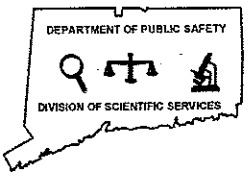
STATE OF CONNECTICUT



DEPARTMENT OF PUBLIC SAFETY
OFFICE OF THE COMMISSIONER

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Commissioner

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February 17, 2009

Rep. Kevin Ryan, Co-Chairman
Sen. Edith G. Prague, Co-Chairman
Labor and Public Employees Committee
Legislative Office Building
Hartford, CT 06106

SB 805 AN ACT CONCERNING WHISTLEBLOWER PROTECTION

The Department of Public Safety suggests changes in bill as drafted.

The existing statutory procedure of CGS Section 4-61dd provides that a whistleblower complaint involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency may be filed with the Auditors of Public Accounts. Subsection (b) (1) prohibits any personnel action being threatened or taken against an employee who discloses information pursuant to this statute.

CGS 4-61dd (b)(2) provides that if a state agency employee alleges that a personnel action has been threatened or taken in violation of the statute, the employee may notify the Attorney General. The proposed language of this bill would provide a needed alternative for the whistleblower employee, in providing for notification of the allegation of personnel action in violation of the statute to the Auditors of Public Accounts. It would be better public policy to transfer all statutory responsibilities regarding alleged adverse personnel actions in violation of the statute from the Office of Attorney General to an independent entity. There are several reasons for this.

The Office of Attorney General is required, pursuant to CGS Section 3-125, to appear in all suits and civil proceedings in which official acts of officers of executive branch agencies are called into question. The current statutory scheme has the Attorney General investigating claims of whistleblowers, and then being required to represent the parties that he is investigating. This creates an irreconcilable conflict of interest. Although the Attorney General's office undoubtedly attempts to maintain "firewalls" or some such division between the two functions, this ultimately is an impossible task in that the Attorney General

necessarily must monitor both those who carry out traditional functions within the office and those who function within the whistleblower unit. The effect of this conflict of interest is manifold. It undermines the confidence of the state employees who look to the Attorney General's office for a statutory right of defense. It causes the state to incur enormous expense when outside counsel must be retained to defend state employees against claims made by whistleblowers when the conflicting responsibilities render it impossible for the Attorney General to provide required statutory representation. It is susceptible of abuse due to limitations on supervision.

Currently in Connecticut, known as the Constitution State, individuals are called to give interviews without knowing whether they are the subject of an investigation. They are not afforded meaningful representation by counsel. The statements they give can be handed over to private counsel for whistleblowers to be used in lawsuits against the people who give statements.

This unit should be independent and subject to close supervision by a head of the unit who not only understands the fundamental need to carry out fair and unbiased investigations, but who is not impeded by the need to maintain distance from the unit in order to avoid a claim of conflict. The Attorney General should be free to provide a vigorous defense on behalf of state agencies and employees, unburdened by a conflicting responsibility to investigate what are, in fact, his clients. All possible protections must be in place to ensure that the whistleblower unit, itself, cannot be corrupted.

The existing statutory language concerning a personnel action taken or threatened against any state employee provides for a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee. The existing language of the statute gives the complainant the benefit of this rebuttable presumption for a period of one year after the employee transmits the information to the Auditors of Public Accounts. This bill would extend the period for the existence of that rebuttable presumption to three years. This is an unreasonable amount of time and there is no demonstrable need for such an extension. There is an understandable public policy in ensuring that whistleblowers can come forth without fear of retaliation. This policy is embodied in the statutory creation of a rebuttable presumption in regard to any personnel action taken within a year after the whistleblower disclosure. To extend the time life of this rebuttable presumption to three years would suggest that state agencies subscribe to the proverb "La vengeance est un plat qui se mange froid" (revenge is a dish best served cold). It is critical to consider that what is being proposed here is not the continued right to make a claim, but a statutory assumption that the complainant is right. The primary responsibility of the Department of Public Safety is to protect the public safety. In the course of carrying out these increasingly complex and challenging duties it is inevitable that employees will sometimes receive assignments that they do not like. To provide a statutory presumption that such an assignment, given 2 years and 11 months after a whistleblower disclosure is in retaliation is an unreasonable extension of this statutory protection.

In fact, this committee should view the entirety of the statute to ensure that what is intended as a statutory shield for the whistleblower cannot be used as a sword by a recalcitrant employee in an attempt to avoid deserved disciplinary action or unwanted assignments. Employees seeking to use the statute for their own purposes can announce to management that they are whistleblowers and then use that status as a means to avoid criticism for inept job performance, duty station transfers, even office assignments by claiming "retaliation".

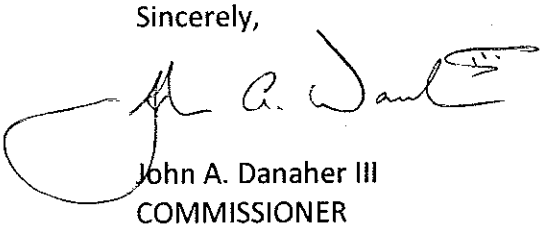
In essence, this situation gives employees an easy method of avoiding legitimate supervisory scrutiny. The statute is thus susceptible of abuse, creating a "trump card" for employees who wish to avoid supervision. The statutory rebuttable presumption should certainly not be applicable for individuals who make public their whistleblower status in an attempt to avoid disciplinary action for conduct unrelated to the information they may have submitted. To that end, I offer the following proposed language change:

> (c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section, shall be subject to disciplinary action by such employee's appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts. Any employee of a state or quasi-public agency or large state contractor, who discloses his or her whistleblower status in an attempt to avoid disciplinary action unrelated to the facts and information which such person has submitted to the Auditors of Public Accounts, pursuant to section 4-61dd (a) shall not be entitled to the rebuttable presumption provided for in section 4-61dd (b) (B) (5).

Lastly, I would like to express my concerns about the proposed language change in section 3(A) that would provide that: If, during the pendency of the hearing, the Retaliation Ajudication Board referee has reasonable cause to believe that any officer or employee has taken personnel action in violation of subdivision (1) of this subsection, such referee may order temporary equitable relief, including, but not limited to, an order reinstating the person filing the complaint to the same position held before such personnel action was taken.

The common law principles of equity look for the non-existence of an adequate remedy at law prior to being invoked. This statutory change would provide for equitable relief to be granted at an administrative hearing level. This is inappropriate because an adequate remedy at law is available if there has been action taken in violation of the statute. It is also inappropriate to grant such relief when a final judicial determination may reach the opposite result.

Sincerely,



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