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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith, on behalf of James A. Kay, Jr., is an original and fourteen (14) copies of his Further Appeal. Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,



Aaron P. Shainis

Counsel for

JAMES A. KAY, JR.

Enclosure

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

AUG 18 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Matter of)
)
James A. Kay, Jr.) WT DOCKET NO. 94-147
)
License of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area)

To: The Commission

FURTHER APPEAL

James A. Kay, Jr. ("Kay"), by his attorneys, and pursuant to Sections 1.245(b)(3) and 1.301(a) of the Commission's rules, appeals the Memorandum Opinion and Order of the Presiding Judge, FCC 98M-105, released August 11, 1998 ("MO&O").¹ In support, the following is respectfully submitted:

1. The Presiding Judge, venting his anger, has singled out one of Mr. Kay's counsel in his August 11, 1998, Memorandum Opinion & Order. In this regard, the July 28, 1998 "Supplement to Motion to Recuse Presiding Judge," was signed by four (4) counsel. The assertions in the pleading were made on behalf of James A. Kay. The Judge's obvious anti-Semitic feelings toward counsel have now caused him to focus on that particular counsel by name.² Clearly, the only motivation was to further ridicule and demean counsel. In this regard, counsel is specifically named in the MO&O 15 times. The Presiding Judge himself acknowledges his insensitivity. See MO&O at footnote 10. However, the Judge's MO&O goes beyond insensitivity. The Judge's conduct is clearly unprofessional and inappropriate.

2. The Supplement made the point that the Presiding Judge had no business in asking questions concerning counsel's religious beliefs. Moreover, the unwillingness of the Judge to accept counsel's assertion as to his religious convictions raises questions as to the ability of the Judge to give any credence to counsel's substantive arguments relative to the merits of the case. See Supplement, p. 4. The Judge's MO&O and the post-hoc rationalizations provided therein as to why counsel was

¹ An Addendum was released on August 12, 1998.

² The Wireless Bureau in its Opposition to Motion to Recuse Presiding Judge, acknowledges the Presiding Judge's insensitivity (para. 2) and his inappropriate conduct (para. 5).

questioned concerning his religious beliefs are specious. In this regard, and as the Presiding acknowledges, no request for any accommodation had been made. See MO&O, 98M-105, released August 11, 1998, at para. 3. The genesis of this entire matter was instigated solely by the Presiding Judge. The manner in which it was done was insipid. The questioning of counsel's religious beliefs had no legitimate purpose. At best it was a direct challenge to counsel's veracity, and at worst it was an attempt by the Presiding Judge to challenge counsel's religious beliefs in an effort to mock counsel. The Judge's conduct is repugnant and should not be tolerated by the Commission.³

3. Rather than assume responsibility for his actions, the Judge seeks to blame counsel, claiming that counsel should have objected to his inappropriate question (MO&O at para. 11). The Presiding Judge, however, conveniently ignores the following, which was stated before counsel's response was given:

I feel insulted by your asking the question, but I will tell you. I don't think you have any right to the information. I don't think any...I don't know of anyone else in any hearing who has ever been asked what their religious convictions are. But I am conservative. (Tr. 425).

4. The Presiding Judge also conveniently ignores the rationale he stated at the conference for asking the question:

Now, it was suggested to me that I ask you as to whether or not you are practicing as Conservative or Orthodox, if I have the universe correct? Can you confirm that? Can you confirm that? (Tr. 425).

5. The rationale was repeated:

Well, it was suggested to me by somebody who was Conservative and he said you know, that I would be entitled to get a clarification to that extent. It was not meant as an insult." (Tr. 426).

It is clear that the reason for asking the question had nothing to do with a "justification" for a hiatus. Rather, it was done at the suggestion of another. The fact that the individual consulted by the

³ The Judge cites a case, Phelps v. Hamilton, 122 F.3d 1309, 1323 (10th Cir. 1997) -- in which a Judge described a parties religious activities as "shocking" -- as somehow exculpating his own conduct. The cases are hardly comparable, since the religious activities occurring in Phelps were criminal in nature, involving assault, battery and aggravated intimidation of a witness. 122 F.3d at 1314. In this case by comparison, the activity at issue is the peaceful observance of a religious holiday. That the Presiding Judge would seek to excuse his actions here, by attempting to compare the two cases, is outrageous.

Presiding Judge was a “former colleague at the Commission’s OALJ who is a practicing Conservative Jew” does not make the inquiry proper. In this regard, it is true that judges are permitted to consult one another on case matters without violating the ex parte restrictions. However, the party who the Presiding Judge consulted was a retired judge.⁴ Thus, the “consultation” by the Judge which led to the question was improper. Compare Canon 3 and Comment to ABA Model Code of Judicial Conduct for Federal Administrative Law Judges (1989).⁵

6. The Presiding Judge’s MO&O is riddled with assertions that have no basis in reality. At paragraph 3, the Judge asserts that at the June 30, 1998, informal conference, he “felt compelled solely for scheduling purposes to inquire of Mr. Shainis’ participation on Rosh Hashanah.” The schedule had been established pursuant to an April 2, 1998 Order, FCC 98M-40. The Presiding Judge acknowledges that he had never been asked to change the scheduling order. Thus, there was no need for an inquiry predicated on “scheduling.”⁶ The Judge’s assertion is thus belied by the facts.

7. The Judge claims, at paragraph 4 of the MO&O that “it was that ruling [Order, FCC 98M-91, released July 6, 1998] requiring Kay to fully participate in the Admissions Session by introducing direct case exhibits that prompted Kay’s Motion to Recuse Presiding Judge.” The Presiding Judge has obviously not read his July 6, 1998, Order. There, he specifically stated: “There has been no ruling made on Kay’s exhibits as of this time.” Here, the Presiding Judge by his own language has once again displayed his bias and prejudgment.

8. The Judge asserts, at paragraph 7, that “counsel seemingly intended to keep the Judge in the dark” and never offered an explanation (e.g. either in private,⁷ in a conference call, or on the record)

⁴ The Presiding Judge attacks counsel for making “an unfounded accusation” concerning the identity of the Judge’s source. MO&O, note 8. Yet, given the fact that the Judge refused to reveal any information regarding his contact at the prehearing conference, Kay had no option but to speculate as to the source’s identity.

⁵ The Model Code does not sanction a communication with a former judge. The Presiding Judge refused to identify the individual at the July 23, 1998, conference (Tr. 425). His failure to identify the individual was obviously due to the Judge’s knowledge that he had committed an impropriety.

⁶ The Presiding Judge is correct that the July 22, 1998, Motion to Recuse Presiding Judge did not refer to the Judge’s reaction on June 30 to counsel’s sharing with the Judge the two day observance of Rosh Hashanah. The reason that was not mentioned was because the Judge’s actions on that date merely showed his insensitivity.

⁷ The Judge is now condoning ex parte contact by Kay.

which “would have resulted in an immediate authorization for a two day hiatus.” Once again the Judge ignores the fact that counsel never asked the Judge for any accommodation. Moreover, the Judge obviously does not understand that one’s religious viewpoints are private matters. Counsel is not aware of any obligation he has to discuss his religious viewpoints with the Presiding Judge since no request to reschedule any hearing date had been requested.

9. Also, at paragraph 7, the Presiding Judge states that it was his desire to “confirm on the record that counsel was of a religious persuasion which observes two days...” However, the Presiding Judge still does not or will not comprehend that he had no right to ask those questions. Additionally, they were irrelevant in any event because counsel never requested any accommodation. Thus, counsel’s religious convictions are not only personal, but are irrelevant and immaterial.

10. The Presiding Judge’s contention, at paragraph 12, that “counsel was never required or pushed by the Presiding Judge to answer the question” is belied by the facts. See Transcript of July 23, 1998, Conference. Clearly, had counsel refused to answer the question, his client could have been subjected to sanctions (i.e. “if Kay does not offer these direct case exhibits at that time he could waive his right to put on an affirmative case.” Order, FCC 98M-91, released July 6, 1998.)

11. Footnote 9 of the Judge’s MO&O is particularly revealing. There, the Judge states that “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.” It is hard to imagine that the author of these words is a judge. As stated in the Supplement to Motion to Recuse Presiding Judge, the asking of the questions violates the U.S. Constitution, The Religious Freedom Restoration Act, and The Civil Rights Act, as amended in 1972.

12. The Presiding Judge, at paragraph 14, attempts to protest his innocence by stating that “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 [sic], races, and cultures.” The language is undermined by the Judge’s current actions. The questioning of counsel as to his religious beliefs is neither an example of respect nor open-mindedness.

13. At paragraph 15, the Judge assumes that counsel knew that there would be a conflict. Again, the Presiding Judge forgets that no accommodation had ever been requested. The Judge’s assertion that if the Presiding Judge had said nothing counsel would have made “accusations” at the field

hearing is unfounded. The Judge is engaging in unbridled speculation to provide a post-hoc rationalization for his own misconduct.

14. Moreover, the fact that the Judge would engage in such conjecture reveals a very real bias against counsel and Kay. The Judge presumes that Kay, through counsel, would engage in obstreperous behavior at the hearing. How can a party, like Kay, facing abuse of process charges, hope to prevail in a hearing conducted by an individual who is willing to engage in such rampant speculation regarding Kay's counsel's bona fide's? If the Judge already presumes that representations of Kay's counsel are false. Kay himself has absolutely no chance of an impartial and unbiased hearing.

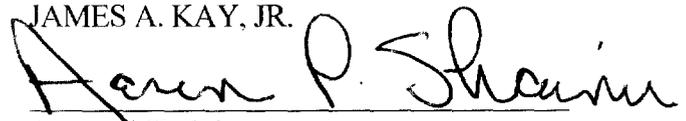
15. The Judge's assertion, at paragraph 16, that Mr. Kay has not been harmed is untrue. When counsel's religious beliefs are not accepted on their face, it is doubtful that the Judge would accept any argument advanced by counsel on behalf of Kay.⁸ Additionally, the Judge's attempt to transmagnify his misbehavior into a personality conflict with Kay's counsel is shameful.

16. In view of the foregoing, Kay submits that the misconduct of the Judge is an embarrassment to the Commission. It is impossible to expect that the Judge can properly preside over the instant proceeding under these circumstances. It would be intolerable to force counsel and Mr. Kay to be in the same room with the Presiding Judge. No intelligent person can have any confidence that this Judge can render an impartial decision in this proceeding. Kay submits that the Presiding Judge's continuous insensitivity and blatant prejudicial conduct can only be counter-balanced by his recusal.

Respectfully submitted,
JAMES A. KAY, JR.

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August 18, 1998

⁸ Additionally, "bias in favor or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of [or against] an attorney, his impartiality might reasonably be questioned in relationship to the party." United States v. Ritter, 540 F.2d 459, 462 (10th Cir.) cert. denied sub nom. Olson Farms, Inc. v. United States, 429 U.S. 951 (1976).

CERTIFICATE OF SERVICE

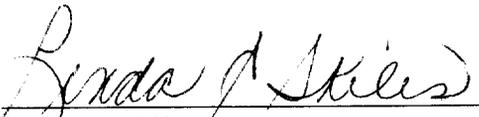
I, Linda E. Skiles, Office Administrator, in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 18th day of August, 1998, copies of the foregoing document were sent, via hand delivery to the following:

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