

HOUSE BILL REPORT

ESHB 1187

As Passed House:

March 6, 2023

Title: An act relating to privileged communication between employees and the unions that represent them.

Brief Description: Concerning privileged communication between employees and the unions that represent them.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Hackney, Berry, Bateman, Ramel, Doglio, Simmons, Lekanoff, Bronoske, Wylie, Stonier, Pollet and Ormsby).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/18/23, 2/10/23 [DPS].

Floor Activity:

Passed House: 3/6/23, 95-0.

Brief Summary of Engrossed Substitute Bill

- Creates a privilege from examination and disclosure for a union representative and a union employee concerning any communication between the union representative or union employee made during union representation.
- Applies the privilege from examination and disclosure to the union members and organizations that represent: employees of college districts, public employees, faculty at public four-year institutions of higher education, civil service employees, ferry employees, port employees, and labor unions.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Hansen, Chair; Farivar, Vice Chair; Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Entenman, Goodman, Peterson, Rude, Thai and Walen.

Minority Report: Without recommendation. Signed by 1 member: Representative Cheney.

Staff: Matt Sterling (786-7289).

Background:

Testimonial Privilege.

The judiciary has the power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. The common law and statutory law recognize exceptions to certain communications when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected from being compelled to testify in judicial proceedings.

Washington statutory law establishes a number of these testimonial privileges, including communications between the following persons: (1) husband and wife; (2) attorney and client; (3) clergy and confessor; (4) physician and patient; (5) psychologist and client; (6) optometrist and client; (7) peer support group counselor and law enforcement officer, limited authority law enforcement officer, or firefighter; (8) sexual assault advocate and victim; (9) mental health counselor and client; and (10) alcohol or drug addiction sponsor and addiction recovery fellowship participant.

Summary of Engrossed Substitute Bill:

Testimonial Privilege.

A testimonial privilege is established for a union representative and an employee the union represents or has represented from being examined or required to disclose any communication between an employee and union representative or between union representatives that is made in the course of union representation. Exceptions to this privilege are established that permit examination and disclosure of such communications under the following circumstances:

- when such examination or disclosure appears necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death of a person;
- in civil or criminal actions in which the represented employee is accused of a crime or assault or battery;
- in civil or criminal actions where a union member is a party to the action, the union member may obtain a copy of any statement previously given that concerns the subject matter of the action and may elicit testimony concerning such statements;

- however, this right does not render them discoverable over the objection of the union member;
- in civil, criminal, or regulatory actions against the union or its affiliated, subordinate, or parent bodies or their agents; or
 - when a union employee discloses information to a union representative about the employee's commission of a crime or intent to engage in criminal conduct.

The testimonial privilege does not apply to any record of communications that would otherwise be subject to disclosure under the Public Records Act. A "communication" includes any oral, written, or electronic communication or document containing such communication.

Union Employees and Representatives.

An employee includes a person represented by a certified or recognized union regardless of whether the employee is a member of the union. Union includes any lawful organization that has as one of its primary purposes the representation of employees in their employment relations with employers. Union representation includes any action by a union on behalf of one or more employees it represents in regard to their employment relations with employers, including personnel matters, grievances, labor disputes, wages, rates of pay, hours of employment, conditions of work, or collective bargaining. Union representative includes a person authorized by a union to act for the union in regard to union representation.

The testimonial privilege from being examined or required to disclose certain communications is established for employees and representatives of any organization that represents the following employees in negotiations with employers: (1) any teacher, counselor, librarian, or department head, who is employed by any college district; (2) public employees; (3) any employees that participate in collective bargaining with employers; (4) faculty at a public four-year institution of higher education; (5) civil service employees; (6) ferry employees who are members of a collective bargaining unit represented by a ferry employee organization; (7) labor unions; and (8) port employees in a labor organization.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill establishes the legal right of privacy for union communications. The problem we are trying to solve is that union stewards have a responsibility to represent union members with grievances and they need the full information about situations from

union members to determine whether to bring a grievance. Stewards give unions the ability to handle issues at a lower level. Truth and honesty are critical to the job and there needs to be legal privacy to maintain those conversations. Colleagues trust union representatives because we work with confidentiality, but we no longer have legal protections. This bill would give union representatives protections from discovery like peer support counselors and domestic violence advocates and would maintain the privacy between a union member and their steward. Before 2021 judges did not honor subpoenas about private conversations between union members and representatives. That has changed and we would like to add union representatives to the list of individuals who have the right to not disclose private discussions. Conversations between workers should not be weaponized against union employees. Union records have been subpoenaed and individuals have faced discrimination and retaliation. Without the protections for these communications, the recent case could have a chilling effect on members bringing issues to their union. Union members need to be able to have conversations without the fear of those conversations being used against them by their employer. Maryland and Illinois also have this protection in place. If employees do not have confidence that conversations will remain confidential, we will lose a very important part of union representation.

(Opposed) The bill has no limitation about the scope of the privilege that limits the privilege and seems to apply to any communication. The bill doesn't recognize that representatives are coworkers with members. There is no distinction about when they are in their representative role and how the privilege would apply. This creates a major problem for law enforcement since there is a duty to report wrongdoing by law enforcement officers and this bill would create a conflict if the conversation is with a union representative. It is unclear if it is the individual or the union that gets to decide whether to waive the privilege. The need for the public to be able to oversee the communications of government officials far outweighs the value of a broad privilege that would make it impossible to obtain any union privileges. In our justice system, testimonial privileges are strongly disfavored since they inhibit the search for truth and cause the loss of evidence. Courts across the country have overwhelmingly refused to create a union privilege in civil litigation. This bill would overturn these decisions and interfere with the administration of justice. In employment litigation, union employees often identify their union representatives as witnesses and call them to testify at trial. Testifying witnesses have duty to disclose pertinent information including their communications and writings. This bill would allow union representatives to testify while simultaneously hiding from the system the very documents that relate to that testimony. There is a preemption issue with National Labor Relations Board that regulates activities between union members and representatives that are privileged. There is a lot of concern that this bill will impede investigation of crimes between union members. This is contrary to every other privilege in that the union would hold the privilege and not the employee and that would inhibit our ability to protect employees and the public.

(Other) There are instances where communications between union employees and representatives need to be protected, but this bill takes a very broad approach. Public sector employers value their employees and have a legal obligation to protect them and this broad

privilege would hamper the ability to protect them. The bill also doesn't recognize that representatives are often employees and so conversations between two employees with municipal electronic devices and would create confusion about how to deal with a public records request for those communications. We need to craft this in a way that gives the employee power and not the union. There is a concern that the roles can be blurred between being a union adviser as opposed to a witness and the law needs to account for this distinction. The bill needs better language to make it more narrow and clearer, so everyone knows what documents need to be provided and when.

Persons Testifying: (In support) Representative David Hackney, prime sponsor; Cory Taylor, Service Employees International Union 925; Samantha Grad, Teamsters 117; and Sara Gering, United Food and Commercial Workers International Union 3000.

(Opposed) Seth Berntsen, Washington Defense Trial Lawyers Association; James McMahan, Washington Association of Sheriffs and Police Chiefs; Bob Battles, Association of Washington Business; and Arthur West.

(Other) Mike Hoover, Washington State Association of Counties; and Candice Bock, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: None.