



Legislative Department Seattle City Council Memorandum

Date: December 4, 2013
To: Council President Clark, Councilmember Burgess and Councilmember Licata
From: Mike Fong and Nate Van Duzer
Subject: **Whistleblower Code Amendments**

On September 18, the Government Performance and Financing Committee (GPFC) discussed a set of policy questions and provided Council staff with direction to craft amendments to Council Bill 117892 related to the City's Whistleblower Code. The follow is summary of those issues and a brief description of any amendments proposed by the Chair.

Policy Questions

- 1) *Who should have the burden of proof when whistleblower retaliation cases are referred to the City's Hearing Examiner?*

Chair's Recommendation: City department shall have the burden of proof.

Page 26, line 4 of (Version 9) replace:

The burden of proof in any proceeding against an agency is with the Executive Director. Retaliation must be shown by a preponderance of the evidence.

with:

The burden of proof in any proceeding before the hearing examiner against an agency is on the agency to prove that no retaliation occurred by showing by a preponderance of the evidence that the cooperating employee's status as a cooperating employee was not a contributing factor in the agency's decision to implement the adverse action against the cooperating employee. is with the Executive Director. Retaliation must be shown by a preponderance of the evidence.

- 2) *Should employees subject to retaliation for reporting improper governmental activity be given the option to file a private right of action in court?*

Chair's Recommendation: Yes. Private right of action available to a cooperating employee after they have filed a timely and sufficient complaint with the SEEC Executive Director. Regardless of the Executive Director's subsequent decision on how or whether to proceed with the complaint, the private right of action would be made available.

Page 28, line 7 of (Version 9) make the following amendment as shown:

The cooperating employee may, after filing a timely and sufficient complaint with the Executive Director, pursue a private cause of action under this subchapter if one of the following conditions applies and the private cause of action is filed within 12 months of the condition being met:

1. The Executive Director has determined not to investigate because the matter is being pursued in another forum; or

2. the Executive Director has completed an investigation and determined that no reasonable cause exists to believe that retaliation occurred; or

3. ~~a timely complaint of retaliation has been filed with the Executive Director,~~ the Executive Director has found that the complaint has reasonable cause, the Executive Director has determined that a joint settlement is not feasible, and ~~the cause of actions is filed within 12 months of the Executive Director providing~~ notice to the parties under subsection 4.20.860.G that he or she has determined a Settlement is not feasible.

In no event can a cooperating employee file a private cause of action if 30 days have passed since the Executive Director has filed a complaint with the Hearing Examiner and named the cooperating employee as an interested party.

- 3) *Should any caps be imposed on attorneys' fees or emotional distress damages recoverably by an employee if he or she opts to file a civil action in court?*

Chair's Recommendation: Yes. Limit emotional distress damages to \$20,000 (same as maximum remedy awardable by Hearing Examiner), but no limit on attorneys' fees.

No amendment necessary. As proposed in C.B. 117892.

- 4) *Should the standard for retaliation hinge on whether an employee's status as a whistleblower (cooperating employee) was a contributing factor or substantial factor in the employer's decision making process?*

Chair's Recommendation: Contributing factor for in-house administrative process and substantial factor for civil suit.

Page 8, line 21 of (Version 9) after "process" insert:

except as provided for in section 4.20.870B.

The new paragraph:

"Retaliate," and its kindred nouns, "retaliation" and "retaliatory action," means to make, or use one's authority to make, an adverse change in a Cooperating Employee's employment status or terms and conditions of employment where the employee's status as a Cooperating Employee was a contributing factor in the decision making process except as provided for in Section 4.20.870B.

Page 29, line 2 of (Version 9), amend paragraph as follows:

When adhering to the filing requirements of subsection 4.20.870A, the Cooperating Employee injured by any retaliation in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further ~~retaliation violations~~, or to recover the actual damages sustained by the person, or both. Remedies for damages include the cost of suit including reasonable attorney's fees, without limitation; emotional distress damages not to exceed \$20,000; and any other appropriate remedy authorized by this chapter, without limitation. ~~To prove retaliation in a civil-court action,~~ the cooperating employee has the burden to prove by a preponderance of the evidence that a violation occurred. To prove retaliation in such a lawsuit, a Cooperating Employee must prove by a preponderance of the evidence that the protected activity the employee's status as a cooperating employee was a substantial factor in the decision making process that resulted in an adverse action against the cooperating employee.

5) Technical Amendments.

Page 4, line 4 (Version 9) amend as follows:

~~"Adverse change" is an unfavorable workplace action that includes...~~

Page 24, line 15 (Version 9) amend as follows:

If the Executive Director determines that initiating a joint settlement conference is not feasible or determines that, at any point after such a conference is initiated, it is no longer feasible to reach a joint settlement, the Executive Director shall issue a notice to all interested parties that a settlement is not feasible. ~~to all interested parties that he or she intends to file a complaint with the Hearing Examiner.~~