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FCC Whacks Six Licensees for EEO-Related Violations

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With the release of six notices of apparent liability (NAL) at the very tail end of 2008, the FCC has given us a glimpse of what EEO enforcement is likely to look like for the foreseeable future. And the outlook is what you might expect: continued emphasis on detailed record-keeping despite the absence of any indication that any unlawful employment discrimination has occurred.

The six decisions appear to be directed to the broadest possible range of stations, with stations in the east and west, large and small licensees, minority and non-minority ownership. One common factor that all share is the age of the alleged violations: all of the alleged recordkeeping shortfalls took place at least two years ago, with most of the data going back to 2003 or 2004. The penalty in all cases was a combination of a fine (with amounts varying from \$7,000 to \$20,000) and reporting conditions.

Each of the NALs arose from the Commission's random audit program. Each year the FCC requires that randomly-selected stations submit detailed information concerning their EEO efforts. The FCC's review process is apparently rigorous – how else to explain the multi-year timeframe from initial submission of the EEO information to the 2008 issuance of the NALs?

There are lessons to be learned from the NALs.

The first is that, if your station's employment unit is not going through some sort of self-assessment regarding EEO matters on a periodic basis, ***it should start doing so immediately.*** The common thread among all of the decisions was that the missing paperwork made it impossible for the station or stations to engage in the required self-assessment. The FCC's rules do, in fact, require that employment units periodically review their EEO practices, and that requirement was the focus in all of the decisions. Accordingly, stations should actually take the time to sit down and look at where they are recruiting, how effective that recruitment is, and what could be done differently to improve results. It might be possible to remove non-productive recruitment sources from the list of sources contacted and to replace those with other, perhaps more responsive,

sources. The important thing is to see what tweaks could be made to the recruiting system to make it better.

Another word to the wise is that, if your review shows a lack of information concerning exactly where applicants came from or how they learned about the opening, ***change that pattern at once***. Stations are required to list the total number of interviewees and the total number of interviewees referred by particular recruiting sources each year in their public file reports. In addition, should you find yourself the subject of one of the FCC's periodic audits, it will be necessary to supply the recruitment source *for each interviewee*. Therefore, make sure that you keep this information as you go. The FCC acknowledges that you may not know a source for everyone who applies for a position. Nonetheless, the Commission still seems to think that if you are serious enough to interview a person, and if you actually talk to that person, you should be able to get a referral source from him or her. Accordingly, it would be prudent to ask, as an essential question to be posed to all interviewees, how they happened to hear of the job opening – and then be sure to make a note of the response in whatever interview-related materials you retain for your files.

Additionally, if your stations are recruiting through only internet sources and in-house referrals, ***broaden your sources before you hire anyone else***. The FCC has already stated that internet sources alone are *not* sufficient. Likewise, if recruitment efforts include only on-air announcements, you need to look elsewhere in addition. The Commission's rationale on the latter is that only those persons who are tuned in to the station at the time that the announcement is made will know about the opening. The upshot is to *not* rely on *only* one source for recruitment, but rather to expand outreach efforts broadly. While the Commission has indicated that reliance on a single source may be enough if that source is broad enough, a better approach is to rely upon different types of recruiting.

And the final tip – which returns us to the overall theme of paperwork – is to document everything that you do in the way of general community outreach. FCC rules require that each station employment unit, depending on the size of both the station(s) involved and the size of the market, complete two to four general EEO outreach efforts in a two-year period. The stations also must keep documentary evidence of such participation, which is where some of the stations targeted in the NALs fell down on the job. Basically, even if you made the required efforts, if you can't document them, they didn't happen and you can't take credit for them.

Perhaps the most intriguing common aspect of the decisions, however, is what the FCC did *not* allege. In none of these cases was there *any* allegation of actual discrimination. Rather, the licensees' sins fell exclusively into the categories of recordkeeping and failure

of adequate self-assessment. The implication seems to be that if the licensees had just kept better records of where their interviewees learned of the opening and the like, then the licensee's employment profile (and, ultimately, the employment profile of the overall broadcasting industry) would somehow ineluctably mirror the ideal of diversity.

There appear to be more than a few problems with the FCC's approach here. The primary target of EEO rules should, it would seem, be actual unlawful discrimination. The failure to keep exhaustive records of interview minutiae – for example, how each interviewee claims to have learned of a job opening – does not relate to such discrimination at all. But historically, the FCC has seemed to view the goal of its EEO program to extend well beyond the enforcement of anti-discrimination laws. In defending an earlier version of that program in the U.S. Court of Appeals for the D.C. Circuit in 2001, the Commission argued that its goal was simply to assure that broadcasters engaged in "broad outreach" in their recruitment. But the Court concluded that the FCC really had a different agenda:

[If] the Commission's only goal [were to assure that broadcasters engage in "broad outreach"], then it would scrutinize the licensee's outreach efforts, not the job applications those efforts generate. Measuring outputs to determine whether readily measurable inputs were used is more than self-evidently illogical; it is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them.

Those observations led the Court to conclude that that earlier version was unconstitutional. The current version, adopted in response to the Court's ruling, was intended to avoid those constitutional pitfalls. But to the extent that the Commission continues to harp on results, the closer it treads to the same pitfalls.

Interestingly, Commissioners Copps and Adelstein issued a separate statement applauding the NALs and asserting that "employment in broadcasting does not reflect America" and that it is a "legal obligation" to have a "communications industry that reflects our nation's diversity". But that notion – that the FCC is both empowered and, indeed, obligated, to take steps to achieve some idealized industry employment profile – seems flatly inconsistent with the Court's 2001 decision. It will be particularly interesting to see whether the Commission as it develops in the Obama administration will pursue that Copps/Adelstein line of thinking. If it does, the Commission may find itself back in court.

For the time being, though, we can expect the current EEO program, complete with annual random audits, to continue full speed ahead.