

2009 SENATE JUDICIARY

SB 2258

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2258

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/3/09

Recorder Job Number: 8468

Committee Clerk Signature



Minutes: **Senator D. Nething, Chairman**

**Senator Tracy Potter** – District 35 - Introduces the bill – see written testimony. He then reads through and explains the bill.

**Senator Nething** – Questions whistleblower protection for public employees or private employees, which is it.

**Senator Potter** – The intent of the legislation is not to apply to private employees and in fact the changes that are made in the private sector are very minor. Section one currently applies to private sector employees. He then explains the first change made there.

**Senator Nething** – Notes that on line 15 he has added a labor organization as someone that the employee can report to. Asks if there is a problem there.

**Senator Potter** – Replies not that he knows of. They put labor organization in the public sector section and this reflects from that.

**Senator Fiebiger** – Questions page 2. What does the new language do that is different from before.

**Senator Potter** – He is unsure, valid is a word that came from Legislative Council.

**Senator Fiebiger** – On page four, asks why the auditor is the one doing the investigation.

**Senator Potter** – His understanding of this is that the auditor is investigating the violation of perhaps state law. The labor commissioner is the one to which charges of retaliation go.

**Stewart Savelkoul**– Director of the ND Public Employees Association – They stand in strong support of any legislation that would provide protection to whistleblowers in our state whether it is public or private employees.

**Jeb Oehlke** – ND Chamber of Commerce – They think it goes too far into the private sector. Seems to give a lot of duties to the Labor Commissioner. They also have a problem with the language labor organization.

**Senator Nething** – If section one were eliminated would that remove your objections to the rest of the bill.

**Oehlke**– Yes it would.

**Senator Olafson** – States that the prime sponsor testified that it doesn't apply to private sector employees. He asks if he could help resolve that.

**Oehlke** – Replies, section one does deal with private sector employees. He says if there was some language put in so it does not apply to private sector employees.

**Senator Fiebiger** – Said he reads the language differently. He said the language screens out the ones without much merit and asks if this wouldn't help him.

**Oehlke**– He believes the Labor Commissioner already has that power.

**Senator Fiebiger** – Thinks the new language may actually help the people you're representing.

Close the hearing on 2258

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2258

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: 2/11/09

Recorder Job Number: 9151

Committee Clerk Signature



Minutes: **Senator Nething, Chairman**

Committee work

**Senator Nelson** passes out a proposed amendment and the committee reads it over.

Discussion on what these amendments would do. The amendments put the bill back to the way it was. Discussion on that it would weaken the bill. This applies to public employees but not the non-classified. These amendments address the concerns of the chamber.

**Senator Nelson** – moves amendment

**Senator Schneider** – seconds

Verbal vote – all yes

Discussion

**Senator Lyson** mentions he just doesn't like this bill.

**Senator Nelson** moves do pass as amended

**Senator Fiebiger** seconds

Vote 3 yes, 3 no

**Senator Lyson** moves do not pass as amended

**Senator Olafson** seconds

Vote 3 yes, 3 no

**Senator Olafson** moves without committee recommendation

**Senator Lyson** seconds

Vote 6 - 0

**Senator Nelson** will carry

February 10, 2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2258

Page 1, line 15, remove "labor organization, a"

Page 2, line 27, remove the overstrike over "~~may~~" and remove "shall review each complaint received to determine whether the complaint"

Page 2, remove line 28

Page 2, line 29, remove "valid, the commissioner shall"

Page 6, line 27, replace "subdivision" with "paragraph"

Renumber accordingly

Date: 2/11/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

2258

Senate JUDICIARY Committee

Check here for Conference Committee

*amendment*

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Nelson Seconded By Sen Schneider

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething – Chairman			Sen. Tom Fiebiger		
Sen. Curtis Olafson – V. Chair.			Sen. Carolyn Nelson		
Sen. Stanley W. Lyson			Sen. Mac Schneider		

Total (Yes) \_\_\_\_\_ (N) \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

*Verbal yes*

Date:  
Roll Call Vote #: 2  
2258

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Nelson Seconded By S. Giebiger

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman		X	Sen. Tom Fiebiger	X	
Sen. Curtis Olafson - V. Chair.		X	Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson		X	Sen. Mac Schneider	X	

Total (Yes) 3 (N) 3

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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



Date: 2/11/09  
Roll Call Vote #: 3

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES 2258  
BILL/RESOLUTION NO.

Senate JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Lyson Seconded By Sen Olafson

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Fiebiger		X
Sen. Curtis Olafson - V. Chair.	X		Sen. Carolyn Nelson		X
Sen. Stanley W. Lyson	X		Sen. Mac Schneider		X

Total (Yes) 3 (N) 3

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Date: 2/11/09  
Roll Call Vote #: 4

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.

2258

Senate JUDICIARY Committee

Check here for Conference Committee

*Move w/out  
Committee Recommendation*

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Sen Olafson Seconded By Sen Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Dave Nething - Chairman	X		Sen. Tom Fiebiger	X	
Sen. Curtis Olafson - V. Chair.	X		Sen. Carolyn Nelson	X	
Sen. Stanley W. Lyson	X		Sen. Mac Schneider	X	

Total (Yes) 6 (N) 0

Absent \_\_\_\_\_

Floor Assignment Sen. Nelson

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

**REPORT OF STANDING COMMITTEE**

**SB 2258: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2258 was placed on the Sixth order on the calendar.

Page 1, line 15, remove "labor organization, a"

Page 2, line 27, remove the overstrike over "~~may~~" and remove "shall review each complaint received to determine whether the complaint"

Page 2, remove line 28

Page 2, line 29, remove "valid, the commissioner shall"

Page 6, line 27, replace "subdivision" with "paragraph"

Renumber accordingly

2009 TESTIMONY

SB 2258

**Testimony of Sen. Tracy Potter, D-35, to the Senate Judiciary Committee, February 3, 2009**

**Senate Bill 2258**

Mr. Chairman, Members of the Senate Judiciary Committee,

It is in the public interest to encourage public employees to look out for the public interest.

When one of our government agency employees sees something going on at work that seems amiss, there should be a way to report that to authorities who can do something about it ... and there should be a way to protect the employee from retaliation for good-faith reporting.

SB 2258 offers a roadmap for public employees who feel a great obligation to North Dakota and then stick out their necks by blowing a whistle. It directs the Auditor to receive whistleblower reports from the Attorney General, Labor Commissioner or law enforcement official; to investigate the alleged or suspected violation of federal, state, local law or the misuse of public resources. These investigations must keep private the names of the complainants. The Auditor is directed to issue a report back to the employee and the employer. The report requirements are on page 5, lines 4-11.

The second issue is retaliation. It is my understanding that the Attorney General pointed out that even if he were inclined to do so, he lacked authority to order reinstatement of a WSI whistleblower. This bill grants that authority to the Labor Commissioner in subsection 6 on pages 6 and 7.

The Commissioner is to attempt to obtain voluntary compliance through informal advice, negotiation or conciliation. Failing in that, the case could go to administrative decision with the possibility of reinstatement, backpay, reinstatement of benefits or some combination thereof.

It should not be the case that a public-spirited public servant should be punished for coming forward with good faith concerns about perceived unauthorized activities at work. The lessons of the WSI whistleblowers in 2007 & 2008, have a chilling effect on other state employees. The way it is seen is that several state employees blew the whistle and ended up losing their jobs. Wrong-doing at the agency was eventually confirmed by a jury, but the damage to the employees had been done. It's not up to the Legislature to change the past, but we can prevent the same kind of damage to current and future state employees.

As the Board of Directors of this state we need to re-assure our employees that we want them to tell us when things don't seem right, and they need to know that we support them. Passage of this bill will provide that re-assurance.

I encourage the Committee to work with Legislative Council to be comfortable with the terms of the legislation. I hope the Committee will be able to recommend a Do-Pass to the Senate.

## WHISTLEBLOWER PROTECTION LAWS - SUMMARY OF SENATE BILL NO. 2258

### SUMMARY

Senate Bill No. 2258 addresses whistleblower protection for private and public employees by amending the two sections of the North Dakota Century Code (NDCC) relating to whistleblower protection.

### CURRENT LAW

Under existing law, there are two Century Code provisions addressing whistleblower protection for employees. One of these provisions generally applies to employees and employers, whereas the other provision is limited in application to public employees. North Dakota Century Code Section 34-01-20 provides general whistleblower protection to employees and is located under the general provisions chapter of the labor and employment title of the Century Code. This section refers to employers and employees and does not provide any specific definition of these terms. Whereas, Section 34-11.1-04 is part of the Public Employees Relations Act chapter of the labor and employment law. As provided under Section 34-11.1-01, as used in the chapter the term "employee" is limited to state and local public employees. A copy of Section 34-11.1-01 is attached as an appendix.

### BILL SUMMARY

Senate Bill No. 2258 amends both the general as well as the public employee whistleblower protection laws.

#### **Section 1 - General Employee Protection**

Section 1 of Senate Bill No. 2258 amends the general whistleblower protection law—NDCC Section 34-01-20. As amended, subsection 1 of Section 1 of the Act clarifies Section 34-01-20 is limited in application to those employees who are not covered under the whistleblower protections of Section 34-11.1-04 (page 1, line 8). Under existing law, it is not clear whether a public employee is able to choose between the two whistleblower protection laws or whether the public employee is limited to which whistleblower protections are available.

The addition of the prohibited employer acts of intimidation, discrimination, threats of prohibited acts, and retaliation act result in Section 1 of the Act having the same prohibited acts as Section 2 of the Act (page 1, lines 9 through 12).

Existing law provides an employee may report a violation or suspected violation of law to an employer, a governmental body, or a law enforcement official and that employee will be protected under the whistleblower protection law. The addition of a labor organization as an entity to which an employee may report a violation or suspected violation acts to mirror

the existing protections in NDCC Section 34-11.1-04 (page 1, line 15).

Under subsection 3 of Section 1, the addition of the new confidentiality provision acts to mirror the new confidentiality provision in Section 2 of the Act (page 2, lines 1 through 4).

Under subsection 5 of Section 1, the amendments provide for a change in the role of the Department of Labor by strengthening the department's role in reviewing a complaint received by an employee who claims the employee's whistleblower protections were violated (page 2, lines 27 through 29). Under existing law, the Department of Labor is required to receive complaints of violations but is not required to take any further action relating to the complaint. The amendments direct that upon receipt of a complaint, the Department of Labor shall review the complaint to determine whether the complaint might be valid, and if the complaint might be valid, the Labor Commissioner shall attempt to obtain voluntary compliance. This amended language acts to mirror the Department of Labor's duties under Section 2 of the Act.

#### **Section 2 - Public Employees Relation Act**

Section 2 of Senate Bill No. 2258 amends the public employee whistleblower protection law—NDCC Section 34-11.1-04. The format of this section is modified to more closely follow the format currently used in Section 34-01-20 (page 3, lines 10 through 31 and page 4, lines 1 through 7).

The substantive changes in subsection 1 of Section 2 of the Act include:

- Rewording the employer's prohibited acts to more closely follow the prohibited acts under NDCC Section 34-01-20 (page 3, lines 23 through 26). In addition to following the existing prohibited acts under Section 34-01-20, the amendments in Sections 1 and 2 provide more extensive protection for employees by providing more comprehensive protection.
- Allowing a person acting on behalf of an employee to report a violation of law or misuse of public resources (page 3, line 27). This new language mirrors the existing language of NDCC Section 34-01-20, which allows an employee's representative to report a violation of law.
- Removing the requirement that an employee's report be in writing (page 3, lines 10 and 27). By removing this requirement, the public employee law mirrors the existing reporting requirements for all other employees under NDCC Section 34-01-20.
- Expanding the persons to which an employee may report a violation (page 3, lines 28 and 29).

In addition to retaining the existing persons to which an employee may report—the employer, an employee organization, and the Attorney General—the amendments allow a report to be made to a law enforcement official, as currently allowed under NDCC Section 34-01-20; the State Auditor; and the Labor Commissioner.

- Expanding the scope of an employee's protected acts (page 4, lines 2 through 7). Under existing whistleblower protection for public employees, the scope is limited to reports of violations of laws and job-related misuse of public resources. However, the scope of protection for employees in general under NDCC Section 34-01-20 is broader in scope, including protection for an employee who is "requested by a public body or official to participate in an investigation, a hearing, or an inquiry" and for an employee who "refuses an employer's order to perform an action that the employee believes violates local, state, or federal law." As amended, the scope of a public employee's protected acts mirrors the scope of an employee's protected acts. However, a public employee's protected acts are broader in scope in that they include the report of job-related misuse of public resources.

Subsection 3 of Section 2 of the Act creates new law in providing a confidentiality provision. If an employer, the Attorney General, the State Auditor, or the Labor Commissioner receives a report from an employee or an employee's representative, the name of the employee is private data.

Subsection 4 of Section 2 of the Act creates new law in providing for a system under which the State Auditor investigates claims of executive branch state employees claiming violation or suspected violation of law or misuse of public resources. In addition to investigating the claim, the State Auditor is directed to issue a report that must include a determination of whether the alleged violation occurred, whether the employer is required to take any actions to remedy the violation, and the process through which the State

Auditor will track whether the employer is taking any required actions.

Subsection 5 of Section 2 of the Act creates new law that mirrors the existing law under NDCC Section 34-01-20 relating to civil actions and labor agreements (page 5, lines 14 through 31 and page 6, lines 1 and 2).

Subsection 6 of Section 2 of the Act creates new law relating to duties of the Department of Labor (page 6, lines 3 through 31 and page 7, lines 1 through 17). Generally, the duties of the Department of Labor mirror the duties of the department as provided under Section 1 of the Act. For claims of an employee who is not an executive branch state employee and for claims of an executive branch state employee who has a collective bargaining agreement or other public employee rights, the Department of Labor shall receive and investigate a claim in the same manner as provided under Section 1 of the Act. However, in the case of a claim filed by an employee of a state executive branch employer, the employee may request that the Department of Labor assist in obtaining voluntary assistance or that the department issue an administrative decision. If the employee seeks an administrative decision, the employee is barred from bringing a separate civil action.

Under subsection 6 of Section 2 of the Act, if the Department of Labor is requested to issue an administrative decision, the department shall review the complaint and shall issue an administrative decision. In issuing an administrative decision, the department may award attorney's fees to the prevailing party and may order:

- Reinstatement of the employee;
- Backpay for up to two years;
- Reinstatement of fringe benefits;
- Temporary or permanent injunctive relief; or
- Any combination of these remedies.

An administrative order issued by the Department of Labor may be appealed under NDCC Chapter 28-32.

ATTACH:1

**34-11.1-01. Definitions.**

In this chapter unless the context otherwise requires:

1. "Agency" means any department, institution, board, or other similar body of state government, or any political subdivision within the state.

2. "Appointing authority" means the individuals in any agency who have authority to fill job vacancies.

3. "Employee" means any person, whether employed, appointed, or under contract, providing services for the state, county, city, or other political subdivision, for which compensation is paid. "Employee" also includes a person subject to the civil service or merit system or civil service laws of the state government, governmental agency, or a political subdivision. "Employee" does not include:

- a. A person elected to public office in the state or in a political subdivision.
- b. A member of the legislative council staff.
- c. A person holding an appointive statutory office.
- d. One deputy or principal assistant for each elected official or appointive statutory official.
- e. One secretary for each elected or appointive statutory official.
- f. All members of the governor's staff.

4. "Organization" means any organized group of individuals working together for the common good of public employees and government.

**Source.** S.L. 1985, ch. 380, § 1.

**Law Reviews.**

Summary of significant decisions rendered by the North Dakota Supreme Court in 1990 relating to officers and public employees, 66 N.D. L. Rev. 844 (1990).