

SUBSTITUTE FOR
SENATE BILL NO. 190

A bill to amend 1969 PA 306, entitled
"Administrative procedures act of 1969,"
by amending section 123 (MCL 24.323), as added by 1984 PA 196.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 123. (1) ~~The~~ **ON STIPULATION OF THE PARTIES OR MOTION**
2 **UNDER SUBSECTION (3), THE** presiding officer ~~that~~ **WHO** conducts a
3 contested case shall award to a prevailing party, other than an
4 agency, the costs and fees incurred by the party in connection with
5 ~~that~~ **THE** contested case, **UNLESS THE AGENCY DEMONSTRATES BY CLEAR**
6 **AND CONVINCING EVIDENCE THAT THE AGENCY'S POSITION WAS**
7 **SUBSTANTIALLY JUSTIFIABLE. HOWEVER, SUBSECTION (2) APPLIES IN ANY**
8 **OF THE FOLLOWING:**

9 (A) A PROCEEDING INVOLVING ILLEGAL GAMBLING AND A LICENSEE
10 UNDER THE MICHIGAN LIQUOR CONTROL CODE OF 1998, 1998 PA 58, MCL

1 436.1101 TO 436.2303, TO WHICH THE LIQUOR CONTROL COMMISSION IS A
2 PARTY.

3 (B) A PROCEEDING TO WHICH THE DEPARTMENT OF HEALTH AND HUMAN
4 SERVICES IS A PARTY THAT RELATES TO THE CHILD ABUSE AND NEGLECT
5 CENTRAL REGISTRY.

6 (C) A LICENSING PROCEEDING WITH RESPECT TO A SUMMARY
7 SUSPENSION OF THE LICENSE THAT WAS REQUIRED UNDER SECTION 92(2).

8 (2) IN A PROCEEDING DESCRIBED IN SUBSECTION (1)(A) TO (C), THE
9 PRESIDING OFFICER SHALL ONLY AWARD COSTS AND FEES UNDER SUBSECTION
10 (1) if the presiding officer finds that the position of the agency
11 ~~to~~ **IN** the proceeding was frivolous. To find that an agency's
12 position was frivolous, the presiding officer ~~shall~~ **MUST** determine
13 that ~~at least 1 OR MORE~~ of the following ~~conditions has been met~~. **IS**
14 **APPLICABLE:**

15 (a) The agency's primary purpose in initiating the action was
16 to harass, embarrass, or injure the prevailing party.

17 (b) The agency had no reasonable basis to believe that the
18 facts underlying its legal position were in fact true.

19 (c) The agency's legal position was devoid of arguable legal
20 merit.

21 (3) ~~(2)~~ If the parties to a contested case do not agree on the
22 awarding ~~of~~ costs and fees under this section, **THE PREVAILING PARTY**
23 **MAY FILE A MOTION FOR COSTS AND FEES. ON A MOTION UNDER THIS**
24 **SUBSECTION, THE PRESIDING OFFICER SHALL HOLD** a hearing ~~shall be~~
25 ~~held if requested by a party,~~ regarding the awarding ~~of~~ costs and
26 fees. ~~and the amount thereof.~~ The party seeking an award of costs
27 and fees ~~shall~~ **MUST** present evidence establishing all of the

1 following:

2 (a) ~~That~~ **IF SUBSECTION (2) APPLIES, THAT** the position of the
3 agency was frivolous.

4 (b) That the party is a prevailing party.

5 (c) The amount of costs and fees sought. ~~including~~ **THE PARTY**
6 **SHALL PRESENT** an itemized statement from any attorney ~~, OR agent ,~~
7 ~~or~~ **WHO REPRESENTED THE PARTY AND ANY** expert witness ~~who represented~~
8 ~~the party~~ showing the rate at which the costs and fees were
9 computed.

10 (d) That the party is eligible to receive an award under this
11 section. Financial records of a party ~~shall be~~ **ARE** exempt from
12 public disclosure if ~~requested by the party~~ **SO REQUESTS** at the time
13 the records are submitted ~~pursuant to~~ **UNDER** this section.

14 (e) That a final order **THAT IS** not subject to further appeal
15 other than ~~for~~ the judicial review of costs and fees provided for
16 in section 125 has been entered in the contested case regarding the
17 subject matter of the contested case.

18 **(4)** ~~(3)~~ The presiding officer may reduce the amount of the
19 costs and fees to be awarded **UNDER THIS SECTION**, or deny an award,
20 to the extent that the party seeking the award engaged in conduct
21 ~~which~~ **THAT** unduly and unreasonably protracted the contested case.

22 **(5)** ~~(4)~~ The final action taken by the presiding officer under
23 this section in regard to costs and fees ~~shall~~ **MUST** include written
24 findings as to ~~that~~ **THE** action and the basis for the findings.

25 **(6)** ~~(5)~~ Subject to subsection ~~(6)~~, **(7)**, the amount of costs
26 and fees awarded under this section ~~shall~~ **MUST** include those
27 reasonable and necessary costs actually incurred by the party and

1 any costs allowed by law or by a rule promulgated under this act.
 2 Subject to subsection ~~(6)~~, **(7)**, the amount of fees awarded under
 3 this section ~~shall~~**MUST** be based ~~upon~~**ON** the prevailing market rate
 4 for the kind and quality of the services furnished, subject to the
 5 following:

6 (a) The expenses paid for an expert witness ~~shall~~**MUST** be
 7 reasonable and necessary as determined by the presiding officer.

8 (b) ~~An~~**IF SUBSECTION (2) APPLIES, AN** attorney or agent fee
 9 ~~shall~~**MUST** not be awarded at a rate of more than \$75.00 per hour
 10 unless the presiding officer determines that special circumstances
 11 existed justifying a higher rate or an applicable rule promulgated
 12 by the agency provides for the payment of a higher rate because of
 13 special circumstances.

14 **(7)** ~~(6)~~**The PRESIDING OFFICER SHALL ONLY AWARD** costs and fees
 15 ~~awarded under this section shall only be awarded to the extent and~~
 16 amount that the agency caused the prevailing party to incur those
 17 costs and fees.

18 **(8)** ~~(7)~~**This section does not apply to any****AN** agency in its
 19 role of hearing or adjudicating a case. Unless an agency has
 20 discretion to proceed, this section does not apply to an agency
 21 acting ex rel on the information and at the instigation of a
 22 nonagency person who has a private interest in the matter ~~nor~~**OR** to
 23 an agency required by law to commence a case upon the action or
 24 request of another nonagency person.

25 **(9)** ~~(8)~~**This section does not apply to an agency that has such**
 26 a minor role as a party in the case in comparison to other
 27 nonprevailing parties ~~so~~ as to make its liability for costs and

1 fees under this section unreasonable, unjust, or unfair.

2 Enacting section 1. This amendatory act takes effect 90 days
3 after the date it is enacted into law.