
INTEROFFICE MEMORANDUM

TO: SEEC COMMISSIONERS
FROM: STAFF
SUBJECT: WHISTLEBLOWER PROPOSAL
DATE: MARCH 2, 2012

BACKGROUND:

In December 2011, after having discussed amendments to the Whistleblower Code for several months, the Commission endorsed a proposal for transmittal to Seattle City Councilmember Tim Burgess, Chair of the Government Performance and Finance Committee. This was done on January 9, 2012. [See attachment 1].

On January 24th, SEEC staff briefed Councilmember Burgess. Subsequently, questions were raised and addressed at meetings held in January and February. Several changes are shown that were addressed in conversations between SEEC staff, Law, Legislative and Council staffs. These are brought back for review and consideration by the Commission. [All revisions are shown in red on the provided .pdf copy of the Whistleblower Protection Code].

Before Council adopts a position on two other aspects of the proposal, the Commission is asked to review what employees will be included in the Whistleblower Protection Code, specifically those employees who are perceived as having reported or cooperated

Lastly, the Commission is asked to clarify its rationale regarding why, when a matter is before the Hearing Examiner, a department must prove by a preponderance of the evidence that the departmental actions were independently justified, and not retaliatory.

REVISIONS and POSSIBLE REVISIONS TO DECEMBER 2011 PROPOSAL:

- Section 2: Definitions:
 - Adds “significant” to describe other types of actions that may be considered as retaliatory. [pg.3]
 - The Law Department suggested the need for an alteration in the definition of Good Faith. Changes have been made to that definition. [pg. 4]

- Adds the prohibition against retaliating against employees perceived to be the Whistleblower or perceived to have cooperated in an investigation. [pg. 5]
- Section 5: Reports to the Executive Director:
 - Reduces the time period to report improper governmental actions from 18 months to 12 months, bringing it in line with State law. [, pg 9]
 - Clarifies what information a Department receiving a discretionary referral must provide the Executive Director. [pg 11]
- Section 8: Retaliation:
 - Adds information that an employee must provide in the written complaint alleging retaliation. [pg 15]
 - Clarifies that the 180 day time in which to file a retaliation complaint is tolled while the Executive Director determines the sufficiency of the retaliation complaint. [pg 16]
 - In line with the City charter, gives the Executive Director and the Hearing Examiner the power to recommend that a department instigate a disciplinary process. [pg 17]
- Section 9: Enforcement:

There are two provisions within Section 9 that the Commission has been asked to review and explain the rationale for Council.

First, the current proposal includes the same presumptive finding of retaliation as contained in the State employee Whistleblower protection statute.¹ In application, this section requires the Executive Director to prove to the Hearing Examiner that the employee is entitled to protection under the City’s Whistleblower Protection ordinance and has suffered an adverse employment action. The Department in which the retaliatory action took place then may offer evidence to “prov[e] by a preponderance of the evidence” that the action taken was not retaliatory.²

Allegations against a specific employee, which may result in a punitive monetary fine imposed by the Commission, must be proved by the Executive Director by a preponderance of the evidence, the same burden the Executive Director has when proving an Ethics Code violation. In

¹ RCW 42.40.050(1) (a): “Any person who is a whistleblower . . . and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter RCW 49.60.”

² RCW 42.40.050(2): The agency presumed to have taken retaliatory action . . . may rebut that presumption by proving by a preponderance of the evidence that . . . a series of documented personnel problems or a single egregious event, or that the agency action or action were justified by reasons unrelated to the employees status as a whistleblower and that improper motive was not a substantial factor.” The proposed ordinance has non-exclusive illustrative circumstances. [Section 9 – (B)(1)]

practice, this would obviate the need for a second hearing if the Commission is asked to levy a fine against the employee under the Ethics Code SMC 4.16.070(5).

Secondly, Section 9 also contains provisions which allow the Hearing Examiner some latitude in determining the proper remedy for a department's retaliatory actions. In the prior draft this was defined as "non-compensatory damages." The Commission has been asked to be more specific on what was considered by this phrase. Staff is proposing that the Commission specify those damages and reiterate the cap of \$10,000. State statutes define retaliation as an unfair employment practice,³ and as such, all retaliation complaints, investigations and settlements are handled by the Washington State Human Rights Commission [HRC]. If retaliation is found by the HRC, remedies available to a State employee are enumerated in RCW 49.60.250(5):

(5) If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed twenty thousand dollars, and including a requirement for report of the matter on compliance. ..." [Emphasis added].

The City Office of Civil Rights [SOCR] offers complainants of employment discrimination nearly identical remedies under SMC 14.04.180(C) if the Hearing Examiner determines that discrimination took place:

C. In the event the Hearing Examiner (or a majority of the panel composed of the Examiner and Commissioners), determines that a respondent has committed an unfair employment practice under this chapter, the Hearing Examiner (or panel majority) may order the respondent to take such affirmative action or provide for such relief as is deemed necessary to correct the practice, effectuate the purpose of this chapter, and secure compliance therewith, including but not limited to hiring, reinstatement, or upgrading with or without back pay, lost benefits, attorney's fees, admittance or restoration to membership in a labor organization, admittance to participation in a guidance, apprentice training or retraining program, or such other action which will effectuate the purposes of this chapter, including action which could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed Ten Thousand Dollars (\$10,000.00). Back pay liability shall not accrue from a date more than two (2) years prior to the initial filing of the charge. [Emphasis added to show similarities between State and City laws].

Council staff has indicated there is opposition to allowing Whistleblowers to recover attorney fees.

³ RCW 49.60.210(2): "It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower ..."

The current proposal to amend the City's Whistleblower Protection ordinance is a progressive step forward modeled on existing State and local law. The retaliation and enforcement sections provide an effective process for addressing retaliation complaints. The remedy follows both State and current City law and supports the overall purpose of the ordinance.