

its exemption will fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee. This is precisely the relevant nexus so far as the journalistic rights of the licensee are concerned. Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression.

The Commission has set itself the difficult task of drawing lines between the secular and religious aspects of the broadcasting operations of its sectarian licensees. Though this is a delicate undertaking, it is one which the First Amendment thrusts upon every public body which has dealings with religious organizations. See *Nyquist, supra*, 413 U.S. at 775; *Tilton v. Richardson*, 403 U.S. 672, 681, 91 S.Ct. 2091, 29 L. Ed.2d 790 (1971); *Lemon v. Kurtzman, supra*, 403 U.S. at 614. The courts have traditionally granted the FCC considerable leeway to work out the difficult First Amendment problems endemic to a system of licensed communications. *Columbia Broadcasting System, supra*, 412 U.S. at 102-103 and 132; *Red Lion, supra*, 395 U.S. at 386-401; *National Broadcasting Co., supra*, 319 U.S. at 227. As presently formulated, the Commission's religious exemption is facially adequate. Problems of application there may be, but they will be questions for another day.

Affirmed.

BAZELON, Chief Judge, concurring:

I disagree with my colleagues that the FCC can impose employment requirements in direct conflict with the standards established by Congress in Title VII. The Commission's mandate to act in the "public interest" does not empower it to contravene an explicit Congressional policy.<sup>1</sup> This is so, however, only

if the policy in question is constitutional. I am convinced by the reasoning of part I of the court's opinion that Title VII's exemption of all "activities" of any "religious corporation, association, educational institution or society" violates the Establishment Clause of the First Amendment. Therefore, I would hold the exemption unconstitutional, and not binding on the FCC.

000017



UNITED STATES of America

v.

Sylvester KEARNEY, Jr., Appellant.

No. 73-1288.

United States Court of Appeals.

District of Columbia Circuit.

May 17, 1974.

Defendant was convicted in the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., of various offenses, and appealed. The Court of Appeals, MacKinnon, Circuit Judge, held that under a District of Columbia statute defining burglary as entry without breaking with intent to commit any criminal offense, consent to enter is not a defense where one is shown to have entered with the requisite criminal intent.

Convictions for assault with dangerous weapon vacated as lesser included offenses; convictions otherwise affirmed.

1. Criminal Law ⇐984

Indictment and Information ⇐191(9)

Assault with dangerous weapon was lesser included offense in armed robbery offense, and additional convictions for assault with dangerous weapon would

1. See *Southern Steamship Co. v. Labor Board*, 316 U.S. 31, 62 S.Ct. 896, 86 L.Ed. 1246 (1942).

F.C.C. 73-534

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

000018

In Re Request of  
NATIONAL RELIGIOUS BROADCASTERS, INC. }  
For a Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted May 16, 1973; Released May 21, 1973)

By THE COMMISSION: COMMISSIONERS JOHNSON, REID AND WILEY  
CONCURRING IN THE RESULT.

1. In *King's Garden Inc.*, 34 FCC 2d 937, 24 RR 2d 281 (1972),<sup>1</sup> we stated that a station that is licensed to a religious organization may discriminate<sup>2</sup> on the basis of religion in its employment practices as to those hired to espouse the licensee's religious philosophy over the air. We further stated:

... the Commission does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views. (34 FCC 2d at 938, 24 RR 2d at 282)

Now under consideration is a letter seeking a ruling as to the applicability of the *King's Garden* decision to various employee categories, filed February 9, 1973, by National Religious Broadcasters, Incorporated (NRB), on behalf of a number of its members. We shall consider the NRB's letter as a request for a declaratory ruling filed pursuant to Section 1.2 of our Rules.

2. In NRB's view, the exemption from the nondiscrimination rules should be interpreted:

... to include those persons responsible for or connected with the planning, preparation, scheduling, presentation, and responses to queries relating to such programs espousing a particular religious philosophy. Illustratively this would include personnel having responsibility for or a direct connection with such programs as writers and research assistants for these religious programs, executive personnel supervising the programs, and the person or persons at the station charged with the responsibility of answering religious type communications stemming from such programs.

In addition, we are advised that some religiously oriented stations include among the station personnel religious counselors (1) answering inquiries on the air and (2) answering mail or telephone inquiries of a religious nature which are not broadcast.

<sup>1</sup> Affirmed on reconsideration, 38 FCC 2d 339, 25 RR 2d 1030 (1972). *King's Garden* has filed an appeal from our decision in the United States Court of Appeals for the Ninth Circuit, Case No. 73-1058.

<sup>2</sup> Our general nondiscrimination requirements are set out in Section 73.125, 73.301, 73.599 and 73.680 of our Rules.

3. We have no difficulty with some of the employee categories listed by NRB. Under the *King's Garden* decision, writers and research assistants<sup>3</sup> hired for the preparation of programs espousing the licensee's religious views are exempt from the nondiscrimination rules as being connected with the espousal of those views. Similarly, those hired to answer religious questions on a call-in program would be exempt. On the other hand, announcers, as a general category, would not be exempt from the nondiscrimination rules. There is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

4. There are other categories listed by NRB which are not so clear cut. As to those categories, which may be defined differently by each licensee, we do not believe that it is advisable to issue a general declaratory ruling such as that requested by the NRB. We have only general information and we are dealing with an area where First Amendment rights are often involved. We believe it would be preferable, therefore, to have specific factual settings presented to us before issuing rulings. We can say generally that our present rules proscribe religious discrimination in employment practices and that the exemption from those rules set out in the *King's Garden* decision is limited to those who, as to content or on-the-air presentation, are connected with the espousal of the licensee's religious views.

5. We wish to emphasize that our decisions in this area are restricted to the *broadcast activities* of licensees that are religious organizations. We cannot and do not make any ruling as to those activities that are not part of broadcast operations. Religious organizations that are licensees may wish to consider whether certain employees are actually part of the broadcast operation or a part of their religious activities generally.

6. In view of the above, IT IS ORDERED, That the request for a declaratory ruling filed by the National Religious Broadcasters, Incorporated, IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,  
BEN F. WAFFLE, Secretary.

<sup>3</sup> We are dealing with the function of the particular person, not his or her title. Thus a secretary does not become exempt from the nondiscrimination rules by changing his or her title to "writer" or "research assistant."

KING'S GARDEN, INC.

000020

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FCC 72-387  
75863KING'S GARDEN, INC. )  
Radio Station KGDN )  
Seattle, Washington )

May 3, 1972

[§53:125, §53:301] Employment practices.

Hiring policies of a licensee, a Christian religious organization, were discriminatory and not in compliance with Commission rules, insofar as it discriminated on religious grounds in employing persons, such as salesmen, whose work was not connected with the espousal of the licensee's religious views. King's Garden, Inc., 24 RR 2d 281 [1972].

This is in reference to: (a) the letter of July 19, 1971, of Mr. Trygve J. Anderson alleging discriminatory hiring practices by Stations KGDN(AM) and KBIQ-FM, Edmonds, Washington, both of which are licensed to you; and (b) your responses to that letter filed September 20 and October 12, 1971.

In his letter, Mr. Anderson states that in seeking employment at your stations, he was asked: "Are you a Christian?", "How do you know you are a Christian?", "Is your spouse a Christian?", and "Give a testimony." Mr. Anderson further states that, "Such questions obviously have no bearing on a person's ability to handle a job in broadcasting, and could only be used to discriminate against potential employees because of their religious beliefs." Mr. Anderson requests, therefore, that your stations be required to delete all requests for religious preferences and beliefs from their employment applications. Mr. Anderson sought a job with you as an announcer or newsman.

Mr. Anderson's letter raises a question as to compliance with §§73.125 and 73.301 of the Commission's Rules, which prohibit licensee employment policies that discriminate on the basis of race, color, religion, national origin or sex. In your response, you indicate that 78 percent of Station KGDN's programming is "inspirational," and that Station KBIQ-FM's format is primarily "good music," which serves as a vehicle for the hourly airing of "brief essays stimulating a desire for higher moral and spiritual values." You state that you are a Christian religious organization with a mission to "share Christ." Since Stations KGDN and KBIQ-FM are a part of your over-all program, you assert that it is necessary to inquire of prospective employees whether they subscribe to your objectives. You deny, however, that your inquiries violate the Commission's rules.

In support of your position, you state that our nondiscrimination rules were based on the Civil Rights Act of 1964. That Act exempts from its provisions religious corporations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation. . . of its religious activities . . ." 42 USC §2000e-1. You also quote 42 USC §2000e-2(e), which provides that it is not an unlawful



000021

employment practice to classify an individual "on the basis of his religion, sex, or national origin in those certain circumstances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Finally, you cite the interpretive memorandum submitted to the Senate by Senators Clark and Case, floor managers for the bill, during the debate on the Civil Rights Act. That memorandum states with respect to the "occupational qualification" exception stated in 42 USC §2000e-2(e):

"This exception is a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." (110 Congressional Record 7213)

In essence, you argue that your employees "perform work connected with. . . [your] religious activities" and you are exempt under the provisions of 42 USC §2002-1, and that religious qualifications are a "bona fide occupational qualification" within the meaning of 42 USC §2000e-2(e).

It should be noted, however, that in your role as a licensee of the Commission, you do not exist solely to espouse a particular religious philosophy. You are required to operate in the public interest, as defined by the Commission's rules and policies. You are also required to have a policy of making time available for the presentation of other, including non-Christian, religious views, Young People's Association for the Propagation of the Gospel, 6 FCC 178 (1938). Clearly, therefore, all work performed by employees of Stations KGDN and KBIQ-FM is not connected with the carrying on of their religious activities. Moreover, the Commission does not believe that religion is a qualification that is "reasonably necessary" to all aspects of the stations' normal operations. In keeping with the exemptions you cite from the Civil Rights Act of 1964, the Commission believes that those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules. But also in keeping with the very limited nature of the exemptions afforded by the 1964 Act, the Commission does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views. As to sales personnel, it should be noted that the sale of commercial time to the business community at large does not come within the example given in the Senate interpretive memorandum, quoted above.

In sum, your hiring policy discriminates on the basis of religion as to all station personnel, and is not, therefore, in compliance with §§73.125 and 73.301 of the Commission's rules. To hold otherwise would strike the word "religion" from those rules as to any station licensed to a religious organization.