

# SENATE BILL No. 101

February 2, 2017, Introduced by Senators ROBERTSON, COLBECK, SHIRKEY, BOOHER, HANSEN, JOHNSON and MACGREGOR and referred to the Committee on Elections and Government Reform.

A bill to amend 1969 PA 306, entitled "Administrative procedures act of 1969," by amending sections 71, 72, 80, 87, 115, 122, and 123 (MCL 24.271, 24.272, 24.280, 24.287, 24.315, 24.322, and 24.323), section 71 as amended by 1984 PA 28, section 80 as amended and section 123 as added by 1984 PA 196, section 115 as amended by 1996 PA 489, and section 122 as amended by 2011 PA 247.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 71. (1) The parties in a contested case ~~shall~~**MUST** be  
2 given an opportunity for a hearing without undue delay.

1           (2) The parties ~~shall~~**MUST** be given a reasonable notice of the  
2 hearing ~~, which~~**IN A CONTESTED CASE. THE** notice ~~shall~~**MUST** include  
3 **ALL OF THE FOLLOWING:**

4           (a) A statement of the date, hour, place, and nature of the  
5 hearing. Unless otherwise specified in the notice the hearing ~~shall~~  
6 **MUST** be held at the principal office of the agency.

7           (b) A statement of the legal authority and jurisdiction under  
8 which the hearing is to be held.

9           (c) A reference to the particular sections of the statutes and  
10 rules involved.

11           (d) A short and plain statement of the matters asserted. If  
12 the agency or other party is unable to state the matters in detail  
13 at the time the notice is given, the initial notice may state the  
14 issues involved. Thereafter on application the agency or other  
15 party shall furnish a more definite and detailed statement on the  
16 issues.

17           (3) **A CONTESTED CASE IS COMMENCED BY GIVING NOTICE TO THE**  
18 **PARTIES UNDER SUBSECTION (2).**

19           (4) ~~(3)~~A member of the legislature ~~shall~~**IS** not ~~be~~ privileged  
20 from service of notice or other process ~~pursuant to~~**UNDER** this  
21 chapter except on a day on which there is a scheduled meeting of  
22 the house of which he or she is a member. However, a member of the  
23 legislature ~~shall~~**IS** not ~~be~~ privileged from service of notice or  
24 other process ~~pursuant to~~**UNDER** this chapter on a day on which  
25 there is a scheduled meeting of the house of which he or she is a  
26 member, if ~~such~~**THE** service of notice or process is executed by  
27 certified mail, return receipt requested.

1           Sec. 72. (1) If a party fails to appear in a contested case  
2 after proper service of notice, the agency, if ~~no~~**AN** adjournment is  
3 **NOT** granted, may proceed with the hearing and make its decision in  
4 the absence of the party. **NOTICE IS PROPERLY SERVED IF IT IS MAILED**  
5 **TO THE PARTY OR THE REPRESENTATIVE OF RECORD OF THE PARTY AT THE**  
6 **PARTY OR THE REPRESENTATIVE'S LAST KNOWN ADDRESS OF RECORD.**

7           (2) A party who has been served with a notice of hearing may  
8 file a written answer before the date set for hearing.

9           (3) The parties ~~shall~~**MUST** be given an opportunity to present  
10 oral and written arguments on issues of law and policy and an  
11 opportunity to present evidence and argument on issues of fact.

12           (4) A party may cross-examine a witness, including the author  
13 of a document prepared by, on behalf of, or for use of the agency  
14 and offered in evidence. A party may submit rebuttal evidence.

15           Sec. 80. (1) A presiding officer may do all of the following:

16           (a) Administer oaths and affirmations.

17           (b) Sign and issue subpoenas, ~~in the name of the agency,~~  
18 requiring attendance and giving of testimony by witnesses and the  
19 production of books, papers, and other documentary evidence.

20           (c) Provide for the taking of testimony by deposition.

21           (d) Regulate the course of the hearings, set the time and  
22 place for continued hearings, and fix the time for filing of briefs  
23 and other documents.

24           (e) Direct the parties to appear and confer to consider  
25 simplification of the issues by consent of the parties.

26           (f) Act ~~upon~~**ON** an application for an award of costs and fees  
27 under sections 121 to 127.

1           (2) ~~In order to~~ **TO** assure adequate representation for the  
2 people of this state, ~~when~~ **IF** the presiding officer knows that a  
3 party in a contested case is a member of the legislature of this  
4 state, and the legislature is in session, the **PRESIDING OFFICER**  
5 **SHALL CONTINUE THE** contested case ~~shall be continued by the~~  
6 ~~presiding officer~~ to a nonmeeting day.

7           (3) ~~In order to~~ **TO** assure adequate representation for the  
8 people of this state, ~~when~~ **IF** the presiding officer knows that a  
9 party to a contested case is a member of the legislature of this  
10 state who serves on a legislative committee, subcommittee,  
11 commission, or council that is scheduled to meet during the  
12 legislative session while the legislature is temporarily adjourned,  
13 or that is scheduled to meet during the interim between legislative  
14 sessions after the legislature has adjourned sine die, or ~~when~~ **IF**  
15 the partisan caucus of which the legislator is a member is  
16 scheduled to meet, the **PRESIDING OFFICER SHALL CONTINUE THE**  
17 contested case ~~shall be continued~~ to a nonmeeting day.

18           (4) ~~In order to~~ **TO** assure adequate representation for the  
19 people of this state, ~~when~~ **IF** the presiding officer knows that a  
20 witness in a contested case is a member of the legislature of this  
21 state, and the legislature is in session, or the member is serving  
22 on a legislative committee, subcommittee, commission, or council  
23 that is scheduled to meet during the legislative session while the  
24 legislature is temporarily adjourned or during the interim between  
25 legislative sessions after the legislature has adjourned sine die,  
26 or ~~when~~ **IF** the partisan caucus of which the legislator is a member  
27 is scheduled to meet, the contested case need not be continued, but

1 the **PRESIDING OFFICER SHALL POSTPONE THE** taking of the legislator's  
2 testimony, as a witness, ~~shall be postponed~~ to the earliest  
3 practicable nonmeeting day.

4 (5) The presiding officer shall notify all parties to the  
5 contested case, and their attorneys, of any continuance granted  
6 ~~pursuant to~~ **UNDER** this section.

7 (6) As used in this section, "nonmeeting day" means a day on  
8 which there is not a scheduled meeting of the house of which the  
9 party or witness is a member, ~~nor~~ a legislative committee meeting  
10 or public hearing scheduled by a committee, subcommittee,  
11 commission, or council of which ~~he or she~~ **THE PARTY OR WITNESS** is a  
12 member, ~~nor~~ **OR** a scheduled partisan caucus of the members of the  
13 house of which ~~he or she~~ **THE PARTY OR WITNESS** is a member.

14 Sec. 87. (1) An agency **OR PRESIDING OFFICER** may order a  
15 rehearing **OR RECONSIDERATION** in a contested case on ~~its~~ **THE**  
16 **AGENCY'S OR OFFICER'S** own motion or on **THE** request of a party.

17 (2) ~~Where~~ **IF THE AGENCY OR PRESIDING OFFICER FINDS** for  
18 justifiable reasons **THAT** the record of testimony made at the  
19 hearing is ~~found by the agency to be inadequate~~ for purposes of  
20 judicial review, the agency **OR PRESIDING OFFICER**, on ~~its~~ **THE**  
21 **AGENCY'S OR OFFICER'S** own motion or on **THE** request of a party,  
22 shall order a rehearing.

23 (3) A request for a rehearing ~~shall~~ **MUST** be filed within the  
24 time fixed by this act for instituting proceedings for judicial  
25 review. A rehearing ~~shall~~ **MUST** be noticed and conducted in the same  
26 manner as an original hearing. The evidence received at the  
27 rehearing ~~shall~~ **MUST** be included in the record for agency

1 reconsideration and for judicial review. A decision or order may be  
2 amended or vacated after the rehearing.

3 Sec. 115. (1) Chapters 4 and 6 do not apply to proceedings  
4 conducted under the worker's disability compensation act of 1969,  
5 ~~Act No. 317 of the Public Acts of 1969, being sections 418.101 to~~  
6 ~~418.941 of the Michigan Compiled Laws.~~ **1969 PA 317, MCL 418.101 TO**  
7 **418.941.**

8 (2) Chapters 4 and 8 do not apply to a hearing conducted by  
9 the department of corrections ~~pursuant to~~ **UNDER** chapter IIIA of Act  
10 ~~No. 232 of the Public Acts of 1953, being sections 791.251 to~~  
11 ~~791.256 of the Michigan Compiled Laws.~~ **THE CORRECTIONS CODE OF 1953,**  
12 **1953 PA 232, MCL 791.251 TO 791.256, OR TO PROCEEDINGS BEFORE THE**  
13 **PAROLE BOARD ESTABLISHED UNDER SECTION 31A OF THE CORRECTIONS CODE**  
14 **OF 1953, 1953 PA 232, MCL 791.231A.**

15 (3) Chapter 8 does not apply to any of the following:

16 (a) A contested case or other proceeding regarding the  
17 granting or renewing of an operator's or chauffeur's license by the  
18 secretary of state.

19 (b) Proceedings conducted by the Michigan employment relations  
20 commission.

21 (c) Worker's disability compensation proceedings under ~~Act No.~~  
22 ~~317 of the Public Acts of 1969.~~ **THE WORKER'S DISABILITY COMPENSATION**  
23 **ACT OF 1969, 1969 PA 317, MCL 418.101 TO 418.941.**

24 (d) Unemployment compensation hearings under the Michigan  
25 employment security act, ~~Act No. 1 of the Public Acts of the Extra~~  
26 ~~Session of 1936, being sections 421.1 to 421.75 of the Michigan~~  
27 ~~Compiled Laws.~~ **1936 (EX SESS) PA 1, MCL 421.1 TO 421.75.**

1           (e) ~~Family independence agency public~~ **PUBLIC** assistance  
2 hearings under section 9 of the social welfare act, ~~Act No. 280 of~~  
3 ~~the Public Acts of 1939, being section 400.9 of the Michigan~~  
4 ~~Compiled Laws.~~ **1939 PA 280, MCL 400.9.**

5           (4) Chapter 6 does not apply to final decisions or orders  
6 rendered under article 15 of the public health code, ~~Act No. 368 of~~  
7 ~~the Public Acts of 1978, being sections 333.16101 to 333.18838 of~~  
8 ~~the Michigan Compiled Laws.~~ **1978 PA 368, MCL 333.16101 TO 333.18838.**

9           (5) ~~Chapters~~ **AFTER AUGUST 14, 1996, CHAPTERS** 2, 3, and 5 do  
10 not apply to the municipal employees retirement system and  
11 retirement board created by the municipal employees retirement act  
12 of 1984, ~~Act No. 427 of the Public Acts of 1984, being sections~~  
13 ~~38.1501 to 38.1555 of the Michigan Compiled Laws, on and after~~  
14 ~~August 15, 1996.~~ **1984 PA 427, MCL 38.1501 TO 1555.**

15           (6) ~~Until the expiration of 12 months after the effective date~~  
16 ~~of the amendatory act that added this subsection,~~ **APRIL 1, 1998,**  
17 chapters 2, 3, and 5 do not apply to the establishment,  
18 implementation, administration, operation, investment, or  
19 distribution of a Tier 2 retirement plan established pursuant to  
20 **UNDER** section 401(k) of the internal revenue code **OF 1986, 26 USC**  
21 **401,** under the state employees' retirement act, ~~Act No. 240 of the~~  
22 ~~Public Acts of 1943, being sections 38.1 to 38.69 of the Michigan~~  
23 ~~Compiled Laws. Upon the expiration of 12 months after the effective~~  
24 ~~date of the amendatory act that added this subsection,~~ **1943 PA 240,**  
25 **MCL 38.1 TO 38.69. AFTER MARCH 31, 1998,** rules and guidelines  
26 promulgated or processed ~~under~~ **FOR THE PURPOSES DESCRIBED IN** this  
27 subsection are not effective and binding unless promulgated and

1 processed in accordance with this act.

2 (7) ~~Until the expiration of 12 months after the effective date~~  
3 ~~of the amendatory act that added this subsection,~~**APRIL 1, 1998,**  
4 chapters 2, 3, and 5 do not apply to the establishment,  
5 implementation, administration, operation, investment, or  
6 distribution of a Tier 2 retirement plan established pursuant to  
7 **UNDER** section 403(b) of the internal revenue code **OF 1986, 26 USC**  
8 **403,** under the public school employees retirement act of 1979, Act  
9 ~~No. 300 of the Public Acts of 1980, being sections 38.1301 to~~  
10 ~~38.1437 of the Michigan Compiled Laws. Upon the expiration of 12~~  
11 ~~months after the effective date of the amendatory act that added~~  
12 ~~this subsection,~~**1980 PA 300, MCL 38.1301 TO 38.1437. AFTER MARCH**  
13 **31, 1998,** rules and guidelines promulgated or processed under ~~FOR~~  
14 **THE PURPOSES DESCRIBED IN** this subsection are not effective and  
15 binding unless promulgated and processed in accordance with this  
16 act.

17 (8) ~~Until the expiration of 12 months after the effective date~~  
18 ~~of the amendatory act that added this subsection,~~**APRIL 1, 1998,**  
19 chapters 2, 3, and 5 do not apply to the establishment,  
20 implementation, administration, operation, investment, or  
21 distribution of a Tier 2 retirement plan established pursuant to  
22 **UNDER** the internal revenue code **OF 1986, 26 USC 1 TO 9834,** under  
23 the Michigan legislative retirement system act, ~~Act No. 261 of the~~  
24 ~~Public Acts of 1957, being sections 38.1001 to 38.1080 of the~~  
25 ~~Michigan Compiled Laws. Upon the expiration of 12 months after the~~  
26 ~~effective date of the amendatory act that added this~~  
27 ~~subsection,~~**1957 PA 261, MCL 38.1001 TO 38.1080. AFTER MARCH 31,**

1 1998, rules and guidelines promulgated or processed under ~~FOR THE~~  
 2 **PURPOSES DESCRIBED IN** this subsection are not effective and binding  
 3 unless promulgated and processed in accordance with this act.

4 Sec. 122. (1) "Contested case" means a contested case as  
 5 defined in section 3, but does not include a case that is settled  
 6 or in which a consent agreement is entered into or a proceeding for  
 7 establishing a rate or approving, disapproving, or withdrawing  
 8 approval of a form.

9 (2) "Costs and fees" means the normal costs incurred, after a  
 10 party has received notice of an initial hearing under section 71,  
 11 in being a party in a contested case under this act, and include  
 12 all of the following:

13 (a) The reasonable and necessary expenses of expert witnesses  
 14 as determined by the presiding officer.

15 (b) The reasonable cost of any study, analysis, engineering  
 16 report, test, or project that is determined by the presiding  
 17 officer to have been necessary for the preparation of a ~~THE~~ party's  
 18 case.

19 (c) Reasonable ~~A REASONABLE~~ and necessary attorney or agent  
 20 fees ~~FEE~~, including those ~~A FEE~~ for purposes of ~~ANY~~ appeal.

21 (3) "Party" means a party as defined in section 5. ~~, but does~~  
 22 ~~not include any of the following:~~

23 ~~—— (a) An individual whose net worth was more than \$500,000.00 at~~  
 24 ~~the time the contested case was initiated.~~

25 ~~—— (b) The sole owner of an unincorporated business or any~~  
 26 ~~partnership, corporation, association, or organization whose net~~  
 27 ~~worth exceeded \$3,000,000.00 at the time the contested case was~~

1 ~~initiated and that is not either exempt from taxation pursuant to~~  
 2 ~~section 501(c)(3) of the internal revenue code, 26 USC 501, or a~~  
 3 ~~cooperative association as defined in section 15(a) of the~~  
 4 ~~agricultural marketing act, 12 USC 1141j(a).~~

5 ~~—— (c) The sole owner of an unincorporated business or any~~  
 6 ~~partnership, corporation, association, or organization that had~~  
 7 ~~more than 250 full time equivalent employees, as determined by the~~  
 8 ~~total number of employees multiplied by their working hours divided~~  
 9 ~~by 40, at the time the contested case was initiated.~~

10 ~~—— (d) As used in this subsection "net worth" means the amount~~  
 11 ~~remaining after the deduction of liabilities from assets as~~  
 12 ~~determined according to generally accepted accounting principles.~~

13 (4) "Presiding officer" means an agency, 1 or more members of  
 14 the agency, ~~a person~~ **AN INDIVIDUAL** designated by statute to conduct  
 15 a contested case, or a hearing officer designated and authorized by  
 16 the agency to conduct a contested case.

17 (5) "Prevailing party" means either of the following, as  
 18 applicable:

19 (a) In an action involving several remedies, or issues or  
 20 counts that state different causes of ~~actions~~ **ACTION** or defenses,  
 21 the party prevailing as to each remedy, issue, or count.

22 (b) In an action involving only 1 issue or count stating only  
 23 1 cause of action or defense, the party prevailing on the entire  
 24 record.

25 Sec. 123. (1) ~~The~~ **ON STIPULATION OF THE PARTIES OR MOTION**  
 26 **UNDER SUBSECTION (3), THE** presiding officer ~~that~~ **WHO** conducts a  
 27 contested case shall award to a prevailing party, other than an

1 agency, the costs and fees incurred by the party in connection with  
2 ~~that~~ THE contested case, UNLESS THE AGENCY DEMONSTRATES BY CLEAR  
3 AND CONVINCING EVIDENCE THAT THE AGENCY'S POSITION WAS  
4 SUBSTANTIALLY JUSTIFIABLE. HOWEVER, SUBSECTION (2) APPLIES IN ANY  
5 OF THE FOLLOWING:

6 (A) A PROCEEDING INVOLVING ILLEGAL GAMBLING AND A LICENSEE  
7 UNDER THE MICHIGAN LIQUOR CONTROL CODE OF 1998, 1998 PA 58, MCL  
8 436.1101 TO 436.2303, TO WHICH THE LIQUOR CONTROL COMMISSION IS A  
9 PARTY.

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

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

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

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

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

26 (c) The agency's legal position was devoid of arguable legal  
27 merit.

1           (3) ~~(2)~~ If the parties to a contested case do not agree on the  
2     awarding of costs and fees under this section, **THE PREVAILING PARTY**  
3     **MAY FILE A MOTION FOR COSTS AND FEES. ON A MOTION UNDER THIS**  
4     **SUBSECTION, THE PRESIDING OFFICER SHALL HOLD** a hearing ~~shall be~~  
5     ~~held if requested by a party,~~ regarding the awarding of costs and  
6     fees. ~~and the amount thereof.~~ The party seeking an award of costs  
7     and fees ~~shall~~ **MUST** present evidence establishing all of the  
8     following:

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

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

12          (c) The amount of costs and fees sought. ~~including~~ **THE PARTY**  
13    **SHALL PRESENT** an itemized statement from any attorney ~~OR~~ agent ~~OR~~  
14    ~~OR~~ **WHO REPRESENTED THE PARTY AND ANY** expert witness ~~who represented~~  
15    ~~the party~~ showing the rate at which the costs and fees were  
16    computed.

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

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

25           (4) ~~(3)~~ The presiding officer may reduce the amount of the  
26    costs and fees to be awarded **UNDER THIS SECTION**, or deny an award,  
27    to the extent that the party seeking the award engaged in conduct

1 ~~which~~ **THAT** unduly and unreasonably protracted the contested case.

2       (5) ~~(4)~~—The final action taken by the presiding officer under  
3 this section in regard to costs and fees ~~shall~~ **MUST** include written  
4 findings as to ~~that~~ **THE** action and the basis for the findings.

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

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

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

21       (7) ~~(6)~~—The **PRESIDING OFFICER SHALL ONLY AWARD** costs and fees  
22 ~~awarded~~ under this section ~~shall only be awarded~~ to the extent and  
23 amount that the agency caused the prevailing party to incur those  
24 costs and fees.

25       (8) ~~(7)~~—This section does not apply to ~~any~~ **AN** agency in its  
26 role of hearing or adjudicating a case. Unless an agency has  
27 discretion to proceed, this section does not apply to an agency

1 acting ex rel on the information and at the instigation of a  
2 nonagency person who has a private interest in the matter ~~nor~~**OR** to  
3 an agency required by law to commence a case upon the action or  
4 request of another nonagency person.

5 (9) ~~(8)~~—This section does not apply to an agency that has such  
6 a minor role as a party in the case in comparison to other  
7 nonprevailing parties ~~so~~ as to make its liability for costs and  
8 fees under this section unreasonable, unjust, or unfair.

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

11 Enacting section 2. This amendatory act does not take effect  
12 unless Senate Bill No. 100

13 of the 99th Legislature is enacted into law.