

# SENATE BILL REPORT

## SSB 5374

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As Passed Senate, February 23, 2017

**Title:** An act relating to state employee whistleblower protection.

**Brief Description:** Concerning state employee whistleblower protection.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Becker, Bailey, Rivers, Brown, Miloscia, O'Ban, Warnick, Angel, Honeyford, Padden and Braun).

**Brief History:**

**Committee Activity:** Law & Justice: 1/25/17, 2/01/17 [DPS].

**Floor Activity:**

Passed Senate: 2/23/17, 49-0.

### Brief Summary of First Substitute Bill

- Amends the Whistleblower Protection Program to include ex parte communication between an agency employee and a presiding officer that violates the Administrative Procedures Act (APA) or other similar provisions of law.
- Protects the confidentiality of an employee who reports improper governmental conduct to the State Auditor or other public official regardless of whether an investigation is initiated.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5374 be substituted therefor, and the substitute bill do pass.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Angel, Darneille, Frockt and Wilson.

**Staff:** Shani Bauer (786-7468)

**Background:** The state Whistleblower Protection Program was established to encourage state employees to report suspected improper governmental action and provide protection to employees who do so. The law makes retaliation against employees who make a report

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*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.*

unlawful and authorizes remedies should retaliation occur. The State Auditor's Office is responsible for investigating and reporting assertions of improper governmental conduct.

Improper governmental action is defined as any action by an employee undertaken in the performance of the employee's official duties which:

- is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;
- is a gross waste of public funds or resources;
- is of substantial and specific danger to the public health or safety;
- is gross mismanagement; or
- prevents dissemination of scientific opinion or alters technical findings.

Currently, agencies designate a presiding officer to hear and decide an adjudicative proceeding. The presiding officer may be the agency's head, an agency employee designated and trained as a hearing officer, or an administrative law judge who is not the agency's employee. These adjudicative proceedings are governed by the Administrative Procedures Act (APA).

Under the APA, ex-parte communications are generally prohibited with limited exceptions. An ex-parte communication is any direct or indirect communication regarding any issue in the appeal, between the presiding officer and any persons employed by the agency, or between the presiding officer and any person who has an interest in the outcome of the proceeding, without notice and opportunity for all parties to participate. A prohibited ex-parte communication must be disclosed and placed on the record with any responses, and also identifying the persons involved in the communication. A presiding officer receiving a prohibited ex-parte communication must allow any party to rebut the communication. A presiding officer who receives a prohibited ex-parte communication may be disqualified and the communication may be sealed. Disciplinary action may be required and sanctions may include a default judgment in the appeal.

**Summary of First Substitute Bill:** Improper governmental action includes ex parte communication in a pending matter in which the agency is a party between an agency employee and a presiding officer, hearings officer, or administrative law judge that violates the APA or other similar provisions of law. The availability of other avenues for addressing the ex parte communication does not bar an investigation by the Auditor. The confidentiality of an employee who reports improper governmental conduct to the Auditor or other public official is protected regardless of whether an investigation is initiated.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: Protecting state employees from

retaliation under the Whistleblower Protection Program is very important to the State Auditor's office. Even if the Auditor does not bring an investigation, the identity of the employee who provided the information should be protected. The bill should be amended to protect the employee's identity in this instance.

OTHER: This is the same bill that was before you last year. This is a good bill with the addition of the amendment recommended by the Auditor.

**Persons Testifying:** PRO: Scott Nelson, State Auditor.

OTHER: Matt Zuvich, WA State Federation of State Employees.

**Persons Signed In To Testify But Not Testifying:** No one.