

F.C.C. 73R-420

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
 APPLICATIONS FOR THE TRANSFER OF CONTROL
 OF D. H. OVERMYER COMMUNICATIONS CO., INC. AND D. H. OVERMYER BROADCASTING CO., INC., FROM D. H. OVERMYER TO U.S. COMMUNICATIONS CORP. Docket No. 18950
File Nos. BTC-5376,
5377, 5378, 5379
and 5380

MEMORANDUM OPINION AND ORDER

(Adopted December 26, 1973; Released December 28, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. This proceeding involves applications for transfer of five UHF television station permits from D. H. Overmyer (Overmyer) to AVC Corp. (AVC).¹ The Commission approved the transfer without hearing by Order, FCC 67-1312, released December 8, 1967, 10 FCC 2d 822. Subsequently, the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (Subcommittee) held hearings on the Overmyer transfer and issued a report which raised questions as to the accuracy of Overmyer's estimated expenses. Thereafter, by Memorandum Opinion and Order released September 4, 1970 (FCC 70-911), the Commission designated this proceeding for hearing on the following issues:

1. To determine, whether in the application for transfer of control of D. H. Overmyer Communications Co., Inc., and D. H. Overmyer Broadcasting Co., Inc., the transferor, D. H. Overmyer, misrepresented to the Commission the amount of out-of-pocket expenses incurred in obtaining and developing the construction permits held by the above companies.

2. To determine, whether in light of the evidence adduced under the foregoing issue, the executory option held by the U.S. Communications Corporation or any assignee thereof, to purchase D. H. Overmyer's interests in the holders of the above-mentioned construction permits should be declared void, whether D. H. Overmyer should be required to transfer to U.S. Communications Corporation his interests in the holders of the construction permits and, if so, whether he should be permitted to receive any consideration for the transfer of his interests.

2. In an Initial Decision released May 4, 1973 (73D-23), Administrative Law Judge Herbert Sharfman concluded that Overmyer had failed to corroborate his alleged expenses, but that divesting him of his remaining 20% interest would not be in the public interest. Accordingly, he terminated the proceeding. Now before the Review

¹ The transfer agreement called for Overmyer to sell to AVC 80% of his interest in the five permits for 80% of his expenses in acquiring and developing the stations or one million dollars, whichever was less, and to grant to AVC an option to purchase his remaining 20% interest in the permits for an amount not to exceed three million dollars. Since Overmyer estimated that his total investment in the permits exceeded \$1,300,000, the ultimate sale price was \$1,000,000. AVC assigned all its rights under the agreement to its wholly-owned subsidiary, U.S. Communications Corporation, prior to the transfer.

Board is a Petition for Special Relief, or in the Alternative, for Remand, filed October 11, 1973, by Overmyer, requesting that this proceeding be terminated at once or, in the alternative, that the case be remanded to the Administrative Law Judge for additional findings and conclusions.²

3. In his Initial Decision, the Administrative Law Judge determined that the Commission, in framing the first issue of the designation Order, intended the term "misrepresentation" to encompass only the question of Overmyer's accuracy in estimating his expenses, and not his good or bad faith in reaching the \$1,300,000 figure. He based this determination primarily on the fact that the Commission had not sought to void the transfer, the usual remedy where an agreement has been procured by fraud, but had instead addressed itself solely to Overmyer's retained 20% interest. In addition, he cited the background of the proceeding, and particularly the Subcommittee's recommendation that the Commission satisfy itself as to the adequacy of the consideration for the sale. In line with his interpretation of the Commission's intentions, the Administrative Law Judge concluded that Overmyer had misrepresented his expenses in that he had failed to demonstrate a reasonable correlation between the claimed and the actual figures. At the same time, he emphasized that in using the term misrepresentation he was neither finding Overmyer guilty of making false statements in order to mislead the Commission nor finding him innocent of any intent to deceive. The Administrative Law Judge further held that since the value of Overmyer's retained interest was marginal,³ requiring him to transfer this interest to AVC would be a meaningless gesture.

4. Overmyer supports the Administrative Law Judge's interpretation of the scope of the misrepresentation issue and contends that the relief contemplated by the Commission's designation Order has already been fully realized because AVC's option has lapsed and Overmyer will gain no further consideration in view of the minimal present value of the permits. Therefore, petitioner submits, this proceeding should be terminated at once. At the same time, Overmyer contends that a reading of the entire Initial Decision indicates that the Administrative Law Judge did not consider him guilty of fraud. However, should the Review Board disagree and determine that an affirmative fraud issue was specified by the Commission and not resolved by the Administrative Law Judge, Overmyer suggests that remanding the case to the Administrative Law Judge would be the proper remedy. In the event that the Board denies these requests, Overmyer asks that the time for filing exceptions to the Initial Decision be extended.

5. The Broadcast Bureau, in its comments, contends that the Administrative Law Judge erred in refusing to decide the misrepresen-

² Also before the Board are: comments, filed October 26, 1973, by the Broadcast Bureau, and a reply, filed November 8, 1973, by Overmyer.

³ The Administrative Law Judge found the present status of the five transferred permits to be as follows:

KEMO-TV San Francisco—silent from 3/31/71; transferred for assumption of liabilities plus \$3,500 for furniture.

WPGH-TV Pittsburgh—silent since 8/16/71; in the hands of a receiver.

WXIX-TV Newport, Kentucky—transferred to Metromedia for assumption of liabilities and funds expended after August 1, 1971.

WALT-TV Atlanta—silent since 3/31/71; transfer of construction permit pending—consideration \$28,500 for out-of-pocket expenses and \$1,000 for equipment.

KJKO-TV Rosenberg, Texas—Permit surrendered and cancelled.

tation issue. Though it admits that the designation Order may be ambiguous on this point, the Bureau argues that the Commission's Order denying Overmyer's petition for reconsideration (27 FCC 2d 982, 21 RR 2d 391 (1971)), specifically cites cases recognizing its power to reexamine agreements procured by fraud as the basis for its jurisdiction in this proceeding. Thus, the Bureau concludes, the Commission did expect this proceeding to resolve the question of whether Overmyer had fraudulently misrepresented his expenses. Even so, it continues, a termination of this proceeding might be justified were it not for the fact that Overmyer is currently a licensee of the Commission.⁴ But, the Bureau maintains, since Overmyer is the licensee of WDHO-TV, Toledo, Ohio, it is imperative that his character qualifications be determined in this proceeding. The Bureau therefore opposes Overmyer's request for termination but has no objection to the Board's remanding the proceeding to the Administrative Law Judge with directions to make appropriate findings and conclusions. The Bureau notes in conclusion, however, that the Board could expedite the entire matter by directing the immediate filing of exceptions and then fully resolving issue 1. In reply to this last point, Overmyer urges that *de novo* review by the Board would be inappropriate, since it would deprive him of the full and fair hearing mandated by the Communications Act of 1934, as amended, and the Administrative Procedure Act, and would also bypass the Administrative Law Judge who is the only person qualified to make the demeanor and credibility determinations necessary for resolving the affirmative fraud issue.

6. The Review Board will grant Overmyer's petition insofar as it requests that this case be remanded to the Administrative Law Judge for additional findings and conclusions. The Commission's designation Order, read in conjunction with its Order denying Overmyer's petition for reconsideration, clearly holds this proceeding encompasses an inquiry into whether or not Overmyer intentionally misrepresented his expenses in securing approval of his transfer.⁵ The Administrative Law Judge therefore erred when he failed to fully consider and resolve the misrepresentation issue⁶—*i.e.*, whether Overmyer intentionally or fraudulently misled the Commission—and his error, we believe, was a significant one. Overmyer is currently a licensee of the Commission and we agree with the Bureau that his qualifications to remain a licensee cannot be determined until the misrepresentation issue here is resolved completely. This is underscored by the

⁴ Overmyer retains ownership of WDHO-TV, Toledo, Ohio, whose license renewal application is currently on deferred status pending the outcome of this proceeding.

⁵ The following language from the Order denying the petition for reconsideration is particularly instructive in this regard:

... [W]e concluded that we had the affirmative duty to re-examine the Overmyer transfer of control agreement to be sure that the Commission's prior approval was not procured by fraudulent misrepresentations. Both court and Commission precedents have recognized an inherent power to reopen a judgment at any time where it is procured by fraud. See *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and *City of Jacksonville*, 35 FCC 401 (1963).

⁶ Contrary to Overmyer's contentions, we do not read the Initial Decision as finally resolving this issue. The Administrative Law Judge clearly limited the scope of his conclusions in the following manner:

It is therefore held that in the applications for transfer of control Overmyer misrepresented to the Commission the amount of out-of-pocket expenses incurred in obtaining and developing the construction permits. "Misrepresentation", as has been emphasized, does not connote culpably false statement or intent to mislead the Commission. It should, however, be understood that no certificate of innocence is intended; whether Overmyer acted from blackest motives or was merely mistaken is immaterial.

fact that the license renewal of WDIHO-TV has been placed on deferred status during the pendency of this proceeding. Since the resolution of this matter will necessarily require judgments as to the credibility of witnesses, we also believe that remanding the case to the Administrative Law Judge, who has already had an opportunity to observe the parties and evaluate their testimony, would be the most appropriate course of action.

7. Accordingly, IT IS ORDERED, That the Petition for Special Relief or, in the Alternative, for Remand, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

8. IT IS FURTHER ORDERED that this case be remanded to the Administrative Law Judge for additional findings and conclusions consistent with this Opinion.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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