

Final agency action regarding decision below:

REQHRG Date hearing requested

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

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| In the Matter of: JOAN FITZ-RANDOLPH, ID # 2000-91628, Appellant. | No. 01F-001-CCE ORDER DENYING APPELLANT'S MOTION FOR ATTORNEY'S FEES AND COSTS |
| In the Matter of: JAY BLANCHARD, ID # 2000-91589, Appellant. | No. 01F-002-CCE ORDER DENYING APPELLANT'S MOTION FOR ATTORNEY'S FEES AND COSTS |

Pending before the Office of Administrative Hearings is Appellants' December 4, 2000 motion for attorney's fees and costs pursuant to A.R.S. § 41-1007, and the Citizens Clean Elections Commission's December 15, 2000 response in opposition thereto. For the reasons hereafter set forth, Appellants' motion is denied.

Background

Political candidates Joan Fitz-Randolph and Jay Blanchard ("Appellants") appealed two separate decisions by the Citizens Clean Elections Commission (the "Commission") regarding payment of matching funds under the Citizens Clean Elections Act, A.R.S. § 16-940 *et seq.* The Administrative Law Judge heard argument on October 27, 2000, and, on October 31, 2000, issued Findings of Fact, Conclusions of Law and Recommended Orders in Appellants' favor. The Commission adopted the Administrative Law Judge's Recommended Orders by Final Agency Decision dated November 6, 2000. Thereafter, Appellants sought attorney's fees and costs pursuant to

A.R.S. § 41-1007.

Applicable Law

A.R.S. § 41-1007 provides, in pertinent part:

A. Except as provided in section 42-2064, subsection G, a hearing officer or administrative law judge shall award fees and other costs to any prevailing party in a contested case or an appealable agency action brought pursuant to any state administrative hearing authority. For purposes of this subsection, a person is considered to be a prevailing party only if both:

1. The agency's position was not substantially justified.
2. The person prevails as to the most significant issue or set of issues unless the reason that the person prevailed is due to an intervening change in the law.

Positions of the Parties

The parties do not dispute that Appellants prevailed "as to the most significant issue or set of issues." Thus, resolution of Appellants' motion depends solely on whether the Commission's position was "substantially justified."

Appellants claim that the Commission's position was not substantially justified, apparently relying on the Administrative Law Judge's determination that the plain language of A.R.S. § 16-952(B) required the Commission to pay matching funds to Appellants without adjustment for subsequent transfer or refund by the respective non-participating candidates.

The Commission argues that the term "substantially justified" requires only that the Commission have had a reasonable basis for its decision, and that Appellants' motion should be denied because, as the Administrative Law Judge found, the underlying appeal presented a close question. The Commission relies in large part on *Pierce v. Underwood*, 487 U.S. 552 (1988), a case construing language in the federal Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA") that is analogous to Arizona's statute.

Analysis

The Administrative Law Judge finds the authorities cited by the Commission to be persuasive and, ultimately, dispositive of Appellants' motion. In *Pierce*, the United States Supreme Court concluded that the term "substantially justified," as used in the EAJA, means "'justified in substance or in the main' – that is, justified to a degree that

could satisfy a reasonable person.” 487 U.S. at 565. Stated another way, a position can be substantially justified “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Id.* at 566 n.2. Because the language in A.R.S. § 41-1007 is analogous to the language in the EAJA, it is appropriate to construe A.R.S. § 41-1007 in accordance with the Supreme Court’s interpretation of the EAJA in *Pierce*.

Appellants correctly cite the Administrative Law Judge’s ultimate conclusion that the plain language of A.R.S. § 16-952(B) prevented the Commission from adjusting the amount of matching funds payable to a participating candidate based on a non-participating candidate’s transfer or refund of contributions received. However, the Administrative Law Judge’s conclusion in this regard does not mean that the Commission’s position was not “substantially justified.” As the Administrative Law Judge pointed out in several places in the recommended decision, the question presented was a close one, and not subject to easy resolution because strict application of the statute rendered an apparently unintended result (*i.e.*, the participating candidates receive funds from the Commission in an amount exceeding the amount of funds available to their non-participating opponents). The Administrative Law Judge concludes that under the totality of the facts and circumstances presented by these appeals, the Commission’s actions in attempting to harmonize the language of the statute with its purpose of “leveling the playing field” cannot be said to have been unreasonable, arbitrary, or without some basis in fact and law. Thus, the Commission’s position, while ultimately deemed incorrect, was nonetheless “substantially justified” as that term has been defined by the United States Supreme Court, and therefore Appellants are not entitled to an award of attorney’s fees under A.R.S. § 41-1007.

Based on the foregoing,

IT IS HEREBY ORDERED that Appellants’ December 4, 2000 motion for attorney’s fees and costs is **DENIED**.

Done this day, January ____, 2001.

Daniel G. Martin
Administrative Law Judge

Copy mailed this ____ day of
_____, 2001, to:

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By _____