

HOUSE BILL REPORT

ESSB 5577

As Passed House - Amended:

April 15, 2013

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].

Floor Activity:

Passed House - Amended: 4/15/13, 96-1.

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

- Affords whistleblower protections to state employees who file a complaint with the appropriate ethics board, and establishes a \$5,000 civil penalty for retaliation or reprisal against such an employee.
- Exempts the identity of a state employee or officer who files a complaint with an ethics board or reports improper governmental action from disclosure under the Public Records Act.
- Prohibits the Executive Ethics Board from delegating to its executive director its authority to issue advisories, advisory letters, or opinions.
- Requires each executive branch agency to appoint an ethics advisor.

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.

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.

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

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:

Whistleblower Protections.

Whistleblower protections are extended to a state employee who files a complaint with an ethics board. To receive such protections, the employee must have complied with other provisions of the Whistleblower Act by making 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.

Public Records Act Exemption.

The identity of a state employee or officer who has in good faith filed a complaint with an ethics board or reported improper governmental action to the auditor or other public official designated by the Whistleblower statute is exempt from disclosure under the Public Records Act.

Other Changes to the Ethics in Public Service Act.

An 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. 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 Executive Ethics Board is prohibited from delegating to the board's executive director its authority to issue advisories, advisory letters, or opinions.

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.

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.