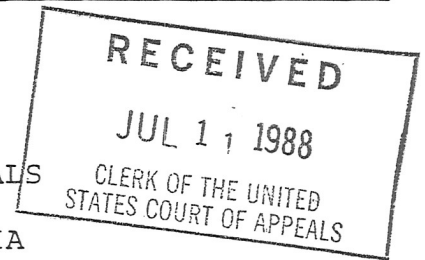


PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

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



No. 87-5304

HAROLD WEISBERG,

Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

On Appeal from the United States District Court for the
District of Columbia, Hon. June L. Green, Judge

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Concise Statement of Issues and Their Importance

This case should be reheard en banc on the issue of whether appellant Harold Weisberg ("Weisberg") substantially prevailed with respect to his second Freedom of Information Act ("FOIA") request in this litigation for the following reasons. First, the panel decided to uphold the District Court's ruling that Weisberg did not "substantially prevail" even though the Justice Department conceded, after the issue had been thoroughly briefed, that he was entitled to a complete fee waiver. This result is inconsistent with the result uniformly reached by this Court in several prior

decisions, notably Fund for Constitutional Gov. v. National Archives, 656 F.2d 856, 871 (D.C.Cir. 1981); Cox v. United States Department of Justice, 601 F.2d 1, 6 (D.C.Cir. 1979) (per curiam); Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 710 (D.C.Cir. 1977); and Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C.Cir. 1977), as well as numerous cases in other courts. Such cases have recognized that it would fundamentally undermine the FOIA if a final judgment in favor of the plaintiff were required before he could be said to have substantially prevailed. Yet under the panel's decision in this case the only way for a FOIA requester in Weisberg's position to substantially prevail is to obtain a judgment in his favor.

Second, the panel's application of the "clearly erroneous" standard to the facts of this case and its failure to insist upon adequate findings of fact by the District Court before undertaking review are also in conflict with this Court's prior decisions. For example, in Fund for Constitutional Gov., supra, this Court held that a district court's finding on the substantially prevailed issue was "clearly erroneous" because the court appeared to have overlooked one relevant factor in its discussion of the causation issue. Here, by contrast, the panel upheld the District Court's ruling despite the fact that it fails to discuss any of a number of facts and factors pertinent to a factual finding that Weisberg did not substantially prevail by obtaining a fee waiver. This willingness to rule on a record left bereft of pertinent factual findings by the District Court is markedly at variance with this

Court's past insistence that rulings on this critical FOIA issue must be supported by "full findings of fact." Union of Concerned Scientists v. U.S.N.R.C., 824 F.2d 1219 (D.C.Cir. 1987).

Third, the panel erred in upholding the District Court's ruling that Weisberg did not substantially prevail on the fee waiver issue on the ground that it was "not clearly erroneous" because she allegedly found "as a factual matter" that a judicial decision in another case involving the same parties and the same issue had broken the causal chain. But this issue involves a question of law, not of fact, and thus it is not reviewable under the "clearly erroneous" standard. Logic and the policy interests underlying the FOIA require that a FOIA plaintiff be held to have substantially prevailed as a matter of law where an agency which has taken a formal litigating position on a major issue in a lawsuit subsequently concedes that issue because of the plaintiff's victory on the same issue in a related case between the parties. This is a question of first impression in this Circuit and should be reheard en banc for that reason.

Alternatively, the panel committed a critical factual error in asserting that the District Court had found "as a factual matter" that "the Department succeeded in breaking the apparent causal chain." Weisberg v. Department of Justice, No. 87-5304 (D.C. Cir. May 27, 1988), slip op. at 8. The District Court did not make an express factual finding on this point, nor, indeed, did she make any reference to the effect of Judge Gesell's ruling in

Weisberg v. Bell on the substantially prevailed issue. There is no reason why she should have, since the Department did not raise this argument or even refer to Judge Gesell's ruling in its opposition to Weisberg's motion for attorney's fees.

The panel's imputation to the District Court of a crucial factual finding she did not make mars the validity of its ruling. Additionally, the Department's presentation of an argument in this Court which it did not make in the court below, based on evidence which it did not call to the lower court's attention, raises due process issues. This tactic deprived Weisberg of the opportunity to challenge this evidence (the Shea Affidavit) in District Court and to present to that court arguments and evidence which might have altered her rulings or at least compelled her to make the kind of reviewable factual findings she failed to make. See Jordan v. Department of Justice, 591 F.2d 753, 779-780 (D.C.Cir. 1978) (en banc) (as a general rule agencies will not be allowed to raise new exemption claims at the appellate level but will be considered to have waived such claims).

I. THE PANEL DECISION IS IN CONFLICT WITH THIS COURT'S
PRIOR DECISIONS

A. The Substantially Prevailed Issue

In this case Weisberg contends, inter alia, that he substantially prevailed within the meaning of 5 U.S.C. § 552(a)(4)(E) because the Department of Justice conceded the major issue of whether

he was entitled to a complete fee waiver only after: (1) the issue had been thoroughly briefed by the parties; (2) a court order resulted in a partial waiver of 40% being granted initially; and (3) the Department granted a complete waiver soon after the District Court issued a second order strongly indicating that Weisberg's motion for summary judgment would be granted unless the Department could provide to the court, within eight days, a good explanation as to why only a partial fee waiver was warranted. Acknowledging the force of these facts, the panel nonetheless upheld the District Court's ruling that Weisberg did not substantially prevail by obtaining a fee waiver.

The result reached by the panel is in direct conflict with prior decisions of this Court such as Fund for Constitutional Gov. v. National Archives; Cox v. United States Department of Justice, Nationwide Building Maintenance, Inc. v. Sampson; and Cuneo v. Rumsfeld, all cited supra, p. 1. It is also in direct conflict with district court decisions in this Circuit which have applied the rulings of this Court on the substantially prevailed issue in the fee waiver context. See National Wildlife Federation v. Dept. of Interior, 616 F. Supp. 889, 891 (D.D.C. 1984) (plaintiffs substantially prevailed where agency reconsidered its ruling two months after complaint was filed and refunded plaintiffs the full amount of the search and duplication charges they had previously paid); Wooden v. Office of Juvenile Assistance, 2 GDS ¶81,123 (D.D.C. March 29, 1981) (unpublished) (plaintiff substantially pre-

vailed where defendants' indicated to the court on the day their response to plaintiff's motion for summary judgment was due that they would waive fees).

The decisions of this Court and other courts have universally recognized that it would fundamentally undermine the FOIA if a final judgment in favor of the plaintiff were required before he could be said to have substantially prevailed. As one court aptly stated the basic point:

If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation.

Goldstein v. Levi, 415 F. Supp. 303, 305 (D.D.C. 1976), quoting Communist Party of the United States v. Department of Justice, C.A. 75-1770 (D.D.C. March 23, 1976) (memorandum opinion at 3).

The facts of this case confirm this observation and emphasize its importance as the fundamental principle guiding determination of the circumstances under which a litigant substantially prevails. Weisberg, considered by the FBI to be its arch-foe, requested a fee waiver for records which divulged information highly embarrassing to the Bureau. The Department stalled for 17 months on the fee waiver issue. When it was ordered to justify its litigating position and could stall no longer, it promptly conceded that Weisberg was entitled to a full waiver. When Weisberg sought attorney's fees, it claimed that the fee waiver decision

was the result of Weisberg's "administrative request" and argued that "fees are not available for the administrative phase of any FOIA litigation." See Defendant's Opposition to Plaintiff's Request for Attorney's Fees, at 18 (filed March 26, 1986). The District Court adopted this legal concept from the Department's papers and incorporated it into her opinion. The panel then affirmed it as a factual finding under the "clearly erroneous" standard. The result is that Weisberg has been deprived of compensation for his expensive undertaking even though he concededly served the public interest and enforced the FOIA's mandate.

The panel's decision comes into conflict with the result in prior cases in part because the panel failed to consider whether the District Court's ruling on the substantially prevailed issue was derived from the application of an erroneous legal standard. The Court's ruling that FOIA requesters do not substantially prevail "where the grant of such a waiver is based on an administrative decision of the agency and not a lawsuit" (slip op. at 15, emphasis in original) could, of course, be a determination of ultimate fact made after carefully weighing the relevant facts and inferences which go into making such a determination. On the other hand, the District Court could have reasoned that because the decision to grant a complete fee waiver was actually made by an administrator rather than by the Court, therefore the fee waiver was caused not by the lawsuit but by the agency's decision. If the Court followed this line of reasoning, then she failed to apply the proper legal standard which requires inquiry

into what caused the fee waiver to be granted, not who granted it. By accepting the Department's characterization of the fee waiver grant as an "administrative decision" as the focal point for her analysis, the District Court appears to have applied an improper test. Because "findings of fact derived from the application of an improper legal standard to the facts may be deemed by an appellate court to be clearly erroneous," Weisberg v. Dept. of Justice, 745 F.2d 1476, 1496 (D.C.Cir. 1984), the process by which the District Court arrived at her ruling is critical.

Several considerations suggest that the District Court applied an improper test, directing her inquiry into the wrong question. First, there are no findings of discussion of facts relevant to a determination under the proper test. The District Court made no attempt at all to discuss such factors relevant to causation as the timing of the Department's decision, the impact of her March 3, 1978 order, the effect of Judge Gesell's ruling, the credibility of and interpretation to be given Quinlan Shea's affidavit, and the Department's long-standing recalcitrance on the fee waiver issue. Second, the Court's ruling is not couched in the customary language of a finding of fact (such as "I find that the waiver in this case was granted as a result of . . ."). Third, comparison of the District Court's ruling with the Department's brief in opposition to the attorney's fees motion indicates that the District Court simply adopted the legal conclusion urged on the Court by the Department.

B. Inadequate Findings of Fact

Even where a district court has provided a relatively detailed explanation of its determination on the substantially prevailed issue, this Court has remanded the case for "full findings of fact." Union of Concerned Scientists v. U.S.N.R.C., 824 F.2d 1219 (D.C.Cir. 1987) (full findings of fact required to support court's belief that party had substantially prevailed in lawsuit before grant of attorney fees could be awarded). This insistence on careful and complete factual findings is well-founded because of the impact that its resolution has on serious policy concerns regarding the implementation of the FOIA on the one hand and expenditure of taxpayer funds on the other.

In this case, however, review proceeded without the panel having before it any explanation of how she arrived at her result, what evidence she considered relevant and what weight she assigned it, and what inferences she drew. For example, the panel had no explanation from the District Court as to why she did not find her March 3, 1978 order was the cause--or at least a cause--of the Department's decision to grant a complete waiver.

Instead of remanding for further factual findings and explanation, the panel proceeded to find that the District Court had determined that Judge Gesell's order had severed the causal nexus that otherwise existed. There is, however, nothing in the record to indicate that Judge Green considered the effect of Judge Gessell's ruling in Weisberg v. Bell nine years before, and, as we have noted, the Department itself made no effort to call it

to her attention. It therefore cannot be reliably inferred from her ruling on the substantially prevailed issue that she considered it at all.

Further, even had the issue of the effect of Judge Gesell's ruling been presented to her as possibly relevant to the determination of the substantially prevailed issue, an adequate analysis of this question would require her to address several other questions, such as (1) whether Gesell's decision could credibly be considered an intervening cause when it preceded the Department's decision to grant a complete fee waiver by two and a half months; (2) whether Shea's attribution of the fee waiver decision to Gesell's ruling was credible in light of the Department's previous recalcitrance on the fee waiver issue; (3) whether in light of the Department's recalcitrance on the fee waiver issue over the preceding 17 months it was likely that the Department would have granted him a total waiver absent his pending summary judgment motion and the District Court's March 3, 1978 order; (4) was Gesell's ruling made in a related or unrelated case, and thus did the Department's reliance on it as a grounds for conceding the fee waiver issue in this case mean that Weisberg had substantially prevailed as a matter of law? The failure of the panel to insist upon further explanation and findings of fact regarding such questions is a drastic departure from the insistence on an adequate record of factual findings required by this Court in Union of Concerned Scientists.

C. The "Clearly Erroneous" Standard

The panel's application of the "clearly erroneous" standard to the facts of this case is in direct conflict with this Court's decision in Fund for Constitutional Gov. v. National Archives, 656 F.2d 856 (D.C.Cir. 1981). In that case this Court overturned the district court's finding that the plaintiff had not substantially prevailed, ruling that his determination was "clearly erroneous" because he appeared to have overlooked one relevant factor in his discussion of the causation issue.

In this case the District Court appears to have overlooked virtually all of the many pertinent facts. It discussed none of them, and the only one it mentions--the fact that the decision to grant the waiver was made by an agency administrator rather than the Court--is of marginal relevance at best and certainly is not dispositive of the substantially prevailed issue. If the district court's finding that the plaintiff in Fund for Constitutional Gov. did not substantially prevail was "clearly erroneous," then that is a fortiori the case here.

As noted above, the panel attributes to the District Court a finding that "as a factual matter" the Department, as a consequence of Judge Gesell's ruling in Weisberg v. Bell, "succeeded in breaking the apparent causal chain." Assuming for sake of argument that such a finding can be imputed to the District Court, it is against the clear weight of the evidence. The evidence indicates that the Department did not act promptly after Judge Gesell's January 16, 1978 ruling to concede the same issue in this case but

did so only some 71 days later. The claim that the Shea affidavit "demonstrates that had there been no motion at all in the instant case, the complete waiver would nonetheless have been granted" (slip op. at 8, emphasis deleted), is simply not credible. Before there was a motion on the matter pending in court, the Department did nothing. Even after there was a motion pending, the Department did nothing, did not even respond to the motion. It took 17 months, two motions for summary judgment, court hearings and two court orders to obtain the complete fee waiver. It took a court order and heated demands at court hearings even to get the Department to make its partial fee waiver decision. The claim that the Department would have granted the complete waiver without a motion before the Court is simply self-serving. The Shea Affidavit itself makes no such claim, and if it made it it would not be credible. The more credible explanation of the Department's actions is that compelled by Judge Green's intervening March 3, 1978 order to justify its position the Department recognized the handwriting on the wall and latched onto Judge Gesell's January 16, 1978 order as a face-saving explanation.

II. A FOIA PLAINTIFF SUBSTANTIALLY PREVAILS WHERE AN AGENCY
CONCEDES DEFEAT ON A MAJOR ISSUE BECAUSE OF A JUDICIAL
RULING IN A RELATED CASE INVOLVING THE SAME PARTIES

The panel's decision upholding the District Court's ruling that Weisberg did not substantially prevail on the fee waiver issue because she found "as a factual matter" that a judicial de-

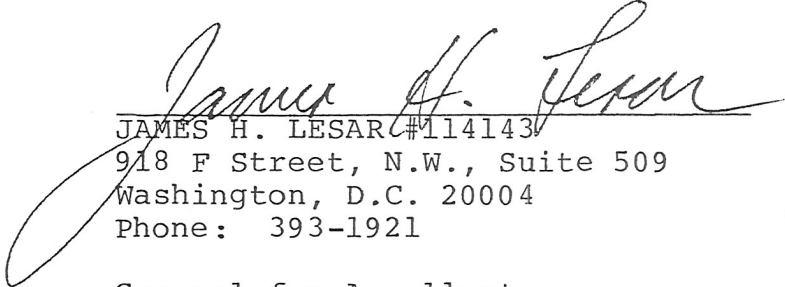
cision in another case involving the same parties and the same issue had broken the causal chain raises a legal issue of first impression in this Circuit; viz., whether a FOIA plaintiff substantially prevails where an agency which has taken a formal litigating position on a major issue in the lawsuit subsequently concedes that issue because of the plaintiff's victory on the same issue in a related case.

Weisberg has located no cases directly on point, although this Court's decision in Public Law Educ. Inst. v. U.S. Dept. of Justice, 744 F.2d 181 (D.C.Cir. 1984) could be read as implying that the plaintiff who does not "substantially prevail" because of developments in a "wholly unrelated" case may do so if the case is related.

Logic and the policy interests underlying the FOIA require that a FOIA plaintiff be held to have substantially prevailed where an agency which has taken a formal litigating position on a major issue in a lawsuit subsequently concedes that issue because of the plaintiff's victory on the same issue in a related case between the parties. It would be irrational to deny that a plaintiff has substantially prevailed in the second suit as well as the first simply because one decision came down before the other. Clearly, the plaintiff in this situation has promoted the policies fostered by the FOIA in both cases regardless of whether or not one preceded the other to decision. He has also incurred expenses in both cases, and to rule out his eligibility for attorney's fees in this circumstance would fundamentally under-

mine the FOIA by reducing the impact which the fee provision was designed to have. Ruling that a plaintiff substantially prevails in this circumstance, would, however, encourage citizens to vindicate their rights under FOIA.

Respectfully submitted,


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