

SENATE BILL 5645

State of Washington 56th Legislature 1999 Regular Session

By Senators Patterson, McCaslin, Winsley, Haugen, Jacobsen, Goings, Fraser, Spanel, Kline, Long, Prentice, T. Sheldon, Rasmussen, Honeyford, Swecker, Rossi, Franklin, Stevens, Costa, Oke, Eide and McAuliffe; by request of State Auditor

Read first time 02/01/1999. Referred to Committee on State & Local Government.

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;
3 providing an effective date; and 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 in
11 carrying out official duties.

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 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))~~ asserted improper
34 governmental action to the auditor or to have provided information to
35 the auditor in connection with an investigation under RCW 42.40.040 but
36 who, in fact, has not reported such action or provided such
37 information; or (b) an employee who in good faith identifies rules
38 warranting review or provides information to the rules review
39 committee, and an employee who is believed to have identified rules

1 warranting review or provided information to the rules review committee
2 but who, in fact, has not 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 assertion of improper
6 governmental action must be provided to the auditor within one year
7 after the occurrence of the asserted improper governmental action.

8 (b) The auditor has the authority to determine whether to
9 investigate any assertions received. In determining whether to conduct
10 either a preliminary or further investigation, the auditor shall
11 consider factors including, but not limited to: The nature and quality
12 of evidence and the existence of relevant laws and rules; whether the
13 action was isolated or systematic; the history of previous assertions
14 of the same nature; whether other avenues are available for addressing
15 the matter; whether the matter has already been investigated or is in
16 litigation; and the cost and benefit of the investigation. The auditor
17 has the sole discretion to determine the priority and weight given to
18 these and other relevant factors and to decide whether a matter is to
19 be investigated. The auditor shall document the factors considered and
20 the analysis applied.

21 (c) The auditor also has the authority to investigate assertions as
22 part of an audit conducted under chapter 43.09 RCW. The auditor shall
23 document the reasons for handling the matter as part of such an audit.

24 (2) The identity of a whistleblower is confidential at all times
25 unless the whistleblower consents to disclosure by written waiver or by
26 acknowledging his or her identity in a claim against the state for
27 retaliation.

28 (3) Upon receiving specific information that an employee has
29 engaged in improper governmental action, the auditor shall, within
30 ((five)) fifteen working days of receipt of the information, mail
31 written acknowledgement to the whistleblower at the address provided
32 stating whether the assertion will be investigated. For a period not
33 to exceed ((thirty)) sixty days from receipt of the assertion, the
34 auditor shall conduct such preliminary investigation of the matter as
35 the auditor deems appropriate. ((In conducting the investigation, the
36 identity of the whistleblower shall be kept confidential.

1 ~~((2))~~ (4) In addition to the authority under subsection ~~((1))~~ (3)
2 of this section, the auditor may, on its own initiative, investigate
3 incidents of improper state governmental action.

4 ~~((3))~~ (5)(a) If it appears to the auditor, upon completion of the
5 preliminary investigation, that the matter is so unsubstantiated that
6 no further investigation, prosecution, or administrative action is
7 warranted, the auditor shall so notify the whistleblower.

8 (b) The written notification shall ~~((be by memorandum containing))~~
9 contain a summary of the information received~~((, a summary))~~ and of the
10 results of the preliminary investigation with regard to each
11 ~~((allegation))~~ assertion of improper governmental action~~((, and any~~
12 ~~determination made by the auditor under (c) of this subsection.~~

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

16 ~~((d) If it appears to the auditor that the matter does not meet~~
17 ~~the definition of an "improper governmental action" under RCW~~
18 ~~42.40.020(3), or is other than a gross waste of public funds,))~~ (c) The
19 auditor may forward a summary of the ~~((allegations))~~ assertions to
20 ~~((the))~~ an appropriate agency for investigation ~~((and require a~~
21 ~~response by memorandum no later than thirty days after the allegations~~
22 ~~are received from the auditor. The response shall contain a summary of~~
23 ~~the investigation with regard to each allegation and any determination~~
24 ~~of corrective action taken. The auditor will keep the identity of the~~
25 ~~whistleblower confidential. Upon receipt of the results of the~~
26 ~~investigation from the appropriate agency, the auditor will notify the~~
27 ~~whistleblower as prescribed under (a), (b), and (c) of this~~
28 ~~subsection))~~ and resolution at any time during the process. If
29 requested by the auditor, the agency shall complete an investigation
30 and report back to the auditor no later than sixty days after the
31 assertions are received from the auditor. The auditor is entitled to
32 all investigative records. All procedural and confidentiality
33 provisions of this chapter apply to investigations conducted under this
34 subsection. The auditor shall document the reasons the assertions were
35 referred.

36 ~~((4))~~ (6) During the preliminary investigation, the auditor shall
37 provide written notification of the nature of the assertions to the
38 subject or subjects of the investigation and the agency head. The
39 notification shall include the relevant facts and laws known at the

1 time and the procedure for the subject of the investigation and the
2 agency head to respond to the assertions and information obtained
3 during the investigation. This notification does not limit the auditor
4 from considering additional facts or laws which become known during
5 further investigation.

6 (7) If it appears to the auditor after completion of the
7 preliminary investigation that further investigation, prosecution, or
8 administrative action is warranted, the auditor shall so notify the
9 whistleblower, the subject of the investigation, and the agency head
10 and either conduct a further investigation((s)) or issue a report under
11 subsection ((+6)) (9) of this section. Within sixty days after the
12 ((~~thirty-day~~) sixty-day period in subsection ((+1)) (3) of this
13 section, the auditor shall complete the investigation and report its
14 findings to the whistleblower unless written justification for the
15 delay is furnished to the whistleblower. In all such cases, the report
16 of the auditor's investigation and findings shall be sent to the
17 whistleblower within one year after the information was filed under
18 subsection ((+1)) (3) of this section. If further investigation is to
19 occur, the auditor shall provide written notification of the nature of
20 the assertions to the subject or subjects of the investigation and the
21 agency head. The notification shall include the relevant facts known
22 at the time and the procedure for the subject of the investigation and
23 the agency head to respond to the assertions and information obtained
24 during the investigation.

25 ((+5)) (8)(a) At any stage of an investigation under this section
26 the auditor may require by subpoena the attendance and testimony of
27 witnesses and the production of documentary or other evidence relating
28 to the investigation at any designated place in the state. The auditor
29 may issue and serve subpoenas, administer oaths, examine witnesses, and
30 receive evidence. In the case of contumacy or failure to obey a
31 subpoena, the superior court for the county in which the person to whom
32 the subpoena is addressed resides or is served may issue an order
33 requiring the person to appear at any designated place to testify or to
34 produce documentary or other evidence. Any failure to obey the order
35 of the court may be punished by the court as a contempt thereof.

36 (b) The auditor may order the taking of depositions at any stage of
37 a proceeding or investigation under this chapter. Depositions shall be
38 taken before an individual designated by the auditor and having the
39 power to administer oaths. Testimony shall be reduced to writing by or

1 under the direction of the individual taking the deposition and shall
2 be subscribed by the deponent.

3 ~~((6))~~ (c) Agencies shall cooperate fully in the investigation and
4 shall take appropriate action to preclude the destruction of any
5 evidence during the course of the investigation.

6 (d) During the investigation the auditor shall interview each
7 subject of the investigation. The subject and the agency head shall be
8 given a minimum of fifteen days to respond to the assertions prior to
9 the issuance of the final report.

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

14 (i) The ~~((employee))~~ subject of the investigation and the head of
15 the employing agency; and

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

18 (b) If the assertions fall within the authority of the office of
19 financial management as set forth in chapter 43.88 RCW, it is the duty
20 of the director of financial management to cause resolution to occur
21 within six months, such an action to include, as appropriate, the
22 withholding of funds as provided in RCW 43.88.110. The director of
23 financial management shall annually report by December 31st of each
24 year the status of whistleblower resolutions to the appropriate
25 committees of the legislature, the state auditor, and the attorney
26 general.

27 (c) The auditor has no enforcement power except that in any case in
28 which the auditor submits ~~((a))~~ an investigative report ~~((of alleged~~
29 improper activity)) containing reasonable cause determinations to the
30 ~~((head of an))~~ agency, the ~~((attorney general, or any other individual~~
31 to which a report has been made under this section, the individual
32 shall report to the auditor with respect to any action taken by the
33 individual regarding the activity, the first report being transmitted
34 no later than thirty days after the date of the auditor's report and
35 monthly thereafter until final action is taken)) agency shall send its
36 plan for resolution to the auditor within fifteen days of having
37 received the report. The agency is encouraged to consult with the
38 subject or subjects in establishing the resolution plan. The auditor
39 may require periodic reports of agency action until all resolution has

1 occurred. The agency shall resolve the matter within six months after
2 the date of the auditor's report. If the auditor determines that
3 appropriate action ~~((is))~~ has not ~~((being))~~ been taken within ~~((a~~
4 ~~reasonable time))~~ the time limits under this subsection (9)(c), the
5 auditor shall report the determination to the governor and to the
6 legislature and may include this determination in the agency audit
7 under chapter 43.09 RCW.

8 ~~((+7))~~ (10) This section does not limit any authority conferred
9 upon the attorney general or any other agency of government to
10 investigate any matter.

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

13 (1) Any person who is a whistleblower, as defined in RCW 42.40.020,
14 and who as a result of being a whistleblower has been subjected to
15 workplace reprisal or retaliatory action has the remedies provided
16 under chapter 49.60 RCW. For the purpose of this section "reprisal or
17 retaliatory action" means but is not limited to:

- 18 ~~((+1))~~ (a) Denial of adequate staff to perform duties;
- 19 ~~((+2))~~ (b) Frequent staff changes;
- 20 ~~((+3))~~ (c) Frequent and undesirable office changes;
- 21 ~~((+4))~~ (d) Refusal to assign meaningful work;
- 22 ~~((+5))~~ (e) Unwarranted and unsubstantiated letters of reprimand or
23 unsatisfactory performance evaluations;
- 24 ~~((+6))~~ (f) Demotion;
- 25 ~~((+7))~~ (g) Reduction in pay;
- 26 ~~((+8))~~ (h) Denial of promotion;
- 27 ~~((+9))~~ (i) Suspension;
- 28 ~~((+10))~~ (j) Dismissal;
- 29 ~~((+11))~~ (k) Denial of employment; ~~((and~~
30 ~~+12))~~ (l) A supervisor or superior encouraging coworkers to behave
31 in a hostile manner toward the whistleblower; and
32 (m) Actions which violate RCW 42.40.030.

33 (2) Nothing in this section prohibits an agency from making any
34 decision exercising its authority to terminate, suspend, or discipline
35 an employee who engages in workplace reprisal or retaliatory action
36 against a whistleblower. However, the agency also shall implement any
37 order under chapter 49.60 RCW (other than an order of suspension if the
38 agency has terminated the retaliator).

1 (3) Nothing in this section prohibits an agency from making any
2 decision exercising its authority to terminate, suspend, or discipline
3 any employee for reasons unrelated to the employee's status as a
4 whistleblower.

5 NEW SECTION. **Sec. 4.** The auditor has the authority to contract
6 for any assistance necessary to carry out the provisions of this
7 chapter.

8 NEW SECTION. **Sec. 5.** The cost of administering this chapter is
9 funded through the auditing services revolving account created in RCW
10 43.09.410.

11 NEW SECTION. **Sec. 6.** A whistleblower wishing to provide
12 information under this chapter regarding asserted improper governmental
13 action against the state auditor or an employee of that office shall
14 provide the information to the attorney general who shall act in place
15 of the auditor in investigating and reporting the matter.

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

18 NEW SECTION. **Sec. 8.** This act is necessary for the immediate
19 preservation of the public peace, health, or safety, or support of the
20 state government and its existing public institutions, and takes effect
21 July 1, 1999.

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