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**SUBSTITUTE SENATE BILL 5211**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Wilson and Honeyford)

AN ACT Relating to adjudicative proceedings involving a state agency; amending RCW 34.05.461, 34.12.060, 34.05.455, 34.05.464, and 80.01.060; and adding a new section to chapter 34.05 RCW.

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

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

(1) For any hearing that is not a qualified hearing, as defined in section 4 of this act:

(a) Except as provided in (b) of this subsection ((~~(2) of this section~~)):

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

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

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

((~~(2)~~)) (b) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall ((~~transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to~~)) enter a final ((~~or initial~~)) order ((~~after considering the record and evidence so transmitted~~)).

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

~~(4)~~)) (2) For any hearing that is a qualified hearing, as defined in section 4 of this act:

(a) Except as provided in (b) of this subsection:

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

(ii) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and

(iii) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

(b) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

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

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

((~~(5)~~)) (4) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

((~~(6)~~)) (5) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

((~~(7)~~)) (6) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

((~~(8)~~)) (7)(a)(i) For any hearing that is not a qualified hearing, as defined in section 4 of this act: Except as otherwise provided in (b) of this subsection, ((~~initial or~~)) final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection ((~~(7)~~)) (6) of this section unless this period is waived or extended for good cause shown. The ((~~initial or~~)) final order may be served on a party via electronic distribution, with a party's agreement.

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

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

((~~(9)~~)) (8) The presiding officer shall cause copies of the order to be served on each party and the agency.

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

(1)(a) For any hearing that is not a qualified hearing, as defined in section 4 of this act:

When an administrative law judge presides at a hearing under this chapter ((~~and a majority of the officials of the agency who are to render the final decision have not heard substantially all of the oral testimony and read all exhibits submitted by any party~~)), it shall be the duty of such judge, or in the event of his or her unavailability or incapacity, of another judge appointed by the chief administrative law judge, to issue ((~~an initial~~)) a final decision or proposal for decision including findings of fact and conclusions of law in accordance with RCW 34.05.461 or 34.05.485.

(b) For any hearing that is a qualified hearing, as defined in section 4 of this act:

When an administrative law judge presides at a hearing under this chapter and a majority of the officials of the agency who are to render the final decision have not heard substantially all of the oral testimony and read all exhibits submitted by any party, it shall be the duty of such judge, or in the event of his or her unavailability or incapacity, of another judge appointed by the chief administrative law judge, to issue an initial decision or proposal for decision including findings of fact and conclusions of law in accordance with RCW 34.05.461 or 34.05.485.

(2) ((~~However,~~)) This section does not apply to a state patrol disciplinary hearing conducted under RCW 43.43.090.

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

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

((~~(a)~~)) (i) Where the ultimate legal authority of an agency is vested in a multimember body, and where that body presides at an adjudication, members of the body may communicate with one another regarding the proceeding;

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

((~~(c)~~)) (iii) Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case; provided that, for hearings that are not qualified hearings as defined in section 4 of this act, this subsection shall not allow communication with an agency employee that requires as part of an employment evaluation that a presiding officer shall decide cases according to the agency head's unwritten policies.

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

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

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

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

(5) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. Portions of the record pertaining to ex parte communications or rebuttal statements do not constitute evidence of any fact at issue in the matter unless a party moves the admission of any portion of the record for purposes of establishing a fact at issue and that portion is admitted pursuant to RCW 34.05.452.

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

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

NEW SECTION. **Sec.**  A new section is added to chapter 34.05 RCW to read as follows:

For purposes of RCW 34.05.461, 34.12.060, and 34.05.455, "qualified hearing" means a hearing conducted by the public employment relations commission under chapter 28B.52, 41.56, 41.59, 41.76, 41.80, 47.64, 49.39, 53.18, or 54.04 RCW.

**Sec.**  RCW 34.05.464 and 1989 c 175 s 20 are each amended to read as follows:

(1) As authorized by law, an agency may by rule provide that initial orders in specified classes of cases may become final without further agency action unless, within a specified period, (a) the agency head upon its own motion determines that the initial order should be reviewed, or (b) a party to the proceedings files a petition for administrative review of the initial order. Upon occurrence of either event, notice shall be given to all parties to the proceeding.

(2) As authorized by law, an agency head may appoint a person to review initial orders and to prepare and enter final agency orders.

(3) RCW 34.05.425 and 34.05.455 apply to any person reviewing an initial order on behalf of an agency as part of the decision process, and to persons communicating with them, to the same extent that it is applicable to presiding officers.

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

(5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.

(6) The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument.

(7) The reviewing officer shall enter a final order disposing of the proceeding or remand the matter for further proceedings, with instructions to the presiding officer who entered the initial order. Upon remanding a matter, the reviewing officer shall order such temporary relief as is authorized and appropriate.

(8) A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461((~~(3)~~)) (1)(c) or (2)(c).

(9) The reviewing officer shall cause copies of the final order or order remanding the matter for further proceedings to be served upon each party.

**Sec.**  RCW 80.01.060 and 2006 c 346 s 5 are each amended to read as follows:

(1) The commission may appoint administrative law judges when it deems such action necessary for its general administration. The administrative law judges may administer oaths, issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony, examine witnesses, make findings of probable cause and issue complaints in the name of the commission, and receive testimony in any inquiry, investigation, hearing, or proceeding in any part of the state, under such rules as the commission may adopt. The administrative law judges appointed under this subsection are not subject to chapter 41.06 RCW; however, they are subject to discipline and termination, for cause, by the executive secretary of the commission. Upon written request of the person so disciplined or terminated, the executive secretary shall state the reasons for such action in writing. The person affected has a right of review by the superior court of Thurston county on petition for reinstatement or other remedy filed within thirty days of receipt of the written reasons.

(2) In general rate increase filings by a natural gas, electric, or telecommunications company, the administrative law judges may preside, but may not enter an initial order unless expressly agreed to in writing by the company making the filing. In all other cases, the administrative law judge may enter an initial order including findings of fact and conclusions of law in accordance with RCW 34.05.461((~~(1)(a) and (c)~~)) (1) (a) (i) and (iii) and (c) and (2) (a) (i) and (iii) and (c) and (3) through ((~~(9)~~)) (8) or 34.05.485. RCW 34.05.461 ((~~(1)(b) and (2)~~)) (1) (a)(ii) and (b) and (2) (a)(ii) and (b) do not apply to entry of orders under this section.

(3) Administrative law judges may not enter final orders, except that the commission may designate persons by rule to preside and enter final orders in emergency adjudications under RCW 34.05.479. Initial orders of administrative law judges shall become final on the day following expiration of the time established by the commission for filing a petition for administrative review, unless, within that time, a party petitions for administrative review or the commission notifies parties that it will review the initial order on its own motion.

(4) If the administrative law judge does not enter an initial order as provided in subsection (2) of this section, then a majority of the members of the commission who are to enter the final order must hear or review substantially all of the record submitted by any party.

**--- END ---**