Legislative Department
Seattle City Council
Memorandum

Date: September 16, 2013

To: Council President Clark, Councilmember Burgess and Councilmember Licata

From: Mike Fong and Nate Van Duzer

Subject: **Whistleblower Code Revisions – Policy Options and Considerations**

On September 4, Council staff provided members of the Government Performance and Financing Committee (GPFC) a high level summary of the policy and process changes to the City's whistleblower code proposed by the Seattle Ethics and Elections Commission (SEEC) and additional amendments as proposed by Councilmember Burgess (see Attachment A). Ongoing deliberations about this bill has centered around three key elements, while a fourth has emerged during staff discussions this past week. Discussion of these four points are below, followed by two proposed amendments to clarify language in other sections of the bill.

Policy Questions

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

    a. Employee/SEEC Director (Burgess Proposal)
    b. Employer/City Agency (SEEC Proposal)

Discussion/Considerations:

Employee/SEEC Director	Employer/City Agency
➢ Traditional trial court standard. Employees litigating a retaliation claim in superior court would be required to prove their claim by preponderance of evidence (prove more likely than not, their claim is true (more than 50% chance it is true)). ➢ Unclear if State whistleblower code "presumption of retaliation" provision would mean employee alleviated from burden of proof in front of an Administrative Law Judge. There is no case law on this provision. ➢ May lead to greater burden on SEEC Director or need for outside legal counsel for administrative hearings.	➢ Not typical in trial court, but some Federal agencies do shift burden onto employers for administrative hearings. ➢ Intended to be similar to State whistleblower code where there is a "presumption of retaliation". ➢ Intended to be more favorable to employees and encourages whistleblowers to come forward. ➢ Presumption that the City Agency is better equipped with resources to bear burden of proof. ➢ May incentivize employees to keep their case "in-house". ➢ May lead to additional legal and other costs to City agencies and City Attorney's Office.

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

   a. Yes. Employee has option to "opt out" only after the SEEC Executive Director has found reasonable cause for the allegation. (Burgess Proposal)
   b. Yes. Employee has option to "opt out" of the internal administrative process at any point (within certain time limitations) after a complaint is filed with the SEEC Executive Director. (SEEC Proposal)
   c. No. Employee must stay within the internal administrative process or identify another matter of law to file a civil suit in court.

Discussion/Considerations:

Yes. Opt out after reasonable cause.	**Yes. Opt out anytime.**	**No. Must stay in administrative process.**
➢ Intended to "weed out" frivolous cases. Sets a minimum threshold for allowing civil suits to be filed. ➢ SEEC Director would effectively screen cases before enabling an employee to file a civil suit. ➢ Provides an alternative path for more complex cases and for employees that may have concerns about the objectivity of the administrative process.	➢ Maximizes employee options to pursue remedies. Most favorable to the employee. ➢ State law allows employees to file a civil action in court for retaliation – if State Auditor opens an investigation into the initial improper governmental activity allegation. ➢ Provides an alternative path for more complex cases and for employees that may have concerns about the objectivity of the administrative process.	➢ Consistent with current law – which does not allow private cause of action for City employees. ➢ Employee or employer may appeal an administrative hearing decision in superior court – but the standard of review is "arbitrary and capricious". In other words, a high bar for overturning the administrative ruling. ➢ State AG's office indicates that virtually all whistleblower retaliation cases filed against the State in court include other causes of action. In other words, plaintiffs not solely reliant on whistleblower code to file suit.

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?

   a. Yes. Limit emotional distress damages to $20,000 (same as maximum remedy awardable by Hearing Examiner), but no limit on attorneys' fees. (Burgess Proposal)
   b. No. No limit on either. (SEEC Proposal)

Discussion/Considerations:

Yes. Limit emotional distress damages to $20,000.	No limits.
➢ Allow for civil suits to be filed, but minimizes the financial incentive to do so since emotional distress damages similarly capped for administrative process and civil suits. ➢ Acknowledges that most whistleblower retaliation cases are filed in conjunction with other causes of action – which may allow for broader remedies. No inherent need to uncap emotional distress damages. ➢ Maintains the option to file suit for those employees that may have concerns with the objectivity of the administrative process or want to retain primary control over the process. But limits the City's liability and legal risk exposure.	➢ Allows for more complex cases to seek redress for extraordinary damages. ➢ Minimizes the risk of over-burdening the SEEC Director and his staff if there is a perceived disincentive to file civil action as a result of caps on remedies. ➢ Would allow a jury to decide what appropriate damages should be awarded to victim of retaliation rather than limited by an arbitrary cap.

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

   a. Contributing factor (SEEC Proposal)
   b. Substantial factor
   c. Contributing factor for in-house administrative process and substantial factor for civil suit.

Discussion/Considerations:

Contributing Factor	Substantial Factor
➢ "means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision" – Washington DC Whistleblower Protection Code ➢ Would represent a lower bar for determining whether retaliation occurred. ➢ Is the standard in Washington DC Whistleblower Code and for Federal OSHA Whistleblower Law administered by Department of Labor.	➢ "The principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries" – Black's Law Dictionary ➢ Would represent a higher bar for determining whether retaliation occurred. ➢ Is the standard adopted in the Washington State Whistleblower Code and is the more commonly used standard by the courts. As a result, there is a large body of case-law with issues that arise with this standard.

Other Amendments

In addition to these four policy questions, Staff recommends adopting two minor clarifying amendments. Additions are in double underline and deletions in double strike-through below.

1) The first is to amend Section 2 of the bill (proposed code section 4.20.805), to remove a redundant portion of the definition of "adverse change" (page 4, line 4):

   "Adverse change" ~~is an unfavorable workplace action that~~ includes, but is not limited to: denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes or changes in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either is in opposition to the employee's expressed wish; refusal to assign meaningful work; unsubstantiated letters of reprimand or unsatisfactory performance evaluations; reduction in pay; denial of promotion; transfer or reassignment; demotion, suspension or dismissal or other disciplinary action; a supervisor or superior who behaves in, or encourages coworkers to behave in, a hostile manner toward the employee; issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or any other significant unfavorable action that is inconsistent compared to actions taken before the employee engaged in action protected by this chapter, or compared to other employees who have not engaged in action protected by this chapter.

2) The second amendment is to Section 8 of the bill (proposed code subsection 4.20.860G), to clarify the SEEC's intent that the SEEC Director has discretion as to whether to file complaints with the Hearing Examiner or not after an unsuccessful attempt at settlement (page 24, lines 14-18):

   G. End of settlement discussions

   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 ~~he or she intends to file a complaint with the Hearing Examiner~~he or she has determined a settlement is not feasible.