

misleading declaration does not establish that Mr. Helgeson had intentionally misrepresented to the Commission. Mr. Helgeson's credibility is assessed further below in connection with responding to the LOI.

2001 Reply to Letter of Inquiry

79. Ms. Sawaya became concerned with a timely response to the LOI while maintaining a detachment from substance. (EB Exh. 23.) She never submitted a supporting declaration. On March 26, 2001, she inquired of Mr. Sanchez whether the "reply to the FCC ha[d] been written." (SFUSD Exh. 19.) Her prompting e-mails were copied to Ms. Jackie Wright, Executive Director, Office of Public Engagement, her "immediate boss" at SFUSD, and to Mr. David Campos, a Deputy City Attorney embedded at SFUSD. (EB Exhs. 22, 23, 49.) Most of the work of the Sanchez attorneys on the letter's preparation occurred just before submitting the response when on April 2 and 3, Ms. Jenkins billed 17 hours. (EB Exh. 35.)

80. There was one significant exception to Ms. Sawaya distancing herself from the LOI response. In a candid March 8 memo to counsel, she wrote "No" to the LOI's question about whether the PIF contained all required supplemental ownership reports and issues/programs lists on August 1, 1997. In the same memo, Ms. Sawaya advised Mr. Sanchez that Mr. Ramirez prepared supplemental ownership reports for 1993 and 1995, after the renewal application had been filed, but that these reports had not been placed in the PIF until December 1997. (EB Exh. 21.) Ms. Sawaya concluded that the PIF had not been maintained as required, and reported that to counsel. Then Ms. Sawaya sent Mr. Sanchez copies of these two ownership reports, plus three others that were overdue. Ms. Sawaya was the first manager at SFUSD to try to come to grips with specific facts as they existed in July-August 1997, and to report them to counsel.

81. Counsel's final letter of April 5, 2001, stated that Station management had a "belief" that its PIF as of August 1, 1997, "contained all of the issues/program lists for the entire period in question." (EB Exh. 34 at 3.) After attorney-client dialogue between Mr. Sanchez and Ms. Sawaya and others, the LOI was answered as Sanchez counsel had drafted it. Inexplicably, Mr. Sanchez rejected Ms. Sawaya's candid "No" answer. There is no evidence to show that Ms. Sawaya was factually in error in recommending "No" responses. Mr. Sanchez shifted the response to mitigation, emphasizing sequential location changes of Station premises causing disruption of PIF maintenance. Counsel also tied the reply letter to a good faith "belief" that on August 1, 1997, all required supplemental ownership reports were in the PIF.

82. Mr. Helgeson was asked whether he had seen counsel's letter before it was sent on April 5, and he testified that "I do not have any recollection of having seen this letter before it was sent in, given the date of April 5th." (Tr. 1072.) Counsel had taken control of the LOI response, and it would not be expected that there would be any objection from Ms. Sawaya, or from any other Station employee. The contents of counsel's letter cannot be accepted as a reliable reconstruction of decisional facts, and the "Yes" answers were misleading. But no intention to deceive is apparent in counsel's letter.

Depositions and Testimony**William Helgeson**

83. Mr. Helgeson was asked on cross-examination about his intent in his 1998 declaration. (Tr. 804-14.) When the Presiding Judge intervened, Mr. Helgeson conceded that, contrary to the assertion in his declaration, he (Mr. Helgeson) did not have knowledge of what the rules required. (Tr. 824-25; 831-42 [discussing EB Ex. 10].) And even though contemporaneous e-mails reflected that Mr. Helgeson was supposed to have helped answer the LOI's questions, he repeatedly insisted that his role was only to bring the PIF up-to-date, notwithstanding that he was the only SFUSD employee to verify SFUSD's assertions in the final LOI response. (Tr. 921-22, 942, 1096-97.)

84. Bureau Exhibit 10 (EB Exh. 10) is a one sheet hand-written message to Mr. Sanchez which Mr. Helgeson identified as his handwriting. (Tr. 831.) It shows a date of January 30, 1998, and states:

Attached is list that Jeff, Ana & I used yesterday to "clean up"
KALW's Public File.

Mr. Helgeson testified that now he is "not sure what list it refers to particularly." He went on to testify "I'm not sure what I meant at this time [and] I can't remember what or why I put the words 'clean up' in quotes, either." (Tr. 832.) He testified further: [W]e felt that we needed some list because I certainly didn't know what should and shouldn't be in a public file --- I just assumed there was some printed list." (Tr. 833.) He continues: "I'm not sure --- like I say I don't know what clean up was then." (Tr. 834.) When asked if the public file had been reorganized, he answered "I don't know if we reorganized" and did not "recall us taking an inventory." (Tr. 835-36.) Mr. Helgeson showed an inability to recall what he should have known concerning the state of the Station's PIF in January 1998. Disarray in testimony with regard to his declaration and the PIF when he assumed the General Manager's position in 1998, seems mainly attributable to his ignorance of regulations, his loyalty to Mr. Ramirez, and recently to his disability.¹⁷ It could not be determined from his misdemeanor whether he was being untruthful, and he receives the benefit of the doubt.

¹⁷ Mr. Helgeson testified in writing:

[As of] early 2004, --- I am now legally blind. --- When I look directly at a piece of paper with writing on it, I cannot read the words printed. --- Moreover, I cannot see the entire document when I look at the enlarged image. --- I generally do not receive the mental impressions of documents that sometimes help people refresh their memories.

(SFUSD Exh. T-2 at 17.)

85. Mr. Helgeson testified at hearing that he had no intent of attesting to the PIF's contents in August 1997, but only intended to state what was in the PIF in April 2001. His declaration of 2001 was to support the LOI response, and he candidly testified that his certification as to the truth of the entire contents of the reply was not "accurate." (Tr. 1112.) He had misguided faith in Mr. Ramirez knowing Commission rules, and in believing that Mr. Ramirez would have acted in accord with the rules. (Tr. 824-825.) None of what Mr. Helgeson believed was based on fact, and none of it proved to be true. However, Mr. Helgeson's reliance on counsel, his naiveté regarding Mr. Ramirez's ability and trustworthiness, and his candid admission, negate any focused intent to deceive the Commission.

Nicole Sawaya

86. On September 28, 2004, the Bureau deposed Ms. Sawaya. Her deposition testimony was convoluted with inabilities to remember and re-directing of questions. (SFUSD Exh. 18 at 371, 391.) To illustrate, when asked whether she had seen the LOI, she responded:

My guess is, and this is only a guess, that I have not or that I did not, but quite frankly, sir, I really don't remember.

(SFUSD Exh. 18 at 368.) Such testimony of unfamiliarity with the LOI is facially inconsistent with her hearing testimony. She acknowledged drafting memos on March 8, 2001, and testified at the hearing that she had used the LOI as a guide in formulating the substantive responses in her memos. (Tr. 1365.) Ms. Sawaya and Mr. Helgeson collaborated in making the 1999, 2000, and 2001 ownership reports current, and these she mailed to Mr. Sanchez. (Tr. 1346.) She was involved in a meaningful way in completing incomplete files of the Station. (Tr. 1361.) (SFUSD Exh. 18, *passim*.) When asked whether she had been asked to respond to the LOI's first question, she answered "No." (*Id.* at 368-69.) She was asked whether she knew if anyone was asked to respond to that question, and she answered "I don't know." (*Id.*) Identical responses were given for remaining questions in the LOI. (*Id.* at 369-70.) She had seen a final reply in draft form, but could not remember providing any information or comments. (*Id.* at 370-71.) Ms. Sawaya "didn't want to come to any quick judgments, especially given the fact that some people were still at the station that was involved in this." She had not even looked at the PIF until "my second week there [at the station], --- . (SFUSD Exh. 18 at 367-76.) She concluded that by mid-March the PIF appeared to her to be in good order. (SFUSD Exh. 18 at 375-76.) Ms. Sawaya lacked candor in denying having any recollection about the LOI. But her denial is not found to be disqualifying for SFUSD because it is obviously not true so that no one would be misled, and she had no discernable motive to lie on the merits.

87. Ms. Sawaya prepared for her deposition by reading GGPR's petition to deny and the *HDO*. (SFUSD Exh. T-3 at 9.) Both documents discuss in detail what was, or what was not, in the PIF at various times. For context *see HDO* Paras. 9-11. But she testified that she only expected to be "asked to discuss what the Station was doing on the programming front and its fiscal situation and [her] role in bringing it to its current status." (SFUSD Exh. T-3 at 9.) Yet in an e-mail sent two months earlier, Ms. Sawaya stated that she understood the *HDO* and that "the issue at hand is FCC regulations around what must be in a station's public file, not whether we

‘think’ our programming is public service or not.” (EB Exh. 57.) This e-mail shows that Ms. Sawaya understood the focus of her deposition would be issues of the *HDO*. Certainly, in advance of her deposition with qualified counsel at her side, she must have known that she would be asked serious and penetrating questions about *HDO* allegations. Her testimony that she expected to testify only about programming was misleading. But it should not be attributable to SFUSD for disqualification because it is *de minimis*, and there is no clear motive to deceive.

88. Ms. Sawaya asserted that she had memory loss because she “had not seen [her] March 8 memo in over three and a half years,” that she “wasn’t asked about the memo at the deposition,” and that she “was not told of the document until some time afterwards.” (SFUSD Exh. T-3 at 9.) Ms. Sawaya asserted that she did not retain a hard copy of her March 8 memo because “it is not my practice to print paper copies of electronic documents and place them in a file.” (SFUSD Exh. T-3 at 10.) Ms. Sawaya then admitted that her March 8 memo was stored in her computer in a directory styled “MyDocs,” which she claims she did not access due to a technician’s glitch (SFUSD Exh. T-3 at 10.) It is difficult to accept her explanation about forgotten March 8 memos which were important evidence. It also is difficult to accept that she would keep an “Ernie file” that omitted to include her March 8 memos. But as unreliable as is this testimony, it does not prove an intentional lack of candor with respect to her testimony on substantive issues.¹⁹

89. There is a lack of proof of any intentional and knowing concealment on Ms. Sawaya’s part of prior misrepresentations in connection with certification of the PIF. There is insufficient evidence to conclude that Ms. Sawaya attempted through a knowing deception to convince the Commission that in August 1997, the station had maintained its PIF in accordance with Commission rules. Ms. Sawaya was concerned about showing superiors at SFUSD that she was pressing counsel on whether a “reply to the FCC ha[d] been written.” (SFUSD Exh. 19.) Her deposition testimony does not support a conclusion that she intended to mislead. She had no motive to deceive the Commission, she never executed a declaration, and her candor in March 2001 offsets failures at deposition to recall details, and any misstatements in deposition are not decisionally significant.

¹⁹ It is important that on September 28, 2004, when the Bureau deposed Ms. Sawaya, SFUSD had not yet authorized the Sanchez attorneys to turn over its files to new counsel. See Declaration of Nicole Sawaya, executed March 2, 2005, included in support of Opposition to Enforcement Bureau’s Motion to Enlarge Issues, filed March 2, 2005. SFUSD’s in-house counsel did not send a written request authorizing the Sanchez law firm to transfer files to Hogan & Hartson until January 2005, in connection with the Bureau’s Second and Third Requests for Documents. Once again, SFUSD was “a day late and a dollar short” in giving Station management assistance at a critical time of need.

CONCLUSIONS OF LAW

General Considerations

90. The Commission's policy on ownership responsibility is applicable in assessing responsibility of SFUSD for the actions of the Station's management. The Commission has a policy that "[a] corporation must be responsible for the FCC – related misconduct --- of its employees in the course of their broadcast employment." *Character Policy Statement*, 102 FCC 2d 11179, 1218 (1986). SFUSD has vicarious responsibility for Mr. Ramirez's conduct under this policy. The policy also provides that "mitigating factors must be considered." *Id.*

91. The Commission's policy on renewal where there has been wrongdoing concludes that "a range of sanctions short of revocation or failure to renew a license can be imposed by the Commission." (*Id.*) It is concluded that gross negligence, vicariously attributable to SFUSD under principles of *respondent superior*, does not automatically result in denial of license renewal. The evidence and applicable case law establish that Mr. Ramirez causing "Yes" certification by SFUSD as to condition of the PIF and his lack of candor in testimony, are serious. But it is concluded that these are isolated violations and are not likely to reoccur. Furthermore, the fact that Mr. Ramirez has left the Station, coupled with the adoption of a compliance policy and retention of new counsel, constitutes reliable evidence that the Station may continue to be operated by SFUSD in the public interest.

Legal Considerations

92. Section 309(k) of the Communications Act provides that if upon consideration of a renewal application and related record, the Commission finds that (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or the Commission's Rules; and (3) there have been no violations that, taken together, show a pattern of abuse, the Commission will grant the renewal application. But if after hearing the licensee fails to meet the standard, the Commission still may grant the application "on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted." 47 U.S.C. §§ 309(k)(2), 209(k)(3). The questions for remedial decision are whether the evidence proves "serious violations" and if so, whether the renewal application should be denied, or granted for a term shorter than eight years. 47 C.F.R. § 73.1020.

93. SFUSD had to truthfully and accurately check off "No" to Questions 1 and 2. 47 USC § 312(a). Instead, SFUSD unwittingly boxed itself into a very close call for license renewal, a box built by Mr. Ramirez's unwitting choice to rationalize wrong answers to simple questions that could have been rectified, but were not rectified until issuance of the *HDO*.²⁰ To

²⁰ Upon issuance of the *HDO*, SFUSD retained new counsel, and filed an amended renewal application with "No" certifications to Questions 1 and 2. (SFUSD Exhs. 48, 76.)

make matters worse, it was after the erroneous "Yes" certifications were announced by GGPR that Mr. Ramirez dissembled. Thus, there were three scenarios involving disqualifying misrepresentations or lack of candor: first, the "Yes" certifications on August 1, 1997; second, the opposition to the petition to deny on January 20, 1998; and third the response to LOI filed on April 5, 2001. In each scenario, SFUSD represented that the Ramirez certifications of August 1, 1997, were correct. In any one of these three scenarios – or all – SFUSD had the opportunity to reflect, research, answer correctly, and perhaps avoid this hearing. SFUSD and its Station management failed all three times to get it right.

Misrepresentation and Candor

94. In order for there to be a disqualifying certification, it must be shown that there is a misrepresentation or lack of candor in connection with an application. *In re Application LUJ, Inc.*, 17 FCC Rcd 16980, 16982 (2002); *In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd. 2122 (1987). Misrepresentation and lack of candor differ as legal concepts only in that misrepresentation involves false statements of fact, while an absence of candor involves concealment, evasion, and failures to be fully informative. *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983). Both misrepresentation and lack of candor can be disqualifying.

95. Substantial evidence of an intent to deceive is required to support a finding of misrepresentation. *See LUJ, Inc.*, 17 FCC Rcd 16980, 17982 (2002) (certifications in assignment application were not false where Commission was not deprived of dispositive information, there was no motive that inferred an intent to deceive, and there was no direct evidence of such an intent). *See Liberty Productions Ltd. P'ship*, 16 FCC Rcd 12061, 12083-93 (2001). In *Liberty Productions*, there was an issue of misrepresentation/lack of candor based on a site availability certification, a more narrowly focused inquiry than here, and the Commission did not find substantial evidence of an intent to deceive. The Commission would not rely on conflicting deposition testimony showing that a witness had "no clear memory" of conversations occurring years before hearing testimony. *Id.* at 12092-93. Commission decisions require a showing of substantial evidence of intent to deceive in order to sustain a finding of misrepresentation. *Id.* at 12085. *Compare Ronald Brasher*, 19 FCC Rcd 18462, 18491-92 (2004) (license revocation for undisclosed parties-in-interest, control of licenses without authorization, concealment of scheme to apply for excessive licenses, numerous misrepresentations and lack of candor, false signatures, false testimony). By contrast, Mr. Ramirez, an inexperienced General Manager who was not a member of any control group, was merely a salaried employee without motive to deceive the Commission.

96. False or misleading representations of Mr. Ramirez that were consequences of his inexperience and absence of oversight do not rise to the level of disqualifying misconduct. *In re Application of Pinelands, Inc.*, 7 FCC Rcd 6058, 6065 (1992). Mr. Ramirez's "Yes" determination of a complete PIF is found to be "wanton, gross and callous, and in total disregard of obligations to the Commission to certify honestly in renewal applications as to be equivalent to an affirmative and deliberate intent." *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978), quoting *Tipton County Broadcasters*, 37 F.C.C. 191 (1964). *See also Liberty Cable*

Co. Inc., 15 FCC Rcd 25050 (2000), *reh. den.*, 16 FCC Rcd 16105 (2001) (unlicensed operations were legion and in disregard of obligation to activate only authorized paths held to be “tantamount to intentional misconduct.”) But in that case, management knew of continuing premature activations and encouraged an employer to continue to activate without concern to non-licensure. *Id.* There is no such active complicity of SFUSD in Mr. Ramirez’s misleading acts of misjudgment, and SFUSD should not be denied renewal based on Mr. Ramirez’s one-time instance of ineptness and gross negligence.

97. Also, the Commission will not impute a disqualifying lack of candor to an applicant where the record shows a good faith reliance on counsel. *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining candor); *Professional Radio, Inc.*, 2 FCC Rcd 6666 (1987) (applicant not penalized for erroneous site designation made on advice of counsel); *Broadcast Association of Colorado*, 104 FCC 2d 16 (1986) (applicant improperly certifying on advice of counsel not disqualified). In the case of *Abacus Broadcasting Corp.*, 8 FCC Rcd 5110 (Rev. Bd. 1993), the Review Board affirmed an *Initial Decision* finding of justified reliance on counsel for applicant’s erroneous site certification, noting particularly that the certification was prepared hastily by counsel and neither the applicant nor counsel were focused on “significance of details.” 8 FCC Rcd at 5113. This case is similar to *Abacus Broadcasting* in the haste that was required in signing declarations, and in the reliance on counsel to draft appropriate documents, pleadings and correspondence to be submitted to the Commission without meaningful review by Station management.

Discussion

98. Due to inexperience with renewal applications and inattention to details, Mr. Ramirez negligently failed to maintain the PIF. He was grossly negligent in soliciting SFUSD management to certify wrongfully to the PIF’s compliance in the face of his inattention, negligence, inexperience, or even disinterest. But the fault was not solely his. He arrived at a Station which had been disrupted by an earthquake and a series of moves. There is no evidence of supervision by the Superintendent’s office that would have provided effective managerial direction to Mr. Ramirez. Equally important, there is no evidence that communications counsel on retainer to SFUSD had advised Mr. Ramirez to repair, or how to repair, a deficient PIF, and there was no legal auditing procedure. Supervisory deficiencies coupled with failures on the part of Mr. Ramirez to receive or follow legal advice that could have rectified the PIF’s contents, constitute circumstances that in their totality raise serious doubts that there was ever any intent by the licensee to mislead or deceive the Commission. The weight of the evidence establishes that the Station’s violations were mainly caused by Mr. Ramirez’s gross negligence which was unknown to SFUSD until after the fact.

99. If he had taken seriously the NAB memo, the FCC instructions, and the information in the Hecht report, Mr. Ramirez, who had been sensitized by Mr. Evans when he first came aboard, would have known that the PIF was not current and would be in violation. Mr. Ramirez at least suspected by June 1997, more than a month before filing the renewal application, that the Station’s PIF was deficient. Had Mr. Ramirez acted with reasonable diligence, it could have been corrected by the time the renewal application was filed. Making

matters worse, Mr. Ramirez signed a misleading declaration to oppose a petition to deny wherein he represented that the Station had an "ongoing process" of updating the PIF. He later testified falsely at hearing to the truth of that assertion, thereby putting license renewal further at risk. Mr. Ramirez cannot rely on advice of counsel as a defense for his misconduct because he could not recall whether he told Mr. Sanchez anything about the state of the PIF. (Tr. 403-04.) And when he testified to "working too fast," "not paying attention," while there was an "ongoing process" to update the PIF, Mr. Ramirez cannot rely on advice of counsel for his lack of candor. (Tr. 452, 455.)

100. But Mr. Helgeson and Ms. Sawaya justifiably relied on counsel. Mr. Helgeson reasonably relied on Mr. Sanchez in connection with his declaration of January 1998 and April 2001, because Mr. Helgeson was not familiar with the events of the 1997 renewal application and he had to rely on counsel who were advising Mr. Ramirez. Ms. Sawaya had recommended to counsel correct and candid answers to the LOI shortly after she was hired. She only changed her position in order to accommodate counsel who had been advising SFUSD on legal matters for many years. She did not wish to jeopardize SFUSD's legal defense, and there were deadlines that had to be met. The erroneous response to the LOI was prepared and sent by counsel and there was little time for any Helgeson/Sawaya review. The testimony of Mr. Helgeson and Ms. Sawaya at deposition and hearing was persuasive as to their reasonable reliance on counsel.

101. The 1998 Helgeson declaration was misleading in representing "an ongoing effective effort --- to update and maintain the Station's public inspection file." But there are mitigating circumstances. When Mr. Helgeson realized that SFUSD's certification was under serious attack by GGPR, he assumed that Mr. Ramirez had reviewed the PIF and had knowledge of its contents before certifying "Yes." Mr. Helgeson played no part in certification of the PIF. As a latecomer, he had to rely on the only (and best) resources who had been involved in advising Mr. Ramirez, *i.e.* the Sanchez attorneys. With the license under challenge by GGPR, Mr. Helgeson was compelled to rely on informed and experienced counsel to draft the declaration. In addition, the signing and filing of the declaration was rushed, and Mr. Helgeson had great difficulty in reading documents. His testimony at hearing did not demonstrate an abundance of candor, but his near blindness precludes any negative assessment of his demeanor and related candor.²⁰ The Bureau does not challenge his deposition. In assessing his declarations and his testimony, Mr. Helgeson receives the benefit of the doubt.

102. The Bureau is correct that the evidence establishes that Ms. Sawaya understood the issues in this proceeding prior to her deposition. Ms. Sawaya knew that "the issue at hand is FCC regulations concerning a station's public file, not whether we 'think' our programming is public service or not." (EB Exh. 57 [e-mail from Ms. Sawaya to Mr. Sanchez showing an understanding of *HDO* issues].) Her ability to assess which issues would likely be explored at deposition, is a reliable indicator of her awareness and caution in giving deposition testimony.

²⁰ The Presiding Judge had opportunity to observe Mr. Helgeson whose testimony was given over three days. (Tr. 593-1198.) Mr. Helgeson had to use a special magnifying instrument to identify and focus on the many documents presented by examining counsel. He gave the appearance of trying to cooperate with cross-examination, and there was nothing untoward in his demeanor appearance on the stand.

Short of speculation, there is no inference to draw that Ms. Sawaya consciously avoided questions at her deposition about her involvement in responding to the LOI by “shading” her testimony in order to distance herself, or by having strategic amnesia. As new General Manager, she presented truthful answers which counsel rejected. She then deferred to counsel, and as would be expected by her SFUSD superiors, she cooperated with counsel in facilitating a timely response to the LOI.

103. Ms. Sawaya attempted at deposition to excuse her failure to recall her March 8 memo, a copy of which was located on her computer. A lack of memory as to such an important document that the witness prepared and sent to counsel is difficult to understand, but a loss of memory as explanation cannot be summarily rejected. *See Liberty Productions Ltd. P'ship, supra* at 12092-93. Her e-mail communications with counsel show that the “license challenge” was a matter of grave concern to her as it had a potentially negative impact on her future employment. That realization motivated her to cooperate with SFUSD’s long-time counsel who she trusted. It seems highly unlikely that she could “forget” a memo that she had prepared that raised questions with counsel about the veracity of answers in filings made with the Commission. Her not remembering the memo and that she “doesn’t typically print out documents,” is hard to accept in view of her ability to print two March 8 memos, one of which served as a cover memo for the original signed supplemental ownership reports that she sent to Mr. Sanchez. (SFUSD Exh. T-3 at 9.) It is also difficult to accept that Ms. Sawaya could have set up and maintained her own “Ernie file,” and not place these March 8 memos therein. However, this circumstantial proof does not establish that she intended to mislead the Commission, and it is plausible to conclude on this record that she did temporarily forget in 2004 her March 8 memos of 2001. Here, Ms. Sawaya is entitled to receive the benefit of the doubt.

104. At hearing, Ms. Sawaya insisted that her role in drafting and completing an LOI response was merely that of facilitator. (Tr. 1328-29, 1332, 1437-38.) Such testimony is transparently inconsistent with the detail of her March 8, 2001 memos to Mr. Sanchez, and her correspondence regarding the LOI in March and April 2001. (SFUSD Exh. T-3 at 9.) There is over-statement in her oft-repeated claim that the issues raised by the LOI were complex and beyond her ken. (Tr. 1332, 1364, 1436.) To the contrary, after only one week on the job, Ms. Sawaya had ascertained that SFUSD’s renewal application certification about the PIF was wrong and drafted a focused memo recommending correction and explaining the deficiencies in the PIF which she sent to counsel. Ms. Sawaya also directed her staff to achieve compliance, which involved researching the PIF and responding to the LOI in a timely and truthful manner. When questioned at her deposition about her role in responding to the LOI, Ms. Sawaya attempted to create an appearance that she was only a facilitator and had no substantive involvement in responding. But there was no discernable deceit or intent to deceive on her part, best illustrated by how quickly, candidly and thoroughly she responded in early March. From observing her testifying, there was nothing in her demeanor to suggest that she was intentionally lying about not recalling. However, there also is little weight to be accorded her testimony which is based on recollection, since there is very little of substantive value that she could remember.

105. Counsel had crafted a reply to the LOI and erroneously reported that on August 1, 1997, the PIF “contained all of the ownership reports.” There was no basis in fact for making such a claim, since the Hecht report showed that ownership reports and program/issues lists were

missing. It also was factually wrong to assert that program guides and NPR issues lists were in the PIF as of August 1, 1997. (EB Exh. 5 at 44-49; EB Exh. 4 at 3.) Mr. Helgeson had placed both sets of documents in the PIF in March 2001, only after he had confirmed that the PIF was a "disorganized mess" and lacked documents. NPR materials were added as attachments to the LOI response, but those documents were not in the PIF. By the time the letter was sent on April 5, neither Mr. Helgeson (Tr. 1012) nor Ms. Sawaya (Tr. 1424) had control over what the letter contained. Preparation and issuance of counsel's letter response to the LOI do not support any conclusion that Mr. Helgeson, Ms. Sawaya, or SFUSD intended to mislead, or were motivated to mislead, in responding to the LOI.

Mitigation

106. What was missing from the PIF in 1997, were supplementary ownership reports for earlier periods. Such reports were discontinued by the Commission. Station program guides were regularly made available in the community which gave information on programming. Thus, SFUSD was making efforts to inform the community about its programming, and there is no question about the responsiveness of its programming to the community's issues. And despite deficiencies in quarterly issues/programming lists, the Station consistently produced programming that was responsive to San Francisco.

107. Mr. Sanchez's preparation of an opposition to GGPR's petition to deny and response to the Bureau's LOI was the primary responsibility of SFUSD's retained counsel. It also was the responsibility of Mr. Ramirez and Mr. Helgeson to cooperate with counsel. Counsel took control over the process of preparing and finalizing supporting declarations of Mr. Ramirez and Mr. Helgeson, and therefore counsel was also responsible for the accuracy of the declarations. SFUSD's response to the LOI also became the responsibility of counsel. The questioned testimony of Mr. Ramirez, Mr. Helgeson and Ms. Sawaya was given with the assistance of counsel, and as sequestered witnesses, their testimony was beyond the supervision of SFUSD. It is concluded that advice of counsel played a substantial role in the preparation of SFUSD's opposition to petition to deny in its response to the LOI, and in preparing the testimony of Messrs. Ramirez and Helgeson and Ms. Sawaya. *See Abacus Broadcasting Corp., supra* at 5112. *See also WADECO, Inc. v. FCC*, 628 F. 2d 122, 127 (D.C. Cir. 1980).

108. There is no evidence of a repetition of compliance violations. Except for isolated violations attributed to former General Manager Ramirez, SFUSD has a record of compliance with the Commission's rules throughout the renewal period. In reacting to this case, SFUSD adopted a responsible policy that requires counsel to monitor compliance with Commission rules. (SFUSD Exh. T-4 at 3.) SFUSD has retained new communications counsel to diligently oversee compliance, and in that way SFUSD will increase its oversight of Station management. The General Manager who prepared the renewal application is no longer employed by the licensee. His successor had prior experience as a General Manager and showed greater concern for compliance. SFUSD is now in the process of selecting another new General Manager, and hopefully will select one who has solid compliance experience. There is good reason to conclude that there should be no reoccurrence of failures to maintain the Station's PIF, and that there will be no misleading application or report filed with the Commission in the future. These

circumstances show that SFUSD should be fully rehabilitated with respect to PIF maintenance and reporting within two years of this ruling. “Compare *Abacus Broadcasting Corp.*, *supra* at 5113 (question of intent to deceive is a “close one” but “on balance” the record as a whole does not support a disqualifying intent to deceive).

109. While considerations of negligence in failing to hire and supervise apply in this case, a licensee’s negligence is not disqualifying misconduct that precludes renewal. *In re Application of Pinelands*, *supra* at 6065. SFUSD acted reasonably by relying on its counsel. There is ample authority for holding that when there is good faith reliance on qualified communications counsel who is retained to prepare pleadings, declarations, and responses to Commission require (LOI), the misconduct of employees, even if potentially disqualifying, should be substantially mitigated. See *WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (good faith reliance on counsel is relevant to determining who is acting with candor); *WADECO, Inc. v. FCC*, 628 F.2d at 127 (good faith reliance on counsel protects applicant from disqualification).

Forfeiture

110. Section 73.3527 of the Commission’s Rules (Rules) requires non-commercial broadcast licensees to maintain a public inspection file containing specific types of information related to station operations. Section 73.3527(e)(8)(i) provides that an issues/programs list is to be placed in a station’s public inspection file each calendar quarter. Where lapses occur in maintaining the public file, neither the negligent acts nor omissions of station employees or agents, nor the subsequent remedial actions undertaken by the licensee, excuse or nullify a licensee’s rule violation. See *Padre-Serra Communications, Inc.*, 14 FCC Rcd 9709 (1999). There is no dispute that serious willful lapses of PIF maintenance occurred at the Station for which SFUSD is responsible.

111. The *HDO*, Para. 25 provides that:

IT IS FURTHER ORDERED, that, irrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934, whether an ORDER OF FORFEITURE in an amount not to exceed \$300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission’s Rules, which occurred or continued within the applicable statute of limitations. [Footnotes omitted.]

The “Yes” certification on August 1, 1997, concerning the PIF was grossly negligent and so wanton as to equate with an act of willful misrepresentation of compliance with Section 73.3527(a)(2)(e)(4)(8) of the Commission’s rules [47 C.F.R. § 73.3527]. As a separate and distinct violation, the licensee failed to maintain ownership reports and issues/programs lists in its PIF from 1991 to 2001.

112. The Bureau asks for denial of renewal for alleged violations, but does not ask that any forfeiture be applied in this case. SFUSD admits that under usual circumstances a \$10,000 base forfeiture would be imposed for violation of the PIF rule. But SFUSD asserts that its current deficit condition demonstrates an inability to pay even the base amount. SFUSD has not persuaded of its inability to pay a reasonable forfeiture.²¹ Section 1.80 of the Commission's rules establishes a base forfeiture amount of \$10,000 for public file violations.²² The evidence presented by SFUSD on its financial condition does not prove an absolute inability to pay any forfeiture.²³ Considering the record as a whole, a \$10,000 forfeiture is appropriate for SFUSD's erroneous "Yes" certification in connection with maintaining a deficient PIF.

CONCLUSION

113. The Enforcement Bureau has presented its case in support of license denial. But it is "only in the most egregious case" that "termination of all rights [must] be considered, and this case does not fall among the "most egregious." *Character Policy Statement, supra* at 1228. *Compare Contemporary Media, Inc.*, 13 FCC Rcd 14437 (1998), *reh. den.* 14 FCC Rcd 8790 (1999) (disqualification for criminal acts and repeated misrepresentations which were unaccompanied by adequate remedial measures.) Rehabilitation is significant, and SFUSD's changes in Station personnel and its adopted compliance program show a tendency toward rehabilitation. *Id.* Another positive factor is the "ability to operate in the public interest with no likelihood of future misconduct." (*Id.* at 1229.) *Policy Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990) (mitigating factors include frequency, willfulness, currentness and seriousness of misconduct, the nature of participation by managers, efforts to remedy, record of compliance, rehabilitation.) All of these factors considered in their totality, and particularly the probability of full rehabilitation, rule out denial of SFUSD's license renewal. Full rehabilitation usually can best be assured by ordering a short-term renewal and forfeiture. *See Abacus Broadcasting Corp.*, 8FCC Rcd 5110, 5117 (1993) (short-term renewal appropriate to test future compliance; forfeiture also assessed).

²¹ The authorized forfeiture amount is \$300,000. *HDO* at Para. 25. The Presiding Judge has favorably considered meritorious programming identified by SFUSD. (SFUSD Exh. 79.) Consideration also has been given to SFUSD's presentation on forfeiture. *See* Paras. 70-72, *supra*. Under all circumstances, the forfeiture ordered in the amount of \$10,000.00 seems reasonable and appropriate.

²² 47 C.F.R. § 1.80(b) (4), Note to paragraph (b) (4): Section I. Base Amounts for Section 503 Forfeitures; *Forfeiture Policy Statement*, 12 FCC Rcd at 17113, Appendix A, Section I.

²³ The rules provide for requests for installment payments. *See* 47 C.F.R. § 1.1914.

114. The Superintendent's recognition of need for effective future compliance with Commission rules shows persuasive remediation. The fact that Mr. Ramirez was a salaried, at-will employee who left the Station in 1998, makes it unlikely that there would be a reoccurrence of non-compliance in the future. Nor should SFUSD's long-held license be jeopardized by poor judgments of an uninformed General Manager. Ultimately, the misconduct proved by the Bureau pales in comparison to misconduct found to justify the harshest penalty, revocation or denial. *Compare Contemporary Media, supra* (criminal conduct), *Ronald Brasher, supra* (fictitious names in scheme to transfer licenses), *Liberty Cable Co., supra* (management sanctioned unauthorized activations by employee).

115. Under established Commission policies favoring renewal and allowing for mitigation of violations which could be a basis for renewal denial, it is concluded that SFUSD qualifies for a short-term renewal.

ORDER

Based on the record in this proceeding, IT IS ORDERED that pending renewal application (File No. BRED-19970801YA) of San Francisco Unified School District for License for Station KALW(FM), San Francisco, California, IS GRANTED for a period of two years from the release date of this *Initial Decision*.

IT IS FURTHER ORDERED that San Francisco Unified School District IS ASSESSED a forfeiture penalty in an amount of Ten Thousand Dollars (\$10,000), to be paid within two years from the release date of this *Initial Decision*.

FEDERAL COMMUNICATIONS COMMISSION²⁴



Richard L. Sippel
Chief Administrative Law Judge

²⁴ This *Initial Decision* shall become effective and this proceeding *shall be terminated* 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. § 1.276(b).