

CASE NO. 09-6422

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GRIFFIN INDUSTRIES, INC.

PLAINTIFF-APPELLEE

V.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

DEFENDANT-APPELLANT

AND

LISA P. JACKSON, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

SEALED REPLY BRIEF OF THE DEFENDANT-APPELLANT
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

Griffin's brief misstates relevant facts and ignores the legal findings necessary to support an award of attorneys' fees under 28 U.S.C. § 2412(b). This case only presented two legal issues: First, does a defendant have the right to review an agency's investigative file and assert FOIA exemptions on behalf of the Agency? Second, must documents that are available to the public, without redaction, be reviewed for confidential information? The Court should overturn the award of attorneys' fees because the district court applied the incorrect legal standard and the factual record does not support a finding of bad faith.

REPLY TO GRIFFIN'S STATEMENT OF FACTS

The relevant facts, with proper citations to the record, are set forth in the U.S. Environmental Protection Agency's brief. While these facts will not be reiterated here, the following statements made by Griffin are inaccurate and must be corrected.

First, Griffin states, without citation to the record, that the two Freedom of Information Act requests were linked "to a Griffin competitor and ties were also shown to the EPA." *See* Griffin's brief at 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit A at ¶ 3, APX at 151.] [REDACTED]

[REDACTED]. Griffin's statement to the contrary is incorrect and has no support in the record on appeal.

Second, Griffin alleges that for "more than four months [it] unavailingly demanded EPA protect its [confidential business information (CBI)] by not releasing the documents" *See* Griffin's brief at 2. Griffin again misstates the facts. [REDACTED]

[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit A at ¶ 9, APX at 154.] [REDACTED]

[REDACTED]. [*Id.*, Exhibit A at ¶ 9, APX at 154-55.] [REDACTED]

[REDACTED]. [*Id.*] Contrary to its representation to this Court, Griffin received the initial relief it requested from the EPA.

[REDACTED]. [*Id.*, Exhibit A at ¶ 13, APX at 156.] [REDACTED]

[REDACTED]

[REDACTED]. [*Id.*, Exhibit D, APX at 208.] [REDACTED]

[REDACTED]

[REDACTED]. [*Id.*, Exhibit D, APX at 210] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[*Id.*]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” [*Id.*, Exhibit D, APX at 216.] [REDACTED]

[REDACTED]

[REDACTED].

[*Id.*, Exhibit D, APX at 215.] Despite these assurances, Griffin nonetheless filed a complaint and temporary restraining order against the EPA. [R. 1: Complaint; R. 2: Motion for Temporary Restraining Order.] Contrary to Griffin’s assertions, the EPA was responsive to Griffin’s concerns about the FOIA requests. Griffin’s

attempt to mislead the Court as to these facts is disingenuous.

[REDACTED]
[REDACTED].” See Griffin’s brief at 5 (emphasis in original). While this may be true, it is misleading. [REDACTED]

[REDACTED]
[R. 58 Sealed Response to Motion at 6-7, APX at 132-33.] [REDACTED]

[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit A at ¶ 9, APX at 155.] Griffin’s assertion to the contrary is refuted by the record.

Griffin proceeds with unwarranted attacks against Bette Ojala. See Griffin’s brief at 8. Griffin, again ignoring the facts, says “Ojala arbitrarily claimed any document that was obtained from a state agency was ‘public’ and not entitled to CBI protections” [*Id.*] [REDACTED]

[REDACTED]
[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit A at ¶¶ 10-11 , APX at 156.] The record does not indicate that Ojala’s determination on the public nature of the documents was in any way arbitrary, and certainly her conduct cannot be found to be in bad faith.

[REDACTED]
[REDACTED]. See

Griffin's brief at 8-9. [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See Griffin's brief at 9. [R. 58: Sealed Response to Motion, Exhibit D, APX at 188-223.]

Fifth, Griffin next alleges the EPA failed to reconfirm the documents were publicly available. See Griffin's brief at 9. [REDACTED]

[REDACTED]

[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit D, APX at 210.] [REDACTED]

[REDACTED]."

[*Id.*, Exhibit D, APX at 221.] [REDACTED]

[REDACTED]

[REDACTED] [R. 58: Sealed Response to Motion, Exhibit B at ¶¶ 4-7, APX at 161-62.]

Sixth, Griffin claims the EPA did not offer any administrative record supporting its decision regarding the FOIA requests. See Griffin's brief at 10. Because Griffin chose to sue the EPA prior to the EPA's completion of its CBI

review, the development of an administrative record was cut short. Nonetheless, the EPA submitted all email correspondence with Griffin and declarations explaining its actions. It is unclear how this would constitute bad faith or what additional records Griffin believes should be in the administrative record.

Seventh, Griffin, again disregarding the evidence of record, claims the EPA had no credible evidence to support its decisions the documents were available to the public. *See* Griffin's brief at 11. [REDACTED]

[REDACTED]

[REDACTED]. [R. 58: Sealed Response to Motion, Exhibit A at ¶¶ 10-12 , APX at 155-56.] [REDACTED]

[REDACTED]

[REDACTED]. [*Id.*, Exhibit A at ¶ 15, APX at 157; *Id.*, Exhibit D, APX at 210, 215, 221.] Critically, at no time during the three-year litigation did Griffin produce a single document from a state agency to refute the EPA's statements the documents were available to the public. The record below supports the EPA's position the documents in question are available to the public without redaction. Griffin cannot now argue otherwise on appeal.

[REDACTED]

[REDACTED].” *See* Griffin's brief at 16. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [R. 37: Sealed Opinion and Order at 50-55, APX at 59-64.] Indeed, Griffin provided no law in its brief to support this assertion. Griffin's claim it presented clear legal authority, whether for its position on the investigative file or its claim the public documents were entitled to confidential treatment, is simply incorrect.

Finally, Griffin accuses the EPA of conducting the litigation in bad faith. *See* Griffin's brief at 31-35. Yet Griffin cannot cite to a single act of bad faith committed by the EPA or its counsel during litigation. Moreover, Griffin ignores the truncated period of this litigation. The complaint was filed on April 22, 2005. [R. 1: Complaint.] A hearing occurred on May 13, 2005. [R. 22: Minute Entry.] By May 20, 2005 — less than one month after filing suit — this matter was fully briefed. No activity occurred again until the court set a status conference on April 27, 2006. [R. 28: Minute Entry.] The court issued its decision on June 20, 2008. [R. 37: Sealed Opinion and Order.] During this time, no documents were produced by the EPA pursuant to the FOIA request. Griffin suffered no harm from any disclosures as the preliminary injunction remained in effect for three years. The delays in this litigation were not due to the EPA. Here, the EPA filed two briefs and attended two hearings, all at the direction of the court. EPA's conduct in this litigation in no way harassed Griffin or otherwise constituted bad faith.

As shown above, Griffin makes demonstrably incorrect representations of fact to the Court. This case did not involve bad faith or any improper motive by the EPA. It merely presented two legal issues: First, does a defendant have the right to review an agency's investigative file and assert FOIA exemptions on behalf of the agency? Second, must documents that are available to the public, without redaction, be reviewed for confidential information? The EPA prevailed on issue one, while Griffin prevailed on issue two. Griffin attempts to describe the EPA's conduct as bad faith simply so it can justify an award of attorneys' fees. This argument must fail, as the EPA simply defended itself in court based upon its good faith and partially successful interpretation of the law.

ARGUMENT

I. Pre-litigation conduct does not justify an award of attorneys' fees under 28 U.S.C. § 2412(b)

The Sixth Circuit has rejected Griffin's argument that pre-litigation conduct justifies an award of attorneys' fees. In *Shimman v. International Union of Operating Eng'rs*, 744 F.2d 1226, 1233 (6th Cir. 1984), this Court held that "the bad faith exception to the American Rule does not allow an award of attorneys' fees based only on bad faith in the conduct giving rise to the underlying claim." As the Court explained, "[a] person who harms another in bad faith is nonetheless entitled to defend a lawsuit in good faith." *Id.* at 1232.

Griffin's attempt to distinguish *Shimman* is unsuccessful. Griffin argues the fee award is not premised on the description of documents as publicly available, but rather "the subsequent abuse of the court system and oppression of Griffin." See Griffin's brief at 20. Griffin's argument is without merit. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [R. 37: Sealed Opinion and Order at 50-55, APX at 59-64.] The entire litigation focused on whether documents available to the public were to be considered confidential, and whether Griffin had a right to exercise FOIA exemptions on the EPA's behalf. The EPA's position that public information is not confidential is precisely the issue the court found to be arbitrary and capricious. [REDACTED]

[REDACTED]

[REDACTED]. Because pre-litigation conduct giving rise to the underlying claim cannot form the basis for a fee award, the award is improper. See *Shimman*, 774 F.2d at 1232.

II. The EPA did not litigate in bad faith

The factual record contains no evidence that the EPA litigated in bad faith. The actual litigation of this case consisted of a preliminary injunction hearing and

briefings by the parties ordered by the trial court and took less than one month. Almost a year passed before a status conference was held, and then another two years before the decision by the trial court. During this entire time, the EPA did not delay the proceedings or harass Griffin in any way, nor did it release documents during the pendency of the action before the trial court. Moreover, while Griffin incorrectly argues the EPA failed to confirm the documents in question were publicly available *prior* to litigation, no such claim can possibly be made about the EPA's conduct *during* the litigation. Indeed, the EPA provided two separate sworn declarations, unrefuted by Griffin, that conclusively establish the documents in question were available to the public.

In addition to the previously referenced declaration of Jonathan Cole, the EPA submitted a declaration from Thomas Seaton, Deputy Director of the Legal Counsel and Resource Management Division for the EPA's Criminal Enforcement program, confirming that the state agency records in EPA's possession were available without redaction to the general public from the respective state. [R. 29: Notice of Filing at 2.] In Seaton's letter to the state agencies seeking confirmation he explained that "[i]t is important for our office to verify our understanding that these records are publicly available, without redaction, from your agency." [*Id.*, Attachment 1, Exhibit A at 1.] Each state confirmed that the documents were

available to the public without redaction. [*Id.*, Attachment 1, Exhibit B.] Given these unrefuted facts, Griffin cannot establish that the EPA failed to confirm the public availability of the documents in question or otherwise litigating in bad faith.

Griffin criticizes the EPA for relying on hearsay evidence at “trial.”

However, no trial occurred. As the Supreme Court has recognized, a preliminary injunction uses “procedures that are less formal and evidence that is less complete than in a trial on the merits.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Additionally, when a court reviews an agency action under the Administrative Procedure Act, as here, “the focus of the review should be ‘the administrative record already in existence, not some new record made initially in the reviewing court.’” *Charter Township of Van Buren v. Wayne Disposal, Inc.*, No. 98-1463, 1999 WL 701924 (6th Cir. Aug. 30, 1999) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

Griffin argues that the EPA’s failure to call Ojala as a witness at the preliminary injunction hearing somehow constituted bad faith. However, the EPA submitted the sworn declaration of Jonathan Cole, an EPA official supervising Ojala and with authority over the subject matter of the litigation. Moreover, at no point did Griffin or the district court ever indicate the EPA’s submitted declarations were insufficient or that Ojala’s live testimony was necessary. Griffin never objected to the use of any sworn declaration during the litigation. Griffin’s attempt

[REDACTED].” [R. 37: Sealed Opinion and Order at 6, APX at 15.] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Furthermore, in the March 13, 2009, telephone hearing, the court justified its decision to award attorneys’ fees and expenses based on the fact that the court “painstakingly reviewed the actions of the EPA and the agents of EPA, which led to a finding of arbitrary and capricious behavior by EPA, and for the reasons set forth in that order,” as well as the petitioner’s reply brief. [R. 69: Transcript of March 13, 2009, Telephone Conference at 18.] Nowhere in his decision does the judge clarify or correct his earlier statement that subjective motivation is “unnecessary” for the purpose of determining whether the EPA had violated the APA. The court proceeded to base its “bad faith” award of attorneys’ fees on this finding of “arbitrary and capricious” pre-litigation action by the EPA. [*Id.*]

Finally, the record establishes that the EPA litigated in good faith. Griffin does not explain why the EPA’s reliance on Executive Order 12,600 was in bad faith. Executive Order 12,600 is explicit that no review for CBI is required if the material sought to be withheld “has been officially made available to the public.” Predisclosure Notification Procedures for Confidential Commercial Information,

Exec. Order No. 12,600, § 8(b), 52 Fed. Reg. 23781 (June 23, 1987). Based upon this Executive Order, the EPA reasonably concluded that no CBI designation and notification procedure was required. Additionally, substantial case law supports the EPA's common-sense argument that information otherwise available to the public is not confidential. *See* EPA's brief at 26. Griffin has never cited any law to the contrary. In light of this substantial authority, the EPA cannot reasonably be found to have acted in bad faith in this litigation.

CONCLUSION

The district court's award of attorneys' fees to Griffin should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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