

2007 DRAFTING REQUEST

Bill

Received: **04/17/2006**

Received By: **bbalinsk**

Wanted: **Soon**

Identical to LRB:

For: **Donald Friske (608) 266-7694**

By/Representing: **Don Dyke**

This file may be shown to any legislator: **NO**

Drafter: **bbalinsk**

May Contact:

Addl. Drafters:

Subject: **Courts - costs and fees**

Extra Copies: **RPN**

Submit via email: **YES**

Requester's email: **Rep.Friske@legis.wisconsin.gov**

Carbon copy (CC:) to: **don.dyke@legis.state.wi.us**
paul.onsager@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Payment of costs and attorney fees in action against state

Instructions:

Expand 227.485 and 814.245 to all persons and all income levels

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	bbalinsk 09/13/2006	kfollett 09/13/2006	jfrantze 09/14/2006	_____	mbarman 09/14/2006		State
/1	bbalinsk 05/22/2007	kfollett 05/22/2007	nmatzke 05/22/2007	_____	lparisi 05/22/2007	sbasford 05/23/2007	State

FE Sent For:

*at
intro*

<END>

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/P1	bbalinsk 09/13/2006	kfollett 09/13/2006	jfrantze 09/14/2006	_____	mbarman 09/14/2006		State

FE Sent For:

1/KF
5/22
MW
5/22
hwh
5/22
<END>

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/P1	bbalinsk	1P1/gjf 9/13	9/14	9/17	9/28		

FE Sent For:

<END>

Nelson, Robert P.

From: Gary, Tim
Sent: Thursday, August 24, 2006 12:36 PM
To: Nelson, Robert P.

Bob,

This session you drafted LRB 4925. Representative Friske respectfully requests you draft up a version for the upcoming legislative session at your earliest convenience.

Please call me if you have any questions.

Tim Gary
Research Assistant for
Representative Donald R Friske

*Put DD on draft.
(LFB)
Put Paul Insinger on
draft*



Fn 9/5/06

BAB:lgf

SOON

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

LPS:
Please
fix components -
no LAW
components

D - Note

Regen

? ~~not complete - not~~
~~our job~~

1 AN ACT to repeal 227.485 (2) (b), (c), and (d), 227.485 (7), 814.245 (2) (a), (b), and
2 (c), and 814.245 (8); and to amend 106.20 (1) (f), 227.485 (1), 227.485 (3),
3 227.485 (6), 814.245 (3); **relating to:** awarding costs in administrative agency
4 actions.

Analysis by the Legislative Reference Bureau

X Under current law, if an individual, small nonprofit corporation, or a small
X business is the prevailing party in an administrative agency contested case, in an
action brought by an agency, or in a judicial review proceeding under s. 227.485 (6),
that prevailing party is entitled to an award of costs unless the court finds the agency
was substantially justified in taking its position or if such an award would be unjust
under the circumstances. If the prevailing party is an individual, that party is not
entitled to recover costs if the party's federal adjusted gross income was \$150,000 or
more in each of the three years prior to the commencement of the action. (A)

This bill eliminates financial and entity size limitations for prevailing parties
to be eligible to receive costs in administrative agency actions, allowing an award of
costs to all persons who are prevailing parties unless the court finds the agency was
substantially justified in taking its position or if such an award would be unjust
under the circumstances.

APK.....

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 106.20 (1) (f) of the statutes is amended to read:

2 106.20 (1) (f) "Small business" has the meaning given in s. 227.485 (2) (e) means
3 a business entity, including its affiliates, which is independently owned and
4 operated, and which employs 25 or fewer full-time employees or which has gross
5 annual sales of less than \$5,000,000.

6 SECTION 2. 227.485 (1) of the statutes is amended to read:

7 227.485 (1) The legislature intends that hearing examiners and courts in this
8 state, when interpreting this section, be guided by federal case law, as of November
9 20, 1985, interpreting substantially similar provisions under the federal equal
10 access to justice act, 5 USC 504.

See 227.485

11 SECTION 3. 227.485 (2) (b), (c) and (d) of the statutes are repealed.

12 SECTION 4. 227.485 (3) of the statutes is amended to read:

13 227.485 (3) In any contested case in which ~~an individual, a small nonprofit~~
14 ~~corporation or a small business~~ a person other than the state is the prevailing party
15 and submits a motion for costs under this section, the hearing examiner shall award
16 the prevailing party the costs incurred in connection with the contested case, unless
17 the hearing examiner finds that the state agency which is the losing party was
18 substantially justified in taking its position or that special circumstances exist that
19 would make the award unjust.

20 SECTION 5. 227.485 (6) of the statutes is amended to read:

1 227.485 (6) A final decision under sub. (5) is subject to judicial review under s.
 2 227.52. If the ~~individual, small nonprofit corporation or small business~~ a person
 3 other than the state is the prevailing party in the proceeding for judicial review, the
 4 court shall make the findings applicable under s. 814.245 and, if appropriate, award
 5 costs related to that proceeding under s. 814.245, regardless of who petitions for
 6 judicial review. In addition, the court on review may modify the order for payment
 7 of costs in the final decision under sub. (5).

8 **SECTION 6.** 227.485 (7) of the statutes is repealed.

9 **SECTION 7.** 814.245 (1) of the statutes is amended to read:

10 814.245 (1) The legislature intends that courts in this state, when interpreting
 11 this section, be guided by federal case law, ~~as of November 20, 1985,~~ interpreting
 12 substantially similar provisions under the federal equal access to justice act, 5 USC
 13 504.

get
DN

14 **SECTION 8.** 814.245 (2) (a), (b) and (c) of the statutes are repealed.

15 **SECTION 9.** 814.245 (3) of the statutes is amended to read:

16 814.245 (3) Except as provided in s. 814.25, if ~~an individual, a small nonprofit~~
 17 ~~corporation or a small business~~ a person other than the state is the prevailing party
 18 in any action by a state agency or in any proceeding for judicial review under s.
 19 227.485 (6) and submits a motion for costs under this section, the court shall award
 20 costs to the prevailing party, unless the court finds that the state agency was
 21 substantially justified in taking its position or that special circumstances exist that
 22 would make the award unjust.

23 **SECTION 10.** 814.245 (8) of the statutes is repealed.

text: ns: inapp IA

24 **SECTION 11. Initial applicability.** The treatment of sections 106.20 (1) (f),

25 227.485 (1), 227.485 (3), 227.485 (6), 814.245 (1) and 814.245 (3) of the statutes and

of the statutes

1 the repeal of sections 227.485 (2) (b), (c), and (d), 227.485 (7), 814.245 (2) (a), (b), and
 2 (c), and 814.245 (8) first applies to administrative agency contested cases, actions by
 3 a state agency, and judicial review proceedings under s. 227.485 (6), commenced on
 4 the effective date of this subsection.

change to
action NS: eff date

5 **SECTION 12. Effective date.** This act takes effect on the first day of the 4th
 6 month beginning after publication.

(END)

D-Note

Date

LRB-0008/P1dr
RPN:lgf

Tim:

In ss. 227.485(1) and 814.245(1) there is legislative intent language that limits our courts. When interpreting the provisions affected by this bill, the courts must be guided by federal case law as of November 20, 1985, that interpreted substantially similar provisions under the federal law. In effect, this provision limits our courts to looking at federal cases that were decided before November 20, 1985, for guidance as to its meaning. This is an unusual provision. I could find nothing similar in the statutes. Usually, our state courts look to other state and federal court decisions when deciding our own cases. They are not bound by those decisions; they only provide guidance. (over)

September 1985 Special Session

SENATE BILL 10

October 1, 1985 - Introduced. Referred to Committee on Judiciary and Consumer Affairs.

1 AN ACT to amend 20.865 (1) (a), (g) and (q) and 814.04 (intro.); and to
2 create 227.115 and 814.245 of the statutes, relating to awards of
3 costs to individuals and small businesses and making an appropriation.

Analysis by the Legislative Reference Bureau

Under present law, costs are generally not awarded in administrative contested case proceedings and costs are subject to certain limitations in court actions. This bill provides procedures for awarding a more complete recovery of actual costs for individuals and small businesses if they prevail in an administrative contested case proceeding or judicial review of a contested case proceeding, regardless of who initiates the proceeding or review, or in a court action brought by a state agency. The small businesses which are covered are those businesses which have fewer than 25 full-time employees or have gross annual sales under \$2,500,000 and the individuals who are covered are those people with a net worth of \$500,000 or less. Costs which are recoverable under the bill include:

1. Expert witness fees which may not exceed the highest rate of compensation paid to expert witnesses by the agency which is the losing party.

2. The reasonable cost of any study, analysis, engineering report, test or project which was necessary for the preparation of the case.

3. Attorney or agent fees, not to exceed \$75 per hour unless a higher fee is justified.

4. Disbursements for service of process, certified copies of official records, copying and correspondence, adverse examinations, plats and photographs, witness fees, mileage and title abstracts.

In the administrative contested case proceeding, the judicial review of a contested case proceeding or the court action, the prevailing individual or small business submits an itemized application for recovery of its costs and the losing agency may dispute any of those items. If an agency is ordered to pay these costs, the payment is made from program supplement funds. Hearing examiners and courts are directed to make partial awards of costs in applicable multiple issue cases. The agency must report annually to the presiding officer of each house of the legislature

regarding orders to pay these costs. Prevailing parties seeking these awards of costs must submit a motion to the hearing examiner or court, as applicable, for the payment. If the hearing examiner or court finds that the motion is frivolous, reasonable costs for responding to the motion may be awarded to the state agency.

This bill applies to contested cases and actions commenced on or after the effective date of this act.

For further information, see the state fiscal estimate which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly,
do enact as follows:

1 SECTION 1. 20.865 (1) (a), (g) and (q) of the statutes are amended to
2 read:

3 20.865 (1) (a) Judgments and legal expenses. A sum sufficient to pay
4 for legal expenses under ss. 59.31 and 776.43, for costs under ss. 227.115
5 and 814.245 and for the costs of judgments, orders and settlements of
6 actions, appeals and complaints under subch. II of ch. 111 or subch. II or
7 III of ch. 230, and those judgments, awards, orders and settlements under
8 ss. 21.13, 165.25 (6), 775.04 and 895.46 that are not otherwise reimburs-
9 able as liability costs under par. (fm). Release of moneys under this
10 paragraph pursuant to any settlement agreement, whether or not incorpo-
11 rated into an order, is subject to approval of the attorney general.

12 (g) Judgments and legal expenses; program revenues. From the appro-
13 priate program revenue and program revenue-service accounts, a sum suffi-
14 cient to pay for legal expenses under ss. 59.31 and 776.43, for costs
15 under ss. 227.115 and 814.245 and for the cost of judgments, orders and
16 settlements of actions, appeals and complaints under subch. II of ch. 111
17 or subch. II or III of ch. 230, and those judgments, awards, orders and
18 settlements under ss. 21.13, 165.25 (6), 775.04 and 895.46 that are not
19 otherwise reimbursable as liability costs under par. (fm). Release of
20 moneys under this paragraph pursuant to any settlement agreement, whether

1 (b) The party or the party's attorney knew, or should have known, that
2 the motion was without any reasonable basis in law or equity and could not
3 be supported by a good faith argument for an extension, modification or
4 reversal of existing law.

5 SECTION 3. 814.04 (intro.) of the statutes is amended to read:

6 814.04 ITEMS OF COSTS. (intro.) Except as provided in s. s.
7 814.025 and 814.245, when allowed costs shall be as follows:

8 SECTION 4. 814.245 of the statutes is created to read:

9 814.245 ACTIONS BY STATE AGENCIES. (1) The legislature intends that
10 courts in this state, when interpreting this section, be guided by federal
11 case law, as of the effective date of this subsection [reviser
12 inserts date], interpreting substantially similar provisions under the
13 federal equal access to justice act, P.L. 96-481.

14 (2) In this section:

15 (a) "Small business" means a business entity, including its
16 affiliates, which is independently owned and operated, and which employs
17 fewer than 25 full-time employees or which has gross annual sales of less
18 than \$2,500,000.

19 (b) "State agency" does not include the public intervenor or citizen
20 utility board.

21 (c) "Substantially justified" means having a reasonable basis in law
22 and fact.

23 (3) If an individual or a small business is the prevailing party in
24 any action by a state agency or in any proceeding for judicial review
25 under s. 227.115 (6) and submits a motion for costs under this section,
26 the court shall award costs to the prevailing party, unless the court
27 finds that the state agency was substantially justified in taking it

September 19 85 Special Session

1985

DRAFTING REQUEST

Extra Copies

BF

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San Jacket

7

LRB

4241

Date rec'd 9/26

Received by BF

Wanted 4:00 PM TODAY

Drafter BF

S

A

Bill

Jt. Res.

Res.

Sub. Amdt.

Amdt.

SUBJECT Costs and small businesses

FOR GOVERNOR

BY/Representing Juan Colon

BILL INDEX COURTS & PROCEDURES This file MAY BE SHOWN to any legislator

(Signature)

MAY CONTACT 6-8008 Juan

INSTRUCTIONS:

[If this bill passes ...]

see attch

Spec. Session
Jacketed

Work/O	/P1	/P2	/P3	1st	2nd	3rd	4th	5th
				Drafted BF				
				Reviewed KC 9/26				
				Typist [handwritten]				
Original to drafter				Proofed [handwritten]				
				Submitted 9/26				
FE sent for 101				FE-S/L	FE-S/L	FE-S/L	FE-S/L	FE-S/L
				PUBDEB	PUBDEB	PUBDEB	PUBDEB	PUBDEB
				RETIRE	RETIRE	RETIRE	RETIRE	RETIRE
				TAXEXM	TAXEXM	TAXEXM	TAXEXM	TAXEXM

All "/P" copies: give to drafter

Requested (Please sign below) ORIGINAL draft:

Received JACKET:

Juan B. Colon

MEMORANDUM

TO: Senator Feingold
FROM: Juan ~~San~~ Colas
RE: Small Business Costs Bill
DATE: September 26, 1985

Instructions

After discussions in our office I suggest the following changes in the small business litigation costs bill, draft LRB 4127/2dn:

1. As you suggested, have a "Wisconsin sized" limit on individual net worth of \$500,000 rather than \$2 million.

2. Add a definition of "substantially justified". I suggest: "substantially justified" means having a reasonable basis in law ^{and} fact." This is the core of the federal case law on the question and would be incorporated by the section referring to following federal case law, but I think agencies, including DOJ, will be more at ease with an explicit definition. The federal reference can also remain, to make it clear that in applying the statute and the definition, Wisconsin courts should rely on the federal decisions.

3. Require a prevailing party to file a petition seeking award of costs, rather than simply having the examiner make the finding on his own motion. The petition would simply have to allege, without any burden of proof, that the agency's position was not substantially justified. The mere filing of the petition would be enough to impose on the agency the burden of showing its position was substantially justified. Coupled with the penalty for frivolous claims (below) this might calm the agency's fears of a having to demonstrate the justification for their position in every case, while not shifting the burden to the prevailing party.

4. Adopt your suggestion of penalizing frivolous claims for costs. If the examiner or court finds prevailing party's petition for costs was frivolous, as defined in § 814.025(3), the examiner or court could (but would not be required to) award to the agency its costs, including employee time, in responding to the prevailing party's petition for costs.

5. 15 days on court side.

814.025

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0008/P1dn
RPN:kjfjf

September 14, 2006

Tim:

In ss. 227.485 (1) and 814.245 (1) there is legislative intent language that limits our courts. When interpreting the provisions affected by this bill, the courts must be guided by federal case law as of November 20, 1985, that interpreted substantially similar provisions under the federal law. In effect, this provision limits our courts to looking at federal cases that were decided before November 20, 1985, for guidance as to its meaning. This is an unusual provision. I could find nothing similar in the statutes. Usually, our state courts look to other state and federal court decisions when deciding our own cases. They are not bound by those decisions; they only provide guidance. I suggest that you ask experts in this field of law, possibly at the Department of Justice, if removing this unusual provision would cause any problems. If not, I would urge its removal.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us



State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-0008/BI

BAB:kjf/jf

RMR

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

FW 5/22/07
Need by 5/24/07

Regen

1 AN ACT *to repeal* 227.485 (2) (b), (c) and (d), 227.485 (7), 814.245 (2) (a), (b) and
2 (c) and 814.245 (8); and *to amend* 106.20 (1) (f), 227.485 (3), 227.485 (6) and
3 814.245 (3) of the statutes; **relating to:** awarding costs in administrative
4 agency actions.

Analysis by the Legislative Reference Bureau

Under current law, if an individual, small nonprofit corporation, or a small business is the prevailing party in an administrative agency contested case, in an action brought by an agency, or in a judicial review proceeding under s. 227.485 (6), that prevailing party is entitled to an award of costs unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances. If the prevailing party is an individual, that party is not entitled to recover costs if the party's federal adjusted gross income was \$150,000 or more in each of the three years prior to the commencement of the action.

This bill eliminates financial and entity size limitations for prevailing parties to be eligible to receive costs in administrative agency actions, allowing an award of costs to all persons who are prevailing parties unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 106.20 (1) (f) of the statutes is amended to read:

2 106.20 (1) (f) "Small business" ~~has the meaning given in s. 227.485 (2) (e)~~ means
3 a business entity, including its affiliates, which is independently owned and
4 operated, and which employs 25 or fewer full-time employees or which has gross
5 annual sales of less than \$5,000,000.

6 **SECTION 2.** 227.485 (2) (b), (c) and (d) of the statutes are repealed.

7 **SECTION 3.** 227.485 (3) of the statutes is amended to read:

8 227.485 (3) In any contested case in which ~~an individual, a small nonprofit~~
9 ~~corporation or a small business~~ a person other than the state is the prevailing party
10 and submits a motion for costs under this section, the hearing examiner shall award
11 the prevailing party the costs incurred in connection with the contested case, unless
12 the hearing examiner finds that the state agency which is the losing party was
13 substantially justified in taking its position or that special circumstances exist that
14 would make the award unjust.

15 **SECTION 4.** 227.485 (6) of the statutes is amended to read:

16 227.485 (6) A final decision under sub. (5) is subject to judicial review under
17 s. 227.52. If ~~the individual, small nonprofit corporation or small business~~ a person
18 other than the state is the prevailing party in the proceeding for judicial review, the
19 court shall make the findings applicable under s. 814.245 and, if appropriate, award
20 costs related to that proceeding under s. 814.245, regardless of who petitions for

1 judicial review. In addition, the court on review may modify the order for payment
2 of costs in the final decision under sub. (5).

3 SECTION 5. 227.485 (7) of the statutes is repealed.

4 SECTION 6. 814.245 (2) (a), (b) and (c) of the statutes are repealed.

5 SECTION 7. 814.245 (3) of the statutes is amended to read:

6 814.245 (3) Except as provided in s. 814.25, if ~~an individual, a small nonprofit~~
7 ~~corporation or a small business~~ a person other than the state is the prevailing party
8 in any action by a state agency or in any proceeding for judicial review under s.
9 227.485 (6) and submits a motion for costs under this section, the court shall award
10 costs to the prevailing party, unless the court finds that the state agency was
11 substantially justified in taking its position or that special circumstances exist that
12 would make the award unjust.

13 SECTION 8. 814.245 (8) of the statutes is repealed.

14 SECTION 9. **Initial applicability.**

15 (1) The treatment of sections 106.20 (1) (f), 227.485 (3), 227.485 (6), and 814.245
16 (3) of the statutes and the repeal of sections 227.485 (2) (b), (c), and (d), 227.485 (7),
17 814.245 (2) (a), (b), and (c), and 814.245 (8) of the statutes first applies to
18 administrative agency contested cases, actions by a state agency and judicial review
19 proceedings under s. 227.485 (6), commenced on the effective date of this subsection.

20 SECTION 10. **Effective date.** This act takes effect on the first day of the 4th
21 month beginning after publication.

(END)

change to
action
effdate

(1) ← text: NS: effdate A

Duerst, Christina

From: Gary, Tim
Sent: Tuesday, May 22, 2007 4:42 PM
To: LRB.Legal
Subject: Draft Review: LRB 07-0008/1 Topic: Payment of costs and attorney fees in action against state

Please Jacket LRB 07-0008/1 for the ASSEMBLY.