

sources that qualified minority members are being sought for consideration when hiring and that all candidates will be considered on a nondiscriminatory basis.

8. The court has recognized that the Commission's oversight of its licensees' employment practices is not confined to determining whether there has been intentional discrimination. The Commission's affirmative action policy calls for a positive and continuing program to "'ensur[e] an active recruitment program and genuine equal employment opportunity'" Bilingual Bicultural Coalition Mass Media, Inc. v. FCC, 595 F. 2d 621, 628 n. 24. (D.C. Cir. 1978), quoting National Broadcasting Co., 58 FCC 2d 419, 422 (1976). Thus, the Commission's EEO rules "embody two concepts; nondiscrimination and affirmative action." Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d 226, 231 (1976).

9. In its 1982 renewal application, the Church specified that, "[w]hen vacancies occur, it is the policy of KFYO and KFYO-FM to seek out qualified minorities and female applicants." The record here establishes, however, that, during the first six and one half years of the licensee's seven year renewal term, at least, the licensee had no plan for affirmative action in the recruitment of minorities and did not seek out qualified minorities as vacancies occurred. In fact, the Church, during this period of time, did nothing to insure that minorities knew

about, or had an opportunity to apply for, openings as they became available at the stations. The primary sources of new employees were referrals from existing employees and Concordia Seminary students and their spouses. While, in some instances, minorities were hired through these sources and through general public advertisements, there was no systematic recruitment program in effect and the hiring of minorities was haphazard at best. Of the five examples of minority recruitment sources specified in Section 73.2080(c)(2), none were utilized by the stations. In their annual employment reports (FCC Form 395-B), the stations went from a high of 2 minorities in 1985, to none in 1987 and 1988. In 1989, the stations reported only one minority employee, a saleswoman of Hispanic heritage.

10. KFYO and KFYO-FM's license term EEO efforts were too little and too late. The stations made no effort until mid-1989 to engage in the meaningful recruitment of minorities. Even then, the stations only began affirmatively recruiting minorities as a result of the efforts of Thomas M. Lauher, who had been hired in May 1987 to be general manager of KFYO-FM. Lauher, a non-Lutheran, noticed the absence of minorities at the station and in March 1988 caused to be hired a female of Hispanic heritage, Caridad Perez. Perez was the only minority employee reported in the stations' 1989 annual employment report (FCC Form 395-B). The hiring of Perez, however, was an ad hoc "fix" which was not accomplished via any plan for bringing openings at the

station to the attention of minorities.

11. The first effort at affirmative action in recruitment did not occur until after Lauher attended a license renewal seminar at a Missouri Broadcasters Association meeting in the fall of 1988 where the importance of EEO compliance to license renewal was stressed. Upon his return, Lauher sought to review KFUE-FM's compliance with the FCC's EEO requirements. He contacted KFUE and KFUE-FM's communications counsel and, by letter dated December 20, 1988, counsel sent him a copy of KFUE and KFUE-FM's 1982 Equal Employment Opportunity report which contained the stations' model EEO program. Apparently, although Lauher, at the time, had been general manager of KFUE-FM, and involved in the hiring process for over a year and a half, he had never been provided with a copy of the station's model EEO program which was to be followed in hiring.

12. When he received a copy of the model EEO program, he concluded that the stations were not in compliance with it. Lauher then took action. He wrote a memorandum, dated March 9, 1989, to his superior, Rev. Devantier, explaining the deficiencies he had uncovered. In his memorandum he stated that KFUE-FM was not in compliance with its own EEO program, and that EEO compliance was the most critical area in license renewal. Lauher's memorandum did not identify recruitment as an area where the station was not in compliance. Lauher believed that the

stations' recruitment efforts were in compliance because the stations used sources for new employees which did not themselves discriminate.

13. Lauher, with the tacit approval of Rev. Devantier to "do whatever is necessary," revised the stations' application forms to exclude a statement that Lutherans were given a preference in hiring and to include the statement that the stations were equal opportunity employers. Although he claims he felt that KFUE-FM's recruitment efforts conformed with the stations' stated EEO program, Lauher drafted a letter to potential sources of minority employees which stressed that KFUE-FM was an equal opportunity employer and encouraged females and members of minority groups to apply for positions. The letter specified that women and minorities who might be interested in working for the station should be referred directly to Lauher. On July 18, 1989, the letter was sent to 10 schools and employment agencies. Lauher was involuntarily terminated in July 1989 for reasons having nothing to do with EEO matters.

14. In January 1990, in response to the NAACP's Petition to Deny the renewal applications of KFUE and KFUE-FM, the stations made a concerted effort to hire minorities by, inter alia, placing advertisements in newspapers with circulation among African Americans for secretary/receptionist and maintenance worker positions. As a consequence, nearly all of the applicants

for these two positions were African American and two African Americans were hired.

15. Given the above it is concluded that the Lutheran Church/Missouri Synod violated Section 73.2080(b) of the Commission's Rules by failing to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice" during the license term. As a result of this failure, minorities that might otherwise have qualified for positions with the stations never learned of the opportunity to apply, and, therefore, minorities were excluded from employment.

Misrepresentation/Lack of Candor Issue

16. The HDO specified a misrepresentation/lack of candor issue, in part, because of a discrepancy in the number of hires reported by KFUD and KFUD-FM for the October 1, 1988, to September 30, 1989, time period. The renewal application referenced six hires, while a February 23, 1990, Opposition to Petition to Deny and Response to Inquiry ("Opposition") indicated that there had been fourteen hires (ten full-time and four part-time) during that time period.

17. It is concluded that the Church did not misrepresent facts or lack candor with the Commission in connection with the

reporting of the number of job hires. Rather, the noted discrepancy was the result of a misunderstanding by Paula Zika, Director of Business Services for KFUD and KFUD-FM. Zika drafted the EEO Program Report, submitted with the stations' renewal application, in which the six hires were reported.

18. The evidence establishes that Zika had a good faith belief that only full-time hires needed to be reported. Indeed, this is consistent with the Commission's focus on full-time hires. See WFSQ(FM), 7 FCC Rcd 6045, 6046 (1992). Looking at full-time hires only, the discrepancy amounts to no more than four hires. Such a small difference belies any intent to deceive. Compare Dixie Broadcasting, Inc., 7 FCC Rcd 5638 (1992) (apparent discrepancy of over 500%); WXBM-FM, Inc., 6 FCC Rcd 4782 (1991) (apparent discrepancy of over 300%).

19. Of the remaining four full-time hires, one actually reported to work so soon after the EEO Program Report was submitted that Zika did not know he had been hired just before the end of the reporting period. This error is understandable. Two hires were not reported because Zika did not include employees who had come and gone during the one year period. Finally, one hire was simply overlooked. None of these errors suggest intentional deceit.

20. In January 1990, the Commission requested additional

information concerning the stations' license term hires. In response, Zika and Dennis Stortz, Director of Operations for KFUD and KFUD-FM, conducted a new review of station records and provided the information to the stations' counsel for filing with the Commission. At the time, neither Zika nor Stortz noticed that there was a discrepancy with the hiring data reported with the stations' renewal application. Such mistakes do not constitute misrepresentation or lack of candor. Cf. High Country Communications, 4 FCC Rcd 6327, 6328 (1989), quoting Kaye-Smith Enterprises, 71 FCC 2d 1402, 1415 (179) ("bare existence of mistake" in an application "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact"). See also, Gary D. Terrell, 59 RR 2d 1452 (Rev. Bd. 1985).

21. In addition, the HDO designated the misrepresentation/lack of candor issue because it appeared that the Church had been less than forthcoming in representations about KFUD and KFUD-FM's recruitment program. In this respect, the evidence shows that the Church misrepresented facts and/or lacked candor with the Commission.

22. In the EEO Program Report accompanying the renewal application for KFUD and KFUD-FM, the Church represented that, "[w]hen vacancies occur" it is the stations' policy to "seek out

qualified minority and female applicants." Moreover, the Church stated that the stations "actively seek female and minority referrals." These representations were, if not knowingly false, less than candid.

23. Throughout most of the license term KFYO and KFYO-FM did not carry out recruitment efforts intended to seek out minority applicants at all. Near the end of the license term, in 1989, KFYO-FM sent letters to various recruitment sources asking for referrals of minority and female candidates. This mass mailing, however, was not related to any specific vacancy. Clearly, the stations did not "actively seek female and minority referrals" throughout the license term, as implied in the EEO Program Report submitted with the renewal application.

24. Lack of candor consists precisely of such concealment, evasion and failure to be fully forthcoming. Both misrepresentation, which involves false statements of fact made with an intent to deceive, and lack of candor represent deceit, differing only in form. Fox River Broadcasting Inc., 93 FCC 2d 127, 129 (1983).

25. Here, the Church had a logical motive to deceive. By creating the impression that its recruitment efforts were more extensive than they were, the Church intended to insure that its license would be renewed without scrutiny. Intent is a factual

question which can be found where, as here, the evidence points to a reasonable inference. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). Like here, intent can be found from a showing of motive or "logical reason or desire to deceive." Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1100 (Rev. Bd. 1982).

26. The Church's explanations for its failure to be more informative are unavailing. The modification of "minority and female applicants" by the word "qualified" could not reasonably alert the Commission that the stations' recruitment efforts were limited by employment criteria, such as Lutheran training or knowledge of classical music, which were considered applicable to nearly every job. Moreover, it does not follow that the Commission should have been aware of the stations' religious training requirements because KFUC and KFUC-FM were licensed to a Church. Not all church-licensed stations have such requirements. Most importantly, to the extent that religious training requirements provide an exemption from the Commission's EEO requirements, the exemption does not permit discrimination in the employment of persons whose work is not connected to the espousal of religious views. King's Garden. Similarly, the Commission could not have guessed that recruitment was affected by an arrangement for the employment of Concordia Seminary students and their spouses. That inference simply does not flow from the fact that one of the stations, KFUC, was once licensed

to the Seminary. Finally, it is immaterial that the Commission did not raise these questions in connection with the Church's earlier renewal application, filed in 1982. All that this shows is that the deception succeeded in 1982.

27. Indeed, it is a licensee's affirmative duty to provide all of the information which the Commission requires, and applicants and licensees must "be scrupulous in providing complete and meaningful information." Lorain Journal Co. v. FCC, 351 F. 2d 824, 839 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). Absolute candor is perhaps the foremost prerequisite for FCC licenseeship. Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989); Mid Ohio Communications, 104 FCC 2d 572 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940 (1990), recon. dismissed in part, denied in part, 5 FCC Rcd 4596 (1990). The Church has failed its duty in this regard.

28. Finally, the HDO directed an inquiry into whether the Church misrepresented its alleged requirement of classical music expertise for certain positions. The evidence establishes that the Church engaged in a deliberate misrepresentation to the Commission regarding the "requirement" for classical music knowledge.

29. The Church first mentioned to the Commission a classical music requirement in a February 23, 1990, Opposition. Examples of the way in which the Church categorized the "requirement" at that time include: "nearly all of the [FM] positions within [the station's] top four categories can only be filled by persons who have ... expertise in classical music" and "nearly all employees must have specialized skills." (Church Ex. 4, Att. 7, Pp. 13-14, emphasis added). Clearly, the language in the Opposition was intended to convey the impression that certain positions at KFUD-FM simply could only be filled by persons possessing the classical music skills noted. The reason the Church wanted to create this impression was that it wanted to persuade the Commission not to rely on overall labor force statistics for St. Louis, which showed the stations' hiring of blacks to be below 50% of parity. Instead, the Church urged the Commission to employ alternative data. Cf. National Capital Christian Broadcasting, Inc., 3 FCC Rcd 1919, 1920, 1922, n. 9 (1988). The Church supplied its own alternative data, which were based on black listenership of KFUD-FM.

30. It was only after the Commission sought clarification of the classical music knowledge "requirement" nearly three years later, that the Church admitted that not all of KFUD-FM's salespersons, the employees who were alleged to be subject to the prerequisite, had such knowledge when hired. Indeed, the record establishes that classical music knowledge, background, training,

etc., was never more than a desirable qualification. Even though the station's management considered classical music knowledge a great advantage, the lack of such a trait would not necessarily disqualify an applicant for employment.

31. In characterizing classical music knowledge as an absolute requirement, rather than a desirable characteristic, the Church engaged in a misrepresentation to the Commission. The Church's motive is clear. The Church advanced a false premise to support its argument that the Commission should rely on alternative work force data. Cf. National Capital Christian Broadcasting. The Church's ultimate purpose was to cover up its EEO shortcomings.

32. The legal argument may have been suggested by counsel. Nevertheless, the facts which formed the basis for the argument were attested to by the Church. The Church knew that the basis for the argument was wrong. Licensees have an affirmative duty to take precautions to insure that all information supplied to the Commission is accurate. Milton Broadcasting Co., 34 FCC 2d 1036, 1947 (1972).

33. In sum, it must be concluded that the Church lacked candor with the Commission with respect to statements about its recruitment efforts. It must also be concluded that the Church misrepresented the nature of KFUCO-FM's classical music training

"requirement."

Ultimate Conclusion

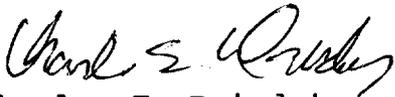
34. It is ultimately concluded that the Church violated Section 73.2080(b) of the Commission's Rules and engaged in misrepresentation and lack of candor in its renewal application and in subsequent filings with the Commission. We note that, here, the 73.2080(b) violation is inextricably intertwined with the misrepresentation and lack of candor. Each has at its heart the failure of the Church to establish and maintain an affirmative action recruitment program as required by Section 73.2080(b). This failure, and the attempt to cover it up by disingenuous statements designed to mislead the Commission's staff, warrant non renewal of The Lutheran Church/Missouri Synod's license to operate KFUD and KFUD-FM.

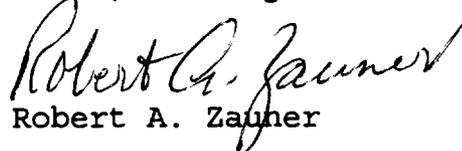
35. Both the Commission and the courts have consistently held that "the Commission's ability to fulfill its statutory responsibilities rests in great part on its being able to rely on the representations of licensees and applicants seeking licenses." Jimmie H. Howell, 65 FCC 2d 516, 521 (Rev. Bd. 1977). See Nick Chaconas, 28 FCC 2d 231 (1971); recon. denied, 35 FCC 2d 698 (1972); aff'd, 486 F. 2d 1314 (1973). It is undisputed that the Commission has the authority to deny a license for a deliberate misrepresentation. This fact has been repeatedly

affirmed by the courts. See, e.g., FCC v. WOKO, Inc., 329 U.S. 223 (1946); Immaculate Conception Church v. FCC, 320 F. 2d 795, cert. denied, 375 U.S. 904 (1963); Continental Broadcasting, Inc. v. FCC, 439 F. 2d 580, (1971) cert. denied, 403 U.S. 905 (1971).

36. Section 309(a) of the Communications Act of 1934, as amended, requires the Commission to affirmatively find that renewal of license is consistent with the public interest, convenience and necessity. No such determination is possible here. Accordingly, the above-captioned renewal applications of KFYO and KFYO-FM should be denied.

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September 2, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass. Media Bureau, certifies that she has, on this 2nd day of September, 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law"** to:

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