
SENATE BILL 5766

State of Washington

53rd Legislature

1993 Regular Session

By Senator Niemi

Read first time 02/12/93. Referred to Committee on Law & Justice.

1 AN ACT Relating to judicial review standards; amending RCW
2 7.16.120, 34.05.010, and 34.05.570; and creating a new section.

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

4 NEW SECTION. **Sec. 1.** The intent of this act is to respond to the
5 Washington supreme court's decision in *Lutheran Day Care v. Snohomish*
6 *County*, 119 Wash. 2d 91 (1992), by providing a new standard for
7 judicial review of decisions of the other branches of government.

8 In *Lutheran Day Care* the Washington supreme court held that a
9 decision found to be "arbitrary and capricious" under the writ of
10 certiorari statute violates substantive due process and creates
11 liability under the federal civil rights act, 42 U.S.C. Sec. 1983.
12 This federal act imposes liability for the bad faith misconduct of
13 government that is so egregious that it shocks the conscience of a
14 court. The legislature agrees that government ought to answer in
15 damages for such misconduct, but the legislature believes that courts
16 must also be able to correct good faith mistakes of the other branches
17 of government. An erroneous decision should not have to violate the
18 federal civil rights act before a court can correct it.

1 The legislature believes and intends that the "manifestly
2 unreasonable" standard of review, as defined in this act, will properly
3 accomplish this purpose while maintaining the separation of powers
4 among the judicial, legislative, and executive branches of government.
5 A court should not substitute its judgment for that of a rational
6 decision-maker of another branch of government, but a court should be
7 able to correct a decision that is so mistaken as to be manifestly
8 unreasonable.

9 It is the intent of the legislature that the "manifestly
10 unreasonable" standard of review replace the "arbitrary and capricious"
11 standard of review under the writ of certiorari statute and the
12 administrative procedure act.

13 **Sec. 2.** RCW 7.16.120 and 1989 c 7 s 1 are each amended to read as
14 follows:

15 The questions involving the merits to be determined by the court
16 upon the hearing are:

17 (1) Whether the body or officer had jurisdiction of the subject
18 matter of the determination under review.

19 (2) Whether the authority, conferred upon the body or officer in
20 relation to that subject matter, has been pursued in the mode required
21 by law, in order to authorize it or to make the determination.

22 (3) Whether, in making the determination, any rule of law affecting
23 the rights of the parties thereto has been violated to the prejudice of
24 the relator.

25 (4) Whether there was any competent proof of all the facts
26 necessary to be proved, in order to authorize the making of the
27 determination.

28 (5) Whether the factual determinations were supported by
29 substantial evidence.

30 In reviewing a factual determination or ultimate decision the court
31 shall uphold the determination or decision unless the court concludes
32 it was manifestly unreasonable. "Manifestly unreasonable" means no
33 reasonable mind would have made the determination or decision. If
34 reasonable minds could differ, then a determination or decision is not
35 manifestly unreasonable even though the reviewing court would have
36 decided the matter differently if the court had been the original
37 decision-maker. A finding or conclusion that a decision was manifestly

1 unreasonable does not constitute a determination that the decision was
2 made willfully, in bad faith, or with malice.

3 **Sec. 3.** RCW 34.05.010 and 1992 c 44 s 10 are each amended to read
4 as follows:

5 The definitions set forth in this section shall apply throughout
6 this chapter, unless the context clearly requires otherwise.

7 (1) "Adjudicative proceeding" means a proceeding before an agency
8 in which an opportunity for hearing before that agency is required by
9 statute or constitutional right before or after the entry of an order
10 by the agency. Adjudicative proceedings also include all cases of
11 licensing and rate making in which an application for a license or rate
12 change is denied except as limited by RCW 66.08.150, or a license is
13 revoked, suspended, or modified, or in which the granting of an
14 application is contested by a person having standing to contest under
15 the law.

16 (2) "Agency" means any state board, commission, department,
17 institution of higher education, or officer, authorized by law to make
18 rules or to conduct adjudicative proceedings, except those in the
19 legislative or judicial branches, the governor, or the attorney general
20 except to the extent otherwise required by law and any local
21 governmental entity that may request the appointment of an
22 administrative law judge under chapter 42.41 RCW.

23 (3) "Agency action" means licensing, the implementation or
24 enforcement of a statute, the adoption or application of an agency rule
25 or order, the imposition of sanctions, or the granting or withholding
26 of benefits.

27 Agency action does not include an agency decision regarding (a)
28 contracting or procurement of goods, services, public works, and the
29 purchase, lease, or acquisition by any other means, including eminent
30 domain, of real estate, as well as all activities necessarily related
31 to those functions, or (b) determinations as to the sufficiency of a
32 showing of interest filed in support of a representation petition, or
33 mediation or conciliation of labor disputes or arbitration of labor
34 disputes under a collective bargaining law or similar statute, or (c)
35 any sale, lease, contract, or other proprietary decision in the
36 management of public lands or real property interests, or (d) the
37 granting of a license, franchise, or permission for the use of

1 trademarks, symbols, and similar property owned or controlled by the
2 agency.

3 (4) "Agency head" means the individual or body of individuals in
4 whom the ultimate legal authority of the agency is vested by any
5 provision of law. If the agency head is a body of individuals, a
6 majority of those individuals constitutes the agency head.

7 (5) "Entry" of an order means the signing of the order by all
8 persons who are to sign the order, as an official act indicating that
9 the order is to be effective.

10 (6) "Filing" of a document that is required to be filed with an
11 agency means delivery of the document to a place designated by the
12 agency by rule for receipt of official documents, or in the absence of
13 such designation, at the office of the agency head.

14 (7) "Institutions of higher education" are the University of
15 Washington, Washington State University, Central Washington University,
16 Eastern Washington University, Western Washington University, The
17 Evergreen State College, the various community colleges, and the
18 governing boards of each of the above, and the various colleges,
19 divisions, departments, or offices authorized by the governing board of
20 the institution involved to act for the institution, all of which are
21 sometimes referred to in this chapter as "institutions."

22 (8) "Interpretive statement" means a written expression of the
23 opinion of an agency, entitled an interpretive statement by the agency
24 head or its designee, as to the meaning of a statute or other provision
25 of law, of a court decision, or of an agency order.

26 (9)(a) "License" means a franchise, permit, certification,
27 approval, registration, charter, or similar form of authorization
28 required by law, but does not include (i) a license required solely for
29 revenue purposes, or (ii) a certification of an exclusive bargaining
30 representative, or similar status, under a collective bargaining law or
31 similar statute, or (iii) a license, franchise, or permission for use
32 of trademarks, symbols, and similar property owned or controlled by the
33 agency.

34 (b) "Licensing" includes the agency process respecting the
35 issuance, denial, revocation, suspension, or modification of a license.

36 (10) "Manifestly unreasonable" means a standard by which a court
37 decides whether to invalidate a decision subject to review under this
38 chapter. A decision is manifestly unreasonable if no reasonable mind
39 would have made the decision. If reasonable minds could differ, then

1 a decision is not manifestly unreasonable even though the reviewing
2 court would have decided the matter differently if the court had been
3 the original decision-maker. A finding or conclusion that a decision
4 was manifestly unreasonable does not constitute a determination that
5 the decision was made willfully, in bad faith, or with malice.

6 ~~(11)~~(a) "Order," without further qualification, means a written
7 statement of particular applicability that finally determines the legal
8 rights, duties, privileges, immunities, or other legal interests of a
9 specific person or persons.

10 (b) "Order of adoption" means the official written statement by
11 which an agency adopts, amends, or repeals a rule.

12 ~~((11))~~ ~~(12)~~ "Party to agency proceedings," or "party" in a
13 context so indicating, means:

14 (a) A person to whom the agency action is specifically directed; or

15 (b) A person named as a party to the agency proceeding or allowed
16 to intervene or participate as a party in the agency proceeding.

17 ~~((12))~~ ~~(13)~~ "Party to judicial review or civil enforcement
18 proceedings," or "party" in a context so indicating, means:

19 (a) A person who files a petition for a judicial review or civil
20 enforcement proceeding; or

21 (b) A person named as a party in a judicial review or civil
22 enforcement proceeding, or allowed to participate as a party in a
23 judicial review or civil enforcement proceeding.

24 ~~((13))~~ ~~(14)~~ "Person" means any individual, partnership,
25 corporation, association, governmental subdivision or unit thereof, or
26 public or private organization or entity of any character, and includes
27 another agency.

28 ~~((14))~~ ~~(15)~~ "Policy statement" means a written description of the
29 current approach of an agency, entitled a policy statement by the
30 agency head or its designee, to implementation of a statute or other
31 provision of law, of a court decision, or of an agency order, including
32 where appropriate the agency's current practice, procedure, or method
33 of action based upon that approach.

34 ~~((15))~~ ~~(16)~~ "Rule" means any agency order, directive, or
35 regulation of general applicability (a) the violation of which subjects
36 a person to a penalty or administrative sanction; (b) which
37 establishes, alters, or revokes any procedure, practice, or requirement
38 relating to agency hearings; (c) which establishes, alters, or revokes
39 any qualification or requirement relating to the enjoyment of benefits

1 or privileges conferred by law; (d) which establishes, alters, or
2 revokes any qualifications or standards for the issuance, suspension,
3 or revocation of licenses to pursue any commercial activity, trade, or
4 profession; or (e) which establishes, alters, or revokes any mandatory
5 standards for any product or material which must be met before
6 distribution or sale. The term includes the amendment or repeal of a
7 prior rule, but does not include (i) statements concerning only the
8 internal management of an agency and not affecting private rights or
9 procedures available to the public, (ii) declaratory rulings issued
10 pursuant to RCW 34.05.240, (iii) traffic restrictions for motor
11 vehicles, bicyclists, and pedestrians established by the secretary of
12 transportation or his designee where notice of such restrictions is
13 given by official traffic control devices, or (iv) rules of
14 institutions of higher education involving standards of admission,
15 academic advancement, academic credit, graduation and the granting of
16 degrees, employment relationships, or fiscal processes.

17 ~~((16))~~ (17) "Rules review committee" or "committee" means the
18 joint administrative rules review committee created pursuant to RCW
19 34.05.610 for the purpose of selectively reviewing existing and
20 proposed rules of state agencies.

21 ~~((17))~~ (18) "Rule making" means the process for formulation and
22 adoption of a rule.

23 ~~((18))~~ (19) "Service," except as otherwise provided in this
24 chapter, means posting in the United States mail, properly addressed,
25 postage prepaid, or personal service. Service by mail is complete upon
26 deposit in the United States mail. Agencies may, by rule, authorize
27 service by electronic telefacsimile transmission, where copies are
28 mailed simultaneously, or by commercial parcel delivery company.

29 **Sec. 4.** RCW 34.05.570 and 1989 c 175 s 27 are each amended to read
30 as follows:

31 (1) Generally. Except to the extent that this chapter or another
32 statute provides otherwise:

33 (a) The burden of demonstrating the invalidity of agency action is
34 on the party asserting invalidity;

35 (b) The validity of agency action shall be determined in accordance
36 with the standards of review provided in this section, as applied to
37 the agency action at the time it was taken;

1 (c) The court shall make a separate and distinct ruling on each
2 material issue on which the court's decision is based; and

3 (d) The court shall grant relief only if it determines that a
4 person seeking judicial relief has been substantially prejudiced by the
5 action complained of.

6 (2) Review of rules. (a) A rule may be reviewed by petition for
7 declaratory judgment filed pursuant to this subsection or in the
8 context of any other review proceeding under this section. In an
9 action challenging the validity of a rule, the agency shall be made a
10 party to the proceeding.

11 (b) The validity of any rule may be determined upon petition for a
12 declaratory judgment addressed to the superior court of Thurston
13 county, when it appears that the rule, or its threatened application,
14 interferes with or impairs or immediately threatens to interfere with
15 or impair the legal rights or privileges of the petitioner. The
16 declaratory judgment order may be entered whether or not the petitioner
17 has first requested the agency to pass upon the validity of the rule in
18 question.

19 (c) In a proceeding involving review of a rule, the court shall
20 declare the rule invalid only if it finds that it violates
21 constitutional provisions, exceeds the statutory authority of the
22 agency, was adopted without compliance with statutory rule-making
23 procedures, or could not conceivably have been the product of a
24 rational decision-maker.

25 (3) Review of agency orders in adjudicative proceedings. The court
26 shall grant relief from an agency order in an adjudicative proceeding
27 only if it determines that:

28 (a) The order, or the statute or rule on which the order is based,
29 is in violation of constitutional provisions on its face or as applied;

30 (b) The order is outside the statutory authority or jurisdiction of
31 the agency conferred by any provision of law;

32 (c) The agency has engaged in unlawful procedure or decision-making
33 process, or has failed to follow a prescribed procedure;

34 (d) The agency has erroneously interpreted or applied the law;

35 (e) The order is not supported by evidence that is substantial when
36 viewed in light of the whole record before the court, which includes
37 the agency record for judicial review, supplemented by any additional
38 evidence received by the court under this chapter;

1 (f) The agency has not decided all issues requiring resolution by
2 the agency;

3 (g) A motion for disqualification under RCW 34.05.425 or 34.12.050
4 was made and was improperly denied or, if no motion was made, facts are
5 shown to support the grant of such a motion that were not known and
6 were not reasonably discoverable by the challenging party at the
7 appropriate time for making such a motion;

8 (h) The order is inconsistent with a rule of the agency unless the
9 agency explains the inconsistency by stating facts and reasons to
10 demonstrate a rational basis for inconsistency; or

11 (i) The order is (~~arbitrary or capricious~~) manifestly
12 unreasonable.

13 (4) Review of other agency action.

14 (a) All agency action not reviewable under subsection (2) or (3) of
15 this section shall be reviewed under this subsection.

16 (b) A person whose rights are violated by an agency's failure to
17 perform a duty that is required by law to be performed may file a
18 petition for review pursuant to RCW 34.05.514, seeking an order
19 pursuant to this subsection requiring performance. Within twenty days
20 after service of the petition for review, the agency shall file and
21 serve an answer to the petition, made in the same manner as an answer
22 to a complaint in a civil action. The court may hear evidence,
23 pursuant to RCW 34.05.562, on material issues of fact raised by the
24 petition and answer.

25 (c) Relief for persons aggrieved by the performance of an agency
26 action, including the exercise of discretion, or an action under (b) of
27 this subsection can be granted only if the court determines that the
28 action is:

29 (i) Unconstitutional;

30 (ii) Outside the statutory authority of the agency or the authority
31 conferred by a provision of law;

32 (iii) (~~Arbitrary or capricious~~) Manifestly unreasonable; or

33 (iv) Taken by persons who were not properly constituted as agency
34 officials lawfully entitled to take such action.

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