

SENATE BILL NO. 246

March 21, 2019, Introduced by Senators HOLLIER, MCBROOM, HORN, WOJNO and DALEY
and referred to the Committee on Oversight.

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.

3 (2) The parties ~~shall~~**must** be given a reasonable notice of the
4 hearing ~~, which in a contested case. The~~ notice ~~shall~~**must** include
5 **all of the following:**

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

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

11 (c) A reference to the particular sections of the statutes and
12 rules involved.

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

19 **(3) A contested case is commenced by giving notice to the**
20 **parties under subsection (2).**

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

1 certified mail, return receipt requested.

2 Sec. 72. (1) If a party fails to appear in a contested case
3 after proper service of notice, the agency, if ~~no~~**an** adjournment is
4 **not** granted, may proceed with the hearing and make its decision in
5 the absence of the party. **Notice is properly served if it is mailed**
6 **to the party or the representative of record of the party at the**
7 **party or the representative's last known address of record.**

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

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

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

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

17 (a) Administer oaths and affirmations.

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

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

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

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

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

29 (2) ~~In order to~~**To** assure adequate representation for the

1 people of this state, ~~when-if~~ the presiding officer knows that a
2 party in a contested case is a member of the legislature of this
3 state, and the legislature is in session, the **presiding officer**
4 **shall continue the** contested case ~~shall be continued by the~~
5 ~~presiding officer~~ to a nonmeeting day.

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

17 (4) ~~In order to~~**To** assure adequate representation for the
18 people of this state, ~~when-if~~ the presiding officer knows that a
19 witness in a contested case is a member of the legislature of this
20 state, and the legislature is in session, or the member is serving
21 on a legislative committee, subcommittee, commission, or council
22 that is scheduled to meet during the legislative session while the
23 legislature is temporarily adjourned or during the interim between
24 legislative sessions after the legislature has adjourned sine die,
25 or ~~when-if~~ the partisan caucus of which the legislator is a member
26 is scheduled to meet, the contested case need not be continued, but
27 the **presiding officer shall postpone the** taking of the legislator's
28 testimony, as a witness, ~~shall be postponed~~ to the earliest
29 practicable nonmeeting day.

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

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

11 Sec. 87. (1) An agency **or presiding officer** may order a
 12 rehearing **or reconsideration** in a contested case on ~~its~~ **the**
 13 **agency's or officer's** own motion or on **the** request of a party.

14 (2) ~~Where~~ **If the agency or presiding officer finds** for
 15 justifiable reasons **that** the record of testimony made at the
 16 hearing is ~~found by the agency to be~~ inadequate for purposes of
 17 judicial review, the agency **or presiding officer**, on ~~its~~ **the**
 18 **agency's or officer's** own motion or on **the** request of a party,
 19 shall order a rehearing.

20 (3) A request for a rehearing ~~shall~~ **must** be filed within the
 21 time fixed by this act for instituting proceedings for judicial
 22 review. A rehearing ~~shall~~ **must** be noticed and conducted in the same
 23 manner as an original hearing. The evidence received at the
 24 rehearing ~~shall~~ **must** be included in the record for agency
 25 reconsideration and for judicial review. A decision or order may be
 26 amended or vacated after the rehearing.

27 Sec. 115. (1) Chapters 4 and 6 do not apply to proceedings
 28 conducted under the worker's disability compensation act of 1969,
 29 ~~Act No. 317 of the Public Acts of 1969, being sections 418.101 to~~

1 ~~418.941 of the Michigan Compiled Laws.1969 PA 317, MCL 418.101 to~~
2 **418.941.**

3 (2) Chapters 4 and 8 do not apply to a hearing conducted by
4 the department of corrections pursuant to ~~under~~ chapter IIIA of Act
5 No. 232 of the Public Acts of 1953, being sections ~~791.251 to~~
6 ~~791.256 of the Michigan Compiled Laws.~~ **the corrections code of 1953,**
7 **1953 PA 232, MCL 791.251 to 791.256, or to proceedings before the**
8 **parole board established under section 31a of the corrections code**
9 **of 1953, 1953 PA 232, MCL 791.231a.**

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

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

14 (b) Proceedings conducted by the Michigan employment relations
15 commission.

16 (c) Worker's disability compensation proceedings under ~~Act No.~~
17 ~~317 of the Public Acts of 1969.~~ **the worker's disability compensation**
18 **act of 1969, 1969 PA 317, MCL 418.101 to 418.941.**

19 (d) Unemployment compensation hearings under the Michigan
20 employment security act, ~~Act No. 1 of the Public Acts of the Extra~~
21 ~~Session of 1936, being sections 421.1 to 421.75 of the Michigan~~
22 ~~Compiled Laws.1936 (Ex Sess) PA 1, MCL 421.1 to 421.75.~~

23 (e) ~~Family independence agency public~~ **Public** assistance
24 hearings under section 9 of the social welfare act, ~~Act No. 280 of~~
25 ~~the Public Acts of 1939, being section 400.9 of the Michigan~~
26 ~~Compiled Laws.1939 PA 280, MCL 400.9.~~

27 (4) Chapter 6 does not apply to final decisions or orders
28 rendered under article 15 of the public health code, ~~Act No. 368 of~~
29 ~~the Public Acts of 1978, being sections 333.16101 to 333.18838 of~~

1 ~~the Michigan Compiled Laws. 1978 PA 368, MCL 333.16101 to 333.18838.~~

2 (5) ~~Chapters~~ **After August 14, 1996, chapters** 2, 3, and 5 do
3 not apply to the municipal employees retirement system and
4 retirement board created by the municipal employees retirement act
5 of 1984, ~~Act No. 427 of the Public Acts of 1984, being sections~~
6 ~~38.1501 to 38.1555 of the Michigan Compiled Laws, on and after~~
7 ~~August 15, 1996.~~ **1984 PA 427, MCL 38.1501 to 38.1555.**

8 (6) ~~Until the expiration of 12 months after the effective date~~
9 ~~of the amendatory act that added this subsection,~~ **April 1, 1998,**
10 chapters 2, 3, and 5 do not apply to the establishment,
11 implementation, administration, operation, investment, or
12 distribution of a Tier 2 retirement plan established ~~pursuant to~~
13 **under** section 401(k) of the internal revenue code **of 1986, 26 USC**
14 **401(k)**, under the state employees' retirement act, ~~Act No. 240 of~~
15 ~~the Public Acts of 1943, being sections 38.1 to 38.69 of the~~
16 ~~Michigan Compiled Laws. Upon the expiration of 12 months after the~~
17 ~~effective date of the amendatory act that added this~~
18 ~~subsection,~~ **1943 PA 240, MCL 38.1 to 38.69. After March 31, 1998,**
19 rules and guidelines promulgated or processed ~~under~~ **for the**
20 **purposes described in** this subsection are not effective and binding
21 unless promulgated and processed in accordance with this act.

22 (7) ~~Until the expiration of 12 months after the effective date~~
23 ~~of the amendatory act that added this subsection,~~ **April 1, 1998,**
24 chapters 2, 3, and 5 do not apply to the establishment,
25 implementation, administration, operation, investment, or
26 distribution of a Tier 2 retirement plan established ~~pursuant to~~
27 **under** section 403(b) of the internal revenue code **of 1986, 26 USC**
28 **403(b)**, under the public school employees retirement act of 1979,
29 ~~Act No. 300 of the Public Acts of 1980, being sections 38.1301 to~~

1 ~~38.1437 of the Michigan Compiled Laws. Upon the expiration of 12~~
2 ~~months after the effective date of the amendatory act that added~~
3 ~~this subsection,~~**1980 PA 300, MCL 38.1301 to 38.1437. After March**
4 **31, 1998,** rules and guidelines promulgated or processed ~~under~~**for**
5 **the purposes described in** this subsection are not effective and
6 binding unless promulgated and processed in accordance with this
7 act.

8 (8) ~~Until the expiration of 12 months after the effective date~~
9 ~~of the amendatory act that added this subsection,~~**April 1, 1998,**
10 chapters 2, 3, and 5 do not apply to the establishment,
11 implementation, administration, operation, investment, or
12 distribution of a Tier 2 retirement plan established ~~pursuant to~~
13 **under** the internal revenue code **of 1986, 26 USC 1 to 9834,** under
14 the Michigan legislative retirement system act, ~~Act No. 261 of the~~
15 ~~Public Acts of 1957, being sections 38.1001 to 38.1080 of the~~
16 ~~Michigan Compiled Laws. Upon the expiration of 12 months after the~~
17 ~~effective date of the amendatory act that added this~~
18 ~~subsection,~~**1957 PA 261, MCL 38.1001 to 38.1080. After March 31,**
19 **1998,** rules and guidelines promulgated or processed ~~under~~**for the**
20 **purposes described in** this subsection are not effective and binding
21 unless promulgated and processed in accordance with this act.

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

27 (2) "Costs and fees" means the normal costs incurred, after a
28 party has received notice of an initial hearing under section 71,
29 in being a party in a contested case under this act, and include

1 all of the following:

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

4 (b) The reasonable cost of any study, analysis, engineering
5 report, test, or project that is determined by the presiding
6 officer to have been necessary for the preparation of ~~a~~**the** party's
7 case.

8 (c) ~~Reasonable~~**A reasonable** and necessary attorney or agent
9 ~~fees~~**fee**, including ~~those~~**a fee** for purposes of ~~any~~ appeal.

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

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

14 ~~(b) The sole owner of an unincorporated business or any~~
15 ~~partnership, corporation, association, or organization whose net~~
16 ~~worth exceeded \$3,000,000.00 at the time the contested case was~~
17 ~~initiated and that is not either exempt from taxation pursuant to~~
18 ~~section 501(c)(3) of the internal revenue code, 26 USC 501, or a~~
19 ~~cooperative association as defined in section 15(a) of the~~
20 ~~agricultural marketing act, 12 USC 1141j(a).~~

21 ~~(c) The sole owner of an unincorporated business or any~~
22 ~~partnership, corporation, association, or organization that had~~
23 ~~more than 250 full-time equivalent employees, as determined by the~~
24 ~~total number of employees multiplied by their working hours divided~~
25 ~~by 40, at the time the contested case was initiated.~~

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

29 (4) "Presiding officer" means an agency, 1 or more members of

1 the agency, ~~a person~~**an individual** designated by statute to conduct
 2 a contested case, or a hearing officer designated and authorized by
 3 the agency to conduct a contested case.

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

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

9 (b) In an action involving only 1 issue or count stating only
 10 1 cause of action or defense, the party prevailing on the entire
 11 record.

12 Sec. 123. (1) ~~The~~**On stipulation of the parties or motion**
 13 **under subsection (3), the** presiding officer ~~that~~**who** conducts a
 14 contested case shall award to a prevailing party, other than an
 15 agency, the costs and fees incurred by the party in connection with
 16 ~~that~~**the** contested case, **unless the agency demonstrates that the**
 17 **agency's position was substantially justifiable. However,**
 18 **subsection (2) applies in any of the following:**

19 (a) A proceeding involving illegal gambling and a licensee
 20 under the Michigan liquor control code of 1998, 1998 PA 58, MCL
 21 436.1101 to 436.2303, to which the liquor control commission is a
 22 party.

23 (b) A proceeding to which the department of health and human
 24 services is a party that relates to the child abuse and neglect
 25 central registry.

26 (c) A licensing proceeding with respect to a summary
 27 suspension of the license that was required under section 92(2).

28 (2) In a proceeding described in subsection (1)(a) to (c), the
 29 presiding officer shall only award costs and fees under subsection

1 (1) if the presiding officer finds that the position of the agency
 2 ~~to~~~~in~~ the proceeding was frivolous. To find that an agency's
 3 position was frivolous, the presiding officer ~~shall~~~~must~~ determine
 4 that ~~at least~~~~1~~ **or more** of the following ~~conditions has been met~~~~is~~
 5 **applicable:**

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

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

10 (c) The agency's legal position was devoid of arguable legal
 11 merit.

12 (3) ~~(2)~~ If the parties to a contested case do not agree on the
 13 awarding ~~of~~ costs and fees under this section, **the prevailing party**
 14 **may file a motion for costs and fees. On a motion under this**
 15 **subsection, the presiding officer shall hold** a hearing ~~shall be~~
 16 ~~held if requested by a party,~~ regarding the ~~awarding of~~ costs and
 17 fees. ~~and the amount thereof.~~ The party seeking an award of costs
 18 and fees ~~shall~~~~must~~ present evidence establishing all of the
 19 following:

20 (a) ~~That~~ **If subsection (2) applies, that** the position of the
 21 agency was frivolous.

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

23 (c) The amount of costs and fees sought. ~~including~~ **The party**
 24 **shall present** an itemized statement from any attorney ~~or~~ agent ~~or~~
 25 ~~or who represented the party and any~~ expert witness ~~who represented~~
 26 ~~the party~~ showing the rate at which the costs and fees were
 27 computed.

28 (d) That the party is eligible to receive an award under this
 29 section. Financial records of a party ~~shall be~~ **are** exempt from

1 public disclosure if ~~requested by~~ the party **so requests** at the time
 2 the records are submitted ~~pursuant to~~ **under** this section.

3 (e) That a final order **that is** not subject to further appeal
 4 other than ~~for~~ the judicial review of costs and fees provided for
 5 in section 125 has been entered in the contested case regarding the
 6 subject matter of the contested case.

7 (4) ~~(3)~~ The presiding officer may reduce the amount of the
 8 costs and fees to be awarded **under this section**, or deny an award,
 9 to the extent that the party seeking the award engaged in conduct
 10 ~~which~~ **that** unduly and unreasonably protracted the contested case.

11 (5) ~~(4)~~ The final action taken by the presiding officer under
 12 this section in regard to costs and fees ~~shall~~ **must** include written
 13 findings as to ~~that~~ **the** action and the basis for the findings.

14 (6) ~~(5)~~ Subject to subsection ~~(6)~~, ~~(7)~~, the amount of costs
 15 and fees awarded under this section ~~shall~~ **must** include those
 16 reasonable and necessary costs actually incurred by the party and
 17 any costs allowed by law or by a rule promulgated under this act.
 18 Subject to subsection ~~(6)~~, ~~(7)~~, the amount of fees awarded under
 19 this section ~~shall~~ **must** be based ~~upon~~ **on** the prevailing market rate
 20 for the kind and quality of the services furnished. ~~, subject to~~
 21 ~~the following:~~

22 ~~(a) The~~ **However**, expenses paid for an expert witness ~~shall~~
 23 **must** be reasonable and necessary as determined by the presiding
 24 officer.

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

1 (7) ~~(6)~~—The **presiding officer shall only award** costs and fees
2 ~~awarded~~ under this section ~~shall only be awarded~~ to the extent and
3 amount that the agency caused the prevailing party to incur those
4 costs and fees.

5 (8) ~~(7)~~—This section does not apply to ~~any~~**an** agency in its
6 role of hearing or adjudicating a case. Unless an agency has
7 discretion to proceed, this section does not apply to an agency
8 acting ex rel on the information and at the instigation of a
9 nonagency person who has a private interest in the matter ~~nor~~**or** to
10 an agency required by law to commence a case upon the action or
11 request of another nonagency person.

12 (9) ~~(8)~~—This section does not apply to an agency that has such
13 a minor role as a party in the case in comparison to other
14 nonprevailing parties ~~so~~ as to make its liability for costs and
15 fees under this section unreasonable, unjust, or unfair.

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

18 Enacting section 2. This amendatory act does not take effect
19 unless Senate Bill No. 245 of the 100th Legislature is enacted into
20 law.