

BILL ANALYSIS

C.S.H.B. 2301
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County Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Under current law, a county may establish an ethics board, but without enabling legislation a county cannot authorize its ethics board to impose certain penalties against those who violate ethics standards. For example, an ethics board can censure a public official, make a referral to a law enforcement agency, or, if the violator is a county employee, recommend disciplinary action. However, an ethics board cannot impose a civil penalty and can take only limited action when an elected official, lobbyist, or vendor violates ethics standards. The purpose of the bill is to authorize the creation of a strengthened county ethics enforcement mechanism, which includes the power to adopt an ethics code governing county public servants, issue advisory opinions, review complaints, and impose penalties on violators.

C.S.H.B. 2301 authorizes the commissioners court of a county that has a population of 650,000, that is located on the international border, and that had a county ethics board appointed by the commissioners court before September 1, 2009, to create a county ethics commission to adopt and enforce an ethics code. The bill sets forth the powers of the commission and sets forth procedures for hearing complaints and for enforcement of commission rulings, including penalties.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

Creation of a County Ethics Commission

C.S.H.B. 2301 amends the Local Government Code to authorize the commissioners court of a county that has a population of 650,000, that is located on the international border, and that had a county ethics board appointed by the commissioners court before September 1, 2009, to create a county ethics commission by an order adopted by a majority of the commissioners court's full membership. The bill requires a copy of such an order to be placed in the minutes of the court's proceedings and makes the copy of the order public information. The bill also authorizes a county ethics commission to be created by approval of the system by a majority of the qualified voters of the county with a population of 650,000 or more and located on the international border voting at an election called for that purpose, and sets out the requirements for the election. The bill sets out the composition of the appointed commission, eligibility requirements, terms of service, method of filling vacancies on the commission, procedure for removing a member, and commission meeting requirements. The bill requires the county attorney, district attorney, or criminal district attorney, as appropriate, with the duty to represent the county in civil matters, to represent the commission in all legal matters.

Ethics Commission Powers

C.S.H.B. 2301 requires the commission to adopt, publish, and enforce an ethics code governing county public servants. The bill authorizes the commission to adopt or use as a guide any ethics law or rule of the United States, Texas, or a political subdivision in Texas to the extent that the law or rule promotes the purposes of the commission and serves the needs of the county. The bill authorizes the commission to adopt bylaws, rules, forms, policies, or procedures to assist in the administration of the commission's duties. The bill authorizes the commission to be guided by Robert's Rules of Order to the extent that it does not conflict with federal or state constitutions and laws or with other guidelines adopted by the commission. The bill requires that the commission be assigned staff by the county and be provided access to county resources to assist in its duties. The bill requires the commission to develop and implement policies that provide the public with information on the commission and the ethics code and to enforce the provisions of the ethics code by issuing appropriate orders or recommendations or by imposing appropriate penalties. The bill authorizes the commission to adopt or use as a guide provisions of the bill relating to complaint procedures and hearings and enforcement.

C.S.H.B. 2301 authorizes the commission on the request of any person covered by the ethics code to issue a written ethics advisory opinion regarding the application of the ethics code to a specified or hypothetical factual situation. The bill prohibits the commission from issuing an opinion that includes the name of any person who may be affected by the opinion and requires that the name of a person who requests an opinion be deemed confidential. The bill sets out the requirements relating to public interest information.

C.S.H.B. 2301 requires a person, not later than the 60th day after the date a person is appointed to the commission, to complete a training program and sets forth required subject matter for the training program. The bill requires a member of the commission to complete subsequent training programs and sets out the required subject matter for those training programs. The bill prohibits a person who is appointed to and who qualifies for office as a member of the commission, other than the initial appointees and public representatives, from voting, deliberating, or being counted as a member in attendance at a meeting of the commission until the person completes the required training program. The bill requires the commission and commission staff to provide periodic training for persons covered by the ethics code on at least a quarterly basis and sets forth the information required to be included in the training program. The bill requires a vendor, in addition to other requirements, to complete training on the ethics code before submitting a bid, responding to a request for qualifications or proposals, or otherwise contracting with the county, an officer, principal, or other person with the authority to bid. The bill also requires a lobbyist intending to meet with a person covered by the ethics code to complete training on the ethics code.

Complaint Procedures and Hearings

C.S.H.B. 2301 sets out categories of ethics code violations defined as a "Category One violation" and a "Category Two violation." The bill authorizes the commission to adopt certain complaint procedures and hearings, hold hearings on a sworn complaint, render decisions on complaints or reports of violations, and agree to the settlement of issues. The bill prohibits the commission from considering a complaint or vote to investigate a matter outside the commission's jurisdiction or investigating any matter except in response to a sworn complaint.

C.S.H.B. 2301 authorizes an individual to file with the commission a sworn complaint, and sets out the procedures for filing the complaint, contents of the complaint, and processing of the complaint. The bill requires the commission to defer jurisdiction of a complaint filed with the commission to the sheriff for disposition if the complaint is within the jurisdiction of the commission but may also be brought under the provisions of a collective bargaining agreement, a civil service rule, or a rule of the sheriff's department. The bill authorizes the sheriff to return a deferred complaint to the commission for additional proceedings as the commission determines

appropriate.

C.S.H.B. 2301 prohibits a county from suspending or terminating the employment of or taking other adverse action against a county employee who in good faith files a complaint or otherwise reports to the ethics commission, commission staff, or another law enforcement authority a violation of the ethics code by a person subject to the ethics code. The bill prohibits a county from suspending or terminating the employment of or taking other adverse action against a county employee who in good faith participates in the complaint processing, preliminary review, hearing, or any other aspect of the investigation and resolution by the commission of an alleged violation of the ethics code by a person subject to the ethics code. The bill makes an ethics commission created by a county a part of the "local governmental entity" for purposes of existing provisions relating to prohibited retaliation for reporting a violation of law and makes an ethics code adopted by a commission a "law" as currently defined in the Government Code.

C.S.H.B. 2301 sets out provisions relating to preliminary review, including requiring the commission staff to promptly conduct a preliminary review on receipt of a written complaint, giving notice of complaint to respondent, and dismissal of the complaint if the commission determines that it does not have jurisdiction over the violation alleged in the complaint.

C.S.H.B. 2301 requires a respondent to respond to the notice not later than the 10th business day after the date the respondent receives the notice if the alleged violation is a Category One violation and requires the commission to set the matter for a preliminary review hearing to be held at the next commission meeting for which notice has not yet been posted if the matter is not resolved by agreement between the commission and the respondent before the 30th business day after the date the respondent receives the notice. The bill requires a respondent to respond to the notice not later than the 25th business day after the date the respondent receives the notice if the alleged violation is a Category Two violation and requires the commission to set the matter for a preliminary review hearing to be held at the next commission meeting for which notice has not yet been posted if the matter is not resolved by agreement between the commission and the respondent before the 75th business day after the date the respondent receives the notice. The bill makes a respondent's failure to timely respond to either notice a Category One violation. The bill requires the response to include any challenge the respondent seeks to raise to the commission's exercise of jurisdiction and provides that the respondent may acknowledge the occurrence of commission of a violation; may deny the allegations contained in the complaint and provide evidence supporting the denial; or may agree to enter into an assurance of voluntary compliance or other agreed order, which may include an agreement to immediately cease and desist. The bill requires the commission to promptly send to the complainant and the respondent written notice of the date, time, and place of any preliminary review hearing.

C.S.H.B. 2301 authorizes the commission staff to submit to the complainant or respondent, during a preliminary review or a preliminary review hearing, written questions reasonably intended to lead to the discovery of matters relevant to the investigation. The bill requires the commission to adopt procedures for the conduct of preliminary reviews and preliminary review hearings and sets forth requirements for the procedures. The bill requires the commission to conduct a preliminary review hearing if, following the preliminary review, the commission and the respondent cannot agree to the disposition of the complaint or if the respondent in writing requests a hearing, and sets forth requirements and procedures for a preliminary review hearing. The bill authorizes the respondent to appear before the commission with the assistance of counsel and to present any relevant evidence, including a written statement.

C.S.H.B. 2301 requires the commission, as soon as practicable after the completion of a preliminary review hearing, to issue a decision by vote stating whether there is credible evidence for the commission to determine that a violation within the jurisdiction of the commission has occurred and whether the violation is technical or de minimis or that there is insufficient evidence for the commission to determine whether a violation within the jurisdiction of the commission has occurred. The bill requires the commission to resolve and settle the complaint

or motion to the extent possible if the commission determines that there is credible evidence for the commission to determine that a violation has occurred. The bill requires the commission, not later than the 10th business day after the date of the final resolution of the complaint or motion, to send to the complainant and the respondent a copy of the decision stating the commission's determination and written notice of the resolution and the terms of the resolution. The bill requires the commission, if the commission is unsuccessful in resolving and settling the complaint, to order a formal hearing to be held and to send notice to the complainant and the respondent and sets forth requirements for the notice. The bill requires the commission, if the commission determined that there is credible evidence for the commission to determine that a violation within the jurisdiction of the commission has not occurred, to dismiss the complaint and to send to the complainant and the respondent a copy of the decision stating the commission's determination and written notice of the dismissal and the grounds for dismissal. The bill authorizes the commission to dismiss the complaint or to promptly conduct a formal hearing if the commission determines that there is insufficient credible evidence for the commission to determine that a violation within the jurisdiction of the commission has occurred, and requires the commission, if the commission makes such a determination, to send to the complainant and the respondent a copy of the decision stating the commission's determination and written notice of the grounds for the determination.

C.S.H.B. 2301 requires the commission, during a formal hearing, to determine by a preponderance of the evidence whether a violation within the jurisdiction of the commission has occurred. The bill sets forth the rights and requirements for a person participating in a formal hearing. The bill requires the commission to provide to the complainant and to the respondent not later than the fifth business day before the date of a scheduled formal hearing or on the granting of a motion for discovery by the respondent a list of proposed witnesses to be called at the hearing, copies of all documents expected to be introduced as exhibits at the hearing, and a brief statement as to the nature of the testimony expected to be given by each witness to be called at the hearing. The bill prohibits the compelling of a respondent to give evidence or testimony that violates the respondent's right against self-incrimination under the United States Constitution or the Texas Constitution. The bill requires the commission to adopt rules governing discovery, hearings, and related procedures consistent with state law.

C.S.H.B. 2301 sets forth requirements and procedures for resolving the complaint.

C.S.H.B. 2301 requires the commission to keep an information file about each sworn or other complaint filed with the commission and sets forth the information required to be included in the file. The bill requires the commission to provide to the person filing the complaint and to each person who is a subject of the complaint a copy of the commission's policies and procedures relating to complaint investigation and resolution. The bill requires the commission, at least quarterly until final disposition of a complaint, to notify the person who filed the complaint and each person who is a subject of the complaint of the status of the sworn complaint. The bill requires the commission to resolve a complaint within six months of its receipt unless it makes a determination that additional time is required to resolve the matter, authorizes the commission to extend the investigation in three-month increments on a determination that additional time is required, and provides that each extension requires separate approval by the commission. The bill requires the complaint to be deemed to have been dismissed without prejudice if the commission does not resolve the matter within six months or within an authorized extension. The bill authorizes the commission, on its own motion or on the reasonable request of a respondent, to extend any deadline for action relating to a sworn complaint, preliminary review hearing, or formal hearing.

C.S.H.B. 2301 authorizes the commission, in connection with a formal hearing, to subpoena and examine witnesses and documents that directly relate to a sworn complaint. The bill authorizes the commission, in connection with a preliminary review and for good cause, to subpoena documents and witnesses on application by the commission staff and a motion adopted by a vote of at least five members of the commission, for the purpose of attempting to obtain from the

documents or witnesses specifically identified information, if the commission reasonably believes that the specifically identified information is likely to be determinative as to whether the subject of an investigation has violated a provision of the ethics code, can be determined from the documents or is known by the witnesses, and is not reasonably available through a less intrusive means. The bill requires the commission to adopt procedures for the issuance of subpoenas and requires a copy of the subpoena to be delivered to the respondent. The bill requires a peace officer to serve a subpoena of the commission in the manner prescribed for service of a district court subpoena at the written request of at least five members of the commission and sets out the requirements relating to a subpoena.

C.S.H.B. 2301 provides that a complainant is not a party to the preliminary review, preliminary review hearing, or formal hearing. The bill makes state public information law inapplicable to documents or any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint except as provided by the bill. The bill makes state open meetings law inapplicable to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint and makes state open meetings laws applicable to a formal hearing. The bill makes certain provisions of the Administrative Procedure Act applicable only to a formal hearing, the resolution of a formal hearing, and the appeal of a final order of the commission, and makes these provisions applicable only to the extent consistent with the provisions of this bill.

C.S.H.B. 2301 makes proceedings at a preliminary review hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint confidential and prohibits this information from being disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information. The bill provides that an order issued by the commission after the completion of a preliminary review or hearing determining that a violation other than a technical or de minimis violation has occurred is not confidential. The bill authorizes commission staff, for the purpose of investigating a sworn complaint, to disclose to the complainant, the respondent, or a witness information that is otherwise confidential and relates to the sworn complaint if the employee makes a good faith, objectively reasonable determination that the disclosure is necessary to conduct the investigation if the commission specifically authorizes the disclosure, and if the employee discloses only the information necessary to conduct the investigation.

C.S.H.B. 2301 makes it a misdemeanor punishable by a fine of not less than \$25 or more than \$4,000, confinement in the county jail for not less than three days or more than three months, or both the fine and confinement, to intentionally destroy, mutilate, or alter information obtained relating to an ethics code violation or to intentionally remove information obtained relating to an ethics code violation. The bill makes it a misdemeanor punishable by a fine of not more than \$1,000, confinement in the county jail for not more than six months, or both the fine and the confinement, to distribute information considered confidential or to obtain access to confidential information if the person knowingly uses the confidential information for a purpose other than the purpose for which the information was received or for a purpose unrelated to ethics code violations, including solicitation of political contributions or solicitation of clients; knowingly permits inspection of the confidential information by a person who is not authorized to inspect the information; or knowingly discloses the confidential information to a person who is not authorized to receive the information. The bill authorizes a person to be prosecuted under these provisions or under the Penal Code if conduct that constitutes one of the above offenses also constitutes an offense under the Penal Code. The bill establishes that a violation relating to confidentiality constitutes official misconduct. The bill authorizes the respondent, in addition to other penalties, to commence a civil action for damages on the respondent's own behalf against any person who is alleged to have disclosed confidential information. The bill requires any action relating to confidential information to be brought in a district court in the county, and authorizes the court to award costs and attorney's fees. The bill makes a county employee subject

to discipline, including termination of employment, for disclosing confidential information. The bill authorizes the commission to disclose confidential information in making a referral to a prosecuting attorney. The bill provides that a county employee who discloses confidential information in compliance with law is not subject to penalties.

C.S.H.B. 2301 requires the commission, as soon as practicable following a preliminary review, preliminary review hearing, or formal hearing at which the commission determines that a person has committed a violation within the commission's jurisdiction, to make available on the Internet a copy of the commission's order stating the determination or a summary of the commission's order. The bill makes this provision inapplicable to a determination of a violation that is technical or de minimis.

Enforcement

C.S.H.B. 2301 authorizes the commission to issue and enforce a cease and desist order to stop a violation, to issue an affirmative order to require compliance with the laws administered and enforced by the commission, and to issue an order of public censure with or without penalty. The bill authorizes the commission to impose a civil penalty of not more than \$500 for each delay in complying with a commission order and to impose a civil penalty of not more than \$4,000 for a violation of the ethics code adopted by the commission. The bill requires a penalty to be deposited to the credit of the general fund of the county. The bill specifies that these provisions are cumulative of any other available sanctions related to the commission. The bill authorizes a person to request the waiver or reduction of a civil penalty by submitting an affidavit to the commission that states the filer's reasons for requesting a waiver or reduction, authorizes the commission to waive or reduce a civil penalty if the commission finds that a waiver or reduction is in the public interest and in the interest of justice, and sets forth the information that the commission is required to consider before acting to waive or reduce a civil penalty. The bill authorizes the commission to affirm, reduce, or waive the civil penalty after hearing the waiver request. The bill authorizes the commission to notify the appropriate regulatory or supervisory entity, including any agency, the State Commission on Judicial Conduct, or the State Bar of Texas, of a violation of the ethics code adopted by the commission.

C.S.H.B. 2301 authorizes the commission to impose a civil penalty of not more than \$4,000 for the filing of a frivolous or bad-faith complaint and defines "frivolous complaint." The bill authorizes the respondent to commence a civil action in district court in the county on the respondent's own behalf against any person who filed a frivolous complaint against the respondent, and authorizes the court to award costs and attorney's fees. The bill authorizes a person to file a sworn complaint with the commission alleging that a complaint relating to that person filed with the commission is frivolous or brought in bad faith, and authorizes the complaint to be filed without regard to whether the complaint alleged to be frivolous or brought in bad faith is pending before the commission or has been resolved. The bill requires the commission to act on such a complaint as it would any other complaint filed with the commission. The bill sets forth the factors the commission is required to consider in assessing a sanction.

C.S.H.B. 2301 authorizes a respondent to appeal the commission's decision by filing a petition in a district court in the county within 30 days after the date of the decision, specifies that such an appeal is under the substantial evidence rule and makes the judgment of the district court appealable as in other civil cases. The bill authorizes the court to order reinstatement of a county employee, payment of back pay, or other appropriate relief if the court renders judgment for the petitioner and the petitioner is a county employee. The bill authorizes the district court to order appropriate relief, including costs and attorney's fees, if the court renders judgment for the petitioner. The bill sets forth requirements and procedures for review under the substantial evidence rule. The bill authorizes the commission to require a party who appeals a final decision to pay one-half of the cost of preparation of the original or a certified copy of the record of the commission proceeding that is required to be sent to the reviewing court. The bill makes such a

charge a court cost and authorizes it to be assessed by the court in accordance with the Texas Rules of Civil Procedure.

Dissolution of the Commission

C.S.H.B. 2301 requires the commissioners court to call an election to determine whether the ethics commission will be dissolved if 10 percent of the qualified voters of the county petition the commissioners court to dissolve the commission after the commission has been in effect for at least one year. The bill requires such an election to be held in the manner provided for an election to create a county ethics commission and sets forth the required language for the ballot. The bill requires the commissioners court, if the proposition is approved by a majority of the qualified voters voting at the election, to declare the result and by order dissolve the ethics commission and requires a copy of the order dissolving the commission to be placed in the minutes of the court's proceedings. The bill establishes that the dissolution of a county ethics commission does not affect the prior operation of the ethics code adopted by the commission or any prior action taken under it; any violation of the ethics code or any penalty, forfeiture, or punishment incurred for a violation of the ethics code before the effective date of the dissolution; and any investigation, proceeding, or remedy concerning any penalty, forfeiture, or punishment. The bill authorizes the investigation, proceeding, or remedy to be instituted, continued, or enforced and the penalty, forfeiture, or punishment imposed, as if the commission had not been dissolved.

Miscellaneous Provisions

C.S.H.B. 2301 prohibits the provisions added by this bill from being construed to affect the terms of an agreement between the county and county fire or police employees or any provision of a civil service statute applicable to a county employee. The bill provides that if provisions added by the bill or an ethics code adopted or enforced under such provisions conflicts with an agreement or a civil service statute applicable to a county employee, the agreement or civil service statute prevails. The bill defines "commission," "commission staff," "communicates directly with," "county affiliate," "county employee," "county office," "county officer," "county public servant," and "lobbyist."

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2301 differs from the original by adding to the criteria used to determine the counties to which the substitute applies a county that had a county ethics board appointed by the county commissioners court before September 1, 2009. The substitute differs from the original by adding a definition for "communicates directly with." The substitute adds a specification to the original's definition of "lobbyist" that the person's communication with a county officer or employee to influence official action be for compensation in excess of an amount established by the county ethics commission. The substitute adds provisions not in the original relating to construing the bill's provisions if there is a conflict between the bill's provisions and the fire and police employee relations act or other civil service statute. The bill adds a provision not in the original requiring the commission in certain complaints over which both the commission and the sheriff have jurisdiction to defer jurisdiction to the sheriff and authorizing the sheriff to return a complaint to the commission under certain circumstances. The substitute differs from the original by removing provisions authorizing the commission to issue an advisory opinion on its own motion, to hold hearings on its own motion, to initiate a preliminary review on its own motion without a sworn complaint, or to initiate a civil enforcement action or refer matters to the prosecuting attorney on its own motion. The substitute adds a provision not in the original prohibiting the commission from investigating any matter except in response to a sworn

complaint. The substitute differs from the original by revising the conduct for which the commission may make a referral to a prosecuting attorney and the circumstances under which the referrals may be made. The substitute adds a provision not in the original establishing that if conduct that constitutes an offense under certain provisions of the bill also constitute an offense under the Penal Code, a person may prosecuted under the substitute's provisions or under the Penal Code. The substitute differs from the original by removing provisions relating to the criminal penalty for a violation of the ethics code adopted by the commission and venue for prosecution.