
SENATE BILL 6268

State of Washington 61st Legislature 2010 Regular Session

By Senators Franklin, Hargrove, Carrell, and Regala

Read first time 01/11/10. Referred to Committee on Judiciary.

1 AN ACT Relating to the administrative procedure act; amending RCW
2 34.05.360, 34.05.534, 34.05.554, 34.05.566, 34.05.558, 34.05.570, and
3 34.05.010; and adding new sections to chapter 34.05 RCW.

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

5 **Sec. 1.** RCW 34.05.360 and 1988 c 288 s 311 are each amended to
6 read as follows:

7 The order of adoption by which each rule is adopted by an agency
8 shall contain all of the following:

- 9 (1) The date the agency adopted the rule;
- 10 (2) A concise statement of the purpose of the rule;
- 11 (3) A reference to all rules repealed, amended, or suspended by the
12 rule;
- 13 (4) A reference to the specific statutory or other authority
14 authorizing adoption of the rule;
- 15 (5) Any findings required by any provision of law as a precondition
16 to adoption or effectiveness of the rule; (~~and~~)
- 17 (6) The effective date of the rule if other than that specified in
18 RCW 34.05.380(2); and

1 (7) The number of votes for and against adoption of the rule, if
2 the rule-making authority includes more than one person.

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

5 Adoption of a rule requires an affirmative vote of the majority of
6 all members of a body that has the legal authority to adopt an agency's
7 rules. An affirmative vote of a majority of the members present is not
8 sufficient to adopt a rule. Ex officio members may not participate in
9 rule making and may not be considered when counting a majority of the
10 members of the body to determine the necessary votes to adopt a rule.

11 **Sec. 3.** RCW 34.05.534 and 1997 c 409 s 302 are each amended to
12 read as follows:

13 (1) A person may file a petition for judicial review under this
14 chapter only after exhausting all administrative remedies available
15 within the agency whose action is being challenged, or available within
16 any other agency authorized to exercise administrative review, except:

17 ~~((+1))~~ (a) A petitioner for judicial review of a rule need not
18 have participated in the rule-making proceeding upon which that rule is
19 based, have petitioned for its amendment or repeal, have petitioned the
20 joint administrative rules review committee for its review, or have
21 appealed a petition for amendment or repeal to the governor;

22 ~~((+2))~~ (b) A petitioner for judicial review need not exhaust
23 administrative remedies to the extent that this chapter or any other
24 statute states that exhaustion is not required; or

25 ~~((+3))~~ (c) The court may relieve a petitioner of the requirement
26 to exhaust any or all administrative remedies upon a showing that:

27 ~~((+a))~~ (i) The remedies would be patently inadequate;

28 ~~((+b))~~ (ii) The exhaustion of remedies would be futile; or

29 ~~((+c))~~ (iii) The grave irreparable harm that would result from
30 having to exhaust administrative remedies would clearly outweigh the
31 public policy requiring exhaustion of administrative remedies.

32 (2) An agency must identify and consolidate any and all legal
33 challenges or defenses to a petition in its initial answer. An agency
34 may not omit a claim or defense and raise the defense or claim later in
35 the review proceedings or in another action. All grounds to deny a

1 petitioner's request must be identified in the agency's initial
2 response and consolidated into one proceeding.

3 **Sec. 4.** RCW 34.05.554 and 1988 c 288 s 512 are each amended to
4 read as follows:

5 (1) Issues not raised before the agency may not be raised on
6 appeal, except to the extent that:

7 (a) The person did not know and was under no duty to discover or
8 could not have reasonably discovered facts giving rise to the issue;

9 (b) The agency action subject to judicial review is a rule and the
10 person has not been a party in adjudicative proceedings that provided
11 an adequate opportunity to raise the issue;

12 (c) The agency action subject to judicial review is an order and
13 the person was not notified of the adjudicative proceeding in
14 substantial compliance with this chapter; or

15 (d) The interests of justice would be served by resolution of an
16 issue arising from:

17 (i) A change in controlling law occurring after the agency action;
18 or

19 (ii) Agency action occurring after the person exhausted the last
20 feasible opportunity for seeking relief from the agency.

21 (2) The court shall remand to the agency for determination any
22 issue that is properly raised pursuant to subsection (1) of this
23 section.

24 (3) An agency may not raise a defense or theory to oppose a
25 petition that it has failed to identify in its answer to a petition.

26 **Sec. 5.** RCW 34.05.566 and 1989 c 175 s 26 are each amended to read
27 as follows:

28 (1) Within thirty days after service of the petition for judicial
29 review, or within further time allowed by the court or by other
30 provision of law, the agency shall transmit to the court the original
31 or a certified copy of the agency record for judicial review of the
32 agency action. The record shall consist of any agency documents
33 expressing the agency action, other documents identified by the agency
34 as having been considered by it before its action and used as a basis
35 for its action, and any other material described in this chapter as the

1 agency record for the type of agency action at issue, subject to the
2 provisions of this section. An agency must transcribe or certify audio
3 recordings of oral presentations at adjudicative proceedings.

4 (2) If part of the record has been preserved without a transcript,
5 the agency shall prepare a transcript for inclusion in the record
6 transmitted to the court, except for portions that the parties
7 stipulate to omit in accordance with subsection (4) of this section.

8 (3) The agency may charge a nonindigent petitioner with the
9 reasonable costs of preparing any necessary copies and transcripts for
10 transmittal to the court. A failure by the petitioner to pay any of
11 this cost to the agency relieves the agency from the responsibility for
12 preparation of the record and transmittal to the court.

13 (4) The record may be shortened, summarized, or organized
14 temporarily or, by stipulation of all parties, permanently.

15 (5) The court may tax the cost of preparing transcripts and copies
16 of the record:

17 (a) Against a party who unreasonably refuses to stipulate to
18 shorten, summarize, or organize the record; or

19 (b) In accordance with any provision of law.

20 (6) Additions to the record pursuant to RCW 34.05.562 must be made
21 as ordered by the court.

22 (7) The court may require or permit subsequent corrections or
23 additions to the record.

24 **Sec. 6.** RCW 34.05.558 and 1988 c 288 s 513 are each amended to
25 read as follows:

26 Judicial review of disputed issues of fact shall be conducted by
27 the court without a jury and must be confined to the agency record for
28 judicial review as defined by this chapter, supplemented by additional
29 evidence taken pursuant to this chapter. The court may consider
30 certified audio recordings, meeting minutes, or transcripts of
31 adjudicative proceedings without supplementing the record. The
32 certified audio recordings, meeting minutes, or transcripts of
33 adjudicative proceedings may be attached to a declaration or brief as
34 an appendix for the court's consideration when relevant to the issues
35 before the court.

1 **Sec. 7.** RCW 34.05.570 and 2004 c 30 s 1 are each amended to read
2 as follows:

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

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

7 (b) The burden of proof required of any agency action related to a
8 license is clear, cogent, and convincing;

9 (c) The validity of agency action shall be determined in accordance
10 with the standards of review provided in this section, as applied to
11 the agency action at the time it was taken;

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

14 (~~(d)~~) (e) The court shall grant relief only if it determines that
15 a person seeking judicial relief has been substantially prejudiced by
16 the action complained of.

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

22 (b)(i) The validity of any rule may be determined upon petition for
23 a declaratory judgment addressed to the superior court of Thurston
24 county, when it appears that the rule, or its threatened application,
25 interferes with or impairs or immediately threatens to interfere with
26 or impair the legal rights or privileges of the petitioner. The
27 declaratory judgment order may be entered whether or not the petitioner
28 has first requested the agency to pass upon the validity of the rule in
29 question. A petition for declaratory judgment to invalidate a rule
30 filed directly in superior court of Thurston county may be served upon
31 the agency and the attorney general's office. The petitioner may not
32 be required to serve any other person or entity. The agency shall post
33 notice of the declaratory judgment filing in the same manner as it
34 posts notice of proposed rule making under this chapter. The parties
35 may proceed with reasonable discovery under the civil rules to present
36 evidence not available in the official rule-making file.

37 (ii) From June 10, 2004, until July 1, 2008:

1 (A) If the petitioner's residence or principal place of business is
2 within the geographical boundaries of the third division of the court
3 of appeals as defined by RCW 2.06.020(3), the petition may be filed in
4 the superior court of Spokane, Yakima, or Thurston county; and

5 (B) If the petitioner's residence or principal place of business is
6 within the geographical boundaries of district three of the first
7 division of the court of appeals as defined by RCW 2.06.020(1), the
8 petition may be filed in the superior court of Whatcom or Thurston
9 county.

10 (c) In a proceeding involving review of a rule, the court shall
11 declare the rule invalid only if it finds that: The rule violates
12 constitutional provisions; the rule exceeds the statutory authority of
13 the agency; the rule was adopted without compliance with statutory
14 rule-making procedures; or the rule is arbitrary and capricious.

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

18 (a) The order, or the statute or rule on which the order is based,
19 is in violation of constitutional provisions on its face or as applied.
20 When the review concerns a license, the action necessarily concerns a
21 life, liberty, and property interest of the petitioner for purposes of
22 constitutional analysis;

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

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

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

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

32 (f) The agency has not decided all issues requiring resolution by
33 the agency;

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

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

4 (i) The order is arbitrary or capricious.

5 (4) Review of other agency action.

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

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

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

21 (i) Unconstitutional. When the review concerns a license, the
22 action necessarily concerns a life, liberty, and property interest of
23 the petitioner for purposes of constitutional analysis;

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

26 (iii) Arbitrary or capricious; or

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

29 **Sec. 8.** RCW 34.05.010 and 1997 c 126 s 2 are each amended to read
30 as follows:

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

33 (1) "Adjudicative proceeding" means a proceeding before an agency
34 in which an opportunity for hearing before that agency is required by
35 statute or constitutional right before or after the entry of an order
36 by the agency. Adjudicative proceedings also include all cases of
37 licensing and rate making in which an application for a license or rate

1 change is denied except as limited by RCW 66.08.150, or a license is
2 revoked, suspended, or modified, or in which the granting of an
3 application is contested by a person having standing to contest under
4 the law.

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

12 (3) "Agency action" means licensing, the implementation or
13 enforcement of a statute, the adoption or application of an agency rule
14 or order, the imposition of sanctions, or the granting or withholding
15 of benefits.

16 Agency action does not include an agency decision regarding (a)
17 contracting or procurement of goods, services, public works, and the
18 purchase, lease, or acquisition by any other means, including eminent
19 domain, of real estate, as well as all activities necessarily related
20 to those functions, or (b) determinations as to the sufficiency of a
21 showing of interest filed in support of a representation petition, or
22 mediation or conciliation of labor disputes or arbitration of labor
23 disputes under a collective bargaining law or similar statute, or (c)
24 any sale, lease, contract, or other proprietary decision in the
25 management of public lands or real property interests, or (d) the
26 granting of a license, franchise, or permission for the use of
27 trademarks, symbols, and similar property owned or controlled by the
28 agency.

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

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

36 (6) "Filing" of a document that is required to be filed with an
37 agency means delivery of the document to a place designated by the

1 agency by rule for receipt of official documents, or in the absence of
2 such designation, at the office of the agency head.

3 (7) "Institutions of higher education" are the University of
4 Washington, Washington State University, Central Washington University,
5 Eastern Washington University, Western Washington University, The
6 Evergreen State College, the various community colleges, and the
7 governing boards of each of the above, and the various colleges,
8 divisions, departments, or offices authorized by the governing board of
9 the institution involved to act for the institution, all of which are
10 sometimes referred to in this chapter as "institutions."

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

15 (9)(a) "License" means a franchise, permit, certification,
16 approval, registration, charter, or similar form of authorization
17 required by law, but does not include (i) a license required solely for
18 revenue purposes, or (ii) a certification of an exclusive bargaining
19 representative, or similar status, under a collective bargaining law or
20 similar statute, or (iii) a license, franchise, or permission for use
21 of trademarks, symbols, and similar property owned or controlled by the
22 agency. Even if an agency does not use the term "license," the
23 required agency authorization is a license under this chapter if an
24 agency requires its consent before a person or entity may provide
25 services, or use products, equipment, or specific sites or locations.
26 Whether a license is a professional license, an occupational license,
27 a product or equipment license, or a site license is a distinction that
28 may not impact the rights of the licensee specified in this chapter.

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

31 (10) "Mail" or "send," for purposes of any notice relating to rule
32 making or policy or interpretive statements, means regular mail or
33 electronic distribution, as provided in RCW 34.05.260. "Electronic
34 distribution" or "electronically" means distribution by electronic mail
35 or facsimile mail.

36 (11)(a) "Order," without further qualification, means a written
37 statement of particular applicability that finally determines the legal

1 rights, duties, privileges, immunities, or other legal interests of a
2 specific person or persons.

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

5 (12) "Party to agency proceedings," or "party" in a context so
6 indicating, means:

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

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

10 (13) "Party to judicial review or civil enforcement proceedings,"
11 or "party" in a context so indicating, means:

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

14 (b) A person named as a party in a judicial review or civil
15 enforcement proceeding, or allowed to participate as a party in a
16 judicial review or civil enforcement proceeding.

17 (14) "Person" means any individual, partnership, corporation,
18 association, governmental subdivision or unit thereof, or public or
19 private organization or entity of any character, and includes another
20 agency.

21 (15) "Policy statement" means a written description of the current
22 approach of an agency, entitled a policy statement by the agency head
23 or its designee, to implementation of a statute or other provision of
24 law, of a court decision, or of an agency order, including where
25 appropriate the agency's current practice, procedure, or method of
26 action based upon that approach.

27 (16) "Rule" means any agency order, directive, or regulation of
28 general applicability (a) the violation of which subjects a person to
29 a penalty or administrative sanction; (b) which establishes, alters, or
30 revokes any procedure, practice, or requirement relating to agency
31 hearings; (c) which establishes, alters, or revokes any qualification
32 or requirement relating to the enjoyment of benefits or privileges
33 conferred by law; (d) which establishes, alters, or revokes any
34 qualifications or standards for the issuance, suspension, or revocation
35 of licenses to pursue any commercial activity, trade, or profession; or
36 (e) which establishes, alters, or revokes any mandatory standards for
37 any product or material which must be met before distribution or sale.
38 The term includes the amendment or repeal of a prior rule, but does not

1 include (i) statements concerning only the internal management of an
2 agency and not affecting private rights or procedures available to the
3 public, (ii) declaratory rulings issued pursuant to RCW 34.05.240,
4 (iii) traffic restrictions for motor vehicles, bicyclists, and
5 pedestrians established by the secretary of transportation or his
6 designee where notice of such restrictions is given by official traffic
7 control devices, or (iv) rules of institutions of higher education
8 involving standards of admission, academic advancement, academic
9 credit, graduation and the granting of degrees, employment
10 relationships, or fiscal processes.

11 (17) "Rules review committee" or "committee" means the joint
12 administrative rules review committee created pursuant to RCW 34.05.610
13 for the purpose of selectively reviewing existing and proposed rules of
14 state agencies.

15 (18) "Rule making" means the process for formulation and adoption
16 of a rule.

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

23 NEW SECTION. **Sec. 9.** A new section is added to chapter 34.05 RCW
24 to read as follows:

25 All materials made available to boards and commissions in the
26 boards and commissions notebooks prepared by the agency for their
27 meetings shall be posted electronically on the agency web site in
28 advance of the meeting when the agency publishes the agenda. Any
29 materials not subject to public disclosure may be redacted or withheld.

--- END ---