

SENATE
STATE OF MINNESOTA
EIGHTY-SEVENTH LEGISLATURE

S.F. No. 1298

(SENATE AUTHORS: THOMPSON)

DATE	D-PG	OFFICIAL STATUS
04/26/2011	1409	Introduction and first reading Referred to Judiciary and Public Safety
02/27/2012		Comm report: To pass as amended and re-refer to State Government Innovation and Veterans

A bill for an act
relating to civil actions; regulating the imposition of certain civil penalties by
state agencies; awarding fees and expenses to prevailing parties in certain actions
involving state agencies and municipalities; amending Minnesota Statutes 2010,
sections 15.471, subdivision 6, by adding a subdivision; 15.472; proposing
coding for new law in Minnesota Statutes, chapters 15; 471.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. **[15.062] PENALTY FACTORS.**

(a) In determining the amount of civil penalty to be proposed or assessed in an
administrative or civil action by any state agency, where there is an allegation of a
violation of statute, regulation, term, condition, or any enforceable standard, the following
factors shall be considered by the state agency, delegated county administering state
authority, administrative law judge, or court:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including irreparable damage to humans, animals,
air, water, land, or other natural resources of the state;
- (3) the number of prior contacts with the person where the state agency offered
reasonable corrective measures prior to issuing the fine;
- (4) the history of past violations;
- (5) the number of violations;
- (6) the economic benefit gained by the person by allowing or committing the
violation;
- (7) the costs incurred to correct the violation or otherwise comply;
- (8) the person's ability to pay;
- (9) other economic factors affecting the feasibility or practicality of compliance;

(10) penalties that similarly situated persons have paid to the state for similar violations;

(11) the cooperation and responsiveness of the person, provided that a penalty shall not be imposed or enhanced because a person has contested a violation or asserted their rights or defenses; and

(12) other factors as justice may require.

(b) For a violation after an initial violation, the state agency, delegated county administering state authority, administrative law judge, or court shall, in determining the amount of a penalty, also consider the following factors:

(1) similarity of the most recent previous violation and the violation to be penalized;

(2) time elapsed since the last violation;

(3) number of previous violations; and

(4) response of the person to the most recent previous violation identified.

(c) In addition to stating the factual and legal basis for each violation, the state agency or delegated county administering state authority shall, in its notice, demand, order, or complaint in an administrative or civil proceeding, document the application of these considerations in determining any proposed penalty. The state agency or delegated county administering state authority shall provide this documentation to the person subject of the administrative or civil action 60 days before initiating any such action.

Sec. 2. **[15.0621] INITIAL VIOLATION; PENALTY LIMITATION.**

In any case where the person subject to the statute, regulation, term, or condition of any enforceable standard has no history of noncompliance, the state agency, delegated county administering state authority, administrative law judge, or court shall not assess a penalty of more than 20 percent of the statutory maximum that may be imposed for such violation unless the alleged violation presents an imminent and substantial endangerment to the public, human health, or the environment or where there is an allegation of a violation of the specific terms of an administrative order, a judicial order, consent decree, a stipulation agreement, or a schedule of compliance.

Sec. 3. Minnesota Statutes 2010, section 15.471, is amended by adding a subdivision to read:

Subd. 3a. **Demand.** "Demand" means the express demand of the agency which led to the civil action or contested case proceeding but does not include a recitation by the agency of the maximum statutory penalty:

(1) in the administrative complaint; or

(2) elsewhere when accompanied by an express demand for a lesser amount.

Sec. 4. Minnesota Statutes 2010, section 15.471, subdivision 6, is amended to read:

Subd. 6. **Party.** (a) Except as modified by paragraph (b), "party" means a person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action or contested case proceeding, or a person admitted by an administrative law judge for limited purposes, and who is:

(1) an unincorporated business, partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed or the contested case proceeding was initiated; and

(2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed ~~\$7,000,000~~ \$30,000,000 at the time the civil action was filed or the contested case proceeding was initiated.

(b) "Party" also includes a partner, officer, shareholder, member, or owner of an entity described in paragraph (a), clauses (1) and (2).

(c) "Party" does not include a person providing services pursuant to licensure or reimbursement on a cost basis by the Department of Health or the Department of Human Services, when that person is named or admitted or seeking to be admitted as a party in a matter which involves the licensing or reimbursement rates, procedures, or methodology applicable to those services.

Sec. 5. Minnesota Statutes 2010, section 15.472, is amended to read:

15.472 FEES AND EXPENSES; CIVIL ACTION OR CONTESTED CASE PROCEEDING INVOLVING STATE.

(a) If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

(b) If, in a civil action or contested case proceeding arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the administrative law judge or court and is unreasonable when compared with such decision under the facts and circumstances of the case, the administrative law judge or court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or engaged in conduct that unduly

and unreasonably protracted the final resolution of the matter in controversy, or special circumstances make an award unjust.

~~(b)~~ (c) A party seeking an award of fees and other expenses shall, within 30 days of final judgment in the action, submit to the court or administrative law judge an application of fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the state was not substantially justified.

~~(c)~~ (d) The court or administrative law judge may reduce the amount to be awarded under this section, or deny an award, to the extent that the prevailing party during the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of an administrative law judge under this section must be made a part of the record containing the final decision of the agency and must include written findings and conclusions.

~~(d)~~ (e) This section does not preclude a party from recovering costs, disbursements, fees, and expenses under other applicable law.

Sec. 6. **[471.421] DEFINITIONS.**

Subdivision 1. **Terms defined.** For purposes of sections 471.421 to 471.423, the terms defined in this section have the meanings given them.

Subd. 2. **Expenses.** "Expenses" means the costs incurred by the party in the litigation, including:

- (1) filing fees;
- (2) subpoena fees and mileage;
- (3) transcript costs and court reporter fees;
- (4) expert witness fees;
- (5) the reasonable cost of any study, analysis, engineering report, survey, appraisal, test, or project;
- (6) photocopying and printing costs;
- (7) postage and delivery costs; and
- (8) service of process fees.

Subd. 3. **Demand.** "Demand" means the express demand of the agency which led to the civil action or contested case proceeding but does not include a recitation by the agency of the maximum statutory penalty:

- (1) in the administrative complaint; or

(2) elsewhere when accompanied by an express demand for a lesser amount.

Subd. 4. **Fees.** "Fees" means the reasonable attorney fees or reasonable fees charged by a person not an attorney who is authorized by law or rule to represent the party and may include reasonable charges by the party, the party's employee, or agent. The amount of fees must be based upon prevailing market rates for the kind and quality of the services furnished. In a court action, an expert witness may not be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state.

Subd. 5. **Municipality.** "Municipality" means a home rule charter or statutory city, county, town, school district, political subdivision, or agency of local government. The term also includes the Metropolitan Council or a board or agency created under chapter 473.

Subd. 6. **Party.** (a) Except as modified by paragraph (b), "party" means a person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action, and who is:

(1) an unincorporated business, partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

(2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed \$30,000,000 at the time the civil action was filed.

(b) "Party" also includes a partner, officer, shareholder, member, or owner of an entity described in paragraph (a), clauses (1) and (2). The term does not include a party in a civil action brought by or against the municipality in connection with the granting or denying of a liquor license.

Subd. 7. **Substantially justified.** "Substantially justified" means that the municipality's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation.

Sec. 7. **[471.422] FEES AND EXPENSES; CIVIL ACTION INVOLVING MUNICIPALITY.**

(a) The court shall award fees and other expenses to a prevailing party in a civil action unless special circumstances make an award unjust, provided that:

(1) the action is a civil action other than a tort action;

(2) the municipality's orders or total cost of compliance with the orders is in an amount of \$10,000 or more;

(3) the prevailing party is not the municipality; and

(4) the position of the municipality was not substantially justified.

6.1 (b) If, in a civil action arising from an agency action to enforce a party's compliance
6.2 with a statutory, regulatory, or ordinance requirement, the demand by the municipality is
6.3 substantially in excess of the decision of the court and is unreasonable when compared
6.4 with such decision under the facts and circumstances of the case, the court shall award to
6.5 the party the fees and other expenses related to defending against the excessive demand,
6.6 unless the party has committed a willful violation of law or engaged in conduct that
6.7 unduly and unreasonably protracted the final resolution of the matter in controversy, or
6.8 special circumstances make an award unjust.

6.9 Sec. 8. **[471.423] PAYMENT OF COSTS AND FEES.**

6.10 A judgment against a municipality in a civil action for fees and expenses under
6.11 section 471.422 must be paid from funds of the municipality.

6.12 Sec. 9. **TITLE.**

6.13 This act may be cited as the "Small Business Bill of Rights - Regulatory Fairness
6.14 Act."

6.15 Sec. 10. **EFFECTIVE DATE; APPLICATION.**

6.16 This act is effective August 1, 2011, and applies to administrative or civil actions
6.17 commenced on or after that date.