

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 6814

Investigation into petition of Scott Barr vs. )  
Brattleboro Community Television )

Hearing at  
Brattleboro, Vermont  
January 22, 2004

Order entered: 8/31/2004

PRESENT: John P. Bentley, Esq.  
Hearing Officer

APPEARANCES: John C. Mabie, Esq.  
Gale, Corum, Mabie & Cook  
for Brattleboro Community Television, Inc.

Scott Barr  
*pro se*

**I. INTRODUCTION**

Multi-Channel Cable TV Company, is one of the cable system operating companies doing business in Vermont as Adelpia Cable Communications ("Adelpia"). As is required by Public Service Board ("Board") Rule 8.400, Adelpia provides access to its cable system for members of the public, educational institutions, and government organizations ("PEG Access"). In Brattleboro and certain adjacent towns this PEG Access is administered by a non-commercial Access Management Organization ("AMO") named Brattleboro Community Television, Inc., ("BCTV").

The present docket arises from a complaint by Scott Barr, an individual who complains that he has been improperly denied access to the studios and airtime on the Adelpia system.

Pursuant to 30 V.S.A. § 8, and based on the record and evidence before me, I present the following findings of fact and conclusions of law to the Board.

## **II. FINDINGS**

1. BCTV equipment and facilities are for the use of the residents of Windham County who have been trained in their use. Exh. E.

2. Mr. Barr has been a producer of programming at BCTV for several years. Exh. A at 5.

3. On November 21, 2002, the director of BCTV wrote a letter in which she informed Mr. Barr that (1) his employment and services were terminated immediately, (2) that this termination was the result his of "improper conduct" at BCTV and "in regard to a BCTV Board member", and (3) that BCTV would obtain and have served a no trespass order from the police. Exh. C.

4. Mr. Barr has never been a paid employee of BCTV, but has volunteered his services. Exh. A at 3.

5. BCTV refused, for several months, to air programming created by Mr. Barr unless it was submitted through a sponsoring member. Exh. A at 1, 5; exh. B at 4.

6. BCTV has a Grievance Procedure that, among other provisions, requires the filing of a written complaint and a hearing. Exh. A. It is undisputed that BCTV did not follow its Grievance Procedure, and I so find.

7. While the actual hearing by the Grievance Committee is supposed to be confidential, the letter from the BCTV manager only refers to a personnel committee recommendation that Mr. Barr be terminated. Any such recommendation came during a closed-door session, so Mr. Barr has no knowledge of the basis for the recommendation nor for BCTV's decision. Exh. C; tr. at 17.

8. BCTV has agreed to allow Mr. Barr to air his programming without sponsorship, to allow Mr. Barr to renew his membership in BCTV, and to withdraw the trespass order banning him from the BCTV premises. Tr. at 21.

## **III. DISCUSSION**

The kernel of this case is Mr. Barr's contention that he was excommunicated from BCTV in a manner not consistent with BCTV's own bylaws. BCTV offered no resistance to that contention, and has represented on the record its intention to undo the effects of that expulsion.

However, Mr. Barr has also raised an argument that BCTV violated the provisions of 11B V.S.A. § 6.31. That section, which is part of Vermont law covering nonprofit corporations, requires that, if a member is to be expelled, it must be pursuant to a "fair and reasonable" procedure; it then goes on at some length to define "fair and reasonable." BCTV has argued that the Public Service Board is without jurisdiction to enforce the provisions of Title 11B, and that, were any claim under that Title to survive the Board's ruling in this docket, only the Superior Court would have jurisdiction to consider it. Mr. Barr's petition also asks for relief from the trespass notice issued by the Brattleboro police to forbid him entrance to the BCTV premises; again, BCTV argues that the Board is without jurisdiction to quash that notice.

It should be emphasized, first, that both of these arguments by Mr. Barr are moot, since BCTV has undone its previous acts. However, since there is no particular reason that BCTV could not act this way again, it is worth discussing these arguments. I agree with BCTV on both these points. The Board is a body of limited jurisdiction, and there is no shred of evidence that the legislature imagined that the Board should enforce the law with respect to nonprofit corporations. Having said that, I should add that the result in a case like this would likely have a similar result even if BCTV had not had a grievance procedure in place, without recourse to Title 11B. That is, if the evidence were clear that an AMO were arbitrarily expelling its members and otherwise behaving in a dictatorial manner,<sup>1</sup> I believe the Board might well take action to ensure that the AMO cease and desist, based upon public policy as expressed in the Board's Rule 8.400 *et seq.* and, if the AMO refused and persisted, the Board would have the authority to instruct the cable operator to select a different AMO, an instruction clearly within the Board's authority. Likewise, the Board cannot reach the trespass notices issued by the Brattleboro police, but does have the authority to affect or replace the organization that obtained them.

#### **IV. CONCLUSION**

I conclude that BCTV acted improperly in expelling Mr. Barr from membership and in forbidding him from airing programming that otherwise met its standards for cablecasting.

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1. Findings I have *not* made in this case.

While BCTV has agreed to undo both of those improper acts, as well as the trespass notice concerning the BCTV offices, I will propose that the Board order BCTV to act in compliance with that agreement.

I further conclude that the Public Service Board is without direct jurisdiction to hear cases concerning abridgement of individual rights under the First Amendment to the Constitution of the United States, as well as cases brought under Title 11B of Vermont Statutes or relative to trespass notices issued by the police.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 20<sup>th</sup> day of August, 2004.

s/John P. Bentley

John P. Bentley, Esq.  
Hearing Officer

### V. BOARD DISCUSSION

The Board emphasizes that the facts of this case must be distinguished from those in *Petition of Bloch*, 133 Vt. 326, 340 A.2d 51 (1975) ("*Bloch*") and its progeny<sup>2</sup>. In *Bloch*, three of the nine trustees of the Washington Electric Cooperative, Inc., were acknowledged to have been elected under a by-law of the cooperative that was in violation of the provisions of 30 V.S.A. §§ 3014 and 3015. The Board had taken jurisdiction, noted the undisputed facts, and ordered that the cooperative take steps to amend its by-laws to accord with Vermont law. The cooperative appealed to the Vermont Supreme Court, arguing that this Order was beyond the Board's jurisdiction. The Court held:

The Public Service Board has general superintendence of laws relating to public service corporations. 30 V.S.A. § 2; 30 V.S.A. §203(1). An electric cooperative is within the definition of companies subject to this superintendence. 30 V.S.A. § 201. Other statutes may be referred to, such as 30 V.S.A. §§ 208 and 209 relating to the filing of complaints having to do with violation of the law or unlawful acts with the Public Service Board.

132 Vt. 326, at 327.

The present case represents no retreat from the rule recognized in *Bloch*. The difference here is that the organization alleged to have violated Vermont statutes is **not** one over which the Board has "general superintendence." An Access Management Organization ("AMO") is a somewhat strange organization, existing under the laws of Vermont for a public purpose; to achieve that purpose it receives funding from a regulated entity, the cable operator, and provides programming back for distribution on the cable operator's system. The mechanism by which this occurs is the Board's Rule 8.400, which gives form to the cable operator's duty to provide access to its system for public, educational, and governmental purposes. The Rule does not create the AMOs, and the Board has no direct "superintendence" over them. Of course, an additional distinguishing fact of this case, as noted by the Hearing Officer, is that, while *Bloch* involved an undisputed violation of Title 30, Mr. Barr complained of violations of Title 11B, a Title that, unlike Title 30, gives the Board no enforcement jurisdiction.

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2. *E.g.*, Docket 5330-D, Order entered 3/1/91; Dockets 5630, 5631, and 5632, Order entered 12/30/93; Docket 5686, Order entered 6/7/94; and Docket 5723, Order entered 4/25/94.

We have also considered BCTV's comments filed on August 6, 2004. We agree that the language in the Order requiring Mr. Barr's reinstatement is not intended to apply to employment of Mr. Barr by BCTV. As to BCTV's comments on injunctive relief, however, we note that Section 9 of Title 30 gives the Board the powers of a court of record, including both law and equity (such as injunctive relief). Vt. PSB Docket No. 5270-CV-1, Order of 3/19/91, at 13–14. In this case, there is no basis for an injunction directed at BCTV (as opposed to Adelpia); however, injunctive relief is within the Board's power in proper cases.

#### **VI. ORDER**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings and Conclusion of the Hearing Officer are adopted.
2. BCTV shall act in compliance with its representations as described in the Findings, that is, it shall reinstate Mr. Barr as a member, accept his programming without sponsorship by anyone else, and allow him the same access to the BCTV premises as any other member.
3. BCTV shall, in the future, refrain from expelling members in other than a fair and reasonable manner.

Dated at Montpelier, Vermont, this 31<sup>st</sup> day of August, 2004.

s/Michael H. Dworkin )

) PUBLIC SERVICE

s/David C. Coen )

) BOARD

s/John D. Burke )

) OF VERMONT

OFFICE OF THE CLERK

FILED: August 31, 2004

ATTEST: s/Susan M. Hudson

Clerk of the Board

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.*