

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

WT Docket No. 95-11

In the Matter of the
Application of

HERBERT L. SCHOENBOHM
Kingshill, Virgin Islands

For Amateur Station and
Operator Licenses

Appearances

Lauren A. Colby, Esquire, on behalf of Herbert L. Schoenbohm, and *Thomas D. Fitz-Gibbon, Esquire*, and *Terrence E. Reideler, Esquire*, on behalf of the Wireless Telecommunications Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: January 26, 1996;

Released: February 2, 1996

I. Preliminary Statement

1. On February 2, 1994, Herbert L. Schoenbohm applied for renewal of his amateur station and operator licenses. Those licenses were scheduled to expire on March 2, 1994, but their terms have been extended pursuant to Section 1.62(a) of the Commission's Rules, 47 C.F.R. §1.62(a), until the disposition of Mr. Schoenbohm's application.

2. On February 6, 1995, the Wireless Telecommunications Bureau ("Bureau") under delegated authority, adopted an order designating Schoenbohm's application for hearing. Mr. Schoenbohm filed a timely appearance. The issues, as modified and expanded by order of the presiding officer on June 5, 1995, are the following:

(a) To determine whether, in light of the conviction described in the Hearing Designation Order, Herbert L. Schoenbohm is qualified to renew his amateur service licenses.

(b) To determine whether Herbert L. Schoenbohm violated Section 1.1210 of the Commission's Rules, 47 C.F.R. §1.1210, by soliciting or encouraging others to make a presentation that he was prohibited from making.

(c) If it is determined that Herbert L. Schoenbohm did violate Section 1.1210 of the Commission's Rules, 47 C.F.R. §1.1210, to determine the effect of such a violation on his qualifications to renew his amateur service licenses.

(d) To determine, in light of the foregoing issues, whether granting Herbert L. Schoenbohm's application would serve the public interest, convenience and necessity.

3. A prehearing conference was held on March 30, 1995. Exhibits, including written ~~direct testimony of witnesses~~, were exchanged prior to the hearing. The hearing was held on August 8, 1995, and the record was closed the same day.

II. Findings of Fact

Conviction

4. In *Government v. Schoenbohm*, No. Crim:1991/0108 (D.V.I. December 30, 1992), Mr. Schoenbohm was convicted in the U. S. District Court for the District of the Virgin Islands (District Court) of violating 18 U.S.C. §1029(a)(1). The statute provides:

whoever--

knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

shall, if the offense affects interstate or foreign commerce, be punished . . .

5. The statute defines the relevant terms:

(1) The term access device' means any card, plate, code, account number or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);

(2) The term counterfeit access device' means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(3) The term unauthorized access device' means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;

(4) The term produce' includes design, alter, authenticate, duplicate, or assemble;

(5) The term traffic' means transfer, or otherwise dispose of, to another, or obtain control with intent to transfer or dispose of; . . . 18 U.S.C. §1029(e).

6. The District Court sentenced Mr. Schoenbohm to imprisonment for a term of two months. The Court suspended execution of this sentence and placed Schoenbohm under house arrest for two months with two years probation. The District Court also required Mr. Schoenbohm to pay a fine of \$5,000.00 during the period of probation. Schoenbohm began serving his sentence on January 11, 1993. (Bureau Ex. 1.)

7. On appeal, the U. S. Court of Appeals for the Third Circuit affirmed Schoenbohm's conviction: "We . . . affirm appellant's conviction under 18 U.S.C. §1029(a)(1)—use of a counterfeit access device." *United States v. Schoenbohm*,

No. 93-7516 (Third Circuit July 2, 1994). Schoenbohm's petition for rehearing was denied on November 2, 1994. *United States v. Schoenbohm*, No. 93-7516 (Third Circuit November 2, 1994).

8. In affirming Schoenbohm's felony conviction, the Court of Appeals reviewed evidence which showed that between 1982 and 1989, Caribbean Automated Long Line Services ("CALLS") provided long distance telephone services to the Virgin Islands. Fraud was a major problem with CALLS. S-II telephone access codes were used to procure telephone service. To stem its losses, CALLS began an investigation which identified Herbert L. Schoenbohm as a possible user of illicitly-obtained access codes. At trial, two witnesses testified that Schoenbohm telephoned them at about the same time that records show calls being placed to their numbers with illicit codes. Five other witnesses to whom calls were placed with illicit codes testified that Mr. Schoenbohm was the only person in the Virgin Islands who ever telephoned them.

9. Mr. Schoenbohm was convicted of the crime of fraudulent use of a counterfeit access device. In his first written declaration (dated May 23, 1995) submitted in this proceeding, Schoenbohm's characterization of his conviction is essentially accurate: "I was convicted for defrauding a telephone resale service provider by . . . making unauthorized long distance calls." (Schoenbohm Ex. 1.) In a later written declaration (dated July 18, 1995), however, Mr. Schoenbohm described his conviction as follows: "I was convicted solely of having knowledge in my mind of certain telephone codes of which 4 of the 6 digits were similar to those that could be used to make long distance calls without paying for them. These telephone numbers were the 'Counterfeit Access Device' which I was convicted of possessing or using." (Schoenbohm Ex. 7.) This theme, that Schoenbohm was not convicted because he performed any act, was continued upon direct examination at the hearing with Mr. Schoenbohm offering this description of his conviction:

Q: Now, you have been convicted, have you not, of the crime of possessing a counterfeit telephone access device?

A: That's correct.

Q: And what was the device that you were convicted of possessing?

A: It was never described fully in the court, but believed to be numbers in my mind.

Q: In other words, numbers that could be used to make long-distance telephone calls?

A: That's correct.

Q: --without paying for them? Is that right?

A: Correct. (Tr. 38.)

10. Schoenbohm claims that his conviction is the subject of a "pending appeal," and because of this:

" . . . I cannot express remorse for this crime. To do so would jeopardize my appeal in which I argue (and truthfully believe) that I was wrongfully convicted. I do, however, express remorse for the trouble my conviction has caused both the amateur community and the FCC." (Schoenbohm Ex. 1.)

11. From 1979 to 1992, Mr. Schoenbohm served as the Chief of Communications for the Virgin Islands Police Department. He lost that job as a result of his criminal conviction. Along with the job, he also lost associated pension benefits and health care insurance. (Schoenbohm Ex. 1.)

12. In his May 23, 1995, declaration, Schoenbohm states that he "now make[s] [his] living as a talk show host at a modest fixed salary." But in oral testimony at the hearing, Schoenbohm first stated that he is no longer in broadcasting (Tr. 63), then, that he works for radio station WJRR, broadcasting "community information, reading community bulletin boards and allowing people who want to call in and ask questions" to do so (Tr. 64). While Schoenbohm still hosts this talk show, "I'm not compensated for the show." Apparently, Schoenbohm is also not presently compensated for hosting any other WJRR talk show since at some earlier time he "resigned my position as a compensated talk show host for WJRR. . . ." At the present time, Mr. Schoenbohm's primary employment appears to be as the Director of Transportation for the Department of Property and Procurement for the Virgin Islands government. (Schoenbohm Ex. 2.) Schoenbohm is employed part-time as a District Field Representative for Delegate Victor O. Frazer, who represents the Virgin Islands in the United States House of Representatives. (Schoenbohm Ex. 4; Tr. 52-53.)

13. In March 1978, F.C.C. Commissioner Margita E. White appointed Schoenbohm Chairman of the State Emergency Communications Committee for the Virgin Islands. In May 1981, F.C.C. Commissioner Joseph R. Fogarty directed the following letter to Mr. Schoenbohm:

It is with pleasure that I send you the Emergency Broadcast System (EBS) Planning Awards for the Virgin Islands. The awards are presented in appreciation to those broadcast industry personnel for their voluntary work in developing EBS plans for the Virgin Islands. The awards may be presented at a place and time that you deem appropriate.

14. On June 5, 1987, an office of the Federal Bureau of Investigation sent Schoenbohm a letter of appreciation thanking him for his assistance in apprehending a man who had attempted to hijack an airplane to Cuba. During the 1969 journey of Thor Heyerdahl across the Atlantic Ocean in the reed boat "Ra," Schoenbohm was in daily contact with the Ra, and, when the boat finally had to be abandoned, Schoenbohm received that information by ham radio and succeeded in arranging for Heyerdahl's safe rescue at sea. Under date of November 14, 1979, Schoenbohm received a written commendation from the Virgin Islands government for his service in using ham radio to provide communications during the tropical storms (Hurricanes David and Frederick) which affected the Virgin Islands in 1979. Schoenbohm also used ham radio communications in an effort to save lives and property during Hurricane Hugo on September 17, 1989. He received a written commendation for that work from the Virgin Islands Police Department. On October 12, 1992, the American Red Cross cited Mr. Schoenbohm for work that he did through ham radio communications during Hurricane Andrew. (Schoenbohm Exs. 1, 1A-1F.)

Ex Parte Communication

15. The parties stipulated that Schoenbohm Exhibit 3 is an essentially accurate transcription of a tape recording made by Mr. Hugh J. LeBlanc at about 8:30 a.m. on April 3, 1995 (Tr. 32-34). The transcription indicates that Schoenbohm made amateur radio transmissions on the frequency 14.313 MHz concerning a number of subjects. In particular, Schoenbohm made the following transmissions:

Well, I'm not allowed, I'm not allowed under the *ex parte* rules to ask for assistance of, with people in political positions but other people, if they feel that government is overbearing or I'm being treated unfairly, have every right to point this out to their elected representatives. Congressional inquiries may indicate that these things will be conducted under the scrutiny of greater illumination but I am not permitted under *ex parte* rules to engage in asking for assistance. We don't have a Republican here but the person elected to Congress presently is from here. He is an independent. He is a wonderful person and I was very, very instrumental in getting him elected to Congress. If you [covered up by Mr. LeBlanc's remark] ... presently though, he is a nonvoting delegate. We don't have a vote except in committee and I just don't know what he could do in a situation like this but I am not permitted at this time because of *ex parte* rules to make any requests for political intervention. Other people could do it if they're so disposed but I can't do it. Go ahead.

[covered up by Mr. LeBlanc's remark] ... It's in the Longworth Building in Washington, D.C.

[Amateur Station AB4PW not heard on LeBlanc's tape.]

Victor Frazer, F-R-A-Z-E-R, Victor Frazer. His phone number is area code 202 225-1700.

[conversation continues]

Getting back to the other thing. I think that there is one thing that can be established. If you have observed KV4FZ operating his station in a manner that you think is beneficial to communications, emergency communications, or during Hugo [Hurricane] or Hurricane Andrew, or Hurricane Frederick or Bob, I don't go back to [Hurricane] David and Hurricane Gilbert, the one in Jamaica. If you have any indication or any observation, that is something you can raise in a letter to someone else if you observed it, it may have an impact. I don't know if the other things will or will not, but you may ask. I think what you should do, if it were me I would ask the question of the gentleman that you plan to write whether or not he feels, he feels the cancellation or the refusal to renew the license of KV4FZ would have a negative impact on the communications readiness and preparedness [covered up by LeBlanc talking to himself] whether or not to renew the license or the failure to renew the license would have a negative impact on the people of his constituency. That might make a difference, but I, it would depend on how things are crafted. AB4PW, KV4FZ.

16. Mr. Schoenbohm claims that he had no knowledge of the *ex parte* rules when this case was first designated for hearing, he did not realize that soliciting help from elected

officials might be improper. Therefore, "... before I received from the Commission the hearing designation order, and shortly thereafter, I did in fact, write a number of letters to elected officials requesting assistance." (Schoenbohm Ex. 7.) Schoenbohm declared that he sent no further letters after his attorney explained the Commission's *ex parte* rules to him. Schoenbohm further declared that his remarks on April 3, 1995 (set out above) were nothing more than an exposition of his newly-acquired knowledge concerning the *ex parte* rules. Mr. Malcolm B. Swan, a licensed radio amateur, submitted an affidavit on Schoenbohm's behalf. Swan states that during a two-way single side band communication he had with Schoenbohm on April 3, 1995, he asked Schoenbohm for the name of the person who represented the Virgin Islands and Mr. Schoenbohm provided Delegate Frazer's name. Swan states that at no time was he requested to solicit or contact any member of Congress on Schoenbohm's behalf.

III. Conclusions of Law**Conviction**

17. Schoenbohm argues that his crime is not the kind of crime that is cognizable under current Commission policy. Therefore the conviction does not preclude the renewal of Schoenbohm's licenses. Schoenbohm asserts that in 1986, the Commission adopted a "new policy for broadcast applicants, declaring that felony convictions would be considered only if those convictions were 'broadcast related.'" Schoenbohm argues further that in its 1990 policy statement, the Commission "made it clear that, with respect to non-broadcast licensees, non-FCC related felony convictions and other non-FCC related misconduct, would be excluded from consideration in passing upon the qualifications of an applicant for a permit or license." The authority for these assertions is stated to be *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986); *recon.* 1 FCC Rcd. 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. F.C.C., No. 86-1179 (D.C. Cir. June 4, 1987), as modified*, 5 FCC Rcd. 3252 (1990) [to cover non-broadcast licensees], *recon.*, 6 FCC Rcd. 3448.

18. Schoenbohm's position reflects a misreading of Commission policy. The policies urged by Schoenbohm are nowhere to be found in any of the cited material. What those policy statements do, however, is make it clear that the Commission's character inquiry focuses on "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [Commission] rules and policies."

19. Mr. Schoenbohm's conviction for a felony involving fraudulent conduct implicates his propensity for truthfulness. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 1179, 1196-97 (1986). In making its determination, the Commission will ordinarily consider a significant showing of mitigating circumstances or rehabilitation. Some factors relevant to claims of mitigation include the willfulness, frequency and currency of the misconduct; the seriousness of the misconduct; the nature of participation of managers and owners; the efforts made to remedy the wrong; the applicant's record of compliance with the Commission's rules and policies; and rehabilitation. *Modified Policy Statement*, 5 FCC Rcd. 3252, *Character Policy Statement*, 102 FCC 2d 1179, at 1227-28; see, *Public Notice*, 4 FCC Rcd. at 7543 (extenuating and miti-

gating circumstances are relevant). Undoubtedly relevant as well is an applicant's forthrightness and truthfulness in the very Commission proceeding in which the applicant's propensity for truthfulness is to be assessed.

20. Mr. Schoenbohm's testimony in this proceeding precludes any notion of either mitigation or rehabilitation. Manifestly, Schoenbohm was convicted of the crime of fraudulent use of a counterfeit access device. That is the conviction which the Court of Appeals affirmed: "We . . . affirm the appellant's conviction under 18 U.S.C. §1029(a)(1)—use of a counterfeit access device." In his first testimony about the matter, Mr. Schoenbohm was straightforward: "I was convicted for defrauding a telephone resale service provider by . . . making unauthorized long distance calls." In written testimony prepared later, however, and in oral testimony given at hearing, Schoenbohm altered his first testimony to cast his conviction in a different light. Here, he described his conviction as follows: "I was convicted solely of having knowledge in my mind of certain telephone codes of which 4 of the 6 digits were similar to those that could be used to make long distance calls without paying for them." This mischaracterization of the facts, i.e., the conviction was not for performing any act but "solely [for] having knowledge . . . of certain telephone codes," was continued upon direct examination at the hearing, where Mr. Schoenbohm offered this softened description of the nature of his conviction:

Q: Now, you have been convicted, have you not, of the crime of possessing a counterfeit telephone access device?

A: That's correct.

Q: And what was the device that you were convicted of possessing?

A: It was never described fully in the Court, but believed to be numbers in my mind.

Q: In other words, numbers that could be used to make long-distance telephone calls--

A: That's correct.

Q: --without paying for them? Is that right?

A: Correct.

21. The apparent reason for Mr. Schoenbohm's altered testimony (and its reiteration in proposed findings) is that the alteration was a conscious effort to influence and mislead the trier of fact. That testimony sought to portray a softened, more benign, image of the facts underlying the felony conviction and was false. Contrary to his claim, Schoenbohm was not convicted "solely of having knowledge in [his] mind of certain telephone codes . . . which . . . were similar to those that could be used to make long distance calls without paying for them." Schoenbohm was actually convicted for the fraudulent use of counterfeit access codes. In affirming the conviction, the Court of Appeals noted that at Schoenbohm's trial, two witnesses testified that Schoenbohm telephoned them at about the same time that records show calls being placed to their numbers with illicit codes; five other witnesses to whom calls were placed with illicit codes testified that Schoenbohm was the only person in the Virgin Islands

who ever telephoned them. Schoenbohm's altered testimony about the facts of his conviction was deliberately false. Neither mitigation or rehabilitation will be found.

Ex Parte Communication

22. Section 1.1210 of the Commission's Rules, 47 C.F.R. §1.1210, reads, in pertinent part, as follows: ". . . no person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart."

23. Schoenbohm Exhibit 3 shows that Mr. Schoenbohm solicited others to make prohibited *ex parte* presentations in his behalf in this proceeding. The plain meaning of the words used leave no real doubt about the matter. Schoenbohm stated that because of the *ex parte* rules, he is not permitted to make any requests for "political intervention" in this matter but other people can do so. He then provided the name, address and telephone number of Congressional Delegate Victor O. Frazer. Schoenbohm went on to make specific suggestions about the content of letters to be written to Congressmen in his behalf--such as information concerning Schoenbohm's participation in emergency communications and asking the Congressmen whether the non-renewal of his amateur licenses would have a negative impact on their constituents.

24. Mr. Swan claims that he asked Schoenbohm for the name of the person who represented the Virgin Islands and that Schoenbohm provided Delegate Frazer's name. But even if no singular request was made to Swan, it is clear that Mr. Schoenbohm was in fact encouraging Mr. Swan and any others who were listening to solicit *ex parte* presentations on Schoenbohm's behalf.

25. Schoenbohm admits that shortly before and shortly after this case was designated for hearing, he wrote a number of letters to elected officials seeking their assistance. He claims that during those times he was unfamiliar with the *ex parte* rules and, hence, "did not realize that it would be improper to request help from elected officials with my case." (Schoenbohm Ex. 7.) In March 1995, Schoenbohm retained an attorney to represent him in this case and the attorney explained the Commission's *ex parte* rules to Mr. Schoenbohm at about that time. Mr. Schoenbohm thereafter ceased writing letters to elected officials seeking their assistance. It is inferred from these facts that Schoenbohm's April 3, 1995, remarks were made knowingly in violation of the *ex parte* rules. Schoenbohm's claim that his remarks were nothing more than "an exposition of [his] newly acquired knowledge" of the *ex parte* rules is not supported by the evidence.

IV. Ultimate Conclusions

26. Mr. Schoenbohm's conviction for a felony involving fraudulent conduct reflects adversely on his propensity to obey the law, a trait predictive of reliability as a licensee. Schoenbohm's knowing violation of the *ex parte* rules provides further evidence that the Commission will not be able to rely on him to be truthful or to comply with the Communications Act and Commission rules and policies. Mr. Schoenbohm does not possess the requisite qualifications for a renewal of his amateur station and operator licenses.

27. In view of the foregoing, it is concluded that:

(a) In light of the conviction described in the Hearing Designation Order, Herbert L. Schoenbohm is not qualified to renew his amateur service licenses.

(b) Schoenbohm's violation of Section 1.1210 of the Commission's Rules provides an additional ground for his disqualification.

Accordingly, IT IS ORDERED that Herbert L. Schoenbohm's application to renew his amateur service licenses is denied.¹

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

¹ In the event exceptions are not filed within thirty (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 fifty (50) days after its release pursuant to Section 1.276(d) of the Commission's Rules.