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## State Government Committee

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### HB 2378

**Brief Description:** Limiting the rule-making authority of certain entities to those instances where there is a specific grant of legislative authority.

**Sponsors:** Representatives Armstrong, Anderson, Schoesler, Nixon and Woods.

#### Brief Summary of Bill

- Prohibits agencies from adopting a proposed rule until after the Legislature has had an opportunity to consider it during a regular or special legislative session.
- Limits the authority the Legislature delegates to state agencies to the minimum delegation necessary to administer legislation's clear and unambiguous directives, and to administer only circumstances and behavior that were foreseeable at the time the legislation was enacted
- Shifts the burden of establishing that a rule is valid from the challenger to the agency once the challenger has identified probable defects in the rule.
- Specifies that a court may overturn agency action if it determines that the action is based on a de facto rule.

**Hearing Date:** 2/3/04

**Staff:** Katie Blinn (786-7114).

#### **Background:**

##### Rulemaking Authority:

State agencies enact rules according to the Administrative Procedure Act (APA) to implement legislation. In addition to regular administrative rules, there are emergency rules, expedited rules, significant legislative rules, procedural rules, and interpretative rules. An agency may not rely solely on an intent section or on the agency's enabling statute for authority to adopt a rule. However, an agency may use the intent section or enabling statute to interpret ambiguities in other provisions of a statute.

##### Challenging the Validity of a Rule:

The burden of proving that an agency rule is invalid is on the party challenging it. The petition must be filed in Thurston County Superior Court and the court may only grant relief if the party

seeking review has been substantially prejudiced by the agency action. A rule can be declared invalid only if it:

- Is unconstitutional;
- Exceeds the statutory authority of the agency;
- Was adopted without compliance with statutory rulemaking procedures; or
- Is arbitrary and capricious.

#### Challenging an Agency Order from an Adjudicative Proceeding:

In addition to establishing the procedures for rulemaking, the APA also establishes the procedures for administrative hearings and appeals. Administrative hearings are called "adjudicative proceedings" in the APA. The burden of proving that an agency order from an adjudicative proceeding is invalid is on the party challenging it. With a few exceptions, the challenger has the option of filing the petition for review in Superior Court of:

- Thurston County;
- The county of the challenger's residence or principal place of business; or
- Any county in which the challenger owns property that is affected by the proceedings.

Superior Court may overturn an agency order from an adjudicative proceeding only if it determines that:

- The order, or the statute or rule on which it is based, is unconstitutional;
- The order is outside the statutory authority or jurisdiction of the agency;
- The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- The agency has erroneously interpreted or applied the law;
- The order is not supported by substantial evidence when viewed in light of the whole record before the court;
- The agency has not decided all issues requiring resolution;
- A motion for disqualification was made and was improperly denied or, if no motion was made, new facts are shown to support the grant of such a motion;
- The order is inconsistent with an agency rule unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- The order is arbitrary or capricious.

#### Review of Other Agency Action:

A party may seek review of other agency action, such as licensing, the implementation or enforcement of a statute, the application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. A court can overturn agency action only if it determines that the action:

- Is unconstitutional;
- Exceeds the statutory authority of the agency;
- Is arbitrary or capricious; or
- Was taken by persons not lawfully authorized to take such action.

#### **Summary of Bill:**

##### Rulemaking Authority:

Agencies may not adopt a proposed rule until after the Legislature has had an opportunity to consider it during a regular or special legislative session. An agency seeking to adopt a proposed

rule must submit a copy of the rule, the summary, and the responses to the Chief Clerk of the House of Representatives and to the Secretary of the Senate by January 15 each year. Emergency rules and Department of Fish and Wildlife hunting and fishing season rules are exempt from this requirement.

The Legislature limits the authority it delegates to state agencies to the minimum delegation necessary to administer legislation's clear and unambiguous directives, and to administer only circumstances and behavior that were foreseeable at the time the legislation was enacted. For certain agencies adopting rules after July 1, 2004, the agency may only adopt rules derived from a specific grant of legislative authority. The rules must include the specific statutory section from which the grant of authority is derived, and may not rely solely on an intent section or the agency's general enabling provisions. This applies to:

- The Office of the Superintendent of Public Instruction;
- The Department of Retirement Systems;
- The Office of the Family and Children's Ombudsman;
- The Department of Social and Health Services;
- The Department of Ecology;
- The Department of Labor and Industries;
- The Department of Agriculture;
- The Department of Fish and Wildlife;
- The Department of Transportation;
- The Department of Licensing;
- The Department of General Administration;
- The Department of Community, Trade, and Economic Development;
- The Department of Veterans Affairs;
- The Department of Revenue;
- The Department of Corrections;
- The Department of Health;
- The Department of Financial Institutions;
- The Department of Natural Resources;
- The State Finance Committee;
- The State Investment Board;
- The Washington Traffic Safety Commission;
- The Washington State Criminal Justice Training Commission;
- The Washington State Commission on Hispanic Affairs;
- The Washington State Commission on Asian Pacific American Affairs;
- The Washington Council for the Prevention of Child Abuse and Neglect;
- The Public Works Board;
- The Community Economic Revitalization Board;
- The Washington Economic Development Finance Authority;
- The Washington State Housing Finance Commission;
- The Office of the Insurance Commissioner;
- The Washington State Liquor Control Board; and
- The Washington Utilities and Transportation Commission.

#### Challenging the Validity of a Rule:

Once the party challenging the validity of a rule has identified probable defects in the rule, the burden of establishing that the rule is valid shifts to the agency. A party can file suit in any county in Washington, not just Thurston County.

Challenging an Agency Order from an Adjudicative Proceeding:

In addition to the existing reasons, a court may overturn an agency order from an adjudicative proceeding if it determines that the order is based on a de facto rule. A "de facto" rule would be a rule that exists, but is illegal, illegitimate, or without proper authority.

Review of Other Agency Action:

In addition to the existing reasons, a court may overturn agency action if it determines that the action is based on a de facto rule.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.