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United States District Court, E.D. Pennsylvania.

IMPRISONED CITIZENS UNION, et al.
v.
Milton SHAPP, et al.

CIV.A. Nos. 70–3054, 71–513, 71–1006 and 70–2545. | June 8, 1988.

Opinion

MEMORANDUM

JOSEPH S. LORD, III, Senior District Judge.

***1** This is the third application for attorney's fees in this 18–year-old prisoners' civil rights case.[1] This application was filed in February, 1988 by John T. Snavely, who represented the plaintiff class in several aspects of this case mainly from 1976 until 1985.

It is useful to recount briefly Snavely's role in this case. In their amended complaint filed May 8, 1972, the plaintiff class comprising prisoners at several Pennsylvania Correctional Institutions alleged that defendants, who are officials responsible for those institutions, violated their civil rights in numerous ways. Through the efforts of Snavely's predecessors and with the sometimes grudging cooperation of the defendants, a proposed consent decree was negotiated which offered substantial benefits to plaintiffs in many areas. Other issues upon which no agreement was reached were litigated by counsel other than Snavely, with mixed success. *See ICU v. Shapp,* 451 F.Supp. 893 (E.D.Pa.1978).

Three obstacles arose which jeopardized final approval of the proposed Consent Decree. Defendants sought to decertify the plaintiff class and to withdraw their previously granted consent. Some inmates protested that the proposed Decree did not go far enough in protecting their rights. It was at this time, in September 1976, that Snavely assumed the role of plaintiffs' lead counsel with respect to the proposed Consent Decree. He successfully opposed the defendants' efforts to decertify the class and withdraw their consent. Together with defendants, he successfully opposed the dissident inmates' efforts to scuttle the proposed Decree. The proposed Consent Decree was modified in response to a number of inmates' objections and was approved by me on May 22, 1978.

Following my approval, Snavely undertook to insure that defendants implemented the Consent Decree. He investigated many reports by prisoner-class members that violations of the Decree were taking place. Based on his investigation, on February 22, 1980, Snavely filed on plaintiffs' behalf a motion asking that defendants be held in contempt. After lengthy negotiations, the motion for contempt was resolved by amending the Consent Decree. The amendments conferred substantial new benefits upon the plaintiff class and I approved them on May 11, 1983. Following that, Snavely's involvement in the case declined although he has remained a counsel of record. In 1986, other counsel filed a second motion for contempt charging that several defendants continued to violate the Decree and its amendments. That motion was granted in part and denied in part on November 25, 1987. Snavely has not sought any compensation for work performed on the second motion for contempt.

II.

Defendants first argue that Snavely's application for attorney's fees is untimely and should be denied on that basis. They say Snavely could have applied for fees in 1978 when the Consent Decree was entered, or in 1983 when plaintiffs' first motion for contempt was resolved by amending the Consent Decree. Defendants contend that they have been unfairly surprised and prejudiced by Snavely's failure to apply earlier.

It is true that Snavely could have applied for fees earlier. However, the statute which governs Snavely's application for attorney's fees, 42 U.S.C. § 1988, contains no deadline for filing an application. Nor has this district court established by local rule any time limit on fee applications. Until my order of November 25, 1987, I had not established any deadline either. Therefore, in and of itself the fact that Snavely postponed applying for fees is of no significance. Only where a fee applicant "unfairly surprises or prejudices the affected party" may a court, in the exercise of its discretion, deny his application for attorney's fees. *White v. New Hampshire,* 455 U.S. 445, 454, 71 L.Ed.2d 325, 333 (1982); *Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177, 179 (3d Cir.1983). I am not persuaded that defendants have suffered either unfair surprise or prejudice. Indeed, in one respect defendants have benefited significantly from Snavely's delay.

***2** If this case had been entirely resolved in 1978 or 1983, then defendants might be entitled to enjoy a sense of repose about it, and their claim of unfair surprise might be convincing. But this case has never yet been closed.

Under the terms of the Consent Decree, I have retained jurisdiction over it and proceedings have continued. In these circumstances, defendants cannot be *unfairly* surprised by Snavely's application. *Cf. Northcross v. Board of Education of Memphis,* 611 F.2d 624, 635 (6th Cir.1979) *cert. denied,* 447 U.S. 911 (delay of several years in filing fee application excused where litigation had continued); *Amico v. New Castle County,* 654 F.Supp. 982 (D.Del.1987) (three-year delay excused where litigation had continued); *compare Baird v. Bellotti,* 724 F.2d 1032, 1033 (1st Cir.1984) *cert. denied,* 104 S.Ct. 2680 (two-and-a-half-year delay not excused where litigation had ended).

Defendants assert that they have been prejudiced by Snavely's delay in that they "no longer have clear recollections of possibly significant occurrences which could affect the amount of any award." Of course, memories fade as time passes. But that hardly means we must abandon the past as beyond recall. I trust that defendants' counsel, like all good counsel, have kept notes and copies of significant documents and events throughout the many years this case has been active. These notes and documents could be used to refresh defendants' recollection.

Defendants also say that their lead counsel changed in 1979. I recognize that this change makes it more difficult for them to reconstruct past events, but I am not persuaded that it is impractical for them to do so. They have not established that their former lead counsel, Jay Andrew Smyser, is unavailable for consultation. Nor have they established that Mr. Smyser is the only one who is familiar with the conduct of their case before 1979.

I am puzzled about what sort of "possibly significant occurrences which could affect the amount of any award" defendants fear they cannot recall. Defendants have not offered any convincing example of what such an occurrence might be. I will not deny Snavely compensation on the basis of speculative prejudice.

I consider it significant that Snavely's delay has substantially benefited defendants in one respect. Had Snavely filed a fee application in 1978, he would have received his compensation for the years 1976 to 1978 ten years sooner. Defendants have enjoyed for ten years the use of the money which Snavely now claims. Snavely is not seeking any enhancement of his fees to compensate for his delayed receipt of the fees, even though he might have sought an enhancement. *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 922 (3d Cir.1985). Snavely has by delaying his application in effect granted defendants a ten-year interest-free loan, which is a significant benefit. Likewise, Snavely's decision not to seek fees in 1983 for his services from 1979 to 1983, resulted in another interest-free loan, of five years' duration.

***3** Most of the labors for which Snavely seeks compensation produced documents which are of record. I have reviewed the principal documents Snavely has produced since 1976 as well as his detailed fee application. I am convinced that it is fair and reasonable to evaluate Snavely's application on its merits in spite of the passage of time.

III.

Next defendants challenge a number of particular hours for which Snavely seeks compensation. Among defendants' challenges I find one which has merit: Snavely's claim for 32.5 hours spent opposing defendants' 1978 motion to reopen the "Glass Cage" at Huntingdon Prison.

A.

One form of relief which plaintiffs originally sought was the closing of the maximum security cell blocks at four state prisons. I visited those cell blocks in 1974 and 1975 to observe their condition. Because of protracted settlement negotiations, I deferred ruling on the cell block issue until May 30, 1978. I then ruled that while the maximum security cells at three institutions met the constitutional minimum "the three cells at Huntingdon known as the 'Glass Cage' are constitutionally unacceptable and must be closed." *ICU v. Shapp,* 451 F.Supp. 893, 894 (E.D.Pa.1978). Jack Levine, who represented plaintiffs in that aspect of the litigation, was awarded attorney's fees in 1979 for his efforts. 473 F.Supp. at 1017.

One week after my order closing the Glass Cage, defendants moved to have the cells reopened. At this time, Snavely began representing plaintiffs in this aspect of the case. Plaintiffs opposed the reopening of the cells.

On November 20, 1978, I dissolved my injunction and permitted the Glass Cage to reopen. I found after a hearing that defendants had renovated the cells to the point where although they were still harsh, they met the constitutional minimum. It is significant that I found that most of the renovations took place in 1977. Also in 1977, defendants adopted explicit administrative procedures which reduced the number of inmates subjected to the Glass Cage and shortened the duration of most inmates' stays there.

Thus, all of the benefits to the plaintiff class with respect to the Glass Cage were achieved before May 30, 1978. Snavely's efforts to prevent the Glass Cage from reopening which began after that date produced no

tangible benefit to the plaintiff class. I rejected his contentions that the Glass Cage should remain closed forever or, in the alternative, that defendants be prohibited from confining psychiatrically disturbed inmates there. Under these circumstances, Snavely's claim for compensation for 32.5 hours will be denied. *Institutionalized Juveniles,* 758 F.2d at 920.

B.

***4** Besides the Glass Cage issue, defendants challenge Snavely's claim for 106 hours spent in 1977. Snavely spent those hours preparing a brief in response to those plaintiff class members who, through a court-appointed attorney, opposed the tentative Consent Decree. In their brief, defendants challenged those hours simply as being "excessive". At oral argument, defendants also argued that these hours produced no benefit to the plaintiff class and so are not compensable. I will address the latter contention first.

Without Snavely's brief advocating my approval of the tentative Consent Decree, that Decree might well have never been approved. Plaintiffs would then have faced protracted litigation and an uncertain outcome. As the objectors' brief itself makes clear, the tentative Consent Decree provided substantial benefits to the class in many areas. Defendants suggest that had Snavely never filed his brief, I would somehow have forced the defendants to accede to all the objectors' demands. That is sheer and improbable speculation.

A significant part of Snavely's brief was devoted to opposing defendants' efforts to decertify the plaintiff class. Obviously Snavely's success in preserving the class was an essential factor in achieving the benefits conferred upon plaintiffs by the Consent Decree.

Defendants produced no evidence to support their contention that Snavely's 106 hours were excessive. I have reviewed the brief which Snavely produced in that time and his affidavit. I find nothing on the face of either document which suggests to me that 106 hours is excessive. One can hardly measure the worth of a brief by its length, as defendants suggest. A concise brief often takes longer to write than a verbose one, yet it is much more effective.

C.

Defendants contend that many hours which Snavely spent corresponding with plaintiff class members are not compensable because they produced no benefit for the class. Time spent monitoring compliance with a consent decree is compensable, provided it is spent reasonably. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. ——, 92 L.Ed.2d 439, 452 (1986). In order to show that his monitoring efforts were reasonable, Snavely need not show that particular hours produced particular benefits for the class. It is enough that his correspondence with class members produced information which led to plaintiffs' first motion for contempt and the 1983 amendments to the Consent Decree. It is also significant that I myself referred many inmate complaints to Snavely. Where a court directs plaintiffs' attorney to monitor compliance with the court's order, compensation is especially warranted. *Adams v. Mathis,* 752 F.2d 553, 554 (11th Cir.1985).

D.

Defendants' remaining contentions are that Snavely's claims of hours spent on various tasks are excessive. Defendants offered no evidence to support these contentions. I have reviewed Snavely's affidavits and most of the documents he produced in those hours. I see nothing which suggests to me his claimed hours are excessive.[2]

IV.

Snavely has asked that I increase the lodestar by a factor of 1.5 on account of the contingent nature of the case and the quality of his work. While I respect both the quality of Mr. Snavely's work and his perseverance in pursuing this case in the face of substantial risks, I cannot award him any such multiplier. The Supreme Court has made it clear that contingency and quality multipliers can be awarded only in rare cases, if ever, and only where the attorney presents exhaustive factual evidence in support of his or her claim. *See Pennsylvania v. Delaware Valley Citizens Council for Clean Air,* —— U.S. ——, 97 L.Ed.2d 585 (1987) (contingency multipliers); *Blum v. Witco,* 829 F.2d 367, 379 (3d Cir.1987) (contingency multipliers); *Pennsylvania v. Delaware Valley Citizens Council for Clean Air,* 478 U.S. ——, 92 L.Ed.2d 439 (1986) (quality multipliers). Snavely has not made the requisite showing.

V.

***5** A table prepared by Snavely summarizing his fee petition by year and hourly rate is appended to this memorandum. Defendants have not contested his hourly rates and I find them to be reasonable. I will grant his fee request except as follows:

1. The hours from 1978 are reduced by 32.5, reflecting the Glass Cage's reopening. At his hourly rate of $70, this reduces his award by $2,275.

2. The hours from 1977 are reduced by 3.0, with Snavely's consent, reflecting mistakenly included clerical chores. At his hourly rate of $65, this reduces his award by $195.

3. No multiplier is allowed.

Thus, defendants will be directed to pay John T. Snavely the sum of $30,832.25 as attorney's fees.

Services Rendered and Sumary of Rate at Which Compensation Sought:

1976–77	142.60 hours @ $65.00/hr	$ 9,269.00
1978	80.20 hours @ $70.00/hr	$ 5,614.00
1979	61.05 hours @ $75.00/hr	$ 4,578.75
1980	68.40 hours @ $80.00/hr	$ 5,472.00
1981	24.90 hours @ $85.00/hr	$ 2,116.50
1982	29.65 hours @ $90.00/hr	$ 2,668.50
1983	4.30 hours @ $95.00/hr	$ 408.50
1984	2.55 hours @ $100.00/hr*	$ 255.00
1985	6.20 hours @ $100.00/hr*	$ 620.00
1986	1.00 hours @ $100.00/hr*	$ 100.00
1987	Litigation of 2nd Motion for Contempt, etc.—no charge although counsel present throughout. $–0–	
	Grand Total: 420 Hours	$31,102.25

Plus compiling and drafting Fee

Application, Legal Memorandum of Entitlement and Affidavit (not including typing production)		
	22 hours @ $100.00/hr*	$ 2,200.00
	TOTAL ("Lodestar"):	$33,302.25
Lodestar Factor (Multiplier) Requested: + 1.5 X above total of $33,302.25 yields total fee of: $49,953.38**		

ORDER

AND NOW, this 8th day of June, 1988, for reasons expressed in my accompanying memorandum, it is

ORDERED that the application of plaintiffs' counsel John T. Snavely for attorney's fees is GRANTED IN PART and DENIED IN PART: defendants shall, within thirty (30) days of the date of this order, pay John T. Snavely the sum of $30,832.25.

Footnotes

2 Snavely voluntarily withdrew his request for compensation for 3 hours spent on April 19, 1977, on clerical chores.

* Mr. Snavely's rate charged his own clients had never exceeded $100.00 per hour except in contingent fee cases.

1 The first petition was filed in 1979 by Jack Levine, who represented ICU from 1972 into 1975. The second petition was filed in January, 1988 by Stefan Presser and Lorray Brown of the American Civil Liberties Union of Pennsylvania, who have represented plaintiffs since 1985. My ruling on Jack Levine's petition was reported at 473 F.Supp. 1017 (E.D.Pa.1979). My order concerning the petition of Mr. Presser and Ms. Brown was filed on May 24, 1988.

** See discussion of "Lodestar" and "Lodestar" evaluation factor in legal memorandum submitted herewith at 12.