

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Defendant-Appellee.

No. 77-1831

MOTION TO STRIKE PORTIONS OF
APPELLANT'S REPLY BRIEF

Appellee, the General Services Administration, moves this Court to strike the following portions of Appellant's Reply Brief on the grounds that they refer to factual material which was not part of the record in the proceedings below:

Page 1 and the first three paragraphs on page 2.

The last sentence on page 6 and the first four lines on page 7.

Page 21 and the first 3 lines on page 22.

The reference to Addendum #10 on page 23.

In the alternative, the brief in its entirety should be stricken, with leave granted to appellant to file a proper reply brief within fourteen days.

The reasons for this motion are as follows:

1. The portions of the reply brief objected to rely heavily on factual allegations contained in material which the plaintiff-appellant collected after the district court had rendered its final judgment in this

case and which he has sought to bring before this Court in the form of an addendum. See Appellant's Motion for Leave to File Reply Brief With Addendum p. 3. None of this material is a proper subject for judicial notice. Much of it is hearsay. Most of it is irrelevant. It includes newspaper articles, excerpts from books, and internal memoranda from agencies such as the F.B.I. which have no interest in or relationship to this litigation. The government has had no opportunity to contest the accuracy of any of these documents, to place them in their proper context, or to object to their admissibility.

2. It is well-settled that an appellate court must look only to the record before the district court in deciding questions presented. See, e.g., Lawn v. United States, 355 U.S. 339, 354 (1957), rehearing denied, 355 U.S. 967 (1957); T.V.T. Corporation v. Basiliko, 103 U.S. App. D.C. 181, 183 257 F.2d 185, 187 (1958).

3. Appellant's reliance on extra-record material violates Rule 28, F.R.A.P. That rule plainly contemplates that factual references in a brief shall be limited to those facts which were introduced into the record in the district court proceedings. See Rule 28(a)(3) and (4) and Rule 28(e).

4. Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since only matters of record are to be considered in the district court's determination, it follows that extra-record material may not be used on appeal to reverse a grant of summary judgment, as the standard for review is whether the district court acted properly on the basis of the record presented to it.

Accordingly, we respectfully request that the designated portions of appellant's Reply Brief be stricken and that appellant be required to base his appeal solely on the evidence within the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1978, I served the foregoing Motion to Strike Portions of Appellant's Reply Brief upon opposing counsel, by causing a copy to be mailed, postage prepaid, to:

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