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1997 Regular Session

By Representatives D. Sommers, D. Schmidt, Backlund, Clements, Appelwick, Dunshee, Buck, Scott, Dyer, Cooper, Conway, Cody, Cole, L. Thomas, Romero, Regala, Chopp, Doumit, Alexander, Cooke, Poulsen, Kessler, Blalock and Costa; by request of State Auditor

Read first time 02/18/97. Referred to Committee on Government Administration.

1 AN ACT Relating to whistleblowers; amending RCW 42.40.020,
2 42.40.040, and 42.40.050; adding new sections to chapter 42.40 RCW; and
3 declaring an emergency.

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

5 **Sec. 1.** RCW 42.40.020 and 1995 c 403 s 509 are each amended to
6 read 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) "Abuse" means acting in an arbitrary and capricious manner that
11 adversely affects the accomplishment of an agency function.

12 (2) "Auditor" means the office of the state auditor.

13 ~~((+2+))~~ (3) "Employee" means any individual employed or holding
14 office in any department or agency of state government.

15 ~~((+3+))~~ (4)(a) "Improper governmental action" means any action by
16 an employee:

17 (i) Which is undertaken in the performance of the employee's
18 official duties, whether or not the action is within the scope of the
19 employee's employment; ~~((and))~~

1 (ii) ~~(is in violation of any state law or rule, is an abuse~~
2 ~~of authority,)~~ results in substantial abuse, misuse, destruction,
3 waste, or loss of public funds or public resources;

4 (iii) Which is in violation of any federal or state law or rule; or

5 (iv) Which is of substantial and specific danger to the public
6 health or safety~~(, or is a gross waste of public funds)~~.

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

17 ~~((4))~~ (5) "Misuse" means an unauthorized use.

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

24 ~~((5))~~ (7) "Waste" means an unnecessary or unreasonable
25 expenditure or use.

26 (8) "Whistleblower" means an employee who in good faith reports
27 alleged improper governmental action to the auditor, initiating an
28 investigation under RCW 42.40.040. For purposes of the provisions of
29 this chapter and chapter 49.60 RCW relating to reprisals and
30 retaliatory action, the term "whistleblower" also means: (a) An
31 employee who in good faith provides information to the auditor in
32 connection with an investigation under RCW 42.40.040 and an employee
33 who is believed to have reported alleged improper governmental action
34 to the auditor or to have provided information to the auditor in
35 connection with an investigation under RCW 42.40.040 but who, in fact,
36 has not reported such action or provided such information; or (b) an
37 employee who in good faith identifies rules warranting review or
38 provides information to the rules review committee, and an employee who
39 is believed to have identified rules warranting review or provided

1 information to the rules review committee but who, in fact, has not
2 done so.

3 **Sec. 2.** RCW 42.40.040 and 1992 c 118 s 2 are each amended to read
4 as follows:

5 (1)(a) In order to be investigated, an allegation of improper
6 governmental action must be provided to the auditor within one year
7 after the occurrence of that alleged improper governmental action.

8 (b) The auditor has the discretion to review allegations received
9 from whistleblowers to determine whether they contain sufficient merit
10 and specificity to warrant investigation or whether the matter already
11 has been sufficiently investigated by another authority. In addition,
12 the auditor may determine whether the matter should be investigated as
13 part of an audit under chapter 43.09 RCW.

14 (2) Upon receiving specific information that an employee has
15 engaged in improper governmental action, the auditor shall, within
16 ((five)) fifteen working days of receipt of the information, mail
17 written acknowledgement to the whistleblower at the address provided.
18 For a period not to exceed ((thirty)) sixty days, the auditor shall
19 conduct such preliminary investigation of the matter as the auditor
20 deems appropriate. ((In conducting the investigation,)) The identity
21 of the whistleblower shall be kept confidential.

22 ((+2)) (3) In addition to the authority under subsection ((+1))
23 (2) of this section, the auditor may, on its own initiative,
24 investigate incidents of improper state governmental action.

25 ((+3)) (4)(a) If it appears to the auditor, upon completion of the
26 preliminary investigation, that the matter is so unsubstantiated that
27 no further investigation, prosecution, or administrative action is
28 warranted, the auditor shall so notify the whistleblower.

29 (b) The notification shall be by memorandum containing a summary of
30 the information received, a summary of the results of the preliminary
31 investigation with regard to each allegation of improper governmental
32 action, and any determination made by the auditor under (c) of this
33 subsection.

34 (c) In any case to which this section applies, the identity of the
35 whistleblower shall be kept confidential unless the auditor determines
36 that the information has been provided other than in good faith.

37 ((If it appears to the auditor that the matter does not meet
38 the definition of an "improper governmental action" under RCW

1 42.40.020(3), or is other than a gross waste of public funds,)) The
2 auditor may forward a summary of the allegations to ((the)) an
3 appropriate agency for investigation ((and require a response by
4 memorandum no later than thirty days after the allegations are received
5 from the auditor. The response shall contain a summary of the
6 investigation with regard to each allegation and any determination of
7 corrective action taken. The auditor will keep the identity of the
8 whistleblower confidential. Upon receipt of the results of the
9 investigation from the appropriate agency, the auditor will notify the
10 whistleblower as prescribed under (a), (b), and (c) of this
11 subsection)). The agency shall complete an investigation and report
12 back to the auditor no later than sixty days after the allegations are
13 received from the auditor. All procedural and confidentiality
14 provisions of this chapter apply to investigations conducted under this
15 subsection.

16 ((+4)) (5) If it appears to the auditor after completion of the
17 preliminary investigation that further investigation, prosecution, or
18 administrative action is warranted, the auditor shall so notify the
19 whistleblower and either conduct further investigations or issue a
20 report under subsection ((+6)) (7) of this section. Within sixty days
21 after the ((thirty-day)) sixty-day period in subsection ((+1)) (2) of
22 this section, the auditor shall complete the investigation and report
23 its findings to the whistleblower unless written justification for the
24 delay is furnished to the whistleblower. In all such cases, the report
25 of the auditor's investigation and findings shall be sent to the
26 whistleblower within one year after the information was filed under
27 subsection ((+1)) (2) of this section. If further investigation is to
28 occur, the auditor shall provide written notification of the nature of
29 the assertions to the subject or subjects of the investigation.

30 ((+5)) (6)(a) At any stage of an investigation under this section
31 the auditor may require by subpoena the attendance and testimony of
32 witnesses and the production of documentary or other evidence relating
33 to the investigation at any designated place in the state. The auditor
34 may issue and serve subpoenas, administer oaths, examine witnesses, and
35 receive evidence. In the case of contumacy or failure to obey a
36 subpoena, the superior court for the county in which the person to whom
37 the subpoena is addressed resides or is served may issue an order
38 requiring the person to appear at any designated place to testify or to

1 produce documentary or other evidence. Any failure to obey the order
2 of the court may be punished by the court as a contempt thereof.

3 (b) The auditor may order the taking of depositions at any stage of
4 a proceeding or investigation under this chapter. Depositions shall be
5 taken before an individual designated by the auditor and having the
6 power to administer oaths. Testimony shall be reduced to writing by or
7 under the direction of the individual taking the deposition and shall
8 be subscribed by the deponent.

9 ~~((+6+))~~ (7)(a) If the auditor determines that there is reasonable
10 cause to believe that an employee has engaged in any improper activity,
11 the auditor shall report the nature and details of the activity to:

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

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

15 (b) If, at the completion of the auditor's investigation, the
16 matter is referred to another authority, the receiving authority must
17 maintain the whistleblowers' confidentiality.

18 (c) The auditor has no enforcement power except that in any case in
19 which the auditor submits a report of alleged improper governmental
20 activity to the ~~((head of an))~~ agency, the ~~((attorney general, or any~~
21 ~~other individual to which a report has been made under this section,~~
22 ~~the individual shall report to the auditor with respect to any action~~
23 ~~taken by the individual regarding the activity, the first report being~~
24 ~~transmitted no later than thirty days after the date of the auditor's~~
25 ~~report and monthly thereafter until final action is taken))~~ agency
26 shall send its plan for corrective action to the auditor within thirty
27 days of having received the report. The auditor may require periodic
28 reports of corrective action until all such action has been completed.
29 The agency shall complete all corrective action within six months after
30 the date of the auditor's report. In taking corrective action, the
31 agency shall consider the recovery of the costs of investigating the
32 improper governmental action. If the auditor determines that
33 appropriate action ~~((is))~~ has not ~~((being))~~ been taken within ~~((a~~
34 ~~reasonable time))~~ the time limits under this subsection (7)(c), the
35 auditor shall report the determination to the governor and to the
36 legislature.

37 ~~((+7+))~~ (8) This section does not limit any authority conferred
38 upon the attorney general or any other agency of government to
39 investigate any matter.

1 **Sec. 3.** RCW 42.40.050 and 1992 c 118 s 3 are each amended to read
2 as follows:

3 Any person who is a whistleblower, as defined in RCW 42.40.020, and
4 who as a result of being a whistleblower has been subjected to
5 workplace reprisal or retaliatory action has the remedies provided
6 under chapter 49.60 RCW. For the purpose of this section "reprisal or
7 retaliatory action" means but is not limited to:

8 (1) Denial of adequate staff to perform duties;

9 (2) Frequent staff changes;

10 (3) Frequent and undesirable office changes;

11 (4) Refusal to assign meaningful work;

12 (5) Unwarranted and unsubstantiated letters of reprimand or
13 unsatisfactory performance evaluations;

14 (6) Demotion;

15 (7) Reduction in pay;

16 (8) Denial of promotion;

17 (9) Suspension;

18 (10) Dismissal;

19 (11) Denial of employment; ((and))

20 (12) A supervisor or superior encouraging coworkers to behave in a
21 hostile manner toward the whistleblower; and

22 (13) Actions which violate RCW 42.40.030.

23 Nothing in this section prohibits an agency from making any
24 decision exercising its authority to terminate, suspend, or discipline
25 an employee who engages in workplace reprisal or retaliatory action
26 against a whistleblower. However, the agency also shall implement any
27 order under chapter 49.60 RCW (other than an order of suspension if the
28 agency has terminated the retaliator).

29 NEW SECTION. **Sec. 4.** The auditor has the authority to contract
30 for any assistance necessary to carry out the provisions of this
31 chapter.

32 NEW SECTION. **Sec. 5.** The cost of administering this chapter is
33 funded through the audit services revolving fund created in RCW
34 43.09.410.

35 NEW SECTION. **Sec. 6.** A whistleblower wishing to provide
36 information under this chapter regarding alleged improper governmental

1 action against the state auditor or an employee of that office shall
2 provide the information to the attorney general who shall act in place
3 of the auditor in investigating and reporting the matter.

4 NEW SECTION. **Sec. 7.** Sections 4 through 6 of this act are each
5 added to chapter 42.40 RCW.

6 NEW SECTION. **Sec. 8.** This act is necessary for the immediate
7 preservation of the public peace, health, or safety, or support of the
8 state government and its existing public institutions, and takes effect
9 immediately.

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