



## Welcome to the Administrative Law Section's E-Newsletter!

We hope you enjoy our newsletter and encourage your feedback.

Please forward our newsletter to your colleagues and encourage them to join the section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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## Agency Deference in Washington State

By Scott Boyce

When the question of deference arises, "Chevron"<sup>1</sup> will often follow. Agencies appreciate *Chevron* deference because under *Chevron*, the courts defer to the agency's interpretation of an ambiguous statute as long as the interpretation resolves the ambiguity and the interpretation is not unreasonable (among other requirements and subject to many caveats). However, *Chevron* and its progeny, such as *Skidmore*,<sup>2</sup> are products of the federal courts. Deference to a state agency in a state court relies upon state case law. While state courts can adopt holdings similar to *Chevron*, deference does not apply by default. In Washington, courts have not adopted a policy similar to *Chevron*, but have adopted some deference principles.

### I. Deference to Agencies, Generally

Generally, the interpretation of a statute or regulation by an administrative agency receives no deference by a reviewing court. Instead, decisions of law are reviewed de novo, and the arguing parties stand on equal footing. The Washington Supreme Court held, in *Franklin County Sheriff's Office v. Sellers*, that issues of law under the Administrative Procedures Act are "the responsibility of the judicial branch to resolve."<sup>3</sup> The Court quoted a previous case (which echoed the oft-quoted line from *Marbury v. Madison*) and held that "it is emphatically the province and duty of the judicial branch to say what the law is."<sup>4</sup> Thus, agency interpretations and construction of a statute or regulation are not binding.

Subsequent cases have not diverged from this standard of non-deferential status of agencies, with the

Washington Supreme Court quoting or citing to the deference principle set out in *Sellers* as recently as 2013.<sup>5</sup> However, *Sellers* did not prohibit deference from applying, noting that where agencies "administer a special field of law" and perform "quasi-judicial functions," the court ought to accord "substantial weight" to that agency's construction of a statute because of its "expertise in that field."<sup>6</sup>

### II. Special Field of Law

Many cases have granted this substantial weight supported by *Sellers*, and granting deference seems to be the more common outcome, but no court has identified what is meant by a "special field of law." However, the courts occasionally declined to grant deference, which provides some understanding of the term. In *In re Impoundment of Chevrolet Truck*, the Washington Supreme Court declined to extend deference to the Washington State Patrol because the State Patrol does not and did not administer the "special field of law" of "vehicle impoundments."<sup>7</sup> As a result, the court reviewed the issue de novo and made all rulings in the case anew, disagreeing with the State Patrol's action of impounding the vehicle in question, noting that the State Patrol's attempt to broaden its powers by regulation was invalid, because an agency does not have the power to "determine the scope of its own authority."<sup>8</sup> Thus, while Washington courts often grant deference, courts draw that line at an agency attempting to expand its own authority and autonomy outside its statutory field.

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## Agency Deference in Washington State

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### III. Other Areas of Deference

There are some situations where deference is an outright guarantee, or an outright impossibility. Some statutes by the legislature grant “substantial weight” to an agency, such as the deference granted to the State Environmental Board at RCW 43.21C.090. Conversely, according to a federal case out of the Ninth Circuit Court of Appeals, state agencies interpreting or implementing federal statutes or regulations are granted no deference at all, not even “substantial weight,” or *Skidmore* deference.<sup>9</sup> The *Belshe* case cited to the interpretation and implementation of the Medicaid Act by the California Department of Health Services – responsible for administering Medicaid – as one example of a state agency’s interpretation and implementation to which no deference is due.<sup>10</sup>

### IV. Practice Points and Conclusion

Because of the limited number of decisions on deference, and the breadth of the terms used therein, deference is applicable in many cases. To obtain deference in a case, citing to an agency as administering a “special field of law” will aid in obtaining deference. For example, if in the rare instance the Washington Blueberry Commission (an actual state agency: <http://www.wablueberrycomm.org/>) somehow begins conducting quasi-judicial hearings, an argument that the law regarding blueberries is so unique and special that this agency’s specialty must be accorded substantial weight for the benefit of the very blueberry industry itself would be reasonable. Likewise, in what is a more likely scenario, if a case arises regarding the interpretation of law on behalf of the Human Rights Commission, an argument that the legislature has granted the agency an important mission and that the rights of every human in Washington are affected by the field of law that the Human Rights Commission, and only that Commission, can interpret and understand, would be warranted. Any and every agency in the state can find a way to make its field of law special, and to date, very few cases have denied deference as a result of a non-special field of law.

Challengers of deference to an agency face an uphill battle. Arguments regarding an agency’s interpretation of a law they do not “administer” may be helpful. However, arguments regarding deference as the exception to the rule, and that courts have the ultimate say in “what the law is,” will likely generate less willingness to grant deference. Further, an argument that an agency’s interpretation would broaden its scope of authority beyond congressional intent will shift the burden on the agency at issue to prove the deference they are owed.

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This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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## State Agencies' Indexes of Orders and Statements

By Richard E. Potter and John M. Gray

Are you new to practicing before a particular state regulatory agency? Would you like ready access to agency documents that describe key precedents and agency policies? Even if you are not new to practice at a given state agency, would you like to double check your knowledge of precedents and policies against the agency's listing of them? Indexes required by the Public Records Act (PRA) are a potential resource for you – especially the ones that are posted online.

RCW 42.56.070(5) requires state agencies to “by rule, establish and implement a system of indexing for the identification and location of the following records” (as defined in the Administrative Procedure Act):

- Final orders in adjudicative proceedings “that contain an analysis or decision of substantial importance to the agency in carrying out its duties;”
- Declaratory orders “that contain an analysis or decision of substantial importance to the agency in carrying out its duties;”
- Interpretive statements;
- Policy statements.

In addition, subsection (6) of that statute states that a public record (which includes these four types of documents) may be used by an agency as precedent only if it “has been indexed in an index available to the public” (or if the “parties affected have timely notice (actual or constructive) of the terms thereof”).

This indexes requirement originated in Section 26 of the 1972 Initiative 276, which was passed by Washington

voters and resulted in the 1973 codification of the state's Public Records Act. The Act was meant to benefit the general public. In the voters' pamphlet the tagline of the “For” argument was: “The People Have The Right To Know!! Vote For Initiative 276!!”

In addition to the public records provisions, Initiative 276 enacted campaign finance regulations, and both were codified in Chapter 42.17 RCW. By 2005 legislation, effective July 1, 2006, the campaign disclosure provisions and the public records provisions were separated, with the PRA being recodified in Chapter 42.56 RCW. (The campaign provisions are in 42.17A RCW.)

In the original law, the indexing provision required all local and state agencies to index all of their “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” and “those statements of policy and interpretations of policy, statute and the Constitution which have been adopted by the agency.” But there was an escape clause: “An agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event” publish a formal order justifying use of this exception, and the agency had to make publicly available all records indexes it did create and maintain (e.g., for its own use).

In 1989, the Legislature separated the indexing requirements for local and state agencies, and it made a few changes to the state agency requirements, which are as they now appear in RCW 42.56.070(5). These changes included the following:

- The “unduly burdensome” escape clause was eliminated.
- The required “final orders” index was limited to decisions “entered after June 30, 1990” in adjudicative cases “that contain an analysis or decision of substantial importance to the agency in carrying out its duties.”
- A distinct requirement to index “declaratory orders” was spelled out, which includes the “substantial importance” proviso.
- Requirements to index all “interpretive statements” and “policy statements” were spelled out.
- The bill also added the rulemaking requirement for state agencies. “(E)ach state agency shall, by rule, establish and implement a system of indexing for the identification following records: \* \* \* Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability

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### Agency Deference in Washington State

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1 The doctrine of judicial deference to administrative actions, referred to as Chevron deference, as no doubt known to our readers, comes from the seminal case of Chevron U.S.A. v. Natural Resources Defense Council, 468 U.S. 837 (1984).

2 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

3 646 P.2d 113, 325 (1982).

4 Sellers at 325-26, quoting Overton v. Economic Assistance Authority, 637 P.2d 652 (1981).

5 See Chaney v. Providence Health Care, 295 P.3d 728

6 Sellers at 325.

7 60 P.3d 53, n. 7 (Wash. 2002).

8 *Id.* at 60, citing In Re Registration Electric Lightwave, Inc., 869 P.2d 1045 (Wash. 1994).

9 See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997).

10 *Id.* at 1495.

## State Agencies' Indexes of Orders and Statements *continued from previous page*

to the public, and the schedule for revising or updating the index. \* \* \*

- State agencies were allowed to satisfy the requirement with "public indexes prepared by other parties but actually used by the agency in its operations."

Note that the Administrative Procedure Act (APA) requires agencies to "keep on file for public inspection all final orders, decisions, and opinions in adjudicative proceedings, interpretive statements, policy statements, and any digest or index to those" documents that the agency happens to have created. The Public Records Act contains the mandate to create such indexes. The APA also has a precedents publication requirement similar to the one in RCW 42.56.070(6). The APA's publication exemption applies only where a party has "actual knowledge" of an unpublished precedent, where the PRA exempts situations of "actual or constructive knowledge."<sup>1</sup>

We researched a number of state agencies to see the status of their implementation of the requirements of RCW 42.56.070(5). We first looked in the agencies' Washington Administrative Code provisions to find the index system rule required by the PRA. The results were uneven. A few agencies have rules that fairly thoroughly follow the particulars of RCW 42.56.070(5). Some agencies do not have an applicable rule at all. Most agencies have some sort of rule, but they lack required elements such as addressing one or more of the types of documents, describing "the form and content of the index," or giving "the schedule for revising or updating the index."

Those rulemaking deficiencies aside, our main interest has been the availability and accessibility of these PRA-required indexes. Of course, they are available through the usual public records request process, but we looked for state agency website postings of these indexes. At present there is no statutory mandate for online posting, but we found that many state agencies have voluntarily made postings of resources that – in varying degrees – provide indexes as contemplated by the PRA.

Based on our legislative history research and bearing in mind that the general public is the primary intended beneficiary of the PRA, we have concluded that these required indexes should be topic or subject matter indexes, and not just a long list of document citations. This is especially the case for "final orders." An agency likely has issued relatively few declaratory orders, interpretive statements and policy statements (as those are defined in the APA), so a simple listing of those might be of practical use to a member of the general public (and to attorneys). But most agencies have over the years issued hundreds and even many thousands

of final orders in adjudicative proceedings. A simple list of all those orders would not be a helpful "index."

After our initial research of an agency's rules and website, we contacted the agency's public records officer to double check our findings, provide clarifications and offer any additional advice for persons seeking online indexes.

This article briefly sets forth the results of our research for state agencies that provided input to us before our article submission deadline. Articles in one or more subsequent newsletters will provide additional results.

### a. Office of Administrative Hearings

The state agency that probably issues the most final orders in adjudicatory proceedings is the Office of Administrative Hearings (OAH). However, OAH does not create or maintain the indexes required by RCW 42.56.070(5) because it is not the custodian of the records covered by that statute. OAH provides hearing officer services for numerous client agencies. When OAH hearing officers conclude a matter, the case file is sent to the client agency, and the final order should be covered by the index created and maintained by the client agency.

### b. Board of Industrial Appeals

In addition to the PRA's indices requirement, the Board of Industrial Insurance Appeals (BIIA) is subject to RCW 51.52.160, Publication and indexing of significant decisions. The statute states: "The board shall publish and index its significant decisions and make them available to the public at reasonable cost." BIIA treats these "significant decisions" as being the same as the PRA's orders "that contain an analysis or decision of substantial importance to the agency in carrying out its duties." BIIA does not post the PRA-required indexes on its website, but it does post its "significant decisions." This material may be accessed via several URLs, including a subject index at <http://www.biiawa.gov/SDSubjectIndex.html>. BIIA "policies" are available online at "Vision, Mission and Values," located on the "About BIIA" page, which is accessible from the "About Us" tab on BIIA's homepage. The PRA-required indexes are available from BIIA via a normal public records request, but note that BIIA has at this point not issued any "interpretive statements." Also, subsection (4)(c) of BIIA's public records rule -- WAC 263-12-016 -- states: "any indices maintained for intra-agency use are available for public inspection and copying."

### c. Department of Social and Health Services

The Department of Social and Health Services (DSHS) calls orders "that contain an analysis or decision of substantial importance to the agency in carrying out its duties" "significant decisions." See WAC 388-01-190(1) and WAC

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## State Agencies' Indexes of Orders and Statements

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388-02-0221. DSHS posts an index of significant decisions. See the pull-down items at <https://www.dshs.wa.gov/sesa/board-appeals/decision-process>. DSHS does not currently post interpretive or policy statements on its website.

### d. Health Care Authority

The website of the Health Care Authority (HCA) defines "significant decisions" using the PRA's verbiage: "has an analysis or decision of substantial importance to HCA in carrying out its duties." HCA posts its significant decisions at <https://www.hca.wa.gov/about-hca/significant-decisions>. HCA does not post indexes of declaratory orders, interpretive statements, or policy statements. HCA "Rules and Policies" are posted at <https://www.hca.wa.gov/employee-retiree-benefits/rules-and-policies#PEBB-Program-law>.

### e. Department of Retirement Systems

The Department of Retirement Systems (DRS) considers its "Disposition of Administrative Appeals 2033-Present" to be the required index of Final Orders. It is posted at <https://www.drs.wa.gov/reviews/AdminAppealsIndex.pdf>. Rather than an index of select significant decisions, it appears to be a listing of all administrative appeals decisions. However, since it is only 10 pages long and since it includes a helpful "Nature of Appeal" column, it is a useful resource. However, it does not contain hotlinks to the decisions themselves, and we did not find decisions posted elsewhere on the DRS website, so they would need to be obtained by a normal public records request. The DRS also has a more comprehensive index used internally that dates back further than the one posted on the website, and it is available upon request. DRS is in the process of updating its posted "index" to include final orders to present date. DRS does not post indexes for formal policy statements, interpretive statements, or declaratory orders. It does post policy-like information -- Notices to Employers -- at <https://www.drs.wa.gov/employer/DRSN/default.htm>.

<sup>1</sup> See RCW 34.05.220(2) and (3).

## The Frank Homan Award

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law.

Only Administrative Law Section members can nominate, but a nominee does not have to be an attorney or a section member.

Nominations for the 2018 award are now closed. However, it is not too early to nominate for 2019! Nominations for the 2019 Award are due by June 30, 2019. For nominations, send an email to Chad Standifer at [ccstandifer@yahoo.com](mailto:ccstandifer@yahoo.com). Please include:

- Your name and contact information
- Information about the person being nominated (name, position, affiliation)
- Why you think this person should be recognized

The award is named for Frank Homan, a dedicated teacher and mentor who was passionate about improving the law. After receiving his law degree from Cleveland State University School of Law in 1965, he began practicing in Washington in 1968, serving as an Employment Security Department hearings examiner from 1970 to 1974 and as a senior administrative law judge at the Office of Administrative Hearings from 1975 to 1993. He continued to serve as an ALJ pro tem after his retirement in 1993. He was an early proponent for the creation of a central hearings panel, and played an important role in the creation of the Office of Administrative Hearings (RCW 34.12).

Frank was generous with his time and expertise and is well-remembered for his sense of humor, his command of the English language, and his writing style -- including his knowledge of legal terminology and history. His commitment to promoting justice for all and the practice of administrative law is the inspiration for the award that bears his name.

### Help us make this newsletter more relevant to your practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please contact Eileen M. Keiffer [emkeiffer@gmail.com](mailto:emkeiffer@gmail.com).

## Case Law Update

### **Hamilton v. Pollution Control Hearings Board, No. 50567-3-II (Wash. Ct. App. Sep. 5, 2018).**

*By Polly McNeill*

In appeal from approval by the Department of Ecology (“DOE”) of a municipality’s request to change groundwater rights, Division II of the Court of Appeals touched on the Administrative Procedures Act provision related to review of “other agency action” under RCW 34.05.570(4).

The City of Napavine applied to DOE for approval to change the purpose and place of use for groundwater rights the City acquired from a private party. The City purchased the groundwater rights from one Hamilton family member, and then three years after DOE’s approval of the requested changes, ownership of the groundwater rights was challenged by another family member. The disputing nephew claimed that his part of the family had inherited half of the property to which the groundwater rights were appurtenant. The relatives were not involved in the City’s purchase of the rights and were not signatories on the application for change of use. The nephew’s side of the family claimed that because the City’s change application to DOE was signed by one of branch of the family, but not the other, DOE’s approval was defective.

In response to the nephew’s after-the-fact claims that the City’s application for change of groundwater rights was flawed, DOE sent a letter stating that public notice was properly made, the nephew had failed to object at that time, and therefore its decision to approve the application would not be changed. The nephew filed a petition for review of DOE’s action to the Pollution Control Hearings Board (“PCHB”). After the PCHB granted summary judgment in favor of DOE, the nephew petitioned for judicial review under RCW 34.05.570(3), arguing that DOE’s letter to him constituted a “final order.” Also, the nephew asserted under RCW 34.05.570(4)(b) that DOE failed to perform a legally required duty by not rejecting the City’s allegedly defective application. Both claims were denied by the superior court, and taken on appeal to Division II.

Review of agency action other than rules and orders is governed by RCW 34.05.570(4). A person whose rights are violated by an agency’s failure to act can file a petition for review, seeking an order mandating performance, similar to a writ of mandamus. Under this provision of the APA, the reviewing court is required to analyze underlying statutory obligations to determine whether an agency’s inaction constitutes a “failure to perform a duty that is required by law to be performed.” Relief can be granted only if the court determines that the failure to act is: (1) unconstitutional, (2) outside the statutory authority of the agency or the authority conferred by a provision of law, (3) arbitrary or capricious, or (4) taken by persons who

were not properly constituted as agency officials lawfully entitled to take such action.

In this case, the appellate court scrutinized Chapter 90.03 RCW, the statute governing groundwater right change applications, to determine if DOE’s inaction was inconsistent with the authority conferred to it. RCW 90.03.270 requires DOE to return defective applications. The nephew based his appeal on an arguing that there is no time limit on DOE’s obligations to return an improperly signed application. The Court disagreed, holding that the requirement to return a defective application for correction applies only while the application is pending. DOE had no legal obligation to return Napavine’s application with allegedly improper signatures after the change was already approved, three years later, particularly when no objection was made during the comment period. DOE had not failed to perform a duty required by law.

In Hamilton, the Court was able to evaluate DOE’s obligations by analyzing the enabling statute to determine whether it was required by law to act. In many cases, review of agency inaction implicates an agency’s discretion over resource allocation and policy priorities. Consequently, few petitions for review of agency inaction under RCW 34.05.570(4) result in favorable rulings.

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## Administrative Law Section List Serve

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