

No. 1982-257

AN ACT

HB 1126

Requiring every Commonwealth agency to award certain fees and expenses in certain agency actions and providing for appeals from decisions of an adjudication officer.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Findings and purpose.

(a) The General Assembly finds that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable action of administrative agencies because of the expense involved in securing the vindication of their rights in administrative and review proceedings.

(b) The General Assembly further finds that because of the greater resources and expertise of the Commonwealth, the standard for an award of fees against the Commonwealth agencies should be different from the standard governing an award against a private litigant in certain situations.

(c) It is therefore the intent of the General Assembly to:

(1) Diminish the deterrent effect of seeking review of or defending against administrative agency action by providing in specified situations an award of attorney's fees, expert witness fees and other costs against the Commonwealth.

(2) Deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities.

Section 2. Definitions.

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Adversary adjudication." An adjudication as defined in 2 Pa.C.S. § 101 (relating to definitions). The term does not include an adjudication:

- (1) establishing or fixing a rate;
- (2) granting, reviewing, revoking or suspending a license or registration;
- (3) resolving disputes concerning the dismissal, suspension, or discipline of any employee of this Commonwealth; or
- (4) involving any criminal charges or allegations of official wrongdoing, corruption, malfeasance or misfeasance.

"Adjudication officer." The deciding official, without regard to whether the official is designated as an administrative law judge, a

hearing officer, examiner, referee or otherwise, who presided at the adversary adjudication.

"Commonwealth agency." Any executive or independent agency as defined by section 102 of the act of October 15, 1980 (P.L.950, No.164), known as the "Commonwealth Attorneys Act," as well as the Auditor General, State Treasurer and Public Utility Commission.

"Fees and expenses." The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the adjudicative officer or the court to be necessary for the preparation of the party's case, reasonable attorney's fees and any fee or charge required by law, rule or regulation to be paid to the agency, court or officer of the agency or court. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

(1) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved; and

(2) attorney fees shall not be awarded in excess of \$75 per hour unless an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding, justifies a higher fee. No award of fees and expenses shall be made where such fees and expenses are less than \$250, and no award shall be greater than \$10,000.

"Party." A party, as defined in 2 Pa.C.S. § 101, which is an individual, partnership, corporation, association or public or private organization other than an agency. The term does not include:

(1) Any individual whose net worth exceeded \$500,000 at the time the adversary adjudication was initiated and any sole owner of an unincorporated business, or any partnership, corporation, association, association or organization whose net worth exceeded \$2,000,000 at the time the adversary adjudication was initiated.

(2) Any sole owner of an unincorporated business, or any partnership, corporation, association or organization having more than 250 employees at the time the adversary adjudication was initiated.

(3) Any party represented by counsel paid, directly or indirectly, in whole or in part, by an appropriation, grant, subsidy or loan made by the State, local or Federal Government.

"Prevailing party." A party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth agency or who obtains a favorable settlement approved by the Commonwealth agency initiating the case.

"Substantially justified." The position of an agency as a party to a proceeding is substantially justified when such position has a reasonable basis in law and fact. The failure of an agency to prevail in a proceeding, or the agreement of an agency to settle a controversy, shall not raise a presumption that the position of the agency was not substantially justified.

Section 3. Award of fees and expenses in certain agency actions.

(a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances make an award unjust.

(b) A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer and a copy to the Commonwealth agency within 30 days after the final disposition of the adversary adjudication. The application shall include:

(1) A showing that the applicant is a prevailing party and is eligible to receive an award under this section.

(2) A clear statement of the total amount sought, including:

(i) an itemized list of fees from any attorney, agent or expert witness representing or appearing in behalf of the party;

(ii) the actual time expended by such agent or expert witness; and

(iii) the rate at which the fees and other expenses were computed.

(3) An allegation that the position of the Commonwealth agency was not substantially justified.

(c) The adjudicative officer shall make a finding of what fees and expenses to be awarded, if any, within 30 days of receipt of the application and may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer under this section shall be made a part of the record containing the final decision in the adversary adjudication and shall include written findings and conclusions and the reasons or basis therefor.

(d) Any party to an adversary adjudication may submit a brief to the adjudicative officer in support of its position as to whether fees and expenses should be awarded.

(e) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal such fee determination to the court having jurisdiction to review final orders of a Commonwealth agency under 42 Pa.C.S. (relating to judiciary and judicial procedure). If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the fee determination only if the court finds that the failure to make an award or the calculation of the amount was an abuse of discretion by the adjudicative officer.

(f) In the event a party appeals the underlying decision of the adversary adjudication, the court having jurisdiction over appeals from that Commonwealth agency shall forward fees and expenses to a prevailing

party, other than the Commonwealth, unless the court finds that during such adversary adjudication the position of the Commonwealth agency was substantially justified, or that special circumstances make an award unjust.

(g) A judgment of fees and expenses awarded to a prevailing party under this section shall be payable by the Commonwealth agency out of its annual appropriation for general government, except where no general government funds are available, out of its general administrative funds. In the event sufficient funds are not available to pay all awards, each award shall be prorated accordingly and the unpaid balance provided from any subsequent appropriations made to the agency.

Section 4. Rules and regulations.

(a) The Governor's Office of Budget and Administration shall promulgate guidelines or uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

(b) After consultation with the Secretary of Budget and Administration, each agency shall by rule establish specific procedures for the submission and consideration of applications for an award of fees and other expenses for adjudicative proceedings before the agency, or may adopt the uniform procedures recommended by the secretary.

(c) Whenever an award of fees or other expenses is made, the agency shall provide a report to the Secretary of Budget and Administration explaining why the award was granted and identifying whatever remedial actions are necessary to avoid future adversary adjudications being undertaken without substantial justification.

(d) The Secretary of Budget and Administration shall, on July 1 of each year, provide a report to the General Assembly on awards made pursuant to this act.

Section 5. Report to General Assembly.

Not later than January 1, 1987 the Secretary of Budget and Administration shall transmit a report to the General Assembly regarding the cost and effectiveness of this act together with a recommendation for its termination, continuation or amendment.

Section 6. Effective date.

(a) Except as provided in subsection (b), this act shall take effect July 1, 1983.

(b) Section 4 shall take effect immediately.

(c) This act shall expire July 1, 1987 unless sooner reenacted or amended.

APPROVED—The 13th day of December, A. D. 1982.

DICK THORNBURGH