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ORIGINAL

Decision No. 90778 SEP 12 1976

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mark L. Bernstein and  
James Vance Henry, formerly doing  
business as BERNSTEIN AND HENRY,  
a partnership,

Complainants,

vs.

COOK'S COMMUNICATIONS and FRESNO  
MOBILE RADIO SERVICE, INC.,

Defendants.

Case No. 10116  
(Filed June 8, 1976;  
amended September 8, 1976)

James Vance Henry, Attorney at Law,  
for complainants.

John Lyon, Attorney at Law, for  
defendants.

A. Douglas Rippey, Jr., for himself,  
intervenor.

O P I N I O N

The original complaint in this proceeding was four short paragraphs in length. It alleged that defendants unlawfully furnished radio pagers to the Fresno Police Department in violation of the Federal Communications Act and the Constitutional and Common Law Rights of Privacy. The prayer requested that defendants' certificate be revoked and that damages be awarded. On July 26, 1976, the Commission mailed a letter to complainants' counsel to advise that the complaint would be dismissed if it was not amended. The amended complaint was filed on September 8, 1976. It was still four paragraphs in length. The amended complaint implies that the defendants revealed radio pager codes of other parties to the Fresno Police Department without their consent. A violation of privacy in the U.S.

Code is alleged. The complaint prays that defendants' certificate be revoked, that defendants' tariffs be altered to forbid such practices in the future, that all subscription fees be returned to complainants, and that the Commission investigate defendants' operations and require them to refund all fees where a customer's pager was furnished to a third party without his consent.

Defendants filed a motion to dismiss the amended complaint on October 29, 1976. A hearing was deferred by agreement of the parties, and points and authorities in opposition to the motion to dismiss were filed on February 10, 1977. A hearing on the motion to dismiss was held on April 25, 1977 in San Francisco. An Administrative Law Judge's ruling denied the motion to dismiss the complaint on July 13, 1977.

Another hearing was scheduled and held on October 5, 1977 in Fresno before Administrative Law Judge Fraser. After opening statements, defendants argued that proof was to be presented on issues not covered in the complaint. Complainants refused to amend their pleading arguing that the sufficiency of the complaint had already been determined on the motion to dismiss. After further argument and the filing of a petition to intervene by a third party, the matter was submitted on the date of hearing. Shortly after this case was submitted, the Commission jurisdiction over radiotelephone utilities was challenged in another proceeding, and all matters were held in abeyance until Commission Decision No. 89045, dated June 27, 1978 (denying rehearing of Decision No. 88513 in Case No. 10210), reaffirmed Commission jurisdiction. Most radiotelephone proceedings were thereupon rescheduled due to long delays occasioned by the challenged jurisdiction. A third hearing was held in this proceeding on February 27, 1979 in Fresno before Administrative Law Judge Fraser. All the parties were present at this hearing including the intervenor who joined with the complainants.

Complainants marked for identification two transcripts from prior criminal proceedings before the Fresno County Superior Court. They requested that designated pages of testimony from each transcript be accepted as an exhibit. Defendants objected to their receipt in evidence since the witnesses were not present or available for cross-examination. Complainants presented no other evidence. They preferred not to testify as witnesses or to call defendants or the intervenor. Complainants refused a continuance and had no legal authority in support of their position. The objection to the receipt of the transcripts in evidence was sustained, and the matter was submitted.

On October 5, 1978 complainants requested by letter that the presiding Administrative Law Judge be removed from the proceeding. On March 7, 1979 complainants filed a motion to disqualify the Administrative Law Judge. Complainants alleged that prejudice appeared when it became evident that the invasion of privacy was related to a narcotics investigation by the Fresno Police Department.

#### Discussion

The right to cross-examine witnesses in administrative proceedings is considered as fundamental an element of due process as in court trials. To deprive a party of this right is a violation of the due process guaranteed by the 14th Amendment of the United States Constitution. (Massachusetts, etc. Insurance Company v Industrial Accident Commission (1946) 74 CA 2d 911, 913; Witkin on California Evidence, 1966, 2nd Ed., Section 40, p. 40; also see Davis on Administrative Law, 1958 Ed., Vol. 2, p. 328, Section 14.15.) The cases are conclusive on this issue since the testimony was taken before a different court in an unrelated proceeding. The judge in this case had little choice since complainants refused a continuance or to present other evidence. It is clear from the record that complainants suffered no prejudice.

Complainants have not produced cogent evidence to sustain their allegations when the opportunity was afforded.

Findings of Fact

1. No evidence has been presented by complainants.
2. Complainants have suffered no prejudice and have had a fair and unbiased hearing.

Conclusions of Law

1. The Commission will not accept testimony from a transcript of a criminal proceeding in the Superior Court where a party has objected to its admission, and the witnesses are not before the Commission and are not available for cross-examination.
2. The relief requested in the complaint should be denied.

O R D E R

IT IS ORDERED that the relief requested in Case No. 10116 is denied.

The effective date of this order shall be thirty days after the date hereof.

Dated SEP 12 1979, at San Francisco, California.

John E. Bayon  
President  
Vernon L. Strayhorn  
Richard W. Howell  
Clare T. DeWitt  
Edward W. Lewis  
Commissioners