

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ROGER HALL, et al.,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Civil Action 04-00814 (HHK)

MEMORANDUM OPINION AND ORDER

Plaintiffs Roger Hall (“Hall”), Studies Solutions Results, Inc. (“Solutions”), and Accuracy in Media, filed this action against defendant Central Intelligence Agency (“CIA”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking records related to soldiers who are prisoners of war or missing in action. Before the court are objections raised by Hall and Solutions (hereinafter “plaintiffs”) pursuant to Federal Rule of Civil Procedure 72 and Local Civil Rule 72.2, to a memorandum opinion and order docketed by Magistrate Judge John Facciola on March 10, 2008 [#95].¹ Upon consideration of the objections, the opposition thereto, and the record of the case, the court denies the objections.

I. BACKGROUND

Prior to the referral to Magistrate Judge John Facciola, the CIA moved to dismiss and for summary judgment on plaintiffs’ claims, and plaintiffs cross-moved for summary judgment. Hall submitted a declaration in support of his motion for summary judgment and in opposition to the

¹ Plaintiffs incorrectly labeled their objections as a “motion for reconsideration.”

CIA's motion. The CIA then moved to strike numerous paragraphs in Hall's declaration on the grounds that these paragraphs violated Federal Rule of Civil Procedure ("Rule") 56(e). This court referred the motion to strike to the magistrate judge, who granted the CIA's motion to strike numerous paragraphs from Hall's declaration. Hall and Solutions now object to the magistrate judge's ruling.

II. ANALYSIS

Plaintiffs raise two objections to the magistrate judge's ruling. Plaintiffs contend that: (1) the magistrate judge misinterpreted Rule 56(e) and (2) the magistrate judge should have qualified Hall as an expert witness and thus permitted him to attest to opinions and facts not otherwise admissible. In addition, plaintiffs assert that this court should permit Hall to submit a revised declaration that, according to plaintiffs, addresses the deficiencies in the stricken paragraphs. Plaintiffs' arguments are without merit.

A. Legal Standard

On review, a magistrate judge's decision is "entitled to great deference and will be upheld unless found to be clearly erroneous or contrary to law." *Neuder v. Battelle Pacific Northwest Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000) (internal quotation omitted); *see also* LCvR 72.2(c). "The court will affirm the magistrate judge's determination unless on the entire evidence the court is left with the definite and firm conviction that a mistake has been committed." *Neuder*, 194 F.R.D. at 292.

B. Federal Rule of Civil Procedure 56(e)

In its motion to strike, the CIA asserted that numerous paragraphs in Hall's declaration failed to comply with Rule 56(e). Rule 56(e)(1) states that "[a] supporting or opposing affidavit

must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.” The CIA asserted that numerous paragraphs in Hall’s declaration violated Rule 56(e) because, *inter alia*, they contained hearsay and contained statements that were not based on personal knowledge.

In their opposing brief filed with the magistrate judge, plaintiffs rejoined that Rule 56(e) should be liberally construed because Hall’s declaration served two purposes. That is, Hall submitted his declaration both in support of his motion for summary judgment and in opposition to the CIA’s motion for summary judgment. Plaintiffs asserted that, in *Underwater Storage, Inc. v. United States Rubber Co.*, 371 F.2d 950 (D.C. Cir. 1966) and *Corley v. Life & Cas. Ins. Co.*, 296 F.2d 449, 450 (D.C. Cir. 1961), the D.C. Circuit indicated that courts should be less demanding in their examination of opposing papers. For example, in *Underwater Storage, Inc.*, the D.C. Circuit stated that “[t]he courts are quite critical of the papers presented by the moving party, but not of the opposing papers.” 371 F.2d at 953 (*quoting Wittlin v. Giacalone*, 154 F.2d 20, 21 (D.C. Cir. 1946)).

The magistrate judge disagreed. He pointed out that Hall submitted his declaration *both* in support of his motion for summary judgment and in opposition to the CIA’s motion for summary judgment. The magistrate judge explained that plaintiffs failed to explain why this “dual function” declaration should be analyzed under the more liberal standard that applies to opposing papers, rather than the stricter standard that applies to moving papers. Mem. Op. 6. The magistrate judge further found that, even if he liberally construed Hall’s declaration, the declaration was still deficient. The magistrate judge noted that numerous statements in Hall’s declaration were not made upon personal knowledge, and the D.C. Circuit has stated “[a]lthough

[Rule 56(e)'s] directive with respect to admissibility of an affidavit's contents on summary judgment has been liberally construed, its requirement of personal knowledge is unequivocal."

Londrigan v. FBI, 670 F.2d 1164, 1174 (D.C. Cir. 1981).

Plaintiffs object to the magistrate judge's ruling by arguing that the magistrate judge erred by failing to liberally construe Rule 56(e). Plaintiffs' argument is without merit. Plaintiffs correctly note that there is language in at least three D.C. Circuit cases that indicate that courts should be less critical of papers submitted in opposition to, rather than in support of, motions for summary judgment. *See Underwater Storage, Inc.*, 371 F.2d at 953; *Corley*, 296 F.2d at 450; *Wittlin*, 154 F. 2d at 21. These cases are not relevant, however. As the magistrate judge pointed out, Hall's declaration was submitted *both* in support of his moving and opposing papers. As noted by the magistrate judge, there is no authority that states that courts should liberally construe Rule 56(e) with respect to declarations that serve this dual purpose. Thus, the magistrate judge's decision not to liberally construe Rule 56(e) was neither erroneous nor contrary to law.

Furthermore, even if the magistrate judge erred by not liberally construing Rule 56(e), the magistrate judge's decision was still not erroneous. A liberal construction does not require the court to completely ignore the standards set forth in Rule 56(e). Yet, this is precisely what the magistrate judge would have had to do for many of the stricken paragraphs to be admissible. For example, Hall sought to rely on facts of which he had no personal knowledge, which is clearly prohibited by Rule 56(e). *Londrigan*, 670 F.2d at 1174 (stating that Rule 56's "requirement of personal knowledge is unequivocal."). The magistrate judge was not required to completely

ignore the standards set forth in Rule 56(e). Accordingly, his ruling is neither clearly erroneous nor contrary to law.

C. Expert Witness

In the CIA's motion to strike that was referred to the magistrate judge, the CIA argued that Hall's declaration improperly asserted that Hall was competent to testify as an expert witness. Plaintiffs opposed the CIA's motion by arguing that Hall was competent to testify as an expert witness. Plaintiffs contended that, as an expert witness, the paragraphs of Hall's declaration challenged by the CIA were admissible in evidence because expert witnesses are permitted to testify as to opinion and facts that would otherwise be inadmissible. The magistrate judge declined to address Hall's request to be considered as an expert witness because the stricken portions of Hall's declaration were inadmissible regardless of whether Hall was an expert witness.

Plaintiffs now object to the magistrate judge's ruling by contending that the magistrate judge erred in refusing to address Hall's request to be considered as an expert witness. Plaintiffs insist that Hall is objective and unbiased, and thus is qualified to serve as an expert. This objection addresses a non-issue. The magistrate judge did not address Hall's request to be considered as an expert witness because the stricken paragraphs of Hall's declaration were inadmissible even if Hall was an expert witness. Hall does not challenge the basis for the magistrate judge's decision that the stricken paragraphs of Hall's declaration would be inadmissible whether or not he was an expert witness. Thus, whether or not Hall qualifies as an expert is a moot point, and there is nothing clearly erroneous or contrary to law about the fact that the magistrate judge did not qualify Hall as an expert witness.

D. Revised Declaration

In their objections to the magistrate judge's ruling, plaintiffs request that the court permit Hall to substitute a revised declaration for the stricken declaration. Plaintiffs have attached a revised declaration to their objections. The CIA rejoins that this revised declaration still contains numerous flaws and is not admissible in its entirety.

This court will not address Hall's request to submit a revised declaration. Rule 72 and Local Civil Rule 72.2 permit plaintiffs to object to rulings made by magistrate judges. Hall's request to submit a revised declaration is in no way related to any objection to the magistrate judge's ruling. Instead, he is attempting to revise the declaration that was stricken in parts. An objection made pursuant to Rule 72 and Local Civil Rule 72.2 is not the proper means for revising stricken portions of a declaration.

III. CONCLUSION

For the foregoing reasons, it is this 29th day of August 2008, hereby

ORDERED that plaintiffs' objections to Magistrate Judge Facciola's ruling [#95] are hereby **DENIED**.

Henry H. Kennedy, Jr.
United States District Judge