th Cir. 1990) is instructive. In *Conserv*, the SEC filed suit alleging that Conserv and four of its officers, including Johnson, had engaged in securities law violations. Each of the defendants except Johnson consented to a permanent injunction against future violations while neither admitting nor denying the allegations. The SEC pursued its suit against Johnson. The SEC proceeded to trial and after the SEC completed its case in chief, the district court granted Johnson's motion to dismiss the action and granted EAJA relief. On appeal, the court agreed that Johnson was the prevailing party since the SEC achieved none of the relief it sought while Johnson obtained all that he sought in pursuing his defense. It also determined that Conserv did not

prevail, pointing out that the SEC achieved its sought-for result even though the dispute ended with Conserv's consent. Here, as in *Conserv*, by settlement through entry of a consent order, the Bureau has gained the public benefit which it sought through this enforcement proceeding.

¹¹ In light of this determination, it is unnecessary to reach the question whether the Bureau's position in this proceeding was "substantially justified."

¹² In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).