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Human Rights Referee**

**March 1, 2011**

**Public Hearing of the Committee on Program Review and Investigations**

**Raised Bill No. 1087: An Act Implementing the Recommendations of the Program Review and Investigations Committee Concerning Whistleblower Complaints**

Good morning, Senator Fonfara, Representative Rowe and members of the Program Review and Investigations Committee. I am Jon FitzGerald, a human rights referee at the Commission on Human Rights and Opportunities. Thank you for the opportunity, on behalf of myself and fellow referees Thomas C. Austin, Jr., Donna Maria Wilkerson Brilliant and J. Allen Kerr, to submit testimony on Raised Bill No. 1087, An Act Implementing the Recommendations of the Program Review and Investigations Committee Concerning Whistleblower Complaints.

This bill would amend General Statutes § 4-61dd to provide additional protection for certain whistleblowers employed by state agencies, quasi-public agencies or private companies with state contracts having a value of at least five million dollars and greater.

Based on our experiences hearing whistleblower retaliation complaints, we generally support the legislation. The bill provides a more realistic timeframe for complainants to research their rights prior to filing a complaint. Rather than complainants (who are typically self-represented) bearing the cost of subpoenas, the bill authorizes the presiding referee to order a state agency or quasi-public agency to produce witnesses and documents. The bill also establishes a more reasonable time period for the rebuttable presumption. Given the few complaints filed against large state contractors, these amendments would have little, if any, financial impact on private employers.

We are concerned, though, with proposed subsection (e) (3), which would replace "As an alternative to the provisions of subdivisions (2) and (3)" with "Any state or quasi-public agency employee or large state contractor employee who has not pursued a remedy under subdivision (2)". We suggest retaining the existing language. We believe that the proposed language would have the

unintended consequence of undermining the remedial purposes of the statute. Frequently, a personnel action raises issues of both retaliatory motive and violations of a collective bargaining agreement. The proposed language would force employees to choose between the grievance process (in which motivation is generally irrelevant) and a whistleblower retaliation complaint with the human rights referees (who have no jurisdiction over collective bargaining agreements). While an employee should bring a claim of retaliation in only one forum, an employee should not be prevented from pursuing non-retaliation claims in other forums.

In addition, for your consideration, we have the following suggestion:

#### **4-61dd**

- Amend (b) (1) (D) to provide retaliation protection to an employee of a large state contractor who is retaliated against after making an internal whistleblower complaint;
- Add (b) (1) (E) for consistency with the beginning of that sentence, prohibiting an appointing authority from taking retaliatory action;
- Amend (b) (3) (A) to provide the Commission on Human Rights and Opportunities with the discretion to assign a commission attorney to present the case. This is consistent with a proposal made by the commission;
- Amend (b) (5) to apply the rebuttable presumption to employees who whistleblow internally, for consistency with our proposed amendment to (b) (1) (D);
- Add a subsection (i) to clarify that § 4-61dd does not impair the rights of a person under a collective bargaining agreement (and for consistency with General Statutes § 31-51m, which is also a whistleblower retaliation protection statute); and
- Add a subsection (j) to provide easier access for a complainant and the human rights referees to identify whether a private employer is a large state contractor by requiring the appropriate state agency to list the names of large state contractors on its website. Alternatively, the appropriate state agency could periodically provide the chief human rights referee with the names of large state contractors.

#### **31-51m**

- We would also suggest amending General Statute § 31-51m as attached. By way of background, both General Statutes § 4-61dd and § 31-51m

provide employees with protection against retaliation for whistleblowing. Complaints alleging violations of § 4-61dd are filed with the chief human rights referee as provided for in that statute. Complaints alleging violations of § 31-51m are not filed with the chief referee. There are differences in coverage between the two statutes.

In our experience, whistleblower retaliation complaints have been filed with the chief human rights referee that appeared to have merit but have had to be dismissed because they did not qualify under § 4-61dd. They may have qualified under § 31-51m but, unfortunately for the employee, the dismissal came too late for re-filing within the timeframe of § 31-51m. Our proposal would amend § 31-51m to allow the referees to hear such complaints. Our proposal does not change the substantive law or remedies currently available under § 31-51m. The proposal only adds the human rights referees as an additional, alternative forum for hearing whistleblower retaliation complaints brought under § 31-51m.

A copy of our proposal is attached for your reference.

Thank you for your consideration, and I would be happy to answer any questions you may have.

**Proposal by the human rights referees for amendments to General Statutes**  
**§ 4-61dd and § 31-51m**

**Sec. 4-61dd.**

(a) Any person having knowledge of any matter 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 or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section or for the purpose of investigating a suspected violation of subsection (a) of section 17b-301b until such time as the Attorney General files a civil action pursuant to section 17b-301c. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section or sections 17b-301c to 17b-301g, inclusive, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

(b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute or pursuant to subsection (b) of section 17a-28; **[or]** (D) in the case of a large state contractor, an employee of **the large state contractor or** the contracting state agency concerning information involving the large state contract; **or (E) the appointing authority.**

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in violation of subdivision (1) of this subsection, the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section.

(3) (A) Not later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. **Upon receipt of the complaint, the Chief Human Rights Referee shall serve a copy of the complaint on the supervising attorney of the Commission on Human Rights and Opportunities appointed under section 46a-55. The supervising attorney may, at the supervising attorney's discretion, assign a commission legal counsel, who shall be counsel for the Commission on Human Rights and Opportunities and not for the party filing the complaint, to present all or any part of the case in support of the complaint at hearing.** If the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred, reasonable

attorneys' fees, and any other damages. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing **or by the Commission on Human Rights and Opportunities**, in accordance with the provisions of section 4-183.

(B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under subparagraph (A) of this subdivision.

(4) As an alternative to the provisions of subdivisions (2) and (3) of this subsection: (A) A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than thirty days after learning of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract; or (B) an employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

(5) In any proceeding under subdivision (2), (3) or (4) of this subsection concerning a personnel action taken or threatened against any state or quasi-public agency employee or any employee of a large state contractor, which personnel action occurs not later than one year after the employee first transmits facts and information concerning a matter under subsection (a) of this section to the Auditors of Public Accounts, [or] the Attorney General, **the appointing authority or an employee of the state agency, quasi-public agency or large state contractor** there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section.

(6) If a state officer or employee, as defined in section 4-141, a quasi-public agency officer or employee, an officer or employee of a large state contractor or an appointing authority takes or threatens to take any action to impede, fail to renew or cancel a contract between a state agency and a large state contractor, or between a large state contractor and its subcontractor, in retaliation for the disclosure of information pursuant to subsection (a) of this section to any agency listed in subdivision (1) of this subsection, such affected agency, contractor or subcontractor may, not later than ninety days after learning of such action, threat or failure to renew, bring a civil action in the superior court for the judicial district

of Hartford to recover damages, attorney's fees and costs.

(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.

(d) On or before September first, annually, the Auditors of Public Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to any employee of the contracting state or quasi-public agency or the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) No person who, in good faith, discloses information to the Auditors of Public Accounts or the Attorney General in accordance with this section shall be liable for any civil damages resulting from such good faith disclosure.

(h) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more; and

(2) "Large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.

**(i) (NEW) This section shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement.**

**(j) (NEW) The Auditors of Public Accounts, the Attorney General and the Office of the State Comptroller shall each post on their agency internet web sites the names of large state contractors.**

OR

**(j) (NEW) Commencing October 1, 2011 and annually thereafter and upon request of the chief human rights referee, the Auditors of Public Accounts, the Attorney General and the Office of the State Comptroller shall each provide the chief human rights referee with a the names and addresses of large state contractors.**

#### **Sec. 31-51m**

(a) As used in this section and section 31-278:

(1) "Person" means one or more individuals, partnerships, associations, corporations, limited liability companies, business trusts, legal representatives or any organized group of persons;

(2) "Employer" means a person engaged in business who has employees, including the state and any political subdivision of the state;

(3) "Employee" means any person engaged in service to an employer in a business of his employer;

(4) "Public body" means (A) any public agency, as defined in subdivision (1) of section 1-200, or any employee, member or officer thereof, or (B) any federal agency or any employee, member or officer thereof.

(b) No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. No municipal employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, to a public body concerning the unethical practices, mismanagement or abuse of authority by such employer. The provisions of this subsection shall not be applicable when the employee knows that such report is false.

(c) Any employee who is discharged, disciplined or otherwise penalized by his employer in violation of the provisions of subsection (b) may, after exhausting all available administrative remedies, bring a civil action, within ninety days of the date of the final administrative determination or within ninety days of such violation, whichever is later, in the superior court for the judicial district where the violation is alleged to have occurred or where the employer has its principal office, for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if such violation had not occurred. An employee's recovery from any such action shall be limited to such items, provided the court may allow to the prevailing party his costs, together with reasonable attorney's fees to be taxed by the court. Any employee found to have knowingly made a false report shall be subject to disciplinary action by his employer up to and including dismissal.

**(d) As an alternative to the provisions of subsection c, any employee who is discharged, disciplined or otherwise penalized by its employer in violation of the provisions of subsection (b) may, within ninety days of the date of the final administrative determination or within ninety days of such violation, whichever is later, file a complaint with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the employer violated any provision of this section. The human rights referee may award reinstatement of the employee's previous job, payment of back wages and reestablishment of employee benefits to which the employee would have otherwise been entitled if such violation had not occurred. An employee's recovery from any such action**

shall be limited to such items, provided the human rights referee may allow to the prevailing party its costs, together with reasonable attorney's fees to be taxed by the human rights referee. Any employee found by the human rights referee to have knowingly made a false report shall be subject to disciplinary action by the employer up to and including dismissal. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing, in accordance with the provisions of section 4-183. The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and notices and conducting hearings under this subsection.

(e)[(d)] This section shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement.