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

DISPATCHED BY

In re Applications of)	MM DOCKET NO. 93-94 ✓
)	
SCRIPPS HOWARD BROADCASTING COMPANY)	File No. BRCT-910603KX
)	
For Renewal of License of Station WMAR-TV)	
Baltimore, Maryland)	
)	
and)	
)	
FOUR JACKS BROADCASTING, INC.)	File No. BPCT-910903KE
)	
For a Construction Permit for a New)	
Television Facility on Channel 2)	
at Baltimore, Maryland)	

MEMORANDUM OPINION AND ORDER

Issued: May 5, 1993; Released: May 6, 1993

Background

1. This is a ruling on a suggestion for voluntary recusal of the Presiding Judge that was submitted by letter to the Presiding Judge dated April 27, 1993, by lead counsel for Four Jacks Broadcasting, Inc. ("Four Jacks"), Mr. Martin R. Leader. Thereafter, a Prehearing Conference was held on May 4, 1993, to receive all relevant facts. See Order FCC 93M-211, released April 29, 1993.

2. The core fact was first focused on by counsel for Scripps Howard Broadcasting Company ("Scripps Howard"), Mr. Kenneth C. Howard, Jr., in his letter dated April 23, 1993. The letter was addressed to counsel for Four Jacks and stated that Mr. Leonard C. Greenebaum would be appearing before the Presiding Judge for Scripps Howard and that all parties should be apprised of the fact that Mr. Greenebaum and the Presiding Judge had been partners in a law firm during the period 1970-1975. A copy of the letter was sent to the Presiding Judge. Counsel for Four Jacks erroneously perceived that Mr. Greenebaum had entered this case coterminous with the Chief Judge's assignment of this case to the Presiding Judge. As was disclosed at the conference, such was not the fact. However, as of the date of the suggestion of recusal, April 27, 1993, counsel for Four Jacks was not aware of any previous involvement by Mr. Greenebaum in this case because his name was not on any pleading or notice of appearance.

3. It was disclosed at the Prehearing Conference that Mr. Greenebaum has been working on this case since April 1992.¹ It is noted that this case was set down for a hearing by the Bureau's designation order released one year later on April 1, 1993. The Presiding Judge was assigned to the case on April 2, 1993, by the Chief Judge's assignment Order 93M-144 (released April 6, 1993). As indicated above, counsel for Four Jacks learned in sequence that the undersigned was the Presiding Judge and that Mr. Greenebaum, who was a former law partner of the undersigned, was on the case for Scripps Howard. In fact, counsel for Four Jacks had erroneously suspected that Mr. Greenebaum may have been brought into the case only after it was assigned to the Presiding Judge² in order to seek or obtain some advantage for Scripps Howard by virtue of his past association with the Presiding Judge in private practice. There had been an unsuccessful effort by counsel for Four Jacks to reach counsel for Scripps Howard to learn more information. But counsel for Scripps Howard was in a meeting and the phone call was not returned before Mr. Leader sent the letter to the Presiding Judge suggesting a voluntary recusal.³

4. Relevant facts disclosed on-the-record- by the Presiding Judge are summarized as follows. He left the firm of Sachs Greenebaum & Tayler ("SG&T") in October 1975 for a career in the federal government. Since that date he has not communicated at all with Mr. Greenebaum. The Judge had no equity interest in the firm and he removed his interest in the SG&T HR-10 program soon after leaving. The firm disbanded in 1991-92 and there is no existing institution of SG&T practicing law at this time. Thus, it is concluded that there is no appearance of a relationship of any kind between the Presiding Judge and Mr. Greenebaum either professionally or socially since October 1975.

¹Mr. Greenebaum explained briefly the basis for the firm's decision to involve him in this case in April 1992. Also, Mr. Greenebaum has agreed to voluntarily disclose relevant records to counsel for Four Jacks which establish the actual date of Mr. Greenebaum's first involvement with this case. Mr. Leader did not demand such corroboration and he accepted Mr. Greenebaum's representation that he commenced work on the case in April 1992. Therefore, the exchange of corroborative evidence on this collateral issue need not be on the record. However, a copy of the document must be provided to Bureau counsel.

²Neither the Chief Judge nor the Presiding Judge had any knowledge that Mr. Greenebaum was involved in this case at the time that the case was assigned to the Presiding Judge.

³This shows the need for better communication between opposing counsel. The suggestion of recusal might have been avoided had all of the facts been known by Mr. Leader before April 27, 1993. Mr. Howard's letter of April 23 was clear, accurate and timely. It disclosed the conclusory fact that Mr. Greenebaum "has been working on this matter." But Mr. Leader was lacking pertinent additional information. In the absence of more facts he acted reasonably in suggesting voluntary recusal since there were important motions pending and this would be an appropriate time to assign another judge. Ultimately, Mr. Leader's letter prompted the conference in which all relevant information was aired.

And no law firm remains as a common institutional linkage because the law firm at which both practiced law during the period 1970-1975 no longer exists.

Discussion

5. The Presiding Judge has considered applicable authority under the ABA's Model Code Of Judicial Conduct (1990)⁴ and finds that there would be no appearance of an impropriety by remaining in the case. Specifically, Canon 2.B prohibits a judge from "permit[ting] others to convey the impression that they are in a special position of influence." In view of the passage of almost twenty years without a single contact between counsel and the undersigned, it could not be reasonably inferred that counsel for Scripps Howard occupies a special position of influence with respect to this Presiding Judge by virtue of Mr. Greenebaum's participation in this case.⁵

6. A second applicable provision would be Canon 3.C. which provides a specific scenario under which a judge should disqualify himself where impartiality might reasonably be questioned:

(1) (b). [I]n private practice the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter,

The practice of SG&T was general in nature and included a heavy docket of litigation. But the firm had no regular communications practice before the Commission and certainly this matter, i.e., the renewal application of Scripps Howard and the challenge by Four Jacks, was not a matter at SG&T in the period 1970-1975, or at anytime.

Conclusion

7. It is concluded by the Presiding Judge after fully considering the facts and circumstances summarized above and the additional disclosure of facts and discussion at the Prehearing Conference of May 4, 1993,⁶ that there is no reasonable appearance of impropriety for the undersigned administrative

⁴The Presiding Judge made reference at the conference to the Model Code Of Judicial Conduct For Federal Administrative Law Judges (1989) which was endorsed by the ABA and which contains the same operative language for this issue as does the ABA Model Code for Judges.

⁵In that regard it is noted that the last contact in October 1975 was when the Presiding Judge was an attorney. There was never any contact at all between Mr. Greenebaum and the undersigned after the Presiding Judge became an administrative law judge.

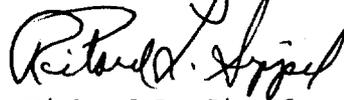
⁶Cf. 47 C.F.R. §1.298(b) (rulings on interlocutory matters may be made orally at the hearing). The Presiding Judge took the question under advisement for determination after the Prehearing Conference of May 4, 1993, was concluded. Matters that were set on-the-record at that conference are the basis for this ruling.

law judge to remain with this case as the Presiding Judge and to hear and decide all pending and any future issues in the case through an initial decision.

Ruling

Accordingly, IT IS ORDERED that the suggestion of voluntary recusal of the Presiding Judge submitted by Four Jacks Broadcasting, Inc. on April 27, 1993, IS DENIED.⁷

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁷Counsel for Scripps Howard and counsel for Four Jacks were instructed to place on the public record their respective letters of April 23 and April 27, 1993.