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The Scope of Judicial Review of Agency Actions in Washington Revisited—Doctrine, Analysis, and Proposed Revisions

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THE SCOPE OF JUDICIAL REVIEW OF AGENCY ACTIONS IN WASHINGTON REVISITED—DOCTRINE, ANALYSIS, AND PROPOSED REVISIONS

The most complex problem in administrative law is defining the scope of judicial review for administrative agency actions.[1] The key to this problem is the concept of deference:[2] when, and to what extent, is judicial intervention into agency decisionmaking justified to achieve a proper allocation of expertise between courts and agencies.[3] A proper understanding of this court-agency relationship is especially important because the Washington Supreme Court has interpreted the state constitution to allow broad delegations of legislative power to administrative agencies.[4]

This Comment analyzes current Washington law on the scope of judicial review, and compares it to recently proposed revisions to the Washington Administrative Procedure Act (APA).[5] Part I discusses the doctrine surrounding the review of agency actions by Washington courts. Part II examines Washington case law and identifies several elements that determine the intensity with which the court will examine a particular agency action, regardless of the doctrinally prescribed deference. Part III compares and discusses the proposed revisions to the Washington APA. While based primarily on the latest Model State APA,[6] the proposed revisions

1. Andersen, *Judicial Review of Agency Fact-Finding in Washington: A Brief Comment*, 13 WILLAMETTE L.J. 397, 397 (1977). Legislatures impose minimum procedural requirements on administrative agencies, which implement broad statutory policies, by adopting Administrative Procedures Acts [APAs]. *See* Bonfield & Levinson, *An Introduction to the Model State Administrative Procedure Act (pts. 1 & 2)*, 34 ADMIN. L. REV. 1, 13, at 1 (1982). The scope of review sections of these APAs describe the relationship desired by legislatures for courts and agencies. *See* WASHINGTON STATE BAR ASS'N ADMIN. LAW TASK FORCE, PROPOSED REVISIONS WASHINGTON ADMINISTRATIVE PROCEDURES ACT, 1–3 (introductory comment) (1984) [hereinafter cited as WASH. PROPOSAL].

2. Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 ARIZ. ST. L.J. 537, 538.

3. Abrahams, *Scope of Review of Administrative Action in Washington: A Proposal*, 14 GONZ. L. REV. 75, 78 (1978).

4. Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wn. 2d 155, 161, 500 P.2d 540, 543–44 (1972). A delegation of legislative authority to an administrative agency will be upheld when (1) it can be shown that the legislature has provided standards defining in general terms what is to be done and which administrative agency is to do it and, (2) sufficient procedural safeguards exist to control arbitrary agency action and prevent abuses of discretionary power. *Id.* at 159, 500 P.2d at 542–43. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 210–12 (1978).

5. WASH. PROPOSAL, *supra* note 1.

6. MODEL STATE ADMIN. PROCEDURES ACT (National Conference of Commissioners on Uniform State Laws, 1981) [hereinafter cited as MODEL ACT]. Bonfield & Levinson, *supra* note 1, provide a succinct discussion of the new Model Act and its underlying purposes and assumptions. The previous versions of the Model Act, first promulgated in 1946 and revised in 1961, have had great impact on state APAs. The Uniform Commissioners list 30 states, including Washington, that have adopted APAs

contain some significant variations. The Comment concludes that the proposed revisions are a necessary step forward and should be adopted by the Washington legislature.

I. TRADITIONAL DOCTRINE

A. *Goals of a Judicial Review Statute*

The legislature's primary goal in drafting APA judicial review standards should be clarity. Three factors contribute to the achievement of this goal. First, the review standards should be set forth in clear language. The courts' function in applying standards should be apparent from the statute. Second, the language and the legislative history of an APA[7] must clearly establish the types of questions reviewable by courts and the appropriate review standards for each type of question.[8] Third, the standards should indicate when courts should defer to the views espoused by agencies. From the courts' point of view, specific and detailed standards encourage structured case analysis and give substance to terms such as "arbitrary and capricious."[9]

The secondary goals for APA scope of review sections are uniformity and predictability. These two goals require a system of judicial review that allows an accurate prediction of the situations in which courts will substitute their judgment for that of agencies.[10] From the standpoint of a legal practitioner, the accuracy of these predictions is crucial in providing dependable legal advice to clients.

B. *Judicial Review of Agency Adjudications*

The traditional basis for determining the standard of review of agency adjudications is the distinction between questions of fact and questions of

based substantially on the previous Model Acts. *See* 14 U.L.A. 171 (Supp. 1985).

The Washington Proposal's structure parallels that of the 1981 Model Act. Part I (General Provisions), contains definitions and states that the APA should be construed to create only procedural rights. Part II (Public Access to Agency Rules), and Part III (Rulemaking Procedures), both reflect the drafters' effort to ensure public participation in rulemaking, to "assure that rulemaking determinations are democratic as well as technocratic." Bonfield & Levinson (pt. 1), *supra* note 1, at 7. Part IV (Adjudicative Proceedings), governs the quasi-judicial determination of legal rights by agencies. Part V (Judicial Review and Civil Enforcement), and particularly § 85, which deals with the scope of judicial review, is the primary focus of this Comment. In the words of the Task Force, this section is "central . . . since it deals with the ultimate relationship between the courts and the adminstrative agencies." WASH. PROPOSAL, *supra* note 1, § 85 comment.

7. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 619 (1965) (choice of standard is up to the legislature, and courts should respect that choice); Andersen, *supra* note 1, at 416 (legislative history should be unambiguous).

8. *See* Abrahams, *supra* note 3, at 77.

9. Brodie & Linde, *supra* note 2, at 560.

10. Franklin County v. Sellers, 97 Wn. 2d 317, 323 n.1, 646 P.2d 113, 116 n.1 (1982); Abrahams, *supra* note 3, at 87.

law.[11] The reviewing court defers to agency findings of fact,[12] while deciding questions of law independently of the agency's position.[13]

In many cases, however, the court will not only determine the meaning of the applicable statute or regulation, but will also review the agency's application of the law to a given set of facts. The court reviews these "mixed questions of law and fact"[14] as questions of law,[15] and thus may

11. Washington doctrine regarding the judicial review of agency adjudications has passed through three generations. The first occurred before the passage of Washington's APA in 1959. A chaotic jumble of statutes and review standards characterized this period. *See* Peck, *Scope of Review in Washington*, 33 WASH. L. REV. 55 (1958) (providing a description of the statutes and standards of review that existed during this period).

In the second generation, spanning the period from 1959 to 1982, courts began reviewing agency actions under the standards in the state APA. The APA's scope of review section is codified at WASH. REV. CODE § 34.04.130(6) (1983). It provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional provisions; or
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> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
>
> (f) arbitrary or capricious.

For contemporaneous academic comment on the APA, see Peck & Trautman, *Comment on Washington Legislation—1959, Administrative Law*, 34 WASH. L. REV. 281 (1959); Schwartz, *The Model State Administrative Procedures Act*, 33 WASH. L. REV. 1 (1958). As enacted, Washington's APA was substantially similar to the 1946 and 1961 versions of the Model State APAs. Professor Davis critiques the 1961 Model Act in 1 K. DAVIS, *supra* note 4, at 37–51.

The third and present generation of doctrinal analysis began with Franklin County v. Sellers, 97 Wn. 2d 317, 646 P.2d 113 (1982). It is characterized by the Washington Supreme Court's clarification of which of the statutory standards will apply to the various questions encountered in the judicial review of agency actions.

12. A finding of fact is defined as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." L. JAFFE, *supra* note 7, at 548. The agency is seen as the primary actor in the process of finding facts, and in laying the factual basis for the application of a predetermined standard of law. *See id.* at 551. In reviewing agency findings of fact, the court makes a legal determination whether there is enough evidence to support the findings made by the agency. This is a deferential standard. *See id.* at 552–53. The traditional way of expressing this deference to agency factfinding is that courts are prohibited from substituting their judgment for that of the agency in factual matters. *See, e.g.*, Ancheta v. Daly, 77 Wn. 2d 255, 260, 461 P.2d 531, 534 (1969).

13. When reviewing the conclusions of law made by an agency, the court is free to substitute its interpretation of the law for that of the agency because interpreting the law is the court's area of expertise. Indeed, the reviewing court has a duty to declare the meaning of the statute or regulation under consideration. L. JAFFE, *supra* note 7, at 575.

14. NLRB v. Marcus Trucking Corp., 286 F.2d 583, 590–91 (2d Cir. 1961), *cited with approval* in Leschi Improvement Council v. State Highway Comm'n, 84 Wn. 2d 271, 283, 525 P.2d 774, 783 (1974). Mixed questions of law and fact are defined as "cases where there is a dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term." *Marcus Trucking Corp.*, 286 F.2d at 590–91.

15. L. JAFFE, *supra* note 7, at 554. Overton v. Economic Assistance Auth., 96 Wn. 2d 552, 555,

substitute its judgment for that of the agency. Yet, some deference to agency applications of law is necessary to ensure that the agency has sufficient flexibility to perform its duties. If the agency's application of law was reasonable, it should be upheld.[16]

The Washington Supreme Court in *Franklin County v. Sellers*,[17] provided a recent statement of this doctrinal framework. In *Sellers*, the court acknowledged that its earlier applications of the APA's standards for review had demonstrated a "lack of consistency" and that clarification was needed.[18] The court recognized that legal practitioners face the key problem of trying to predict when the courts will substitute their judgment for that of agencies.[19] In addressing this problem, the court discussed the proper scope of judicial review for questions of fact, questions of law, and mixed questions of law and fact.

The court in *Sellers* carefully defined and limited the range of state court inquiry when reviewing agency factfinding. The reviewing court is to search the entire record for evidence both supporting and weighing against the finding of fact,[20] and is to reject the finding if it is "clearly erroneous." Only findings of fact are reviewed under this standard.[21]

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637 P.2d 652, 654 (1981).

16. Many commentators agree that agency determinations of law should be given some deference. *See, e.g.*, Abrahams, *supra* note 3, at 78 (agency applications of law should be reviewed under the arbitrary and capricious standard as long as the law applied falls within the agency's area of special expertise); Comment, *Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law*, 31 VAND. L. REV. 91, 93 (1978) (arguing that courts should apply a deferential abuse of discretion standard of judicial review to agency determinations of law). *See also* L. JAFFE, *supra* note 7, at 572 (if an agency determination of law is reasonable and does not contravene the "clear purpose" of the statute, the courts should defer to the agency's view).

17. 97 Wn. 2d 317, 646 P.2d 113 (1982).

18. *Id.* at 323 n.1, 646 P.2d at 116 n.1. The court cited Abrahams, *supra* note 3.

19. *Sellers*, 97 Wn. 2d 323 n.1, 646 P.2d at 116 n.1.

20. *Id.* at 324, 646 P.2d at 116. The court cited Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950), and WASH. REV. CODE § 34.04.130(6)(e) (1983) (clearly erroneous test to be applied "in view of the entire record"), as requiring this search. Compare with this Professor Andersen's criticism that the Washington court was previously operating under a "fundamental misconception" that it need only search the record for evidence supporting the agency's finding when applying the substantial evidence test. This standard was replaced with the present clearly erroneous test in 1967. Andersen, *supra* note 1, at 411. It is important that the court continue to examine the whole record, since the Washington Proposal, if adopted, would restore the substantial evidence test. *See* WASH. PROPOSAL, *supra* note 1, § 85(3)(g); *see also infra* note 103.

21. *See* Renton Educ. Ass'n v. Public Employment Relations Comm'n, 101 Wn. 2d 435, 440, 680 P.2d 40, 44 (1984) (*Sellers* holds that factual determinations must be upheld under clearly erroneous test unless court left with definite and firm conviction of mistake).

The *Sellers* court cited with approval the definition of the clearly erroneous test adopted in Ancheta v. Daly, 77 Wn. 2d at 259–60, 461 P.2d at 534 (1969), which allows a court to overturn an agency factfinding when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 97 Wn. 2d at 324, 646 P.2d at 116. This formulation was first announced in United States v. U.S. Gypsum, 333 U.S. 364, 395 (1948).

The court's approach in *Sellers* represents an implicit rejection of the past practice of applying the clearly erroneous test to agency action as a whole.[22] Before *Sellers,* the court overturned agency actions when it was left with the "definite and firm conviction" that the agency had made a mistake.[23] Such review is not the narrow review of agency factfinding authorized by the clearly erroneous test.[24] Application of the test as defined in *Sellers* should result in agency factfinding receiving the proper deference, and clarify for lower courts, agencies, and private litigants the weight such findings will receive on judicial review.

The *Sellers* court adopted a partnership approach for reviewing questions of law.[25] Under the "error of law" standard provided by the Washington APA,[26] the reviewing court is free to exercise its independent judgment in resolving questions of law. But while the court is the final arbiter of the law's meaning, the *Sellers* court recognized that the view of the agency should be given substantial weight.[27]

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22. Abrahams, *supra* note 3, at 85–87, 91–99 and Andersen, *supra* note 1, at 407–12, discuss the deficiencies in the major Washington cases through 1977. The same criticisms can be leveled against the case law between 1977 and the *Sellers* decision in 1982. *See infra* note 23. Professor Abrahams lays some of the blame for the confusion on the present statute, which gives no indication of the types of questions that are to be reviewed under its standards. He views its amendment as the proper cure. *See* Abrahams, *supra* note 3, at 79–80.

23. *See, e.g.,* Overton v. Economic Assistance Auth., 96 Wn. 2d 552, 556, 637 P.2d 652, 655 (1981) (the trial court was correct in overturning an agency decision only if it "was *clearly erroneous, arbitrary and capricious,* or a result of an *error of law*") (emphasis in original); Weyerhaeuser Co. v. Southwest Air Pollution Auth., 91 Wn. 2d 77, 84, 586 P.2d 1163, 1167 (1978) (holding the Pollution Authority's application of certain standards to one of Weyerhaeuser's mills was not "clearly erroneous").

24. The court at one point recognized the limited applicability of the clearly erroneous test. In Leschi Improvement Council v. State Highway Comm'n, 84 Wn. 2d 271, 282 (1974), the court stated that "[t]he clearly erroneous test is, of course, not applicable to the review of questions of law." (Note: Pacific Reporter 525 P.2d 774, 783 (1974) contains different language). Unfortunately, the court did not follow this declaration in later cases.

Professor Andersen's concept of "intensity" is a useful description of how courts review agency factfinding. Andersen, *supra* note 1, at 400. A more "intensive" standard of review allows a court more freedom to substitute its judgment for that of the agency (e.g., the clearly erroneous test). Conversely, a less "intensive" standard diminishes this freedom, increasing the deference given to agency factfinding (e.g., the substantial evidence test). *Contra* 2 F. COOPER, STATE ADMINISTRATIVE LAW 726–28 (1965) (arguing that while the tests are logically distinct, they are indistinguishable in application). The legislature is free to prescribe any point along the "intensity" scale when it drafts the standard for judicial review of agency factfinding. However, the legislative history and the language of the statute itself should clearly indicate what level of intensity is desired. Andersen, *supra* note 1, at 416. Additionally, both the clearly erroneous and substantial evidence tests are "middle-ground" standards; neither of them authorizes a court to disregard an agency's finding of fact. *Id.* at 402–03.

25. 97 Wn. 2d at 325, 646 P.2d at 117. *See generally* L. JAFFE, *supra* note 7, at 546; Abrahams, *supra* note 3, at 76, 88–90 (view reached without application of specialized expertise should receive no deference, but agency interpretations and applications of law utilizing expertise should receive deferential review); Comment, *supra* note 16, at 92–93.

26. WASH. REV. CODE § 34.04.130(6)(d) (1983); *see supra* note 11.

27. 97 Wn. 2d at 325–26, 646 P.2d at 117. The court cited with approval Overton v. Economic

Under *Sellers,* the court reviews mixed questions of law and fact as questions of law.[28] The court conducts the review on two levels. The factual component is reviewed under the clearly erroneous standard.[29] The *Sellers* court expressly disapproved the practice of reviewing questions of fact de novo in cases presenting mixed questions of law and fact; courts should not substitute their judgment for the agency's in factual matters.[30] The legal component is reviewed under the error of law standard, and the court is free to substitute its judgment for the agency's.[31] As long as the agency "applied the correct law to facts which were not clearly erroneous,"[32] its decision will be upheld.[33]

C. *Judicial Review of Rules*

Washington courts review rules that have been adopted by agencies exercising their quasi-legislative powers, under several well-defined doctrinal standards. First, because agencies are created by statute, they may only exercise such powers as are expressly granted or necessarily implied

Assistance Auth., 96 Wn. 2d 552, 555, 637 P.2d 652, 654 (1981) (agency's construction of statute should be given substantial weight if in the agency's field of expertise, but court retains final authority to declare meaning of the law).

28. 97 Wn. 2d at 330, 646 P.2d at 119. The court reiterated its previous holding that it could review such questions without regard to the agency's decision. *See* Daily Herald Co. v. Department of Employment Sec., 91 Wn. 2d 559, 562, 588 P.2d 1157, 1159 (1979).

29. 97 Wn. 2d at 330, 646 P.2d at 119.

30. *Id.* at 325, 646 P.2d at 117; *see* Ancheta v. Daly, 77 Wn. 2d at 260, 461 P.2d at 534. *See generally* L. JAFFE, *supra* note 7, at 579–84.

31. *Sellers,* 97 Wn. 2d at 330, 646 P.2d at 119. While the court is free to substitute its judgment for that of the agency, agency views will be given substantial weight. *See supra* note 27 and accompanying text.

32. 97 Wn. 2d at 329, 646 P.2d at 119.

33. In Washington, appellate courts perform the same task as the trial court when reviewing an agency action. The appellate court gives no deference to the lower court's ruling. Instead, the appellate court directly reviews the administrative record, not the record of the trial court. *See* Farm Supply Distrib. v. Washington Utilities & Transp. Comm'n, 83 Wn. 2d 446, 448, 518 P.2d 1237, 1238 (1974). This rule differs from the rule in the federal courts. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

The reason for the difference between the Washington and federal rules is not clear. The federal rule apparently implements a policy of finality; by giving a narrower review to lower court findings, the continued substitution of judgment is discouraged. Andersen, *supra* note 1, at 414. In contrast, the Washington court's primary concern in adopting the present rule was ensuring that agency determinations received the proper deference. *Farm Supply,* 83 Wn. 2d at 448, 518 P.2d at 1238–39. Appellate courts have more experience in reviewing written records, and tend to focus on broader themes than do trial courts. Thus, the appellate courts are presumably more qualified than trial courts to review agency actions. In order to guarantee that appropriate deference is granted, appellate courts will stand in the shoes of the trial court when reviewing agency actions.

Professor Andersen has criticized Washington's rule as being an inefficient allocation of judicial resources, since it encourages "second and third level judicial review." Andersen, *supra* note 1, at 415. While these criticisms are well taken, the rule seems firmly entrenched in Washington law.

from the statutory grant of authority.[34] Thus, while the agency may pass rules that are needed to "fill in the gaps" of a general statutory scheme,[35] it may not promulgate rules that change or amend the implemented statutes.[36] Second, substantive agency rules are given a presumption of validity,[37] and the person challenging a rule must prove that the rule is not reasonably consistent with the purpose of the underlying statute.[38] Finally, if an agency rule has been adopted without following required and lawful procedures, it will be invalidated regardless of its content.[39]

D. Judicial Review of Informal Agency Actions

In Washington, courts may review all administrative actions using the arbitrary and capricious standard.[40] The supreme court has held that the right to be free from arbitrary and capricious administrative action is a fundamental right,[41] and that the courts have inherent constitutional power to review any agency action to ensure that it is not arbitrary or capricious.[42]

34. Anderson, Leech & Morse, Inc. v. Liquor Control Bd., 89 Wn. 2d 688, 694, 575 P.2d 221, 225 (1978).

35. Hama Hama Construction Co. v. Shorelines Hearings Bd., 85 Wn. 2d 441, 448, 536 P.2d 157, 161–62 (1975).

36. Fahn v. Cowlitz County, 93 Wn. 2d 368, 374, 610 P.2d 857, 860 (1980).

37. Weyerhaeuser Co. v. Department of Ecology, 86 Wn. 2d 310, 314, 545 P.2d 5, 8 (1976). *See* Levin & Woodward, *In Defense of Deference: Judicial Review of Administrative Action*, 31 ADMIN. L. REV. 329 (1979). Levin & Woodward list several factors supporting the presumption of validity of agency regulations as well as deference to agency interpretations of law. These factors include the duration of the construction, the agency interpreting the meaning, implicit legislative approval, consistency with judicial interpretation, and the technical complexity of the subject matter. *Id.*

One additional consideration should be whether the agency's interpretation of the law most effectively implements the public policy underlying the statute or regulation. If so, courts should defer. *See* L. JAFFE, *supra* note 7, at 572.

38. *See* Bazan v. Department of Social & Health Serv., 26 Wn. App. 16, 24, 612 P.2d 413, 418 (1980), *appeal dismissed*, 99 Wn. 2d 1011 (1981).

39. 2 F. COOPER, *supra* note 24, at 786. WASH. REV. CODE § 34.04.070 (1983) is a typical declaratory order statute, authorizing courts to rule on the validity of agency rules when they are challenged by persons who will or might be prejudiced by the application of the rules.

40. The arbitrary and capricious standard is most often applied in the review of informal agency actions, i.e., those actions other than rulemaking and adjudicatory decisions. *See, e.g.*, United Parcel Serv. v. Department of Revenue, 102 Wn. 2d 355, 363–65, 687 P.2d 186, 191–93 (1984) (the decision to subject delivery trucks to the state use tax by determining whether they crossed state lines in more than 25% of their trips); Schuh v. Department of Ecology, 100 Wn. 2d 180, 186, 667 P.2d 64, 67–68 (1983) (the decision to deny an original application for a water permit).

Professor Cooper cites the following as examples of informal agency actions that reviewing courts have declared arbitrary or capricious: the denial of licenses to entitled applicants; the refusal to allow a carrier to transport asphalt, even though a certificate allowed the carrier to do so; and the contravention of a direct statutory command to set a quota for retail liquor licenses in a city. 2 F. COOPER, *supra* note 24, at 761–63.

41. Williams v. Seattle School Dist. No. 1, 97 Wn. 2d 215, 221–22, 643 P.2d 426, 430–31 (1982).

42. Pierce County v. Civil Serv. Comm'n, 98 Wn. 2d 690, 693–94, 658 P.2d 648, 650–51. The

Moreover, the courts have jurisdiction to exercise this type of review even in the face of an explicit statutory prohibition of court appeals.[43]

The arbitrary and capricious test is quite deferential to the agency. Agency action is arbitrary and capricious if there is no support in the record for the action.[44] An agency action is not arbitrary and capricious when there is room for two opinions, despite a belief on the part of the reviewing court that the agency reached an erroneous conclusion.[45]

II. DOCTRINE OR NO DOCTRINE—TRENDS IN WASHINGTON CASE LAW ON JUDICIAL REVIEW OF AGENCY ACTION

Despite the well-defined doctrinal framework discussed above, an examination of the case law in Washington shows that courts do not always give agency actions the deference prescribed by the various standards of review. While the courts define their functions in terms of the standards of review,[46] the cases show a varying intensity of review that depends not on the applicable standard of review, but rather on the particular combination of facts, statutes, regulations, and underlying public policies in an individual case. The discussion below identifies the broad factors the courts consider and how the interplay of those factors affects the deference courts give to agency actions.

A. Traditional Judicial Functions

A recurrent theme in the case law is the court's retention of traditional judicial functions. Despite the grant of substantial weight to the agency view under the error of law standard,[47] the court usually asserts its final

court stated that there are three sources of authority for judicial review of agency action: (1) statutes specifically authorizing review; (2) statutory writ of certiorari; and (3) the "inherent constitutional power" of the courts to review agency actions violative of fundamental rights. *Id.*

43. *Williams*, 97 Wn. 2d at 218, 643 P.2d at 429. The court held that a statutory prohibition simply removed the statutory authorization to conduct judicial review; the constitutional right to review still remained.

44. Barrie v. Boundary Review Bd., 97 Wn. 2d 232, 236, 643 P.2d 433, 436 (1982) (applying arbitrary and capricious standard in the exercise of its inherent power); Hayes v. Yount, 87 Wn. 2d 280, 286, 552 P.2d 1038, 1042 (1976) (applying the arbitrary and capricious standard from the state APA).

45. Pierce County v. Civil Serv. Comm'n, 98 Wn. 2d at 695, 658 P.2d at 652 (quoting State v. Rowe, 93 Wn. 2d 277, 284, 609 P.2d 1348, 1351 (1980)); *see* Schuh v. Department of Ecology, 100 Wn. 2d 180, 186, 667 P.2d 64, 68 (1983) (a clear abuse of discretion may be shown by demonstrating that the agency exercised discretion in a manner that was manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons).

46. In discussing the inherently malleable distinction between fact and law, it is commonly stated that "[t]he knife of policy alone effects an artificial cleavage at the point where the court chooses to draw the line between public interest and private right." B. SCHWARTZ, ADMINISTRATIVE LAW 643 (1976) (quoting F. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927)).

47. *See supra* notes 27–30 and accompanying text.

authority to declare what the law is, regardless of the position taken by the agency.[48] Thus, the court has prohibited administrative agencies from adjudging the constitutionality of the statutes they administer.[49] Additionally, the court has ignored the agency view when a question was determined under common law principles.[50]

The most strenuously asserted power is the court's ability to exercise independent judgment in determining the proper meaning or application of a statute. For example, the court has rejected the responsible agency's interpretation of the statutory exceptions to the labor dispute disqualification for unemployment benefits,[51] and has rejected an agency's taxation of certain payments as gross income under the business and occupation tax.[52] This is a proper exercise of judicial expertise, and a necessary restraint on agency discretion.

In addition, the court has reviewed with special intensity claims that an agency's action exceeds its statutory powers. Thus, it held it was beyond the necessarily implied powers of the Department of Social and Health Services (DSHS) to determine parentage for support obligation purposes,[53] although the agency's statutes did empower it to charge parents for the partial cost of foster care for their handicapped child.[54] Likewise, the Human Rights Commission may not award monetary damages for humiliation and mental suffering,[55] but may prohibit preemployment inquiries regarding the height of the applicant because such action furthers the agency's broad remedial purpose.[56]

The court also has conducted intensive review of claims that the agency rules exceed its statutory authority. If the rule directly contradicts the statute it implements, it is invalid.[57] Moreover, if the agency statute is

48. *See, e.g.*, Overton v. Economic Assistance Auth., 96 Wn. 2d 552, 555, 637 P.2d 652, 654 (1981) (agency interpretation upheld, but court careful to retain its power to make final declaration).

49. Bare v. Gorton, 84 Wn. 2d 380, 383, 526 P.2d 379, 381 (1974).

50. *See, e.g.*, Department of Revenue v. Boeing Co., 85 Wn. 2d 663, 666–67, 538 P.2d 505, 507–08 (1975).

51. Employees of Pacific Maritime Ass'n v. Hutt, 88 Wn. 2d 426, 434–37, 562 P.2d 1264, 1269–71 (1977).

52. Walthew v. Department of Revenue, 103 Wn. 2d 183, 186–87, 691 P.2d 559, 561–62 (1984).

53. Taylor v. Morris, 88 Wn. 2d 586, 592, 564 P.2d 795, 798 (1977).

54. Griffin v. Department of Social & Health Serv., 91 Wn. 2d 616, 624, 590 P.2d 816, 821 (1979).

55. Human Rights Comm'n v. Cheney School Dist., 97 Wn. 2d 118, 126–27, 641 P.2d 163, 167 (1982).

56. Fahn v. Cowlitz County, 93 Wn. 2d 368, 376–82, 610 P.2d 857, 862–65 (1980) (agency may prohibit pre-employment inquiries about height of applicant, though regulations invalidated for placing too heavy a burden of proof on employers to show height is a valid job qualification).

57. *See, e.g.*, Baker v. Morris, 84 Wn. 2d 804, 809, 529 P.2d 1091, 1094 (1974) (regulation requiring six votes to waive mandatory minimum sentence invalid because authorizing statute required only four votes).

unconstitutionally vague, it will not be saved by any clarification found in the regulation.[58]

Additionally, the court has closely examined agency actions involving public policies of particular concern to the legislature. One such policy is the collection of tax revenues. To implement this policy, tax exemptions are narrowly construed.[59] Thus, the court upheld agency regulations that decreased the percentage of the cost of installing pollution control equipment allowable as a tax exemption.[60] The court has also upheld agency adjudications imposing liability under the unemployment insurance tax.[61] However, the court has given relief to individuals from agency-imposed tax liabilities that are not justified under the applicable statute.[62]

Protection of the environment is another important legislative policy[63] that the court has enforced rigorously. Thus, despite recognizing that the clearly erroneous test applies only to questions of fact,[64] the court adopted that test for the review of agency determinations that a project did not require an environmental impact statement.[65] The adopted test provided a more intensive scope of review than the arbitrary and capricious test, and the court used the adopted test to provide a judicial check on attempts to short-circuit the State Environmental Policy Act (SEPA) decisionmaking process.[66] As a result, negative threshold determinations made under SEPA by development-minded officials are examined closely by the supreme court.[67] Additionally, the court has required close compliance with the

58. Public Disclosure Comm'n v. Rains, 87 Wn. 2d 626, 631–33, 555 P.2d 1368, 1372–73 (1976).

59. Overton v. Economic Assistance Auth., 96 Wn. 2d 552, 556, 637 P.2d 652, 655 (1981). This case may also reflect the influence of subsequent legislative approval, *see infra* notes 99–100, as the statute was amended to adopt the administrative interpretation before the supreme court decided this case. *See Overton*, 96 Wn. 2d at 556–67, 637 P.2d at 655.

60. Weyerhaeuser Co. v. Department of Ecology, 86 Wn. 2d 310, 317–18, 545 P.2d 5, 10 (1976). *Cf.* International Paper Co. v. Department of Revenue, 92 Wn. 2d 277, 280–81, 595 P.2d 1310, 1311–12 (1979) (court rejected both parties' interpretation of the statute and adopted an intermediate interpretation of when period for filing for tax exemptions and credits begins to run).

61. Schuffenhauer v. Department of Employment Sec., 86 Wn. 2d 233, 238–40, 543 P.2d 343, 347–48 (1975); *see also* Daily Herald Co. v. Department of Employment Sec., 91 Wn. 2d 559, 564–65, 588 P.2d 1157, 1161 (1979).

62. Walthew v. Department of Revenue, 103 Wn. 2d 183, 186, 691 P.2d 559, 561 (1984) (litigation costs paid by law firm and passed straight through for reimbursement by client not gross income for purposes of the business and occupations tax); Pope & Talbot, Inc. v. Department of Revenue, 90 Wn. 2d 191, 193–95, 580 P.2d 262, 263–64 (1978) (plane flown into Washington by Oregon-based firm on eight days over three month period not subject to Washington use tax).

63. *See, e.g.*, WASH. REV. CODE § 43.21C.010 (1984) (SEPA preamble). *See generally* Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 34–35 (1984).

64. Leschi Improvement Council v. State Highway Comm'n, 84 Wn. 2d 271, 283, 525 P.2d 774, 782 (1974); *see supra* note 22 and accompanying text.

65. Norway Hill Assoc. v. King County Council, 87 Wn. 2d 267, 275, 552 P.2d 674, 679 (1976).

66. *See id.*

67. *See, e.g.*, ASARCO, Inc. v. Air Quality Coalition, 92 Wn. 2d 685, 704–05, 601 P.2d 501, 514

procedures for obtaining substantial development permits under the Shoreline Management Act from agencies and applicants.[68]

B. Sphere of Agency Functions

While reserving certain functions to itself, the court also has recognized a sphere of legitimate decisionmaking authority for administrative agencies. Within this sphere there are three classes of cases. First, in some cases the court has exercised its statutory interpretation function, and then remanded the case to the agency for reconsideration of how the proper interpretation applies to the facts. Second, the court has been deferential in some cases toward the means chosen by agencies in performing their mandated duties, as long as those means are within the agency's statutory range of discretion. Third, greater deference is usually found in cases involving agencies that have greater expertise than the court in the area considered.

In the first class of cases, the court determines that the agency has considered the case under an erroneous interpretation of the applicable statute,[69] or has applied an inappropriate statute or regulation.[70] Once this error is corrected, the court remands the case to the agency[71] so that it may reconsider its decision and correctly apply its expertise. Questions remanded have included the proper amount of tax credits for newly installed pollution control equipment,[72] the proper classification of a contract

(1979) (granting five year variance that would allow ASARCO to exceed emission limits requires environmental impact statement); Swift v. Island County Comm'n, 87 Wn. 2d 348, 360, 552 P.2d 175, 182 (1976). *But see* Save a Neighborhood Environment (SANE) v. Seattle, 101 Wn. 2d 280, 283–84, 676 P.2d 1006, 1008–09 (1984) (new negative threshold determination not required for revised project proposal that was substantially similar to previous proposal, when first negative threshold determination not appealed). *See generally* Rodgers, *supra* note 63, at 40–43.

68. *See, e.g.*, Skagit County v. Department of Ecology, 93 Wn. 2d 742, 746–47, 613 P.2d 115, 118 (1980) (portion of permit allowing dredge spoil to be dumped on site that had not been properly designated was invalidated by the court). *But see* Nisqually Delta Ass'n v. City of Dupont, 103 Wn. 2d 720, 696 P.2d 1222 (1985) (where adequacy of final EIS not appealed, but actual location of log transport dock overlapped the preferred and alternate locations, agency decision to allow the dock was upheld despite challenges that inadequate notice was given to the public regarding the changed site, and that the dock would violate the City of Dupont's shorelines master program).

69. *See, e.g.*, Farm Supply Distrib., Inc. v. Utilities & Transp. Comm'n, 83 Wn. 2d 446, 450, 518 P.2d 1237, 1239 (1974) (Commission had misinterpreted statutory definition of "contract carrier").

70. *See, e.g.*, Safeco Ins. Co. v. Meyering, 102 Wn. 2d 385, 395, 687 P.2d 195, 201–02 (1984) (Department of Employment Security treated case as a discharge, applied WASH. REV. CODE § 50.20.050 (1983), and granted benefits; court found facts arguably constituted voluntary resignation and remanded for reconsideration under proper section of the statute).

71. Courts are authorized to remand to the agency for further proceedings under WASH. REV. CODE § 34.04.130(6) (1983). *See supra* note 11.

72. *See* International Paper Co. v. Department of Revenue, 92 Wn. 2d 277, 281, 595 P.2d 1310, 1312 (1979); Weyerhaeuser Co. v. Department of Ecology, 86 Wn. 2d 310, 323, 545 P.2d 5, 13 (1976).

carrier,[73] and whether an applicant for unemployment benefits had good cause for voluntarily resigning.[74]

When an agency's authorizing legislation grants some discretion in choosing the means of accomplishing the agency's purposes, or defines those purposes in extremely broad terms, the court has given the agency more leeway in its actions. For instance, the Department of Ecology has a broad statutory charge to protect existing water rights and the public interest.[75] The courts have overturned the Department's decisions that deny an amendment or application for a water permit only when the applicant could show that the decision was an abuse of discretion.[76] Similarly, the Department of Social and Health Services (DSHS), in an attempt to ameliorate prison overcrowding, was granted sufficient latitude to convert a youth honor camp into an adult honor camp as an exercise of its powers of management over public institutions.[77]

Agencies that the court views as having specialized expertise also have often received deference on judicial review. Thus, the Shoreline Hearings Board's decision to issue a permit that represented a compromise of the adverse parties' positions was upheld in deference to the Board's expertise.[78] The court also has deferred to the institutional expertise of the Utilities and Transportation Commission regarding awards for ferry contracts[79] and regarding methods for refereeing disputes on the division of intrastate telephone revenues.[80] Finally, the court has deferred to the expertise of both the Public Employment Relations Commission (PERC), and the Higher Education Personnel Board in solving labor disputes.[81]

73. *See Farm Supply*, 83 Wn. 2d at 452–53, 518 P.2d at 1240–41.

74. *See Safeco Ins.*, 102 Wn. 2d at 395, 687 P.2d at 201–02.

75. *See* WASH. REV. CODE § 90.44.100 (1983).

76. *See, e.g.*, Jensen v. Department of Ecology, 102 Wn. 2d 109, 112–13, 685 P.2d 1068, 1070–71 (1984); *see also* Schuh v. Department of Ecology, 100 Wn. 2d 180, 186, 667 P.2d 64, 67–68 (1983).

77. *See* McGovern v. Department of Social & Health Serv., 94 Wn. 2d 448, 453, 617 P.2d 434, 437 (1980); *see also* State v. Rowe, 93 Wn. 2d 277, 284, 609 P.2d 1348, 1351 (1980) (standards chosen by prosecuting attorney to enforce a particular statute not arbitrary or capricious).

78. *See* Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Bd., 92 Wn. 2d 1, 8, 593 P.2d 151, 154–55 (1979); *see also* Skagit County v. Department of Ecology, 93 Wn. 2d 742, 751, 613 P.2d 115, 120 (1980) (invalidating one portion of a permit, but allowing remainder of development decision to stand).

79. *See, e.g.*, Equitable Shipyards, Inc. v. State, 93 Wn. 2d 465, 473–75, 611 P.2d 396, 402 (1980) (granting of ferry contract involves more than simple ranking of bids).

80. *See, e.g.*, Peninsula Tel. & Tel. Co. v. Utilities & Transp. Comm'n, 89 Wn. 2d 795, 801–02, 575 P.2d 1066, 1070 (1978).

81. *See, e.g.*, Renton Educ. Ass'n v. Public Employment Relations Comm'n, 101 Wn. 2d 435, 443–44, 680 P.2d 40, 45 (1984); Green River Community College v. Higher Educ. Personnel Bd., 95 Wn. 2d 108, 121, 622 P.2d 826, 834 (1980).

C. *Adversely Affected Individuals*

The degree to which an agency's decision disadvantages individuals also is relevant in predicting the eventual outcome of a case. While not as pervasive a factor as those described above, the cases reflect a subterranean balancing of the private and public interests involved. When the prejudice to the individual greatly outweighs the public interest asserted, the courts may overturn an agency's decision.

In cases where private parties have met all the statutory requirements to qualify for certain benefits,[82] or to avoid either criminal[83] or civil[84] penalties, the court has invalidated administrative regulations that would have denied such benefits or imposed such penalties. The court also has required certainty in administrative standards that will impose considerable burdens on private parties. For example, where a polluter spent $35 million to comply with pollution standards, and compliance with revised standards would have required expenditures of approximately $20 million more, the court enjoined the enforcement of the compliance schedule. The polluter was allowed to delay compliance until the Environmental Protection Agency (EPA) promulgated new and final standards.[85]

These cases should be contrasted with situations in which the agency treats an individual the same as all other applicants. For instance, the court has upheld non-discriminatory agency denials of water permits to applicants who attempted to be processed ahead of earlier applicants.[86] Also, the court has upheld the denial of benefits to applicants who failed to meet an unambiguous deadline.[87] The equality of treatment and countervailing public policies persuaded the court to deny relief in these instances.

D. *Judicial Review of Agency Rules*

The court's decisions regarding the validity of administrative rules reveal a varying intensity of review, despite the presumption of validity.[88] The

82. *E.g.*, Fecht v. Department of Social & Health Serv., 86 Wn. 2d 109, 110–11, 542 P.2d 780, 781–82 (1975).

83. *E.g.*, State v. Ermert, 94 Wn. 2d 839, 847, 621 P.2d 121, 125 (1980).

84. State Public Disclosure Comm'n v. Rains, 87 Wn. 2d 626, 631–33, 555 P.2d 1368, 1372–73 (1976).

85. ITT Rayonier, Inc. v. Department of Ecology, 91 Wn. 2d 682, 690–94, 586 P.2d 1155, 1160–61 (1978). *See also* Malland v. Department of Retirement Sys., 103 Wn. 2d 484, 489–91, 694 P.2d 16, 21–22 (1985) (unless agency can show significant change in circumstances, collateral estoppel prevents the relitigation of claimant's disabled status).

86. *See, e.g.*, Jensen v. Department of Ecology, 102 Wn. 2d 109, 113–14, 685 P.2d 1068, 1071 (1984); Schuh v. Department of Ecology, 100 Wn. 2d 180, 185, 667 P.2d 64, 67–68 (1983).

87. *See, e.g.*, Rasmussen v. Department of Employment Sec., 98 Wn. 2d 846, 850–52, 658 P.2d 1240, 1243 (1983) (failure to show good cause for not filing appeal from denial of unemployment benefits within mandatory ten day period).

88. *See supra* notes 40–41 and accompanying text.

intensity hinges on the type of issue presented. In general, courts look closely for any prejudice that may have arisen from an agency's failure to follow proper procedures in adopting rules. In contrast, courts have usually deferred to the agency regarding the content of the rule. Thus, in the review of agency rules, actual judicial practice tracks closely with the doctrines announced by the legislature and the court.

An agency's failure to comply substantially with statutorily mandated procedures results in the invalidation of the rule regardless of its contents.[89] Therefore, where an agency adopted a rule, ostensibly to comply with federal funding requirements, the court struck down the rule because the agency failed to make the finding required by statute as a condition precedent to adopting the rule.[90] Failure to provide notice of intent to adopt a rule to parties who had made adequate requests under APA standards was another basis for invalidation.[91]

The content of an agency rule has usually been given deference similar to that afforded a statute.[92] This is particularly true when the statute being implemented is either ambiguous or states broad remedial goals. Thus, the Human Rights Commission could expand the meaning of sex discrimination by issuing rules prohibiting company anti-nepotism policies, except in cases where married status had some impact on job capability.[93] Charged to conserve the fishery resource,[94] the Department of Fisheries adopted rules restricting the spring chinook salmon season to a single day, and was upheld by the court.[95]

When examining a rule for validity, the court uses several interpretive aids. The rule's validity may be tested by determining the construction that it places on the statute.[96] An administrative construction adopted contemporaneously with the statute and not repudiated by the legislature will be

89. 2 F. COOPER, *supra* note 24, at 786.

90. Federation of State Employees v. Higher Educ. Personnel Bd., 87 Wn. 2d 823, 826–27, 557 P.2d 336, 339 (1976).

91. *See, e.g.*, Pan Pacific Corp. v. Department of Labor & Indus., 88 Wn. 2d 347, 350–52, 560 P.2d 1141, 1143–44 (1977); *see also* State v. Thompson, 95 Wn. 2d 753, 759, 630 P.2d 925, 929 (1981) (regulations struck down because based on statute passed through defective procedures).

92. *See supra* notes 37–38 and accompanying text. While parties challenging the validity of a statute in Washington must prove it invalid beyond a reasonable doubt, State v. Maciolek, 101 Wn. 2d 259, 263–64, 676 P.2d 996, 998 (1984), this standard has not been applied to administrative agency regulations.

93. Washington Water Power Co. v. Human Rights Comm'n, 91 Wn. 2d 62, 69, 586 P.2d 1149, 1153–54 (1978).

94. WASH. REV. CODE § 75.08.012 (1983).

95. Northwest Gillnetters Ass'n v. Sandison, 95 Wn. 2d 638, 648, 628 P.2d 800, 805 (1981) (rule adopted as result of negotiations with Oregon Department of Fisheries under Columbia River Compact).

96. *Washington Water Power*, 91 Wn. 2d at 68–69, 586 P.2d at 1153–54.

given some weight,[97] and this weight will increase if the legislature amends specific sections of the statute without upsetting the administrative construction.[98] As a practical matter, subsequent legislative approval, such as amending the statute to adopt the agency view,[99] or giving funding for the contested project,[100] also may influence the court, even though the legislature's action occurs after the institution of a lawsuit.

III. WASHINGTON PROPOSAL COMPARED

The Washington Bar Association formed an Administrative Law Task Force in 1980 to study the need for legislative reform of the administrative process.[101] After research and hearings, the Task Force promulgated its proposed revisions to the Washington APA. According to the Task Force, one of the purposes of the Washington Proposal is to provide a clear, statutory statement that codifies present judicial practices.[102] The scope of review section of the Proposal is much more detailed than the present statute,[103] and provides a descriptive indication of the functions to be

97. Green River Community College v. Higher Educ. Personnel Bd., 95 Wn. 2d 108, 118, 622 P.2d 826, 832.

98. *Id.*

99. Overton v. Economic Assistance Auth., 96 Wn. 2d 552, 556–67, 637 P.2d 652, 655.

100. McGovern v. Department of Social & Health Serv., 94 Wn. 2d at 451, 617 P.2d at 437.

101. WASH. PROPOSAL, *supra* note 1, introductory comment.

102. WASH. PROPOSAL, *supra* note 1, Part V comment (Judicial Review and Civil Enforcement). The Washington Proposal contains detailed provisions regarding standing (§ 73), exhaustion of administrative remedies (§ 74), time for filing a petition for judicial review (§ 76), and what the petition must contain (§ 77). Each is superior to the present statute in terms of clarity. For example, § 77 is designed to guide non-attorneys in preparing a petition for judicial review and § 74 clarifies the law on exhaustion, a topic the present statute does not.

103. Section 85 of the WASH. PROPOSAL provides:

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

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

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

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

(3) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(a) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) The agency has acted beyond the jurisdiction conferred by any provision of law;

(c) The agency has not decided all issues requiring resolution;

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

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

(f) The persons taking the agency action were improperly constituted as a decision-making

performed by the court when reviewing an agency action.[104] As a result, the Proposal would not only implement the legislature's intended goals in passing the statute,[105] but should also give better notice to litigants and agencies of what is necessary to prevail in a judicial review proceeding.

A. *Traditional Judicial Powers Retained*

The Proposal authorizes judicial relief from actions that are unconstitutional, are beyond the jurisdiction of an agency, and are taken without following required procedures or through unlawful procedures.[106] These are areas in which the court presently reserves its right to invalidate agency actions.[107] Such judicial oversight is necessary to ensure that authority is validly delegated and that the agencies do not exceed their statutorily granted authority.[108] Additionally, the Proposal recognizes another trend in present judicial practice by authorizing a remand to the agency when the court determines that the agency has not decided all issues requiring resolution.[109]

B. *Questions of Fact*

Factual determinations underlying agency actions must be "supported by evidence that is substantial . . . in light of the whole record before the court."[110] The section retains the requirement that the court must examine the entire record for evidence that supports and weighs against findings of

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body, were subject to disqualification, or undertook the action for reasons not predominantly related to the authorized purposes of the agency or the merits of the controversy before it;

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

(h) The agency action is:

(i) Outside the range of discretion delegated to the agency by any provision of law;

(ii) Agency action, other than a rule, that is inconsistent with a rule of the agency;

(iii) Agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency; or

(iv) Arbitrary or capricious.

WASH. PROPOSAL, *supra* note 1, § 85.

104. *See supra* notes 7–10 and accompanying text.

105. *See* text accompanying notes 7–10.

106. WASH. PROPOSAL, *supra* note 1, § 85(3)(a),(b),(e); *see supra* note 103.

107. *See supra* notes 51–56.

108. *See supra* notes 57–62 and accompanying text.

109. WASH. PROPOSAL, *supra* note 1, § 85(3)(c); *see supra* note 103.

110. WASH. PROPOSAL, *supra* note 1, § 85(3)(g); *see supra* note 103.

fact.[111] If evidence exists from which a reasoning mind could have arrived at the finding it must be upheld.[112] This standard is in line with the supreme court's presently deferential treatment of agency factfinding,[113] and recognizes the relative expertise of the agency in the factfinding process.[114]

C. *Interpretations and Applications of Law*

The Proposal authorizes relief when an agency has incorrectly interpreted or applied the law in a particular case. This standard is clearly superior to the present "error of law" standard,[115] and is also in line with current judicial practice.[116] Despite judicial opinions that purportedly grant "substantial weight"[117] to agency interpretations of law, courts will not hesitate to correct an agency interpretation of the law in many circumstances.[118]

D. *Review of Agency Rules*

The Proposal retains the present statute authorizing courts to rule on the validity of agency regulations.[119] Thus, the procedures and doctrine surrounding the review of agency rules should remain unaltered by the Proposal.[120] However, the Proposal is much more specific about the materials available to a court when it reviews such rules. The agency is required

111. *See supra* note 21.

112. WASH. PROPOSAL, *supra* note 1, § 85(3)(g) comment. *See generally* L. JAFFE, *supra* note 7, at 596–98.

113. *See* Franklin County v. Sellers, 97 Wn. 2d 317, 325, 646 P.2d 113, 116–17 (1982).

114. The 1981 Model Act § 5–116(7) is similar to § 85(3)(g), except that it provides for relief when the "agency action is based on a determination of fact that is not supported by evidence that is substantial." The Task Force eliminated the underscored language to allow the test to be applied "more broadly" and "in any factual areas where a court finds it helpful." WASH. PROPOSAL, *supra* note 1, § 85(3)(g) comment. In light of the approach adopted in *Sellers*, which separated the factual and legal components of mixed questions of law and fact, this change seems unnecessary and may cause confusion as to the scope of the test. The language of the Model Act is more precise and should be adopted instead.

115. WASH. REV. CODE § 34.04.130(6)(d) (1983); *see supra* note 11.

116. *See supra* notes 28–33, 70–74 and accompanying text.

117. *See, e.g., Sellers*, 97 Wn. 2d at 325, 646 P.2d at 117.

118. *See supra* notes 51–57 and accompanying text. The Proposal also provides two methods by which an agency can clarify its interpretation of legal standards. An agency must issue an Interpretive or Policy Statement when it would be "feasible and where useful to guide agency action and to inform the public." WASH. PROPOSAL, *supra* note 1, § 21(1). This section is an innovative and original product of the Task Force, and has no counterpart in the 1981 Model Act. Additionally, an agency must issue a declaratory order that states whether a given statute or rule applies to a specified situation within 30 days of receiving a request by petition. *Id.* § 10(5)(a). If used properly, agencies could not only make clear statements of their positions available, but could explain the rationale behind those positions as well.

119. *See* WASH. REV. CODE § 34.04.070 (1983); WASH. PROPOSAL, *supra* note 1, § 75.

120. *See supra* notes 34–39, 88–100 and accompanying text.

to maintain a rulemaking record that contains the agency's file of documents, data, and commentary received on the rule,[121] and a concise explanatory statement stating the agency's reasons for adopting the rule.[122] On judicial review, if the rule cannot be justified on the basis of those reasons, the court remands the issue to the agency for reconsideration.[123] This procedure requires agencies to justify their rules before adopting them, while giving agencies flexibility to reconsider rules that are challenged without having them invalidated by a reviewing court.

E. Informal Action Standards

A detailed section in the Proposal governs review of informal administrative actions.[124] Informal actions may be set aside if they are "[o]utside the range of discretion delegated to the agency."[125] This standard requires a reviewing court to consider the institutional limitations that restrict an agency's discretion. Since these limits are generally found in statutes and regulations, they provide more objective criteria than the present practice of evaluating the reasonableness of the agency action.[126]

The standard of review for informal agency actions also allows relief from any action that is inconsistent with an agency rule.[127] This approach comports with present judicial practice.[128] In addition, the section governing informal administrative actions allows relief from agency actions that are inconsistent with a past agency practice unless the agency can demonstrate a rational basis for the departure from that practice.[129] Finally, the traditional arbitrary or capricious standard is included in the Proposal.[130] Although the judicial role in reviewing informal agency actions is not expanded by the Proposal, it clarifies for legal participants the functions that courts perform in such review.

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121. WASH. PROPOSAL, *supra* note 1, § 25.

122. *Id.* § 22. A similar statement is required under WASH. REV. CODE § 34.04.045 (1983). In construing a similar statement issued according to state statute, (now codified at WASH. REV. CODE § 34.04.025(3) (1983)), the court found the purposes of the statement to be "(1) to assure that the agency actually considered all arguments made, and (2) to facilitate court review." Anderson, Leech & Morse, Inc. v. Liquor Control Bd., 89 Wn. 2d 688, 693, 575 P.2d 221, 224 (1978).

123. WASH. PROPOSAL, *supra* note 1, § 22(2).

124. *Id.* § 85(3)(h). *See supra* note 103.

125. WASH. PROPOSAL, § 85(3)(h)(i); *see supra* note 103.

126. *See generally* Brodie & Linde, *supra* note 2, at 548–50.

127. WASH. PROPOSAL, *supra* note 1, § 85(3)(h)(ii); *see supra* note 103.

128. *See* Ritter v. Board of Comm'rs, 96 Wn. 2d 503, 507–08, 637 P.2d 940, 943–44 (1981).

129. WASH. PROPOSAL, *supra* note 1, § 85(3)(h)(iii).

130. *Id.* § 85(3)(h)(iv).

F. Judicial Investigations of Bias

The Proposal additionally deals with bias and improperly constituted decisionmaking bodies,[131] an area not currently addressed in the APA's scope of review section. This issue is currently handled under the "appearance of fairness" doctrine, which applies only to quasi-adjudicatory decisions made by agencies or legislative bodies.[132] Under the appearance of fairness doctrine, decisions will be overturned when a disinterested party, aware of the decisionmaker's personal interests in a matter, might reasonably believe that bias existed.[133]

Under the Washington Proposal, judicial relief is allowed only when the decisionmaking body was "improperly constituted," the decisionmakers were "subject to disqualification," or the action was taken for "reasons not predominantly related to the authorized purposes of the agency."[134] Two effects would flow from the adoption of the Proposal's standard. First, since the Proposal's scope of review standards apply to all "agency actions,"[135] the prohibition against bias would extend to informal agency actions as well as adjudications and rulemaking.[136] Although this standard would apply to a wider range of agency actions, the second effect of the Proposal is to narrow judicial inquiry when fairness challenges are raised by prescribing more objective standards.

This narrower scope of inquiry is consistent with the traditional judicial reluctance to inquire into the mental processes of agency decisionmakers.[137] The Proposal standard clarifies the permissible grounds for invalidation in quasi-judicial proceedings by applying the standards already applied to judges.[138] By confining the inquiry to these established standards, the Proposal limits the confusion that has surrounded the nebulous appearance of fairness doctrine.[139]

131. *Id.* § 85(3)(f).

132. *See* Zehring v. Bellevue, 99 Wn. 2d 488, 494, 663 P.2d 823, 826 (1983). But the restriction of the doctrine was put in question by this decision, as the court also indicated that the doctrine applies whenever a public hearing is required by statute. *See id.* at 499–50, 663 P.2d at 829–30 (Utter, J., dissenting). The court has recently recognized the harsh criticism of this doctrine. Harris v. Hornbaker, 98 Wn. 2d 650, 658 n.1, 658 P.2d 1219, 1222 n.1 (1983). *See generally* Vache, *Appearance of Fairness, Doctrine or Delusion,* 13 WILLAMETTE L.J. 479 (1977).

133. *Zehring,* 99 Wn. 2d at 494, 663 P.2d at 826.

134. WASH. PROPOSAL, *supra* note 1, § 85(3)(f).

135. *Id.* § 1(2).

136. *Cf. Harris,* 98 Wn. 2d at 657, 658 P.2d at 1221–22 (appearance of fairness doctrine applies only to quasi-adjudicatory decisions).

137. *See* United States v. Morgan, 313 U.S. 409, 420 (1941). *But cf.* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (inquiry into mental processes of decisionmaker allowed).

138. *Harris,* 98 Wn. 2d at 665–66, 658 P.2d at 1228–29 (Utter, J., concurring); *see also* Medical Disciplinary Bd. v. Johnston, 99 Wn. 2d 466, 483–85, 663 P.2d 457, 466–67 (1983) (Utter, J., concurring).

139. *Zehring,* 99 Wn. 2d at 500, 663 P.2d at 829–30 (Utter, J., dissenting).

IV. CONCLUSION

Defining the relationship between courts and administrative agencies is a crucial task that cannot be accomplished with cryptic provisions in a scope of review statute. Washington courts have adopted the traditional doctrines regarding judicial review of agency actions, based primarily on the distinction between facts and law. However, case analysis reveals several factors that motivate courts to review agency action with greater or lesser intensity. The combination of those factors present in a case are helpful in predicting whether the court will invalidate or uphold agency actions. The scope of review section of the Washington Proposal provides a more definite statement of the functions that courts perform when reviewing agency actions. Additionally, it promotes the legislature's goals of clarity, uniformity, and predictabilty. The legislature should therefore adopt this clarification of Washington law.

Tim J. Filer