

## HOUSE AMENDMENTS TO HOUSE BILL 3085

By COMMITTEE ON JUDICIARY

June 8

- 1 On page 1 of the printed bill, line 3, after "182.090" insert ", 183.482, 183.484".
- 2 Delete lines 7 and 8 and insert:
- 3 "(a) 'Civil judicial proceeding' means any proceeding conducted before a court of this state, ex-
- 4 cept:
- 5 "(A) A criminal proceeding, as defined in ORS 131.005;
- 6 "(B) A proceeding on a tort claim; and
- 7 "(C) A proceeding to establish, modify or enforce a child support obligation under ORS chapter
- 8 25, 107, 108, 109, 110 or 416 or ORS 419B.400 or 419C.590 involving an entity providing support
- 9 enforcement services under ORS 25.080, or any related proceeding, such as a civil contempt action
- 10 or judicial review of an administrative action."
- 11 In line 9, delete "meaningful" and insert "significant".
- 12 Delete lines 12 through 16 and insert:
- 13 "(c) 'State agency's action' means the position or action of a state agency in a civil judicial
- 14 proceeding.
- 15 "(d) 'Substantially justified' means justified in both fact and law and to a degree that would
- 16 satisfy a reasonable person."
- 17 In line 28, delete "A state agency's".
- 18 Delete line 29.
- 19 In line 30, delete "basis in fact and in law."
- 20 On page 2, delete lines 2 through 14 and insert:
- 21 "(4)(a) Within 30 days after the entry of a judgment at trial or after a decision on appeal, a
- 22 petitioner seeking an award of attorney fees and costs and disbursements shall file with the court
- 23 a petition for attorney fees and costs and disbursements. In the petition, the petitioner shall:
- 24 "(A) State that the petitioner is eligible for an award under this section and describe the holding
- 25 in favor of the petitioner;
- 26 "(B) State the amounts sought;
- 27 "(C) Include an itemized statement of attorney fees and costs and disbursements, including ex-
- 28 pert witness fees, for representing the petitioner, stating the actual time expended and the rates at
- 29 which the fees and costs and disbursements were computed; and
- 30 "(D) Allege that the state agency's action was not substantially justified.
- 31 "(b) A state agency may file objections to the petition within 14 days after being served with
- 32 the petition. The objections must be specific and explain how the state agency's action was sub-
- 33 stantially justified in both fact and law.
- 34 "(c) If the state agency does not timely file objections, the court shall award attorney fees and
- 35 costs and disbursements, including expert witness fees, based on the information in the petition.

1 “(d) If the state agency timely files objections, the petitioner may reply to the objections within  
2 10 days after being served with the objections.

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

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

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

13 “(h) The court shall make any award or denial of attorney fees and costs and disbursements in  
14 a supplemental or appellate judgment.”.

15 In line 15, delete “(6)” and insert “(5)”.

16 In line 32, delete “meaningful” and insert “significant”.

17 Delete lines 35 through 39 and insert:

18 “(b) ‘State agency’s action’ means the position or action of a state agency in a contested case  
19 administrative proceeding or in a judicial proceeding designated in subsection (5) of this section.

20 “(c) ‘Substantially justified’ means justified in both fact and law and to a degree that would  
21 satisfy a reasonable person.”.

22 On page 3, after line 1, insert:

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

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

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

34 In line 2, delete “(3)” and insert “(4)” and delete “(4)” and insert “(5)”.

35 In line 5, delete “A state”.

36 Delete line 6.

37 In line 7, delete “reasonable basis in fact and in law.”.

38 In line 9, delete “(4)” and insert “(5)” and delete “(3)” and insert “(4)”.

39 Delete lines 15 through 27 and insert:

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

43 “(A) State that the petitioner is eligible for an award under this section and describe the holding  
44 in favor of the petitioner;

45 “(B) State the amounts sought;

1 “(C) Include an itemized statement of attorney fees and costs and disbursements, including ex-  
2 pert witness fees, for representing the petitioner, stating the actual time expended and the rates at  
3 which the fees and costs and disbursements were computed; and

4 “(D) Allege that the state agency’s action was not substantially justified.

5 “(b) A state agency may file objections to the petition within 14 days after being served with  
6 the petition. The objections must be specific and explain how the state agency’s action was sub-  
7 stantially justified in both fact and law.

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

10 “(d) If the state agency timely files objections, the petitioner may reply to the objections within  
11 10 days after being served with the objections.

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

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

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

22 “(h) The court shall make any award or denial of attorney fees and costs and disbursements in  
23 a supplemental or appellate judgment.”.

24 After line 30, insert:

25 “**SECTION 3.** ORS 183.482 is amended to read:

26 “183.482. (1) Jurisdiction for judicial review of contested cases is conferred upon the Court of  
27 Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The  
28 petition shall be filed within 60 days only following the date the order upon which the petition is  
29 based is served unless otherwise provided by statute. If a petition for rehearing has been filed, then  
30 the petition for review shall be filed within 60 days only following the date the order denying the  
31 petition for rehearing is served. If the agency does not otherwise act, a petition for rehearing or  
32 reconsideration shall be deemed denied the 60th day following the date the petition was filed, and  
33 in such cases, petition for judicial review shall be filed within 60 days only following such date. Date  
34 of service shall be the date on which the agency delivered or mailed its order in accordance with  
35 ORS 183.470.

36 “(2) The petition shall state the nature of the order the petitioner desires reviewed, and shall  
37 state whether the petitioner was a party to the administrative proceeding, was denied status as a  
38 party or is seeking judicial review as a person adversely affected or aggrieved by the agency order.  
39 In the latter case, the petitioner shall, by supporting affidavit, state the facts showing how the  
40 petitioner is adversely affected or aggrieved by the agency order. Before deciding the issues raised  
41 by the petition for review, the Court of Appeals shall decide, from facts set forth in the affidavit,  
42 whether or not the petitioner is entitled to petition as an adversely affected or an aggrieved person.  
43 Copies of the petition shall be served by registered or certified mail upon the agency, and all other  
44 parties of record in the agency proceeding.

45 “(3)(a) The filing of the petition shall not stay enforcement of the agency order, but the agency

1 may do so upon a showing of:

2 “(A) Irreparable injury to the petitioner; and

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

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

8 “(c) When the agency grants a stay it may impose such reasonable conditions as the giving of  
9 a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents  
10 necessary to bring the matter to issue before the Court of Appeals within specified reasonable pe-  
11 riods of time.

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

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

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

32 “(6) At any time subsequent to the filing of the petition for review and prior to the date set for  
33 hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws  
34 an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm,  
35 modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal  
36 for purposes of reconsideration, the petitioner may refile the petition for review and the review shall  
37 proceed upon the revised order. An amended petition for review shall not be required if the agency,  
38 on reconsideration, affirms the order or modifies the order with only minor changes. If an agency  
39 withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of  
40 the petitioner, the court shall allow the petitioner **attorney fees and costs**, [*but not attorney*] **in-**  
41 **cluding expert witness** fees, to be paid from funds available to the agency.

42 “(7) Review of a contested case shall be confined to the record, **and** the court shall not substi-  
43 tute its judgment for that of the agency as to any issue of fact or agency discretion. In the case of  
44 disputed allegations of irregularities in procedure before the agency not shown in the record which,  
45 if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a

1 master appointed by the court to take evidence and make findings of fact upon them. The court shall  
2 remand the order for further agency action if it finds that either the fairness of the proceedings or  
3 the correctness of the action may have been impaired by a material error in procedure or a failure  
4 to follow prescribed procedure.

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

8 “(A) Set aside or modify the order; or

9 “(B) Remand the case to the agency for further action under a correct interpretation of the  
10 provision of law.

11 “(b) The court shall remand the order to the agency if it finds the agency’s exercise of discretion  
12 to be:

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

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

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

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

20 “**SECTION 4.** ORS 183.484 is amended to read:

21 “183.484. (1) Jurisdiction for judicial review of orders other than contested cases is conferred  
22 upon the Circuit Court for Marion County and upon the circuit court for the county in which the  
23 petitioner resides or has a principal business office. Proceedings for review under this section shall  
24 be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the  
25 county in which the petitioner resides or has a principal business office.

26 “(2) Petitions for review shall be filed within 60 days only following the date the order is served,  
27 or if a petition for reconsideration or rehearing has been filed, then within 60 days only following  
28 the date the order denying such petition is served. If the agency does not otherwise act, a petition  
29 for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition  
30 was filed, and in such case petition for judicial review shall be filed within 60 days only following  
31 such date. Date of service shall be the date on which the agency delivered or mailed its order in  
32 accordance with ORS 183.470.

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

37 “(4) At any time subsequent to the filing of the petition for review and prior to the date set for  
38 hearing, the agency may withdraw its order for purposes of reconsideration. If an agency withdraws  
39 an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm,  
40 modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal  
41 for purposes of reconsideration, the petitioner may refile the petition for review and the review shall  
42 proceed upon the revised order. An amended petition for review shall not be required if the agency,  
43 on reconsideration, affirms the order or modifies the order with only minor changes. If an agency  
44 withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of  
45 the petitioner, the court shall allow the petitioner **attorney fees and costs**, [*but not attorney*] in-

1 **cluding expert witness** fees, to be paid from funds available to the agency.

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

5 “(A) Set aside or modify the order; or

6 “(B) Remand the case to the agency for further action under a correct interpretation of the  
7 provision of law.

8 “(b) The court shall remand the order to the agency if it finds the agency’s exercise of discretion  
9 to be:

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

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

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

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

17 “(6) In the case of reversal the court shall make special findings of fact based upon the evidence  
18 in the record and conclusions of law indicating clearly all aspects in which the agency’s order is  
19 erroneous.”.

20 In line 31, delete “3” and insert “5” and delete “and 183.497 by sections 1 and 2” and insert “,  
21 183.482, 183.484 and 183.497 by sections 1 to 4”.

22 In line 32, delete “pending or” and delete “January” and insert “the effective date of this 2005  
23 Act.”.

24 Delete line 33.

25 In line 34, delete “4” and insert “6”.

26