

HOUSE BILL REPORT

ESSB 5577

As Reported by House Committee On:
Government Operations & Elections

Title: An act relating to protecting public employees who act ethically and legally.

Brief Description: Protecting public employees who act ethically and legally.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senator Carrell).

Brief History:

Committee Activity:

Government Operations & Elections: 3/26/13, 4/2/13 [DPA].

**Brief Summary of Engrossed Substitute Bill
(As Amended by Committee)**

- Establishes that knowing acquiescence by a supervisor in the ethics violation of an employee is itself an ethics violation.
- Exempts from disclosure under the Public Records Act certain information revealing the identity of a state employee or officer who has reported improper governmental action.
- Modifies provisions governing an ethics board's investigation of a complaint.
- Makes changes to whistleblower protections for state employees and officers, including establishment of a \$5,000 civil penalty for retaliation or reprisal.
- Requires appointment of ethics advisors for each executive branch agency.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: Do pass as amended. Signed by 9 members: Representatives Hunt, Chair; Bergquist, Vice Chair; Buys, Ranking Minority Member; Alexander, Carlyle, Fitzgibbon, Manweller, Orwall and Van De Wege.

Minority Report: Do not pass. Signed by 2 members: Representatives Taylor, Assistant Ranking Minority Member; Kristiansen.

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.

Staff: Jasmine Vasavada (786-7301).

Background:

In 1994 the Legislature enacted the Ethics in Public Service Act (Act), establishing new and revised ethics rules, consolidating them in a single Revised Code of Washington chapter, and applying the new chapter to all state officials and employees of the executive, legislative, and judicial branches of state government. The Act created the Executive Ethics Board (EEB) and Legislative Ethics Board, and expanded the authority of the Commission on Judicial Conduct. Each of these ethics boards have broad powers to enforce the ethics chapter, and may investigate and initiate complaints regarding the conduct of state government employees.

Ethical Violations.

The Act generally addresses conflicts of interest, improper use of state resources, compensation for outside activities, and gifts. It provides that all state officers and employees have a duty to ensure the proper stewardship of state resources, and that those resources may not be used for the private benefit or gain of a state employee, officer, another employee, person, or organization. A state officer or employee is generally prohibited from having a beneficial interest in a contract with a state agency and is prohibited from accepting a thing of economic value by contract or grant unless certain conditions are met. These include the requirements that performance of the contract does not take place within the course of official duties, is not prohibited by outside employment laws, is not compensated by someone from whom the officer or employee would be prohibited from receiving a gift, the contract or grant is not expressly created by the officer or employee, and the contract or grant does not require unauthorized disclosure of confidential information.

No state officer or employee may intentionally conceal a record, where the person knows that the disclosure is required under the Public Records Act, and the person is under a personal obligation to disclose the record. This prohibition does not apply where the state officer or employee makes the decision to withhold the record in good faith. The EEB has determined that a delay in disclosing a requested public record may constitute intentional concealment.

Investigation of an Ethics Complaint.

Any person may file a complaint with an ethics board alleging violations of the ethics law. The staff's investigation of the complaint is limited to the assertions made in the complaint. The staff must either determine that the complaint should be dismissed or recommend to the board that there is or is not reasonable cause to believe that an ethics violation has occurred. The board or the staff may issue an order of dismissal based on a finding that the complaint is outside of the board's jurisdiction, is unfounded or frivolous, or alleges violations that do not constitute material violations of the ethics laws. If the staff issues an order of dismissal, the order may be appealed to the appropriate ethics board.

If the investigation results in a determination of reasonable cause that a violation occurred, the ethics board must hold a public hearing on the merits of the complaint. The staff of the appropriate ethics board must present the case in support of the complaint. The respondent must file a response to the complaint and may appear in person at the hearing and submit testimony. If the ethics board finds, upon a preponderance of evidence, that the respondent

has violated ethics laws, an enforcement action may be taken. If the ethics board finds that the respondent has not violated the law, it must file an order dismissing the complaint.

Penalties.

Upon finding that an ethics violation has occurred, an ethics board may order payment of any damages sustained by the state that are caused by the conduct constituting the violation, a civil penalty of up to \$5,000 per violation or three times the economic value of any thing received or sought in violation of the ethics rules, whichever is greater; and costs, including reasonable investigative costs.

Option of a Hearing by Administrative Law Judge Where Penalties and Costs Exceed \$500.

If an ethics board finds that there is reasonable cause to believe that a violation has occurred, the board must consider whether the total amount of penalty and costs may exceed \$500. Based on such consideration, the board may give the person who is the subject of the complaint the option to have an administrative law judge conduct the hearing and rule on procedural and evidentiary matters. The board may also, on its own initiative, provide for retaining an administrative law judge. An ethics board may not require total payment of more than \$500 in penalty and costs in any case where an administrative law judge is not used and the board did not give such option to the person who is the subject of the complaint.

Citizen Action.

A person who has notified the appropriate ethics board and the Attorney General in writing of a possible ethics violation may bring a citizen action, if the appropriate ethics board or the Attorney General has failed to commence an action within 45 days after notice from the person. Any judgment awarded in such an action is given to the state, but the person bringing the action is entitled to be reimbursed for costs and attorneys' fees.

Whistleblower Protections.

Whistleblower protection applies to a person who reports alleged improper governmental action in good faith to the State Auditor or public official, defined to include the Attorney General's designee, the director of the employee's agency, individuals designated to receive whistleblower reports by the head of each agency, and the EEB. A whistleblower has a cause of action under the Law Against Discrimination if he or she experiences a workplace reprisal or retaliatory action.

No state employee may disclose confidential information gained through his or her job, or otherwise use confidential information for personal gain or benefit. A whistleblower may disclose confidential information otherwise prohibited by law, but only to the extent that information is necessary to substantiate a whistleblower complaint, and only to the State Auditor or public official.

A whistleblower receives protection from retaliatory action, but also has a duty to make a reasonable attempt to ascertain the correctness of the information furnished. A whistleblower who supplies false information is subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information, as determined by the employee's appointing authority.

Summary of Amended Bill:

The amended bill makes the following changes to the Ethics in Public Service Act:

- Knowing acquiescence by a supervisor in an ethics violation by a state officer or state employee is itself made an ethics violation.
- The provision making it an ethics violation for a state employee to intentionally conceal a public record is modified by adding a definition for "intentionally concealing a record." This phrase means "that the state officer or state employee knew the record was required to be released under chapter 42.56 RCW, knew of the record's existence, and intentionally did not provide the record to the requestor within the time frame established by the agency."
- The Executive Ethics Board is prohibited from delegating to the board's executive director its authority to issue advisories, advisory letters, or opinions.
- An ethics board may request the assistance of the Office of the Attorney General or of a contract investigator in conducting an investigation of a complaint.
- The ethics board is deemed to have commenced an action to enforce against an ethics violation when the board or the board's executive director accepts a complaint for filing and initiates a preliminary investigation.

Whistleblower Protections.

Whistleblower protections are extended to a state employee who files a complaint with an ethics board, subject to the following limitations in the Whistleblower Act:

1. the Senate, the House of Representatives, and the Washington Supreme Court may adopt policies regarding the applicability of whistleblower protections to their respective institutions; and
2. the employee filing the complaint has made a reasonable attempt to ascertain the correctness of the information furnished.

A state employee may not be denied whistleblower protections, even if the ethics board denies an investigation of the complaint.

A person who takes retaliatory action against a state employee who makes a whistleblower complaint may be subject to a civil penalty of up to \$5,000.

Exemptions from Disclosure.

No legislator or statewide elected official may be compelled to disclose information identifying a person who has made a whistleblower report under a request for anonymity. A Public Records Act exemption is created for information revealing the identity of a state employee or officer who has reported improper governmental action, when such information is in the possession of a legislator or statewide elected official who has received the information in the context of an investigation of such improper action. The identity of a person filing a complaint with an ethics board is exempt from public disclosure unless the person filing the complaint consents to public disclosure and copying by written waiver.

Ethics Advisors and Mandatory Ethics Training.

Each executive branch agency must designate an ethics advisor to provide informal advice and ensure uniformity in the agency's operations. Every executive branch officer and employee is encouraged to attend an ethics training at least once every 36 months.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill makes the following changes to the underlying Engrossed Substitute Senate Bill:

Changes to Investigations and Authority of Ethics Boards.

- Removes the provision authorizing the Executive Ethics Board (EEB) to delegate its complaint-issuing authority to the executive director, and prohibits the board from delegating to its executive director its authority to issue advisories, advisory letters, or opinions.
- Provides that the EEB may request the assistance of the Office of the Attorney General or a contract investigator in conducting its investigation of a complaint involving any employee, rather than limiting such assistance to investigations involving exempt employees.
- Removes provisions concerning the participation of agency staff in ethics board investigations.

Whistleblower Protections.

- Provides that a state employee who files a complaint with the appropriate ethics board is afforded state employee whistleblower protection, as long as the employee has fulfilled the requirement in the whistleblower statute of having made a reasonable attempt to ascertain the correctness of information furnished.
- Retains the civil penalty of up to \$5,000 for a person who has taken retaliatory action against a whistleblower, but removes the provisions establishing disciplinary consequences of a letter of reprimand and 30-day suspension.

Public Records Act Exemptions and Other Exemptions from Disclosure.

- Creates a Public Records Act (PRA) exemption for information revealing the identity of a state employee or officer who has reported improper governmental action, when in the possession of a legislator or statewide elected official who has received the information in the context of an investigation of the improper governmental action.
- Removes the PRA exemptions for all documents related to the complaint and subsequent investigation.
- Limits the prohibition on compelling a legislator or statewide elected official to disclose investigative records to information revealing the identity of a whistleblower who has requested anonymity.

Training and Ethics Advisors.

- Limits to the executive branch the requirement that an ethics advisor be designated for each agency.
- Replaces the mandatory ethics training requirement for all state officers and employees with a provision encouraging executive branch employees to attend such a training every 36 months.
- Restores the option of a hearing by an administrative law judge where a person may be subject to a penalty and costs of \$500 or more.

Option of an Administrative Hearing.

- Removes the provision which would have repealed a statute giving the subject of an ethics complaint the right to a hearing before an administrative law judge when there is the possibility of a penalty greater than \$500.

Other.

- Deletes changes made in the Ethics in Public Service Act definitions of "ethics" and "university."

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) This bill provides the same types of protections for those who file complaints against state employees as they have under the Whistleblower Act. The absence of such protections has a chilling effect on those who wish to file a complaint against another state employee, especially against an agency supervisor or head, for fear of retaliation. Sometimes the Executive Ethics Board (EEB) asks agencies to perform an in-house investigation before the EEB takes over. This bill would eliminate the participation of agency staff with conflicts of interest. Mandatory training is important, because if employees will be held accountable for violating ethics law and may be subject to a monetary fine, they must know the law. There will be an online ethics training available mid-summer. One of the most important changes made in this bill is that it holds supervisors accountable for violations of their subordinates.

(With concerns) This bill creates new disciplinary consequences for an ethics violation, such as suspension from state employment for up to 30 days without pay and monetary penalties. This may conflict with collective bargaining agreements and civil service law. An agency may wish to terminate or demote the employee, but the provision may now be construed under civil service law as limiting the possible consequences to 30 days suspension. The board currently has sufficient authority to recommend additional actions to the agency, so subsection 4 of section 7 should be stricken. It is important to maintain the division between the agency and the board's investigation. Exempting investigations from public disclosure can keep an agency from knowing enough to take appropriate action. The provisions exempting from disclosure information compiled by legislators and statewide officials seem to be in conflict with the intent of the bill. Why would the Legislature want to exempt this information, hiding it from the public? Sections 11 and 12 encourage parallel investigations by legislators and statewide officials instead of promoting a consistent practice among agencies and branches of government.

The fiscal note suggested \$175 in training costs per employee, so the fiscal impact on Washington State University (WSU) alone would be in the millions of dollars. Ethics laws

are already a component of new hire training and the university reaches out to all employees annually, offering trainings six times per year, and specialized training upon request, supplemented by regular communications and advisories. From the perspective of WSU, there is concern that this measure would prove quite costly, as would the university's efforts to improve compliance.

At The Evergreen State College, the faculty is a collective bargaining unit and the college would have to renegotiate with the bargaining unit to include another mandatory training, which would impose an additional cost not captured by the fiscal note. The Evergreen State College currently conducts 30 minutes of ethics training. The person designated to provide ethics advice gets about one request for guidance a week. There are already ethics training and advice programs in place.

(Opposed) Allowing legislators to conduct investigations and withhold information, as in sections 8, 11, and 12 of the bill, does not make sense. This is unworkable; it would set up parallel and conflicting investigations by members of the Legislature, and such investigations are not within the scope of work of the Legislature. The Public Records Act exemptions by their terms apply to legislators but make no mention of staff, so these exemptions will not apply to staff, leaving legislators to investigate on their own, in a Columbo-esque way.

Persons Testifying: (In support) Melanie de Leon, Executive Ethics Board.

(With concerns) Julie Murray, Office of Financial Management; Chris Mulick, Washington State University; and John Craighill, The Evergreen State College.

(Opposed) Rowland Thompson, Allied Daily Newspapers.

Persons Signed In To Testify But Not Testifying: None.