

employing, supervising, and firing personnel. The people who recruit and service customers, fix repeaters, and perform the billing and collection functions are among the personnel covered under that factor. There is no dispute that Kay hires, supervises, and fires his employees. Kay even has the right to dismiss Sobel from his work on the Management Agreement stations at any time. WTB Ex. 39, p. 3. Sobel's statement that Kay has not hired any employees specifically to work on the Management Agreement stations (Sobel Exceptions, p. 15) is irrelevant. The important point is that the people who work on those stations are hired, supervised, and fired by Kay.

E. Who is in charge of the payment of financing obligations, including expenses arising out of operating?

31. The arguments of Sobel (Sobel Exceptions, pp. 15-16) and Kay (Kay Exceptions, p. 18) attempt to distort simple facts on this point. Sobel clearly testified:

Q. Except for an instance where you may have missed billing Mr. Kay for a part, is it correct that Mr. Kay has, in fact, paid all the expenses relating to the Management Agreement stations?

A. Yes.

Tr. 131. The argument that Sobel is somehow paying the operating expenses by agreeing to forego the \$600 a month of revenue from each station (Sobel Exceptions, p. 15) is gibberish. Moreover, their repeated recitation of the mantra that the agreement was a reasonable business decision is beside the point. It goes without saying that it would be advantageous to anybody to enter into an agreement in which they had no financial obligation or liability whatsoever. Such an arrangement, however, necessarily raises questions as to whether that person is in fact in control of that business. Sobel's and Kay's failure to candidly acknowledge that Kay pays all the operating expenses just shows that their exceptions are not reliable.

F. Who receives monies and profits from the operation of the facilities?

32. The only money Sobel has received from the Management Agreement stations is the fees he has earned working on those stations as Kay's contract technician, and money Kay decided to give him in connection with the sale of Management Agreement stations. The monies from the Management Agreement stations go directly into Kay's bank account. I.D., ¶48. Sobel's claim that the only reason he is not receiving money is the Bureau's delay in processing applications (Sobel Exceptions, p. 16), and Kay's claim that Kay and Sobel never deviated from the written agreement (Kay Exceptions, p. 19) are wrong. Even though the agreement provides that Sobel is supposed to receive fifty percent of the revenues once the revenue from any station exceeds \$600 a month, and though the revenue from four of the stations exceeds \$600 a month, Sobel has received none of the operating revenue. I.D., ¶48.

33. Sobel and Kay argue that the Presiding Judge improperly concluded that Kay's option to purchase the Management Agreement stations at any time for \$500 each was evidence of a transfer of control. Sobel Exceptions, pp. 16-17, Kay Exceptions, p. 19. While the mere existence of an option may not be evidence of a transfer of control. When the nominal option price in relation to the value of the stations, Kay's right to exercise the option at any time, and Kay's control of the acquisition and disposition of licenses is considered, however, the option is compelling evidence of Kay's control. Kay was offered \$1.5 million dollars for the Management Agreement stations. Tr. 275. Since Sobel cannot sell the stations without Kay's consent, but Kay can force a sale of the stations over Sobel's objection (I.D., ¶40), Kay's right to acquire the stations for a token part of their market value further demonstrates his complete financial control over the Management Agreement stations.

IV. ADMINISTRATIVE PROCEDURE ACT

34. Sobel argues that the HDO was adopted in violation of Section 9(c) of the Administrative Procedure Act, 5 U.S.C. § 558(c), because he was not given, prior to designation, notice of the facts which could warrant revocation, or an opportunity to demonstrate compliance with all lawful requirements. Sobel Exceptions, pp. 6-9. As Sobel acknowledges, this requirement is not applicable to cases where "willfulness" is present. Sobel argues that "willfulness" means "an intentional misdeed or such gross neglect of duty as to be the equivalent thereof." Sobel Exceptions, p. 6. Sobel's argument is contrary to Finer Foods Sales Co., Inc., 708 F.2d 774, 778 (D.C. Cir. 1983). In Finer, the D.C. Circuit rejected an argument that evil intent had to be shown in order for an act to be "willful" under Section 9(c) of the APA. In interpreting the word willful, the Court looked to the underlying substantive statute for an appropriate definition of "willful." In that case, the statute was the Perishable Agricultural Commodities Act, which defined willful as meaning any act done "intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements."

35. In this case, the definition of willfulness found in the Communications Act would define that term for purposes of Section 9(c) of the APA. Section 312(f)(1) of the Communications Act, 47 U.S.C. § 312(f)(1), defines "willful" as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter. . ." Sobel's oral and written agreements with Kay were "willful" within the meaning of the Communications Act -- he knowingly and voluntarily entered into his agreements with Kay. Since Sobel's conduct was willful as defined in the Communications Act, Sobel was not

entitled to notice and an opportunity to come into compliance.

36. Even if the Commission was required to have evidence that Sobel had engaged in intentional misconduct or gross neglect of duty, the management agreement constituted such evidence. As the Commission found in the HDO (at ¶15), "the overwhelming thrust of the Agreement suggests that Kay's dominion over the facilities is virtually absolute." Such an agreement would, at a minimum, constitute a clear neglect of Sobel's responsibilities under Section 310(d) of the Communications Act. Moreover, since Sobel had entered into an agreement which he had no right to terminate (I.D., ¶18), no purpose would have been served by giving Sobel notice and an opportunity to come into compliance. Sobel's claim of "bad faith" (Sobel Exceptions, p. 9) is totally unsupported. Indeed, the Presiding Judge concluded that *Sobel* acted in bad faith by attempting to deceive the Commission. Accordingly, the Commission did not violate the Administrative Procedure Act in issuing the HDO.

V. SANCTIONS AND CONCLUSION

37. Sobel and Kay argue that the record does not support revocation of all of Sobel's licenses and that the appropriate sanction for an unauthorized transfer of control is a forfeiture, not revocation. Sobel Exceptions, p. 25, Kay Exceptions, pp. 22-23. Neither Sobel nor Kay address the Presiding Judge's detailed reasoning as to why revocation was the appropriate sanction. I.D., ¶78. Their arguments also ignore the fact that this case involves not only an unauthorized transfer of control but also the grave offenses of misrepresentation and lack of candor. Merely revoking the Management Agreement licenses would not be a significant deterrent to dissuade future misconduct by Sobel or others. The Management Agreement stations are not a meaningful source of revenue to Sobel, and he has no firm

expectation of receiving revenue from those stations in the future. Only by revoking all of Sobel's licenses can the Commission impose a meaningful sanction and show that it will not tolerate such serious misconduct. Licenses may be revoked even for "meaningless" misrepresentations. FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). Sobel's refusal to be honest with the Commission, and his repeated refusal to acknowledge his duty to provide information needed by the Commission, shows that he lacks the essential character traits of truthfulness and reliability. The Presiding Judge therefore correctly concluded that all of Sobel's licenses should be revoked.

Accordingly, the Bureau asks the Commission to deny Sobel's and Kay's exceptions in their entirety and to affirm Judge Frysiaak's Initial Decision.

Respectfully submitted,

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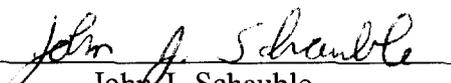
CERTIFICATE OF SERVICE

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