

Case Summary: Counsel Fees

Lee Enterprises, Inc. v. The City of Glens Falls, 63270 [New York Law Journal April 18, 2017]

The Court awarded petitioners' counsel fees following their successful litigation concerning a FOIL denial. The Court found that a senior partner used this case to teach two associates about FOIL, and then sought to hold respondents responsible for the fees incurred in connection therewith. The Court determined that awarding fees for the identical services provided by the associates would be inequitable, as would awarding fees for the time spent by them in learning about FOIL. Claim of \$45,049.30 was reduced to \$9,846.15. Petitioners also sought \$1,376.30 in administrative fees incurred, which fees include, inter alia, \$931.40 in "Lexis Advance Fees" and a \$40.00 "NYS Library Fee." It has been explicitly held "that computer research is merely a substitute for an attorney's time that is compensable under an application for attorneys' fees and is not a separately taxable cost and these costs were denied.

Decision

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

LEE ENTERPRISES, INC., as parent company
of The Post Star; MAURY THOMPSON, as

Staff Writer for The Post Star, HUBBARD
BROADCASTING, INC., as owner of

WNYT-TV; KATHY BARRANS, as Special

Projects Producer at WNYT-TV,

Petitioners,

for a Judgment under Article 78 of the
Civil Practice Law and Rules

v.

THE CITY OF GLENS FALLS; CITY CLERK
ROBERT A. CURTIS, as the City of Glens Falls'
Records Access Officer; and MAYOR JOHN A.
DIAMOND, as the City of Glens Falls' Chief

**DECISION
AND ORDER**

No. 63270
2016-0543

Index
RJI No. 56-1-

Executive Officer and Records Access Appeal
Officer,

Respondents.

Greenberg Traurig, LLP, Albany (*Michael J. Grygiel* of counsel) for petitioners.

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany (*William C. Firth* of counsel) for respondents.

ROBERT J. MULLER, J.S.C.

The Court issued a Decision, Order and Judgment in this matter on December 1, 2016 granting the relief requested in the petition and directing respondents to release a certain report and recommendation pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]). The Court also awarded petitioners counsel fees, finding that respondents had no reasonable basis for denying them access to the report and recommendation (*see* Public Officers Law § 89 [4] [c]; *Matter of Maddux v New York State Police*, 64 AD3d 1069, 1070 [2009], *lv denied* 13 NY3d 712 [2009]). Petitioners were directed to submit their request for counsel fees within 20 days, following which respondents were given an opportunity to oppose and petitioners an opportunity to reply. All submissions have now been received.

Petitioners contend that counsel fees in the amount of \$45,049.30 were incurred in connection with this proceeding. In support of this contention, petitioners submitted the affirmation of Michael J. Grygiel, Esq., a shareholder with Greenberg Traurig, LLP. Grygiel indicates that during the months of October and November 2016, he spent a total of 9.2 hours on this matter at a rate of \$450.00 per hour, for a total cost of \$4,140.00. Grygiel further indicates that Jennifer M. Gomez, Esq. and Kelly L. McNamee, Esq. – associates at Greenberg Traurig – spent 71.4 hours and 71.1 hours, respectively, on the matter at a rate of \$275.00 per hour, for a

total cost of \$39,187.50. Finally, Grygiel indicates that \$1,376.30 in administrative fees were incurred, which fees include, *inter alia*, \$931.40 in “Lexis Advance Fees” and a \$40.00 “NYS Library Fee.”

Notwithstanding the \$45,049.30 in fees allegedly incurred, Grygiel states that petitioners were charged a flat fee of \$6,000.00 “in recognition of the newsroom budgetary constraints faced by [p]etitioners, and because [he] was persuaded that [r]espondents were obstructing [his] clients’ ability to report timely on matters of legitimate public concern, in clear violation of [r]espondents’ disclosure obligations under FOIL.” Grygiel then requests that petitioners be awarded counsel fees in the amount of \$25,000.00. It is unclear how he arrived at this figure.

In opposition to this request, respondents contend that petitioners are only entitled to the \$6,000.00 charged in connection with the proceeding. In support of this contention, respondents submitted the affirmation of William C. Firth, Esq., who first points out that Grygiel failed to include any time records in support of his request for counsel fees. Indeed, Grygiel submitted nothing more than a chart with a summary of the fees charged. Firth further points out that while Grygiel outlined his own experience and expertise relative to FOIL requests, he included nothing relative to the experience and expertise of Gomez and McNamee. In this regard, Firth has attached copies of the biographies posted on Greenberg Traurig’s website for Gomez and McNamee, which the Court finds instructive.

In reply, Grygiel submitted an affirmation attaching a copy of the time records maintained by Greenberg Traurig in this matter.

“The Court ‘bears the ultimate responsibility to decide what constitutes reasonable legal compensation’” (*Matter of Rose BB.*, 35 AD3d 1044, 1046 [2006], *appeal dismissed* 8 NY3d 936 [2007], quoting *Matter of Verplanck*, 151 AD2d 767, 767 [1989]; see *Hinman v Jay's Vil.*

Chevrolet, 239 AD2d 748, 748 [1997]). “In determining what constitutes reasonable compensation . . . , the [C]ourt should consider ‘the time commitment involved, the relative difficulty of the matter, the nature of the services provided, counsel’s experience and the results obtained’” (*Matter of Rose BB.*, 35 AD3d at 1046, quoting *Matter of Middagh*, 267 AD2d at 593-594; see *Hinman v Jay's Vil. Chevrolet*, 239 AD2d at 749). The Court must also award counsel fees with an eye toward moderation, “‘seeking to avoid either the reality or the appearance of awarding windfall fees’” (*Shamrock Power Sales, LLC v Scherer*, 2016 WL 7647597, *16 [SDNY 2016], quoting *New York State Assn. for Retarded Children, Inc. v Carey*, 711 F2d 1136, 1139 [2d Cir 1983]).

Here, a review of the time records submitted by petitioners demonstrates that Gomez and McNamee *repeatedly* billed for what appears to be the simultaneous performance of identical services. For example, on October 24, 2016, Gomez spent 4.50 hours “[c]onfer[ing] with M. Grygiel and K. McNamee re: denial of FOIL request” and McNamee spent 4.20 hours “[c]onfer[ring] with M. Grygiel re: FOIL Article 78.” Then, on October 25, 2016, Gomez spent 5.50 hours “confer[ring] with K. McNamee and M. Grygiel regarding strategy” and McNamee spent 5.40 hours “[c]onferring with M. Grygiel and J. Gomez re: FOIL Article 78.” Other duplicate entries appear on October 26, 27, 28, 30 and 31, 2016, as well as on November 17, 22, 23 and 30, 2016. It appears that Grygiel used this case to teach Gomez and McNamee about FOIL, and now seeks to hold respondents responsible for the fees incurred in connection therewith. The Court finds that awarding fees for the identical services provided by Gomez and McNamee would be inequitable, as would awarding fees for the time spent by Gomez and McNamee in learning about FOIL. Indeed, any such award would constitute a windfall for petitioners.

Under the circumstances, the Court finds that petitioners should only be awarded fees for the services performed by McNamee, who spent 71.1 hours on the file, slightly less than the 71.4 hours spent by Gomez. The Court further finds that the 71.1 hours spent by McNamee should be cut in half to account for the time spent in researching and familiarizing herself with FOIL. To the extent that McNamee billed for large amounts of time – typically ranging from 4 to 8 hours – and simply listed a variety of tasks performed during that time, it is impossible for the Court to parse out the time spent on any particular task. The Court finds that cutting the time in half is the most equitable way to address the situation. Finally, the Court finds that \$275.00 per hour is excessive in view of McNamee’s lack of experience and expertise; \$175.00 per hour is more appropriate. To that end, petitioners are awarded \$6,221.25 (35.55 hours x \$175.00 per hour) for the services performed by McNamee.

The Court also awards petitioners for the entire 9.2 hours spent by Grygiel on the file, but finds that the rate of \$450.00 per hour – which is excessive for this locality – should be reduced to \$350.00 per hour (*see Hinman v Jay's Vil. Chevrolet*, 239 AD2d at 749). Petitioners are therefore awarded \$3,220.00 (9.2 hours x \$350.00 per hour) for the services performed by Grygiel.

Insofar as the \$1,376.30 in administrative fees are concerned, the Court finds that petitioners are not entitled to the \$931.40 in Lexis Advance Fees nor to the \$40.00 New York State Library Fee. It has been explicitly held “that computer research is merely a substitute for an attorney’s time that is compensable under an application for attorneys’ fees and is not a separately taxable cost” (*United States of Am. v Merritt Meridian Constr. Corp.*, 95 F3d 153, 173 [2d Cir 1996]; *see Noghrey v Town of Brookhaven*, 17 Misc 3d 1102[A], 2007 NY Slip Op 51798[U], *6 [Sup Ct, Suffolk County 2007]). Moreover, these fees resulted from the excessive

research conducted by both Gomez and McNamee in learning about FOIL. Petitioners are therefore awarded only \$404.90 in administrative fees.

Briefly, the Court finds that the award of counsel fees should not be limited to the \$6,000.00 flat fee charged to petitioners in connection with this matter. “[T]he [C]ourt ‘is not bound by the existence of a retainer agreement or other agreement between the parties as to the fees in question’” (*Matter of Rose BB.*, 35 AD3d at 1046, quoting *Matter of Middagh*, 267 AD2d 593, 593 [1999]; see *Matter of Verplanck*, 151 AD2d at 767; see also *Ross v Congregation B’Nai Abraham Mordechai*, 12 Misc 3d 559, 565-568 [Civ Ct, NY County 2006]). Here, Grygiel has demonstrated that more than \$6,000.00 worth of work was done on the file.

Based upon the foregoing, petitioners are awarded a total of \$9,846.15 (\$6,221.25 + \$3,220.00 + \$404.90) in counsel fees. Respondents shall pay this \$9,846.15 to counsel for petitioners within **thirty (30) days** of service of a copy of this Decision and Order with notice of entry thereon.

Therefore, having considered the Affirmation of Michael J. Grygiel, Esq. with exhibits attached thereto, dated December 20, 2016; Affirmation of William C. Firth, Esq. with exhibit attached thereto, dated January 5, 2017; and Reply Affirmation of Michael J. Grygiel, Esq. with exhibit attached thereto, dated January 13, 2017, it is hereby

ORDERED that petitioners are awarded \$9,846.15 in counsel fees; and it is further

ORDERED that respondents shall pay this \$9,846.15 directly to counsel for petitioners within **thirty (30) days** of service of a copy of this Decision and Order with notice of entry thereon.

The original of this Decision and Order has been filed by the Court together with the submissions enumerated above. Counsel for petitioners is hereby directed to promptly obtain a

filed copy of this Decision and Order for service with notice of entry upon respondents in accordance with CPLR 5513.

Dated: March 31, 2017

Lake George, New
York

s/RJM _____
ROBERT J. MULLER, J.S.C.

ENTER:

