

the so-called "Pick Letter," which contains derogatory information about Kay.

3. As to the "Pick Letter," the Commission found no basis to conclude that the letter had ever been received by the ALJ. *Id.* at ¶ 11. The letter in question was found in the files of Robert Andary, a former employee of the Commission's Office of Inspector General, and produced by Andary during the course of civil litigation in California. It is a photocopy of a letter typed on the stationery of Gerard Pick, for his signature. It reads:

Your Honor --

T[h]ere seems to be a convention that you don't write to a Judge. There is also a convention that if you are about to drown you grab at any straw.

Please your Honor, read the enclosed. I know it sounds as if I dramatize myself and my situation; nevertheless my family and I are being systematically destroyed because we brought some impossible facts to the attention of the FCC. And the FCC is hurt in the process.

It is the Kay case which is before you. . . . Please read the papers attached hereto.³

Although the letter closes: "Respectfully -- Gerard Pick," it is signed by his wife, Ann. The heading of the letter is partially obscured on the photocopy by a copy of a handwritten note that reads:

Dear Bob

[M]y husband passed away. [H]e tried desperately to save us, but I am at the end of the line. Kay is still suing us.

The letter is addressed to "THE HON. L. RI. . . Adminis. . . ," the rest being obscured by the note. The mailing address is "Federal Commun. . . 1270 Fairfield . . . Gettysburg, PA. . . ," the rest also being obscured by the note.

4. In response to a Freedom of Information Act request filed by Kay in support of his allegations, the ALJ denied ever having received the letter. *See* FCC 97M-52 at ¶¶ 11-12. He stated that his case log showed no record of the Pick Letter and that a search of his files of pleadings and correspondence similarly showed no trace of the Pick Letter. He indicated that he had not seen the Pick Letter until Kay produced it in his motion to disqualify.

5. The Commission rejected Kay's contention that the ALJ should be found to have received the letter, despite his denials. 12 FCC Rcd at 15664-65 ¶¶ 9-11. The Commission found no merit to Kay's argument that, because the letter "was addressed to the [ALJ]," it should be presumed to have been delivered. Initially, the Commission noted that the ALJ's name is "Richard L. Sippel," not "L. Ri. . . "

³ The attachments consist of two other letters from Pick, one addressed to Regina M. Keeney, then Chief of the Wireless Telecommunications Bureau, and one to the Internal Affairs Bureau of the Los Angeles County Sheriff's Office. They concern a slander suit initiated by Kay against Pick (who had complained to the FCC about Kay) and related bankruptcy proceedings.

and that his mailing address is Washington, D.C.,⁴ not Gettysburg, Pennsylvania. Based on the content of the handwritten note and the fact that the letter was found in Robert Andary's files, the Commission found that it was most likely that Ann Pick signed the letter after her husband's death and that it was delivered to Andary, not the ALJ.

6. Kay now claims to have new evidence that the letter was received by the ALJ. This evidence consists of an unsigned version of the letter found among Gerard Pick's property. Kay indicates that he purchased the letter, on September 15, 1997, at a Sheriff's auction conducted to satisfy a judgment by Kay against Pick. The text of the new letter, which is on the stationery of Century Communications Service, Pick's business, is identical to that of the original Pick Letter. The heading of the letter shows that it was addressed to:

THE HON. L. RICHARD SIPPLE
Administrative Law Judge
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 18325

The heading also contains the following typewritten data off to one side: "717/337-1311(202/632-7000)," "(1919 M Street) (Washington, D.C.)," and "17 July 1995." The new unsigned letter, like the letter signed by Ann Pick, has the legend "6-SP-SIPPLE" in the upper right hand corner.⁵

7. According to Kay, the additional information disclosed on the new version of the letter undermines the Commission's basis for rejecting the presumption that the letter was delivered to the ALJ. Kay notes that the letter contains the ALJ's full name, albeit misspelled, and a Washington address (in addition to the incorrect Gettysburg address).

II. DISCUSSION

8. We deny reconsideration. Kay's new evidence does nothing to establish that the letter was received by the ALJ. It does not alter the basis for concluding that the legal "presumption of receipt" does not apply to this case. As explained by the courts (see Konst v. Florida East Coast Railway Co., 71 F.3d 850, 851 (11th Cir. 1996):

The "presumption of receipt" arises upon proof that the item was properly addressed, had sufficient postage, and was deposited in the mail. The presumption is, of course, rebuttable.⁶

⁴ Specifically, 2000 L. St., N.W., Washington, D.C. The address "1270 Fairfield Road, Gettysburg, Pennsylvania," belongs to the Commission's Gettysburg facility.

⁵ The Commission's prior order did not address the fact that in the upper right hand corner of the letter are the characters "6-SP[sipple]" However, the fact that the legend "6-SP-SIPPLE" was also on an unsigned version of the letter indicates that the designation was placed there by the sender.

⁶ The court further indicated at 71 F.3d at (851 n.1):

The presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty and the usual

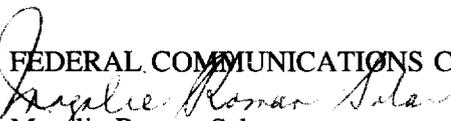
In this case, there has been no showing that the letter was properly mailed to the ALJ. We do not have either a statement from Ann Pick concerning the mailing of the letter or the envelope that was used. Indeed, the facts before us strongly suggest that it was not properly mailed. Most significantly, the handwritten note to Bob (presumably, Andary), and the fact that the letter was found in Andary's files, support an inference that the letter was directed to him and not the ALJ. Moreover, the address directly associated on the letter with the ALJ's name is an incorrect Gettysburg address. Further, the address "1919 M St., Washington, D.C." is the address of the FCC's main headquarters building in Washington (where the Inspector General is located) but is not the building where the ALJ has his office.⁷ Similarly, the phone number (202) 632-7000 was, at one time, the FCC's main telephone number in Washington, D.C., not the ALJ's.⁸

9. The evidence before us provides no reason to conclude that the ALJ received the Pick Letter. We have no reason to doubt the ALJ's representations that he had not seen the letter prior to its proffer by Kay and that his records disclosed no evidence of receipt. The evidence just discussed, indicating that Andary rather than the ALJ received the letter, is fully consistent with the ALJ's representations.

III. ORDERING CLAUSES

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed October 31, 1997, by James A. Kay, Jr. IS DENIED.

10. IT IS FURTHER ORDERED, That the Motion to Stay Proceedings, filed October 31, 1997, by James A. Kay, Jr. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

course of business; and, when it is opposed by evidence that the letters never were received, must be weighed with all other circumstances of the case, by the jury in determining whether the letters were actually received or not.

⁷ As noted above (note 3), the ALJ's office is at 2000 L St., N.W., Washington, D.C.

⁸ The telephone number (717)337-1311 was formerly the number of what is now the Wireless Telecommunications Bureau's Office of Operations in Gettysburg.