DOCKET FILE COPY ORIGINAL

FCC MAIL SECTION

AUG 12 8 37 AM '98

DISPATCHED BY

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

FCC 98M-105

81234

In Matter of	)	WT DOCKET NO. 94-147
	)	
JAMES A. KAY, JR.	)	
	)	
Licensee of one hundred fifty two	)	
Part 90 licenses in the	)	
Los Angeles, California area.	)	

MEMORANDUM OPINION AND ORDER

Issued: August 10, 1998 ; Released: August 11, 1998

Preliminary Statement

1. On July 28, 1998, Aaron P. Shainis, Esquire, on behalf of his client James A. Kay, Jr. ("Kay") and under his personal affidavit, filed a Supplement To Motion To Recuse Presiding Judge.[1] The Supplement raised a new matter arising out of a Prehearing Conference that was held on July 23, 1998, and matters leading up to that conference concerning the schedule of the Los Angeles phase of the case in the month of September and the possible conflict in the observance of Rosh Hashanah. The Presiding Judge authorized a two day hiatus in a field hearing in order to accommodate observance of the holiday. Mr. Shainis has alleged a religious bigotry directed towards himself which he ascribes to the Presiding Judge that he claims has jeopardized "counsel's professional ability to represent his client and function ethically as an officer of the court." On July 30, 1998, the Wireless Telecommunications Bureau ("Bureau") filed an Opposition To Supplement To Motion To Recuse Presiding Judge. The Presiding Judge has shown no animus towards anyone's religious beliefs and Mr. Kay is assured that he will have counsel of his choice at each day of the hearing.

---

[1] On July 22, 1998, a Motion To Recuse Presiding Judge was filed by James A. Kay, Jr. ("Kay") under Mr. Kay's affidavit. A ruling denying the Motion was issued on July 28, 1998. Memorandum Opinion and Order, FCC 98M-101, issued July 28, 1998. Kay's counsel hand-delivered an Appeal from that ruling minutes before the commencement of the Admission Session on August 4, 1998. The Supplement is considered as new matter raised by Mr. Shainis and is not considered as a Supplement to the Motion To Recuse. It was agreed that the Supplement would be ruled on and that all questions would be certified to the Commission at the same time. (Tr. 436) But Kay is still required to file a timely Appeal from this ruling under 47 C.F.R. §1.245(b)(3). For all other purposes the proceeding has been suspended. 47 C.F.R. §1.245(b)(4).

Field Hearing Dates Selected By Counsel

2. Hearing dates of September 15 to September 24, 1998, were selected by Bureau counsel and by Kay's former counsel for a field hearing in Los Angeles, CA. Order FCC 98M-40, released April 2, 1998. The Jewish holiday of Rosh Hashanah falls within those dates. There was never any approach made to the Presiding Judge by any counsel to discuss an observance of Rosh Hashanah. Therefore, the Presiding Judge presumed that all counsel were willing to participate on those hearing dates or had made arrangements for co-counsel to stand in during the holiday. On April 8, 1998, Aaron P. Shainis, Esquire, entered an appearance for Kay by filing a Notice of Substitution of Counsel.

Informal Conference Of June 30

3. The Presiding Judge felt compelled solely for scheduling purposes to inquire of Mr. Shainis' participation on Rosh Hashanah. For that purpose as well as for purposes of discussing an important procedural question that had just arisen concerning Kay's refusing to fully participate in the prescribed Admission Session, on June 30, 1998, the Presiding Judge initiated discussions through an informal telephone conference. The Presiding Judge had consulted with the Chief Judge in advance of the telephone call and was prepared to cancel the hearing for September 21, 1998, the calendar date for observance of Rosh Hashanah,[2] if new counsel advised that he would be observing the holiday.[3] The Presiding Judge advised in the telephone conference that he would close the hearing on September 21 if counsel so requested. Counsel stated that the holiday extended for two working days. As counsel asserts, he had not asked for any accommodation and the Presiding Judge merely advised that he was not prepared to close down the case for two days. See Supplement at 1-2. The Presiding Judge only referred to his government-issued calendar, which shows only September 21 as a holiday. He did not characterize counsel's statement. There is nothing in the June 30 event to justify a claim of religious insensitivity. As explained below, the Presiding Judge later learned through a former colleague that Reform Jews observe Rosh Hashanah on one day while Conservative and Orthodox Jews observe for two days.

4. The Presiding Judge did not mention the subject of scheduling for Rosh Hashanah in his subsequent Order because of his uncertainty about the observance in light of counsel's statement of a two day observance and out of deference to the sensitivity of the subject. The Presiding Judge had indicated in the telephone conference that he was sensitive to the subject and that he did not intend to make a formal ruling. At the time of initiating the call, the Presiding Judge was unaware of

---

[2] The calendar used by the Presiding Judge was issued to him by OALJ through the Commission's office supply system.

[3] There was no discussion between the Presiding Judge and the Chief Judge about a one day observance by Reformed Jews and a two day observance by Conservative and Orthodox Jews. The focus at that time was directed entirely on the September 21 date that is reflected on the calendar as the only day for observing Rosh Hashanah.

any two day observance. The concern of the Presiding Judge was for the completion of the Los Angeles hearing under the schedule on which prior counsel and the parties had agreed. The Order issued after the telephone conference only summarized the non-sensitive topic requiring that Direct Case exhibits of Kay be introduced at the Admission Session after the Bureau had completed the introduction of its documents into evidence. Order FCC 98M-91, released July 6, 1998. It was that ruling requiring Kay to fully participate in the Admission Session by introducing Direct Case exhibits that prompted Kay's Motion To Recuse Presiding Judge to be filed.[4] There was no mention in that recusal Motion of the Presiding Judge's reaction on June 30 to counsel's advice of a two day observance of Rosh Hashanah. See Order FCC 98M-91, supra.

Counsel's Criticisms Of The Presiding Judge

5. Because of counsel's reluctance or refusal to participate further in telephone conference calls after June 30, the Presiding Judge required the submission of written positions of counsel on future participation in such conference calls.[5] Order FCC 98M-95, released July 20, 1998. Kay's counsel advised on July 16, 1998, in a pleading entitled Response To Order:

> The Presiding Judge stated that he would not have a hearing on September 21, 1998. The Presiding Judge, at that point, stated that his calendar only indicated that it was a "one day holiday" thereby challenging counsel's assertion that it was a two day holiday.

Id. at Para. 6. That statement was footnoted with the following gratuitous remark: "Counsel is not appreciative of the Presiding Judge's ridicule of his religious beliefs."

6. Counsel stated further:

> Moreover, the Judge indicated that he would not terminate the hearing for two days. The Presiding Judge's July 6, 1998, Order, FCC 98-91, is totally silent on this matter.

---

[4] See fn. 1, supra.

[5] The experience of the Presiding Judge in the use of informal telephone conference calls to facilitate discussion of procedures and scheduling matters has been generally favorable with counsel who practice before the Commission. Years of experience has shown that phone conferences are quick and inexpensive and tend to resolve questions or show a need for a follow-up conference on the record. It is the practice of the Presiding Judge to issue a short summarizing order afterwards in order to account for the business conducted. This informal system has proved to be successful, except in this case. Counsel expressed a dissatisfaction with the Judge's summarization in Order FCC 98M-91. It was suggested by the Judge that counsel prepare proposed orders but counsel found that option to be "costly, burdensome and cumbersome." See Response To Order filed July 16, 1998, at 2.

Id. The first sentence of the quoted portion was footnoted by counsel as follows: The Judge, in taking this position [denying a two day hiatus], has managed to simultaneously display apparent ignorance and insensitivity." It is noted that the only "challenge" that counsel alleges was the Judge's reference to the one day holiday shown on the calendar. There was never a personal challenge to counsel's representation.

Answers Were Immediately Sought

7. The Presiding Judge was obviously perplexed and very concerned with the assertions in Kay's Response To Order that he had ridiculed religious beliefs or that he had displayed an insensitivity. The Presiding Judge has never contested the assertion that he was ignorant of the two day observance of Rosh Hashanah. Counsel seemingly intended to keep the Judge in the dark. He never offered to provide an explanation which if presented in a professional manner (either in private, in a conference call, or on the record) would have resulted in an immediate authorization for a two day hiatus. After receiving the Response To Order with the disturbing quotes noted above, the Presiding Judge took it upon himself to consult solely for educational purposes with a prior colleague who was knowledgeable on Jewish religious observances.[6] After that consultation, the Presiding Judge was better informed and felt prepared to formally schedule a two day hiatus if that was necessary to accommodate Kay's counsel or anyone else. The Presiding Judge concluded after that collegial consultation that a Prehearing Conference should be called to place on the record the background as to how the subject of a religious observance arose in this case; to show to counsel the government-issued calendar reference to a one day observance;[7] to confirm on the record that counsel was of a religious persuasion which observes two days; and to inquire as to whether co-counsel might assume Kay's representation during the two days of observance. It was never an agenda of the Judge to embarrass or insult any counsel or any party. All efforts were directed solely to utilizing as much as possible of the allotted two weeks in Los Angeles that had been agreed to by counsel for both parties and in making a record of any hiatus in a scheduled field hearing.

---

[6] At that point, counsel ruled out any further informal discussion. He had blocked any informal resolution of an unnecessary impasse.

[7] See Prehearing Conference at Tr. 423-424 (before the June 30 telephone conference the calendar was consulted showing a one day observance for Rosh Hashanah and only that one-day observance was discussed before the call to counsel was initiated). Kay's counsel suggested in his July 16 Response To Order that the Presiding Judge "may desire to confer with Judge Chachkin to verify the information he was given at the June 30, 1998, telephone conference." Chief Judge Chachkin was on vacation at that time and therefore he was unavailable. But on July 20, 1998, a retired colleague who is knowledgeable on the subject was visiting OALJ. The Presiding Judge learned for the first time from that colleague that Reformed Jews observe the holiday on one day and Conservative and Orthodox Jews observe the holiday on two days.

Order Setting Conference

8. All counsel were advised before the formal Prehearing Conference that the Judge was open-minded on granting a two-day hiatus. The Order which set the Prehearing Conference for July 23, 1998, specifically stated:

> The Presiding Judge requests that counsel for James A. Kay, Jr. confirm on-the-record the dates in the Los Angeles phase of the hearing that he will be absent and whether his co-counsel will appear and participate so that the Los Angeles hearing could be conducted without interruption on the dates proposed by counsel for the Los Angeles session.
>
> **Alternatively, the Presiding Judge will consider a 2-day hiatus for the observance by Mr. Kay's counsel of a religious holiday.**

Order FCC 98M-98, released July 22, 1998. (Emphasis added.) The reference to counsel's forecasted absence is footnoted with the recently learned distinction between the Rosh Hashanah one day observance and the two day observance. Order FCC 98-98 was issued on July 20 and a courtesy copy was transmitted to counsel via fax on July 20. Footnote 1 stated:

> Mr. Shainis recently advised in a telephone conference that he will observe Rosh Hashanah which is identified on a Government-issued calendar as occurring on Monday, September 21, 1998. He advised that he will observe the holiday for two days: Monday September 21 and Tuesday September 22, 1998. The Presiding Judge has recently learned that notwithstanding the one-day calendar reference, some persons observe the Rosh Hashanah holiday for two days while others observe it on only one day.

9. The Order stated the purpose for the conference as follows:

> To clarify this matter on-the-record, a Prehearing Conference IS SET for July 23, 1998, at 9:00 a.m. The Presiding Judge will also address related matters in Kay's pleading entitled Response To Order dated July 16, 1998.

Order FCC 98M-98, supra. That statement notes that the Presiding Judge is particularly concerned about "the circumstances under which he became partially uninformed [i.e. lacking knowledge of the two day observance] at the time of the [June 30] telephone conference." The Order made clear that the Presiding Judge was revisiting the scheduling of a possible two-day hiatus in order to provide for observance of Rosh Hashanah and that a formal Order would be issued on the subject.

The Prehearing Conference

10. The Supplement To Motion To Recuse Presiding Judge has attached a copy of the transcript of the Prehearing Conference that was held on July 23, 1998. The transcript, in its entirety, speaks for itself. Mr. Shainis' accusations that the Presiding Judge perpetrated Jew Baiting and engaged in anti-Semitic conduct have no foundation in a fair and reasoned reading of the transcript. First, the Presiding Judge immediately asked counsel to confirm his unavailability on September 21 and 22, which he did. The Presiding Judge then asked whether co-counsel could substitute. (Prehearing Conference at Tr. 419-420.) Counsel stated that it was "difficult for me to say to you that Mr. Keller [co-counsel] would all of a sudden be able to pick up the hearing at this point." (Prehearing Conference at Tr. 421.) The Presiding Judge immediately responded: "I am prepared to put this case in a hiatus status for two days. I am prepared to do that." (Prehearing Conference at Tr. 422.) The Presiding Judge added:

> [I]f within the confines of a religious observance -- if there can be testimony -- if we can conduct business on both of those days, of course that would be my preference. But only for purposes of assuring that the case gets completed on time; and by that I mean we'll just go a little bit later in the evening in the earlier week and, you know, we can start on Monday [September 14] instead of Tuesday [September 15], you know, we'll deal with it. (Prehearing Conference at Tr. 422.)

11. The adverse conclusions that are reached for by Kay's counsel are based on the Presiding Judge's narrow question at the Prehearing Conference, **asked after the two day observance had been granted**, "as to whether or not [counsel is] practicing as a Conservative or Orthodox ---. Can you confirm that? Prehearing Transcript at 425. And <u>before</u> counsel spoke, the Presiding Judge gave counsel the option of answering or of not answering:

> **But do you have any objection to telling me as to whether or not you are one or the other persuasion; or is there a third persuasion?**

Prehearing Conference Tr. 425. (Emphasis added.) Counsel then had an opportunity to cut-off the inquiry without responding or by simply objecting. Had any objection been raised by counsel with sufficient time for a ruling, counsel's wishes would have been honored. But rather than objecting, counsel stated without any pause that he was Conservative. Prehearing Conference at Tr. 426. Counsel quickly insisted that the question was "taken as an insult" to which the Presiding Judge replied: "No, its not meant that way. The record is now clear." Prehearing Conference at Tr. 426. The Presiding Judge meant that through his question which counsel voluntarily answered, the record clearly reflected that the Judge was now fully informed and that the two-day hiatus which was already authorized was justified by the record. In view of the intensity of counsel's response, the Presiding Judge concluded the conference with a direct apology:

> **Again, I extend my sincere apologies for any ill feelings that I have caused in my ignorance; but I am doing what I think is what I need to do to be sure that this record is completed; and that the proceeding goes forward in as timely a fashion as I can manage it. I'm just trying to do the best I can.**

Prehearing Conference at Tr. 431. (Emphasis added.)

12. The record establishes that the two day observance was acknowledged at the outset of the Prehearing Conference and the two day hearing hiatus was authorized. Counsel was never required or pushed by the Presiding Judge to answer the question as to whether he would identify a religious persuasion that traditionally observed two days for Rosh Hashanah. The Presiding Judge apologized immediately and made clear that he was only completing the record to show justification for a two day hiatus during a scheduled field hearing. There is no evidence at all of an interest by the Presiding Judge in anything other than keeping the case on the same September track that Kay's previous counsel had requested and that Kay's current counsel never questioned.

Unjustified Name Calling

13. The transcript of the Prehearing Conference taken as a whole, or even taken in parts that were considered to be offensive by Mr. Shainis, does not support a conclusion of Jew Baiting or of anti-Semitic conduct. At all times, the Presiding Judge was acting in good faith in attempting to learn facts and to make a record as to why the hearing in Los Angeles might be shortened by a factor of two days, to inquire into whether there were options to avoid a hiatus through participation by co-counsel, and to indicate the possibility of working later into the evenings to make up the time. Kay's counsel offered no suggestions. Counsel never assisted by offering information about his personal religious observances before or after the subject was raised on June 30 by the Presiding Judge. Since counsel had not raised his observance schedule in the first instance, it became necessary for the Presiding Judge to carry out the sensitive task of asking counsel for his days of religious observance solely in order to learn what days would be hearing days, i.e., scheduling. Scheduling is a high priority where travel of multiple Commission personnel is involved. With what was in innocent ignorance believed to be a satisfactory degree of sensitivity at the time, the Presiding Judge approached the subject with counsel off-the-record . He was not acting recklessly or with any intent to insult or ridicule counsel or anyone else. Realizing that the calendar designation may be incomplete, in order to become better informed, the Presiding Judge consulted a former colleague at the Commission's OALJ who is a

practicing Conservative Jew.[8] The Presiding Judge believed that he was acting in good faith in thereafter questioning Kay's counsel strictly on the facts at the subsequent July 23 Prehearing Conference in order to become fully informed and to make an adequate record.

14. Notwithstanding the clear intentions of the Presiding Judge to maintain a scheduled hearing, in a forced and unfair reading of the transcript, Mr. Shainis unjustifiably accused in the most hurtful phraseology that "in a classic case of 'Jew Baiting'[9] the Presiding Judge displayed his bias and prejudice" and that the Presiding Judge also "displayed insensitivity, ignorance and anti-Semitic conduct."[10] See Supplement at 2, 8. Nothing can be more hurtful and nothing can be further from the truth. The Presiding Judge has been a civil servant for more than 30 years. He always has observed and practiced open-mindedness and respect for all religious, races and cultures. The Presiding Judge has heard cases as an administrative law judge for the Commission since 1986. He has at all times been sensitive to religious, cultural and ethical convictions of all who have appeared in those cases. He never has sought to embarrass anyone for their faith, or religion or culture. It was due to a sensitivity about a religious observance that the Presiding Judge took the initiative to first raise the matter with counsel who was new to the case. Counsel must have known when he first

---

[8] The Presiding Judge is attempting to use discretion to avoid disclosing a retired colleague's identity which is difficult to do in this small community of Commission administrative law judges. Yet Mr. Shainis has made an unfounded accusation in the Supplement of prohibited "ex parte contact" which would not only taint the Presiding Judge but also the Judge with whom he consulted. Mr. Shainis also made the preposterous suggestion that the Presiding Judge may be a "puppet" for another party. It is a categorical fact that there is no party or attorney involved. Judges are permitted to consult one another on case matters without violating the ex parte restrictions. See Canon 3 and Comment to ABA Model Code of Judicial Conduct for Federal Administrative Law Judges (1989) (prescription against communications concerning a proceeding does not preclude a judge from consulting with other judges). There was nothing untoward in the Presiding Judge consulting a respected colleague who is knowledgeable of the subject and who is willing to assist another Judge who asked for help.

[9] In a footnote, Mr. Shainis rationalized his conclusions with a totally uninformed non-sequitur assertion: "The only purpose of the Judge's actions was to single counsel out to embarrass him because of his religion." See Supplement at 2 n.5. Completely to the contrary, the only reason for asking about a religious belief was to make clear on the record the reasoning for the already authorized two day hiatus. The questioning may have asked for more information than was absolutely needed. But there was no animus in the question when taken in its true context. And certainly no one was being "singled out" in order to embarrass.

[10] There is no convincing justification given by Mr. Shainis counsel for his accusation of anti-Semitic conduct. He merely asserts that singling out counsel and questioning his religious observances "served no other purpose than to display insensitivity, ignorance and anti-Semitic conduct." Supplement at 8. The Judge has conceded ignorance and may have appeared insensitive to Mr. Shainis. But none of those questions justifies an accusation of anti-Semitic conduct.

appeared on April 8 that there would be a conflict based on the dates to which former counsel had agreed.[11] Yet, inexplicably, he never approached the Presiding Judge formally or informally with the conflict.

15. Mr. Shainis has never evidenced a reluctance to bring up any matter thought to be important to him in this case. Yet he asserts in the Supplement that "he had been reluctant to bring up the matter, since the procedural schedule had been established prior to his having entered an appearance." Supplement at 1. One inference to be drawn from that statement is that he would have participated in a hearing conducted on Rosh Hashanah regardless of his religious beliefs if the Presiding Judge had not raised the subject. There is an equally plausible inference to draw. If the Presiding Judge had said nothing about the Rosh Hashanah observance, counsel would make equally intense accusations midway through the Los Angeles field hearing before any alternative arrangements to accommodate an observance of Rosh Hashanah. Ironically, it is as a result of his sensitivity that the Presiding Judge now finds himself responding to unfounded charges.

The Law Does Not Support Recusal

16. In Phelps v. Hamilton, 122 F. 3d 1309, 1323 (10th Cir. 1997) a claim of judicial bias was rejected even where a state judge had called a party's religious activities "shocking." Nothing the Presiding Judge has stated in the entirety of this case comes close to any characterization of a person's religion. It is also important to note that the Supplement is supported by Mr. Shainis' declaration. It is Mr. Shainis, Kay's counsel - and not Kay personally - who is seeking the Judge's disqualification based on the Supplement. Any personal bias felt by Mr. Shainis is unfortunate and unfounded. But recusal for bias exhibited towards an attorney is warranted only "**when it results in material and identifiable harm to that party's case**." Baldwin Hardware Corp. v. Franksu Enterprise Corp., 78 F. 3d 550, 557 (Fed. Cir. 1996). (Emphasis added.) No such harm to Mr. Kay has been shown.

17. Mr. Kay was assured by the Presiding Judge that he "will be represented throughout this hearing by whichever counsel he chooses to be represented by on every day of the hearing." Prehearing Conference at Tr. 422. There has been no "material and identifiable harm" shown to have resulted by the Presiding Judge's conduct of the Prehearing Conference or by his accommodating for a two day observance of Rosh Hashanah. There has been no fact or argument that could support counsel's contention (without conceding its accuracy) that his "professional ability to represent his client and function as an officer to the court has been jeopardized by the Presiding Judge's discriminating treatment of counsel's religious beliefs and observances." Supplement at 7. Both Mr. Kay and his counsel have been assured of a two day hiatus and equally assured that Mr. Kay can be represented by counsel of choice on each day of hearing.

---

[11] September rather than August was selected because Kay's prior counsel advised that he would be away on vacation in August. See Order FCC 98M-22, released February 26, 1998.

Conclusion

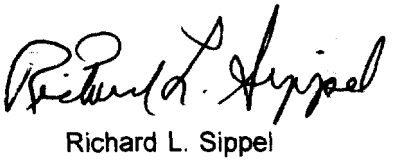
18. The Bureau filed its Opposition after an opportunity for Bureau counsel and staff to carefully review the record. After review, the Bureau concludes that "it is clear that the Presiding Judge was attempting to accommodate counsel's religious beliefs instead of ridiculing those beliefs." Opposition at 1-2. The Bureau confirms that "Kay cannot point to any statement in which the Presiding Judge ridiculed or disparaged any religion." Opposition at 2, para. 4. The Bureau concludes with the telling observation: "The accusations trivialize what has historically been a very serious problem." Opposition at 3-4, para. 6. For all the reasons stated, the matters alleged though Mr. Shainis' affidavit in support of the Supplement do not require a recusal. The Presiding Judge still considers himself fully qualified to continue to hear this case and to issue an unbiased Initial Decision. See also Memorandum Opinion and Order, FCC 98M-101, issued July 28, 1998 (denying Motion To Recuse Presiding Judge).

19. Since the Presiding Judge is not now and never has been what he is accused of being, there is no basis for recusal. It is considered important not to voluntarily recuse lest that be interpreted as surrendering to factually unfounded and extremely distasteful charges of biased bigotry that are being made an attempt to pressure this Judge from the case.

Order

IT IS ORDERED that the Supplement To Motion To Recuse Presiding Judge filed and attested to by Aaron P. Shainis, Esquire on July 28, 1998, IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

---

[12] The release date of this ruling, **August 11, 1998**, determines the time that this denial of disqualification under the Supplement is made. 47 C.F.R. §1.4(b)(2). Courtesy copies of this Memorandum Opinion and Order were sent to counsel by fax or e-mail before 12 noon on **August 10, 1998**, the date of issuance, in order to allow counsel time to perfect an appeal of this ruling on the Supplement. 47 C.F.R. §1.245(b)(3). If an Appeal is not filed by **August 12, 1998**, the request for withdrawal of the Presiding Judge under the Supplement To Motion To Recuse Presiding Judge will be deemed waived. Id. If a timely Appeal is filed, the earlier ruling in Memorandum Opinion And Order FCC 98M-101 and this ruling on the Supplement will be simultaneously certified to the Commission. 47 C.F.R. §1.245(b)(4). See fn. 1, supra (intent is to certify simultaneously all questions of qualifications for which an Appeal is taken. If there is not a timely appeal of this ruling on the Supplement, only the denial of the proceeding Motion To Recuse in Memorandum Opinion And Order, FCC 98M-101, supra, will be certified to the Commission.