

HOUSE BILL REPORT

HB 3193

As Reported by House Committee On:
State Government & Tribal Affairs

Title: An act relating to state employee whistleblower protection.

Brief Description: Modifying state whistleblower protections.

Sponsors: Representatives Ormsby, Chandler, Hunt, Kretz, Green, Armstrong, Kessler, Appleton, Hudgins, Dickerson, Kelley, Morrell, Sells, VanDeWege, Wood, Kenney and Conway.

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/30/08, 2/7/08 [DP].

Brief Summary of Bill

- Expands protections for state employee whistleblowers.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: Do pass. Signed by 8 members: Representatives Hunt, Chair; Appleton, Vice Chair; Chandler, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Kretz, Lias, Miloscia and Ormsby.

Staff: Tracey Taylor (786-7196).

Background:

The State Whistleblower Act (Act) was created in 1982 to encourage state employees to report improper governmental actions and to protect the rights of state employees making such disclosures. Under the Act, retaliatory actions are prohibited against the employee who discloses the information concerning the improper governmental action.

Summary of Bill:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Legislature's intent for this legislation is to protect public servants who step forward to inform the citizens of Washington about the actions of their government that are contrary to the law or the public's interest. The Act shall be broadly construed.

Whistleblower Act Procedures

The State Auditor (Auditor) has the authority to investigate, within available resources, reports of improper government activities made by whistleblowers to any public official. Any public official receiving the report must submit a record of that report to the Auditor within 15 business days of receiving it. The period of time the Auditor has to investigate a report is extended from 30 to 60 working days.

If the Auditor's preliminary investigation indicates the allegations are unsubstantiated, the Auditor, prior to making the determination, must provide a preliminary notification to the whistleblower summarizing where the allegations are deficient and provide a reasonable opportunity for the employee to reply.

If the Auditor determines there is reasonable cause to believe an employee or public official has engaged in improper governmental action, the Auditor must report, to the extent allowed under the Public Disclosure Act, the nature and details to not only the subjects of the investigation, the head of the employing agency and the Attorney General, but also to the Governor, the Secretary of the Senate, the Chief Clerk of the House of Representatives and the public, unless the release of such information is prohibited by statute or executive order.

If the appropriate action to resolve the matter takes more than one year, the Auditor must report quarterly, instead of annually, to the whistleblower, the agency head, and the subject or subjects of the investigation.

Confidentiality Under the Act

The current confidential protections of the whistleblower's identity is expanded to include identifying characteristics. The exception to the confidentiality provisions is expanded to include the disclosure of the employee's identity if it is necessary because of imminent danger to public health or safety or imminent violation of criminal law. If the Auditor makes such a determination, the Auditor must provide reasonable advance notice to the employee that his or her identity or identifying characteristics are to be disclosed.

Retaliatory Actions

"Reprisal or retaliatory action" is further clarified to include, but is not limited to, threatening, taking, directing others to take, recommending, processing, or approving certain actions because of conduct protected by the Act. Among the new examples added: creating a hostile work environment; removal from a pending assignment; denial of training; and issuance of or attempt to enforce any nondisclosure policy, form, or agreement in a manner that is inconsistent with prior practice.

The standard of proof for rebutting the presumption of retaliatory action is changed from preponderance of the evidence to clear and convincing evidence that the agency action or actions were justified by reasons unrelated to the employee's whistleblower status and the

agency would have taken the same action for lawful, independent reasons if the whistleblower had not engaged in the protected conduct.

In cases where the file has been certified to the Human Rights Commission (Commission), if a determination is made that retaliatory action has been taken against a whistleblower, the administrative law judge may now require the agency to transfer the whistleblower at his or her request and consent to any other available position for which the whistleblower is qualified, and order restoration of benefits, back pay and any increases in compensation which would have occurred, with interest. The amount of the civil penalty that may be imposed upon the retaliator is increased from \$3,000 to up to \$5,000. The administrative law judge may also order the state employer to terminate the retaliator.

A whistleblower complaining about retaliation may request an emergency hearing. Upon such request, the administrative law judge must conduct emergency proceedings and may provide interim relief to prevent or reverse any alleged retaliation. In order to occur, there must be a determination that the employee is a "whistleblower" under the Act or has reported the alleged occurrence of improper governmental action to a public official.

Any gag order or nondisclosure order, policy or agreement that precludes, undermines, obstructs, or otherwise adversely affects conduct, rights or relief protected by the Act shall be void from inception, and no agency can spend any funds to implement or enforce any such order, policy or agreement.

A complaint alleging whistleblower retaliation must be filed within two years of the alleged retaliation.

The limit for damages for humiliation and mental suffering is increased from \$10,000 to \$20,000.

If the Commission has not issued a final decision on the alleged retaliation within 180 days, or within 90 days if the Commission denied the requested relief in whole or in part, the whistleblower may seek injunctive relief or final relief by filing an action for de novo review of the complaint by Superior Court. Either party may request a jury trial.

Definitions

"Abuse of authority" is defined as the use of power and authority in a manner that is arbitrary and capricious, coercive, or demeaning. It also includes willful malfeasance or a willful failure to perform a duty and that failure to perform adversely affects the rights of another person or results in improper personal gain or advantage.

The definition of "employee" is clarified to include persons under contract to a department or agency, excluding volunteers.

The definition of "good faith" is clarified to mean there is a reasonable basis in fact for the belief or communication and the employee has made a reasonable attempt to ascertain the correctness of the belief or communication. Good faith is lacking where the employee reports information that is knowingly false or frivolous or with a reckless disregard for the truth.

"Gross mismanagement" is defined as the arbitrary or capricious exercise of management responsibilities in a manner grossly deviating from the standard of care that a reasonable person would observe in the same situation.

The definition of "improper governmental action" is expanded to include gross mismanagement, abuse of authority or an action that prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless the disclosure is otherwise prohibited by state law or common law privilege.

A definition of "public official" is added. It means the employee's direct or secondary supervisors, other agency managers and the Attorney General.

The definition of "use of official authority or influence" is clarified. It includes threatening actions. In addition, personnel action may include, but is not limited to duties and office location and determining any material changes in pay, provision of training or benefits, and the tolerance of a hostile work environment.

The definition of "whistleblower" is expanded to include an individual with a current application for a position carrying out the responsibilities of the department or agency of state government that the complaint concerns who refuses to violate any federal, state or local law. It also includes an employee or applicant that is perceived by the employer as reporting or about to report alleged improper government action, unless public disclosure is prohibited by statute or executive order, in which case the employee may disclose the information to the Auditor.

General Provisions

Government employees must be provided annual notice of their rights under the Act.

The Act does not preclude the availability of other remedies. The availability of remedies under the Act does not preclude the use of other remedies.

This bill does not affect the jurisdiction of the Legislative Ethics Board, the Executive Ethics Board, or the Commission on Judicial Conduct. The Senate, the House of Representatives and the Supreme Court must still adopt policies regarding the applicability of the Act to the Senate, House of Representatives, and the judiciary.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Although there is a state law that protects whistleblowers, they are only protected if they make their report to the Auditor. If someone reports an allegation of improper

government action to the Governor, Attorney General, or an elected representative, they are not protected under the Act. Currently, a whistleblower cannot even make a report to another manager in their own organization and be protected. This bill will assist those who are willing to come forward and expose government misconduct to a more inclusive group without fearing reprisals. Also, the bill is the result of collaboration by the stakeholder groups. Improper government action will include the prevention of dissemination of scientific opinion or the alteration of technical findings without scientifically valid justification. This is an issue for a few agencies who do important and complex work. Washington ranks 33 in the nation for whistleblower protections and this bill will not only increase protections, but provide a more open government. The change in the burden of proof from rebutting an allegation of retaliation is important, as is including other public officials in the reporting mechanism.

(With concerns) Although strong whistleblower protections are important, there are several areas where this bill needs additional work. First, defining improper government action to include the prevention of the dissemination of scientific opinion is troublesome as written --what constitutes dissemination? Additional work is needed to clarify this is necessary so agencies understand their obligations. In addition, the change in the burden of proof to rebut a presumption of retaliation is problematic for agencies. It increases the burden of proof for an agency significantly. The expansion of remedies available to the Administrative Law Judge to include termination of a whistleblower impedes on the ability of leadership and management to handle the situation appropriately.

(Opposed) This is a significant expansion of the whistleblower laws. The burden of proof change is significant and unprecedented. This could increase the costs to state agencies and the courts by increasing the number of complaints. In addition, the section addressing scientific opinion needs clarification in order to properly work. The bill also may conflict with collective bargaining agreements and the state civil service law. The bill also provides an Administrative Law Judge broad remedial authority with very little guidance how proceedings will be conducted or the burden of proof required by parties in an emergency hearing. There are other significant reasons for concern with the bill as written.

Persons Testifying: (In support) Representative Ormsby, prime sponsor; Matt Zuvich, Pete Kmet and Drea Traeumer, Washington Federation of State Employees; Tom Carpenter, The Governmental Accountability Project; and Linda Long, State Auditor's Office.

(With concerns) Polly Zehm, Department of Ecology; and Mike Sellars, Department of Personnel.

(Opposed) Lisa Sutton, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying: None.