
Government Operations & Elections Committee

ESSB 5577

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

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

Brief Summary of Engrossed Substitute Bill

- Establishes that knowing acquiescence by a supervisor in the ethics violation of an employee is itself an ethics violation.
- Exempts certain investigative documents and documents related to the identity of the person making an ethics complaint to an ethics board, legislator, or statewide elected official from disclosure under the Public Records Act.
- 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 ethics training and appointment of ethics advisors for each agency.
- Repeals a provision giving the subject of an ethics complaint the option of a hearing before an administrative law judge when there is the possibility of a penalty greater than \$500.

Hearing Date: 3/26/13

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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

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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 shall 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 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 Bill:

Ethical Violations.

Knowing acquiescence by a supervisor in an ethics violation by a "state office" 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."

A new condition is added to the list of requirements governing when a state officer or employee may ethically receive a thing of economic value under a contract or grant. The state officer or employee must have attended an ethics training approved by the appropriate ethics board within the past 36 months.

Issuance and Investigation of an Ethics Complaint.

The EEB is authorized to delegate to the board's executive director its authority to issue complaints.

The process by which an ethics board investigates a complaint is further specified in statute to include the following:

- An investigating ethics board may file a new complaint if it discovers other potential ethics violations during the course of its investigation.
- Ethics board staff must oversee the investigation. Agency staff may assist, but staff with actual or apparent conflicts of interest because of a relationship with the persons under investigation must disclose this relationship. If the ethics board determines that a conflict of interest exists, the agency shall designate an independent employee with no conflict to assist the board with its investigation.
- If the investigation involves an employee, such as a person in a management capacity, who is exempt from Civil Service law or collective bargaining, the ethics board may request the assistance of the Office of the Attorney General or of a contract investigator.

Citizen Action.

The provision authorizing citizen actions to enforce against ethics violations when the appropriate ethics board has failed to commence an action is modified. The ethics board is deemed to have commenced an action 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 the Legislative Ethics Board or Commission on Judicial Conduct, subject to the limitation that the Senate, the House of Representatives, and the Washington Supreme Court may adopt policies regarding the applicability of whistleblower protections to their respective institutions. In addition, a state employee may not be denied such 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 and suspended from state employment for up to 30 days without pay. At a minimum, a letter of reprimand shall be placed in the retaliator's personnel file.

No legislator or statewide elected official may be compelled to disclose the following information:

- information identifying a person who has made a whistleblower report under a request for anonymity; and
- investigative records compiled in the course of an investigation of possible improper governmental action.

Ethics Advisors and Mandatory Ethics Training.

Each agency must designate an ethics advisor to provide informal advice and ensure uniformity in the agency's operations. Every state officer and employee shall attend an ethics training approved by the appropriate ethics board within 60 days of taking office or employment. Beginning January 1, 2014, every state officer and state employee shall attend an ethics training, including sexual harassment training, no less than every three years. Every state officer or state employee of a regulatory agency or of an agency that seeks to acquire goods or services who participates in those regulatory or contractual matters must be provided specialized or enhanced ethics training.

Public Records Act Exemptions.

New exemptions from disclosure under the Public Records Act are created, exempting:

- the identity of a person filing a complaint to an ethics board, unless the filer consents to public disclosure and copying by written waiver;
- all documents related to the complaint and subsequent investigation are also exempt from public disclosure and copying and shall not be released by any legislator or statewide elected official;
- information identifying a person who makes a report of possible improper governmental action to any legislator or statewide elected official, if the person requests this information not be disclosed;
- investigative records compiled by a legislator or statewide elected official conducting an investigation of a possible improper governmental action; and
- information identifying a person who files a whistleblower complaint with an ethics board and requests this information not be disclosed.

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

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 is repealed.

Other Changes.

The following changes are made to definitions in the Ethics in Public Service Act:

- "Ethics" is defined to mean "adherence to the standards" as set forth in the Ethics in Public Service Act.
- Innovate Washington is included in the definition of "university," and specific reference to the Spokane Intercollegiate Research and Technology Institute and the Washington Technology Center is removed from this definition.

Appropriation: None.

Fiscal Note: Not requested.

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