

# SENATE BILL REPORT

## SB 5211

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As Reported by Senate Committee On:  
Law & Justice, February 8, 2017

**Title:** An act relating to adjudicative proceedings involving a state agency.

**Brief Description:** Addressing adjudicative proceedings by state agencies.

**Sponsors:** Senators Wilson and Honeyford.

**Brief History:**

**Committee Activity:** Law & Justice: 1/24/17, 2/08/17 [DPS-WM, w/oRec].

### Brief Summary of Substitute Bill

- Requires a presiding officer for an internal state agency administrative hearing to issue final orders.
- Requires an administrative law judge at the Office of Administrative Hearings to issue final orders.
- Includes, in prohibited ex-parte communications, that a presiding officer must decide cases according to the agency head's unwritten policies.
- Exempts the Public Employment Relations Commission from the requirements of the bill.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5211 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Angel, Frockt and Wilson.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Darneille.

**Staff:** Tim Ford (786-7423)

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:** The Administrative Procedure Act (APA) sets the process state agencies must use when the agency takes administrative action. Individuals appealing agency actions must exhaust their administrative remedies with the agency prior to judicial review. Agencies offer administrative hearings that are quasi-judicial to hear appeals of agency actions. Administrative hearings adjudicate appeals by interpreting agency policy and regulations. Adjudication resembles what a court does but it is less formal. Adjudicative proceedings determine legal rights, duties, or privileges when a hearing is required by law or by the Constitution.

Currently, agencies designate a presiding officer to hear and decide an adjudicative proceeding. The presiding officer may be the agency's head, an agency employee designated and trained as a hearing officer, or an administrative law judge who is not the agency's employee. In a limited number of adjudicative proceedings, an administrative law judge must be the presiding officer.

The APA requires the presiding officer to be free from bias, conflict of interest, or undue influence whether the presiding officer is inside or outside the agency. Agencies may use a two-step process to reach a final agency decision in adjudicative proceedings. First, a presiding officer hears evidence and makes an initial, or recommended decision. Second, the agency reviews the initial decision and makes a final decision to accept or reject the initial decision. A party appeals the final agency decision to the superior court for judicial review. In a judicial review the superior court becomes an appellate court. The superior court decides if the final agency decision is correct.

In the APA, ex-parte communications are generally prohibited with limited exceptions. An ex-parte communication is any direct or indirect communication regarding any issue in the appeal, whether between the presiding officer and any persons employed by the agency or between the presiding officer and 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. A prohibited ex-parte communication must be disclosed and placed on the record with any responses and identify the persons involved in the communication. A presiding judge receiving a prohibited ex-parte communication must allow any party to rebut the communication. A presiding officer who receives a prohibited ex-parte communication may be disqualified and the communication may be sealed. Disciplinary action may be required and sanctions may include a default judgment in the appeal.

**Summary of Bill (First Substitute):** A presiding officer for an internal state agency administrative hearing must issue final orders. An administrative law judge at the Office of Administrative Hearings must issue final orders. Prohibited ex-parte contacts include, as a part of an employment evaluation, communications that a presiding officer must decide cases according to the agency head's unwritten policies. The Public Employment Relations Commission is exempt from the provisions of the bill.

**EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute):**

- Exempts the Public Employment Relations Commission from the requirements of the bill.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: It's important that the public has faith in our agencies and in any judicial system. We all expect our judges, including administrative law judges, to be above reproach and without undue influence. Recently there was a case where a hearing on an issue was heard within its own agency. The Administrative Law Judge was an employee of that agency, but ruling on an issue from inside that very agency. An administrative law judge is supposed to be independent in their ruling, however, the question arises...how can they be independent if the judge was directly supervised by the top deputy of that same agency? At the very least, this could create the appearance of influencing an outcome. In short, this bill would help to renew public trust in a quasi-judicial system by requiring that when an agency itself is also a party to the proceedings an administrative law judge from the Office of Administrative Hearings (OAH) be used rather than one from within the agency itself to issue a final order—rather than an initial order that is returned to that very agency for final decision. In order for a fair and impartial decision to be made, it must be transparent and free of undue influence that could and probably would be perceived as biased coming from the agency that is directly involved.

There is a need for adjudicative proceedings to be fair and to provide the appearance of fairness for the gathering of data and information. There needs to be an ability to develop a full record where the agency is both making a decision and the agency is ruling on a challenge of that decision in an adjudicative proceeding.

DSHS did previously delegate to the OAH its final decision making authority for Temporary Assistance for Needy Family (TANF) cases. There is some debate as to whether federal rules requires DSHS to issue final orders on TANF appeals. There are a minority of states that delegate final decision making authority on TANF cases. DSHS now issues a final decision on TANF cases.

CON: The WA State Public Employees Relations Commission is the agency responsible for administering the public sector collective bargaining laws in WA. PERC has an administrative adjudicative function. PERC does not prosecute or investigate a complaint. It's adjudicative function is based on complaints brought to it by either unions or employers or private citizens. PERC was established to be the experts in public sector labor relations. The record is set at the examiner level. Examiner decisions may be appealed to the commission. Commission decisions are de novo and may be appealed to a superior court. The purpose of commission review is to ensure consistency. The commission opposes this bill applying to PERC.

OTHER: OAH has more than 100 administrative law judges and conducts hearings for more than 20 state agencies and local agencies which spans more than 100 programs state and federal. We have final order authority for some programs such as special education cases referred by the Office of Superintendent of Public Instruction. Within the DSHS caseload we have final order authority on child support on establishment and modification. When we issue final orders, the next step is for an appeal to superior court. Under the Administrative Procedures Act, there is an affirmative duty of the Administrative Law Judge to develop a full record.

**Persons Testifying:** PRO: Senator Wilson, Prime Sponsor; Bob Battles, Association of WA Businesses.

CON: Mike Sellars, Executive Director, WA State Public Employment Relations Commission.

OTHER: Lorraine Lee, Chief Administrative Law Judge.

**Persons Signed In To Testify But Not Testifying:** No one.