

SENATE BILL REPORT

SB 5121

AS REPORTED BY COMMITTEE ON GOVERNMENTAL OPERATIONS,
FEBRUARY 14, 1991

Brief Description: Protecting whistleblowers.

SPONSORS: 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.

SENATE COMMITTEE ON GOVERNMENTAL OPERATIONS

Majority Report: That Substitute Senate Bill No. 5121 be substituted therefor, and the substitute bill do pass.

Signed by Senators McCaslin, Chairman; Roach, Vice Chairman; and Madsen.

Staff: Barbara Howard (786-7410); Eugene Green (786-7405)

Hearing Dates: January 31, 1991; February 14, 1991

BACKGROUND:

The state's whistleblower program was originally enacted in 1982. The investigation of whistleblower complaints and retaliatory acts against whistleblowers was assigned to the State Auditor. In recent years, several bills have been introduced in attempts to resolve perceived problems with the process. Senate Resolution 1990-8752 directed the Committee on Governmental Operations to conduct a study of the program, and make recommendations for possible clarification or improvement. Among the issues which were identified during the study were:

- o Current terminology is confusing as to the distinction between a whistleblower and a retaliator. It is also unclear whether the program applies to a whistleblower who seeks reemployment with the state, or to persons who provide information in a whistleblower investigation.
- o The time period in which the State Auditor must acknowledge receipt of the complaint, complete the whistleblower investigation, and provide a final report is not specified.
- o If a whistleblower files a civil suit for retaliation, the court may award reasonable attorneys' fees, but not other costs incurred in the action. In addition, if a supervisor or manager is sued, defense by the state and award of attorney fees or costs are not authorized if the supervisor prevails.

- o Concern was expressed that some agency other than the State Auditor might have more of the specialized skills needed for discovering subtle acts of retaliation.
- o The activities defined as retaliation do not specifically include denial of reemployment for a whistleblower or creation of a hostile atmosphere by a whistleblower's superiors.
- o The current statute does not authorize any sanctions or penalties against a retaliator.
- o The whistleblower program is not explicitly specified among the enumerated powers or duties of the State Auditor.

SUMMARY:

"Whistleblower" is defined as a state employee who in good faith reports an alleged improper governmental action to the State Auditor. The term includes an employee who provides information to the State Auditor and one who is believed to be a whistleblower or who has provided information in an investigation.

Within five working days of receiving whistleblower information, the State Auditor must acknowledge receipt in writing. The State Auditor must complete investigation of the complaint within 90 days, unless written justification for the delay is furnished to the whistleblower. In any case, the State Auditor's report must be sent to the whistleblower within one year of the initial filing of the complaint.

If a whistleblower who is subject to alleged retaliation files a civil action, the reviewing court may award costs as well as reasonable fees to the prevailing party. The provisions relating to civil actions against the state are specifically incorporated.

In cases of perceived retaliation, the whistleblower must notify the Human Rights Commission in writing. The commission must investigate and act upon the complaint under its normal powers. The Human Rights Commission is given exclusive jurisdiction over retaliation cases for whistleblowers.

"Denial of employment" is added to the list of activities defined as "reprisal or retaliatory action," as is encouragement by a supervisor to the whistleblower's colleagues to behave in a hostile manner.

Retaliation by a state employer is added to the list of unfair practices within the powers of the Human Rights Commission. If the commission determines that retaliatory action has been taken against a whistleblower, the commission may fine the retaliator up to \$3,000 and issue an order to the appointing authority to suspend the retaliator for up to 30 days. At a minimum, the commission must require that a letter of reprimand be placed in the retaliator's personnel file.

Whistleblower investigations are added to the enumerated powers of the State Auditor.

EFFECT OF PROPOSED SUBSTITUTE:

In cases of perceived retaliation the whistleblower files a formal complaint with the Human Rights Commission. Actions taken by other agencies on order of the commission (as well as its own orders) are included in the provisions relating to exclusive jurisdiction over retaliatory matters. The administrative law judge, rather than the Human Rights Commission, imposes penalties on retaliators; monetary penalties are credited to the general fund. Other technical changes are intended to clarify definition of terms.

Appropriation: \$20,000 from the general fund to the Human Rights Commission for implementing its new powers to investigate whistleblower retaliations.

Revenue: none

Fiscal Note: available

TESTIMONY FOR:

This revision of the whistleblower law clarifies a number of ambiguities in the present process. Allowing a whistleblower or an unfairly challenged supervisor to receive legal costs as well as attorneys' fees strikes a needed balance. Adding specific penalties should help to deter retaliation. Transferring the functions relating to retaliation to the Human Rights Commission is a natural assignment, since other types of retaliatory action are already within its jurisdiction and expertise.

TESTIMONY AGAINST:

The changes really do not accomplish anything. If someone wishes to retaliate against a whistleblower, it will happen, because those activities are too subtle to substantiate. The bill does nothing to help individuals who suffer retaliation for reporting wrongdoing to legislators or to the media.

TESTIFIED: PRO: Rob Kavanaugh, Olympia, Jack Heinricher, Assistant State Auditor; Gerald Pollet, Heart of America NW; Kathy Friedt, Executive Director, Human Rights Commission; Ernie LaPalm, Olympia