

HOUSE BILL REPORT

ESSB 6776

As Passed House - Amended:

March 11, 2008

Title: An act relating to state employee whistleblower protection.

Brief Description: Modifying state whistleblower protections.

Sponsors: By Senate Committee on Government Operations & Elections (originally sponsored by Senators Kline, Roach, Fraser, Fairley and Swecker).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 2/26/08, 2/28/08 [DPA];

Appropriations: 3/1/08 [DPA(APP w/o SGTA)].

Floor Activity:

Passed House - Amended: 3/4/08, 94-0.

Senate Refused to Concur.

Passed House - Amended: 3/11/08, 95-0.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Expands protections for state employee whistleblowers.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: Do pass as amended. Signed by 7 members: Representatives Hunt, Chair; Appleton, Vice Chair; Chandler, Ranking Minority Member; Kretz, Liias, Miloscia and Ormsby.

Staff: Tracey Taylor (786-7196).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Appropriations and without amendment by Committee on State Government & Tribal Affairs. Signed by 34 members:

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.

Representatives Sommers, Chair; Dunshee, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Chandler, Cody, Conway, Darneille, Ericks, Fromhold, Grant, Green, Haigh, Hinkle, Hunt, Hunter, Kagi, Kenney, Kessler, Kretz, Linville, McDonald, McIntire, Morrell, Pettigrew, Priest, Ross, Schmick, Schual-Berke, Seaquist, Sullivan and Walsh.

Staff: Alex MacBain (786-7288).

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 Amended Bill:

An intent section is added that includes an expression of 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 Legislature also intends that the Act shall be broadly construed.

Whistleblower Act Procedures

The State Auditor (Auditor) has the sole authority to investigate 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 is extended from 30 days to 60 working days.

If the Auditor's preliminary investigation indicates the allegations are unsubstantiated, the Auditor must provide notification to the whistleblower summarizing where the allegations are deficient and provide a reasonable opportunity for the employee to reply. The communication may be accomplished electronically.

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, 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.

Failure to cooperate with an audit or investigation, or engaging in retaliation against anyone who assists the Auditor shall be reported as a separate finding with recommendations for corrective action in the Auditor's report.

Confidentiality under the Act

The current confidential protections of the whistleblower's identity is expanded to include identifying characteristics. If the Auditor makes a determination that the information has been provided other than in good faith, the identity or identifying characteristics of the whistleblower may be disclosed. However, the Auditor must provide reasonable advance notice to the employee that his or her identity or identifying characteristics are to be disclosed.

In addition, the identity or identifying characteristics of any person who in good faith provides information to the investigation is confidential. The identity or identifying characteristics of such person may only be disclosed by the person's consent by written waiver or by acknowledgment of his or her identity as a witness.

An agency may not issue any nondisclosure order or policy, execute any nondisclosure agreement, or expend any funds requiring that information that is public under the Public Disclosure Act be kept confidential, unless state or federal law requires the information must remain confidential.

Retaliatory Actions

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

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 order the 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 up to \$3,000 to up to \$5,000.

Reprisal or retaliatory action under the Act is expanded to include the issuance or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice. It also includes any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected under the Act or in comparison to other employees who have not engaged in whistleblower conduct.

An agency may rebut the presumption that it has taken retaliatory action by proving by the preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event. An agency may also demonstrate that the action or actions were justified by reasons unrelated to the whistleblowing and that improper motive was not a substantial factor.

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

A whistleblower alleging retaliation may pursue arbitration, with the cost of the arbitration shared equally by the whistleblower and the agency.

Definitions

The definition of "good faith" is clarified to mean an individual providing the information or report of improper governmental activity has a reasonable basis in fact for the belief or for

reporting or providing the information. An individual who knowingly, or reasonably ought to know, provides or reports malicious, false, or frivolous information, or information that is provided with reckless disregard for the truth, or who knowingly omits relevant information is not acting in good faith.

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

The definition of "improper governmental action" is expanded to include gross mismanagement. It also includes the prevention of the dissemination of scientific opinion or the alteration of technical findings without scientifically valid justification, unless state law or a common law privilege prohibits disclosure. This does not preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or findings to the exclusion of other scientific opinions or technical findings. A state agency or public official shall not be prevented or impaired in the management of public resources or employees in the performance of official job duties. De minimis, technical disagreements are not relevant. The Auditor is not required to contract or consult with external experts regarding the scientific validity, invalidity, or justification of an opinion or finding.

A definition of "public official" is added. It means the Attorney General's designee, the agency director, an appropriate number of individuals designated by the head of the agency to receive whistleblower reports, or the Executive Ethics Board.

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 employee that is perceived by the employer as reporting, whether they did or not, alleged improper government action.

General Provisions

The required notices to state employees about the Act and procedures may be provided via agency internal newsletters, included with paychecks or stubs, sent via electronic mail, or sent by other cost-effective means. The notice must reach all employees of the government level, division, or subdivision. In addition, the notice must include a list of public officials authorized to receive whistleblower reports. This list of public officials must also be displayed prominently in all agency offices.

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 Whistleblower Act to the Senate, House of Representatives and the Judiciary.

The bill is null and void if not funded in the Appropriations Act of 2008.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony: (State Government & Tribal Affairs)

(In support) This bill is long overdue and strengthens the legal and procedural protections of the whistleblower program. Currently, the only place to make a whistleblower report is the State Auditor's Office. By providing additional places to report, including those within the agency's chain of command, this will be a more effective program. The bill also addresses scientific and technical whistleblowers. This new portion will only really impact the three agencies with scientists on staff -- Department of Ecology, the Department of Natural Resources, and the Department of Fish and Wildlife. Currently, the Governor's policy is to use the "best available science;" however, in order to get the full benefit of science, we must ensure that the scientists are not stymied from sharing all the available information. This bill should help Washington avoid the problems seen on the federal level with the lack of freedom of scientific expression and opinion. In addition, the retaliation provisions are strengthened to assist whistleblowers who are punished as the result of their reporting. This bill represents a negotiation by a broad spectrum of persons and agencies who would utilize the whistleblower program.

(Opposed) None.

Staff Summary of Public Testimony: (Appropriations)

(In support) This is an important bill for state workers because it widens the protections that state employees get when they report governmental impropriety and because it expands the types of issues that can be reported. The fiscal impact of the bill has been decreased significantly from its original version through work with the stakeholders that would be impacted.

(Opposed) None.

Persons Testifying: (State Government & Tribal Affairs) Senator Kline, prime sponsor; Linda Long, Office of the State Auditor; Rob Kavanaugh; Bob Cooper, Government Accountability Project; and Matt Zuvich, Washington Federation of State Employees.

Persons Testifying: (Appropriations) Matt Zuvich, Washington Federation of State Employees.

Persons Signed In To Testify But Not Testifying: (State Government & Tribal Affairs) None.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.