
SUBSTITUTE SENATE BILL 5121

State of Washington

52nd Legislature

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By 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).

Read first time February 19, 1991.

1 AN ACT Relating to improper governmental action; amending RCW
2 42.40.020, 42.40.040, 42.40.050, 49.60.210, 49.60.250, 43.09.050, and
3 43.88.160; prescribing penalties; and making an appropriation.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 42.40.020 and 1989 c 284 s 1 are each amended to read
6 as follows:

7 As used in this chapter, the terms defined in this section shall
8 have the meanings indicated unless the context clearly requires
9 otherwise.

10 (1) "Auditor" means the office of the state auditor.

11 (2) "Employee" means any individual employed or holding office in
12 any department or agency of state government.

13 (3) (a) "Improper governmental action" means any action by an
14 employee:

1 (i) Which is undertaken in the performance of the employee's
2 official duties, whether or not the action is within the scope of the
3 employee's employment; and

4 (ii) Which is in violation of any state law or rule, is an abuse of
5 authority, is of substantial and specific danger to the public health
6 or safety, or is a gross waste of public funds.

7 (b) "Improper governmental action" does not include personnel
8 actions including but not limited to employee grievances, complaints,
9 appointments, promotions, transfers, assignments, reassignments,
10 reinstatements, restorations, reemployments, performance evaluations,
11 reductions in pay, dismissals, suspensions, demotions, violations of
12 the state civil service law, alleged labor agreement violations,
13 reprimands, or any action which may be taken under chapter 41.06 or
14 28B.16 RCW, or other disciplinary action except as provided in RCW
15 42.40.030.

16 (4) "Use of official authority or influence" includes taking,
17 directing others to take, recommending, processing, or approving any
18 personnel action such as an appointment, promotion, transfer,
19 assignment, reassignment, reinstatement, restoration, reemployment,
20 performance evaluation, or any adverse action under chapter 41.06 or
21 28B.16 RCW, or other disciplinary action.

22 (5) "Whistleblower" means an employee who in good faith reports
23 alleged improper governmental action to the auditor, initiating an
24 investigation under RCW 42.40.040. For purposes of the provisions of
25 this chapter and chapter 49.60 RCW relating to reprisals and
26 retaliatory action, the term "whistleblower" also means an employee who
27 provides information to the auditor in connection with an investigation
28 under RCW 42.40.040 and an employee who is believed to have reported
29 alleged improper governmental action to the auditor or to have provided

1 information to the auditor in connection with an investigation under
2 RCW 42.40.040.

3 **Sec. 2.** RCW 42.40.040 and 1989 c 284 s 3 are each amended to read
4 as follows:

5 (1) Upon receiving specific information that an employee has
6 engaged in improper governmental action, the auditor shall, within five
7 working days of receipt of the information, mail written
8 acknowledgement to the whistleblower at the address provided. For a
9 period not to exceed thirty days, the auditor shall conduct such
10 preliminary investigation of the matter as the auditor deems
11 appropriate. In conducting the investigation, the identity of the
12 ~~((person providing the information which initiated the investigation))~~
13 whistleblower shall be kept confidential.

14 (2) In addition to the authority under subsection (1) of this
15 section, the auditor may, on its own initiative, investigate incidents
16 of improper state governmental action.

17 (3) (a) If it appears to the auditor, upon completion of the
18 preliminary investigation, that the matter is so unsubstantiated that
19 no further investigation, prosecution, or administrative action is
20 warranted, the auditor shall so notify the ~~((person, if known, who~~
21 ~~provided the information initiating the investigation))~~ whistleblower.

22 (b) The notification shall be by memorandum containing a summary of
23 the information received, a summary of the results of the preliminary
24 investigation with regard to each allegation of improper governmental
25 action, and any determination made by the auditor under (c) of this
26 subsection.

27 (c) In any case to which this section applies, the identity of the
28 ~~((person who provided the information initiating the investigation))~~

1 whistleblower shall be kept confidential unless the auditor determines
2 that the information has been provided other than in good faith.

3 (d) If it appears to the auditor that the matter does not meet the
4 definition of an "improper governmental action" under RCW 42.40.020(3),
5 or is other than a gross waste of public funds, the auditor may forward
6 a summary of the allegations to the appropriate agency for
7 investigation and require a response by memorandum containing a summary
8 of the investigation with regard to each allegation and any
9 determination of corrective action taken. The auditor will keep the
10 identity of the (~~person who provided the information initiating the~~
11 ~~investigation~~) whistleblower confidential. Upon receipt of the
12 results of the investigation from the appropriate agency, the auditor
13 will notify the (~~provider~~) whistleblower as prescribed under (a),
14 (b), and (c) of this subsection.

15 (4) If it appears to the auditor after completion of the
16 preliminary investigation that further investigation, prosecution, or
17 administrative action is warranted, the auditor shall so notify the
18 (~~party, if known, who provided the information initiating the~~
19 ~~investigation~~) whistleblower and either conduct further investigations
20 or issue a report under subsection (6) of this section. Within sixty
21 days after the thirty-day period in subsection (1) of this section, the
22 auditor shall complete the investigation and report its findings to the
23 whistleblower unless written justification for the delay is furnished
24 to the whistleblower. In all such cases, the report of the auditor's
25 investigation and findings shall be sent to the whistleblower within
26 one year after the information was filed under subsection (1) of this
27 section.

28 (5) (a) At any stage of an investigation under this section the
29 auditor may require by subpoena the attendance and testimony of
30 witnesses and the production of documentary or other evidence relating

1 to the investigation at any designated place in the state. The auditor
2 may issue subpoenas, administer oaths, examine witnesses, and receive
3 evidence. In the case of contumacy or failure to obey a subpoena, the
4 superior court for the county in which the person to whom the subpoena
5 is addressed resides or is served may issue an order requiring the
6 person to appear at any designated place to testify or to produce
7 documentary or other evidence. Any failure to obey the order of the
8 court may be punished by the court as a contempt thereof.

9 (b) The auditor may order the taking of depositions at any stage of
10 a proceeding or investigation under this chapter. Depositions shall be
11 taken before an individual designated by the auditor and having the
12 power to administer oaths. Testimony shall be reduced to writing by or
13 under the direction of the individual taking the deposition and shall
14 be subscribed by the deponent.

15 (6) (a) If the auditor determines that there is reasonable cause to
16 believe that an employee has engaged in any improper activity, the
17 auditor shall report the nature and details of the activity to:

18 (i) The employee and the head of the employing agency; and

19 (ii) If appropriate, the attorney general or such other authority
20 as the auditor determines appropriate.

21 (b) The auditor has no enforcement power except that in any case in
22 which the auditor submits a report of alleged improper activity to the
23 head of an agency, the attorney general, or any other individual to
24 which a report has been made under this section, the individual shall
25 report to the auditor with respect to any action taken by the
26 individual regarding the activity, the first report being transmitted
27 no later than thirty days after the date of the auditor's report and
28 monthly thereafter until final action is taken. If the auditor
29 determines that appropriate action is not being taken within a

1 reasonable time, the auditor shall report the determination to the
2 governor and to the legislature.

3 (7) This section does not limit any authority conferred upon the
4 attorney general or any other agency of government to investigate any
5 matter.

6 **Sec. 3.** RCW 42.40.050 and 1989 c 284 s 4 are each amended to read
7 as follows:

8 (1) Any ~~((employee))~~ whistleblower (a) who provides his or her name
9 and specific information to the auditor on any matter which is found to
10 warrant further investigation or other action, or which is provided by
11 the ~~((employee))~~ whistleblower in good faith, as determined by the
12 auditor, whether or not further action is warranted and (b) who is
13 subjected to any reprisal or retaliatory action ~~((undertaken during the~~
14 ~~period beginning on the day after the date on which the specific~~
15 ~~information is received by the auditor alleging improper governmental~~
16 ~~action,))~~ may seek judicial review of the reprisal or retaliatory
17 action in superior court, whether or not there has been an
18 administrative review of the action. In such ~~((an))~~ action, the
19 reviewing court may award costs and reasonable ((attorney's))
20 attorneys' fees to the prevailing party. The provisions of RCW
21 4.92.060 through 4.92.075 shall apply to judicial proceedings and
22 proceedings before the human rights commission under this chapter.

23 (2) ~~((The employee who provided specific information shall notify~~
24 ~~the state auditor in writing if any changes in the employee's work~~
25 ~~situation exist which are related to the employee's having provided~~
26 ~~information. If the auditor has reason to believe that such a change~~
27 ~~in work situation has occurred, the auditor shall investigate and~~
28 ~~report on the matter in accordance with this chapter))~~ A whistleblower
29 or perceived whistleblower having reason to believe that he or she has

1 been subjected to retaliatory action may make, sign, and file a
2 complaint with the human rights commission in accordance with RCW
3 49.60.230. The human rights commission shall investigate and pass upon
4 the complaint in accordance with chapter 49.60 RCW. The auditor shall
5 provide a record of its investigation under RCW 42.40.040 to the human
6 rights commission. The human rights commission shall have exclusive
7 administrative jurisdiction over complaints alleging reprisal or
8 retaliatory action under this chapter and any fine, order, or other
9 action issued by the human rights commission or any action taken by an
10 appointing authority on order of the human rights commission shall not
11 be subject to consideration, review, or alteration by any other state
12 agency or board.

13 (3) For the purpose of this section "reprisal or retaliatory
14 action" means but is not limited to:

15 (a) Denial of adequate staff to perform duties;

16 (b) Frequent staff changes;

17 (c) Frequent and undesirable office changes;

18 (d) Refusal to assign meaningful work;

19 (e) Unwarranted and unsubstantiated letters of reprimand or
20 unsatisfactory performance evaluations;

21 (f) Demotion;

22 (g) Reduction in pay;

23 (h) Denial of promotion;

24 (i) Suspension; (~~and~~)

25 (j) Dismissal;

26 (k) Denial of employment; and

27 (l) A supervisor or superior encouraging coworkers to behave in a
28 hostile manner toward the whistleblower.

1 **Sec. 4.** RCW 49.60.210 and 1985 c 185 s 18 are each amended to read
2 as follows:

3 (1) It is an unfair practice for any employer, employment agency,
4 labor union, or other person to discharge, expel, or otherwise
5 discriminate against any person because he or she has opposed any
6 practices forbidden by this chapter, or because he or she has filed a
7 charge, testified, or assisted in any proceeding under this chapter.

8 (2) It is an unfair practice for a state agency manager or
9 supervisor to retaliate against a whistleblower as defined in chapter
10 42.40 RCW.

11 **Sec. 5.** RCW 49.60.250 and 1989 c 175 s 115 are each amended to
12 read as follows:

13 (1) In case of failure to reach an agreement for the elimination of
14 such unfair practice, and upon the entry of findings to that effect,
15 the entire file, including the complaint and any and all findings made,
16 shall be certified to the chairperson of the commission. The
17 chairperson of the commission shall thereupon request the appointment
18 of an administrative law judge under Title 34 RCW to hear the complaint
19 and shall cause to be issued and served in the name of the commission
20 a written notice, together with a copy of the complaint, as the same
21 may have been amended, requiring the respondent to answer the charges
22 of the complaint at a hearing before the administrative law judge, at
23 a time and place to be specified in such notice.

24 (2) The place of any such hearing may be the office of the
25 commission or another place designated by it. The case in support of
26 the complaint shall be presented at the hearing by counsel for the
27 commission: PROVIDED, That the complainant may retain independent
28 counsel and submit testimony and be fully heard. No member or employee
29 of the commission who previously made the investigation or caused the

1 notice to be issued shall participate in the hearing except as a
2 witness, nor shall the member or employee participate in the
3 deliberations of the administrative law judge in such case. Any
4 endeavors or negotiations for conciliation shall not be received in
5 evidence.

6 (3) The respondent shall file a written answer to the complaint and
7 appear at the hearing in person or otherwise, with or without counsel,
8 and submit testimony and be fully heard. The respondent has the right
9 to cross-examine the complainant.

10 (4) The administrative law judge conducting any hearing may permit
11 reasonable amendment to any complaint or answer. Testimony taken at
12 the hearing shall be under oath and recorded.

13 (5) If, upon all the evidence, the administrative law judge finds
14 that the respondent has engaged in any unfair practice, the
15 administrative law judge shall state findings of fact and shall issue
16 and file with the commission and cause to be served on such respondent
17 an order requiring such respondent to cease and desist from such unfair
18 practice and to take such affirmative action, including, (but not
19 limited to) hiring, reinstatement or upgrading of employees, with or
20 without back pay, an admission or restoration to full membership rights
21 in any respondent organization, or to take such other action as, in the
22 judgment of the administrative law judge, will effectuate the purposes
23 of this chapter, including action that could be ordered by a court,
24 except that damages for humiliation and mental suffering shall not
25 exceed one thousand dollars, and including a requirement for report of
26 the matter on compliance.

27 (6) If a determination is made that retaliatory action, as defined
28 in RCW 42.40.050, has been taken against a whistleblower, as defined in
29 RCW 42.40.020, the administrative law judge may, in addition to any
30 other remedy, impose a civil penalty upon the retaliator of up to three

1 thousand dollars and issue an order to the state employer to suspend
2 the retaliator for up to thirty days without pay. At a minimum, the
3 administrative law judge shall require that a letter of reprimand be
4 placed in the retaliator's personnel file. All penalties recovered
5 shall be paid into the state treasury and credited to the general fund.

6 (7) The final order of the administrative law judge shall include
7 a notice to the parties of the right to obtain judicial review of the
8 order by appeal in accordance with the provisions of RCW 34.05.510
9 through 34.05.598, and that such appeal must be served and filed within
10 thirty days after the service of the order on the parties.

11 ((+7)) (8) If, upon all the evidence, the administrative law judge
12 finds that the respondent has not engaged in any alleged unfair
13 practice, the administrative law judge shall state findings of fact and
14 shall similarly issue and file an order dismissing the complaint.

15 ((+8)) (9) An order dismissing a complaint may include an award of
16 reasonable attorneys' fees in favor of the respondent if the
17 administrative law judge concludes that the complaint was frivolous,
18 unreasonable, or groundless.

19 ((+9)) (10) The commission shall establish rules of practice to
20 govern, expedite, and effectuate the foregoing procedure.

21 **Sec. 6.** RCW 43.09.050 and 1979 c 151 s 91 are each amended to read
22 as follows:

23 The auditor shall:

24 (1) Except as otherwise specifically provided by law, audit the
25 accounts of all collectors of the revenue and other holders of public
26 money required by law to pay the same into the treasury;

27 (2) In his or her discretion, inspect the books of any person
28 charged with the receipt, safekeeping, and disbursement of public
29 moneys;

1 (3) Investigate improper governmental activity under chapter 42.40

2 RCW;

3 (4) Inform the attorney general in writing of the necessity for
4 ((him)) the attorney general to direct prosecutions in the name of the
5 state for all official delinquencies in relation to the assessment,
6 collection, and payment of the revenue, against all persons who, by any
7 means, become possessed of public money or property, and fail to pay
8 over or deliver the same, and against all debtors of the state;

9 ((+4)) (5) Give information in writing to the legislature,
10 whenever required, upon any subject relating to the financial affairs
11 of the state, or touching any duties of his or her office;

12 ((+5)) (6) Report to the director of financial management in
13 writing the names of all persons who have received any moneys belonging
14 to the state, and have not accounted therefor;

15 ((+6)) (7) Authenticate with his or her official seal papers
16 issued from his or her office;

17 ((+7)) (8) Make his or her official report annually on or before
18 the 31st of December.

19 **Sec. 7.** RCW 43.88.160 and 1987 c 505 s 36 are each amended to read
20 as follows:

21 This section sets forth the major fiscal duties and
22 responsibilities of officers and agencies of the executive branch. The
23 regulations issued by the governor pursuant to this chapter shall
24 provide for a comprehensive, orderly basis for fiscal management and
25 control, including efficient accounting and reporting therefor, for the
26 executive branch of the state government and may include, in addition,
27 such requirements as will generally promote more efficient public
28 management in the state.

1 (1) Governor; director of financial management. The governor,
2 through the director of financial management, shall devise and
3 supervise a modern and complete accounting system for each agency to
4 the end that all revenues, expenditures, receipts, disbursements,
5 resources and obligations of the state shall be properly and
6 systematically accounted for. The accounting system shall include the
7 development of accurate, timely records and reports of all financial
8 affairs of the state. The system shall also provide for central
9 accounts in the office of financial management at the level of detail
10 deemed necessary by the director to perform central financial
11 management. The director of financial management shall adopt and
12 periodically update an accounting procedures manual. Any agency
13 maintaining its own accounting and reporting system shall comply with
14 the updated accounting procedures manual and the rules of the director
15 adopted under this chapter. An agency may receive a waiver from
16 complying with this requirement if the waiver is approved by the
17 director. Waivers expire at the end of the fiscal biennium for which
18 they are granted. The director shall forward notice of waivers granted
19 to the legislative fiscal committees. The director of financial
20 management may require such financial, statistical, and other reports
21 as the director deems necessary from all agencies covering any period.

22 The director of financial management is responsible for quarterly
23 reporting of primary budget drivers such as applicable workloads,
24 caseload estimates, and appropriate unit cost data. These reports
25 shall be transmitted to the legislative fiscal committees or by
26 electronic means to the legislative evaluation and accountability
27 program committee. Quarterly reports shall include actual monthly data
28 and the variance between actual and estimated data to date. The
29 reports shall also include estimates of these items for the remainder
30 of the budget period.

1 In addition, the director of financial management, as agent of the
2 governor, shall:

3 (a) Make surveys and analyses of agencies with the object of
4 determining better methods and increased effectiveness in the use of
5 manpower and materials; and the director shall authorize expenditures
6 for employee training to the end that the state may benefit from
7 training facilities made available to state employees;

8 (b) Report to the governor with regard to duplication of effort or
9 lack of coordination among agencies;

10 (c) Review any pay and classification plans, and changes
11 thereunder, developed by any agency for their fiscal impact: PROVIDED,
12 That none of the provisions of this subsection shall affect merit
13 systems of personnel management now existing or hereafter established
14 by statute relating to the fixing of qualifications requirements for
15 recruitment, appointment, or promotion of employees of any agency. The
16 director shall advise and confer with agencies including appropriate
17 standing committees of the legislature as may be designated by the
18 speaker of the house and the president of the senate regarding the
19 fiscal impact of such plans and may amend or alter said plans, except
20 that for the following agencies no amendment or alteration of said
21 plans may be made without the approval of the agency concerned:
22 Agencies headed by elective officials;

23 (d) Fix the number and classes of positions or authorized man years
24 of employment for each agency and during the fiscal period amend the
25 determinations previously fixed by the director except that the
26 director shall not be empowered to fix said number or said classes for
27 the following: Agencies headed by elective officials;

28 (e) Provide for transfers and repayments between the budget
29 stabilization account and the general fund as directed by appropriation
30 and RCW 43.88.525 through 43.88.540;

1 (f) Promulgate regulations to effectuate provisions contained in
2 (~~subsections~~) (a) through (e) (~~hereof~~) of this subsection.

3 (2) The treasurer shall:

4 (a) Receive, keep and disburse all public funds of the state not
5 expressly required by law to be received, kept and disbursed by some
6 other persons: PROVIDED, That this subsection shall not apply to those
7 public funds of the institutions of higher learning which are not
8 subject to appropriation;

9 (b) Disburse public funds under the treasurer's supervision or
10 custody by warrant or check;

11 (c) Keep a correct and current account of all moneys received and
12 disbursed by the treasurer, classified by fund or account;

13 (d) Perform such other duties as may be required by law or by
14 regulations issued pursuant to this law.

15 It shall be unlawful for the treasurer to issue any warrant or
16 check for public funds in the treasury except upon forms duly
17 prescribed by the director of financial management. Said forms shall
18 provide for authentication and certification by the agency head or the
19 agency head's designee that the services have been rendered or the
20 materials have been furnished; or, in the case of loans or grants, that
21 the loans or grants are authorized by law; or, in the case of payments
22 for periodic maintenance services to be performed on state owned
23 equipment, that a written contract for such periodic maintenance
24 services is currently in effect and copies thereof are on file with the
25 office of financial management; and the treasurer shall not be liable
26 under the treasurer's surety bond for erroneous or improper payments so
27 made: PROVIDED, That when services are lawfully paid for in advance of
28 full performance by any private individual or business entity other
29 than as provided for by RCW 42.24.035, such individual or entity other
30 than central stores rendering such services shall make a cash deposit

1 or furnish surety bond coverage to the state as shall be fixed in an
2 amount by law, or if not fixed by law, then in such amounts as shall be
3 fixed by the director of the department of general administration but
4 in no case shall such required cash deposit or surety bond be less than
5 an amount which will fully indemnify the state against any and all
6 losses on account of breach of promise to fully perform such services:
7 AND PROVIDED FURTHER, That no payments shall be made in advance for any
8 equipment maintenance services to be performed more than three months
9 after such payment. Any such bond so furnished shall be conditioned
10 that the person, firm or corporation receiving the advance payment will
11 apply it toward performance of the contract. The responsibility for
12 recovery of erroneous or improper payments made under this section
13 shall lie with the agency head or the agency head's designee in
14 accordance with regulations issued pursuant to this chapter. Nothing
15 in this section shall be construed to permit a public body to advance
16 funds to a private service provider pursuant to a grant or loan before
17 services have been rendered or material furnished.

18 (3) The state auditor shall:

19 (a) Report to the legislature the results of current post audits
20 that have been made of the financial transactions of each agency; to
21 this end the auditor may, in the auditor's discretion, examine the
22 books and accounts of any agency, official or employee charged with the
23 receipt, custody or safekeeping of public funds. The current post
24 audit of each agency may include a section on recommendations to the
25 legislature as provided in (c) of this subsection (~~((3)(c) of this~~
26 ~~section))~~).

27 (b) Give information to the legislature, whenever required, upon
28 any subject relating to the financial affairs of the state.

29 (c) Make the auditor's official report on or before the thirty-
30 first of December which precedes the meeting of the legislature. The

1 report shall be for the last complete fiscal period and shall include
2 at least the following:

3 Determinations as to whether agencies, in making expenditures,
4 complied with the laws of this state: PROVIDED, That nothing in *this
5 act shall be construed to grant the state auditor the right to perform
6 performance audits. A performance audit for the purpose of *this act
7 shall be the examination of the effectiveness of the administration,
8 its efficiency and its adequacy in terms of the programs of departments
9 or agencies as previously approved by the legislature. The authority
10 and responsibility to conduct such an examination shall be vested in
11 the legislative budget committee as prescribed in RCW 44.28.085 as now
12 or hereafter amended.

13 (d) Be empowered to take exception to specific expenditures that
14 have been incurred by any agency or to take exception to other
15 practices related in any way to the agency's financial transactions and
16 to cause such exceptions to be made a matter of public record,
17 including disclosure to the agency concerned and to the director of
18 financial management. It shall be the duty of the director of
19 financial management to cause corrective action to be taken promptly,
20 such action to include, as appropriate, the withholding of funds as
21 provided in RCW 43.88.110.

22 (e) Promptly report any irregularities to the attorney general.

23 (f) Investigate improper governmental activity under chapter 42.40
24 RCW.

25 (4) The legislative budget committee may:

26 (a) Make post audits of the financial transactions of any agency
27 and management surveys and program reviews as provided for in RCW
28 44.28.085 as now or hereafter amended. To this end the committee may
29 in its discretion examine the books, accounts, and other records of any
30 agency, official, or employee.

1 (b) Give information to the legislature or any legislative
2 committee whenever required upon any subject relating to the
3 performance and management of state agencies.

4 (c) Make a report to the legislature which shall include at least
5 the following:

6 (i) Determinations as to the extent to which agencies in making
7 expenditures have complied with the will of the legislature and in this
8 connection, may take exception to specific expenditures or financial
9 practices of any agencies; and

10 (ii) Such plans as it deems expedient for the support of the
11 state's credit, for lessening expenditures, for promoting frugality and
12 economy in agency affairs and generally for an improved level of fiscal
13 management.

14 NEW SECTION. **Sec. 8.** The sum of twenty thousand dollars, or
15 as much thereof as may be necessary, is appropriated for the biennium
16 ending June 30, 1993, from the general fund to the human rights
17 commission for the purposes of this act.