

2011 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1234

2011 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HB 1234
February 11, 2011
14454

☐ Conference Committee

Committee Clerk Signature

Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to whistleblower protection for public employees

Minutes:

Chairman Bette Grande opened the hearing on HB 1234.

Rep. Eliot Glassheim, District 18, appeared as a sponsor of this bill. **Attachments 1 and 2.** What I am going to work from is a hoghouse amendment to the whole bill.

Rep. Lisa Meier: On Page 2, Section 1, you reference two laws that were passed in previous sessions that actually offer less protection for the public. Can you reference those two laws?

Rep. Eliot Glassheim: I don't have those on the top of my head. They are in code now, but I don't have them. I can try and get them for you.

Rep. Gary Paur: How many whistleblower cases have there been?

Rep. Eliot Glassheim: I don't. Other people testifying might have that. I think there have been very few. My hope if this passes is that will be the end of it, and it will sit there and the framework will be there if needed, but hopefully not needed. Whether some cases don't come up to our notice because of fear, I don't know those.

Rep. Karen Rohr: Just a question regarding the documentation. Is that kept regarding the privacy of the information that is obtained in these cases? Is it locked and put away forever?

Rep. Eliot Glassheim: I am not sure. Others may be able to testify to that. While investigations are ongoing I think they are private. While the auditor investigates it is private. Once the conclusions are reached, that is public. Whether the labor department voluntary compliance is public or private I am not aware.

Attachment 3 was handed out by the law intern.

Stuart Savelkovl, Executive Director of the ND Public Employees' Association, appeared in favor. This is not a perfect bill. Whistleblower statue is something that definitely needs some attention and the last two legislative sessions have attempted to improve. Rep. Meier

a bill you were looking for last session was 2267 sponsored by Senator Ray Holmberg and did pass both chambers. I think anytime you attempt to increase whistleblower protection for state workers it is a good thing. The intent of this bill is to make it safer for state workers that see something either illegal or improper going on in their agency to report it and to be safe in doing so. A lot of concern has been made for the last several years regarding what occurred at WSI. There is some issue regarding classified workers and non classified workers and what you will be told is that this bill protects unclassified workers. They too now are protected from being terminated for blowing the whistle. If you are an unclassified worker, you are essentially at will so you can be dismissed without cause in most cases. State government is light years ahead of where higher ed is on whistleblower protection, and I want to give you a story. At NDSU we had an employee who worked in one section of the university. Recently university system adopted a code of conduct and in that it says if you see something illegal or improper occurring you are obligated to report it. He had forgotten something at his office and went back after hours and saw the light on in his boss's office. He said that is peculiar because my boss is in San Diego. When he looked in his boss's office, he saw somebody sitting at his boss's computer who happened to be his boss's husband. How did his boss's husband get into the building, into the office, and get on to his boss's computer while his boss was in San Diego? He followed the proper policy. He reported it to campus police and the proper chain of command. Three days later he received a letter that would go in his file that was writing him up essentially for harassment of his supervisor. It was deemed he was trying to get his supervisor into trouble by reporting this. Therefore, in the future it is important that he exercise due caution and be more careful in trying to throw somebody into the bus. This person happened to be a member of ours so we immediately hired an attorney to represent this person through the grievance process thinking this person was clearly trying to blow the whistle on illegal activity. We lost that grievance at the first level and proceeded to lose it at every single stage of the appeal. Whistleblower protection for public workers in North Dakota does come up short.

Chairman Bette Grande: Let us say I was the head person and that was my office and I am in San Diego. Was that my husband at the computer?

Stuart Savelkovl: Yes.

Chairman Bette Grande: I am in San Diego and I forgot some documents. I can't get them until he goes into my computer and downloads them and I have left my keys at home. I can't send him to my office to send that document to me?

Stuart Savelkovl: That could absolutely be the case. The problem is that when your employee, Rep. Boehning, comes into the office and sees somebody that is not an official personnel of the university in the office he should be allowed to at least say hey is this right, should this have happened? That is all he did is say I saw this person in my boss's office. He didn't take it to the newspaper. He just sent it to the proper channels as dictated by university system policy and he was consequently written up for it.

Chairman Bette Grande: He got in trouble for inquiry?

Stuart Savelkovl: He got in trouble for reporting?

Chairman Bette Grande: When he found out that was the spouse and he was doing this particular thing because a document needed to be taken off the computer, it should have just gone away?

Stuart Savelkovl: It was never told to him the reasons for why the person was in the office. They were not deemed to be of relevance to our member. He was told it is none of your business why that person was in there. You need to respect your supervisor.

Rep. Lisa Meier: What year did that occur?

Stuart Savelkovl: About four months ago. I would like to reiterate that I don't necessarily think that an incident like that could occur in state government. The appeals process for this situation at all was inter university. Here in what the labor commissioner will be able to tell you is that there are other agencies that oversee and so there are some checks and balances. This bill seeks to strengthen those protections. What we would argue is that the intent of this bill is to do no harm. It is not to make anything worse. It is only to try to improve.

Rep. Karen Karls: This bill would not protect university system.

Stuart Savelkovl: That is true. I was only responding to Rep. Paur's concern that how many of these occur. A lot of the members that call us don't want to go public with situations like that out of fear that it will get thrown back in their face or hurt them down the road.

Opposition:

Tony Weiler, Commissioner of Labor, appeared in opposition. I have seen the hoghouse. It simplifies the bill as it was originally written. We still have some concerns. Those protections are in place. State employees do have protections if in fact there is a whistleblower complaint and that there is action adverse to that employee as a result. What we really need to clarify is that an employee now under this bill and amendments would be able to go directly to district court. This body last session addressed that, changed the law such that an employee would need to go through the administrative process before going to court. The WSI case is important in this instance because those employees could go directly to district court. The amendments last session to the legislation took care of that so that you first had to exhaust your administrative remedies. That case alone cost the state approximately \$200,000 in legal fees and if the protections are in place and there is a more economical, efficient way to do that is better for the state and better for that employee because obviously that employee probably had significant legal costs as well. If the committee chooses to amend the law such that the state employee language is similar to that which private employees have, I don't think I have any problems with that. I would want to look at that a little more closely. The real issue is changing it such that an employee can now go directly to district court. The bill and hoghouse amendment set up dual investigations by my office and by the auditor's office. I do not think that is efficient or that would be in the employee's best interest. What if I investigate the case and the auditor's office investigates the case and we come up with different determinations. You could have the potential for inconsistent investigations and determinations and I think that is problematic.

Chairman Bette Grande: I work in the tax department and I see someone in the office that I feel is doing illegal activities with some of the tax returns and I offer a grievance to that effect and I want it checked out. Currently what am I suppose to do?

Tony Weiler: Under current law 34-11.1-04 talks about violations for misuse reported by employee. That allows an employee without fear of reprisal to report in writing to the respective agency head, a state's attorney, the attorney general, or an employee organization, the existence of a job related violation of local, state, or federal law, rule, regulation, or ordinance or the job related misuse of public resources.

Chairman Bette Grande: I can pick one of those places to send my grievance to?

Tony Weiler: Yes. That's correct. If you do that, the next subsection under 34-11.1-04 says for having made that report no employee will be dismissed from employment, have salary increases or employment related benefits withheld, be transferred or reassigned, be denied a promotion that the employee would otherwise have received, be demoted, be discriminated against in any term or condition of employment. If your employee who is in the tax department reports that to any of those agencies, none of those adverse actions or reprisal could take place for basically whistleblowing.

Chairman Bette Grande: What happens if I don't agree with what happened? I want to appeal that decision. I go to the attorney general's office and he says no, they are fine in what they did. I don't think so. I know what I saw and I want to see something done. Now what do I do?

Tony Weiler: You have an administrative avenue. First of all, you may file a complaint with the department of labor. Our office may attempt to get what is called some sort of a voluntary compliance with that issue. We can take a look at that. We can attempt to help the employee and the employer come to some sort of agreement perhaps provide some protections for that employee. The other thing an employee may do is appeal a claim of reprisal under this section in the manner prescribed for a classified employee under Chapter 55-44.3. That is central personnel or HRMS now. That is basically an administrative process through an administrative law judge that if the employee still is unsatisfied with that determination under 28-32 which is the administrative agencies' practices act, there are in fact avenues for that employee to appeal to district court. It is a more streamlined process and when you get to court, the record is somewhat more limited but you had due process all along and it has been much more efficient for both parties.

Chairman Bette Grande: When I go to the labor department and then on to HRMS, am I still protected under point 2 you made with no dismissal, no change in benefits, no transfer of job, no discrimination? I still am covered.

Tony Weiler: That is my understanding. Those protections are in place. You have those avenues. You have those steps you can take right now. The one you can't do right now is you can't go directly to district court. Subsection 5 of 34-11.1-04 that I just read was added last session to address that issue because of the significant costs that can occur. The question from Rep. Paur about the number of complaints my office received. I took a look at the last three bienniums. We average about 45 claims of retaliation (COR) per biennium, 22 or 23 a year. In the last biennium was the only one I looked at for state employees and we had received 2.

Rep. Lisa Meier: How many individuals do have working in your department that actually do the investigations?

Tony Weiler: We have 7 investigators and a human rights director but she helps a lot with the investigations and with our numbers. We don't have a lot of power in this area.

Rep. Lonny Winrich: Going to district court is also expensive for the person who files the suit. That seems to me be a deterrent except in perhaps very egregious cases. Why would that not deter the employee as well?

Tony Weiler: Litigation is expensive for both parties. The best answer I can give you is that perhaps the employee had an attorney retained on a contingent fee basis and in that case then that employee would not be paying fees. I don't know what the WSI employees paid in fees, but if the state paid 200 and it wasn't done on a contingent basis, their fees had to be at least half that. Many people cannot afford to litigate cases just based on the sheer expense if your attorney is not representing you on a contingent fee basis.

Rep. Lonny Winrich: If I am an attorney and someone comes to me and wants me to take case on a contingency basis, I am probably not going to spend much effort on that unless it really looks like a sure thing. Then it is expensive for me. I don't see why the burden here is so heavily on the state. It is also on the employee.

Tony Weiler: I don't necessarily disagree with you. The other thing with a contingent fee basis your remedy is limited to reinstatement and I think one or two years of back pay. You may not be talking about significant amount of money anyway depending on your level of classification of pay.

Rep. Lonny Winrich: You said a little bit ago that over a certain period of time you had two appeals or something under this section of the statute. What was the period of time?

Tony Weiler: Beginning of last biennium through October 2010. In that time we had 49 CORs. Two of those were from state employees.

Rep. Lonny Winrich: Did either of those proceed all the way to district court?

Tony Weiler: I don't know that.

Rep. Lonny Winrich: Rep. Glassheim alluded to the fact that apparently the whistleblower statutes governing private employees are much different than those for state employees. Do people employed in the private sector have the right to go directly to district court?

Tony Weiler: They do.

Chairman Bette Grande: The **Attachment 3** that was handed out to you is how it is done in the private.

Rep. Bill Amerman: You mentioned you had concerns about dual investigation between your office and the auditor's office. Say right now the auditor's office is not involved and there is a complaint that might be substantial misuse of state funds or something like that, do you

investigators have that type of background and knowledge to dig in and find what might be going on with those funds?

Tony Weiler: That is a difficult question for me to answer. I don't want to speak for the auditor's office. In thinking about that investigation that they can do they have the statutory power to do that. What I could foresee is that our office in our investigation would probably rely on facts gathered or information brought out from their determination. What the auditor's office does could become a factual basis for the claim and it could be a factual basis going forward through the administrative process as well.

Tag Anderson, Director of the Risk Management Division, OMB appeared. First of all to address a question that Rep. Winrich asked. Private employees do not necessarily have a right to go to district court immediately. Under 34-01-20 if their collective bargaining agreement, for example, requires or has an internal grievance process they are required to use that first. The difference between a private and a public employee is that we have 28-32 which is the mechanism by which we have administrative adjudication that then gets moved to district court through an orderly process. Going back to the WSI incidents, the problem there was that those employees did not have access to the statewide appeals mechanism. They had no choice but to bring it to district court, and that was a choice that from our perspective, was a bad choice that they had to make. They didn't have that easy efficient mechanism to address their complaints like every other state employee. That was addressed last session which is now Subsection 5 of the existing statute. All employees of state government in the executive branch with the exception of those employees of the governor's office, legislative council, one chief secretary, and one chief deputy and elected official, now has access to the statewide appeals mechanism which from our perspective is the best thing for the employee, agency, and as director of risk management it is the best thing for the state because it is cost effective. Another point that Chairman Grande raised was the idea that if an employee brought a complaint to the attorney general and the attorney general said no they are following the law as I understand it would they have the ability to appeal that? Under the current law the answer is they have the ability to appeal reprisal, in other words if the employer punishes them for raising the issue. There is no mechanism to have someone second guess the attorney general. The attorney general is a constitutional officer and his role is to provide legal advice to agencies. I think that is part of the problem with Section 5 of the bill. It potentially requires the auditor's office to do things that is really outside of their sphere. Under the hoghouse bill as I understand it, the concern that we have with it is that it appears to allow state employees to go to immediately to district court which is contrary to what we did last session. Specifically Section 2 of the bill says an employee can do one or more of the following and then Subsection 2 of that section uses the word and. I think that creates at least an ambiguity.

Rep. Karen Rohr: What is your role in this?

Tag Anderson: My role is probably twofold. Prior to my existing position at risk management I held the personnel portfolio at the attorney general's office and I handled hundreds of personnel cases involving state employees including retaliation claims so I am familiar with the underlying subject matter. As director of risk management, my concern is that the cases involving the WSI employees who did not have that efficient administrative remedy available to them cost the state of North Dakota through the risk management division an excess of \$200,000.

Rep. Lonny Winrich: You indicated that for private sector employees if they have a grievance process in place through a collective bargaining agreement that then they must go through that before they go to district court. Is that correct?

Tag Anderson: That is correct.

Rep. Lonny Winrich: That only applies to employees who are covered under such a collective bargaining agreement and I understand that is not a very large percentage of private sector employees in North Dakota is it?

Tag Anderson: That is correct. I believe the statute is broad enough to include general policies of an employing organization that would have an internal grievance type of mechanism. They would have to utilize that first.

Neutral:

Laurie Sterioti Hammeren, Director of Human Resource Management Services, appeared. The only clarifying point that I would make for the committee members who are freshmen, you may not understand why WSI was not able to access the statewide appeals mechanism. At the time WSI was not part of the classified service and then last biennium the legislature required that they become part of the classified service. Had they been part of the classified service they could have used the statewide appeal mechanism. Since then they have become classified workers so it is really a moot point. We do still have an agency that is not part of a classified service and that is commerce. The legislative body changed the law last session to say that all executive branch agencies' employees regardless of classification or not would now have access to the appeals mechanism which makes sense. Virtually if they file the grievance with their agency and then they appeal, they would appeal to my office, and I would forward that appeal to the office of administrative hearings, and an administrative law judge would conduct the hearing.

Rep. Eliot Glassheim appeared again. Section 1 slightly expands the definition of what we are talking about but it is taken from the private sector. It is modeled and paralleled as the private sector law. The comments about going to court, I have no intention of increasing litigation from this. I was assured by legislative council that as it is drafted it does not expand in any way civil actions. Should they appeal a decision to district court, it would be more of a review and they could not initiate new facts. In regard to the business of dual investigations, my understanding is we give a slightly increased role to the labor commissioner and require them to investigate if they think there is any cause. The labor commissioner's job has to do with the employee. The auditing department I think would come later once things move further and that has to do with the state and the institution. The auditor's office would be more interested in the integrity of the state and the finances and the proper procedures being followed in the state.

The hearing was closed.

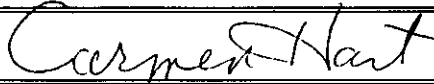
2011 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HB 1234
February 17, 2011
14692

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to whistleblower protection for public employees

Minutes:

Chairman Bette Grande opened the discussion on HB 1234. Rep. Glassheim had presented a hoghouse amendment.

Rep. Lonny Winrich moved to adopt the amendment.

Rep. Ron Guggisberg seconded the motion.

A voice vote was taken. Motion carried.

Chairman Bette Grande: We spent time on this last session and this kind of undoes that bill. I understand the comparisons between private and public. Private and public are not the same.

Rep. Lisa Meier: I think what the bill does also is if a complaint is issued it could go directly to the district court and potentially be a pretty large cost as well to the state.

Vice Chairman Randy Boehning made a motion for a **Do not pass as amended**.

Rep. Roscoe Streyle seconded the motion.

Rep. Lonny Winrich: I will resist the do not pass. I realize that there is a difference between public employees and private sector employees, but in many contacts we attempt to tell our public employees that they should behave or be treated more like private sector employees. This extends some privileges to public employees that private sector employees enjoy. I don't think it is realistic to anticipate a whole bunch of suits in district court. That is kind of a last resort. It is expensive for the state to do that but it is also expensive for the plaintiff.

DO NOT PASS AS AMENDED, 10 YEAS, 3 NAYS. Vice Chairman Randy Boehning is the carrier of this bill.

Later on Chairman Grande told me to change the carrier to Rep. Gary Paur.

VK
2/17/11
log 4

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1234

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact sections 34-11.1-04.3, 34-11.1-04.4, 34-11.1-04.5, and 34-11.1-04.6 of the North Dakota Century Code, relating to whistleblower protection for public employees; and to amend and reenact section 34-11.1-04 of the North Dakota Century Code, relating to whistleblower protection for public employees.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 34-11.1-04 of the North Dakota Century Code is amended and reenacted as follows:

**~~34-11.1-04. Violations for misuse reported by employee--~~
~~Reprisals~~Employer retaliation prohibited - Furnishing false information--~~Labor~~
~~department.~~**

1. ~~An employee may, without fear of reprisal, report in writing to the employee's respective agency head, a state's attorney, the attorney general, or an employee organization the existence of:~~
 - a. ~~A job related violation of local, state, or federal law, rule, regulation, or ordinance.~~
 - b. ~~The job related misuse of public resources.~~
2. ~~For having made a report under subsection 1, no employee will:~~
 - a. ~~Be dismissed from employment.~~
 - b. ~~Have salary increases or employment-related benefits withheld.~~
 - c. ~~Be transferred or reassigned.~~
 - d. ~~Be denied a promotion that the employee otherwise would have received.~~
 - e. ~~Be demoted.~~
 - f. ~~Be discriminated against in any term or condition of employment.~~
3. An employer may not discharge, discipline, intimidate, penalize, discriminate against, threaten any of these prohibited actions against, or otherwise retaliate against an employee regarding the employee's compensation or benefits, conditions, location, terms, duties, or privileges of employment because:
 - a. The employee, or a person acting on behalf of an employee, in good faith reports to the employer, employee organization, the attorney general, the state auditor, the labor commissioner, a state's attorney, or a law enforcement official:

- (1) A violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule; or
 - (2) A job-related misuse of public resources.
 - b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.
 - c. The employee refuses an employer's order to perform an action the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for this belief and shall inform the employer that the order is being refused for that reason.
2. An employee who intentionally furnishes false information is subject to disciplinary action, including suspension or dismissal as determined by the employee's appointing authority or designee. ~~An employee claiming reprisal under this section may appeal first to the human resource management services division and then to the district court in the manner prescribed by chapter 28-32, or to other appropriate offices and then to district court if the employee is not under the jurisdiction of the human resource management services division.~~
4. The labor department shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. To receive assistance from the labor department, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the labor department under this subsection before proceeding under other provisions of this section.
5. An employee of the state may appeal a claim of reprisal under this section in the manner prescribed for a classified employee under chapter 54-44.3. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

SECTION 2. Section 34-11.1-04.3 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.3. Claims of employer retaliation - Recourse.

As provided under this chapter, an employee claiming retaliation under section 34-11.1-04 may do one or more of the following:

1. File a complaint with the labor department for assistance in obtaining voluntary compliance as provided under section 34-11.1-04.5;
2. Appeal to the human resource management services division or other appropriate office at the state or local level as provided under subsection 1 or 2 of section 34-11.1-04.4; and
3. Bring a civil action as provided under subsection 3 of section 34-11.1-04.4.

SECTION 3. Section 34-11.1-04.4 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.4. Appeal to human resource management services division or other appropriate office - Civil action.

1. A state employee who is claiming retaliation under section 34-11.1-04 may appeal the retaliation to the human resource management services division under chapter 54-44.3 and then to the district court in the manner prescribed under chapter 28-32. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.
2. An employee who is not covered under subsection 2 may appeal to the appropriate office at the state or political subdivision level and then to the district court.
3. An employee who is not covered under subsection 1 or 2 may bring a civil action for injunctive relief or actual damages or both in the same manner as provided under subsection 3 of section 34-01-20.

SECTION 4. Section 34-11.1-04.5 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.5. Claims of employer retaliation - Labor department - Voluntary compliance.

1. The labor department shall receive complaints of retaliation under section 34-11.1-04.1. In order to receive assistance from the labor department under this section, an employee claiming to be aggrieved shall file a complaint with the department within three hundred days after the alleged act of retaliation. An employee is not prohibited from filing nor is required to file a complaint with the labor department under this section before proceeding with any other legal remedy available.
2. If an employee files a complaint of retaliation with the labor department, the department shall review the complaint to determine whether the complaint may be substantiated. If the department determines the complaint may be substantiated, the department shall attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. The department's determination under this subsection is not an appealable order.

SECTION 5. Section 34-11.1-04.6 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.6. Claims of employer retaliation - State auditor investigation.

If an executive branch state employee, or a person acting on behalf of that employee, makes a report under subdivision a of subsection 1 of section 34-11.1-04.1 to the attorney general, the labor commissioner, a state's attorney, or a law enforcement official, and if the recipient of the report is not the employer, the recipient of the report shall forward the report to the state auditor. If the employee is employed by the state auditor, for purposes of this section the attorney general shall fulfill the investigation and reporting duties under this section.

1. Upon the state auditor's receipt of a report under this section, the state auditor shall investigate the alleged violation or suspected violation of

federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources. The state auditor may not disclose the employee's name to the public until this investigation is complete.

2. Following an investigation under this section, the state auditor shall provide the state auditor's finding to the employee and to the employer. The state auditor's report must include:
 - a. A determination of whether a violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources occurred;
 - b. Whether the employer is required to take any actions to remedy a violation or misuse of public funds; and
 - c. The process through which the state auditor will track whether the employer is implementing actions that may be required under subdivision b.
3. A state auditor report issued under this section is an appealable order under chapter 28-32."

Renumber accordingly

Date: 2-17-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1234

House GOVERNMENT AND VETERAN AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Winrich Seconded By Guggisberg

Representatives	Yes	No	Representatives	Yes	No
Chairman Bette Grande			Bill Amerman		
Vice Chairman Randy Boehning			Ron Guggisberg		
Glen Froseth			Lonny Winrich		
Karen Karls					
Lisa Meier					
Gary Paur					
Karen Rohr					
Mark Sanford					
Vicky Steiner					
Roscoe Streyle					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

*voice vote
to
adopt
amendment
motion
Carried*

Date: 2-17-11
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1234

House GOVERNMENT AND VETERAN AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☒ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Boehning Seconded By Streyle

Representatives	Yes	No	Representatives	Yes	No
Chairman Bette Grande	✓		Bill Amerman		✓
Vice Chairman Randy Boehning	✓		Ron Guggisberg		✓
Glen Froseth	✓		Lonny Winrich		✓
Karen Karls	✓				
Lisa Meier	✓				
Gary Paur	✓				
Karen Rohr	✓				
Mark Sanford	✓				
Vicky Steiner	✓				
Roscoe Streyle	✓				

Total (Yes) 10 No 3

Absent 0

Floor Assignment Paur

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1234: Government and Veterans Affairs Committee (Rep. Grande, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1234 was placed on the Sixth order on the calendar.

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1. ~~An employee may, without fear of reprisal, report in writing to the employee's respective agency head, a state's attorney, the attorney general, or an employee organization the existence of:~~
 - ~~a. A job-related violation of local, state, or federal law, rule, regulation, or ordinance.~~
 - ~~b. The job-related misuse of public resources.~~
2. ~~For having made a report under subsection 1, no employee will:~~
 - ~~a. Be dismissed from employment.~~
 - ~~b. Have salary increases or employment-related benefits withheld.~~
 - ~~c. Be transferred or reassigned.~~
 - ~~d. Be denied a promotion that the employee otherwise would have received.~~
 - ~~e. Be demoted.~~
 - ~~f. Be discriminated against in any term or condition of employment.~~
3. An employer may not discharge, discipline, intimidate, penalize, discriminate against, threaten any of these prohibited actions against, or otherwise retaliate against an employee regarding the employee's compensation or benefits, conditions, location, terms, duties, or privileges of employment because:
 - a. The employee, or a person acting on behalf of an employee, in good faith reports to the employer, employee organization, the attorney general, the state auditor, the labor commissioner, a state's attorney, or a law enforcement official:
 - (1) A violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule; or
 - (2) A job-related misuse of public resources.

- b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.
 - c. The employee refuses an employer's order to perform an action the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for this belief and shall inform the employer that the order is being refused for that reason.
2. An employee who intentionally furnishes false information is subject to disciplinary action, including suspension or dismissal as determined by the employee's appointing authority or designee. An employee claiming reprisal under this section may appeal first to the human resource management services division and then to the district court in the manner prescribed by chapter 28-32, or to other appropriate offices and then to district court if the employee is not under the jurisdiction of the human resource management services division.
 4. The labor department shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. To receive assistance from the labor department, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the labor department under this subsection before proceeding under other provisions of this section.
 5. An employee of the state may appeal a claim of reprisal under this section in the manner prescribed for a classified employee under chapter 54-44.3. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

SECTION 2. Section 34-11.1-04.3 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.3. Claims of employer retaliation - Recourse.

As provided under this chapter, an employee claiming retaliation under section 34-11.1-04 may do one or more of the following:

1. File a complaint with the labor department for assistance in obtaining voluntary compliance as provided under section 34-11.1-04.5;
2. Appeal to the human resource management services division or other appropriate office at the state or local level as provided under subsection 1 or 2 of section 34-11.1-04.4; and
3. Bring a civil action as provided under subsection 3 of section 34-11.1-04.4.

SECTION 3. Section 34-11.1-04.4 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.4. Appeal to human resource management services division or other appropriate office - Civil action.

1. A state employee who is claiming retaliation under section 34-11.1-04 may appeal the retaliation to the human resource management services division under chapter 54-44.3 and then to the district court in the manner prescribed under chapter 28-32. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

2. An employee who is not covered under subsection 2 may appeal to the appropriate office at the state or political subdivision level and then to the district court.
3. An employee who is not covered under subsection 1 or 2 may bring a civil action for injunctive relief or actual damages or both in the same manner as provided under subsection 3 of section 34-01-20.

SECTION 4. Section 34-11.1-04.5 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.5. Claims of employer retaliation - Labor department - Voluntary compliance.

1. The labor department shall receive complaints of retaliation under section 34-11.1-04.1. In order to receive assistance from the labor department under this section, an employee claiming to be aggrieved shall file a complaint with the department within three hundred days after the alleged act of retaliation. An employee is not prohibited from filing nor is required to file a complaint with the labor department under this section before proceeding with any other legal remedy available.
2. If an employee files a complaint of retaliation with the labor department, the department shall review the complaint to determine whether the complaint may be substantiated. If the department determines the complaint may be substantiated, the department shall attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. The department's determination under this subsection is not an appealable order.

SECTION 5. Section 34-11.1-04.6 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.6. Claims of employer retaliation - State auditor investigation.

If an executive branch state employee, or a person acting on behalf of that employee, makes a report under subdivision a of subsection 1 of section 34-11.1-04.1 to the attorney general, the labor commissioner, a state's attorney, or a law enforcement official, and if the recipient of the report is not the employer, the recipient of the report shall forward the report to the state auditor. If the employee is employed by the state auditor, for purposes of this section the attorney general shall fulfill the investigation and reporting duties under this section.

1. Upon the state auditor's receipt of a report under this section, the state auditor shall investigate the alleged violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources. The state auditor may not disclose the employee's name to the public until this investigation is complete.
2. Following an investigation under this section, the state auditor shall provide the state auditor's finding to the employee and to the employer. The state auditor's report must include:
 - a. A determination of whether a violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources occurred;
 - b. Whether the employer is required to take any actions to remedy a violation or misuse of public funds; and

c. The process through which the state auditor will track whether the employer is implementing actions that may be required under subdivision b.

3. A state auditor report issued under this section is an appealable order under chapter 28-32."

Renumber accordingly

2011 TESTIMONY

HB 1234

Attachment 1
1234

HB 1234

HB 1234 deals with the laws that protect whistle blowers. It deals with how state and local employees are to be treated when they report potential violations of law or regulations or misuse of public funds.

Why do we care about protecting whistle blowers?

We are charged with monitoring a giant organization with thousands of state employees. In fact, most managers of this large enterprise are doing an excellent job and are completely trustworthy. However, human beings are fallible and sometimes do things that compromise the public trust. The legislature wants employees to feel safe in bringing misuse of funds or violation of state law to public attention. We are responsible and we don't want unpleasant truths hidden from us because employees are afraid they will be fired if they say anything. By protecting whistle blowers we are protecting the integrity of state government.

Will HB 1234 result in more lawsuits?

No. On the contrary, I believe that by clarifying the avenues of resolving claims of retaliation the bill will reduce the likelihood of expensive, drawn out, embarrassing show trials. First of all, most employees are not looking for ways to make their work lives stressful and upsetting. Secondly, most of what is here is already in the law, but it is made clear for the benefit of both managers and employees. Third, by clearly describing the range of options when an employee believes he or she has been retaliated against, HB 1234 gives employees choices of informal mediation by the labor commissioner and binding adjudication by an administrative law judge well short of time- and money-consuming and publicly embarrassing formal legal action. And finally, the bill leaves intact the penalties against employees whose claims are not fact based and adds the requirement that a claim may not be made in bad faith.

What Changes does HB 1234 make in current law?

Much of HB 1234 is already in state law. But it reorganizes and re-codifies the law to make it clearer what behaviors are prohibited and what options are open to an employee who believes he or she has been retaliated against. HB 1234 relates only to state and local public employees; it changes nothing pertaining to employment in the private sector.

In addition to clarifying for both employers and employees who does what, HB 1234 makes three basic changes to current state law: First, it updates and clarifies the language that lays out what type of action is prohibited and how to report an alleged violation; Second, it strengthens the role of the Labor Commissioner in attempting to obtain voluntary compliance between the parties; and Third, it requires the State Auditor to see if there is any substance to the charges and to recommend corrective action, if any is called for.

I believe the law will be used very few times in the next decade, both because misuse of public funds or the public trust is rare and because--even if legally protected from retaliation--few employees want to work in an adversarial atmosphere. By clarifying expectations, HB 1234 offers protection in the rare cases when it's needed to both state employees and the proper running of state institutions the

legislature is responsible for.

Details of the Bill

After consulting with experts at state agencies and reviewing the original bill draft Legislative Council thought the law could be improved and made clearer so that everyone would know their duties, obligations and procedures to follow. Although the amendments are presented as a Hoghouse (01004, February 10), the substance of the bill is still very similar.

Section 1 amends the current law, and makes clear that employers may not retaliate against public employees in three circumstances: (1) the employee reports a suspected violation of federal, state or local laws, ordinances or rules or job-related misuse of public resources; (2) the employee is requested to participate in an investigation or hearing; and (3) the employee refuses an order which he or she believes violates local, state or federal law or regulation, provided the employee has an objective basis in fact for refusing and makes the reason known to his or her employer. This language in the amended law is based very closely on the current whistleblower law that applies to private employees (NDCC Section 34-01-20). By making our public whistleblower law more closely parallel the private law, not only is it clearer for public employees and employers to understand the law, but we reduce the risk of unequal protection between public and private employees and the risk that a public employee may attempt to forum shop for remedies. Under existing law, it appears there is less protection for public employees and I'm sure this was not what was intended, but instead is a result of the two laws being passed at different times.

Subsection 2 of Section 1, which is already in state law, makes clear that intentionally giving false information subjects the employee to disciplinary action as serious as suspension or dismissal.

At this point the Amendment kicks in, with Section 2 which sets out the options open to a public employee who claims retaliation. These are: Seek (informal) voluntary compliance through the labor department; seek an administrative decision through the established HR grievance procedure; and bring a civil action. These remedies are already in law, but they are clearly codified here. The reality is that very few if any public employees will be able to initiate a civil action in district court, as this option is only available if there is not a state or local government appeal procedure available which allows for appeal of the decision to district court.

Section 3 provides the details regarding the employee's options.

Under Subsection 1, as a result of 2009 amendments to the public employee whistleblower law, most state employees now have access to the appeal process through the Human Resource Division, regardless of whether the state employee is a classified employee. Although there are some state employees who do not have access to this appeal forum, (Judicial Branch employees and SBHE employees), those employees appear to have their own grievance procedure.

Subsection 2 recognizes that employees of political subdivisions (as well as Judicial Branch employees and SBHE employees) have their own grievance procedure.

Subsection 3, recognizes that if a public employee does not have access to the Human Resource Division grievance procedure or other appropriate grievance procedure that allows for appeal of the

decision to the district court, that employee may bring a civil action in the same way as a private sector employee under NDCC Section 34-01-20. Ideally, a public employee would never qualify for this method of recourse because the employee's grievance procedure should be adequate and allow for that appeal to the district court.

Section 4 deals in greater detail with the procedures available to an employee in relation to the Labor Department. This provision strengthens the role of the Labor Department by providing that if an aggrieved employee files a complaint with the Labor Department it shall review the complaint to determine whether the complaint may have merit. If the Labor Department determines the complaint may have merit, the department is required to attempt to obtain voluntary compliance through informal advice, negotiation, or conciliation.

Section 5 requires the state auditor's office to investigate state employee complaints of alleged violation of law or misuse of public resources. The State Auditor would investigate whether the alleged violation of law or misuse of funds actually occurred, and what actions, if any, the employer must take action to remedy the violations. This section differs from the existing whistleblower laws in that it does not focus on retaliation, but instead focuses on the alleged violation of federal, state, or local law or the misuse of public resources.

Attachment
1234 2

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1234

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact sections 34-11.1-04.3, 34-11.1-04.4, 34-11.1-04.5, and 34-11.1-04.6 of the North Dakota Century Code, relating to whistleblower protection for public employees; and to amend and reenact section 34-11.1-04 of the North Dakota Century Code, relating to whistleblower protection for public employees.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 34-11.1-04 of the North Dakota Century Code is amended and reenacted as follows:

**~~34-11.1-04. Violations for misuse reported by employee--~~
~~Reprisals~~Employer retaliation prohibited - Furnishing false information--~~Labor~~
~~department.~~**

1. ~~An employee may, without fear of reprisal, report in writing to the employee's respective agency head, a state's attorney, the attorney general, or an employee organization the existence of:~~
 - a. ~~A job-related violation of local, state, or federal law, rule, regulation, or ordinance.~~
 - b. ~~The job-related misuse of public resources.~~
2. ~~For having made a report under subsection 1, no employee will:~~
 - a. ~~Be dismissed from employment.~~
 - b. ~~Have salary increases or employment-related benefits withheld.~~
 - c. ~~Be transferred or reassigned.~~
 - d. ~~Be denied a promotion that the employee otherwise would have received.~~
 - e. ~~Be demoted.~~
 - f. ~~Be discriminated against in any term or condition of employment.~~
3. An employer may not discharge, discipline, intimidate, penalize, discriminate against, threaten any of these prohibited actions against, or otherwise retaliate against an employee regarding the employee's compensation or benefits, conditions, location, terms, duties, or privileges of employment because:
 - a. The employee, or a person acting on behalf of an employee, in good faith reports to the employer, employee organization, the attorney general, the state auditor, the labor commissioner, a state's attorney, or a law enforcement official:

- (1) A violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule; or
 - (2) A job-related misuse of public resources.
- b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.
- c. The employee refuses an employer's order to perform an action the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for this belief and shall inform the employer that the order is being refused for that reason.
2. An employee who intentionally furnishes false information is subject to disciplinary action, including suspension or dismissal as determined by the employee's appointing authority or designee. An employee claiming reprisal under this section may appeal first to the human resource management services division and then to the district court in the manner prescribed by chapter 28-32, or to other appropriate offices and then to district court if the employee is not under the jurisdiction of the human resource management services division.
4. The labor department shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. To receive assistance from the labor department, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the labor department under this subsection before proceeding under other provisions of this section.
5. An employee of the state may appeal a claim of reprisal under this section in the manner prescribed for a classified employee under chapter 54-44.3. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

SECTION 2. Section 34-11.1-04.3 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.3. Claims of employer retaliation - Recourse.

As provided under this chapter, an employee claiming retaliation under section 34-11.1-04 may do one or more of the following:

1. File a complaint with the labor department for assistance in obtaining voluntary compliance as provided under section 34-11.1-04.5;
2. Appeal to the human resource management services division or other appropriate office at the state or local level as provided under subsection 1 or 2 of section 34-11.1-04.4; and
3. Bring a civil action as provided under subsection 3 of section 34-11.1-04.4.

SECTION 3. Section 34-11.1-04.4 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.4. Appeal to human resource management services division or other appropriate office - Civil action.

1. A state employee who is claiming retaliation under section 34-11.1-04 may appeal the retaliation to the human resource management services division under chapter 54-44.3 and then to the district court in the manner prescribed under chapter 28-32. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.
2. An employee who is not covered under subsection 2 may appeal to the appropriate office at the state or political subdivision level and then to the district court.
3. An employee who is not covered under subsection 1 or 2 may bring a civil action for injunctive relief or actual damages or both in the same manner as provided under subsection 3 of section 34-01-20.

SECTION 4. Section 34-11.1-04.5 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.5. Claims of employer retaliation - Labor department - Voluntary compliance.

1. The labor department shall receive complaints of retaliation under section 34-11.1-04.1. In order to receive assistance from the labor department under this section, an employee claiming to be aggrieved shall file a complaint with the department within three hundred days after the alleged act of retaliation. An employee is not prohibited from filing nor is required to file a complaint with the labor department under this section before proceeding with any other legal remedy available.
2. If an employee files a complaint of retaliation with the labor department, the department shall review the complaint to determine whether the complaint may be substantiated. If the department determines the complaint may be substantiated, the department shall attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. The department's determination under this subsection is not an appealable order.

SECTION 5. Section 34-11.1-04.6 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.6. Claims of employer retaliation - State auditor investigation.

If an executive branch state employee, or a person acting on behalf of that employee, makes a report under subdivision a of subsection 1 of section 34-11.1-04.1 to the attorney general, the labor commissioner, a state's attorney, or a law enforcement official, and if the recipient of the report is not the employer, the recipient of the report shall forward the report to the state auditor. If the employee is employed by the state auditor, for purposes of this section the attorney general shall fulfill the investigation and reporting duties under this section.

1. Upon the state auditor's receipt of a report under this section, the state auditor shall investigate the alleged violation or suspected violation of

federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources. The state auditor may not disclose the employee's name to the public until this investigation is complete.

2. Following an investigation under this section, the state auditor shall provide the state auditor's finding to the employee and to the employer. The state auditor's report must include:

a. A determination of whether a violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources occurred;

b. Whether the employer is required to take any actions to remedy a violation or misuse of public funds; and

c. The process through which the state auditor will track whether the employer is implementing actions that may be required under subdivision b.

3. A state auditor report issued under this section is an appealable order under chapter 28-32."

Renumber accordingly

34-01-20. Employer retaliation prohibited - Civil action for relief - Penalty.

1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:
 - a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.
 - b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.
 - c. The employee refuses an employer's order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.
2. An employer who willfully violates this section is guilty of an infraction.
3. An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within one hundred eighty days after the alleged violation, completion of proceedings under subsection 4, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this section, the court may order, as the court deems appropriate, reinstatement of the employee, backpay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee, from the same employer, must reduce backpay otherwise allowable. In any action under this section, the court may award reasonable attorney's fees to the prevailing party as part of the costs of litigation. An employee whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for conduct prohibited by subsection 1 is available must exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.
4. The department of labor shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. In order to receive assistance from the department of labor, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the department of labor under this subsection before proceeding under other provisions of this section.