UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ROGER HALL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	D.C. Cir. No. 04-5235
	:	(C.A. No. 98-1319)
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant	:	

RESPONSE TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

STATEMENT OF THE CASE

In 1998 Appellant Roger Hall ("Hall") sued on Freedom of Information Act ("FOIA") requests he made pro se beginning in 1994 and on a request made in 1998 by an attorney who then represented him. Hall has long represented veterans, veterans' families and veterans organizations in seeking records pertaining to missing prisoners of wars ("POWs") and persons missing in action ("MIA"), and the requests at issue in this case sought such records.

Some records were released without charge to Hall. The parties then filed cross-motions for summary judgment on the issues of exemption claims and the adequacy of the search done by defendant Central Intelligence Agency ("CIA"). The District Court ruled in the CIA's favor as to exemption claims but ordered it to conduct a further search. August 10, 2000 Opinion. [R. 55]

After suit was filed but before the District Court's ruling on the search issue, the CIA denied Hall's request for a waiver of fees. It stated, however, that it had chosen to "utilize its ad-

ministrative discretion" and not charge him unspecified "processing" fees in the amount of $4,500.00. The CIA's letter cautioned that it would begin charging Hall "the applicable processing fees for future searches and copying." Apparently considering the administrative record closed, Hall's then-attorney did not appeal this prospective denial.

Six weeks after it was ordered to conduct further searches, the CIA filed a motion to require Hall to commit to pay processing fees. It did not specify the amount of such fees, nor did it reveal that the searches already had been done. On October 27, 2000, Hall opposed the CIA's motion and cross-moved for a waiver of fees. The District Court denied Hall's motion and ordered that he "must provide the defendant with a commitment to pay such fees up to a specified amount." July 22, 2002 Memorandum Opinion and Order (emphasis added). Hall responded by committing to pay $1,000. He also stated that he would specify the priority in which the various searches would be undertaken. The District Court was informed of this in a Joint Status Report filed August 23, 2002. Subsequently, by letter dated October 15, 2002, Hall's counsel sent the CIA a check for $1,000.00 and specified the priority of the searches.

By order dated January 16, 2003 [R.87], the District Court noted that in their August 23rd report the parties had agreed that after Hall had specified the priority of the searches he wanted made, the parties would file either the CIA's objections to Hall's search specifications or a proposed schedule. Since no such report

had been filed, the Court directed the parties to file one by January 31, 2003.

In the January 31 report, the CIA informed the Court for the first time that "searching and processing conducted after August 2000 amounts to at least $29,000." [R. 88] These fees were incurred without notice to Hall n violation of CIA regulations. See 31 C.F.R. 1900.13(e). Hall took the position that the CIA had waived its right to collect such fees, and that records located as a result of such searches should be provided to him without charge. He also demanded that the CIA provide an accounting to justify the $29,000 figure. Finally, he pointed out that the Court's order of August 3, 2000 required the CIA to provide a supplemental declaration regarding its efforts to search for copies of its own records provided to a Senate committee.

By letter dated February 7, 2003, Hall submitted a new FOIA request to the CIA. It re-requested, in slightly different terms, the same records which Hall had originally requested. It also added requests for records pertaining to the searches that the CIA had conducted and the time and costs associated with such searches, information which he had been unable to obtain from the CIA in his lawsuit.

On April 2, 2003, the CIA filed a Notice of Corrected Calculation of Search Fees, lowering its previous figure of $29,000 to $10,906.33 [R. 91] but failed to explain the basis for this figure or why it differed so drastically from the $29,000 figure.

On October 8, 2003, Hall moved for leave to file an amended and supplemental complaint [R. 93], which the CIA opposed [R. 94]. On November 13, 2003, the District Court issued (1) a Memorandum Opinion [R. 95] and (2) a Memorandum Opinion and Order [R. 96]. The latter denied Hall's motion to file an amended and supplemental complaint. In doing so, it asserted that "[t]here is no prejudice to plaintiff . . . in awaiting defendant's administrative response to plaintiff's February 2003 FOIA request and, if he is dissatisfied, filing a separate lawsuit at that time."[1] The latter dismissed Hall's case with prejudice on the ground he had "constructively abandoned" his request.

Notwithstanding the fact that Hall had both committed to pay $1,000 in search fees and actually paid that amount, the District Court ruled that he had "constructively abandoned his request for documents by refusing to commit to pay for the searches he requested." [R. 95] The District Court did not address the several issues that had been raised by the parties' January 31, 2003 Joint Statement; e.g., the legal ramifications of (1) the CIA's undocumented and inconsistent claims regarding the amount of search fees, (2) its failure to notify Hall of the estimated costs of the searches before conducting them, (3) the effect of Hall's limiting his payment of fees to $1,000, and (4) the CIA's claim that it

---

[1]After denial of his motion to amend and supplement his complaint, and after waiting 15 months without an administrative response to his request, Hall did file a new case, Civil Action No. 04-0814, Hall, et al. v. Central Intelligence Agency. However, the CIA claims that Hall's new action is barred by res judicata, collateral estoppel and failure to exhaust administrative remedies.

could not determine what results had been obtained for $1,000 worth of searches. These issues had not been briefed by the parties, nor had they been argued. Nonetheless, the District Court dismissed the case with prejudice.

Hall subsequently filed a motion for reconsideration pursuant to Rule 59(e). When he made this motion, plaintiff's counsel was unaware that this Court had ruled in 1994 that Rule 59 motions do not receive the benefit of the three days which Rule 6(3) adds to the response time of any party when a "notice or paper is served upon the party by mail." The CIA did not mention this error in its opposition to Hall's motion for reconsideration, nor did the District Court call it to plaintiff's attention until it ruled, nearly five months later that Hall had missed the deadline for filing a Rule 59(e) motion and, in consequence of this, the deadline for appealing all of the Court's prior decisions.

Although the District Court ruled that Hall's Rule 59(e) motion was untimely, it treated it as if it had been made pursuant to Rule 60 (b). In this fashion it discussed four issues which Hall had raised in his motion for reconsideration: (1) that the Court was substantively incorrect in denying Hall a fee waiver; (2) that the Court had erred in dismissing Hall's complaint; (3) that the Court had misapplied the liberal amendment provisions of Rule 15; and (4) the Court should vacate its orders because Hall had "subsequently paid the fees initially requested by" the CIA. R. 103, p.

5 (emphasis added).[2] The Court analyzed the first three issues under Rule 60(b)(1) and the fourth under 60(b)(5).

With respect to the fee waiver issue, however, the Court declined to reach the merits of the issue, asserting that this claim did not qualify under Rule 60(b)(1) because the time to appeal from its July 22, 2002 denial of a fee waiver had expired and the motion was made more than one year thereafter. For the same reasons, the Court also rejected Hall's challenge to the Court's November 13, 2002 order dismissing the case. With respect to Hall's motion to supplement his complaint pursuant to Rule 15(d), the Court peremptorily rejected it, stating "the Court will not permit supplementation at this time both for the reasons stated in its November 13 2003 Opinion and because there are no Volpe considerations that would justify doing so in these circumstances." The Court did concede that under Rule 15(a) Hall was entitled to amend his complaint as a matter of right, and that therefore it should not have denied his motion to do so. It further conceded that this error comes under Rule 60(b)(1) as a mistake of an "obvious nature" amounting to little more than a clerical error or inadvertent decision. Nonetheless, the Court went on to reject this ground, too, saying that Hall had failed to exhaust administrative remedies with respect to the claim that he was a representative of the news media, thus the amended complaint promptly would have been

---

[2]The Court's characterization is factually inaccurate. The CIA's initial demand was for payment of at least $29,000. Hall paid only about one-third of that, the $10,906.33 that he CIA demanded after receiving Hall's new FOIA asking for documentation of the $29,000 figure.

dismissed and the Court's error was "harmless, thereby extinguishing [Hall's] claims."

Finally, the Court considered whether, by virtue of Hall's payment of the CIA's "corrected" amount of search fees, he qualified for relief under Rule 60(b)(5) because of a "significant change in circumstances that justifies modification." Once again the Court denied relief, this time on the ground that courts apply this standard "only to situations in which unforeseen circumstances make a decree 'unworkable because of unforeseen obstacles,' not when a moving party has changed the circumstances himself by reversing a position. . . ." R. 103, p. 10.

ARGUMENT

I. THIS CASE IS NOT APPROPRIATE FOR SUMMARY DISPOSITION

A party seeking summary disposition on appeal "bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir.1987), citing Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir.1980)(per curiam), cert. denied, 449 U.S. 994 (1980); United States v. Allen, 408 F.2d 1287, 1288 (D.C.Cir.1969). In order to summarily affirm an order of the District Court, this Court "must conclude that no benefit will be gained from further briefing and argument of the issues presented." Taxpayers Watchdog, Inc., 819 F.2d at 298 (emphasis added), citing Sills v. Bureau of Prisons, 761 F.2d 792, 793-794 (D.C.Cir.1985).

Moreover, this Court is "obligated to review the record and the inferences to be drawn therefrom 'in the light most favorable to [the party opposing summary disposition].'" Id., quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

This case is not appropriate for summary affirmance. Not only are the legal issues not so clear as to justify summary action, but the case also presents novel issues. The presence of these issues makes summary disposition inappropriate. See D.C. Circuit Handbook of Practice and Internal Procedures 66 (1997) ("Parties should avoid requesting summary disposition of issues of first impression.")[3]

II. BECAUSE OF UNIQUE CIRCUMSTANCES, APPELLANT SHOULD BE ALLOWED TO APPEAL THE DISTRICT COURT'S NOVEMBER 13, 2003 ORDERS

Appellee's motion for summary affirmance assumes that appellant is unable to appeal the District Court's orders of November 13, 2003 denying plaintiff's motion to amend and supplement his complaint and dismissing his case with prejudice. This assumption is based on the fact that Hall's Rule 59 motion was not timely filed, therefore the time for appealing the November 13th orders (and all prior orders) expired January 12, 2004, more than three months before the Court ruled on the Hall's Rule 59 motion.

While the rule is that an untimely Rule 59 motion does not extend the time for appeal, "[t]he Supreme Court has held . . . that under unique circumstances in which the party was lulled by

---

[3]Cited in the October 5, 1998 order of this Court denying appellees' motion for summary affirmance in Sinito v. Department of Justice, et al., D.C. Cir. No. 98-5227 (copy attached hereto as Addendum A).

the court into acting after the time had run, the appeal time would be extended." Wright & Miller, Federal Civil Practice, § 1212, citing, inter alia, Thompson v. Immigration & Naturalization Serv., 375 U.S. 384 (1964). This Court has adhered to this exception where it found that an attorney had filed what he thought was a Rule 59(e) motion and had good reason to believe that the Court was treating it as such, saying it would be unfair to dismiss the appeal in light of the circumstances. Webb v. Department of Health and Human Services, 696 F.2d 101 (D.C.Cir.1982).

In this case, appellant's counsel believed he had timely filed his Rule 59(e) motion. In opposing his motion, the CIA made no claim that it was not timely filed. Indeed, if it had reached that conclusion, it seems highly unlike that it would not have stressed it in its lengthy opposition brief, even eliminating its other arguments in light of this. It did not. Nor did the District Court do anything to indicate it was considering the motion under Rule 60(b), not Rule 59. In short, Hall and his counsel had every reason to believe that the motion for reconsideration was timely filed and was being considered on its merits by the District Court. If Hall had received any indication in the 90 days following the filing of his motion for consideration that it had not been timely filed, he would immediately have appealed the November 13th orders.[4]

---

[4]The 90 day period alluded to represents the 60-day period for appeal plus a possible additional 30 days allowable for "excusable neglect" set forth in Rule 73.

Under these unique circumstances, it would be unfair to deprive Hall of his right to directly appeal the Court's November 13th orders.

III. THE DISTRICT COURT ERRED IN DENYING RELIEF TO PLAINTIFF WHEN CONSIDERATION HIS MOTION UNDER RULE 60(b)

In arguing for summary affirmance of the District Court's Rule 60 determinations, the CIA makes the fundamental error of asserting that "[m]odification of a judgment pursuant to Rule 60(b) is extraordinary relief which requires that the movant show special circumstances . . . ." See Motion for Summary Affirmance ("Mot. Sum Aff."), at 6. However, Wright and Miller note that "the leading cases speaking of a requirement of exceptional or extraordinary circumstances have been cases of motions under Rule 60(b)(6)." Wright & Miller, Federal Civil Practice, § 2857. They add, "it does not assist sound analysis to repeat those phrases in cases brought pursuant to the other provisions of Rule 60(b)." Id. Here, the District Court considered granting relief under Rule 60(b)(1) and 60(b)(5), not under Rule 60(b)6).

A district court's decision to grant or deny relief under Rule 60(b) is reviewable for abuse of discretion. In exercising its discretion under Rule 60(b), the court may take equitable principles into account. Wright & Miller, § 2857, citing cases. "A number of cases say that discretion ordinarily should incline toward granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue." Id (citations omitted). "Based on

the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited." Id. (citations omitted).

Rule 60(b)1)

The District Court conceded, albeit somewhat begrudgingly (plaintiff "appears to be correct"), R. 103, p. 8, that Hall was entitled to amend his complaint as a matter of course. Contradictorily, however, it then denied him that right. It also conceded that its error in denying amendment was "a mistake of an 'obvious nature' which qualifies for relief under Rule 60(b)(1). It nevertheless denied relief because it said Hall had not exhausted administrative remedies with respect to his request that he be accorded status as a representative of the news media. His amended complaint was therefore a futility and "promptly would have been dismissed."

This ruling was based on multiple mistakes and constitutes a clear abuse of discretion. First, Hall had paid in full the CIA's revised search fee. Given this circumstance, whether or not he was entitled to status as a representative of the news media was irrelevant to his right to obtain the records located by the CIA's searches. The Court had ordered additional searches performed. Hall had paid the bill for those searches. He was entitled to get any nonexempt information produced by the searches. Whether or not he was entitled to representative of the news media status, he was entitled to receive the records he had paid for. Given the fact that Hall's complaint was viable whether or not he was entitled to

representative of the news media status, the Court's denial of his right to amend his complaint constituted an abuse of discretion.

Second, the Court's decision is self-contradictory. It took away with the left hand what its right hand conceded Hall could do "as a matter of right." If Hall had a right "as a matter of course" to amend his complaint without leave of court, the Court had no basis for denying that right on the basis of its own conclusion, reached without briefing or oral argument, that the amended complaint would be futile. The Court's denial of a right firmly ensconced in unambiguous language in the Federal Rules of Civil Procedure constitutes an abuse of discretion.

Third, assuming that the Court had promptly dismissed Hall's amended complaint as conjectured, Hall would then have had a right to appeal that decision and all prior adverse orders under a de novo review rather than a Rule 60 abuse of discretion standard. The failure to consider this aspect of the case constituted an abuse of discretion.

Fourth, the District Court states that "the statute first requires the appeal of an adverse decision of an agency after a petitioner has exhausted administrative remedies." R. 103, at 9, citing 5 U.S.C.§ 552(a)(4)(A)(vii). The cited provision does not say or imply this. Rather, it states that de novo judicial review of a fee waiver is limited to the record before the agency. The Court then cites the holding in Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 66 (D.C.Cir. 1990), that exhaustion of administrative remedies "does not occur until 'the required fees are paid or an

[administrative] appeal is taken from the refusal to waive fees," id., quoting Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 66 (D.C.Cir.1990). However, a more careful reading of Oglesby makes clear that where an agency has not responded to a request before suit is brought and the statutory time for agency response has passed, judicial review is appropriate. Moreover, if the agency does respond but does not provide certain specifics, such as notifying the requester of his right to appeal an adverse determination, actual exhaustion of remedies is also not required. Id., 920 F.2d at 65-67, 71. Here, the CIA did not respond either to Hall's initial fee waiver requests until after he filed suit, and when it did respond it did not advise him of his right to appeal. See Attachment 11 to Plaintiff's Motion for a Waiver of Search Fees and Copying Costs. [R. 66]

The Court goes on to assert that Hall did not make his initial fee request under the specific provision dealing with representatives of the news media and thus was trying to present a new basis for a fee waiver without having first presented it to the CIA. See April 22, 2004 Opinion at 9, n.7. The Court's reasoning was based on a sharp distinction it drew between the Amended Complaint and the Supplemental Complaint. Because the claim to new media status was staked out in Hall's letter to the CIA of February 7, 2003, the Court treated it only as pertaining to the supplemental complaint, In reality, however, it pertained to both parts of the complaint. It applied both to the original requests made Hall, which were incorporated in February 7th request, and to new items which were

added to that request. In terms of equity or efficient judicial administration of the FOIA, it made no sense to treat them that way. The Amended and Supplemental Complaint makes the claim to news media status with respect both to those counts which constitute amendments to the complaint and those which supplemented the original complaint.

Had the Court not denied Hall his right to amend his complaint, the CIA would have had to make a decision whether to treat the February 7, 2003 request for news media status as a revision or modification of Hall's initial fee waiver request. It would have been consistent with the CIA's own regulations for it do have done so. See 32 C.F.R. § 1900.13(d)(fee waiver requests will be accepted at any time prior to the release of documents or the completion of a case) and § 1900.13(e)(providing that the closing of a case for failure to commit to pay fees will not prevent a requester from refiling his or her fee request with a fee commitment at a subsequent time). However, had the CIA wished to litigate the issue of whether the issue of Hall's status was ripe for judicial review, Hall could have moved the Court to remand the administra- record to the Agency for further development and stayed the court case pending the final administrative resolution of the issue.

Rule 60(b)(5)

Rule 60(b)(5) provides that a court may set aside a judgment if it is "no longer equitable that the judgment should have prospective application." A party "may meet [his] initial burden by showing a significant change in circumstances that justifies modi-

fication" under the Rule. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992). There is no question here that there was a significant change in circumstances. Hall initially committed to pay and paid$1,000 in fees. He thought that this was in compliance with the Court's order specifying that he commit to pay fees "up to a specified amount," and that it would enable him to get the results of the searches he felt would be most productive. The District Court, without first issue an order that he pay the full amount demanded by the CIA, dismissed the case because he had not paid the full amount. Hall then paid the full amount.

This eliminated the basis for the order dismissing his case, which was grounded on the claim that by not paying the full amount he had constructively abandoned his request and failure to prosecute his case.

The inequity in keeping in place an order which bars Hall from receiving documents he has paid for is obvious. The District Court labored to apply past Supreme Court and other precedent to this situation and concluded that Rule 60(b)(5) did not apply. It did not apply because the Court was trying to fit the square pegs of past precedent into round holes without looking at the basic purpose of the Rule.

These precedents and their progeny originated nearly a century and a half ago in the case of Pennsylvania v. Wheeling & Belmont Bridge Company, 18 How. (59 U.S.) 421 (1856). The Freedom of Information Act was not enacted until more than a century later and was born into a world which could not then have been conceived.

Thus, the old cases, most of which involve consent degrees or continuing injunctions, They are thus readily distinguishable from the kind of judgments at issue in FOIA litigation.

The Rule itself requires only that (1) it is no longer equitable that (2) the judgment have prospective application. The first element is clearly met. Hall has complied with all requirements which give him a right to obtain any documents located by the CIA's searches. The judgment clearly has prospective application because it continues to bar Hall from receiving documents he has paid for. Indeed, the CIA is presently contending in District Court that it bars Hall from forever receiving the documents he has paid for.

As Wright and Miller observe

> Although the principle significance of the [prospective application] portion of the rule is with regard to injunctions, it is not confined to that form of relief, nor even to relief that historically would have been granted in courts of equity. Instead, it applies to any judgment that has prospective effect as contrasted with those that offer present remedy for a past wrong.

Wright & Miller, § 2863 (citations omitted)(emphasis added).

What is at stake here is not just a past wrong but a continuing wrong. The CIA continues to bar Hall from receiving the information he requested even though he has met all requirements for obtaining it. While most cases arising under Rule 60(b)(5) have little in common with the circumstances of the present case, there are a few that are roughly analogous. Thus, in Levenson v. Mills, 294 F.2d 397 (1st Cir.1961), cert. denied 368 U.S. 954, the

First Circuit held that a an order of disbarment, though permanent in form, was subject to modification on proof of a change in attitude. See also Johnson Waste Materials v. Marshall, 611 F.2d 593 (5th Cir. 1980)(reform of judgment could be had, subject to certain caveats, where party produced bank statements and cancelled payroll checks which constituted practically conclusive evidence of payment of over one-half of the amount of judgment).

The District Court also rejected relief under Rule 60(b)(5) because he said it did not apply "when a moving party has changed the circumstances himself by reversing a position. . . ." April 22, 2004 Opinion, at 10. Note, however, that in Levenson, supra, the First Circuit considered the party's changed conduct the basis for granting relief. Moreover, the changed circumstances present in this case were the result of a change by the Court. Initially, the Court directed Hall to commit to paying fees "up to a specified amount." July 22, 2002 Order. As late as January 16, 2003, the Court seemed to accept Hall's commitment to pay up to $1,000 for certain specified searches as complying with its July 22nd order. See July 16, 2003 Order. Only subsequently, in its order of November 13, 2002 dismissing the case, did the Court indicate that Hall should pay the full amount. Hall did so promptly. In this sense, it was the conduct of the court, not Hall, that changed. Hall did not defy any of the Court's orders; rather, he complied with them.

In the end, the District Court lost sight of the equitable nature of Rule 60(b)(5) and woodenly applied past precedents to a

novel situation. However, Rule 60(b)(5) involves "a flexible standard that allow[ed the party to be relieved from the decree when it was no longer equitable to enforce the decree. . . . U.S. v. Eastman Kodak Co., 853 F.Supp. 1454 (D.C.N.Y.1994). The public interest is also considered in weighing the equities favoring modification of a judgment. Id; Consumer Advisory Bd. v. Glover, 989 F.2d 65 (1st Cir.1993)(courts have full power to terminate continuing consent decrees when they no longer serve the public interest).

Here plaintiff was acting as a private attorney general seeking to vindicate the public's right to information about a subject that has been the focus of congressional investigations and a White House executive order. The equities overwhelmingly favored modification of the Court's order dismissing Hall's complaint. The District Court abused its discretion in denying relief.

CONCLUSION

For the reasons set forth above, appellee's motion for summary affirmance should be denied and this case set down for full briefing and oral argument.

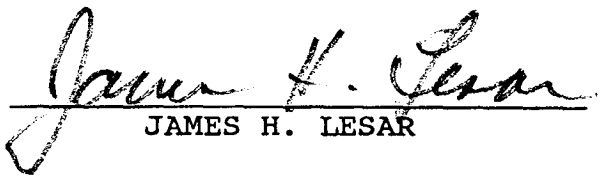
Respectfully submitted,

JAMES H. LESAR #114413
1003 K Street, N.W., Suite 640
Washington, D.C. 20001
Phone: (202) 393-1921

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that I have this 15th day of November, 2004, mailed a copy of the foregoing Appellant's Response to Motion for Summary Affirmance to AUSA Megan L. Rose, 555 Fourth Street, N.W., Washington, D.C. 20530.



JAMES H. LESAR