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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)

READ FIRST TIME 02/09/17.

1 AN ACT Relating to adjudicative proceedings involving a state  
2 agency; amending RCW 34.05.461, 34.12.060, 34.05.455, 34.05.464, and  
3 80.01.060; and adding a new section to chapter 34.05 RCW.

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

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

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

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

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

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

19 ~~((c))~~ (iii) If the presiding officer is one or more  
20 administrative law judges assigned by the office of administrative

1 hearings in accordance with chapter 34.12 RCW, the presiding officer  
2 shall enter ~~((an initial))~~ a final order.

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

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

25 ~~(+4))~~ (2) For any hearing that is a qualified hearing, as defined  
26 in section 4 of this act:

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

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

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

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

37 (b) With respect to agencies exempt from chapter 34.12 RCW or an  
38 institution of higher education, the presiding officer shall transmit  
39 a full and complete record of the proceedings, including such  
40 comments upon demeanor of witnesses as the presiding officer deems

1 relevant, to each agency official who is to enter a final or initial  
2 order after considering the record and evidence so transmitted.

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

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

29 ~~((+5))~~ (4) Where it bears on the issues presented, the agency's  
30 experience, technical competency, and specialized knowledge may be  
31 used in the evaluation of evidence.

32 ~~((+6))~~ (5) If a person serving or designated to serve as  
33 presiding officer becomes unavailable for any reason before entry of  
34 the order, a substitute presiding officer shall be appointed as  
35 provided in RCW 34.05.425. The substitute presiding officer shall use  
36 any existing record and may conduct any further proceedings  
37 appropriate in the interests of justice.

38 ~~((+7))~~ (6) The presiding officer may allow the parties a  
39 designated time after conclusion of the hearing for the submission of  
40 memos, briefs, or proposed findings.

1       ~~((+8))~~ (7)(a)(i) For any hearing that is not a qualified  
2 hearing, as defined in section 4 of this act: Except as otherwise  
3 provided in (b) of this subsection, ~~((initial-er))~~ final orders shall  
4 be served in writing within ninety days after conclusion of the  
5 hearing or after submission of memos, briefs, or proposed findings in  
6 accordance with subsection ~~((+7))~~ (6) of this section unless this  
7 period is waived or extended for good cause shown. The ~~((initial-er))~~  
8 final order may be served on a party via electronic distribution,  
9 with a party's agreement.

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

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

20       ~~((+9))~~ (8) The presiding officer shall cause copies of the order  
21 to be served on each party and the agency.

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

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

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

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

37       When an administrative law judge presides at a hearing under this  
38 chapter and a majority of the officials of the agency who are to  
39 render the final decision have not heard substantially all of the

1 oral testimony and read all exhibits submitted by any party, it shall  
2 be the duty of such judge, or in the event of his or her  
3 unavailability or incapacity, of another judge appointed by the chief  
4 administrative law judge, to issue an initial decision or proposal  
5 for decision including findings of fact and conclusions of law in  
6 accordance with RCW 34.05.461 or 34.05.485.

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

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

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

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

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

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

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

36 (2) Unless required for the disposition of ex parte matters  
37 specifically authorized by statute or unless necessary to procedural  
38 aspects of maintaining an orderly process, a presiding officer may  
39 not communicate, directly or indirectly, regarding any issue in the

1 proceeding, with any person not employed by the agency who has a  
2 direct or indirect interest in the outcome of the proceeding, without  
3 notice and opportunity for all parties to participate.

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

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

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

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

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

1        NEW SECTION.    **Sec. 4.**    A new section is added to chapter 34.05  
2 RCW to read as follows:

3        For purposes of RCW 34.05.461, 34.12.060, and 34.05.455,  
4 "qualified hearing" means a hearing conducted by the public  
5 employment relations commission under chapter 28B.52, 41.56, 41.59,  
6 41.76, 41.80, 47.64, 49.39, 53.18, or 54.04 RCW.

7        **Sec. 5.**    RCW 34.05.464 and 1989 c 175 s 20 are each amended to  
8 read as follows:

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

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

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

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

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

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

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

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

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

12 **Sec. 6.** RCW 80.01.060 and 2006 c 346 s 5 are each amended to  
13 read as follows:

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

31 (2) In general rate increase filings by a natural gas, electric,  
32 or telecommunications company, the administrative law judges may  
33 preside, but may not enter an initial order unless expressly agreed  
34 to in writing by the company making the filing. In all other cases,  
35 the administrative law judge may enter an initial order including  
36 findings of fact and conclusions of law in accordance with RCW  
37 34.05.461(~~(+1)(a) and (e)~~) (1) (a) (i) and (iii) and (c) and (2) (a)  
38 (i) and (iii) and (c) and (3) through (~~(+9)~~) (8) or 34.05.485. RCW



1 34.05.461 (~~(1)(b) and (2)~~) (1) (a)(ii) and (b) and (2) (a)(ii) and  
2 (b) do not apply to entry of orders under this section.

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

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

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