UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Patricia Welsch, et al, Plaintiffs, vs. Edward J. Dirkswager, Jr., Commissioner of the Department of Public Welfare of the State of Minnesota, et al, Defendants.	)	MEMORANDUM ORDER No. 4-72-Civil 451

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This action was brought six years ago on behalf of mentally retarded citizens civilly committed to several Minnesota state hospitals. The litigation has focused thus far on Cambridge State Hospital. In 1976 defendants appealed several orders to the Eighth Circuit, which in March 1977 affirmed in part and vacated and remanded in part, Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977). Following the remand, the parties prepared for another hearing, but were able at the last moment to successfully negotiate a consent decree with respect to Cambridge, approved by the Court on December 28, 1977. Plaintiffs now have moved for attorneys' fees and costs for trial preparation and settlement following the remand from the Eighth Circuit.

I. Eleventh Amendment Immunity.

In Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), the Eighth Circuit held that attorneys' fees could be awarded against a state under the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988 (The 1976 Act), and that the Eleventh Amendment did not bar such awards. The Supreme Court granted certiorari in Finney and decision on this motion was delayed pending the outcome of that case. The Supreme Court decided Finney on June 23, 1978, Hutto v. Finney, 46 U.S.L.W. 4817, and affirmed the Eighth Circuit's view. There is thus no bar to awarding fees against the State in this case.

II. Fee Awards to Legal Service Organizations.

Defendants acknowledge that this case is properly within the purview of 42 U.S.C. § 1988 and that, with regard to the consent decree, plaintiffs are the prevailing party. Defendants do dispute, however, the reasonableness of plaintiffs' counsel's hourly fee request and certain portions of the fees and costs.

The major area of dispute is how an hourly rate for plaintiffs' counsel, who is a salaried attorney for the Legal Aid Society of Minneapolis,[1] should be determined. Defendants argue that legal services attorneys should be compensated at substantially less than the private bar rate. They assert that the 1976 Act contemplates reimbursing fee-paying clients, not giving "windfall" awards to entities dependent on public funds. They also argue that the fee plaintiffs' counsel claims of $75.00 per hour is impermissibly high because it far exceeds counsel's hourly pay based on his annual salary.

Most courts that have considered the award of fees under the 1976 Act or similar provisions of other civil rights acts, see e.g., 42 U.S.C. § 2000a-3(b), have decided that fee awards should not be either denied or limited simply because legal services attorneys or public interest law firms are involved. See e.g., Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Lund v. Affleck, 442 F. Supp. 1109 (D. R.I. 1977); Swann v. Charlotte-Mecklenberg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975). But cf. Equal Employment Opportunity Comm'n v. Enterprise Ass'n Steamfitters, 542 F.2d 579 (2d Cir. 1976) (factor of public funding may be taken into account in district court's discretion). Although the legislative history of the 1976 Act contains some reference to "fee-paying" clients, S. Rep. No. 94-1011, reprinted in 5 U.S.C.C.A. 5908 at 5913 (1976), and the Act's purpose is in part to attract the private bar, the history also states:

> "It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature." Id. at 5913.

The Report approvingly cites the Swann case, supra, in which a fee award was granted to attorneys in a school desegregation case even though the client had no obligation to pay. Moreover, although legal aid offices receive public funds, their resources are limited and fee awards "enhance their capabilities to assist in the enforcement of congressionally favored rights." Rodriguez v. Taylor, supra, at 1245. This Court concludes that under the Act an attorney's status as a legal aid lawyer does not merit denial or limitation of an award of reasonable fees comparable to those a private attorney might receive under the same circumstances.

This conclusion essentially disposes of defendants' second point as well. It would be unrealistic to determine a reasonable hourly rate of compensation

based on legal aid attorneys' annual salaries, for those salaries do not accurately reflect the "market" value of the attorneys' services. In Rodriguez v. Taylor, supra, the Court addressed this problem:

> "Legal aid organizations often are the sole representatives of the economically, socially and culturally deprived in their disputes with landlords, government welfare agencies, employers and creditors. The cumulative value to society, and hence the derivative value of individual attorney's time, from legal services representation of the needy is substantial, albeit not easily monetized.
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> Legal services salaries are generally considered lower than salaries paid associates in private firms who have comparable experience and credentials. This salary differential need bear no relation to the quality of representation, in general or in a particular case, or to the benefits received by clients. Compensation disparities usually reflect the relative poverty of legal services funding." Id. at 1248.

Some courts have referred, as defendants suggest, to the scale provided by the Criminal Justice Act (CJA), 18 U.S.C. 3006(A)(d), see Equal Employment Opportunity Comm'n v. Enterprise Ass'n Steamfitters, supra, but that approach was flatly rejected in Rodriguez v. Taylor, supra, at 1249-50, on the ground that the CJA compensation scales are designed to serve significantly different ends than the 1976 Act. This Court also rejects use of the CJA scales or counsel's annual salary as a basis for determining the fee. Rather, the proper approach is to take into account the several factors listed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), approved by the Eighth Circuit in Wharton v. Knefel, 562 F.2d 550 at 557 n. 37 (1977), including customary billing rates of private attorneys in this area, to arrive at a reasonable fee.[2]

III. Factors in Determining a Reasonable Fee.

The Court in Johnson v. Georgia Highway Express, Inc., supra, listed twelve factors courts should take into account in determining a reasonable fee: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases. The Court will also take into account another factor--that the award will be made from the public fisc. Some of these factors will be combined in the discussion below.

A. The Time and Labor Required.

Defendants do not dispute plaintiffs' counsel's calculation of hours or the reasonableness of the amount of time spent on various activities, as revealed by counsel's detailed time sheets. The Court will add that in its own judgment and based on its familiarity with this case, the amount of time involved in preparation for a possible trial and in settlement negotiations was entirely reasonable. There is no duplication of fees--although Mr. Granquist was accompanied by an associate on some occasions, no fees have been requested for his work.

Defendants assert, however, that there should be some distinction between "legal work in the strict sense" and other activities. Johnson, supra, at 717, expresses the reason for such distinctions--many tasks can be performed efficiently by a non-lawyer and the mere fact that a lawyer does something does not enhance its dollar value. Defendants suggest that different rates should be set for out-of-court time, supervisory time, travel time, investigation, and court room work, with the rate for the former four categories lower than for the latter. A distinction between court room time and other time is generally valid, for trial may require a kind of sustained concentration and exercise of unique legal skills that are rarely needed in other tasks such as routine factual investigation. But in the particular circumstances of this case, there is no reason to distinguish between the two. In-court time was only 4.5 hours for pretrial conferences and the motion for approval of the consent decree. Substantial out-of-court time, however, was spent on preparation, negotiation, and drafting of the consent decree, which demanded the same degree of legal skill and attention that would have been required had the issues been presented to the Court.

Nor does the Court find that time spent on investigation should be distinguished from any other "legal" time. Due to the nature of this suit, counsel's intimate familiarity with the facts and his personal knowledge of the conditions at Cambridge were essential. Had someone other than counsel performed these investigatory tasks, the process of negotiation and settlement would have been far less efficient.

Travel time, however, should be reimbursed at a lower rate. Although counsel traveled with an expert to Cambridge on two occasions, and thus had an opportunity to consult with him, time spent driving simply cannot be utilized as efficiently as regular work time. In other instances, although travel to Cambridge was essential to conducting informed negotiations and preparation, the

travel time itself was not used for "legal work." All travel time will therefore be reimbursed at half the hourly rate. See Keyes v. School Dist. No. 1, Denver, Colo., 439 F. Supp. 393, 409 (D. Colo. 1977).

Supervisory time will be compensated at the full rate. The kind of supervision involved here--instructing other personnel on the nature of the research to be undertaken--required the exercise of legal skill and could not have been performed by a non-lawyer. Moreover, the use of other personnel for research tasks is essentially an economy measure--the supervisory time was much lower than the time that would have been involved had counsel performed the delegated tasks himself.

B. Novelty and Difficulty of the Case and Degree of Skill Required.

At the outset, this case was novel indeed, for it raised the difficult question of what, if any, constitutional protections should be accorded to civilly committed mentally retarded persons at State institutions. In the early stages of the case, complicated medical, psychological, and other factual issues had to be investigated and resolved. The highest degree of skill was required and was demonstrated. During the period of time for which fees are now sought, many of the difficult legal questions were settled and the factual issues, although still complex, were considerably refined. But Mr. Granquist's long experience with the case permitted him to negotiate the consent decree more easily and more efficiently than could have been expected of a newcomer--if the task was easier than other phases of the suit, that is largely attributable to counsel's own efforts.

C. Preclusion of Other Employment.

This is one respect in which legal aid offices differ from private firms--that is, the attorneys are not precluded from "other employment" because they take a certain case. The Court should consider, however, the limited resources of a legal aid society and take into account the fact that some cases may be turned away when a large case is accepted. There is no evidence that the Legal Aid Society turned away cases in 1977 as a result of Mr. Granquist's efforts in this suit, however; Mr. Granquist's position with the Society was largely an administrative one.

D. Customary Fee and Awards in Other Cases.

Counsel has submitted an affidavit from another lawyer in the area who is familiar with civil rights litigation, which attests that $75.00 an hour is a

reasonable billing rate for this type of litigation. The Court notes, however, that in its own experience with fee awards, there is a great deal of variation in billing rates. Some local lawyers with 30 years of experience at large firms charge $65.00 per hour for class action cases of similar complexity; the same firm is likely to bill the time of an attorney with about 10 years of experience at $60.00 per hour. Many firms bill the time of young associates with even less experience at $35.00 or $40.00 per hour.

Looking at awards in other civil rights cases of similar complexity, the disparities appear even greater. Awards have ranged from $5.00 per hour, Spero v. Abbott Laboratories, 396 F. Supp. 321 (N.D. Ill. 1975), to an average effective rate of $126.00 per hour, Oliver v. Kalamazoo Bd. of Education, 73 F.R.D. 30 (W.D. Mich. 1976). See Keyes, supra, at 413, n.26, for a list of other cases. In Keyes the court cut requested fees of $60.00 per hour and $75.00 per hour for in-court time to $35.00 and $45.00, respectively, awarding even less for out-of-court work; the court noted that Denver rates were somewhat lower than those in the rest of the country.

E. Whether the Fee is Fixed or Contingent.

This factor is a method of taking into account the risk a lawyer may have run by accepting a case with no certain promise of reaping any financial benefit. It has little bearing on cases involving legal services organizations for they are not dependent upon fee-generating cases for their financial survival. The Court therefore finds this factor irrelevant here.

F. Time Limitations Imposed by the Client or Circumstances.

This factor has no bearing on this suit.

G. The Amount Involved and the Results Obtained.

It cannot be gainsaid that plaintiffs have won incalculably valuable benefits as a result of this suit. In monetary terms, the sums the State has expended or will expend on plaintiffs' behalf is huge, and, in less tangible terms, the quality of plaintiffs' lives will be greatly improved.

H. Reputation, Experience, and Ability of Counsel.

Mr. Granquist has approximately nine years of experience as an attorney with the Legal Aid Society, and has served as its Executive Director since 1974. He is an exceptionally able lawyer and the Court agrees with defendants that he is a credit to his profession.

I. The "undesirability"of the Case.

This factor is often extremely important in controversial civil rights cases,

for attorneys' reputations and businesses may be damaged or they may be the objects of public scorn when they champion unpopular causes. See e.g., Lund v. Affleck, supra. Although the instant case has not been universally well received, neither has it been highly unpopular or resulted in any harm to plaintiffs' counsel or the Legal Aid Society.

J. The Nature and Length of the Professional Relationship.

This factor is not relevant to this suit.

K. Payment from the Public Fisc.

This criterion is not listed as one of the factors in Johnson, but it is appropriate to consider in this case that the source of the attorneys' fees payments is the same budget that must be used to effectuate the reforms plaintiffs have won. The Court considered this factor in Keyes, supra, at 415, and the Supreme Court in Hutto v. Finney, 46 U.S.L.W. 4817 (June 23, 1978), noted that the fact that fees are to be awarded against the state "may counsel moderation in determining the size of the award." Id. at 4821 n.20. Because the award here will be taken from the general funds of the Welfare Department, the Court must ensure that the amount does not interfere with the Department's ability to carry out its duties, now or in the future. Nor is this a situation in which "deterrence" of the State is a relevant factor, cf. Finney v. Hutto, 410 F. Supp. 251, 285 (D. Ark. 1976), for this litigation has been marked for the most part by cooperation from both sides.[3]

If the quality of work and the importance of the case to plaintiffs were the only factors to be taken into account, the Court would not hesitate to award the full amount plaintiffs' counsel has requested. But all of the factors discussed must be balanced and considering them all, particularly that the payments will come from the same funds necessary to ensure humane living conditions at Cambridge, the Court has determined that $55.00 per hour, with travel time at half that rate, represents a reasonable, albeit conservative, fee.

IV. Fees for Seeking Fees.

Counsel has requested reimbursement for 6.8 hours spent on the fee application. Courts are divided as to whether fees should be awarded for such activities. According to one view, fees should be routinely granted but at a lower rate. See e.g., National Ass'n for Mental Health, Inc. v. Weinberger, 68 F.R.D. 387, 393 (D. D.C. 1975). Other courts are of the view that resolution of the fee issue inures only to the benefit of counsel, not to the class, and that no

amount should be awarded at all. See e.g., Clanton v. Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976). The Court believes that the determination must be flexible--there may be instances in which the class does benefit from counsel's efforts, in that class members are relieved of fee obligations themselves, or cases where fee application time should be reimbursed because defendant's conduct has caused plaintiff to spend numerous hours on the issue. But there are no such special circumstances here--the award will benefit only the Society, not the plaintiffs. The Court therefore declines to grant any amount for time spent on the fee application.

V. Calculation of Fees.

Plaintiffs' counsel shall be awarded $55.00 per hour for 187.43 hours of work, or a total of $10,308.65, and $27.50 per hour for eight hours of travel time, or a total of $220.00. The entire award of attorneys' fees is thus $10,528.65.

VI. Costs.

Plaintiffs have asked for costs in the amount of $2,254.41 for the time of an expert witness and for paralegal work. Defendants contend that the expert's fees and expenses should not be reimbursed because he functioned as an advisor to plaintiffs during negotiations and that the sum requested for one of the paralegals (Briggs) is excessive because it includes the production costs of a document prepared for trial, which defendants assert was unnecessary. The Court finds that all of the costs incurred were reasonable and necessary in preparation for possible trial and that the expert's advice and investigation were essential to the negotiation of the consent decree. All the requested costs will therefore be granted.

IT IS ORDERED THAT:

1. Plaintiffs' counsel is awarded attorneys' fees in the amount of Ten Thousand Five Hundred Twenty-eight Dollars and Sixty-five Cents ($10,528.65), to be made payable to Central Minnesota Legal Services.

2. Costs are awarded in the amount of Two Thousand Two Hundred Fifty-four Dollars and Forty-one Cents ($2,254.41).

July 14, 1978.

/s/ Earl R. Larson

United States Senior District Judge

FOOTNOTES

1. The Law Offices of the Legal Aid Society of Minneapolis now operate under the auspices of a non-profit corporation, Central Minnesota Legal Services, to which plaintiffs' counsel requests the fees be made payable. Financing for the corporation comes from various sources, including the Department of Health, Education and Welfare, the United Fund, the Legal Services Corporation and others.

2. In Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), the Eighth Circuit suggested that the analysis used in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), is the appropriate method of determining "any discretionary fee award in a class action context." 513 F.2d at 128. The Lindy analysis takes as its starting point a "lodestar" figure determined by multiplying the number of hours spent times the "typical hourly rates." The lodestar figure may then be increased by a multiplier representing the Court's assessment of the quality of representation and the risk involved in the litigation. This analysis is aimed at starting with an "objective" basis for the fee award and considering "subjective" factors only after the lodestar is calculated.

   The Eighth Circuit has also cited the Johnson factors approvingly as the standards for determining awards under the 1976 Act. Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977). The Johnson analysis differs from Lindy perhaps more in form than in substance--certain "subjective" factors are considered in arriving at a reasonable fee and no multiplier is used. In other words, factors such as the quality of work and risk of the litigation go into the beginning of the equation rather than being taken into account in a multiplier at the end.

   Because the Eighth Circuit has approved both of these methods of determining attorneys' fees, it is not entirely clear which method ought to be used in which cases. It should be noted that Johnson, not Lindy, was cited as setting out the "appropriate standards" in the legislative history of the 1976 Act, S. Rep. 94-1011, reprinted in 5 U.S.C.C.A. 5908 at 5913. The parties in this case agree that Johnson applies here. Moreover, the Johnson analysis is particularly appropriate in circumstances such as these, for the reasonable hourly billing rate is really the end point rather than the starting point of the Court's inquiry--the Court cannot even use counsel's "usual" rate as a guideline. So long as both the subjective and objective factors considered in determining the billing rate are clearly set out and discussed, it seems that the Johnson method is as efficacious as Lindy in ensuring that the bar and bench are not "brought into disrepute" and there is no "prejudice to those whose substantive interests are at stake." Grunin v. International House of Pancakes, supra, at 128.

3. That fees are to be paid by the State may not always be an important factor in determining the size of an award--Congress obviously intended to subject the states to the burden of fee awards and states should be treated like other litigants, for the most part. But, as with other litigants, the Court should take into account the position of the parties and take care that an award not deprive plaintiffs of the fruits of their victory. See e.g., Grunin v. International House of Pancakes, 513 F.2d 114, 128 (8th Cir. 1975).