UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)

Plaintiff)

v.) Civil Action No. 75-1996

U. S. DEPARTMENT OF JUSTICE)

MEMORANDUM OPINION

This action is before the Court on two matters: plaintiff's motion for partial reconsideration of the Court's order denying him a consultancy fee and plaintiff's application for an award of costs. For the reasons stated below, the Court denies plaintiff's motion for partial reconsideration on the consultancy issue and awards plaintiff costs in the amount of $14,481.95.

I.

Waiving the excess over $10,000, plaintiff argues that the Court should apply promissory estoppel or equitable estoppel to enforce his consultancy arrangement with the defendant. The Court disagrees.

The Restatement (Second) of Contracts (1981), discusses promissory estoppel in section 90:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if

90J

> injustice can be avoided only by enforcement of the promise.

Equitable estoppel arises

> when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

31 C.J.S. Estoppel § 59 (1964).

Both doctrines, as applied in the District of Columbia, require the plaintiff to act in reasonable reliance upon the promise or misrepresentation. Donovan v. United States Postal Service, 530 F. Supp. 872, 893 (D.D.C. 1981) (promissory estoppel); Bender v. Design Store Corporation, 404 A.2d 194, 196 (D.C. 1979) (same); Founding Church of Scientology v. Director, Federal Bureau of Investigation, 459 F. Supp. 748, 758 (D.D.C. 1978) (equitable estoppel as a defense).

The Court determined in its memorandum opinion of January 21, 1983, that Mr. Weisberg did not act reasonably in proceeding with work on the consultancy arrangement. In the Court's view, the abundance of correspondence submitted by plaintiff in support of his motion to reconsider did not contain evidence sufficient to change that finding. Plaintiff's reply filed on February 22, 1983 reflected unsuccessful efforts throughout November and December 1977 and January 1978 to obtain agreement on the rate of compensation.

The doctrines of promissory estoppel and equitable estoppel are inapplicable because plaintiff did not rely on any promise or silence by agents of the defendant intended to mislead plaintiff into believing that an agreement had been reached.

The Court finds it more likely than not that Ms. Zusman offered to pay Mr. Weisberg $75 an hour in a conversation with plaintiff's counsel in March 1978. The Court notes also Mr. Schaffer's offer in Court in May 1978 to pay Mr. Weisberg $30 an hour. Although it is unfortunate that these offers did not ripen into agreements, Mr. Weisberg did not rely on them; he did most of the work on the consultancy before March 1978.

The Court found liability based on promissory estoppel or equitable estoppel inappropriate for a second reason: the defendant did not use or obtain benefits from Mr. Weisberg's work. See Granfield v. Catholic University of America, 530 F.2d 1035, 1041 (D.C. Cir.), cert. denied, 429 U.S. 821 (1976) (equitable considerations in promissory estoppel claim "properly include evaluation of the formality of the promise, whether there is a commercial setting and its nature, and whether there is unjust enrichment"). Plaintiff points to Mr. Quinlan Shea's review of his consultancy reports as evidence that defendant benefited from them. See plaintiff's supplemental memorandum in support of motion for

partial reconsideration, attachment 1, tabs A and B. The Court does not draw the same conclusion: there is no evidence that these reports changed the FBI's view of its deletions. Since no contract was formed, defendant was not obligated under a theory of unjust enrichment to pay Mr. Weisberg for his consultancy work unless the reports caused the FBI to release withheld material.

Both parties state that the defendant had no objection to Mr. Weisberg's working at his home on the proposed consultancy. The Court's previous reliance on the place of work was misplaced, except that permitting Mr. Weisberg to work at his home highlighted the importance of agreeing on the number of hours to be spent on the consultancy.

Because neither promissory estoppel nor equitable estoppel is appropriate here, the Court need not decide if the Government should be estopped from retracting the offers of Ms. Zusman and Mr. Schaffer. See General Accounting Office v. General Accounting Office Personnel Appeals Board, 698 F.2d 516, 526-27, n.57 (D.C. Cir. 1983); Community Health Services of Crawford County, Inc. v. Califano, 698 F.2d 615 (3d Cir. 1983); National Treasury Employees Union v. Reagan, 663 F.2d 239, 249 (D.C. Cir. 1981).

II.

By order entered January 21, 1983, the Court directed plaintiff to submit additional documentation supporting the reasonableness of his litigation costs. Plaintiff's counsel incurred $4,044.28 in litigation costs, excluding $157.50 spent for a treatise. See attachment 3 to plaintiff's motion for attorney's fee and litigation costs. Plaintiff incurred $12,437.67 in litigation costs, see exhibit 1 to affidavit of Lillian Weisberg, filed January 31, 1983. The Court finds that the affidavits of Lillian Weisberg and James Lesar, filed in this action on January 31, 1983, document adequately the reasonableness of those costs, with two exceptions.

Plaintiff made five copies of his own filings: two for his counsel and one each for himself, the Court, and the defendant. See affidavit of James H. Lesar, ¶¶ 5, 10. The Court finds that a reasonable number of copies in the circumstances of this case would have been four: one each for plaintiff, his counsel, the Court, and defendant. Plaintiff's counsel did not require two copies. Estimating plaintiff's filings at 2,500 pages, the Court deducts $250 from the total copying cost of $7,155.20. The Court considered plaintiff's affidavits much too lengthy and rambling. Almost every one of plaintiff's 27 affidavits exceeded 25 pages. Therefore, the

Court deducts another $750 from the cost of copying. The long-distance telephone calls amounted to $4,045.87. The Court requested clarification of the need and nature of these calls. Plaintiff's counsel explained that the calls were between himself in Washington, D.C., and plaintiff in Maryland. The numerous status conferences, negotiations, and filings in this action warranted those calls, but the Court deducts $1,000 to account for unrelated or unduly lengthy conversations.

Defendant contests the categories of costs for which plaintiff seeks reimbursement, relying on inapposite cases under Rule 54(d) of the Federal Rules of Civil Procedure and Section 1920 of Title 28, United States Code. Rule 54(d) provides in pertinent part that

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agents shall be imposed only to the extent permitted by law.

Section 1920 lists items taxable as costs. They are defined precisely. See 28 U.S.C. § 1920(1)-(6)(1976). Reimbursement for copies is permitted only where they are "necessarily obtained for use in the case." Id., § 1920(4). The policy underlying this narrow interpretation of court costs is to avoid creating litigation costs that are "so high as to

discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be." Farmer v. Arabian American Oil Company, 379 U. S. 227, 235 (1964).

The standards for determining costs and the policies supporting their imposition are entirely different under the statute involved here, the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). Section 552(a)(4)(E) of the FOIA states that a court may assess against the United States "reasonable attorney fees and other litigation costs reasonably incurred" where a plaintiff has substantially prevailed. The Court has determined that plaintiff is both eligible and entitled to an award of attorney fees and litigation costs in this case. A successful FOIA complainant, such as the plaintiff, "has rendered substantial services to both the government by bringing it into compliance with the policy underlying the FOIA, and to the public at large by securing for it the benefits assumed to flow from public disclosure of government information." Cuneo v. Rumsfeld, 553 F.2d 1360, 1367 (D. C. Cir. 1977).

In Dowdell v. City of Apopka, Florida, No. 81-5690, slip op. at 1804-08 (11th Cir. February 28, 1983), the Eleventh Circuit distinguished treatment of costs under Rule 54(d) and under the Attorney's Fees Awards Act of 1976, 42

U.S.C. § 1988 (1976). The Dowdell court held that the issue of which expenses are chargeable to defendants under section 1988 "is governed by the purposes of the governing statute and the nature and context of the specific litigation." Id., at 1805. Travel, telephone and postage expenses were held acceptable costs. Id., at 1808. As in Dowdell, the Court looks to the purposes of the governing statute and the nature and context of the case. The statutory standards, relevant policy, and the legislative history of the FOIA discussed in the Court's previous memorandum opinion permit an award here of reasonable litigation costs of photocopying, telephone calls, transcripts of depositions and court hearings, travel expenses, postage, photographs, and notary fees.

Defendant refers to the district court's dictum in Larionoff v. United States, 365 F. Supp. 140, 147 (D.D.C. 1973), aff'd, 533 F.2d 1167 (D. C. Cir. 1976), aff'd, 431 U. S. 864 (1977), that "[s]tenographic services and xeroxing are matters counsel should provide as of course in connection with the rendition of legal services." The reviewing courts did not comment on that broad dictum. It is inapplicable to a FOIA case such as this one where an extraordinarily large number of records and affidavits were generated.

An appropriate order accompanies this opinion.

JUNE L. GREEN
U. S. DISTRICT JUDGE

April 29, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)
Plaintiff)
v.) Civil Action No. 75-1996
U. S. DEPARTMENT OF JUSTICE)

O R D E R

Upon consideration of plaintiff's motion for partial reconsideration, defendant's opposition, plaintiff's reply, defendant's response, plaintiff's supplemental memorandum, the affidavits of Lillian Weisberg and James H. Lesar filed on January 31, 1983, defendant's responses to the affidavits, plaintiff's reply thereto, and the entire record in this action, for the reasons stated in the accompanying memorandum opinion, it is by the Court this 29th day of April 1983,

ORDERED that plaintiff's motion for partial reconsideration of the Court's order entered January 21, 1983 is denied; and it is further

ORDERED that the defendant shall pay plaintiff his litigation costs reasonably incurred in this action in the amount of $14,481.95.

JUNE L. GREEN
U. S. DISTRICT JUDGE