

1 **Final agency action regarding decision below:**

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3 **REQHRG Date hearing requested**

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5 **STATE OF ARIZONA**
6 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

7
8 **In the Matter of:**

No. 01A-26482293-CWP

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10 **PRESTON BRYANT JOHNSON,**

**ORDER GRANTING APPELLANT'S
APPLICATION FOR AWARD OF
ATTORNEY'S FEES AND COSTS**

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16 Pending before the Office of Administrative Hearings is Appellant Preston Bryant
17 Johnson's **Application for Award of Attorney's Fees and Costs** made under A.R.S. §
18 41-1007. Respondent *Department of Public Safety* was afforded five (5) days to submit
19 a response in opposition to the motion as is required by A.A.C. R2-19-106(D).
20 Respondent did not file a statement in response to the motion filed.

21
22 **History of the Case**

23 Appellant is a licensee and permittee under the State of Arizona's Concealed
24 Weapon Permit program, holding Concealed Weapon Permit No. 29284293, Instructor
25 Approval License No. 26482293, and Organization Authorization No. 29130326. On
26 June 8, 2001, the *Department* summarily suspended all three of the permits. The
27 licenses were suspended without there first being a hearing on the merit of the
28 allegations that had been made. Upon Appellant's timely request for a hearing, the
29 undersigned Administrative Law Judge received evidence and testimony, as well as
30 written argument. The matter constituted an appealable agency action as such action is

1 contemplated by Title 41.¹ Based upon the facts as they were presented, as well as in
2 consideration of argument made and in review of the relevant statute and regulations,
3 the Administrative Law Judge issued Findings of Fact, Conclusions of Law and a
4 Recommended Order on September 19, 2001. The Decision of the Administrative Law
5 Judge was adopted without modification by issuance of the *Department's* Final Agency
6 Decision on October 22, 2001. Thereafter, Appellant filed his motion for attorney's fees
7 and costs.

8 Applicable Law

9 Consideration of the motion is made in light of and as authorized by A.R.S. § 41-
10 1007. The statute is herein set forth in pertinent part.

11 **Award of costs and fees against a department in administrative 12 hearings; exceptions; definitions**

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

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

23 B. Reimbursement under this section may be denied if during the
24 course of the proceeding the party unduly and unreasonably protracted
25 the final resolution of the matter.

26 C. A party that seeks an award of fees or other costs shall apply to the
27 hearing officer or administrative law judge, within thirty days after
28 the final decision or order, providing:

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¹ A.R.S. § 41-1092(3) identifies an "appealable agency action" as an action undertaken by an agency that
30 affects the legal rights and privileges of an individual and is not preceded by an opportunity for an
administrative hearing.

1 1. Evidence of the party's eligibility for the award.

2 2. The amount sought.

3 3. An itemized statement from the attorneys and experts stating:

4 (a) The actual time spent representing the party.

5 (b) The rate at which the fees were computed.

6
7 D. The award of reasonable attorney fees pursuant to subsection A of
8 this section need not equal or relate to the attorney fees actually paid or
9 contracted, but an award may not exceed the amount paid or agreed to be
10 paid.

11 E. A decision of a hearing officer or administrative law judge under
12 this section is subject to judicial review. If fees and other costs were
13 denied by the hearing officer or administrative law judge because the
14 party was not the prevailing party but the party prevails on appeal, the
15 court may award fees and other costs for the proceedings before the
16 hearing officer or administrative law judge if the court finds that fees and
17 other costs should have been awarded under subsection A of this section.

18 F. The department shall pay the fees and costs awarded pursuant to
19 this section from any monies appropriated to the department and
20 available for that purpose, or from other operating costs of the
21 department. If the department fails or refuses to pay the award within
22 thirty days after the demand, and if no further review or appeals of the
23 award are pending, the person may file a claim for the award with the
24 department of administration which shall pay the claim within thirty days in
25 the same manner as an uninsured property loss under chapter 3.1, article
26 1 of this title, except that the department shall be responsible for the total
27 amount awarded and shall pay it from operating monies. If the department
28 had appropriated monies available for paying the award at the time it
29 failed or refused to pay, the legislature shall reduce the department's
30 operating appropriation for the following fiscal year by the amount of the
award and appropriate that amount to the department of administration as
reimbursement for the loss.

Appellant's Argument

Mr. Johnson's argument consists of an observation that 1) an award is mandated ("an Administrative Law Judge shall") by the statute when all conditions are met; 2) the

1 *Department's* summary suspension of the Appellant's licenses and permit were
2 unjustified and in violation of the controlling regulations; 3) Appellant prevailed on all
3 issues presented at the hearing; 4) substantial justification was lacking for the
4 suspensions, there was no reasonable basis in law or fact for the summary
5 suspensions,² this not being debatable given the clear language of the applicable
6 regulations; 5) the *Department* had not sought to enter into prehearing settlement
7 discussion although Appellant had suggested that such discussion could benefit the
8 parties; and 6) Appellant has itemized a reasonable attorney's fee, with actual costs
9 incurred.

10 Analysis

11 The phraseology "substantially justified" is generally referred to a consideration
12 whether a position taken is one that would induce a reasonable person so to conclude
13 and act in furtherance of that conclusion.³ While it is clear that adequate suspicion was
14 raised by 1) the polygrapher's revelations,⁴ 2) the statements made by Mr. Johnson to
15 Officer Thompson,⁵ and 3) the allegations made by former permittees in training,⁶ to
16 justify commencement of disciplinary action against Appellant's Instructor's license, it
17 has been found A) that summary suspension was not authorized by the statute and
18 rules, and B) that the quality of the evidence creating the suspicion (as that evidence
19 was presented at the hearing) was insufficient even to arise to a preponderance level of
20 proof.

21 Appellant has not demonstrated⁷ that the action taken by the *Department* was
22 undertaken to harass Appellant or was done in bad faith. However, based upon the
23 evidence presented at the hearing, the *Department's* action in summarily suspending
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25 ² Appellant cites to A.R.S. § 20-463(D) (the statute governing the activities of the *Department of*
26 *Insurance*) wherein is set forth a definition of "substantially justified" in the fees award context. The statute
27 identifies an action "substantially justified" when "a proceeding . . . has a reasonable basis in law or fact at
the time that it is initiated."

28 ³ See e.g. *Pierce v. Underwood*, 487 U.S. 552 (1988) (the Supreme Court construing the language of the
Equal Access to Justice Act, 28 U.S.C. § 2412).

29 ⁴ See Genco to Farrar Memorandum dated July 29, 2001.

30 ⁵ See Thompson to Sgt. Whalen Memorandum dated July 24, 2001.

⁶ See Thompson to Sgt. Whalen Memorandum dated July 30, 2001.

⁷ And has not alleged.

1 Appellant's licenses and permit was groundless. This was not a close call. A strict
2 application of the statute, and the glosses upon the statute provided by the
3 administrative rules, if followed, would have dictated a different course of action by the
4 *Department*. Therefore, the action taken by the *Department* was not substantially
5 justified. A summary suspension of Appellant's permit and licenses did not have a
6 reasonable basis in law and fact when such suspension was initiated. Again therefore,
7 the action was not substantially justified as is required by the statute in order to avoid an
8 assessment of attorney's fees. The *Department* may have had cause to continue its
9 investigation and contemplate initiation of disciplinary proceedings. It did not have
10 reasonable cause to summarily suspend Appellant's licenses and permit.

11 Of considerable import is it that the *Department* apparently chose not to respond
12 to Appellant's motion for attorney's fees and costs. The absence of a reasoned
13 response can only be construed as tacit acquiescence to the statements and arguments
14 contained therein. In the least, therefore, it is clear and convincing that Appellant is
15 entitled to the award he seeks under A.R.S. § 41-1007. The fees and costs asserted are
16 reasonable given counsel's experience, the nature of the claim, the time and effort
17 expended, the outcome achieved, the rate at which the client was charged, and the
18 itemization of the actual costs pursued.

19 Based upon the foregoing,

20 **IT IS ORDERED** that Appellant's November 19, 2001 **Application for Award of**
21 **Attorney's Fees and Costs** is **granted**. Appellant is entitled to **\$4,558.** in legal fees
22 and costs under A.R.S. § 41-1007.
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24 Done this day, November 27, 2001.
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26 **OFFICE OF ADMINISTRATIVE HEARINGS**
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Gary B. Strickland

Administrative Law Judge

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

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4 Dennis A. Garrett, Director
5 *Department of Public Safety - Concealed Weapons Permit Unit*
6 Att'n: Sgt. W.A. Whalen
7 2102 West Encanto Boulevard
8 Phoenix, AZ 85009

9 Lisa Gervase
10 Attorney at Law
11 4150 West Northern
12 Phoenix, AZ 85051-5787

13 *Arizona Attorney General's Office*
14 Dennis Carpenter, Assistant Attorney General
15 Transportation Section
16 1275 W. Washington
17 Phoenix, AZ 85007

18 By _____
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