

AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
NATIONAL SECURITY PROJECT  
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MARK H. LYNCH  
SUSAN W. SHAFFER  
*Staff Counsel*

June 17, 1985

Mr. Harold Weisberg  
7627 Old Receiver Road  
Frederick, Maryland 21701

Dear Harold:

Enclosed is Judge Smith's decision. After you have had a chance to look it over, please call me collect so we can discuss it.

Best Regards,



Mark H. Lynch

ML/skh  
Enclosure:

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JUN 13 1985

HAROLD WEISBERG, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 WILLIAM H. WEBSTER, et al. )  
 )  
 Defendant, )  
 )  
 \_\_\_\_\_ )  
 HAROLD WEISBERG, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FEDERAL BUREAU OF INVESTIGATION )  
 et al., )  
 Defendant. )  
 \_\_\_\_\_ )

JAMES F. DAVEY, Clerk

Civil Action No. 78-0322

Civil Action No. 78-0420

MEMORANDUM AND ORDER

This matter grows out of what was originally a consolidated FOIA case brought by plaintiff Harold Weisberg against defendant Federal Bureau of Investigation, seeking access to some 150,000 pages of documents pertaining to the assassination of John F. Kennedy. In prior proceedings, this Court dismissed plaintiff's action for the repeated failure of plaintiff to respond to defendant's discovery request. Weisberg v. FBI, No. 78-0322, slip op. at 4 (D.D.C. Nov. 18, 1983). In addition, in two separate orders, the Court awarded defendant attorneys fees incurred in prosecuting the motion to compel responses and later in prosecuting the motion to dismiss for failure to comply with the Court's earlier order compelling responses. Pursuant to the

first order, plaintiff was ordered to pay \$684.50; the second order required plaintiff and his counsel, Mr. Lesar, to pay \$1,053.55 to defendant's attorneys.

On appeal, the Court of Appeals for the District of Columbia affirmed the order dismissing the action and the assessment of attorneys fees against Mr. Weisberg. The Court of Appeals remanded the case to this Court for determination of:

(1) Whether the documentation submitted and to be submitted by the government to support its request for attorney fees satisfies [the] test in Concerned Veterans, and

(2) The proper division of responsibility between lawyer and client for the conduct which led to the award of expenses, with findings by the District Court which apportion their liability.

Weisberg v. FBI, No. 84-5058, slip op. at 22 (D.C. Cir. Dec. 7, 1984).

On reconsideration, the Court finds that no fees should be assessed against Mr. Lesar. Though Mr. Lesar's actions in this matter are not to be condoned, the Court is not now prepared to hold him liable for attorneys fees.

While the Court finds that the documentation for the fee applications associated with the two district court orders does not wholly comply with the standard of National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982), such a finding does not preclude any award. Although the lack of documentation prevents the Court from granting defendant's application in full, the Court, in an

exercise of the "discretion" on fee matters left to the district courts by Hensley v. Eckerhart, 461 U.S. 424, 437 (1982), recognizes that some time was obviously expended in drafting the various motions and preparing for the two hearings. Before setting the exact number of hours for which compensation is to be received, the Court notes that defendant's fee application requested relatively few hours, a result of defendant's counsel requesting compensation for less time than actually expended. As to the prosecution of the motion to compel, the Court finds that defendant is entitled to compensation for 6 hours, which includes one hour spent in the hearing on the motion. As to the prosecution of the motion to dismiss, the Court finds that defendant is entitled to compensation for 10 hours, which includes two hours spent in the hearing on the motion. The requested hourly rate of \$53 has remained unchallenged. The Court finds that defendant is entitled to a total of \$848 in attorneys fees.

Defendant also seeks compensation for the 161 hours it spent on the appeal of this case. While the Court does not question that an award of appellate expenses may be proper under certain circumstances, see Tamari v. Bache & Co., 729 F.2d 469, 475 (7th Cir. 1984), the "truly fractionable" nature of defendant's success on appeal in conjunction with the nondescript contemporaneous records maintained by defendant's appeal counsel prevent the Court from determining which time was spent on which issues. See Copeland v. Marshall, 641 F.2d 880, 892 n.18 (D.C.

Cir. 1980). In view of the foregoing, the Court denies any award of attorneys fees to defendant for time expended on the appeal.

Hopefully, today's opinion will bring this case to a close. The attorney fee issues here have certainly resulted in "second major litigation" warned against by the Supreme Court in Hensley v. Eckerhart, 461 U.S. at 437. At some point in time both parties must factor into their decisions the cost effectiveness of continuing this litigation.

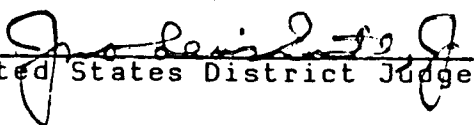
Accordingly, it is by the Court this 13<sup>th</sup> day of June, 1985

ORDERED that defendant is entitled to an award of attorneys fees under Fed. R. Civ. P. 37 in the amount of \$848.00, said amount to be paid by Mr. Weisberg within 30 days from the date of this Order. It is further

ORDERED that Mr. Lesar is not liable for payment of any portion of the fee award. It is further

ORDERED that defendant's application for attorneys fees for time spent litigating these cases in the U. S. Court of Appeals for the District of Columbia is denied. It is further

ORDERED that defendant's oral petition for leave to file an application for attorneys fees associated with litigating the remand from the U. S. Court of Appeals is denied.

  
United States District Judge