



Senate Fiscal Agency
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BILL ANALYSIS

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Senate Bills 245 and 246 (as introduced 3-21-19)
Sponsor: Senator Ed McBroom (S.B. 245)
 Senator Adam Hollier (S.B. 246)
Committee: Oversight

Date Completed: 4-8-19

CONTENT

Senate Bills 245 and 246 would amend the Revised Judicature Act (RJA) 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 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.

Senate Bill 246 also 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 245**Award Against the State**

Chapter 24 of the Revised Judicature Act 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 have to award costs and fees to the prevailing party unless the State demonstrated 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 it 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 Michigan 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 either of the following: a) the child abuse and neglect central registry or b) child support or the establishment of paternity under Subchapter IV of the Social Security Act.
- 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 specifies 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.

Definition of "Party"

Chapter 24 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 246

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 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 the 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 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).

Definition of "Party"

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. 245)
24.271 et al. (S.B. 246)

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

Senate Bill 245

The bill would have an indeterminate, but likely negative, fiscal impact on the State and no fiscal impact on local government. The bill would broaden the potential liability exposure of the State for costs and fees in cases in which the State is not the prevailing party. The amount of State payments in cases in which it is not the prevailing part as well as fees and costs vary from year to year. For fiscal year (FY) 2016-17, the State paid \$17.1 million for nine

judgments and \$74.1 million for 59 settlements, but in FY 2008-09, for example, payments by the State for judgments and settlements totaled \$11.8 million. Although the bill would not directly affect settlements, it is likely that future settlements would take the changes proposed in the bill into consideration.

Senate Bill 246

The bill would have an indeterminate fiscal impact on State government and no fiscal impact on local government units. The magnitude of the fiscal impact on the State would depend upon the number of contested cases in which an agency is not the prevailing party and the amount of costs and fees assessed.

There were approximately 83,753 cases closed by the Michigan Administrative Hearing System in FY 2018-19, but there are no data on the number of cases in which the State was not the prevailing party.

The elimination of the \$75 per hour rate limit on attorney fees could result in increased costs for State agencies. The cost is indeterminate and would depend on the actual hourly rate charged.

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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.