



Senate Fiscal Agency  
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## BILL ANALYSIS



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Senate Bills 100 and 101 (as passed by the Senate)  
Sponsor: Senator Tom Casperson (S.B. 100)  
Senator Dave Robertson (S.B. 101)  
Committee: Elections and Government Reform

Date Completed: 9-14-17

### **RATIONALE**

In Michigan, as in the rest of the United States, each party to a lawsuit usually is responsible for paying his or her own court costs (such as filing fees and witness fees) and attorney fees. There are a number of exceptions to this principle, including statutory exceptions that permit or require a court to order the losing party to pay the costs and fees of the prevailing party. Various Michigan statutes contain these provisions, and a court rule for civil procedure states, "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise..." (MCR 2.625). Michigan laws, however, also limit situations in which the State or a State agency may be ordered to pay costs and fees. Specifically, in court cases and administrative proceedings, the State or an agency may be required to pay a prevailing party's costs and fees only if the court or the presiding officer finds that the State's or the agency's position was frivolous.

Many people consider this unfair, particularly if a State department or employee misapplies a law or rule and a person has to go to court to get that decision reversed. For example, if an agency denies a person's application for a permit, and the person sues the agency and wins, he or she will receive the permit but also will have to pay potentially significant legal fees--unless the court finds that the agency's decision to deny the permit was frivolous. To address this, it has been suggested that, subject to limited exceptions, the State should be required to pay a prevailing party's costs and fees unless the State's position was found, by clear and convincing evidence, to be justifiable.

### **CONTENT**

**Senate Bills 100 and 101 would amend the Revised Judicature Act and the Administrative Procedures Act (APA), respectively, to require the court in a civil action, or the presiding officer in a contested case, to award costs and fees to a prevailing party against the State or a State agency, unless the State or agency demonstrated by clear and convincing evidence that its position was substantially justifiable, except in certain cases in which costs and fees could be awarded only if the position of the State or agency were frivolous.**

**The bills also would delete provisions that limit an attorney or agent fee to \$75 per hour, absent special circumstances; and provisions under which costs and fees may not be awarded to a party whose net worth or number of employees exceeds a certain level.**

**In addition, Senate Bill 101 would exclude Parole Board hearings from provisions of the APA governing contested cases; and make several changes regarding contested case procedures.**

The bills are tie-barred. Each bill would take effect 90 days after its enactment.

## **Senate Bill 100**

### **Award against the State**

Chapter 24 of the Revised Judicature Act (RJA) governs the awarding of court costs and fees, and requires a court that conducts a civil action brought by or against the State as a party, except for a civil infraction action, to award to a prevailing party other than the State the costs and fees incurred by the party in connection with the civil action, if the court finds that the position of the State was frivolous.

Under the bill, unless one of the exceptions listed below applied, on stipulation of the parties or on a motion brought by the prevailing party, the court would be required to award costs and fees to the prevailing party unless the State demonstrated by clear and convincing evidence that its position was substantially justifiable.

In the following types of actions or proceedings, the court would have to award costs and fees to the prevailing party only if the court found that the State's position was frivolous:

- An action or proceeding involving illegal gambling and a licensee under the Michigan Liquor Control Code, to which the Liquor Control Commission was a party.
- An action or proceeding to which the Department of Health and Human Services was a party that related to the child abuse and neglect central registry.
- An action or licensing proceeding related to the summary suspension of a license that was required under Section 92(2) of the Administrative Procedures Act.

(Section 92(2) of the APA allows an agency to order summary suspension of a license if the agency finds that the public health, safety, or welfare requires emergency action).

Currently, to find that the State's position was frivolous, the court must determine that at least one of the following conditions has been met:

- The State's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
- The State had no reasonable basis to believe that the facts underlying its legal position were in fact true.
- The State's legal position was devoid of arguable legal merit.

Under the bill, these conditions would apply to cases in which there was an exception to the substantially justifiable standard.

The RJA provides that costs and fees may be awarded to a prevailing party only to the extent and amount that the State caused the party to incur those costs and fees. The bill would retain these provisions.

### **Rate of Attorney's Fee**

The RJA requires the amount of fees awarded to be based on the prevailing market rate for the kind and quality of services furnished, but provides that an attorney fee may not be awarded at a rate of more than \$75 per hour unless the court determines that there were special circumstances justifying a higher rate or an applicable law or court rule provides for the payment of a higher rate. The bill would delete this fee limit.

### **Exclusion of Certain Parties**

Chapter 24 of the RJA defines "party" as a named plaintiff or defendant involved in a civil action but excludes the following:

- An individual whose net worth was more than \$500,000 at the time the civil action was commenced.

- The sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded \$3.0 million at the time the action was commenced and that is not exempt from taxation under Section 501(c)(3) of the Internal Revenue Code (a nonprofit charitable organization) or a cooperative association as defined in Federal law.
- The sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees at the time the action was commenced.

The bill would delete these exclusions.

### **Senate Bill 101**

#### **Award against a State Agency**

The Administrative Procedures Act requires the presiding officer who conducts a contested case to award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with the case, if the presiding officer finds that the position of the agency was frivolous. (The APA defines "contested case" as a proceeding in which a determination of the legal rights, duties, or privileges of a named party is required to be made by an agency after an opportunity for an evidentiary hearing. "Agency" means a State department, bureau, division, section, board, commission, trustee, authority, or officer, created by the Constitution, statute, or agency action.)

Under the bill, unless one of the exceptions listed below applied, on stipulation of the parties or on a motion brought by the prevailing party, the presiding officer would be required to award costs and fees to the prevailing party unless the agency demonstrated by clear and convincing evidence that its position was substantially justifiable.

In the following types of actions or proceedings, the presiding officer would have to award costs and fees to the prevailing party only if the officer found that the agency's position was frivolous:

- An action or proceeding involving illegal gambling and a licensee under the Michigan Liquor Control Code, to which the Liquor Control Commission was a party.
- An action or proceeding to which the Department of Health and Human Services was a party that related to the child abuse and neglect central registry.
- An action or licensing proceeding related to the summary suspension of a license that was required under Section 92(2) of the APA.

Currently, to find that agency's position was frivolous, the presiding officer must determine that at least one of the following conditions has been met:

- The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.
- The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.
- The agency's legal position was devoid of arguable legal merit.

Under the bill, these conditions would apply to cases in which there was an exception to the substantially justifiable standard.

The APA provides that costs and fees may be awarded to a prevailing party only to the extent and amount that the State agency caused the party to incur those costs and fees. The bill would retain these provisions.

#### **Rate of Attorney's or Agent's Fee**

Currently, an attorney or agent fee may not be awarded at a rate of more than \$75 per hour unless the presiding officer determines that there were special circumstances justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances. The bill would delete this provision.

### Parole Board Proceedings

Chapter 4 of the APA governs contested case procedures Chapter 8 of the APA governs the awarding of costs and fees to a prevailing party in a contested case.

The APA states that Chapters 4 and 8 do not apply to a hearing conducted by the Department of Corrections under Chapter IIIA of the Corrections Code (which provides for prisoner hearings conducted by a hearings division within the Department).

Under the bill, Chapters 4 and 8 also would not apply to proceedings before the Parole Board established under Chapter III of the Corrections Code (which governs paroles and pardons).

### Exclusion of Certain Parties

Chapter 8 excludes from the definition of "party" the same individuals and entities that are excluded from the definition in Chapter 24 of the RJA, based on their net worth or number of employees. The bill would delete these exclusions.

### Contested Case Amendments

The APA requires the parties in a contested case to be given an opportunity for a hearing without undue delay, and to be given reasonable notice of the hearing. The bill states that a contested case would be commenced by giving the required notice.

Currently, if a party fails to appear in a contested case after proper service of notice, the agency, if an adjournment is not granted, may proceed with the hearing and make its decision in the absence of the party. Under the bill, notice would be properly served if it were mailed to the party or the representative of record of the party at the party's or representative's last known address of record.

The APA authorizes a presiding officer to take certain actions, which include signing and issuing subpoenas in the name of the agency. The bill would delete "in the name of the agency".

Currently, an agency may order a rehearing in a contested case on its own motion or on the request of a party. Under the bill, either an agency or a presiding officer could order a rehearing or reconsideration on the agency's or officer's own motion or on a party's request.

The APA requires an agency to order a rehearing, on its own motion or a party's request, if the agency finds for justifiable reasons that the record of testimony made at the hearing is inadequate for purposes of judicial review. Under the bill, a presiding officer also would have to order a rehearing under these circumstances.

MCL 600.2421b-600.2421e (S.B. 100)  
24.271 et al. (S.B. 101)

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The bills would help ensure that State departments do not force people to go to court in order to get what they are entitled to, and would hold the State accountable when it lost in court or in a contested case and could not demonstrate, by clear and convincing evidence, that its position was substantially justifiable. Too often, when an individual or business is denied a permit or license, is informed inaccurately that a permit is needed for a particular activity, or otherwise is subject to an adverse decision by a State agency, the person has no recourse but to bring a lawsuit or initiate a contested case. Many individuals and small businesses, however, cannot afford to hire an

attorney or they feel that it would be too much trouble to challenge the agency. Those who do go to court may prevail but incur sizeable legal fees, which the State cannot be ordered to pay unless its position is found to be frivolous based on the conditions set forth in the law. This standard seriously curtails the cases in which a prevailing party can be awarded costs and fees.

The current system gives State agencies and employees little incentive to work cooperatively with residents and businesses that might be seeking a building or operating permit, an occupational license, a determination of benefit eligibility, or a review of tax liability, for example. Reportedly, in some situations, people not only are denied their rights but are threatened with a fine or criminal charges. If a person does challenge a State agency in court or in a contested case, the agency has virtually nothing to lose, since it will be defended by State attorneys and there will be no adverse consequences even if the other party wins the case.

By broadening the State's liability for the payment of costs and fees in civil court actions and contested cases, the bills would encourage departments and agencies, and the individuals who act on their behalf, to make decisions responsibly and within the bounds of their authority, and essentially to play by the rules that apply to everyone else. This would ease the regulatory burden on Michigan residents and businesses, as well as reduce litigation and administrative hearings. At the same time, the bills would make limited exceptions to the proposed substantially justifiable standard, in order to accommodate specific concerns and circumstances of several departments.

**Response:** Although a State agency or department could be ordered to pay a prevailing party's costs and fees in more cases than under current law, it is not clear how this would lead to greater accountability of the individuals who actually make the decisions. They would not be personally responsible for paying costs and fees, and might not even be identifiable. In addition, unless the agencies themselves experienced consequences through the budget process, it is not clear how they would be held accountable. Although there are available data on the State's payment of judgments and settlements, there is little or no information about contested cases in which the State is or is not the prevailing party, or how often the State is ordered to pay costs and fees.

### **Supporting Argument**

Senate Bill 101 would ensure that individuals subject to parole hearings could not avail themselves of the contested case process or attempt to seek costs and fees from the State, and that parole hearings would be governed by the Corrections Code. This would be consistent with the current treatment of prisoner hearings conducted by the Department of Corrections.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The bills would have an indeterminate impact on State government and no impact on local government. The bills would increase potential liability exposure of the State for costs and fees in cases in which the State is not the prevailing party.

While Section 2421e of the Revised Judicature Act and Section 126 of the Administrative Procedures Act require the Department of Technology, Management, and Budget (DTMB) to report annually to the Legislature regarding the amount of costs and fees paid by the State during the preceding fiscal year, no annual report has been provided by the DTMB. The Department of Licensing and Regulatory Affairs reports that there were approximately 118,696 cases closed by the Michigan Administrative Hearing System in FY 2015-16. However, there are no summary data on the number of cases in which the State was not the prevailing party. Also, no summary data are available regarding court cases that could be affected by the proposed changes. Future liability would depend on the number of civil actions and contested cases in which the State is not the prevailing party and the amount of costs and fees assessed.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.