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HOUSE BILL NO. 1799

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws on January 27, 2009)

(Patron Prior to Substitute—Delegate Loupassi)

A BILL to amend and reenact § 2.2-3705.3 of the Code of Virginia and to amend the Code of Virginia by adding in Title 2.2 a chapter numbered 30.1, consisting of sections numbered 2.2-3009 through 2.2-3013, and by adding a section numbered 30-133.2, relating to the Fraud and Abuse Whistle Blower Protection Act.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3705.3 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 2.2 a chapter numbered 30.1, consisting of sections numbered 2.2-3009 through 2.2-3013, and by adding a section numbered 30-133.2 as follows:

CHAPTER 30.1.

THE FRAUD AND ABUSE WHISTLE BLOWER PROTECTION ACT.

§ 2.2-3009. Policy.

It shall be the policy of the Commonwealth that employees of state government be freely able to report instances of wrongdoing or abuse committed by their employing agency, other state agencies, or independent contractors of state agencies.

§ 2.2-3010. Definitions.

As used in this chapter:

"Abuse" means an employer's or employee's conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.

"Appropriate authority" means a federal or state agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or abuse; or a member, officer, agent, representative, or supervisory employee of the agency or organization. The term also includes the Office of the Attorney General, the Division of State Internal Audit of the Department of Accounts, and the General Assembly and its committees having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or abuse.

"Employee" means any person who is regularly employed full time on either a salaried or wage basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of and whose compensation is payable, no more often than biweekly, in whole or in part, by a state agency.

"Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the state agency.

"Good faith report" means a report of conduct defined in this chapter as wrongdoing or abuse which is made without malice and which the person making the report has reasonable cause to believe is true.

"Misconduct" means conduct or behavior by an employee that is inconsistent with state or agency standards for which specific corrective or disciplinary action is warranted.

"State agency" means any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act.

"Whistle blower" means an employee who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee.

§ 2.2-3011. Discrimination and retaliatory actions against whistle blowers prohibited; good faith required.

A. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower whether acting on his own or through a person acting on his behalf or under his direction, by changing his compensation, terms, conditions, location, or privileges of employment.

B. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower by changing his compensation, terms, conditions, location, or privileges of employment because the whistle blower is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry by an appropriate authority or in a court action.

C. To be protected by the provisions of this chapter, an employee who discloses information about suspected wrongdoing or abuse shall do so in good faith and upon a reasonable belief that the

information is accurate. Disclosures that are false or reckless, confidential by law, or malicious shall not be deemed good faith reports and shall not be protected.

D. Nothing in this chapter shall prohibit an employer from disciplining or discharging a whistle blower for his misconduct or any violation of criminal law.

§ 2.2-3012. Application of state grievance procedure; other remedies.

A. Any whistle blower covered by the state grievance procedure (§ 2.2-3000 et seq.) may initiate a grievance alleging a violation of this chapter. In addition to reinstatement, back pay, and restoration of benefits, the whistle blower may be reimbursed for any costs associated with the grievance, including any attorney's fees. Any such reimbursement shall be made out of moneys appropriated to the employing agency.

B. Any whistle blower disclosing information of wrongdoing or abuse under this chapter where the disclosure results in a savings of at least $1 million may file a claim for reward under the Fraud and Abuse Whistle Blower Reward Fund established in § 30-133.2.

C. Nothing in this chapter shall be construed to limit the remedies provided by the Virginia Fraud Against Taxpayers Act, Article 19.1 (§ 8.01-216.1 et seq.) of Chapter 3 of Title 8.01.

§ 2.2-3013. Notice to employees of whistle blower protection.

An employer shall post notices and use other appropriate means to notify employees and keep them informed of the protection and obligations set forth in the provisions of this chapter.

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Confidential records of all investigations of applications for licenses and permits, and of all licensees and permittees, made by or submitted to the Alcoholic Beverage Control Board, the State Lottery Department, the Virginia Racing Commission, the Department of Agriculture and Consumer Services relating to investigations and applications pursuant to Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2, or the Private Security Services Unit of the Department of Criminal Justice Services.

2. Records of active investigations being conducted by the Department of Health Professions or by any health regulatory board in the Commonwealth.

3. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body, including local school boards as are responsible for conducting such investigations in confidence. However, nothing in this section shall prohibit the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

4. Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1.

5. Investigative notes and other correspondence and information furnished in confidence with respect to an investigation or conciliation process involving an alleged unlawful discriminatory practice under the Virginia Human Rights Act (§ 2.2-3900 et seq.) or under any local ordinance adopted in accordance with the authority specified in § 2.2-2638, or adopted pursuant to § 15.2-965, or adopted prior to July 1, 1987, in accordance with applicable law, relating to local human rights or human relations commissions. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

6. Records of studies and investigations by the State Lottery Department of (i) lottery agents, (ii) lottery vendors, (iii) lottery crimes under §§ 58.1-4014 through 58.1-4018, (iv) defects in the law or regulations that cause abuses in the administration and operation of the lottery and any evasions of such provisions, or (v) the use of the lottery as a subterfuge for organized crime and illegal gambling where such official records have not been publicly released, published or copyrighted. All studies and investigations referred to under clauses (iii), (iv) and (v) shall be open to inspection and copying upon completion of the study or investigation.

7. Investigative notes, correspondence and information furnished in confidence, and records otherwise exempted by this chapter or any Virginia statute, provided to or produced by or for the (i) Auditor of Public Accounts; (ii) Joint Legislative Audit and Review Commission; (iii) *an appropriate authority as defined in § 2.2-3010 with respect to an allegation of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ 2.2-3009 et seq.); (iv)* Department of the State Internal Auditor with respect to an investigation initiated through the State Employee Fraud, Waste and Abuse Hotline; ~~(iv)~~*(v)* committee or the auditor with respect to an investigation or audit conducted pursuant to § 15.2-825; or ~~(v)~~*(vi)* auditors, appointed by the local governing body of any county, city or town or a school board, who by charter, ordinance, or statute have responsibility for conducting an investigation of any officer,

department or program of such body. Records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is prohibited by this section, the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released only with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

8. Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative consents in writing to such identification or (ii) such identification is required by court order.

9. Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 (§ 2.2-1000 et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

10. The names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaints made to a local governing body.

11. Records of active investigations being conducted by the Department of Criminal Justice Services pursuant to Article 4 (§ 9.1-138 et seq.), Article 4.1 (§ 9.1-150.1 et seq.), Article 11 (§ 9.1-185 et seq.), and Article 12 (§ 9.1-186 et seq.) of Chapter 1 of Title 9.1.

12. Records furnished to or prepared by the Board of Education pursuant to subsection D of § 22.1-253.13:3 in connection with the review or investigation of any alleged breach in security, unauthorized alteration, or improper administration of tests by local school board employees responsible for the distribution or administration of the tests. However, this section shall not prohibit the disclosure of records to (i) a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee or (ii) any requester, after the conclusion of a review or investigation, in a form that (a) does not reveal the identity of any person making a complaint or supplying information to the Board on a confidential basis and (b) does not compromise the security of any test mandated by the Board.

13. Investigator notes, and other correspondence and information, furnished in confidence with respect to an active investigation conducted by or for the Board of Education related to the denial, suspension, or revocation of teacher licenses. However, this subdivision shall not prohibit the disclosure of records to a local school board or division superintendent for the purpose of permitting such board or superintendent to consider or to take personnel action with regard to an employee. Records of completed investigations shall be disclosed in a form that does not reveal the identity of any complainant or person supplying information to investigators. The records disclosed shall include information regarding the school or facility involved, the identity of the person who was the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation fails to support a complaint or does not lead to corrective action, the identity of the person who was the subject of the complaint may be released only with the consent of the subject person. No personally identifiable information in the records regarding a current or former student shall be released except as permitted by state or federal law.

14. Records, notes and information provided in confidence and related to an investigation by the Attorney General under Article 1 (§ 3.2-4200 et seq.) or Article 3 (§ 3.2-4204 et seq.) of Chapter 42 of Title 3.2, Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 or Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, or Article 1 (§ 58.1-1000) of Chapter 10 of Title 58.1. However, records related to an investigation that has been inactive for more than six months shall, upon request, be disclosed provided such disclosure is not otherwise prohibited by law and does not reveal the identity of charging parties, complainants, persons supplying information, witnesses or other individuals involved in the investigation.

§ 30-133.2. Fraud and Abuse Whistle Blower Reward Fund.

From such funds as may be appropriated by the General Assembly, there is hereby created in the state treasury a special nonreverting fund to be known as the Fraud and Abuse Whistle Blower Reward Fund, hereafter referred to as "the Fund." The Fund shall be established on the books of the

Comptroller. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely to provide a monetary reward not to exceed $5,000 to any person who has disclosed information of wrongdoing or abuse under the Fraud and Abuse Whistle Blower Protection Act (§ 2.2-3009 et seq.) and the disclosure results in a savings of at least $1 million. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Division of State Internal Audit of the Department of Accounts.

The Division of State Internal Audit of the Department of Accounts shall promulgate regulations for the proper administration of the Fund including eligibility requirements and procedures for filing a claim.