

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

In the Matter of) EB Docket No. 07-13
)
DAVID L. TITUS) FRN No. 0002074797
) File No. EB-06-IH-5048
Amateur Radio Operator and Licensee of)
Amateur Radio Station KB7ILD)

FILED/ACCEPTED
OCT - 8 2008
Federal Communications Commission
Office of the Secretary

To: Richard L. Sippel
Chief Administrative Law Judge

**MOTION FOR LEAVE TO FILE SUPPLEMENT TO ENFORCEMENT BUREAU'S
MOTION TO PERMIT TESTIMONY BY REBUTTAL WITNESSES**

1. The Enforcement Bureau hereby requests permission to supplement its "Motion to Permit Testimony By Rebuttal Witnesses," filed in this proceeding on September 8, 2008 ("Motion"). In support whereof, the following is shown.

2. In its Motion, the Bureau respectfully requested the Presiding Judge to permit the Bureau to present rebuttal testimony in this proceeding of Dr. Gerry Hover and Police Officers Jennifer Franklin, Mark Wong and Susan Wong. As directed by the Presiding Judge,¹ the Bureau attached statements to its Motion summarizing the rebuttal testimony of each of these individuals. The Bureau indicated in its Motion that the rebuttal testimony, particularly that of

¹ At the conclusion of the initial stage of the hearing in this proceeding, prior to the closing of the record (which has yet to take place) and pursuant to the prior statement of the Presiding Judge that rebuttal should not be addressed until that time, the Bureau respectfully requested the opportunity to present rebuttal evidence. TR. 1125-26. The Presiding Judge ordered the Bureau to support its request to present rebuttal evidence in the form of a written motion containing, among other things, statements summarizing its proposed rebuttal testimony. See Order, FCC 08M-41 (released July 23, 2008). The Bureau timely filed the referenced Motion. The Bureau notes that on April 8, 2008, before testimony in this case even commenced, Mr. Titus submitted proposed rebuttal testimony to the Presiding Judge without the need to make any similar showing. Further, the Presiding Judge acknowledged that he "looked at" Mr. Titus' submission soon after he received it. TR 285.

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the three police officers, was necessary to demonstrate the extent to which Mr. Titus played fast and loose with the facts -- indeed, lacked candor -- in his testimony to the Presiding Judge about events surrounding his run-ins with the police. The Bureau did not and does not offer this rebuttal testimony to "re-litigate" the underlying incidents; rather, it offers rebuttal testimony to demonstrate Mr. Titus' proclivity to dissemble to persons of authority, particularly police officers and the Presiding Judge. The proffered testimony goes directly to the reliability of Mr. Titus' testimony before the Commission and his basic qualifications to be a Commission licensee.

3. The Bureau also noted in its Motion that it was unable at the time to provide a written statement summarizing the testimony of another proposed rebuttal witness, Victoria Halligan, because she was traveling abroad and unavailable. The Bureau appropriately informed the Presiding Judge in its Motion of the likelihood that it would promptly submit a supplemental filing containing Ms. Halligan's written statement summarizing her rebuttal testimony when she returned to the United States. *See* Motion at 4-5.

4. The supplement to the Bureau's Motion which the Bureau hereby seeks leave to file includes Ms. Halligan's written statement. Ms. Halligan's statement is not being offered to "re-litigate" the matters surrounding her physical altercation with Mr. Titus. Rather, it is intended to demonstrate Mr. Titus' failure to testify candidly in this proceeding, and as such goes directly to his character qualifications to remain a Commission licensee.

5. The supplemental information which the Bureau seeks leave to file also includes new and potentially decisionally significant evidence that only became available *after* the Bureau

filed its Motion. As will be shown below, the new evidence -- consisting of a transcript of testimony recently given under oath in a Washington State proceeding involving Mr. Titus -- establishes a *prima facie* showing that Mr. Titus either misrepresented material facts to or lacked candor in his testimony before the Presiding Judge in the instant proceeding.

6. Given the importance of this evidence on the ultimate outcome of the instant proceeding, the Bureau urges the Presiding Judge to consider the supplemental filing in determining that rebuttal evidence is absolutely critical in this case to ensure that a full and complete record forms the basis for a reasoned decision by the Presiding Judge on the merits. The Bureau is acutely aware that such rebuttal testimony and receipt of rebuttal evidence will prolong to a limited extent this hearing and require the expenditure of Commission resources. However, in designating this case for hearing, the Commission did not contemplate anything less than a full, complete, and robust proceeding to ensure that all relevant evidence is received into the record and considered in determining whether Mr. Titus is qualified to remain a Commission licensee. The Bureau believes that Mr. Titus is entitled to nothing less.

HALLIGAN TESTIMONY

7. At the hearing in this proceeding, the evidence showed that Ms. Halligan filed an assault complaint against Mr. Titus with the Seattle Police Department as a result of a traffic altercation (Bur. Ex. 4 at 35-37; TR. 592). Mr. Titus' testimony (TR. 1110) before the Presiding Judge differed in material respects from the description of the incident contained in the Seattle Police Department's official Assault Incident Report (Bur. Ex. 4 at 35-37). Specifically, while Mr. Titus testified in this proceeding that he simply pushed her hand down (TR. 1110), the police

report about the incident prepared by Officers Mark Wong and Susan Wong states that Mr. Titus used a hold against Ms. Halligan that the officers identified as a counter-joint wrist lock that is taught in police training. Bur. Ex. 4 at 35. Furthermore, the police officers confirmed that Ms. Halligan's hand was lacerated in the incident. Bur. Ex. 4 at 35-37.

8. The Seattle police report was not received for the truth of the matters therein. TR. 328-29. Since Titus was given the opportunity to testify about this incident, TR 592-95, 1108-1111, and his description of the incident differs *in substance* from the police report, fundamental fairness requires that the Presiding Judge allow the Bureau to provide rebuttal evidence in the form of testimony from Officers Mark Wong, Susan Wong, and Ms. Halligan. Ms. Halligan, if permitted to testify in this proceeding, will, like Officers Mark Wong and Susan Wong, also rebut Mr. Titus' testimony regarding this incident. She will explain that Mr. Titus verbally attacked her after their cars collided, then physically assaulted and injured her by "twisting her wrist." She demonstrated to Officer Mark Wong what Mr. Titus had done to her and the Officers have identified the hold used by Mr. Titus as one frequently used by law enforcement officers. She will testify that she felt compelled to flee the scene because Mr. Titus' abusive, confrontational and bizarre behavior so frightened her.

9. As a general matter, the Bureau concedes that reasonable people may differ in their descriptions about certain events that may have transpired. In the instant case, however, the evidence clearly indicates that Mr. Titus, in his testimony in this proceeding, went far beyond simply attempting to downplay or minimize the significance of his confrontation with Ms. Halligan in order to present the matter in a light most favorable to his position. Rather, the disparity between his almost innocent description of the events that transpired, including his

attempt to make Ms. Halligan out to be the aggressor (TR 593-94) and the more onerous events as they actually happened -- according to the victim *and* police officers who have no personal interest in the outcome of this hearing proceeding -- is striking and plainly suggests that Mr. Titus was less than candid or actually affirmatively misrepresented material facts in his testimony in this proceeding. In a case where his basic qualifications are in issue, Mr. Titus' capacity to deal truthfully with the Commission is very much in issue. As such, the record in this proceeding requires a full and complete exploration of whether Mr. Titus' testimony regarding the incident with Ms. Halligan was entirely candid.

10. Mr. Titus, in his opposition to the Bureau's Motion asserts that no further exploration of this matter is warranted because it is a collateral issue about which the Presiding Judge should have no concern. Opposition at 6. However, the Bureau is not seeking to "re-litigate" the assault case, which Mr. Titus suggests is the Bureau's motivation. To the contrary, the Bureau is seeking to determine whether Mr. Titus, in his testimony in this hearing, misrepresented facts under oath in this proceeding in order to downplay his history of violent and unreliable behavior. Far from a collateral matter, Mr. Titus' propensity to deal truthfully with the Commission -- a core element of licensee reliability -- is at the very crux of this hearing proceeding.²

11. Mr. Titus, in his opposition to the Bureau's Motion, also criticized the Bureau for providing statements from the police officers who investigated the incident, while failing to provide the victim's testimony. See Titus September 22, 2008, Opposition at 8. This assertion is

² While this and the Mercer Island incidents did not result in convictions, accurate accounts of the incidents are necessary not only to a determination of Mr. Titus' credibility and qualification to be a licensee, but also to a determination of whether Mr. Titus has been rehabilitated.

disingenuous because the Bureau had previously explained that Ms. Halligan was out of the country and that the Bureau intended to seek to supplement its Motion with her testimony when she returned. See Enforcement Bureau Motion at 4-5. Implicit in Mr. Titus' argument, however, is the belief that Ms. Halligan's testimony presents the best evidence regarding the altercation. The Bureau agrees that the testimony of Ms. Halligan is indeed now necessary for a full and complete record regarding Mr. Titus' behavior during the indecent and his testimony about it. The testimony of Officers Mark Wong and Susan Wong concerning statements contained in the police report and their contact with and observations of Ms. Halligan and Mr. Titus are also necessary to properly evaluate the truthfulness of Mr. Titus' hearing testimony. Additionally, the Bureau notes that the expert testimony and conclusions of Detective Robert Shilling and Dr. Douglas Allmon are based in part upon their assessments of Mr. Titus' behavior during his altercation with Ms. Halligan. Consequently, Ms. Halligan's testimony is also necessary to assess the accuracy of the conclusions drawn by Detective Shilling and Dr. Allmon about Mr. Titus' behavior during this incident.

12. Mr. Titus was freely permitted to testify about incidents involving his past behavior, including the incident with Ms. Halligan. The Bureau believes that Mr. Titus' testimony about the incident was less than truthful and respectfully requests permission to present evidence to rebut the veracity of Mr. Titus' testimony, including the supplemental evidence described herein. The public interest and fundamental fairness compels that that the Bureau have that opportunity.

TRANSCRIPT OF BENTON COUNTY HEARING

13. The Bureau also seeks to admit as an additional exhibit, a transcript of testimony of Mr. Titus, Dr. Allmon and Officer Jennifer Franklin of the Mercer Island Police Department given during a hearing on August 8, 2008, in the Superior Court of Benton County, Washington. That hearing involved Mr. Titus' Petition For Certificate of Rehabilitation And Termination Of Requirement To Register As A Sex Offender.

14. After Mr. Titus testified in the instant Commission proceeding, Bureau counsel learned that he had given testimony under oath in the referenced Benton County hearing proceeding. The Benton County hearing was held on August 8, 2008 – little more than three weeks after the Commission hearing. Further, the Bureau learned that Mr. Titus' testimony in the Benton County hearing contradicted his testimony in the Commission's hearing. The Bureau promptly ordered a transcript of the Benton County proceeding. Last week, on Monday, September 29, 2008, Bureau counsel received a transcript from the Benton County Court Reporter who reported and transcribed the Benton County hearing ("Benton Transcript").³

15. The Benton County hearing involved a number of the same matters addressed in the Commission's hearing, and some of the testimony in the Benton County case differed significantly from the testimony in Commission proceeding. In order to afford the Presiding Judge a full complete record on which to make a determination of whether Mr. Titus is qualified to remain a Commission licensee, the Bureau respectfully requests that the Benton Transcripts be admitted into evidence as an Enforcement Bureau exhibit in this proceeding.

³ A copy of the Benton Transcript is attached to the Bureau's Supplement, filed concurrently herewith.

16. The Benton Transcript reveals that Mr. Titus' testimony in the Benton County hearing about the Mercer Island incident directly contradicted his testimony about the same subject in the Commission's hearing. The official police report about the Mercer Island incident states that Mr. Titus represented to investigating police officers at the scene that he had met Charles⁴ in an internet chat room. However, in the Commission's hearing, Mr. Titus disputed the police report and testified instead that he had *not* told the Mercer Island police officers that he had met "Charles" in an internet chat room. TR at 645, lines 13-17; 605. Nevertheless, in the Benton County hearing, Mr. Titus testified under oath that he had indeed informed the police on the scene that he had met "Charles" in an internet chat room, but that he had deliberately lied to them in doing so. Benton TR at 35, lines 18-24.

17. Mr. Titus' admitted lie to Mercer Island police officers supports the statements of the officer whom the Bureau has proposed in its Motion to offer as rebuttal witness. Contrary to what Mr. Titus would have the Presiding Judge believe, the Mercer Island police officers did not, in the course of preparing their official report, somehow invent the idea that Mr. Titus told them he met "Charles" through an internet chat room. He told them that, and it apparently was not truthful.⁵

⁴ "Charles" was an alias name that Mr. Titus used for the person he left shortly before he was stopped by the police at 3 a.m. in a dark, closed park restroom.

⁵ Similarly, Mr. Titus testified in the Commission proceeding that he did not tell the police that he met "Charles" through his ham radio activities. TR at 645, lines 13-17; 605. This testimony suggests that the investigating police officer somehow invented this fact and, for unknown reasons, included it in the official police report. If allowed to offer rebuttal testimony, Officer Jennifer Franklin will testify that Mr. Titus did indeed represent to her that he met "Charles" through his ham radio activities, thereby further calling into question the veracity of Mr. Titus' testimony in this proceeding.

18. Mr. Titus's apparent conflicting testimony raises questions as to whether Mr. Titus misrepresented material information to, or lacked candor in his dealings with, the Mercer Island police or the Benton County officials or the Presiding Judge or some combination of the above. Whatever the outcome, Mr. Titus' proclivity to deal truthfully with persons of authority - and hence, the Commission -- is very much in issue. Indeed, Mr. Titus' apparent inability or unwillingness to deal truthfully with respect to the Mercer Island incident may be sufficient, standing alone, to show that he does not possess the character to be a Commission licensee.⁶ In any event, receipt of the Benton Transcript is, the Bureau believes, critical to ensuring that the record on which the Presiding Judge renders his initial decision in this proceeding is full and complete.

A REBUTTAL SESSION IS NECESSARY TO RESOLVE THIS CONFLICT

19. In situations where an applicant or licensee misrepresents facts on the witness stand during a hearing, it is proper for the Presiding Judge to hold a rebuttal session. For example, in *Maria M. Ochoa, et al.*, Memorandum Opinion and Order, 9 FCC Rcd 56, 57-58 (1993), the Commission affirmed the disqualification of Ms. Ochoa's application stating that the Presiding Judge had properly afforded her an opportunity at a rebuttal session to present evidence relating to a demonstration that she testified falsely at hearing.⁷ Failure to consider

⁶ See *Intermart Broadcasting Gulf Coast, Inc., et al.*, 7 FCC Rcd 83 (1992) (finding that an applicant's misrepresentations and lack of candor provided an independent basis for its disqualification); *In re Application of Mid-Ohio Communications Inc.*, Decision, 104 FCC 2d 572 (Rev. Bd. 1986) (stating that "false statements in the course of the hearing process are, in and of themselves, of substantial significance" and, quoting the Commission's Character Policy, "[t]he Commission is authorized to treat even the most insignificant misrepresentation as disqualifying"); *Nick J. Chaconas*, Decision, 28 FCC 2d 231, 233 (1971) (stating "Above all, when a licensee is called before the Commission, the Commission must be able to rely on the representation made by the licensee and those which he has caused to be made on his behalf during the hearing process. If the Commission cannot rely on a licensee . . . the licensee lacks the basic character qualifications to remain a licensee.").

⁷ In *Ochoa*, the Commission stated:

rebuttal evidence may require a remand for the taking of further testimony and the preparation of a supplemental initial decision. See, e.g., *Kate F. Thomas, Timothy Z. Barber dba Double B Broadcasting, and Lady Bug Broadcasting Company, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 7630 (1993) (Review Board remanded adding a misrepresentation issue and requiring the Presiding Judge to hear additional testimony and prepare a Supplemental Initial Decision). Here we are presented with conflicting sworn testimony regarding the veracity of Mr. Titus' statements to police officers. The Commission has held that where there are conflicting sworn statements raising substantial and material questions of fact, and the record is inadequate to permit a reasoned resolution of the conflict, a proceeding must be remanded for further hearings. *Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 533, (1994) (citing *David Ortiz Radio Corporation v. FCC*, 941 F.2d 1253, 1260-61 (D.C. Cir. 1992)). In the instant case, it is incumbent on the Presiding Judge to permit the Bureau to supplement its motion with this new evidence and permit rebuttal testimony.⁸

20. In light of the foregoing, the Bureau respectfully requests that the Presiding Judge grant the Enforcement Bureau's request to supplement its Motion with the information contained

It is well-settled that applicants may properly be disqualified for lying in hearing testimony in the absence of previous formal notification that findings would be made as to whether the testimony was deceitful. See *RKO General, Inc. v. FCC, Opinion, 670 F.2d 215, 235 (D.C.Cir.1981)*, and *Richardson Broadcast Group, Memorandum Opinion and Order, 7 FCC Rcd 1583, 1585 ¶ 9 (1992)*, aff'd sub nom. *Younts v. FCC*, No. 92-1119 (D.C.Cir., May 10, 1993). *RKO* holds that such action may be warranted provided that: (a) the misconduct before the agency is so blatant that its existence cannot be denied; (b) the disqualified party had some form of prior actual notice and was not prejudiced by surprise; and (c) the disqualified party was afforded an opportunity to defend against the charge.

Id.

⁸ Rebuttal is also necessary to resolve Mr. Titus' challenge to Dr. Hover's qualifications as an expert witness. Dr. Hover's position with the State of Washington does not require that he be licensed as a psychologist by the State in order to treat and supervise the treatment of high risk sex offenders. Such a license is required only of some psychologists, like Dr. Allmon, who practice in the private sector. Dr. Hover is recognized as an expert regarding sex offender related matters by the State of Washington, various courts, sex offender treatment organizations, and federal and international government entities. He has testified as an expert in approximately 35 civil commitment cases to ascertain sexual predator status, two cases involving rape/murder/and multiple personality disorder, and 100 state administrative hearings to determine whether release is appropriate for a convicted sex offender.

in the Bureau's Supplement To Motion To Permit Testimony By Rebuttal Witnesses, filed concurrently herewith.

21. Furthermore, the Bureau respectfully requests that the Presiding Judge grant the Motion as supplemented and allow the receipt of rebuttal evidence in this proceeding.

Respectfully submitted,
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October 8, 2008

CERTIFICATE OF SERVICE

Rebecca Lockhart, a paralegal for the Enforcement Bureau, certifies that she has, on this 8th day of October 2008, served the foregoing "Enforcement Bureau's Motion For Leave To File Supplement to Enforcement Bureau's Request to Permit Testimony by Rebuttal Witnesses" by delivery of a copy as follows.

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