

**STATE OF MICHIGAN  
99TH LEGISLATURE  
REGULAR SESSION OF 2018**

Introduced by Senators Robertson, Colbeck, Shirkey, Booher, Hansen, Johnson and MacGregor

# ENROLLED SENATE BILL No. 101

AN ACT to amend 1969 PA 306, entitled “An act to provide for the effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters; to provide for the printing, publishing, and distribution of certain publications; to provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters; to create and establish certain committees and offices; to provide for declaratory judgments as to rules; to repeal certain acts and parts of acts; and to repeal certain parts of this act on a specific date,” 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:*

Sec. 71. (1) The parties in a contested case must be given an opportunity for a hearing without undue delay.

(2) The parties must be given a reasonable notice of the hearing in a contested case. The notice must include all of the following:

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

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

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

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

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

(4) A member of the legislature is not privileged from service of notice or other process under this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature is not privileged from service of notice or other process under this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if the service of notice or process is executed by certified mail, return receipt requested.

Sec. 72. (1) 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. Notice is properly served if it is mailed to the party or the representative of record of the party at the party or the representative's last known address of record.

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

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

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

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

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

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

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

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

(f) Act on an application for an award of costs and fees under sections 121 to 127.

(2) To assure adequate representation for the people of this state, if the presiding officer knows that a party in a contested case is a member of the legislature of this state and the legislature is in session, the presiding officer shall continue the contested case to a nonmeeting day.

(3) To assure adequate representation for the people of this state, if the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or if the partisan caucus of which the legislator is a member is scheduled to meet, the presiding officer shall continue the contested case to a nonmeeting day.

(4) To assure adequate representation for the people of this state, if the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or if the partisan caucus of which the legislator is a member is scheduled to meet, the contested case need not be continued, but the presiding officer shall postpone the taking of the legislator's testimony, as a witness, to the earliest practicable nonmeeting day.

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

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member; a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which the party or witness is a member, or a scheduled partisan caucus of the members of the house of which the party or witness is a member.

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

(2) If the agency or presiding officer finds for justifiable reasons that the record of testimony made at the hearing is inadequate for purposes of judicial review, the agency or presiding officer, on the agency's or officer's own motion or on the request of a party, shall order a rehearing.

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

Sec. 115. (1) Chapters 4 and 6 do not apply to proceedings conducted under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

(2) Chapters 4 and 8 do not apply to a hearing conducted by the department of corrections under chapter IIIA of the corrections code of 1953, 1953 PA 232, MCL 791.251 to 791.256, or to proceedings before the parole board established under section 31a of the corrections code of 1953, 1953 PA 232, MCL 791.231a.

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

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

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

(c) Worker's disability compensation proceedings under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

(d) Unemployment compensation hearings under the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.1 to 421.75.

(e) Public assistance hearings under section 9 of the social welfare act, 1939 PA 280, MCL 400.9.

(4) Chapter 6 does not apply to final decisions or orders rendered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(5) After August 14, 1996, chapters 2, 3, and 5 do not apply to the municipal employees retirement system and retirement board created by the municipal employees retirement act of 1984, 1984 PA 427, MCL 38.1501 to 1555.

(6) Until April 1, 1998, chapters 2, 3, and 5 do not apply to the establishment, implementation, administration, operation, investment, or distribution of a Tier 2 retirement plan established under section 401(k) of the internal revenue code of 1986, 26 USC 401, under the state employees' retirement act, 1943 PA 240, MCL 38.1 to 38.69. After March 31, 1998, rules and guidelines promulgated or processed for the purposes described in this subsection are not effective and binding unless promulgated and processed in accordance with this act.

(7) Until April 1, 1998, chapters 2, 3, and 5 do not apply to the establishment, implementation, administration, operation, investment, or distribution of a Tier 2 retirement plan established under section 403(b) of the internal revenue code of 1986, 26 USC 403, under the public school employees retirement act of 1979, 1980 PA 300, MCL 38.1301 to 38.1437. After March 31, 1998, rules and guidelines promulgated or processed for the purposes described in this subsection are not effective and binding unless promulgated and processed in accordance with this act.

(8) Until April 1, 1998, chapters 2, 3, and 5 do not apply to the establishment, implementation, administration, operation, investment, or distribution of a Tier 2 retirement plan established under the internal revenue code of 1986, 26 USC 1 to 9834, under the Michigan legislative retirement system act, 1957 PA 261, MCL 38.1001 to 38.1080. After March 31, 1998, rules and guidelines promulgated or processed for the purposes described in this subsection are not effective and binding unless promulgated and processed in accordance with this act.

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

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

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

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

(c) A reasonable and necessary attorney or agent fee, including a fee for any appeal.

(3) "Party" means a party as defined in section 5.

(4) "Presiding officer" means an agency, 1 or more members of the agency, an individual designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a contested case.

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

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

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

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

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

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

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

(2) In a proceeding described in subsection (1)(a) to (c), the presiding officer shall only award costs and fees under subsection (1) if the presiding officer finds that the position of the agency in the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer must determine that 1 or more of the following is applicable:

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

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

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

(3) If the parties to a contested case do not agree on awarding costs and fees under this section, the prevailing party may file a motion for costs and fees. On a motion under this subsection, the presiding officer shall hold a hearing

regarding awarding costs and fees. The party seeking an award of costs and fees must present evidence establishing all of the following:

(a) If subsection (2) applies, that the position of the agency was frivolous.

(b) That the party is a prevailing party.

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

(d) That the party is eligible to receive an award under this section. Financial records of a party are exempt from public disclosure if the party so requests at the time the records are submitted under this section.

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

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

(5) The final action taken by the presiding officer under this section in regard to costs and fees must include written findings as to the action and the basis for the findings.

(6) Subject to subsection (7), the amount of costs and fees awarded under this section must include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this act. Subject to subsection (7), the amount of fees awarded under this section must be based on the prevailing market rate for the kind and quality of the services furnished. However, expenses paid for an expert witness must be reasonable and necessary as determined by the presiding officer.

(7) The presiding officer shall only award costs and fees under this section to the extent and amount that the agency caused the prevailing party to incur those costs and fees.

(8) This section does not apply to an agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an agency acting ex rel on the information and at the instigation of a nonagency person who has a private interest in the matter or to an agency required by law to commence a case upon the action or request of another nonagency person.

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

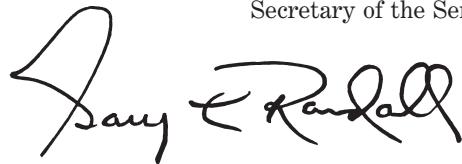
Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 100 of the 99th Legislature is enacted into law.

This act is ordered to take immediate effect.



Secretary of the Senate



Clerk of the House of Representatives

Approved .....

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Governor