

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

1 UNDER THE MICHIGAN LIQUOR CONTROL CODE OF 1998, 1998 PA 58, MCL  
2 436.1101 TO 436.2303, TO WHICH THE LIQUOR CONTROL COMMISSION IS A  
3 PARTY.

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

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

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

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

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

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

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

1 and fees ~~shall~~**MUST** present evidence establishing all of the  
2 following:

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

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

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

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

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

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

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

26 (6) ~~(5)~~Subject to subsection ~~(6)~~**(7)**, the amount of costs  
27 and fees awarded under this section ~~shall~~**MUST** include those

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

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

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

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

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

26 (9) ~~(8)~~ This section does not apply to an agency that has such  
27 a minor role as a party in the case in comparison to other

1 nonprevailing parties ~~so~~ as to make its liability for costs and  
2 fees under this section unreasonable, unjust, or unfair.

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

5 Enacting section 2. This amendatory act does not take effect  
6 unless all of the following bills of the 98th Legislature are  
7 enacted into law:

8 (a) Senate Bill No. 189.

9 (b) Senate Bill No. 886.