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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 10D-01

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

78913

Appearances

George L. Lyon, Jr., Esquire, on behalf of David L. Titus; *Judy Lancaster, Esquire and William Knowles-Kellett, Esquire* on behalf of the Enforcement Bureau

INITIAL DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: March 9, 2010 **Released: March 9, 2010**

PRELIMINARY STATEMENT

1. David Titus ("Titus") holds the license of Amateur Radio Station KB7ILD issued on June 8, 1989. Mr. Titus also operates a related radio repeater on frequency 444.375 MHz. (Tr. 450, 661.) But for this proceeding, his amateur license term was to expire on June 8, 2009.[1] (EB Exh. 1; Tr. 506-07.) There is no complaint about licensee's knowledge, ability, or competency of usage of the licensed facility. This proceeding concerns only his character qualifications and whether convictions of sex crimes against minors pled to between 1986 and 1993, disqualify him from holding an FCC license to operate an Amateur Radio station.

Order to Show Cause

2. On January 30, 2007, the Enforcement Bureau ("Bureau"), by delegated authority, instituted this proceeding to revoke Mr. Titus' Amateur Radio license based upon adverse determination of the below issues:[2]

(a) The effect of David L. Titus' felony conviction(s) on his qualifications to be and to remain a Commission licensee; and

[1] *Order to Show Cause*, 22 FCC Rcd 1638, 1640, ¶¶ 6-8 (EB, rel. Jan. 30, 2007) ("*OSC*").

[2] The license is *extant* unless and until revoked or terminated in accordance with statutory procedure. *See* 47 U.S.C. § 312 (providing revocation procedures); 47 C.F.R. § 1.955 (providing termination procedures).

(b) In light of the evidence adduced pursuant to the foregoing issue, whether David L. Titus is qualified to be and to remain a Commission licensee; and

(c) Whether the license of David L. Titus for Amateur Radio Station KB7ILD should be revoked.

The burdens of proceeding and proof were assigned to the Bureau.[3] A hearing was conducted on July 16, 2008, and post hearing findings and conclusions were filed on February 27 and April 3, 2009.[4] For the duration of the proceeding, the burden of proof remained with the Bureau and never shifted to Mr. Titus, the licensee.

Background

3. Mr. Titus was born in 1974. He grew up with an abusive father. His mother emigrated from Eastern Europe when he was born. (Titus Exh. 1 at 1.) Evidence sponsored by the Bureau indicates that he was raped by a babysitter at age 6. (EB Exh. 4 at 17.) At age 13, he became aware that he was sexually oriented as gay, and so informed his mother. (Titus Exh. 1 at 3-4.) In adolescence he was harassed by contemporaries ("faggot") and had few friends his own age. For acceptance, he bonded with school teachers and mentors from a gay community. (Titus Exh. 1 at 3.) He became interested in Citizens Band (CB) and Amateur Radio (HAM) at a pre-adolescent age. (Titus Exh. 1 at 2.) He won a CB two-way as a prize which he mounted on his pedal-bike. He also set up a CB in his room. (Titus Exh. 1 at 2-4.) He became a HAM radio operator at age 14 with a novice license from the FCC. In 1989, he became licensee of Amateur Radio Station KB7ILD, and learned emergency radio procedures, an important public service activity for HAM operators. (Titus Exh. 1 at 4.)[5]

4. In 1991, as an adolescent, Mr. Titus completed a period of internment lasting 18 months. He then received sex offender treatment and counseling. He gained employment and obtained a GED degree from a community college. He joined a medical emergency volunteer group and was trained in life support and first-aid procedures. He advanced to instructor in administering CPR and emergency first-aid, and volunteered regularly at a fire station. (Titus Exh. 1 at 5.) He became a useful person to his community.

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[3] *OSC* at ¶ 9.

[4] Retirement in January 2009, of the presiding judge in three bifurcated cable carriage complaints, required full time and attention of the undersigned. All three cases went to full trial; one required a written decision and two were settled. The last complaint dismissal order was issued on December 24, 2009. *See In the Matter of Herring Broadcasting, Inc.*, MB Docket No. 08-214, *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (rel. Oct. 10, 2008), *ordered expedited* by the Commission, FCC 09-4 (rel. Jan. 27, 2009).

[5] It is noted that HAM operators were recently encouraged by Commission Bureaus to enhance preparedness in responding to disasters. *Amateur Service Communications During Government Drills, Public Notice*, DA 09-2259 (WTB, PSHSB, EB, rel. Oct. 20, 2009) ("*Disaster Drills Notice*") (waivers for employees of public safety agencies and hospitals to participate in drills and tests to speed up transmittal of messages and warnings).

Crimes and Punishments

5. As a consequence of paternal sexual abuse, Mr. Titus was inclined as an adolescent to inappropriate acting out with peers and lessers, most of whom were males. (Titus Exh. 1 at 3-4; EB Exh. 4 at 17.) His conduct led to four punishable acts of coercive sex against minors, three of which occurred when he was a minor. These were:

A. April 1986 - **At age 11,** Mr. Titus was found guilty of taking indecent liberties with an 8-year-old boy, resulting in confinement in a treatment facility for 65 weeks. (EB Exh. 4 at 2, 14.)

B. 1987/88 - **Between ages 13 and 14,** Mr. Titus was assigned to mandatory residence at a youth facility for one-year treatment as a sex offender. The treatment was positive. (EB Exh. 4 at 18.) He was under the care of a therapist with whom he still remains in contact. (Titus Exh. 1 at 3.)

C. 1990 - **At age 15,** Mr. Titus plead guilty to taking indecent liberties with a 12-year-old boy. He was confined in a treatment facility for 65 weeks. He also was required to pay $100 to a victims fund. (EB Exh. 4 at 14.)[6]

D. 1993 - **At age 18,** as an adult, Mr. Titus plead guilty to one felony count of communication with a minor (11-year-old boy) for immoral purposes. He was sentenced to 25 months confinement in a correction center, and assessed $500 in penalties. (EB Exh. 4 at 7-8.)

Mr. Titus has fulfilled all his sentences and has paid all fines and penalties. He has not been accused or charged with any other sex offense.

Classification and Registration

6. In 1995, **at age 20,** the Seattle police classified Mr. Titus as a Level 2 sex offender, meaning he was only a "moderate risk" to re-offend. (EB Exh. 2 at 5.) There is no hearing provided for classification. Detective Shilling disclosed that classification is based on a "significant subjective component." After classification as Level 2, Mr. Titus was required to register as a sex offender, which he did, and since then he has never been in violation of any registration requirements. (EB Exh. 5.)

7. From 1994 to 2004, Mr. Titus committed no crime, and was law abiding. (*OSC* at Para. 2.) In 2004, Mr. Titus had two isolated *serendipitous* **non-criminal/non-sexual** occurrences. For no apparent reason, these occurrences were used by Detective Shilling to

[6] The State of Washington's Department of Correction reports his incarceration at Echo Glen Children's Center. Mr. Titus testified that he was sent to a youth camp where he was treated as a sex offender and released in 1991. (Titus Exh. 1 at 5.) This conflict in testimony with a state's record reduces reliability of the state record.

inflate arbitrarily his classification from Level 2 "moderate risk" to Level 3 "high risk." (EB Exh. 2 at 7.)[7] No nexus was or could be shown in the evidence between these two inconsequential events devoid of any suggestions of sexual activity, *i.e.* traffic accident and unrelated use of a public restroom. No testimony from a psychologist or any qualified expert or unbiased witness was used to show a rational explanation for assigning a higher classification (Level 3) to Mr. Titus, whose last offense was committed 12 years before Detective Shilling publicized the higher classification in an official Bulletin. Detective Shilling authored the *Bulletin.*

Traffic Accident

8. In 2002, while still a Level 2 "moderate risk," Mr. Titus was party to a minor automobile accident with a Ms. Victoria Halligan. Ms. Halligan was traveling abroad at the time of the hearing and could not or did not testify in this proceeding. (*EB Motion To Permit Testimony By Rebuttal Witness* at 4.) The Bureau failed to seek a subpoena, would not depose her, and offered only hearsay testimony in the form of a police Incident Report. (EB Exh. 4 at 36-37.) Neither Ms. Halligan nor Mr. Titus filed an accident report, believing that the damage was minimal. According to a report, Ms. Halligan told the police that Mr. Titus assaulted her at the accident scene by twisting her hand. (EB Exh. 4 at 36.) It appears in the report that she asked Mr. Titus whether he was a police officer, and Mr. Titus refused to answer her question. (EB Exh. 4 at 37.) Mr. Titus admitted making some contact with Ms. Halligan but denied it amounted to an assault. No assault charge was brought against Mr. Titus.

Mercer Park Incident

9. In 2004, while still classified a "moderate risk," Mr. Titus was stopped by a police officer in a public park restroom at Mercer Island Park in the early morning. Reportedly, a police officer had observed wet paint splattered against an outside wall of the restroom. (EB Exh. 4 at 39.) Mr. Titus was found in the restroom but there was nothing untoward reported about his actions or appearance. He consented to a search of his vehicle. The search revealed a miniature police medallion, a sheriff's cap, a Mag flashlight, and a radio. But Mr. Titus had no paint or means of paint application. (EB Exh. 4 at 40.) The only item in his possession was a lotion that was never shown to have any connection with an illegal or indecent act. Yet Detective Shilling reported the lotion as "contraband" in the *Bulletin.* (EB Exh. 5.) Mr. Titus was neither arrested nor charged in that incident.

Use of Events To Elevate Risk

10. In July 2004, referring to the traffic and park incidents, neither of which involved contact with a minor, Detective Shilling arbitrarily raised Mr. Titus' status to Level 3, and advised the community that he had become a "high risk" to commit a sex offense with a minor.

[7] Detective Schilling's sworn written testimony stated under oath: "Mr. Titus was briefly detained and questioned by Mercer Island police officers who were investigating why Mr. Titus was in a public restroom at approximately 3 a.m. in a closed park. Although Mr. Titus was not arrested, my office received routine notification of this incident because Mr. Titus is a registered sex offender in Seattle. As a consequence, I pulled his file for review.... [I] determined that Mr. Titus' risk assessment should be elevated to a Level 3 ranking, indicating a high potential risk to re-offend." (EB Exh. 2 at 7.)

(Tr. 864.) Whereupon, *Seattle Police Bulletin 04-202* was published on July 8, 2004, reporting that Mr. Titus received a new designation as a Level 3 offender. (EB Exh. 5.) From the *Bulletin* it could be inferred that Mr. Titus had been recently released from confinement, which was not the case. Even worse, it was not made clear that his offenses did not include kidnapping, leaving the inference that Mr. Titus had been a kidnapper as well as a child sex offender. And for no justifiable reason, the unrelated traffic and restroom events not involving minors were described in detail, causing Mr. Titus to appear in the worst possible light. Upon further analysis, it is found to be unjustifiable to reclassify Mr. Titus as a "high risk" on a mere unproven "bromide" that sex crimes are crimes of power and control, while using as illustrations two non-sexual incidents in an effort to show Mr. Titus "acting out" as a person of power. (Tr. 856.)

11. At that time, Detective Shilling was the only police official authorized to assign sex offender risk rankings in the Seattle area. (EB Exh. 2 at 1, 7.) Detective Shilling did not prepare a written analysis to justify Mr. Titus' reclassification. (Tr. 882.) At the hearing, he referred to the accident and park incident, both of which he regarded as shows of "power." (Tr. 878.) And Detective Shilling believed such "power" to be relevant to Mr. Titus' reclassification based on his assumption that sex crimes are acts of "power and control." He saw the two incidents as evidence that Mr. Titus was trying to assume "power" by passing himself off as an authority figure, *i.e.* a "law enforcement officer." (Tr. 856.) But under oath, Detective Shilling admitted that he never believed that Mr. Titus had impersonated a police officer. (Tr. 870.) Yet, he was determined to put a debilitating marker on Mr. Titus as "high risk." Mr. Titus was afforded no opportunity to object or comment. As a personal affront, in an e-mail directing a junior to publicize the reclassification, Detective Shilling referred to Mr. Titus as a "clown." (Titus Exh. 18; Tr. 867.) That affront was insulting to Mr. Titus who had been in compliance with Seattle's public registry. It is evident that such "clown" characterization by a law enforcement official in the course of his duty shows, at a minimum, ill will, malice, and disrespect towards Mr. Titus. Detective Shilling admittedly could not conclude that Mr. Titus was "clowning" as a police officer. (Tr. 870.) Yet, Detective Shilling represented Mr. Titus as a "clown" to colleagues and subordinates. (Titus Exh. 18; Tr. 867.) Such petty, needless name calling while engaged in police business shows contempt for process, as well as the person.[8]

Reliance on a Discredited WASOST

12. In February 2008, while preparing his testimony, Detective Shilling assessed Mr. Titus under the Washington State Sex Offender Screening Tool ("WASOST"), an actuarial model for assessing sex offenders. WASOST scores are based on four factors: whether a person with sex convictions was vulnerable due to disability or ill health; whether convictions were of a predatory nature or involved abuse of a trust; whether the offender acted out sexual deviancy during incarceration; and results of a test called the Rapid Risk Assessment for Sexual Offense Recidivism or "RRASOR," a measure based on the number of prior sex offenses, age at release from treatment, victim gender, and offender's relationship to victim. (Tr. 798-800, 890-91.) Another test called the STATIC 99 is based on time and conduct in the community, in contrast to the WASOST which only assesses conditions at time of release, omitting the more relevant time

[8] In his explanation for using the term "clown," Detective Shilling testified that he "was irritated at the time." He also admitted that the term was not an official police term and he concluded that its use was an indiscretion on his part. (Tr. 867.)

after an offender's adjustment period in the community. (Tr. 816-17.) Thus, Mr. Titus' WASOST score had no relevance in predicting recidivism. (*Id.*; Titus Exh. 16.) Detective Shilling did not endorse WASOST because he found it to be an inappropriate tool to assess risk of offenders who had integrated into a community. (Tr. 801, 814, 843-44.) The Washington State Institute for Public Policy ("WSIPP"), in an evaluation of the effectiveness of sentencing, concluded that a WASOST score has little accuracy in predicting recidivism. (Titus Exh. 17 at 1.) In fact, the purpose for WASOST was only for assessment of sex offenders just released from confinement. Thus, WASOST was wrongfully used to upgrade Mr. Titus to Level 3 "high risk." (EB Exh. 14; Tr. 800-01, 814.) By using WASOST, Detective Shilling could feint an appearance of objectivity in his subjective assessment of "high risk." (Tr. 885-86.)

Psychologist's Expert Opinion

13. Douglas J. Allmon, Ph.D., is a Clinical Assistant Professor in the Psychology Department of the University of Washington. (Titus Exh. 2 at 15.) He is a licensed psychologist and certified Sex Offender Treatment Specialist who was retained by Mr. Titus. He qualifies as an expert on the subject matter of this case.[9] He conducted a psychosexual evaluation of Mr. Titus and professionally applied the necessary tests and interview: Hanson/Gizzarelli/Scott Sexual Attitudes Test; Minnesota Multiphasic Personality Inventory-II; Michigan Alcohol Screening Test; Beck Depression Inventory; Gambril & Richie Assertion Questionnaire; 16-PF/Clinical Analysis Questionnaire; Incomplete Sentence Blank-Modified; and a structured clinical interview tested by a lie detector. (Titus Exh. 2 at 8.) Dr. Allmon concluded, after considering the results of the battery of testing and the interview, that Mr. Titus demonstrated for the past 15 years his "ability to manage any further predisposition toward pedophilia that might arise." (Titus Exh. 2 at 12.) He determined that Mr. Titus had no predisposition for pedophilia and that his former predisposition towards young boys is "unambiguously in remission." (Tr. 965, 989.)

14. Dr. Allmon opined that Mr. Titus was not in need of treatment for sexual deviancy, and concluded that he is not likely to re-offend. (Tr. 1041.) Mr. Titus, now 35, testified that he has not had sexual contact with any minor since he was charged with felony child abuse in 1993 at the age of 18. (Tr. 674.) Mr. Titus testified, without objection, that he is no longer sexually attracted to children. (Tr. 1057.) Mr. Titus realizes that his actions harmed the victims. He knows about appropriate relationships and boundaries. (Tr. 1056.) He now regrets the affect his actions had on victims and their families. (Tr. 676-77.) There is no reason to reject Dr. Allmon's professional opinion that Mr. Titus is no longer a threat to the youth of Seattle.

Character Testimony in Support of Mr. Titus

15. Ten character witnesses complimented Mr. Titus' character, including: a clergyman, a police officer, a corrections officer, a school counselor, a government contractor, a Red Cross worker, a lab engineer, and Mr. Titus' mother. Each presented written testimony on behalf of Mr. Titus. (Titus Exhs. 3-13.) Each of these witnesses testified that they have known Mr. Titus

[9] Of particular relevance are Dr. Allmon's Ph.D. in Counseling Psychology, his recognition as author of the training course, "The Emotionally Charged Client," his presentations for graduate students, and his radio broadcast of "*Evaluation and Treatment of Sex Offenders*." (Titus Exh. 2 at 15, 17.)

for at least five years. Each attested to his current good character despite his criminal past. *Id.* Several of these witnesses are active in Amateur Radio and approved of Mr. Titus' conduct in operating Amateur Radio. *Id.* There was no rebuttal. Nor was any negative character testimony or other evidence bearing on character offered.

One Ham Club's Concern

16. Amateur Radio communication or HAM radio is an activity that is engaged in far more by adults than by children. (Tr. 457.) But some minors do communicate over Amateur Radio. (EB Exhs. 9-10.) Young HAM operators are encouraged to participate through youth organizations such as Boy Scouts and community and school HAM radio clubs. (EB Exhs. 10, 12, 13.) The Lake Washington Ham Club ("LWHC") instructs minors and provides activities in Amateur Radio. (EB Exh. 6.) LWHC has helped more than 100 minors obtain HAM radio licenses. *Id.* It is common for adults who are proficient in Amateur Radio to mentor minors, and LWHC matches mentors with minors who seek such mentoring. (Tr. 410.)

17. Mr. Shurman is president of LWHC. He testified in person, and he was a credible witness. He expressed concern that a convicted sex offender, who is licensed, could use his Amateur Radio to contact children for immoral purposes. (Tr. 442.) His concern was heightened by the fact that Mr. Titus also operates a "repeater" station, which is an automated relay facility that receives weak radio signals and repeats those signals at a higher power thereby affording wider coverage. Operators commonly meet on repeater frequencies and then move to other frequencies in order to have private conversations. (Tr. 417, 442-44.)

18. But there is no evidence of Mr. Titus mentoring a minor on HAM procedures. Nor is there evidence of Mr. Titus communicating with a minor through his Amateur Radio or on his repeater frequency. And finally, there is no credible or reliable evidence in the record to support a finding that the FCC license in issue probably would be used by Mr. Titus to solicit minors for sex.

CONCLUSIONS OF LAW

Legal Standards

19. A licensee's character is relevant in determining qualifications for continuing to hold an FCC license.[10] In determining character, prior felony convictions must be considered.[11] Allegations of relevant non-FCC misconduct[12] receive no consideration unless it is determined to be "misconduct so egregious as to shock the conscience and evoke almost universal

[10] 47 U.S.C. § 308(b). *See Shoenbohm v. FCC*, 204 F.3d 243 (D.C. Cir. 2000).

[11] *Policy Regarding Character Qualifications in Broadcast Licensing*, Policy Statement and Order, 5 FCC Rcd 3252, 3252, ¶ 3 (1990) ("*1990 Policy Statement*").

[12] *Id.* at 3252, ¶ 7. *See Contemporary Media*, 214 F.3d 187, 192 (D.C. Cir. 2000) ((*citing 1990 Policy Statement*) (as to non FCC-related conduct, the Commission generally "consider[s] only adjudicated cases")).

disapprobation."[13] Non-adjudicated misconduct that is determined to be relevant is considered only if it falls within a ten-year statute of limitations.[14]

20. Mitigating factors must be considered in weighing misconduct that affects character. Mitigating factors include "the willfulness of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, . . . efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation."[15] A rehabilitation determination is necessarily fact-specific and must include these relevant considerations: whether the applicant has not been involved in any significant wrongdoing since the alleged misconduct occurred; whether substantial time has lapsed since the misconduct; whether the applicant has a reputation for good character in the community; and whether measures were taken by the applicant to prevent future reoccurrence of the misconduct.[16]

Passage of Time

21. Misconduct at issue consists of two felony child molestation adjudications as a juvenile (ages 11 and 15), and one adult (age 18) felony conviction for communicating with a minor for immoral purposes. Evidence of all felonies must be considered in evaluating character.[17] Under Washington state law, a juvenile "adjudication" has the same meaning as an adult "conviction."[18] However, the two juvenile charges that did not result in conviction should not be considered in assessing character. Although those charges involved egregious misconduct, they were the acts of a minor that occurred in 1985 and 1989, dates beyond the ten-year limitation period at a time when Mr. Titus was 11 and 15 years old.[19]

22. Mr. Titus' felony conviction as an 18-year-old adult, in which his victim was age 11, was an extremely serious act of misconduct. The difference in ages demonstrates cowardly misconduct against a much younger boy, who most likely was scared or seduced, or both. The D.C. federal circuit, in affirming revocation of an FCC license based on a child abuse conviction, found that crimes of child sexual molestation are "characterized by moral turpitude to such an extent that they fall in the category of those that 'shock the conscience' and summon almost

[13] *Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179, 1205, n.60 (1986) ("*1986 Policy Statement*"). *See Contemporary Media*, 214 F.3d at 192; *1990 Policy Statement*, 5 FCC Rcd at 3253, n.5.

[14] *1986 Policy Statement*, 102 FCC 2d 1179, 1229. *See also Robert D. Landis*, 22 FCC Rcd 19979, 19982 (EB 2007) ("the *1986 Character Policy Statement* provides a ten-year limitation on considerations of *allegations* of misconduct, it does not limit consideration of *adjudicated* misconduct that already has been litigated") (emphasis in original). *Landis* involved revocation of an Amateur Radio license in 2007 based upon a 1991 conviction for felony child abuse.

[15] *1990 Policy Statement*, 5 FCC Rcd at 3252, ¶ 5. *See Contemporary Media v. FCC*, 214 F.3d at 194.

[16] *1990 Policy Statement*, 5 FCC Rcd at 3253, n.4. *See Contemporary Media, Inc. v. FCC*, 214 F.3d at 194-95.

[17] *1990 Policy Statement*, 5 FCC Rcd at 3252, ¶ 3.

[18] RCW § 13.04.011(1).

[19] *1990 Policy Statement*, 5 FCC Rcd at 3252, ¶ 7; n.5.

universal disapproval."[20] Willfully taking advantage of a child for sexual purposes, by anyone 18 years of age or older, is an act that the Presiding Judge considers to be "shockingly evil."[21] However, under the laws of the United States, including the Administrative Procedure Act and the Communications Act, the government must prove by a preponderance of evidence[22] that a person convicted of conduct that occurred 18 years ago probably cannot be rehabilitated. The Bureau has failed to prove that any conduct of Mr. Titus from the time of his release from prison in 1995 to the present shows any prognostication that is based on substantial evidence of probable recidivism. To the contrary, Mr. Titus presented expert psychologist testimony that he now has no attraction to minors and there is no probability of his repeating his past misconduct in the future. This constitutes convincing proof of rehabilitation. The Bureau, however, failed to offer opposing proof of a qualified expert. So while Mr. Titus has satisfactorily proven his rehabilitation, the Bureau has not met its burden to prove non-rehabilitation by a preponderance of evidence.[23]

Record of Compliance

23. Where there are sufficient mitigating factors, a licensee previously convicted of an egregious crime, even one involving homicide, can be found to have the requisite character for licensing.[24] One recognized mitigating factor is a substantial lapse of time since the violation.[25] In this case, the crimes in question were committed 18 years ago when Mr. Titus was 11, 15 and 18 years of age.[26] Here, Mr. Titus was incarcerated primarily for treatment, was released on probation, continued to receive treatment after release, and performed useful public interest service. He also made a positive showing through testing by a licensed psychologist who diagnosed his current rehabilitation and a non-likelihood of recidivism. The weight of the evidence that includes non-contradicted testimony of Mr. Titus and a licensed psychologist supports the conclusion that Mr. Titus is now attracted to adults and is no longer attracted to

[20] *Contemporary Media, Inc. v. FCC*, 214 F.3d at 193. *See Lonnie L. Keeney*, 24 FCC Rcd 2426, 2429, ¶ 8 (2009) (child sexual abuse is a "very serious crime which . . . shocks the conscience."); *Robert D. Landis*, 22 FCC Rcd at 19982, ¶¶ 7-8 (felony child molestation is "heinous" and "egregious").

[21] *Webster's Third International Dictionary (Unabridged)* at 1050.

[22] *Steadman v. S.E.C.*, 450 U.S. 91, 102 (1981), *followed by, Silver Star Commc'ns Albany Inc.*, 3 FCC Rcd 6342, 6348 (Rev. Bd. 1988).

[23] *Id.* at 102.

[24] *Richard Richards*, 10 FCC Rcd 3950, 3959 (Rev. Bd. 1995) (felonious drug possession with intent to distribute conviction was close question but license renewal granted based on rehabilitation evidence, overruling Presiding Judge); *Swan Broad. Ltd.*, 6 FCC Rcd 17 (Rev. Bd. 1991) (licensee found qualified to hold a license despite manslaughter conviction); *Alessandro Broad. Co.*, 99 FCC 2d 12 (Admin. L.J. 1984) (licensee qualified to hold a license despite second degree murder conviction due to passage of time and rehabilitation).

[25] *See Robert D. Landis, supra* note 14.

[26] *Cf. Swan Broad. Ltd.*, 6 FCC Rcd 17 (Rev. Bd. 1991) (confessed manslaughter applicant who was confined in a mental institution for 10 years and required psychiatric care indefinitely, but participated in community projects and had shown no recent bad behavior, was found qualified to hold an FM license by the Review Board, overruling the Presiding Judge in comparative hearing, despite a criminal act of manslaughter occurring more than 10 years before).

minors.

24. Two of Mr. Titus' felonies were adjudications in juvenile court more than 20 years ago. Because they are adjudications of a juvenile, the prescribed statute of limitations neutralizes those adjudications in any character determination.[27] One other positive factor is a substantial history of accordance with the Communications Act and FCC rules.[28] And of great importance to the public's safety and this *Decision*, Mr. Titus registered himself as a sex offender when ordered to do so, thereby facilitating his monitoring, while showing his conscientious disposition to comply with the law.

Rehabilitation Proven by Preponderance of Evidence

25. There is substantial credible evidence that was not refuted showing Mr. Titus to be rehabilitated. He now is a 35-year-old adult whose last conviction was adjudicated while he was only 18 years old. The fact that he has lived in the community for 15 years without being charged with a crime is substantial and reliable evidence of his rehabilitation.[29] No contrary evidence was introduced to suggest that after release from prison in 1995, he engaged in any criminal conduct, or in any improper conduct of any kind involving a minor. In fact, the weight of credible testimonial evidence indicates his sexual interest is now only with consenting adults. He has expressed remorse for his past crimes in non-refuted testimony. (Tr. 676-77.) A cross-section of character witnesses were produced, including a clergyman, a police officer, a corrections officer, a school counselor, a government contractor, a Red Cross worker, and a lab engineer, each of whom attested to Mr. Titus' successful integration into the community as a law-abiding citizen. (Titus Exhs. 3-13.)

26. Neither a traffic accident involving an alleged assault, nor a non-incriminating public restroom incident that was initiated by an enforcement officer shows any "significant wrongdoing."[30] Evidence of those events is decisionally irrelevant and is non-probative of the character issues set out in this proceeding. Those events also do not support a finding of non-rehabilitation. When carefully considered, there is no relevance to his character qualifications of hearsay evidence to the effect that Mr. Titus may have once twisted a woman's hand at an accident scene seven years ago, which the police did not report as an assault. There is no evidence that either the park incident or the traffic accident could support a finding that Mr. Titus

[27] *See 1986 Policy Statement*, 102 FCC 2d 1179, 1229 (1986) (past conduct showing flagrant disregard of Commission policy barred from consideration after passage of 10 years).

[28] An overall record of compliance with Commission rules and policies is relevant in assessing character. *1990 Policy Statement*, 5 FCC Rcd at 3252, ¶ 3. *Cf. Contemporary Media*, 214 F.3d at 196 (affirming FCC's revocation of a license for child sexual abuse notwithstanding the licensee's "good overall record of FCC rule compliance"); *David Edward Cox*, 21 FCC Rcd 14153, 14155 (EB 2006) (revocation of Amateur Radio license on the basis of a felony conviction despite compliance with the Act and the rules).

[29] *See, e.g., Kevin David Mitnick*, 17 FCC Rcd 27028, 27037, ¶ 32 (Admin. L.J. 2002) (Amateur Radio licensee who was convicted of computer hacking and who served time in a penitentiary was found rehabilitated based on absence of criminal activity for more than seven years). *Cf. Richard Richards, supra* note 24 (felony conviction of drug possession for distribution did not disqualify as FCC licensee).

[30] *1990 Policy Statement*, 5 FCC Rcd at 3253, n.4.

impersonated a police officer, and neither event resulted in any criminal charges or any police enforcement such as an arrest of Mr. Titus. (EB Exh. 4 at 37.)

27. It is not remotely relevant that Mr. Titus made nocturnal use of a restroom in a public park even though the restroom may have been officially closed. While there alone, Mr. Titus did not engage in unlawful conduct or even suspicious conduct. His possession in his vehicle of a small police medallion, a sheriff's ball cap, and a Mag flashlight infers nothing nefarious. It can be noted here that law abiding citizens wear articles such as miniature police medallions or ball caps having logos of law enforcement agencies. Street vendors located only blocks from Commission headquarters are daily selling caps and shirts with an "FBI" or "CIA" logo. Mag lights are simply flashlights having high powered light beams that are the better to see with. They are not restricted for police use only and are available for purchase by the general public. Vehicle owners have powerful flashlights for safety reasons. Persons in rural areas have particular needs for powerful lights to check road conditions, detect animals or varmints, or to locate lost animals. From the factual evidence in this case and particularly the defective testing and prejudice of Detective Shilling against Mr. Titus, there is not sufficient credible evidence to show that Mr. Titus impersonated a police officer. Detective Schilling's assertion that Mr. Titus was impersonating a person of power is rejected as unreliable, speculative, and a waste of time.[31]

Unrebutted Proof of Rehabilitation

28. Mr. Titus has not been charged with a crime since his release from his last confinement in 1995. Nothing in the record even hints that he has had an improper contact, or that he attempted improper contact, with a minor at any time in the past 18 years, including while in confinement. To the contrary, reliable evidence shows that Mr. Titus currently has sexual contact only with consenting adults. And without contradiction, Mr. Titus denied under oath that he now has any sexual contact with children. (Tr. 673-74.) Dr. Allmon, a qualified expert in such matters, conducted a battery of psychological tests that in his professional opinion confirmed that Mr. Titus now has no predisposition towards pedophilia. He further concluded that Mr. Titus' past pedophilia was "unambiguously in remission." (Tr. 965, 989, 1041.) The record contains no opinion of a licensed or qualified psychologist, psychiatrist, or other qualified expert to prove the contrary, or evidence that refutes Dr. Allmon's conclusions, and none was offered by the Bureau.[32] Thus, under the preponderance of the evidence, he now presents absolutely no proven risk to commit or attempt sexual misconduct involving a minor.

Enforcement Bureau's Failure of Proof

29. Nonetheless, the Bureau argues that Mr. Titus presents a danger. The Bureau argues that conclusion based on a non-probative, defective test that was relied upon by Detective Shilling to assign Mr. Titus to sex offender Level 3 and publicly pronounce him a high risk to re-offend. Substantial questions have been raised as to reliability of the WASOST in predicting an

[31] *See* FED. R. EVID. 403.

[32] The Bureau did attempt to bring in a rebuttal expert to testify after the hearing was concluded. The Bureau's request was denied for being tardy. *See Memorandum Opinion and Order*, FCC 08M-51 (rel. Dec. 5, 2008) (decision denying Bureau's post-hearing *Motion to Permit Testing by Rebuttal Witnesses*).

offender's risk to commit a pedophilic sex crime. Detective Shilling testified that he uses the WASOST only "[b]ecause state law requires me to." (Tr. 801.) In fact, the test is useless because it does not test for risk of re-offending where, as here, the offender has been a law-abiding member of his community for many years.

30. Upon release from prison in 1995, a committee chaired by Detective Shilling assigned Mr. Titus a Level 2 sex offender status showing a "moderate risk" to re-offend. (EB Exh. 2 at 5.) In 2004, after a decade of being crime-free in the same community, Detective Shilling arbitrarily increased Mr. Titus' risk assessment to Level 3, showing a "high risk" to re-offend. (Tr. 864.) Detective Shilling later affirmed his Level 3 ranking at hearing. (EB Exh. 14; Tr. 800-01, 814.) But he gave no credit to Mr. Titus for being a long time law-abiding member of the community, despite his acknowledgement that "time in the community without re-offense is an important aspect in terms of assessing the risk for re-offense." (Tr. 821.) Detective Shilling failed to take into account this "important factor" in arbitrarily raising his risk to a Level 3 sex offender.[33]

31. Moving beyond his unjustified Level 3 reclassification, evidence in this record also does not support a conclusion that Mr. Titus likely would use his Amateur Radio to solicit minors for sex. (EB Exhs. 6, 9-10.) Some, none, or few minor HAM operators may be in close proximity to his radio repeater facility. (EB Exh. 6.) There is, however, no evidence and therefore no risk that Mr. Titus would use his HAM radio to solicit minors. This conclusion is based on expert opinion evidence of his rehabilitation, a present absence of sexual interest in children and adolescents, and a record of non-recidivism for the past 18 years.

32. Moreover, Mr. Titus has held an Amateur Radio license for 20 years, and there is no credible or reliable evidence even suggesting that he ever has used or ever would dare to use HAM radio communication as a means to contact minors for illicit purposes. And, it is officially noticed that the Internet is the chosen tool of pedophiles for readily reaching minors and children.[34] By contrast, an Amateur Radio solicitation would be highly risky in view of a culture among HAM operators of self-monitoring traffic over Amateur Radio frequencies. The risk to Mr. Titus of being monitored for any misuse of Amateur Radio is many times greater than the Internet, particularly since he has registered as a sex offender and can be readily identified and apprehended if necessary.

Candor Assessment

33. Finally, the Bureau asserts that Mr. Titus lacked candor because he testified that he had an inability to recall details of his sexual crimes or treatment. (*EB Proposed Findings of Fact and Conclusion of Law* at 11-12.) In order to establish a lack of candor, the Bureau has the burden to establish by a preponderance of reliable evidence that Mr. Titus misspoke and that in

[33] Detective Shilling should have taken into account Mr. Titus' long history as a law abiding citizen by exercising his option to depart from the numerical WASOST score. (EB Exh. 14 at 4.) Detective Shilling, however, made no such departure despite his testimony that such history is an "important aspect" of risk assessment. (Tr. 821.)

[34] 47 C.F.R. §1.351 (applying Federal Rules of Evidence to Commission hearings); FED. R. EVID. 201(a)-(b) (providing for judicial notice of adjudicative facts).

doing so, he intended to deceive the Presiding Judge.[35] In this case, the Bureau relies solely on speculative inference based on Mr. Titus' inability to recall derelict and distasteful events perpetrated many years ago. There is no reliable evidence in the record to support a finding that Mr. Titus was not truthful in his inability to recall those details of such long past, distasteful events. Mr. Titus' asserted memory loss of details that may have occurred before 1995[36] is not by itself a basis for finding a lack of candor in his testimony.

ORDER

For the foregoing considerations of the evidence and legal authorities showing that the Enforcement Bureau failed to carry its burden of proof, IT IS HEREBY ORDERED that the Amateur Radio Operator License of Amateur Radio Station KB7ILD held by Mr. David L. Titus SHALL NOT BE REVOKED.

IT IS FURTHER ORDERED that this License Revocation Proceeding EB Docket No. 07-13, IS DISMISSED on the merits and with prejudice.[37]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Chief Administrative Law Judge

[35] *Swan Creek Commc'ns, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994) (citing *Weyburn Broad. Ltd. P'ship v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993) (intent to deceive [is] an essential element of a misrepresentation or lack of candor showing)).

[36] The repeater license was not put in issue by the Bureau in the *OSC*. Therefore, the repeater license is not revoked.

[37] 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).