

FCC MAIL SECTION

Federal Communications Commission

FCC 98-19

MAR 6 12 47 PM '98

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

In the Matter of)	
)	
Streamlining Broadcast EEO Rule and Policies,)	MM Docket No. 96-16
Vacating the EEO Forfeiture Policy Statement and)	
Amending Section 1.80 of the Commission's Rules)	
To Include EEO Forfeiture Guidelines)	

ORDER AND POLICY STATEMENT

Adopted: February 5, 1998;

Released: February 25, 1998

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

I. INTRODUCTION

1. In Streamlining Broadcast EEO Rule and Policies (Order and Notice of Proposed Rule Making), MM Docket No. 96-16, 11 FCC Rcd 5154 (1996) ("NPRM"), the Commission set forth proposals for streamlining the Commission's Equal Employment Opportunity ("EEO") Rule and policies. We stated our concern that the Commission's EEO requirements "may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters,"¹ and requested comment on ways to improve our EEO Rule and policies to afford relief to such broadcasters without undermining the effectiveness of our EEO program.² In response to the NPRM, we received comments concerning one such group of distinctly situated broadcasters, religious broadcasters, and their treatment under the EEO Rule.³ Many of these commenters requested that the Commission's EEO policy concerning religious broadcasters, first announced in Complaint by Trygve J. Anderson, 34 FCC 2d 937 (1972), affd sub nom. King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden"), be changed. Because we believe that this issue is ripe for review, we hereby issue this Order and Policy Statement which adopts a change in the Commission's enforcement of the EEO Rule for religious broadcasters, as defined herein.⁴

¹ Id. at 5155.

² Id. at 5162-5163.

³ Commenters on this issue included National Religious Broadcasters ("NRB"); over 100 letters in support of NRB's comments; the Christian Legal Society's Center For Law and Religious Freedom; Concerned Women for America, and Focus on the Family ("CLS"); the Center for Individual Rights ("CIR"); the Lutheran-Church - Missouri Synod ("LCMS"); the Adventist Radio Network ("ARN"); Americans United For Separation of Church and State ("AUSCS"); the American Civil Liberties Union, People For the American Way, and the Office of Communication of the United Church of Christ; Illinois Bible Institute; Southwest Florida Community Radio, Inc.; Side By Side, Inc.; Radio Training Network, Inc.; Eastern Shore Broadcasting, Inc.; and the American Jewish Committee ("AJC").

⁴ This Order and Policy Statement concerns only religious broadcasters. We will address the other issues and specific proposals raised in the NPRM in a Report and Order to be issued at a later date.

II. BACKGROUND

2. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires a broadcast licensee or permittee to refrain from employment discrimination on the basis of race, color, religion, national origin, or sex, and to establish, maintain, and carry out an EEO program reflecting positive and continuing efforts to assure equal employment opportunity in every aspect of station employment. The EEO Rule is not intended to replicate federal and state anti-discrimination laws but to promote equal employment opportunity as a means to furthering program diversity.⁵ When evaluating a licensee's EEO performance, the Commission focuses on the licensee's efforts to contact sources likely to refer qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The objective of the Commission's efforts-based program is to increase the pool of eligible candidates from which the licensee can select the best qualified applicant.⁶ Broadcast stations with five or more full-time employees are required to file a "Broadcast Equal Employment Opportunity Program Report" (Form 396) as part of their renewal application and to file a "Broadcast Station Annual Employment Report" (Form 395-B) on a yearly basis.⁷ In addition, applicants for broadcast construction permits, transfers of control and assignment of licenses are required to file a "Broadcast Equal Employment Opportunity Model Program Report" (Form 396-A).

III. DISCUSSION

3. Our policy in King's Garden established a limited exemption for religious broadcasters from the Commission's rules prohibiting employment discrimination on the basis of religion. The exemption applies to persons hired to espouse religious views over the air.⁸ The National Religious Broadcasters ("NRB"), a national association of radio and television broadcasters whose purpose is to "foster and encourage the broadcasting of religious programming,"⁹ urges the Commission to refashion the King's Garden policy to permit religious licensees to establish religious affiliation or belief as a bona fide occupational qualification for all positions at their stations.¹⁰ Upon review of this matter, we conclude that the Commission's policy should be expanded to permit religious broadcasters to establish religious belief or affiliation as a job qualification for all station employees. This action should be considered binding for radio licensees and permittees, and, in light of the limitations imposed by Section 334 of the Communications Act,¹¹ a non-binding policy statement for television licensees and permittees. Therefore,

⁵ See Implementation of Commission's Equal Employment Opportunity Rules, 9 FCC Rcd 2047 (1994) ("Implementation of Commission's Equal Employment Opportunity Rules").

⁶ NPRM, 11 FCC Rcd at 5158-59.

⁷ 47 C.F.R. § 73.3612.

⁸ King's Garden, 498 F.2d at 61.

⁹ NRB comments at 1. NRB states that more than 1,300 radio stations provide full-time religious programming. Id.

¹⁰ Id. at 2.

¹¹ Section 334 of the Communications Act of 1934, as amended, 47 U.S.C. § 334, prohibits the Commission from revising "the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees," as well as the

in this Order and Policy Statement, we expand the Commission's King's Garden policy, as described supra. However, we emphasize that this action does not permit religious broadcasters to engage in employment discrimination against women and minorities and that religious broadcasters, when vacancies occur, will still be required to recruit without limitation on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief.

4. In King's Garden, the court upheld the Commission's limited exemption policy.¹² "Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension," the court held enforcement of the Commission's nondiscrimination rules does not violate a licensee's First Amendment right to freedom of religious expression.¹³ In deciding that the Commission's policy violated neither the Free Exercise nor the general First Amendment rights of religious broadcasters, the court's decision does not preclude the Commission from defining and broadening its policy to include all station employees.

5. The NRB, in comments supported by some eighty other parties, submits that the Commission should alter its current policy of affording religious broadcasters a limited exemption from the EEO requirements and adopt a "bright line exemption" extending to all positions at such a broadcast station.¹⁴ Specifically, NRB and other commenters¹⁵ posit that the Commission's current policy places a substantial burden on the ability of religious broadcasters to order their internal affairs, including the conduct of activities undertaken as a community and the need to insure that all employees share a common commitment to the licensee's religious objective and mission. Moreover, NRB submits that the King's Garden policy excessively entangles the government in religious affairs, whereas a bright line rule exempting all positions at a religious station would avoid this pitfall.¹⁶

6. We believe that it is reasonable to conclude that it may be appropriate for all employees of religious broadcasters to share a common commitment to a licensee's basic religious objective and mission.¹⁷ As NRB contends, "employees at all levels have an ability to affect the morale and cohesiveness of religious organizations by the beliefs they espouse and the standards of moral conduct that they maintain."¹⁸ By allowing religious broadcasters to use religious belief or affiliation as a job qualification for all station jobs, we will eliminate the potential danger of impermissible governmental interference with a religious broadcaster's judgment in the conduct and definition of its religious affairs,

EEO forms used by television licensees and permittees, except for necessary "nonsubstantive technical or clerical revisions. . . ." Accordingly, the action taken here can be and is binding only with respect to radio licensees and permittees.

¹² King's Garden, 498 F.2d at 61.

¹³ Id.

¹⁴ NRB Comments at 1.

¹⁵ See NRB Comments at 8-9; CLS Comments at 2-3; CIR Comments at 8.

¹⁶ NRB Comments at 12. See CIR Comments at 10; CLS Comments at 10.

¹⁷ NRB Comments at 10.

¹⁸ Id.

and, as NRB points out, end the need for the Commission's current practice of engaging in case-by-case analysis of particular job categories to determine if they involve espousal of the licensee's religious views.¹⁹ Such an action is consistent with the principle long recognized by the Supreme Court "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause" of the First Amendment.²⁰ Moreover, subjecting all station jobs to the same requirements is also more consistent with our current enforcement of the EEO Rule generally. Consequently, we broaden our King's Garden policy to allow religious broadcasters to use religious belief or affiliation as a job qualification for all station jobs. We reiterate, however, that our action today does not create a blanket exemption from our EEO Rule. We expect that religious broadcasters will continue to ensure equal employment opportunity in every aspect of station employment policy and practice for persons who share their faith. We emphasize that religious broadcasters, like others, must serve the public interest as articulated in Commission rules and policies.

7. For these purposes, we will define a "religious broadcaster" as a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity. Our determination as to whether a licensee is a "religious broadcaster" will be made on a case-by-case analysis, based upon an evaluation of the religious entity's characteristics. The relevant characteristics will include, among other things, whether the entity is operated for profit or non-profit, the existence of a distinct religious history, and whether the entity's articles of incorporation mention any religious purpose. The Equal Employment Opportunity Commission conducts a similar process in determining whether an entity qualifies as a "religious corporation."²¹

8. In their reply comments, AJC and AUSCS disagree with expanding the King's Garden policy. AUSCS is concerned that expanding the King's Garden policy could lead to racial and ethnic discrimination and have a negative impact on equal opportunity in the industry. As noted above, however, religious broadcasters are still required to operate their stations in the public interest, as defined by the Commission's rules and policies. Religious broadcasters, like all other licensees, take their licenses subject to the responsibilities and obligations of public trustees. Thus, we believe AUSCS' concern unavailing.

9. Nothing in this order should be interpreted as permission to engage in employment discrimination against women and minorities. As stated previously, religious broadcasters must still recruit without limitation on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief in filling positions at their stations. Religious broadcasters will also remain subject to Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§ 73.2080(b) and (c), requiring broadcast licensees to maintain a positive continuing program of specific practices designed to ensure equal employment opportunity, for persons who share their faith, in every aspect of station employment policy and practice. We hereby emphasize this continuing obligation notwithstanding any suggestion to the contrary in Lutheran Church/Missouri Synod, 12 FCC Rcd 2152, 2166 n.9 (1997), appeal pending. We shall also continue to require religious broadcasters to file Forms 396-A, 396 and 395-B, and will still examine their EEO programs at renewal time, as well as other relevant periods, to determine if they have complied with our EEO Rule, inquire further if there is evidence of lack of compliance, and take appropriate action if violations have occurred.

¹⁹ Id. at 12.

²⁰ Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) quoting Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 144-45 (1987) (footnote omitted).

²¹ See generally EEOC v. Townley Engineering & Manufacturing Company, 859 F.2d 610 (1988).

IV. PROCEDURAL MATTERS

Paperwork Reduction Act of 1995 Analysis

10. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and found to impose or propose no modified information collection requirement on the public.

Final Regulatory Flexibility Certification

11. As required by the Regulatory Flexibility Act ("RFA"),²² see 5 U.S.C. Section 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the NPRM.²³ The Commission sought written public comments on the proposals in the NPRM, including the IRFA.

12. Joint Commenters criticize the IRFA for not stating that the proposals in the Notice could adversely affect some non-licensee entities including Black colleges, community groups which refer job candidates, discrimination victims, individual job applicants, petitioners to deny, and members of the listening and viewing audience. Joint Commenters maintain that the IRFA failed "to mention the limited resources available to each of these parties in meeting significant burdens which would be imposed on them by cutbacks in EEO enforcement."²⁴ Joint Commenters' arguments are without merit. In the IRFA, the Commission did not indicate the economic impact of a rule change on any entity, stating that it "was unable to assess at this time what, if any, economic impact the proposed rule change would have on small business entities" and that a full assessment of the potential impact would be made, if applicable, at the final rulemaking stage.²⁵ Furthermore, the entities described by Joint Commenters would not be discussed in the Regulatory Flexibility Analysis at any stage in this proceeding because such analysis is reserved for entities directly regulated and affected by the subject rule of a proceeding and the entities discussed by Joint Commenters are not so regulated and affected. See Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission, 773 F.2d 327 (D.C. Cir. 1985).

13. We now believe that, pursuant to the RFA, see 5 U.S.C. § 605(b), we can certify that the action taken in this Order and Policy Statement, as distinguished from the broader proposals contained in the entire NPRM, will not have a significant economic impact on a substantial number of small entities. Other issues and proposals will be addressed in a Report and Order to be issued at a later date. This action simply allows religious broadcasters to establish religious affiliation or belief as a bona fide occupational qualification for all station positions, an action which will not have a significant economic impact. Religious broadcasters are still required to ensure equal employment opportunity in every aspect of station employment policy and practice for persons who share their faith. The Commission will publish this certification in the Federal Register, and will provide a copy of the certification to the Chief Counsel for Advocacy of the Small Business Administration. The Commission will also include the certification

²² The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

²³ 11 FCC Rcd at 5183.

²⁴ Comments of Joint Commenters at 119.

²⁵ 11 FCC Rcd at 5183-84.

in the report to Congress pursuant to the RFA, see 5 U.S.C. § 801.

Ordering Clauses

14. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 4, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154, 303, and 307, the change to the Commission's enforcement of its EEO Rule as to religious broadcasters, as described in this Order and Policy Statement, **IS ADOPTED**.

15. **IT IS FURTHER ORDERED** that, pursuant to the Contract with America Advancement Act of 1996, the change set forth in this Order and Policy Statement **SHALL BE EFFECTIVE** either 30 days after publication in the Federal Register or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, whichever is later.

16. **IT IS FURTHER ORDERED** that the Commission's Office of Public Affairs, Reference Operations Division, **SHALL SEND** a copy of this Order and Policy Statement, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Maggie Roman Salas
Secretary

SEPARATE STATEMENT OF COMM. HAROLD W. FURCHTGOFF-ROTH**In the Matter of Broadcast Equal Employment Opportunity Enforcement Policy As to Religious Broadcasters**

I agree with the essential conclusion of this Order & Policy Statement, namely, that religious broadcasters should be permitted to establish religious belief or affiliation as a legitimate occupational qualification for all employees, and I therefore support its adoption. I write separately simply to highlight several important points that this item leaves unaddressed.

Who Is A "Religious Broadcaster"?

At this point in time, it is not entirely clear which broadcast licensees are even entitled to invoke the benefits of this Order & Policy Statement. If the meaning of the term "religious broadcaster" truly depends on "case-by-case analysis, based upon an evaluation of . . . characteristics" not conclusively described, *see* page 4 ("relevant characteristics will include, *among other things* . . .") (emphasis added), it would appear difficult, if not impossible, to know *ex ante* whether a particular licensee is covered by the policy -- at least until the Commission establishes helpful precedent on the definition of "religious broadcaster." And although we observe that the Equal Employment Opportunity Commission conducts a "similar" inquiry, *id.*, we do not say whether the existing caselaw developed by that agency will in fact guide our decisionmaking.

Due to this potential ambiguity as to coverage, I fear that we may have merely shifted the uncertainty and attendant chilling effect surrounding the rights of religious broadcasters from the back end of our policy (the determination of jobs involving religious espousal) to the front (the determination whether a licensee is a religious broadcaster). *Cf. Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring) ("A case-by-case analysis for [religious and secular] activities . . . would both produce excessive government entanglement with religion and create the danger of chilling religious activity."). This remains to be seen.

Potential Inconsistency Between Exemption and Processing Scheme

In the near future, perhaps when we apply this new rule in the context of a specific licensing proceeding, I would hope that we also come to grips with other practical problems that implementation of the item could present. For instance, although the Order & Policy Statement asserts that religious broadcasters cannot discriminate on the basis of race, color, national origin, or gender "from among those who share their religious affiliation or belief," page 4, our current Equal Employment Opportunity (EEO) processing scheme explicitly requires statistical comparison of the racial and gender composition of a broadcaster's workforce to the general racial and gender makeup of the entire local labor market, without regard to religious affiliation. *See Streamlining Broadcast EEO Rules and Policies* (Order and Notice of Proposed Rulemaking), 11 FCC Rcd 5154, 5159-61 (1996).

If the ability to choose employees who share a religious broadcaster's faith is to be exercised without penalty for any unintentional disparate impact that such exercise might have on other groups, *cf. In re Applications of the Lutheran Church/Missouri Synod* (Memorandum Opinion and Order), 12 FCC Rcd 2152, 2153 (1997), the Commission should evaluate that broadcaster's equal employment efforts in light of the labor pool of persons with the same religious affiliation as the broadcaster. Procedural adjustments thus may be necessary in order to eliminate this potential inconsistency between our new approach toward religious broadcasters and extant EEO procedures.

Processing By Legal Standards Rather Than "Guidelines"

The above-described modification of our renewal procedures should be clearly established in a legally enforceable manner. Unfortunately, the Commission's current processing "guidelines," as they have been termed, are not set forth in any duly-promulgated regulations. Rather, they are merely the product of agency custom -- a situation that can all too easily lead to inconsistent and possibly arbitrary application -- and were apparently developed without notice or comment.

Although we thus would be well advised to codify the entirety of our enforcement guidelines in published and accessible rules so that *all* broadcasters could enjoy greater certainty about the standards by which their EEO efforts will be measured, only the question of religious broadcasters is posed here. And with respect to those broadcasters, we ought at least to ensure that if the above-described adjustment to our EEO review is made, it is rooted in a rule of law.

Legal Status of Changes in EEO Enforcement

To all of this, there is a complicating factor: section 334 of the Communications Act. That provision states:

"[T]he Commission shall not revise . . . the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or . . . the forms used by such licensees and permittees to report pertinent employment data to the Commission."

47 U.S.C. section 334(a)(1)-(2). In light of section 334, the Commission noted at the outset of this proceeding that any changes in our EEO system that "require the revision of EEO regulations and/or forms for television stations would require statutory change" and further observed "that statutory change would not be required for the proposals if they only applied to radio stations." *Streamlining Broadcast EEO Rules and Policies*, 11 F.C.C. Rcd. at 5167. By its plain terms and as the Commission has construed it, then, section 334 has no applicability to regulatory changes made with respect to radio stations.²⁶ Religious broadcasters who operate those kinds of stations can thus be sure that they are legally entitled to use religious affiliation as a *bona fide* occupational qualification for all station jobs upon issuance of this item.²⁷

Whether religious broadcasters in the television business can do so, however, is far murkier. We have made clear that, due to section 334, this item is only a statement of policy as to religious television stations. *See* pages 2-3 ("This action should be considered . . . [,] in light of the limitations imposed by Section 334 of the Communications Act, a non-binding policy statement for television licensees and permittees."). Policy statements, as the U.S. Court of Appeals for the D.C. Circuit has repeatedly explained, have no force of law whatsoever, absent independent rulemaking or adjudication. *See Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181, 1186 (1986) (policy statement

²⁶ For this reason, the suggestions that I make above such as codification of our processing guidelines, if limited to radio stations, would not seem barred by section 334. As for my proposals as applied to television stations, legislative action may be required under that statute, as explained below.

²⁷ Or, more accurately, they can be sure of their ability to do so 30 days after publication of this item in the Federal Register or upon receipt by Congress of a report under the Contract with America Advancement Act, whichever is sooner. *See* page 6.

is "neither a rule nor a precedent. . . . [L]ike a press release, [it] presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)); *American Bus Association v. ICC*, 627 F.2d 525, 529 (D.C. Cir. 1980) (policy statement "acts [only] prospectively" and "genuinely leaves the agency and its decision-makers free to exercise discretion.").

Accordingly, today's action cannot, by itself, create any enforceable substantive right in religious television broadcasters to be free from application of the EEO religious anti-discrimination provision, nor can it preclude the Commission from enforcing that provision against such broadcasters. Until we either embody the "policy" announced today in an official agency rule or adhere to it in future adjudication, the legitimate interests of all religious broadcasters that we recognize today will not be safeguarded with any degree of real certainty. Short of such action, this statement is but a promise that can be broken tomorrow.

On the other hand, further agency action to create a binding standard for religious television broadcasters might arguably run afoul of section 334. That is, subsequent adherence to this policy statement by the Commission in matters involving television licensees could theoretically raise questions about the propriety of such action *if* application of the policy could be said to constitute a "revision of EEO regulations" within the meaning of section 334. And if that *were* the case, Congressional action might be necessary, as suggested in the Notice of Proposed Rulemaking, and our hands might be tied; no matter how laudable the goal of establishing an enforceable right for religious television broadcasters to hire based on religious affiliation, the Commission of course would not be free to violate the law in pursuit of that end. While I express no final views on the impact of section 334 on our ability to take action beyond mere policy statements in this context, I simply note the possibility that we could find ourselves on the horns of a regulatory dilemma as far as religious broadcasters who operate television, as opposed to radio, stations are concerned.

Religious Freedom

I note one last, and grave, difficulty with respect to enforcement of the EEO rules as against religious broadcasters. If and when an individual claims that they are a member of a certain religious faith but were nevertheless denied a job based on impermissible factors, and the religious broadcaster in turn asserts that the person is not in fact a member of their religious group, it is imperative that the Commission not involve itself in the determination of who is and who is not a *bona fide* member of a particular religious organization. Even under the umbrella of one religious denomination, there may be factions that disagree about the tenets of that denominational faith; the history of religion is replete with examples of such schisms. These are intensely personal debates into which government ought not inject itself. If the factual question of who is a "true" member of a particular religious group arises in the context of an EEO proceeding, government should defer to the considered judgment of the particular group with which the broadcaster is affiliated.

Indeed, the constitutional principles implicitly acknowledged today teach as much. The First Amendment protects the ability of religious entities "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952), and "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). In implementing our EEO rules, we must take care not to infringe the rights of religious organizations to self-identification, or the associational rights of persons belonging to such organizations, by launching governmental inquiries into whether a person shares the same faith as others who believe

that he does not.

Conclusion: A Step In The Right Direction

Notwithstanding the above-described concerns regarding future implementation of this new EEO position, I support this item. I do so because I believe that it is a step in the legally right direction for our EEO policies concerning religious broadcasters. By no means, however, does it represent the end of the matter. Many difficult issues -- including ones deriving from the non-binding nature of this action with respect to television licensees -- lie ahead.