
SENATE BILL 5211

State of Washington 65th Legislature 2017 Regular Session

By Senators Wilson and Honeyford

Read first time 01/17/17. Referred to Committee on Law & Justice.

1 AN ACT Relating to adjudicative proceedings involving a state
2 agency; and amending RCW 34.05.461, 34.12.060, and 34.05.455.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 34.05.461 and 2013 c 110 s 2 are each amended to
5 read as follows:

6 (1) Except as provided in subsection (2) of this section:

7 (a) If the presiding officer is the agency head or one or more
8 members of the agency head, the presiding officer (~~((may))~~) shall enter
9 (~~((an initial order if further review is available within the agency,~~
10 ~~or))~~) a final order (~~((if further review is not available))~~);

11 (b) If the presiding officer is a person designated by the agency
12 (~~((to make the final decision and enter the final order))~~) other than
13 under (c) of this subsection, the presiding officer shall enter a
14 final order; and

15 (c) If the presiding officer is one or more administrative law
16 judges assigned by the office of administrative hearings in
17 accordance with chapter 34.12 RCW, the presiding officer shall enter
18 (~~((an initial))~~) a final order.

19 (2) With respect to agencies exempt from chapter 34.12 RCW or an
20 institution of higher education, the presiding officer shall
21 (~~((transmit a full and complete record of the proceedings, including~~

1 ~~such comments upon demeanor of witnesses as the presiding officer~~
2 ~~deems relevant, to each agency official who is to~~) enter a final
3 ~~((or initial)) order ((after considering the record and evidence so~~
4 ~~transmitted)).~~

5 (3) ~~((Initial and))~~ Final orders shall include a statement of
6 findings and conclusions, and the reasons and basis therefor, on all
7 the material issues of fact, law, or discretion presented on the
8 record, including the remedy or sanction and, if applicable, the
9 action taken on a petition for a stay of effectiveness. Any findings
10 based substantially on credibility of evidence or demeanor of
11 witnesses shall be so identified. Findings set forth in language that
12 is essentially a repetition or paraphrase of the relevant provision
13 of law shall be accompanied by a concise and explicit statement of
14 the underlying evidence of record to support the findings. The order
15 shall also include a statement of the available procedures and time
16 limits for seeking reconsideration or other administrative relief.
17 ~~((An initial order shall include a statement of any circumstances~~
18 ~~under which the initial order, without further notice, may become a~~
19 ~~final order.))~~

20 (4) Findings of fact shall be based exclusively on the evidence
21 of record in the adjudicative proceeding and on matters officially
22 noticed in that proceeding. Findings shall be based on the kind of
23 evidence on which reasonably prudent persons are accustomed to rely
24 in the conduct of their affairs. Findings may be based on such
25 evidence even if it would be inadmissible in a civil trial. However,
26 the presiding officer shall not base a finding exclusively on such
27 inadmissible evidence unless the presiding officer determines that
28 doing so would not unduly abridge the parties' opportunities to
29 confront witnesses and rebut evidence. The basis for this
30 determination shall appear in the order.

31 (5) Where it bears on the issues presented, the agency's
32 experience, technical competency, and specialized knowledge may be
33 used in the evaluation of evidence.

34 (6) If a person serving or designated to serve as presiding
35 officer becomes unavailable for any reason before entry of the order,
36 a substitute presiding officer shall be appointed as provided in RCW
37 34.05.425. The substitute presiding officer shall use any existing
38 record and may conduct any further proceedings appropriate in the
39 interests of justice.

1 (7) The presiding officer may allow the parties a designated time
2 after conclusion of the hearing for the submission of memos, briefs,
3 or proposed findings.

4 (8)(a) Except as otherwise provided in (b) of this subsection,
5 (~~initial or~~) final orders shall be served in writing within ninety
6 days after conclusion of the hearing or after submission of memos,
7 briefs, or proposed findings in accordance with subsection (7) of
8 this section unless this period is waived or extended for good cause
9 shown. The (~~initial or~~) final order may be served on a party via
10 electronic distribution, with a party's agreement.

11 (b) This subsection does not apply to the final order of the
12 shorelines hearings board on appeal under RCW 90.58.180(3).

13 (9) The presiding officer shall cause copies of the order to be
14 served on each party and the agency.

15 **Sec. 2.** RCW 34.12.060 and 2011 c 336 s 763 are each amended to
16 read as follows:

17 When an administrative law judge presides at a hearing under this
18 chapter (~~and a majority of the officials of the agency who are to~~
19 ~~render the final decision have not heard substantially all of the~~
20 ~~oral testimony and read all exhibits submitted by any party)), it
21 shall be the duty of such judge, or in the event of his or her
22 unavailability or incapacity, of another judge appointed by the chief
23 administrative law judge, to issue (~~an initial~~) a final decision or
24 proposal for decision including findings of fact and conclusions of
25 law in accordance with RCW 34.05.461 or 34.05.485. However, this
26 section does not apply to a state patrol disciplinary hearing
27 conducted under RCW 43.43.090.~~

28 **Sec. 3.** RCW 34.05.455 and 1988 c 288 s 416 are each amended to
29 read as follows:

30 (1) A presiding officer may not communicate, directly or
31 indirectly, regarding any issue in the proceeding other than
32 communications necessary to procedural aspects of maintaining an
33 orderly process, with any person employed by the agency without
34 notice and opportunity for all parties to participate, except as
35 provided in this subsection:

36 (a) Where the ultimate legal authority of an agency is vested in
37 a multimember body, and where that body presides at an adjudication,

1 members of the body may communicate with one another regarding the
2 proceeding;

3 (b) Any presiding officer may receive aid from legal counsel, or
4 from staff assistants who are subject to the presiding officer's
5 supervision; and

6 (c) Presiding officers may communicate with other employees or
7 consultants of the agency who have not participated in the proceeding
8 in any manner, and who are not engaged in any investigative or
9 prosecutorial functions in the same or a factually related case;
10 provided this subsection shall not allow communication with an agency
11 employee that requires as part of an employment evaluation that a
12 presiding officer shall decide cases according to the agency head's
13 unwritten policies.

14 (d) This subsection does not apply to communications required for
15 the disposition of ex parte matters specifically authorized by
16 statute.

17 (2) Unless required for the disposition of ex parte matters
18 specifically authorized by statute or unless necessary to procedural
19 aspects of maintaining an orderly process, a presiding officer may
20 not communicate, directly or indirectly, regarding any issue in the
21 proceeding, with any person not employed by the agency who has a
22 direct or indirect interest in the outcome of the proceeding, without
23 notice and opportunity for all parties to participate.

24 (3) Unless necessary to procedural aspects of maintaining an
25 orderly process, persons to whom a presiding officer may not
26 communicate under subsections (1) and (2) of this section may not
27 communicate with presiding officers without notice and opportunity
28 for all parties to participate.

29 (4) If, before serving as presiding officer in an adjudicative
30 proceeding, a person receives an ex parte communication of a type
31 that could not properly be received while serving, the person,
32 promptly after starting to serve, shall disclose the communication in
33 the manner prescribed in subsection (5) of this section.

34 (5) A presiding officer who receives an ex parte communication in
35 violation of this section shall place on the record of the pending
36 matter all written communications received, all written responses to
37 the communications, and a memorandum stating the substance of all
38 oral communications received, all responses made, and the identity of
39 each person from whom the presiding officer received an ex parte
40 communication. The presiding officer shall advise all parties that

1 these matters have been placed on the record. Upon request made
2 within ten days after notice of the ex parte communication, any party
3 desiring to rebut the communication shall be allowed to place a
4 written rebuttal statement on the record. Portions of the record
5 pertaining to ex parte communications or rebuttal statements do not
6 constitute evidence of any fact at issue in the matter unless a party
7 moves the admission of any portion of the record for purposes of
8 establishing a fact at issue and that portion is admitted pursuant to
9 RCW 34.05.452.

10 (6) If necessary to eliminate the effect of an ex parte
11 communication received in violation of this section, a presiding
12 officer who receives the communication may be disqualified, and the
13 portions of the record pertaining to the communication may be sealed
14 by protective order.

15 (7) The agency shall, and any party may, report any violation of
16 this section to appropriate authorities for any disciplinary
17 proceedings provided by law. In addition, each agency by rule may
18 provide for appropriate sanctions, including default, for any
19 violations of this section.

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