

FCC MAIL SECTION

FEDERAL COMMUNICATIONS COMMISSION

ECC 98-65

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
MOBILEMEDIA CORPORATION, et al.)	WT DOCKET NO. 97-115
)	
Applicant for Authorizations and Licensee)	
of Certain Stations in Various Services)	

ORDER

Adopted: April 3, 1998 ; Released: April 8, 1998

By the Commission:

1. This order further clarifies and modifies our action staying the hearing in this proceeding. MobileMedia Corp., 12 FCC Rcd 7927 (1997) ("June 6 Order"). In response to requests, we have reexamined the impact of the relief we have granted MobileMedia Corporation (MobileMedia) in this proceeding on employees and investors of MobileMedia. We will clarify and elaborate upon these matters here.

I. BACKGROUND

2. The Commission designated this proceeding for hearing after MobileMedia disclosed the results of an internal investigation (the "October 15 Report" or the "Report"), which concluded that on numerous occasions MobileMedia had filed notifications that falsely reported the construction of facilities that had not in fact been built. MobileMedia Corp., 12 FCC Rcd 14896 (1977) ("HDO"). The October 15 Report also disclosed the identities of certain members of senior management who allegedly participated in the deception. The Wireless Telecommunications Bureau (Bureau) then conducted a further investigation. The HDO designated issues to determine the facts and circumstances surrounding the deceptive filings, including which officers, directors, and senior management officials of MobileMedia were involved in misconduct.

3. In its June 6 Order, the Commission stayed the hearing to permit MobileMedia to avail itself of relief under the Commission's Second Thursday doctrine. Under Second Thursday, we may approve the license transfer application of a licensee designated for hearing on its character qualifications that also has filed for bankruptcy "if individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from

favorable action on the [assignment or transfer] application or will receive only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." Second Thursday Corp., 22 FCC 2d 515, 516 ¶ 5 (1970). MobileMedia has filed for reorganization under Chapter 11 of the Bankruptcy Code.

4. Two provisions of the June 6 Order addressed the treatment of stockholders and employees of MobileMedia, as distinct from MobileMedia as a corporate entity. In paragraph 17 of the June 6 Order, we adopted measures intended to prevent the type of enrichment of wrongdoers barred by Second Thursday. We stated (12 FCC Rcd at 7932-33 ¶ 17):

. . . we emphasize that we will scrutinize MobileMedia's Second Thursday showing with extreme care to ensure full compliance with the Second Thursday showing with respect to all potential wrongdoers, that is, all former and current officers, directors, and senior managers. In this regard, MobileMedia's Second Thursday request shall demonstrate with specificity its compliance with the standard with respect to all such persons. This shall include a showing that its former and current officers, directors and senior managers will not receive compensation for their equity interests and will have no role in the future operation and management of the company. In addition, MobileMedia shall demonstrate that its current officers, directors, and senior managers have not benefitted from sale of their stock in the interim. [Emphasis in original.]

5. In paragraph 18 of the June 6 Order, we also addressed whether individuals within the scope of this proceeding would be permitted to acquire additional telecommunications interests during the pendency of the stay (12 FCC Rcd at 7933 ¶ 18):

We take this opportunity to reiterate that the scope of the HDO includes whether any former or current MobileMedia officers, directors and senior managers have engaged in serious wrongdoing. In this regard, we instruct Commission staff in all Bureaus and Offices that any radio applications in which these former or current officers, directors or senior managers have attributable interests shall not be granted without resolution of this issue, either in the context of this hearing, if Second Thursday relief is ultimately not granted, or in the context of another specific application. To assist in this effort, the Chief, Wireless Telecommunications Bureau, within 10 days of the release date of this order, shall provide to all Bureaus and Offices a copy of this order, along with a list of all such persons.

A copy of the list should also be provided to the Chairman and the Commissioners. In addition, to the extent a Bureau or Office recommends that any application in which such an individual holds an attributable interest should be granted, it shall refer the matter to the Commission for disposition.

6. The scope of the former and current officers, directors, and senior managers subject to paragraphs 17 and 18 has been refined and clarified by subsequent actions. In response to the June 6 Order, the Bureau, on June 16, 1997, submitted a list of 91 individuals. Subsequently, on June 25, 1997, the Bureau substituted a revised and corrected list of 43 individuals. Later, we received petitions for reconsideration or clarification arguing that paragraphs 17 and 18 were overly broad. We agreed with contentions set forth in these petitions and reconsidered the stay order in two respects. MobileMedia Corp., 12 FCC Rcd 11861 (1997) ("August 8 Order").

7. First, we noted that we intended to include only individuals who were associated with MobileMedia during the time period covered by the HDO, because only such individuals could have had involvement in MobileMedia's misconduct. August 8 Order, 12 FCC Rcd at 11863 ¶ 6. Consequently, five individuals -- Joseph Bondi, Roberta Boykin, H. Andrew Cross, Ronald R. Grawert, and Steven Gross -- should not have been included within the group of covered individuals, because they joined MobileMedia afterwards. That observation applied equally to paragraphs 17 and 18, since these individuals cannot logically be considered alleged wrongdoers for any purpose.

8. Second, we found that, consistent with precedent, the allegations against MobileMedia are sufficient to raise questions only as to the qualifications of four individuals. August 8 Order, 12 FCC Rcd at 11863-64 ¶¶ 7-10. The October 15 Report alleges that Gene P. Belardi, former Secretary and Regulatory Counsel, and Kenneth R. McVay, former Secretary, Vice President, and General Counsel, were primarily responsible for carrying out the deception of the Commission and that they were fired by MobileMedia because of their involvement. Moreover, according to the Report, there is an unresolved dispute as to the responsibility of John M. Kealey, former Director, President, and Chief Operating Officer, and Gregory M. Rorke, former Director and Chief Executive Officer.

9. We held that paragraph 18 should not apply to any other individuals, specifically including three other individuals as to whom the Report did not make specific allegations of wrongdoing. Exhibits attached to the Report indicate that Mark Witsaman, Debra P. Hilson, and Santo J. Pittsman, who are currently officers of MobileMedia, may have had some degree of knowledge of the wrongdoing. However, no evidence has been presented that they were participants in any deceptive practices, that they approved the deception, or that their activities otherwise raise a substantial and material question concerning their qualifications to be a licensee.

II. DISCUSSION

A. Petitions Concerning Witsaman, Hilson, and Pittsman

10. MobileMedia, as well as Witsaman and Hilson individually, assert that the exclusion of Witsaman, Hilson, and Pittsman from the scope of paragraph 18 implies that they should be excluded from paragraph 17 as well. They argue that the Commission implicitly so found in ruling that there was no substantial and material question as to the qualifications of these individuals. They urge that it would be anomalous to hold that the three individuals were qualified to acquire licenses in their own right but that they could not remain employed by MobileMedia or its successor for that company to qualify for Second Thursday relief. The petitions urge the Commission to clarify the status of Witsaman, Hilson, and Pittsman to remove the cloud on their employment prospects with MobileMedia or its successor.

11. The Chase Manhattan Bank (as agent for MobileMedia's secured lenders) and Hellman & Friedman Capital Partners II, L.P. (which had filed a petition for reconsideration of the June 6 Order) support the petitions for clarification. They observe that MobileMedia's viability in the bankruptcy process would be enhanced if prospective purchasers were assured that the company's top management would remain intact following a grant of Second Thursday relief. The Bureau takes no position on the merits of the requests for clarification but agrees that clarification would be appropriate. MobileMedia asserts, based on the October 15 report, that there is no evidence that Witsaman, Hilson, or Pittsman were involved in or approved deceptive acts.

12. We agree with the petitioners that Witsaman, Hilson, and Pittsman should be excluded from the scope of paragraph 17 as well as of paragraph 18. In the absence of evidence that the three participated in or approved of misconduct, there is no justification for treating them as "individuals charged with misconduct" for purposes of the Second Thursday doctrine.

B. Kealey Petition

13. Kealey complains that his designation as an "alleged wrongdoer" has damaged his reputation and tainted his employment prospects without giving him a means to clear his name. He asks either that he be excluded from the scope of paragraph 17 and 18 or else that the Commission specify a procedure by which he can proffer information relevant to his qualifications. He points out that he is not a party to any application that would provide a forum for resolving his qualifications and that if Second Thursday relief is granted this proceeding will not provide a forum either. Kealey complains that the fact that he remains on the list of suspected wrongdoers unfairly stigmatizes him, since nearly all others, including individuals who may have had some knowledge of wrongdoing, have been removed from the list.

14. Kealey supplies a sworn declaration in which he denies, contrary to Belardi's allegations, which he asserts should not be deemed credible, that he was ever informed of the fraudulent filings until outside counsel and the Bureau contacted him as part of their investigations. Kealey claims that he reasonably relied on MobileMedia's counsel to ensure compliance. Kealey contends that if the Commission retains him on its list of potential wrongdoers, it should specify a procedure for adjudicating his qualifications. He further contends that a failure to do so would deprive him of due process.

15. MobileMedia does not oppose Kealey's request that the Commission specify a process to give him an opportunity to remove himself from the list of potential wrongdoers provided that it does not interfere with approval of Mobilemedia's Second Thursday request. On the other hand, MobileMedia and the Bureau dispute Kealey's claim that current evidence warrants removing Kealey from the list. MobileMedia submits that the record contains allegations sufficient to support the Commission's characterization of Kealey as a "suspected" wrongdoer.

16. The Bureau also disputes Kealey's contention that he is entitled, as a matter of due process, to a hearing on the allegations against him. The Bureau asserts that Kealey has not been deprived of a "liberty" or "property" interest such as would trigger the constitutional requirement of a hearing.

17. We deny Kealey's petition for reconsideration. Turning first to Kealey's factual contentions, we agree with the commenters that we cannot resolve the factual issues presented by the evidence before us without some form of hearing. The evidence contains allegations that Kealey knew of and condoned the deceptive filings. We cannot resolve the questions raised by these adverse allegations based on Kealey's denials alone, without a hearing to weigh the relative credibility of Kealey and his accusers.

18. Kealey's culpability would certainly be considered in the course of a hearing regarding MobileMedia's qualifications, if Mobilemedia fails to make a showing warranting Second Thursday relief. Kealey would also be entitled to a hearing under 47 U.S.C. § 309(e) if he applies for a radio license in his own right. However, we are not persuaded that Kealey has a right to a hearing to "clear his name" apart from the adjudication of his (or MobileMedia's) right to hold a specific license.

19. It is axiomatic that procedural due process imposes constraints on governmental decisions which deprive individuals of the "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The Supreme Court has held that some form of hearing is required before an individual can be finally deprived of such an interest. Id. at 333. The precise type of hearing required depends on an analysis of the particular governmental and private interests involved. Id. at 334-35. The fundamental requirement of due process is the opportunity to be

heard at a meaningful time and in a meaningful manner. Brock v. Roadway Express, Inc., 481 U.S. 252, 261 (1987).

20. This right to a hearing presupposes the existence of a cognizable liberty or property interest. In some circumstances, damage to a person's reputation may constitute a protected interest. "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [Due Process] Clause must be satisfied." Goss v. Lopez, 419 U.S. 565, 574 (1975). More recently, however, the Supreme Court has adopted a narrow interpretation of when potential damage to a person's reputation gives rise to Due Process concerns.

21. In Paul v. Davis, 424 U.S. 693, 701 (1976), the Court held that the stigma that may result from government "defamation," does not, apart from more tangible interests, such as employment, constitute a liberty or property interest sufficient to invoke the procedural protection of the Due Process Clause. See also Siegert v. Gilley, 500 U.S. 226, 233 (1991) (injury to reputation by itself is not a liberty interest protected under the Fourteenth Amendment). As applied here, this means that the potential impact of a governmental utterance on an individual's employment prospects triggers the requirements of due process only if the government is effectively adjudicating the person's employment status. Governmental utterances that merely have an incidental effect on a person's future employment do not implicate due process requirements.¹ The United States Court of Appeals for the District of Columbia Circuit explained in Kartseva v. Department of State, 37 F.3d 1524, 1527 (D.C. Cir. 1994):

Under this line of cases, a government action that potentially constrains future employment opportunities must involve a tangible change of status to be actionable under the due process clause. If a government action does constitute an adjudication of status under law, the underlying factual and legal determinations are subject to due process protection.

22. In Kartseva, an employee of a private contractor with the State Department was fired from her job as a translator after the State Department declared her ineligible to work on the contract because of "significant counterintelligence concerns." 37 F.3d at 1525. The

¹ See also Robertson v. Rogers, 679 F.2d 1090, 1091 (4th Cir. 1982) ("the [Paul] Court did indicate that if the defamation occurred in the course of terminating a plaintiff's employment, then the plaintiff could be [deemed to have been] deprived of a protected liberty interest"); District Council 20 v. The District of Columbia, 1997 WL 446254 *7 (D.D.C. 1997) ("To maintain a liberty claim, the discharged employee must show that a public employer published alleged untrue stigmatizing statements in connection with the employee's termination . . .").

court held that the employee was entitled to a hearing if the State Department's disqualification formally excluded her from future government employment or effectively precluded her from meeting the eligibility requirements for other jobs, and therefore, in effect, constituted an adjudication of her status. *Id.* at 1528. By contrast Paul and Siegert involved alleged governmental defamation uttered apart from any particular action involving the subject's employment. *Id.* at 1527. In Paul, plaintiff's photograph was included in a flyer of "active shoplifters" after he had been arrested for shoplifting, a charge that was eventually dismissed. In Siegert, a government psychologist, who had resigned from his position after being informed that the government was preparing to terminate his employment, was denied a second job after his original supervisor gave him an adverse recommendation. Unlike Kartseva, neither Paul nor Siegert involved the government's adjudication of the individual's employment status, although what the government did might have an impact on the individual's reputation and future employment.

23. Here, the Commission, while incidently finding that Kealey is an accused wrongdoer, in light of the statements in the MobileMedia Report, has not adjudicated his rights or status. Our statement was not involved in Kealey's dismissal from Mobilemedia, which was based on circumstances unrelated to the allegations against him and which predated our order. We also have not adjudicated the question of his qualifications to hold a license. On that score, we merely held that, in light of the statements in the MobileMedia Report, if there is no hearing on MobileMedia's qualifications because of relief granted pursuant to Second Thursday, further hearing proceedings would be required in the event Kealey applies for a license. August 8 Order, 12 FCC Rcd at 1163-64 ¶ 8. Thus, in the event that this proceeding is resolved by a grant of Second Thursday relief, Kealey has no due process right to a hearing merely "to clear his name."

24. This result is consistent with well-established Commission precedent under which the Commission does not conduct hearings unless they are required to adjudicate a pending application or otherwise required to execute our regulatory functions. See, e.g., A.S.D. Answer Service, Inc., 1 FCC Rcd 753, 756 (1986) ("To the extent that these principals are unhappy with the settlement because it fails to exonerate them (nor does it find them culpable), we can be of no assistance. We do not conduct hearings unless they are necessary to our regulatory mandate"); Allegan County Broadcasters, Inc., 83 FCC 2d 371, 373 (1980) ("If the dismissing applicant is not an existing Commission licensee, the allegations can be revisited in a future proceeding should the applicant again seek to obtain a Commission license"). Indeed, we are aware of no cases in which the Commission has held a hearing simply to permit a non-applicant, non-licensee an opportunity to exonerate itself.

25. We are aware of one case in which we elected to adjudicate the qualifications of an applicant or its principals despite the disposition of all relevant applications without a hearing in order to consider barring them from future participation. In that case, Commercial Realty St. Pete, Inc., 10 FCC Rcd 4313 (1995), the Commission designated for hearing basic

qualifications issues against an auction applicant and its principals in order to consider barring them from further participation, even though the applications were dismissed because of failure to make the required down payments. We deemed this action appropriate in light of the exceptional circumstances surrounding our early auctions. It is unlikely that these circumstances will arise in the future, either in the auctions context or otherwise. That case should not, therefore, be taken as establishing a policy of routinely adjudicating the qualifications of an applicant or its principals for purposes of barring future participation, separate from action on a pending application .

26. We further note that in a recent case, Westel Samoa, Inc., FCC 98-31 (March 10, 1998), we cited Commercial Realty in affirming the designation of an issue regarding the qualifications of Anthony T. Easton (Easton), who as the principal of an applicant (PCS 2000) had been implicated in misconduct. The issue was designated despite the fact that PCS 2000's applications had been granted without hearing following Easton's removal. Although Easton had no pending application, Quentin L. Breen, a second former principal, was the principal in the pending application at issue, and Easton's conduct was inextricably linked to the issues regarding Breen. FCC 98-31 at ¶ 6. Accordingly, Westel Samoa should not be read as indicating that a hearing concerning Easton would have been held in the absence of Breen's pending applications. Nor should Westel Samoa be considered to extend the applicability of Commercial Realty beyond its facts or those of Westel Samoa.

27. We are not insensitive to Kealey's plight. If Kealey does file an application for a radio license, he will, of course, receive a full hearing with all appropriate rights. Moreover, Kealey may not be without other recourse. Kealey's counsel has informed the Commission that Kealey is a defendant in class action suits and that the complaints in those suits are based in part on the issues raised in this proceeding. Letter from David Spears et al. to David H. Solomon, Deputy General Counsel (February 24, 1998). Kealey may well have the ability to exonerate himself in those suits. Additionally, if Kealey believes that he has been falsely accused in the MobileMedia Report, he may have civil remedies against his accusers.

IV. ORDERING CLAUSE

28. ACCORDINGLY, IT IS ORDERED, That the Requests for Clarification, filed September 3, 1997 by MobileMedia Corporation and its subsidiaries, and September 5, 1997, by Mark L. Witsaman and Debra P. Hilson ARE GRANTED, and the Petition of John M. Kealey for Reconsideration and Modification or Clarification of the Commission Order of August 8, 1997, filed September 5, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Maggie Roman Salas

Secretary