

Senate Bill 526

Sponsored by Senator STARR

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires court to award attorney fees and costs and disbursements to petitioner in judicial proceeding against state agency if court finds in favor of petitioner, unless agency can prove agency's action was substantially justified.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to legal expenses awarded against state agencies; creating new provisions; amending ORS
3 182.090, 183.482, 183.484 and 183.497; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 182.090 is amended to read:

6 182.090. (1) **As used in this section:**

7 (a) **"Civil judicial proceeding" means any proceeding conducted before a court of this**
8 **state, except:**

9 (A) **A criminal proceeding, as defined in ORS 131.005;**

10 (B) **A proceeding on a tort claim; and**

11 (C) **A proceeding to establish, modify or enforce a child support obligation under ORS**
12 **chapter 25, 107, 108, 109, 110 or 416 or ORS 419B.400 or 419C.590 involving an entity providing**
13 **support enforcement services under ORS 25.080, or any related proceeding, such as a civil**
14 **contempt action or judicial review of an administrative action.**

15 (b) **"In favor of the petitioner" means that a significant portion of a state agency's action**
16 **challenged by a petitioner is altered or invalidated in a manner that is or likely will be in the**
17 **petitioner's favor.**

18 (c) **"State agency's action" means the position or action of a state agency in a civil ju-**
19 **dicial proceeding.**

20 (d) **"Substantially justified" means justified in both fact and law and to a degree that**
21 **would satisfy a reasonable person.**

22 (2) **It is the policy of the Legislative Assembly that the law be applied and enforced justly**
23 **and fairly. Judicial review of state agency actions provides an adversarial test of those**
24 **actions and ensures the legitimacy and fairness of the actions. Persons must not be deterred**
25 **in seeking judicial review of or defending against unreasonable state agency actions because**
26 **of the expense involved in vindicating their rights. It is the Legislative Assembly's intent to**
27 **deter state agency wrongdoing and provide compensation to parties injured by state agency**
28 **actions that are not substantially justified.**

29 [(1)] (3) **In any civil judicial proceeding involving as adverse parties a state agency, as defined**
30 **in ORS 291.002, and a petitioner, the court shall award the petitioner reasonable attorney fees and**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 reasonable [*expenses*] **costs and disbursements** if the court finds in favor of the petitioner, [*and*
 2 *also*] **unless the court** finds that the state agency [*acted without a reasonable basis in fact or in*
 3 *law.*] **has proved that the state agency's action was substantially justified. The court shall**
 4 **determine whether the state agency's action is substantially justified based on the whole**
 5 **record made in the civil judicial proceeding.**

6 (4)(a) **Within 30 days after the entry of a judgment at trial or after a decision on appeal,**
 7 **a petitioner seeking an award of attorney fees and costs and disbursements shall file with**
 8 **the court a petition for attorney fees and costs and disbursements. In the petition, the**
 9 **petitioner shall:**

10 (A) **State that the petitioner is eligible for an award under this section and describe the**
 11 **holding in favor of the petitioner;**

12 (B) **State the amounts sought;**

13 (C) **Include an itemized statement of attorney fees and costs and disbursements, includ-**
 14 **ing expert witness fees, for representing the petitioner, stating the actual time expended and**
 15 **the rates at which the fees and costs and disbursements were computed; and**

16 (D) **Allege that the state agency's action was not substantially justified.**

17 (b) **A state agency may file objections to the petition within 14 days after being served**
 18 **with the petition. The objections must be specific and explain how the state agency's action**
 19 **was substantially justified in both fact and law.**

20 (c) **If the state agency does not timely file objections, the court shall award attorney fees**
 21 **and costs and disbursements, including expert witness fees, based on the information in the**
 22 **petition.**

23 (d) **If the state agency timely files objections, the petitioner may reply to the objections**
 24 **within 10 days after being served with the objections.**

25 (e) **If the state agency timely files objections, the court may decide the matter based on**
 26 **the petition, objections and reply, or the court may hold a hearing and take testimony.**

27 (f) **At the request of either party, the court shall make special findings of fact and state**
 28 **its conclusions of law on the record regarding the issues material to the award or denial of**
 29 **attorney fees and costs and disbursements.**

30 (g) **In making the decision, the court shall consider that the burden of proving that the**
 31 **state agency's action was substantially justified is on the state agency. The court may not**
 32 **rely on the factors specified in ORS 20.075 (1) or ORCP 68. However, the court may consider**
 33 **factors found in Oregon common law, which also appear in ORS 20.075 (2), in determining a**
 34 **reasonable amount of attorney fees and costs and disbursements.**

35 (h) **The court shall make any award or denial of attorney fees and costs and disburse-**
 36 **ments in a supplemental or appellate judgment.**

37 [(2)] (5) **Amounts allowed under this section for reasonable attorney fees and [*expenses*] rea-**
 38 **sonable costs and disbursements shall be paid from funds available to the state agency. [*The court***
 39 ***may withhold all or part of the attorney fees from any award to a petitioner if the court finds that the***
 40 ***state agency has proved that its action was substantially justified or that special circumstances exist***
 41 ***which make the award of all or a portion of the attorney fees unjust.*]**

42 [(3) *As used in this section, "civil judicial proceeding" means any proceeding, other than a criminal*
 43 *proceeding as defined in ORS 131.005 (7), conducted before a court of this state.*]

44 **SECTION 2.** ORS 183.497 is amended to read:

45 183.497. [(1) *In a judicial proceeding designated under subsection (2) of this section the court:*]

1 *[(a) May, in its discretion, allow a petitioner reasonable attorney fees and costs if the court finds*
 2 *in favor of the petitioner.]*

3 *[(b) Shall allow a petitioner reasonable attorney fees and costs if the court finds in favor of the*
 4 *petitioner and determines that the state agency acted without a reasonable basis in fact or in law; but*
 5 *the court may withhold all or part of the attorney fees from any allowance to a petitioner if the court*
 6 *finds that the state agency has proved that its action was substantially justified or that special cir-*
 7 *cumstances exist that make the allowance of all or part of the attorney fees unjust.]*

8 **(1) As used in this section:**

9 **(a) “In favor of the petitioner” means that a significant portion of a state agency’s action**
 10 **challenged by a petitioner is altered or invalidated in a manner that is or likely will be in the**
 11 **petitioner’s favor.**

12 **(b) “State agency’s action” means the position or action of a state agency in a contested**
 13 **case administrative proceeding or in a judicial proceeding designated in subsection (5) of this**
 14 **section.**

15 **(c) “Substantially justified” means justified in both fact and law and to a degree that**
 16 **would satisfy a reasonable person.**

17 **(2) It is the policy of the Legislative Assembly that the law be applied and enforced justly**
 18 **and fairly. Judicial review of state agency actions provides an adversarial test of those**
 19 **actions and ensures the legitimacy and fairness of the actions. Persons must not be deterred**
 20 **in seeking judicial review of or defending against unreasonable state agency actions because**
 21 **of the expense involved in vindicating their rights. It is the Legislative Assembly’s intent to**
 22 **deter state agency wrongdoing and provide compensation to parties injured by state agency**
 23 **actions that are not substantially justified.**

24 **(3)(a) Within 30 days after issuance of the final order in a contested case that is in favor**
 25 **of the petitioner, the petitioner may file a petition with the state agency for an award of**
 26 **attorney fees and costs and disbursements, including expert witness fees. The procedure**
 27 **described in subsection (6) of this section applies to the petition and the procedure under this**
 28 **subsection.**

29 **(b) The state agency shall award the petitioner reasonable attorney fees and reasonable**
 30 **costs and disbursements, including expert witness fees, unless the state agency proves that**
 31 **its action was substantially justified.**

32 **(c) The state agency shall issue a ruling on the petition within 30 days after the final**
 33 **filing described in subsection (6) of this section. If the petitioner is aggrieved by the state**
 34 **agency’s ruling, the petitioner may, within 30 days after the issuance of the ruling, seek ju-**
 35 **dicial review of the ruling by the court with jurisdiction to review the final order.**

36 **(4) In an administrative or judicial proceeding designated under subsection (5) of this**
 37 **section, the court shall award the petitioner reasonable attorney fees and reasonable costs**
 38 **and disbursements if the court finds in favor of the petitioner, unless the court finds that**
 39 **the state agency has proved that the state agency’s action was substantially justified. The**
 40 **court shall determine whether the state agency’s action is substantially justified based on**
 41 **the whole record made in the judicial proceeding.**

42 **[(2)] (5) The provisions of subsection [(1)] (4) of this section apply to an administrative or judi-**
 43 **cial proceeding brought or defended by a petitioner against a state agency, as defined in ORS**
 44 **291.002, for:**

45 **(a) Judicial review of a final order as provided in ORS 183.480 to 183.484;**

1 (b) Judicial review of a declaratory ruling provided in ORS 183.410; or

2 (c) A judicial determination of the validity of a rule as provided in ORS 183.400.

3 **(6)(a) Within 30 days after the entry of a judgment at trial or after a decision on appeal,**
 4 **a petitioner seeking an award of attorney fees and costs and disbursements shall file with**
 5 **the court a petition for attorney fees and costs and disbursements. In the petition, the**
 6 **petitioner shall:**

7 **(A) State that the petitioner is eligible for an award under this section and describe the**
 8 **holding in favor of the petitioner;**

9 **(B) State the amounts sought;**

10 **(C) Include an itemized statement of attorney fees and costs and disbursements, includ-**
 11 **ing expert witness fees, for representing the petitioner, stating the actual time expended and**
 12 **the rates at which the fees and costs and disbursements were computed; and**

13 **(D) Allege that the state agency's action was not substantially justified.**

14 **(b) A state agency may file objections to the petition within 14 days after being served**
 15 **with the petition. The objections must be specific and explain how the state agency's action**
 16 **was substantially justified in both fact and law.**

17 **(c) If the state agency does not timely file objections, the court shall award attorney fees**
 18 **and costs and disbursements, including expert witness fees, based on the information in the**
 19 **petition.**

20 **(d) If the state agency timely files objections, the petitioner may reply to the objections**
 21 **within 10 days after being served with the objections.**

22 **(e) If the state agency timely files objections, the court may decide the matter based on**
 23 **the petition, objections and reply, or the court may hold a hearing and take testimony.**

24 **(f) At the request of either party, the court shall make special findings of fact and state**
 25 **its conclusions of law on the record regarding the issues material to the award or denial of**
 26 **attorney fees and costs and disbursements.**

27 **(g) In making the decision, the court shall consider that the burden of proving that the**
 28 **state agency's action was substantially justified is on the state agency. The court may not**
 29 **rely on the factors specified in ORS 20.075 (1) or ORCP 68. However, the court may consider**
 30 **factors found in Oregon common law, which also appear in ORS 20.075 (2), in determining a**
 31 **reasonable amount of attorney fees and costs and disbursements.**

32 **(h) The court shall make any award or denial of attorney fees and costs and disburse-**
 33 **ments in a supplemental or appellate judgment.**

34 **[(3)] (7) Amounts allowed under this section for reasonable attorney fees and [costs] reasonable**
 35 **costs and disbursements shall be paid from funds available to the state agency whose final order,**
 36 **declaratory ruling or rule was reviewed by the court.**

37 **SECTION 3.** ORS 183.482 is amended to read:

38 183.482. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of
 39 Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The
 40 petition shall be filed within 60 days only following the date the order upon which the petition is
 41 based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then
 42 the petition for review shall be filed within 60 days only following the date the order denying the
 43 petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or
 44 reconsideration shall be deemed denied the 60th day following the date the petition was filed, and
 45 in such cases, petition for judicial review shall be filed within 60 days only following such date. Date

1 of service shall be the date on which the agency delivered or mailed its order in accordance with
2 ORS 183.470.

3 (2) The petition shall state the nature of the order the petitioner desires reviewed, and shall
4 state whether the petitioner was a party to the administrative proceeding, was denied status as a
5 party or is seeking judicial review as a person adversely affected or aggrieved by the agency order.
6 In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the
7 petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised
8 by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit,
9 whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person.
10 Copies of the petition shall be served by registered or certified mail upon the agency, and all other
11 parties of record in the agency proceeding.

12 (3)(a) The filing of the petition shall not stay enforcement of the agency order, but the agency
13 may do so upon a showing of:

14 (A) Irreparable injury to the petitioner; and

15 (B) A colorable claim of error in the order.

16 (b) When a petitioner makes the showing required by paragraph (a) of this subsection, the
17 agency shall grant the stay unless the agency determines that substantial public harm will result if
18 the order is stayed. If the agency denies the stay, the denial shall be in writing and shall specifically
19 state the substantial public harm that would result from the granting of the stay.

20 (c) When the agency grants a stay, the agency may impose such reasonable conditions as the
21 giving of a bond, irrevocable letter of credit or other undertaking and that the petitioner file all
22 documents necessary to bring the matter to issue before the Court of Appeals within specified rea-
23 sonable periods of time.

24 (d) Agency denial of a motion for stay is subject to review by the Court of Appeals under such
25 rules as the court may establish.

26 (4) Within 30 days after service of the petition, or within such further time as the court may
27 allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire
28 record of the proceeding under review, but, by stipulation of all parties to the review proceeding,
29 the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may
30 be taxed by the court for the additional costs. The court may require or permit subsequent cor-
31 rections or additions to the record when deemed desirable. Except as specifically provided in this
32 subsection, the cost of the record shall not be taxed to the petitioner or any intervening party.
33 However, the court may tax such costs and the cost of agency transcription of record to a party
34 filing a frivolous petition for review.

35 (5) If, on review of a contested case, before the date set for hearing, application is made to the
36 court for leave to present additional evidence, and it is shown to the satisfaction of the court that
37 the additional evidence is material and that there were good and substantial reasons for failure to
38 present it in the proceeding before the agency, the court may order that the additional evidence be
39 taken before the agency upon such conditions as the court deems proper. The agency may modify
40 its findings and order by reason of the additional evidence and shall, within a time to be fixed by
41 the court, file with the reviewing court, to become a part of the record, the additional evidence,
42 together with any modifications or new findings or orders, or its certificate that the agency elects
43 to stand on its original findings and order, as the case may be.

44 (6) At any time subsequent to the filing of the petition for review and prior to the date set for
45 hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws

1 an order for purposes of reconsideration, the agency shall, within such time as the court may allow,
 2 affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after
 3 withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the
 4 review shall proceed upon the revised order. An amended petition for review shall not be required
 5 if the agency, on reconsideration, affirms the order or modifies the order with only minor changes.
 6 If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order
 7 in favor of the petitioner, the court shall allow the petitioner **attorney fees and** costs, [*but not at-*
 8 *torney*] **including expert witness** fees, to be paid from funds available to the agency.

9 (7) Review of a contested case shall be confined to the record, and the court shall not substitute
 10 its judgment for that of the agency as to any issue of fact or agency discretion. In the case of dis-
 11 puted allegations of irregularities in procedure before the agency not shown in the record which, if
 12 proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a
 13 master appointed by the court to take evidence and make findings of fact upon them. The court shall
 14 remand the order for further agency action if the court finds that either the fairness of the pro-
 15 ceedings or the correctness of the action may have been impaired by a material error in procedure
 16 or a failure to follow prescribed procedure, including a failure by the presiding officer to comply
 17 with the requirements of ORS 183.417 (8).

18 (8)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has
 19 erroneously interpreted a provision of law and that a correct interpretation compels a particular
 20 action, the court shall:

21 (A) Set aside or modify the order; or

22 (B) Remand the case to the agency for further action under a correct interpretation of the pro-
 23 vision of law.

24 (b) The court shall remand the order to the agency if the court finds the agency's exercise of
 25 discretion to be:

26 (A) Outside the range of discretion delegated to the agency by law;

27 (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency
 28 practice, if the inconsistency is not explained by the agency; or

29 (C) Otherwise in violation of a constitutional or statutory provision.

30 (c) The court shall set aside or remand the order if the court finds that the order is not sup-
 31 ported by substantial evidence in the record. Substantial evidence exists to support a finding of fact
 32 when the record, viewed as a whole, would permit a reasonable person to make that finding.

33 **SECTION 4.** ORS 183.484 is amended to read:

34 183.484. (1) Jurisdiction for judicial review of orders other than contested cases is conferred
 35 upon the Circuit Court for Marion County and upon the circuit court for the county in which the
 36 petitioner resides or has a principal business office. Proceedings for review under this section shall
 37 be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the
 38 county in which the petitioner resides or has a principal business office.

39 (2) Petitions for review shall be filed within 60 days only following the date the order is served,
 40 or if a petition for reconsideration or rehearing has been filed, then within 60 days only following
 41 the date the order denying such petition is served. If the agency does not otherwise act, a petition
 42 for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition
 43 was filed, and in such case petition for judicial review shall be filed within 60 days only following
 44 such date. Date of service shall be the date on which the agency delivered or mailed its order in
 45 accordance with ORS 183.470.

1 (3) The petition shall state the nature of the petitioner's interest, the facts showing how the
 2 petitioner is adversely affected or aggrieved by the agency order and the ground or grounds upon
 3 which the petitioner contends the order should be reversed or remanded. The review shall proceed
 4 and be conducted by the court without a jury.

5 (4) At any time subsequent to the filing of the petition for review and prior to the date set for
 6 hearing, the agency may withdraw its order for purposes of reconsideration. If an agency withdraws
 7 an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm,
 8 modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal
 9 for purposes of reconsideration, the petitioner may refile the petition for review and the review shall
 10 proceed upon the revised order. An amended petition for review shall not be required if the agency,
 11 on reconsideration, affirms the order or modifies the order with only minor changes. If an agency
 12 withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of
 13 the petitioner, the court shall allow the petitioner **attorney fees and costs**, [*but not attorney*] **in-**
 14 **cluding expert witness** fees, to be paid from funds available to the agency.

15 (5)(a) The court may affirm, reverse or remand the order. If the court finds that the agency has
 16 erroneously interpreted a provision of law and that a correct interpretation compels a particular
 17 action, it shall:

18 (A) Set aside or modify the order; or

19 (B) Remand the case to the agency for further action under a correct interpretation of the pro-
 20 vision of law.

21 (b) The court shall remand the order to the agency if it finds the agency's exercise of discretion
 22 to be:

23 (A) Outside the range of discretion delegated to the agency by law;

24 (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency
 25 practice, if the inconsistency is not explained by the agency; or

26 (C) Otherwise in violation of a constitutional or statutory provision.

27 (c) The court shall set aside or remand the order if it finds that the order is not supported by
 28 substantial evidence in the record. Substantial evidence exists to support a finding of fact when the
 29 record, viewed as a whole, would permit a reasonable person to make that finding.

30 (6) In the case of reversal the court shall make special findings of fact based upon the evidence
 31 in the record and conclusions of law indicating clearly all aspects in which the agency's order is
 32 erroneous.

33 **SECTION 5. The amendments to ORS 182.090, 183.482, 183.484 and 183.497 by sections 1**
 34 **to 4 of this 2009 Act apply to administrative or judicial proceedings brought on or after the**
 35 **effective date of this 2009 Act.**

36 **SECTION 6. This 2009 Act being necessary for the immediate preservation of the public**
 37 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
 38 **on its passage.**