



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.

CONTACT US

Section Chair
Bill Pardee
Bill.Pardee@bta.wa.gov
Newsletter Submissions
Edward Pesik
edward.pesik@oah.wa.gov

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LEGISLATIVE SESSION REPORT

By Richard E. Potter, Chair, Legislative Committee

During the 2022 session of the Washington Legislature, the Administrative Law Section's Legislative Committee reviewed 30 bills (not counting companion bills).

The areas of interest to the committee were the Administrative Procedure Act (34.05 RCW), the Public Records Act (42.56 RCW), the Open Public Meetings Act (42.30 RCW), the Office of Administrative Hearings law (34.12 RCW), and other statutes that affected administrative agency procedures, processes, hearings, rulemakings, appeals/judicial review, etc. (as opposed to the substantive law implemented by agencies). Nine bills of interest were passed by the Legislature. Except as otherwise noted, the bills' effective date is June 9, 2022. The text of bills and committee reports are available on the Legislature's website at apps.leg.wa.gov/billinfo/.

By a unanimous vote, the Senate confirmed Lorraine Lee as chief administrative law judge of the Office of Administrative Hearings for a term ending June 30, 2025.

Bills affecting the Public Records Act

Several of these bills enacted exemptions to the disclosure requirements of the PRA. The Code Reviser will add these to its list of disclosure exemptions, which is available at www.atg.wa.gov/sunshine-committee (scroll down).

Second Substitute **House Bill 1210** replaces "marijuana" with "cannabis" throughout the Revised Code of Washington. It includes making this

change in the Public Records Act in RCW 42.56.270, -.620, -.625, -.630. Substitute **House Bill 1673** concerns broadband infrastructure loans and grants made by the Public Works Board. It includes amending RCW 42.56.270(4) of the Public Records Act to add a cross-reference to RCW 43.155.160 (broadband service expansion grant and loan program), which is heavily amended by Section 1 of the bill. This brings financial and commercial information and records supplied by businesses or individuals during application for loans or grants under this program under the PRA disclosure exemption.

House Bill 1744 concerns collaborative arrangements between institutions of higher education and nonprofit private entities that provide comprehensive cancer care. Section 6 of the bill amends RCW 42.56.10 of the Public Records Act to specify that "Agency" does not include a comprehensive cancer center participating in a collaborative arrangement as defined in Section 2 of the PRA.

House Bill 1833 establishes an electronic option for the submission of household income information required for participation in school meals programs. It includes adding a new section to the Public Records Act to exempt this information from disclosure.

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The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Edward Pesik (edward.pesik@oah.wa.gov).

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.

Layout • Sutherland Design Works
brittsutherland@comcast.net

House Bill 1899 amends RCW 42.56.400 of the Public Records Act to exempt from disclosure certain information provided to the Department of Financial Institutions (DFI) by an out-of-state or federal agency, or a regulatory association comprised of members of financial regulatory agencies. It also adds a new section to chapter 43.320 RCW (Department of financial institutions) to allow the director of the DFI or the director's designee to, for the purpose of regulating financial institutions, enter into agreements governing the sharing, receiving, and use of documents, materials, or other information, consistent with the Public Records Act.

House Bill 1953 amends RCW 42.56.420 of the Public Records Act to add (7)(a)(iii), exempting sensitive voter information on ballot return envelopes, ballot declarations, and signature correction forms from public disclosure. **The effective date was March 24, 2022.**

House Bill 1956 adds a new section to the Public Records Act to exempt from public disclosure sensitive records pertaining to current and formerly incarcerated individuals' dignity (e.g., body scan images and health information) and safety. **The effective date was March 31, 2022.**

Bills Relating to Administrative Procedure

Senate Bill 5729 creates a good cause exception to administrative hearing deadlines for applicants or recipients of certain public assistance benefits. **The effective date is July 1, 2023.**

Bill Relating to Public Meetings

House Bill 1329 makes several amendments to the Open Public Meetings Act (RCW 42.30), some specific to local government bodies and some applicable to all agencies, including:

- requiring an opportunity for public comment at or before every regular meeting at which final action is taken, except in emergency situations, and allowing this requirement to be satisfied by accepting oral testimony or by providing an opportunity for written testimony to be submitted prior to the meeting;
- requiring, upon the request of an individual who will find physical attendance at a meeting difficult, an opportunity for remote oral comment if doing so is feasible and if oral public comment from other members of the public will be accepted;
- allowing a public agency to hold meetings of its governing body remotely or with limited in-person attendance, after a declared emergency and requiring that the public be allowed to listen in, in real time, to such meetings;
- requiring all public agencies, except for certain special purpose districts, cities, and towns to post agendas online for every regular meeting and for special meetings that are held remotely or with limited in-person attendance during an emergency.

House Bill 1744 amends RCW 42.30.020 of the Open Public Meetings Act to specify that "Agency" does not include a comprehensive cancer center participating in a collaborative arrangement. ■

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 email Bill Pardee at Bill.Pardee@bta.wa.gov.

ETHOS

By John Gray

Have you heard about ETHOS? ETHOS stands for “Examining the Historical Organization and Structure of the Bar.” This article is about what ETHOS is and where it could take us. Currently, the WSBA is a “unified bar association.”

Any lawyer who practices law in Washington state must be a member of the Washington State Bar Association. APR 1(b) states:

Except as may be otherwise provided in these rules, a person shall not appear as an attorney or counsel in any of the courts of the State of Washington, or practice law in this state, unless that person has passed an examination for admission, has complied with the other requirements of these rules, and is an active member of the Washington State Bar Association (referred to in these rules as the Bar). A person shall be admitted to the practice of law and become an active member of the Bar only by order of the Supreme Court.

A very useful recent article in NWSidebar written by WSBA staff gives a summary of the issues involved: nwsidebar.wsba.org/2022/02/22/what-you-need-to-know-about-the-latest-wsba-bar-structure-review/. It is worth reading.

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JOIN OUR SECTION!

We encourage you to become an active member of the Administrative Law Section.

Benefits include a subscription to this newsletter and networking opportunities in the field.

[Click here to join!](#)

The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and more.

Feel free to contact the chair of any committee you have an interest in or for more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

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ETHOS

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An essential source is the WSBA Bar Structure Study webpage (<https://wsba.org/about-wsba/who-we-are/board-of-governors/bar-structure-study>), which states:

In the wake of *Janus* [*Janus v. American Federation of State, County and Municipal Employees, Council 31*, ___ U.S. ___, 138 S.Ct. 2448, 201 L.Ed.2d (2018)] and associated lawsuits, in late 2018 the Washington Supreme Court convened the Washington Supreme Court Work Group on Bar Structure, which evaluated federal law developments, as well as the WSBA's historical and existing structure and practices.

The Work Group on Bar Structure reported its work to the Supreme Court in September 2019. Then, the Supreme Court issued an order on Sept. 25, 2019, regarding the structure of the WSBA, voting 5-4 to retain an integrated bar structure. Think how close that vote was. The order included decisions on other issues on the WSBA, frequently decided in divided votes.

The Bar Structure web page states:

In light of recent constitutional challenges to integrated bar associations across the country, the Washington Supreme Court has asked the Washington State Bar Association Board of Governors to consider three questions and make a recommendation back:

- Does current federal litigation regarding the constitutionality of integrated bars require the WSBA to make a structure change?
- Even if the WSBA does not have to alter its structure now, what is the contingency plan if the U.S. Supreme Court does issue a ruling that forces a change?
- Litigation aside, what is the ideal structure for the WSBA to accomplish its mission?

The Board of Governors named the study process ETHOS — Examining the Historical Organization and Structure of the Bar. The process comprises eight full-day meetings between January and August 2022 — open to the public via Zoom and in person at the WSBA offices — to gather information and build a common understanding of the issue, to explore other bar structures, and to form a recommendation. Throughout each phase, the board has committed to gathering wide stakeholder feedback.

ETHOS meetings were held on Feb. 5 and March 5, 2022. I attended the March 5 meeting. It was a long day, starting at 9 a.m. and ending about half an hour short of the 4 p.m. ending time. The purpose of the March 5 meeting was to explain how the WSBA is currently structured and how it works now. After all, if one proposes to change how the Bbar is structured, it is essential to know how it is

structured before changes are made. Various department heads at the WSBA spoke on how the WSBA is funded, understanding the WSBA's regulatory functions, a history of and activities of the WSBA sections, the relationship between the WSBA and the sections, understanding the Supreme Court boards administered by the WSBA, what is the *Keller* deduction and how is it germane, an opportunity for comments from membership and the public, questions and comments from the Board of Governors, and a review of future agenda items.

“Regulatory functions” include admissions to practice, MCLE, licensing functions, membership records, and the disciplinary functions.

Again, the point of the March 5 ETHOS meeting was to inform those people listening about how the WSBA is currently run. In the process, there were some interesting facts related to the Administrative Law Section. For example, the Administrative Law Section was one of the first sections created, one of four in 1973. Also, there are 29 sections, but only nine sections engage in legislative activity (the Administrative Law Section is one of them, through its legislative committee).

There was a discussion of the *Janus* case and whether it has overturned the *Keller* case, the name of which relates to the *Keller* deduction from WSBA bar dues. The WSBA website explains the *Keller* deduction this way:

Under *Keller v. State Bar of California*, the WSBA cannot use the compulsory membership and licensing fees of objecting WSBA members for political or ideological activities that are not reasonably related to the regulation of the legal profession or improving the quality of legal services. These activities are considered “nonchargeable.”

The WSBA may use compulsory membership fees for all other activities. WSBA members may deduct a specified amount from their license fee payment that represents each member's prorata portion of fees devoted to nonchargeable activities. The method used to calculate the fee reduction is based on the method approved by the U.S. Supreme Court in *Chicago Teachers Union v. Hudson*. In that case, the Court indicated that it was appropriate to use the year for which the most recent audit report is available as the base line period for determining chargeable and nonchargeable activities and for calculating the cost of the nonchargeable activities. To calculate the 2022 fee reduction, the WSBA used its fiscal year 2021 budget and activities.

Based on the decision of the Impartial Decision maker in *Popejoy v. New Mexico Board of Bar Commissioners*, the Board of Governors of the WSBA has concluded that the largest portion of the activities in the WSBA budget

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ETHOS

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that are “political or ideological” are a portion of those activities funded as legislative activities. To calculate the 2022 fee reduction for the nonchargeable portion of legislative activities, the WSBA used its fiscal year 2021 legislative budget. (For more on the Keller deduction, visit www.wsba.org/docs/default-source/licensing/keller-deduction-overview.pdf?sfvrsn=9f3538f1_20.)

The question *Janus* and *Keller* relate to is whether to keep a unified bar association or to bifurcate the WSBA into two separate organizations, one of which handles the regulatory and disciplinary functions and the other one for the voluntary activities (such as this section).

At the meeting, the Board encouraged all sections to come to the ETHOS meetings and to share their views on the sections and their relationship with the WSBA.

The next scheduled ETHOS meeting was set for March 25. However, the bar cancelled that meeting, saying:

A couple of bar associations recently decided that they did not feel comfortable having public dialogue on these issues. Considering that, and in light of the U.S. Supreme Court potentially making a decision on whether to take up cert. on the four pending cases on April 1, leadership has decided to cancel the meeting this Friday and regroup after April 1. We apologize for the last-minute change and any confusion or inconvenience this may have caused. The WSBA Board of Governors is very interested in hearing from you all on the topic of WSBA's structure and we encourage you to attend the meeting scheduled for April 23, which plans to be dedicated for stakeholder feedback and input.

The last meeting was held on Saturday, April 23, from 9 a.m. to 4 p.m., at the WSBA offices in Seattle. There was an in-person component as well as an opportunity to attend via Zoom. There are two other meetings on the Bar calendar set for Saturday, May 21, from 9 a.m. to 5 p.m. (not a typo)

and Saturday, June 18, 2022, from 9 a.m. to 4 p.m. The May meeting will be held at 333 W. Spokane Falls Blvd. (the Davenport Hotel) in Spokane. The June meeting will be held again at the WSBA offices in Seattle.

Not directly related to ETHOS, but a WSBA effort to stay in touch with its members, is the Membership Engagement Council. Its web page is www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/member-engagement-council. The description states:

The Council's purpose is to educate members in a proactive manner about the WSBA's and Board of Governor's actions and work, to seek input and involve members in decision-making process, build relationships between members and WSBA governance and ensure ongoing updates to members on WSBA processes and measurement. In carrying out these goals, the Council shall seek to create mutual understanding between the Board and members, drive Board priorities, form relationships with WSBA sections, and specialty, minority and regional bars and share opportunities across regions of the state to members living outside the geographical area of the state.

That web page will provide links and more useful information. I attended the Council's March 3 meeting and received a warm welcome. They want to hear from more WSBA members, so if you are so inclined, it would be a good use of your time. The next meetings are on Thursday, May 5, from 1 to 3 p.m., and Thursday, June 2, from 1 to 3 p.m. Meetings are via Zoom or there is a toll-free call-in number provided.

Most articles have a conclusion. There is no conclusion yet, though. This is an ongoing issue; it is in progress. The WSBA website has useful information on these issues, including links to related sources, such as the case law. The outcome could change the Bar Association as we know it. Let the WSBA know what you think. ■

VOLUNTEER OPPORTUNITY

Pro Bono Representatives in Administrative Adjudications Conducted by OAH

The Office of Administrative Hearings (OAH) has developed a small network of pro bono attorneys and legal services organizations to represent parties with disabilities. See WAC 10-24-010.

The number of available suitable representatives has decreased in part due to the impact of COVID-19 on law practices and home life or the lack of liability insurance coverage for pro bono work. The income of the party with a disability is usually a disability benefit from social security or public assistance. The hearings are rarely more than two hours in length. OAH expects that your method of communication with the party would be by telephone or email. Most of the parties have appealed action by the Department of Social and Health Services for public assistance, food assistance, and child support, by the Health Care Authority for Medicaid, and by the Employment Security Department for unemployment insurance.

Please consider helping parties with disabilities participate meaningfully in telephonic administrative hearings by volunteering to be a suitable representative.

Contact Johnette Sullivan, Deputy Chief ALJ - ADA Coordinator, at Johnette.Sullivan@oah.wa.gov.

Case Law Update

Port of Tacoma v. Sacks, 19 Wn. App. 2d 295, 495 P.3d 866 (2021)

By William Pardee

THE NORTHWEST SEAPORT ALLIANCE (NWSA) decided to purchase new marine cranes to use at the Port of Tacoma (Port) from a manufacturer located in China. The Port is responsible for the maintenance of cranes operated on its premises and employs crane maintenance mechanics for that purpose. In 2017, the Port invited interested mechanics to volunteer to be part of the quality inspection team observing the manufacturing process in China. The Port intended that the mechanics observe the manufacture of components that they would later repair. The Port arranged two trips to China to observe manufacturing, and one trip to Houston to attend training. The trips to China were scheduled in coordination with the manufacturer and Port's consultants. The Port made all of the arrangements for the trips, including air transportation.

On March 25, 2017, two individuals left on the first of two trips to China. The Port instructed them to arrive at the airport three hours before their scheduled flight. During the flight, both individuals spent some of their time reviewing materials regarding the inspection in which they were going to participate, although the Port did not require them to do so. The rest of the time they spent on activities unrelated to work. Both individuals returned to SeaTac on April 2, 2017.

In May 2017, another individual flew to and from Houston to attend training regarding the drive systems to be employed by the new cranes. The individual was compensated for his training time but not his flight time.

On June 16, 2017, four individuals left SeaTac for the second and final trip to China. The group returned to SeaTac on June 24.

The Port did not have policy for the type of travel above, so it negotiated with the workers' union to reach an agreement with the union for wages. They agreed that the hourly employees would be paid a maximum of eight hours a day, straight time, for travel to and from China and within China. The Port paid the individual employees for their travel time consistent with the labor agreement and with the Port's understanding of applicable federal law. Because of this, the Port did not pay the employees for all of their time spent traveling.

The individual employees each filed wage claims with the Department of Labor and Industries (Department), seeking compensation for the time they spent traveling for

the Port. That travel time included all travel to and from the airport, all time spent at the airport, and all time spent in flight. The Department's investigator first looked to the Department's definition of "hours worked" based on WAC 296-126-002(8): "all hours worked during which the employee is authorized or required, known or reasonably believed by the employer to be on duty on the employer's premises at a prescribed workplace." She then reviewed the Department's policy, ES.C.2, on "hours worked." Section 1 of the policy states: "The department's interpretation of 'hours worked' means all work requested, suffered, permitted or allowed and includes travel time, training and meeting time, wait time, on-call time, preparatory and concluding time, and may include meal periods." Section 2 of the policy relates to circumstances where an employee drives a company-provided vehicle, and the introduction to that section states in part:

This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in [*Stevens v. Brink's Home Security*, 162 Wn.2d 42, 169 P.3d 473 (2007)] regarding whether time spent driving a company-provided vehicle between home and first or last job site of the day constitutes compensable "hours worked."

The Department investigator concluded that the above policy did not address the travel at issue with the Port employees' wage claims. At the direction of her supervisor, she then reviewed the Department's Desk Aid, which provides that all travel time related to work is compensable. The Desk Aid reads in part:

The federal Portal to Portal Act limits compensability of out-of-town travel to travel that takes place during the employee's normal work hours. The federal law also dictates that the trip to the airport or train station is considered a normal commute and is not compensable. In Washington, all travel time related to work is compensable regardless of the hours when it takes place and includes the time to get to the airport or train station.

If a person is required to travel to a training seminar in another city, the time from when the employee leaves their home until they arrive at their hotel in the other city is compensable. Likewise, the time from when the employee leaves the hotel (or training facility) the remote city, until they arrive back at their home is also compensable.

The Desk Aid is not available to the public and Department investigators are not required to apply its provisions.

Case Law Update: Port of Tacoma v. Sacks

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Ultimately, the Department investigator recommended issuing a citation to the Port for wages owed, and the recommendation was adopted. In October 2017, the Department issued the citation and notice of assessment. A month later, the Port filed an appeal with the Office of Administrative Hearings (OAH). Both the Department and the Port filed motions for summary judgment. The OAH granted the Port's motion for summary judgment, denied the Department's motion, and issued an order reversing the Department's citation and notice of assessment. Shortly thereafter, the Department filed a petition for review with the Director of the Department. The Director reversed the OAH's decision. The Director noted and considered the Department's policy ES.C.2 and the Desk Aid as evidence of its "longstanding interpretation" of the "hours worked" provision. He noted that federal law also distinguishes between regular work travel and "travel for an out-of-town assignment." He concluded that the Department's interpretation was entitled to deference and did not conflict with Washington case law, specifically, *Stevens*, 162 Wn.2d 42, and the case it relies on, *Anderson v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 452 (2003). Specifically, he concluded that *Stevens* and *Anderson* were inapplicable because "[n]either case addresses the compensability of travel time for out-of-town work assignments. The Director further concluded in part:

Under WAC 296-126-002(8), "hours worked" includes travel time for out-of-town work assignments. As in federal law, travel for an out-of-town work assignment is not the same as ordinary home-to-work travel ... Because the travel itself is a duty of the work assignment, so long as the employer approves the means of travel, the employee is on duty at a prescribed workplace throughout the travel time.

The Port petitioned for judicial review of the Director's order with the superior court. The Port argued that the Director erroneously interpreted and applied the law. Specifically, the Port argued that the Director erred in giving substantial weight to the Desk Aid in determining that *Anderson* and *Stevens* were inapplicable, and in determining that the travel time met the definition of "hours worked." Both parties again filed motions for summary judgment. The superior court granted the Port's

motion and denied the Department's. The Department appealed.

Under the Minimum Wage Act (MWA), Ch. 49.46 RCW, unless exempt, employees are entitled to compensation for regular hours worked and for any overtime hours worked. Washington has a long and proud history of being a pioneer in the protection of employee rights. The Industrial Welfare Act (IWA), Ch. 49.12 RCW, and the MWA are remedial statutes protecting employees' rights. Remedial statutes, as well as the regulations promulgated thereunder, must be liberally construed in favor of the work.

Under the "error of law" standard, this court gives a high level of deference to an agency's interpretation of its regulations based on the agency's expertise and insight gained from administering the regulation. Deference to the

We conclude that the travel time for out-of-town travel is "hours worked" under the regulation...

Department's interpretation of its own properly promulgated regulations is appropriate absent a compelling indication that the agency's regulatory interpretation conflicts with the legislative intent or is in excess of the agency's authority.

Generally, to be entitled to deference the agency must show it adopted its interpretation as a matter of agency policy. While the construction does not have to be memorialized as a formal rule, the agency cannot merely bootstrap a legal argument into the place of agency interpretation, but must prove an established practice of enforcement.

We conclude that the travel time for out-of-town travel is "hours worked" under the regulation for three reasons. First, *Anderson* and *Stevens* are distinguishable. Second, the Department's interpretation of its own regulation is entitled to deference. Third, the Department's interpretation is consistent with plain meaning of the regulation and the mandate that we liberally construe in favor of the worker.

In *Anderson* the court addressed a claim by Department of Social and Health Services employees, who sought compensation for the time they spent riding the employer ferry to and from the Special Commitment Center on McNeil Island. The ferry was the only way to reach the island. The court determined that the claims failed because the employees were not "on duty" during the ferry rides. This court did not define "on duty," but found it significant that during the ferry ride the workers engaged in various personal activities, such as reading, conversing, knitting, playing cards, playing hand-held video games, listening to

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Case Law Update: Port of Tacoma v. Sacks

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CD players and radios, and napping. This court concluded that this daily commute was not “hours worked.”

Relying on this court’s analysis of “on duty” in *Anderson*, the Supreme Court later addressed the definition of “hours worked” under WAC 296-126-002(8) in *Stevens*. In that case, Brink’s employees sued their employer seeking wages for the time spent driving their employer-provided trucks from home to their first work site and from their last work site to home. The employees already received compensation for the time spent driving between work sites. In agreeing with the workers, the court identified factors that weighed in favor of classifying the time spent driving to the first call and driving home from the last call as time spent “on duty.” First, the drivers took the trucks home with them every day and infrequently went to a Brink’s office. Second, the workers received their assignments from home and were always on call while driving. Third, Brink’s had detailed policies limiting how employees used the trucks, which included prohibitions on running personal errands in the trucks. The court in *Stevens* then determined that the trucks could be classified as the “employer’s premises” or “prescribed workplace.” The court reasoned that driving the trucks was an integral part of the employer’s business. Workers also had to carry all necessary tools and equipment in the trucks, had to do their paperwork in the truck or at the customer’s home, and formal policies required the workers to keep the trucks clean and serviced. The court in *Stevens* therefore concluded that the Brink’s vehicles were essentially mobile offices for the employees.

Anderson and *Stevens* interpret the meaning of “hours worked” within the context of a daily commute. In contrast, this case deals with out-of-town travel. Both *Stevens* and *Anderson* are inapplicable here. We concluded that neither case controls the analysis of “hours worked” as that term relates to out-of-town travel.

The Port argues that the Department’s interpretation is not entitled to deference because it comes in the form of an unpublished Desk Aid. We disagree. The Port appears to argue that in *Carranza v. Dovex Fruit*, 190 Wn.2d 612 (2018), the Supreme Court determined that courts should not give deference to an agency’s interpretation that comes in the form of unpublished policies. Therefore, it argues, we should not defer to the Department’s interpretation enumerated in its unpublished Desk Aid. Leaving aside that *Carranza* is distinguishable from the present case based upon the facts, nothing in *Carranza* indicates the Supreme Court’s intention to no longer defer to an agency’s

interpretation of its own regulation. In fact, recently the Supreme Court again stated that it “accords substantial weight to an agency’s interpretation within its area of expertise and upholds that interpretation if it reflects a plausible construction of the regulation, and is not contrary to legislative intent.” *State v Numrich*, 197 Wn.2d 1, 18-19 (2021). We therefore accord deference to the Department’s interpretation if it reflects a plausible construction and is not contrary to legislative intent.

Department’s policy ES.C.2 defines “hours worked” as “all work requested, suffered, permitted, or allowed and includes travel time, training and meeting time, wait time, on call time, preparatory and concluding time, and may include meal periods.” More importantly, Section 2 of the policy recognizes the limited application of the *Stevens* opinion, stating: “This policy is not intended to address or cover all employee travel time issues. Instead, it is limited to the particular issues raised in the [*Stevens*’s] case...” This indicates, independently of the unpublished Desk Aid, that it has been the Department’s policy to treat the commute travel time at issue in *Stevens* differently than other types of travel time. This is not a case of bootstrapping a legal argument into the place of agency interpretation.

The Department argues that the MWA requires an employer to compensate travel on out-of-town assignments, because unlike a commute, the travel itself is a duty of the work assignment performed at an employer-approved location. At issue is whether the Port employees were both on duty and at a prescribed workplace, as required by WAC 296-126-002(8). In determining the ordinary meaning of an undefined statutory term, we may look to the dictionary definition. “On duty” is defined as “assigned to a task or duty [or] engaged in or responsible for some specific performance.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 705 (3rd ed. 1961). The travel is at the behest and for the benefit of the employer and is a necessary part of the assigned task. The time spent traveling is the time that employees would otherwise have been engaged in their own non-work activities. Here, the Port’s employees were, in fact, on duty. They engaged in an assigned task—the travel—at the behest of their employer, in order to effectuate their assigned duty to inspect the crane manufacturing process. “Prescribed” is defined as “dictate[d] or direct[ed].” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1792 (3rd ed. 1961). The instrumentality of travel is the place dictated by the employer where the assigned task or duty occurs. Here the Port approved the means of travel

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and purchased the plane tickets, thereby dictating, i.e., prescribing, the workplace.

The Department's interpretation of out-of-town travel as "on duty at a prescribed workplace," is consistent with the plain meaning of the regulation.

The Department also argues that the interpretation advocated by the Port is contrary to Washington policy to protect employees. We agree. Here, the Department's interpretation is not only consistent with the plain meaning of the regulation, but it is also consistent with the directive that this court liberally construe a regulation promulgated under remedial statutes, the IWA and MWA, in favor of the beneficiaries of those acts. The interpretation is thus in line with Washington's "long and proud history of being a pioneer in the protection of employee rights." The interpretation proffered by the Port is, in fact, contrary to a liberal interpretation because absent the union agreement, and under the Port's reading of the regulation, their employees would not be compensated for any of the time spent traveling.

We conclude that the Director's order did not erroneously interpret or apply the law and was not arbitrary or capricious. Therefore, we reverse the superior court's grant of summary judgment to the Port. Accordingly, we reinstate the Director's order, and remand for further proceedings. On remand, the Port is permitted to contest the factual basis and validity of the wage calculation.

Northwest Pulp & Paper Assoc. v. Dep't of Ecology, 20 Wn. App. 2d 533, 500 P.3d 231 (2021)

By William Pardee

IN JULY 2018, the Department of Ecology (Ecology) added a new section, Chapter 6, Section 4.5 (Section 4.5), to its Water Quality Program Permit Writer's Manual (Manual) to specifically address the release of polychlorinated biphenyls (PCBs) into Washington's surface waters. To identify and measure the presence of PCBs in surface waters, Section 4.5 allows the use of testing Methods 1668C and 8082A, which are particularly sensitive, in addition to Method 608.3, the method expressly authorized in federal regulation.

Northwest Pulp & Paper Association, Association of Washington Business, and Washington Farm Bureau

(hereinafter collectively referred to as Northwest Pulp & Paper) petitioned for judicial review and declaratory judgment under the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, asking the superior court to invalidate Section 4.5. Northwest Pulp & Paper argued Section 4.5 is an invalid rule under the APA because Ecology failed to comply with the procedural requirements for rule-making, Ecology exceeded its authority, and the section is arbitrary and capricious. The superior court dismissed the petition and denied the request for declaratory judgment, concluding that Section 4.5 is not a rule under the APA.

We hold Section 4.5 is guidance for agency staff, not a rule subject to the APA's rule-making requirements. We affirm.

Banned since the 1970's, PCBs are manufactured toxic chemicals that persist in the environment and are capable of bioaccumulation and biomagnification. Some PCBs are likely carcinogens that are harmful to humans. Under the federal Clean Water Act, it is unlawful to discharge any pollutant into the water unless the discharger has applied for and received a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). In Washington, responsibility for controlling state water pollution and administering the NPDES permit program is delegated to Ecology. 33 U.S.C. § 1342(b); RCW 90.48.260(1).

Ecology has established state water quality standards to protect surface waters in Washington. See chapter 173-201A WAC. Ecology has promulgated a specific rule that added numeric criteria to protect human health. One numeric criterion for protecting human health currently provides that the total PCBs in a body of surface water should be limited to 0.00017 µg/L (micrograms per liter). WAC 173-201A-240(5) tbl.240.

Currently, the only test method for measuring PCBs that is approved under 40 C.F.R. part 136, the EPA's guidelines establishing test procedures for the analysis of pollutants, is Method 608.3. The description of Method 608.3 in appendix A of party 136 explains that "EPA has promulgated this method for use in wastewater compliance monitoring under the [NPDES]" permitting system. But as Ecology explains in its Permit Writer's Manual, surface water quality standards to protect aquatic life and human health are set at levels lower than Method 608.3 is able to detect and quantify. Method 608.3 is able to reliably detect a concentration of 0.065 micrograms of PCBs per liter of water. This means water could contain approximately 382 times more PCBs than the state numeric criterion necessary to

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protect human health of 0.00017 µg/L, yet the PCBs would not be detectable using Method 608.3. Two testing methods exist for measuring PCBs that are more sensitive. Methods 8082A and 1668 C “provide lower analytical limits” than Method 608.3, and may be used for purposes other than determining compliance.

PCBs consist of 209 individual compounds known as congeners. Mixtures of these compounds were commercially produced, and the mixtures are known by their trade names, most commonly Aroclor. Method 608.3, the part 136-approved method for analyzing PCBs, measures the total concentration of Aroclors in water. In contrast, Method 1668C is a very sensitive analytical method that has the capability of detecting 209 PCB congeners. Ecology has the flexibility to require the use of EPA Method 1668C for monitoring of PCB congeners.

To reiterate, in 2018 Ecology issued a revised version of its Manual. The Manual’s Note to Readers describes it as a working document for people at Ecology who write wastewater discharge permits. And The Manual’s introduction similarly classifies it as a technical guidance and policy manual for permit writers that aims to enhance the quality and consistency of the wastewater discharge permits issued by Ecology and to improve the efficiency of the permitting process. The introduction of the Manual clarifies that the Manual is not a regulation and should not be cited as regulatory authority for any permit condition. Rather, the Manual “describes laws and regulation pertaining to permitting,” which must be followed to issue a legal permit. The Manual emphasizes that consistent with federal regulation that only test methods approved under 40 C.F.R. part 136 can be used for permit applications and permit compliance monitoring. Because Method 608 (now 608.3) is the only method for analyzing PCBs that is approved under part 136, Section 4.5 repeatedly states that it must be used for permit applications and monitoring compliance with numeric effluent limits for PCBs.

The Manual clearly states that Methods 8082A and 1668C cannot be used to evaluate compliance with numeric effluent limits for PCBs. However, the Manual presents Methods 8082A and 1668C, along with Method 608.3, as

“the three methods that are used for permitting purposes.” Because water quality standards for PCBs are lower than Method 608.3 can evaluate, and Methods 8082A and 1668C provide lower analytical limits, Ecology advises that Methods 8082A and 1668C may be used for purposes other than evaluating compliance. With Method 1668C specifically, Ecology explains that it is not proposing to seek EPA approval of this method under 40 C.F.R. part 136.5. But Ecology recognizes that targeted monitoring under Method 1668 may be useful for identifying PCB sources or evaluating the effectiveness of a best management practice, two activities that are separate from compliance monitoring. A quality assurance project plan is required when using Method 1668C for any purpose, and is recommended when

using Method 8082A. Section 4.5.4 of the Manual provides additional guidance that permit writers should consider when requiring monitoring using either Method 8082A or 1668C. Some monitoring may be done to assist with decision making, while other monitoring may serve to estimate the scope of a problem. Additionally, while Method 1668C is the most sensitive method, it is also the most expensive. Section 4.5.5. of the Manual further advises permit writers on how to select the

...in 2018 Ecology issued a revised version of its Manual. The Manual’s Note to Readers describes it as a working document for people at Ecology who write wastewater discharge permits.

appropriate analytical test method and instructs permit writers to only include monitoring requirements when necessary for the facility and its specific discharge situation. While PCB monitoring may be appropriate for some dischargers based on individual facility characteristics, permit writers should consider the value and purpose of requiring PCB monitoring when developing discharge permits.

Therefore, Section 4.5 of the Manual requires that only Method 608.3 be used to ultimately determine compliance with PCB effluent limits, but the more sensitive test Methods, 8082A and 1668C, can be used for other purposes in the course of the permitting process.

As a preliminary matter, we must determine whether the challenged action in this case falls within the APA’s definition of a “rule.” To determine whether any agency action constitutes a rule under the APA, we look to the Act’s statutory definition. The label the agency assigns to the action is not determinative. Under the APA, there are

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two elements of a rule. For an agency to qualify as a rule it must be “an agency order, directive, or regulation of general applicability, and it must fall into one of five enumerated categories.” RCW 34.05.010(16). An agency action is not a rule if it consists of “statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public.” RCW 34.05.010(16)(i).

An agency action is a directive of general applicability if it is applied uniformly to all members of a class. How the agency applies the challenged standard, not the outcome of the application, is determinative. This court had held that an agency action is not a directive of general applicability where the challenged action is a document “written to guide agency staff” that “does not require strict adherence.” *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wash. App. 22, 31-32 (2015). In *Sudar*, petitioners challenged a policy document that the Department of Fish and Wildlife Commission developed to guide the Department of Fish and Wildlife in its management of state resources, including its adoption of fishery rules. But the policy document had no legally enforceable regulatory effect on fishers. Its objectives were unenforceable until and unless the Department promulgated rules implementing them, and a fisher could not be penalized for violating the policy document. Department staff were not bound by the policy document either.

In sum, not every agency action carries the force of a rule. Where the action provides guidance for agency staff that (1) allows staff to exercise discretion, (2) provides for a case-by-case analysis of variable rather than uniform application of a standard, and (3) is not binding on the regulated community, the action does not constitute a directive of general applicability.

When Section 4.5 of the Manual addressed which testing methods should be used for various purposes, it only employs mandatory language to specify when regulations require use of Method 608.3. The section is clear that Method 608.3 must be used in permit applications and to monitor compliance with numeric effluent limits because these requirements are established in federal regulations. For all other purposes, Section 4.5 allows for flexibility and discretion in determining which testing methods will be required in an individual permit or permitting process. Permit writers are expected to exercise a considerable amount of discretionary authority and good judgment. The plain language of Section 4.5 does not mandate use of Methods 8082A or 1668C. Instead, the

decision is within the permit writer's discretion. Section 4.5 does not require permit writers to uniformly impose PCB testing requirements on all entities discharging any amount of PCBs into any body of water. The Manual expressly states that PCB monitoring may not be necessary, and it instructs permit writers to only include monitoring requirements when necessary for the facility and its specific discharge situation. The decision of whether to require any additional testing for PCBs will depend on multiple site-specific variables. Permit writers should consider the discharging facility's size, the possibility of preexisting pollution in the water, the type of pollutants involved, and what benefit additional monitoring before requiring PCB characterization in permits.

Here, individual outcomes differ because permit writers are considering and imposing different obligations within each permit—under the Manual's guidance—after reviewing site-specific conditions. There is no uniform directive in the Manual that requires permit writers to impose testing Method 1668C or 8082A. The Manual instructs permit writers to use all valid and applicable data, including data collected using methods not approved under 40 C.F.R. part 136 (e.g. Methods 1668C and 8082A) to evaluate whether a discharger's effluent has the reasonable potential to violate a water quality standard and to calculate appropriate numeric effluent limits for permits. Northwest Pulp & Paper argues this language directs and requires permit writers to use unapproved test methods for these purposes. But the Manual does not state that permit writers must mandate data collection using Methods 1668C and 8082A where such data does not already exist. And a state policy goal is to prevent all discharges that cause or contribute to a violation of water quality standards. RCW 90.48.520; WAC 173-201A-510(1). Requiring permit writers to use all valid and applicable data to evaluate the reasonable potential of a discharge to violate water quality standards is one way to achieve this stated goal. If Ecology cannot use data collected using more sensitive test methods, then Ecology cannot know when a permittee is discharging PCBs at a concentration lower than 0.065 µg/L yet higher than the water quality criterion of 0.00017 µg/L. The development of numeric effluent limits for each permit is Ecology's responsibility under the law, and the Supreme Court has affirmed that “Ecology may use any data gathered in the past for its decision making on permits.” *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 400 (1997).

The Manual is intended to guide use of the more sensitive testing methods in permitting. Importantly,

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Section 4.5 has no legally enforceable regulatory effect on PCB dischargers, and dischargers cannot be penalized for violating the manual. Only a violation of a specific NPDES permit condition will subject a discharger to an enforcement action. Like the policy at issue in *Sudar*, Section 4.5 is written to guide agency staff, and it does not require strict adherence with its guidance. Although the Manual's preliminary note requires permit writers to use its listed procedures, the note also contemplates that permit writers may deviate from those procedures. If a permit writer believes a permitting situation requires a different process than in the manual, then they are instructed to discuss the alternative process with their supervisor. This is reiterated in the Manual's introductory section, which explains that the Manual is not regulation but it describes law and regulation pertaining to permitting.

In sum, Section 4.5 is not a directive of general applicability. Its purpose is to guide agency staff in their exercise of discretion as they implement the NPDES permit program and develop site-specific discharge permits. It is not binding on either the regulated community or agency staff.

Because Northwest Pulp & Paper fails to show that Section 4.5 satisfies the first element of the APA's definition of a "rule," we decline to consider whether Section 4.5 falls into one of RCW 34.05.010(16)'s enumerated categories and satisfies the second element. We hold Ecology did not adopt a rule when it added Section 4.5 to the Manual.

Although Section 4.5 is not subject to judicial review as a rule, we note that procedural avenues are available for dischargers to challenge an Ecology decision to impose specific requirements to test for PCBs using Method 1668C or 8082A. Dischargers may challenge the issuance, modification, or termination of their permit, including any modification of its conditions or terms before the Pollution Control Hearings Board. RCW 43.21.110(1)(c). Dischargers may also challenge the enforcement of any permit condition. RCW 34.05.570(3); RCW 43.21B.110(a)-(b). Additionally, requirements to use more sensitive testing methods outside of the permit's conditions, such as during the permit application process, may constitute other agency action that can be challenged under RCW 34.05.574(4). ■

NOMINATIONS OPEN FOR THE 2022 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 2022 award are due by June 30, 2022.

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