

Final agency action regarding decision below:

REQHRG Date hearing requested

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CONWEST GROUP,

Appellant,

-v-

ARIZONA DEPARTMENT OF
ADMINISTRATION,

Appellee.

No. 00-1001-ADM

**ORDER RECOMMENDING
DENIAL OF REHEARING**

The undersigned has reviewed and considered Appellant Conwest's request for rehearing, award of attorney's fees, and request for pre-judgment interest. Appellee Arizona Department of Administration has failed to file any response. It is recommended, based on the following, that each of the requests be denied.

As to the issue of the denial of the claim for the duct work offsets , based on the law and the facts presented in this case, and having reviewed pertinent portions of the audio tape of the hearing, the undersigned is convinced that there is no basis for granting a rehearing on this issue.

As to the request for attorney's fees, the parties have not cited the undersigned to any statutory authority under the procurement code (A.R.S. §41-2611 et. seq.) or under the administrative rules promulgated by the director (A.A.C. 2-7-901 et seq.) that would provide authority to grant such fees. Nor have the parties suggested that anything in the contract provides for the award of such fees in this administrative proceeding.

Complainant cites A.R.S. §12-341.01 for the proposition that it is entitled to

attorney's fees. This statute has no application to this administrative proceeding. The applicable statute is §42-1007, and in the absence of other controlling authority, its provisions must be looked to for guidance in the matter of the awarding of attorney's fees. That statute provides that an administrative law judge shall award attorney's fees and other costs to a "prevailing party." A.R.S. §42-1007(A). The statute then directs that a person is considered 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 . . . "of the case. A.R.S. §42-1007(A)(1) and (2) (emphasis added).

The term "substantially justified," has been discussed by the United States Supreme Court in interpreting a federal statute in the federal Equal Access to Justice Act, the provisions of which provide for the award of attorney's fees where an agency's conduct is not "substantially justified." *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L.Ed. 2d 490 (1988). In that case, the supreme court determined that an agency's position in a case met the standard of being "substantially justified " if there was a "genuine dispute" or "if reasonable people could differ as to [the appropriateness of the contested action]." 487 U.S. at 565. Under this definition, the Department of Administration's position with regard to the claim for the problematic installation of the makeup air units (MAU's) was substantially justified. Accordingly, an award of attorney's fees in this case is not appropriate under A.R.S. §41-1007.

Finally, the Appellant has failed to demonstrate that it is entitled to pre-judgment interest or that the undersigned has any statutory authority to award pre-judgment interest. Appellant has not shown or even argued that the contract between the parties provided for pre-judgment interest. Accordingly, this claim, too, should be rejected.

RECOMMENDED DECISION

Based on the foregoing, it is recommended that the Director deny the motion for rehearing, deny the request for attorney's fees, and deny the request for pre-judgment interest.

Done this day, December 11, 2000.

Gregory L. Hanchett
Administrative Law Judge

Copy mailed this ____ day of _____, 2000, to:

J. Elliot Hibbs, Director
Department of Administration
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By _____