

HOUSE BILL REPORT

ESSB 5121

*As Reported By House Committee on:
State Government*

Title: An act relating to improper governmental action.

Brief Description: Protecting whistleblowers.

Sponsor(s): Senate Committee on Governmental Operations (originally sponsored by Senators Metcalf, Talmadge, McCaslin, Owen, Thorsness, Vognild, Rinehart, Sellar, L. Smith, Sutherland, Roach, Amondson, Hayner, Rasmussen, Bailey, Moore, Barr, Oke, Wojahn, Nelson, von Reichbauer, Bauer, Gaspard, L. Kreidler, Johnson, Stratton, Skratek and Erwin).

Brief History:

Reported by House Committee on:
State Government, April 3, 1991, DPA.

**HOUSE COMMITTEE ON
STATE GOVERNMENT**

Majority Report: *Do pass as amended.* Signed by 8 members: Representatives Anderson, Chair; Pruitt, Vice Chair; McLean, Ranking Minority Member; Bowman, Assistant Ranking Minority Member; R. Fisher; Moyer; O'Brien; and Sheldon.

Minority Report: *Do not pass.* Signed by 1 member: Representative Chandler.

Staff: Linda May (786-7135).

Background:

Whistleblower Investigations. The state whistleblower program was created in 1982 to encourage state employees to disclose improper governmental actions. Actions which qualify for investigation under the whistleblower provisions are those where there is a violation of any state law or rule, an abuse of authority, a substantial and specific danger to the public health or safety, or a gross waste of public funds. "Improper governmental actions" do not include employee personnel actions or grievances.

Current law does not contain a definition of a whistleblower. Instead, statute refers to "the person

providing the information which initiated the investigation" of alleged improper governmental action.

Whistleblower investigations are conducted by the state auditor's office. After receiving notification of alleged improper action, the auditor's office has a period not to exceed 30 days to conduct a preliminary investigation. If the auditor determines that no further investigation is warranted, the auditor will supply the whistleblower with a summary of the results of the preliminary investigation and findings. The auditor may choose to forward a summary of the allegations to an agency. The agency must respond with a summary of its investigation into the allegations and of its corrective actions, if any. If the auditor believes that further investigation is warranted, the auditor may conduct further investigation, or may alert the head of the employing agency or the attorney general. In all cases, the identity of the person who provides the information to the auditor's office remains confidential.

Retaliation. In some cases, a person who acted as a whistleblower or who is perceived to be a whistleblower may be subjected to reprisals or retaliatory action. Actions which constitute reprisal or retaliation include denials of adequate staff or frequent staff changes, a refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or poor performance evaluations, demotion, suspension, or dismissal. A whistleblower is to notify the auditor in writing of any changes in his or her work situation that are related to the employee's having provided information. If the auditor's office has reason to believe that retaliatory acts may be occurring, the auditor is to investigate and report on the matter.

Also, an employee who provides information to the auditor and who is then subjected to any reprisal or retaliatory action may seek judicial review of the retaliatory action in superior court. The court may award reasonable attorneys' fees, though statute does not identify to whom.

Scope of the Whistleblower Program. Currently, the whistleblower program is for any individual employed or holding office in any department or agency of state government. "Improper governmental actions" refer to violations of state law or rules. The state auditor's office receives an appropriation for the administration of the program.

Summary of Amended Bill:

Whistleblower Investigations. A "whistleblower" is defined as an employee who in good faith reports alleged improper

governmental action to the state auditor. The definition also includes employees who in good faith provide information to the auditor in connection with a whistleblower investigation, and employees who are perceived as having reported improper governmental actions or information connected to a whistleblower investigation.

Formal time lines are incorporated for a whistleblower investigation. The auditor's office will mail written acknowledgement to a whistleblower within five days of receipt of information. The preliminary investigation period continues to be 30 days or less. The auditor is to complete the investigation and report the findings within 60 days of the completion of the preliminary investigation. If the auditor cannot meet this time limitation, the office must provide the whistleblower with written justification for the delay. In all cases, the findings from the auditor's investigation must be mailed to the whistleblower within one year of the initial filing of information. Responsibility for investigation of alleged improper governmental activity is added in statute to the duties of the state auditor.

Retaliation. The list of acts which constitute reprisal or retaliatory action is expanded to include 1) denial of employment, and 2) a supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower. Retaliation against a whistleblower is added to the definition of an unfair practice in the statutes guiding the Human Rights Commission.

A whistleblower who believes he or she has been subjected to retaliatory action may file a complaint with the Human Rights Commission. The commission will then investigate the complaint as a potential unfair practice. If the commission brings the case before an administrative law judge and it is determined that a person has engaged in retaliatory action, the judge may impose a civil penalty on the retaliator. The maximum civil penalty is \$3,000 and a 30 day suspension without pay. Monetary civil penalties go into the general fund. The minimum penalty is a letter of reprimand to be placed in the retaliator's personnel file. Imposition of a civil penalty by the administrative law judge may be in addition to other remedies available under the Human Rights Commission statutes.

A person who meets the definition of "whistleblower" and who is subjected to reprisals or retaliatory action may continue to seek judicial review in court. The court avenue is provided under the Human Rights Commission statutes with the inclusion of whistleblower retaliation as an unfair

practice. The person bringing suit against a retaliator may recover actual damages plus cost of suit, including reasonable attorneys' fees. The court avenue is removed from the whistleblower section of the RCW.

New language also clarifies that an agency retains the authority to discipline retaliators itself, in addition to carrying out any orders stemming from review through the Human Rights Commission.

The bill contains a request for an appropriation of \$20,000 for the Human Rights Commission for whistleblower retaliation cases.

Scope of the Whistleblower Program. The scope of the whistleblower program is expanded to include local government employees and violations of local laws or rules. Each local government is encouraged to adopt its own whistleblower program. Until a local government does so, that unit of government and its employees are covered by the state whistleblower program. Local government whistleblower programs must be approved by the state auditor. Local government retaliation cases qualify for the remedies provided by the Human Rights Commission.

The expense of investigating alleged improper local government activity is to be borne by each local government unit subject to such investigation.

Amended Bill Compared to Engrossed Substitute Bill: The definition of a whistleblower is clarified slightly. The option of a whistleblower taking action in superior court against a retaliator is removed from the whistleblower statutes; the court option remains in the Human Rights Commission statutes. The amended bill specifies that agencies are not prohibited from taking disciplinary action against whistleblower retaliators, in addition to carrying out any orders issued through the Human Rights Commission.

In the engrossed substitute bill, local government employees, laws, and rules are incorporated into the state whistleblower program by amending the definitions of "employee" and "improper governmental action." In the amended bill, incorporation of local governments into the state whistleblower program is moved to a separate section. The amended bill encourages local governments to adopt their own whistleblower programs. Local government programs would have to be approved by the state auditor. Until such time as a local government adopts an approved whistleblower program of its own, local government agencies and employees are covered by the state whistleblower provisions.

Fiscal Note: Available (on ESSB 5121).

Appropriation: Yes.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill received rigorous work by Senate staff over the interim. Senate staff worked with all interested parties on the version of the bill that came out of Senate Governmental Operations. There are problems with the existing set-up to deal with retaliations. It is appropriate to move retaliation cases to the jurisdiction of the Human Rights Commission. The bill offers a number of necessary changes to the state whistleblower program. Retaliation does exist, and should be investigated as a separate offense. The Human Rights Commission has experience in dealing with these kinds of issues. The existing whistleblower program needs to be strengthened; it does not work as well as it needs to now.

Whistleblower protection from retaliation should be for all public employees, not just state employees. Discrimination against whistleblowers exists at all levels within organizations. Not providing whistleblowers with protection from retaliation costs taxpayers money due to agency mismanagement. The state can not afford to deny this coverage to local government employees. The state has waited too long to cover local government employees. The expanded coverage is worth the extra expense. Whistleblower programs should be available for employees, in both the public and private sector.

In the course of testifying in favor of the bill, several witnesses described their own or others' experiences with whistleblowing and retaliatory actions.

Testimony Against: The Senate staff spent the interim working on a state whistleblower bill in consultation with state government parties. Local governments were added to the Senate bill on the floor, so local governments had no input in the study process. The state program is modeled to state government, with a geographic center and relative ease for the State Auditor's Office to reach agencies under the new time lines proposed in the bill. There are over 2,400 units of local government which are geographically dispersed. It will be difficult and expensive to reach them all in a timely fashion. The auditor's office has an informal local government program now, where emergencies are investigated immediately and other complaints are investigated at the time of that unit's regular audit. Local governments should have input into designing a local

government program. There may be other alternatives that would be better for local governments. These should be studied, and local governments should be covered in their own separate program in the future. This bill could cause serious financial damage to a small local government unit.

Witnesses: Senator Jack Metcalf; Jack Heinricher and Linda Sheler, State Auditor's Office; Fred Hellberg, Governor's Office; Kathy Friedt, Human Rights Commission (all in favor of changes to state whistleblower program but against amendments adding local government); Gary Lowe, Association of Counties; Kathleen Collins, Association of Washington Cities (both against inclusion of local governments); Cheryl L. Lupkes, King County Legislative Action Committee, King County Employees Council, and Public Employees for Responsible Government; Gary Albright, University of Washington; David Westberg, International Union of Operating Engineers; Bob Hegamin; Senator Sylvia Skratek; Senator Phil Talmadge; Linda Bruce, City of Spokane; Mike Barrow and Ron Murray, King County Democrats; Keith A. Arnold; Rob Kavanaugh; Nigel Keiffer and Chuck Pillon, Public Employees for Responsible Government; Gordon Hamilton, Committee for Equal Rights at City Light; and David L. Allison, Heart of America Northwest (all in favor).