

December 5, 2012
Commission Meeting

ORDINANCE _____

~~AN ORDINANCE relating to the Whistleblower Protection Code; _____;
_____; _____, amending the following sections of the Seattle
Municipal Code: Section 4.20.800, to clarify the legislative purpose; Section 4.20.810, to
clarify the rights and responsibilities of employees and the process for reporting; Section
4.20.860 to amend the manner in which allegation of retaliation are reported, investigated
and resolved; Section 4.16.070.6 adding retaliation to prohibited behavior under the
Ethics Code; Sections 3.70.010 and 3.70.100 redefining the jurisdiction of the Ethics and
Elections Commission to include administration of the Whistleblower Protection Code;
adding new sections 4.20.805, containing definitions of terms used in the whistleblower
code ; 4.20.870, creating a private cause of action for retaliation against whistleblowers;
4.20.875, providing the Ethics and Elections Director investigative tools including
subpoena power; repealing sections 4.20.820 concerning confidentiality provisions
replaced by ; 4.20.840; 4.20.850. AN ORDINANCE relating to the Whistleblower
Protection Code; _____; _____; _____, amending the
following sections of the Seattle Municipal Code: Section 4.20.800, to clarify the
legislative purpose; Section 4.20.810, to clarify the rights and responsibilities of
employees and the process for reporting; Section 4.20.860 to amend the manner in which
allegation of retaliation are reported, investigated and resolved; Section 4.16.070.6
adding retaliation to prohibited behavior under the Ethics Code; Sections 3.70.010 and
3.70.100 redefining the jurisdiction of the Ethics and Elections Commission to include
administration of the Whistleblower Protection Code; adding new sections 4.20.805,
containing definitions of terms used in the whistleblower code ; 4.20.870, creating a
proviate cause of action for retaliation against whistleblowers; 4.20.875, providing the
Ethics and Elections Director investigative tools including subpoena power; repealing
sections 4.20.820 concerning confidentiality provisions replaced by ; 4.20.840; 4.20.850.~~

WHEREAS, it is in the public interest to encourage public employees to report instances of
improper governmental action in order to give the governmental entity the opportunity to
correct improper governmental actions; and,

WHEREAS, the most effective way to encourage public employees to report improper
governmental action is to provide an effective whistleblower protection program that
includes a clear reporting process and effective protection from retaliation; and,

1 WHEREAS City employees who step forward as whistleblowers to make good faith reports of
perceived improper governmental actions serve the public interest; and ,
2 WHEREAS, in 1990, 1991, 1992 and 1994, the City Council has recognized the important public
policy inherently expressed by the City’s Whistleblower Protection Code; and,
3 WHEREAS, City employees who step forward as whistleblowers uphold the principle that
holding a public office or employment is a public trust; and,
4 WHEREAS, the efficient and honest use of public funds is of paramount importance to
upholding the public trust; and,
5 WHEREAS, ensuring that government comports with the rule of law is the underpinning of a
democratic government; and,
6 WHEREAS, ensuring that governmental actions advance and protect the public health and
7 safety; -and, |
8 WHEREAS, the dissemination of thorough, accurate, truthful and necessary information is the
basis upon which decision makers make informed decisions and judgments; and,
9
10 WHEREAS ~~is it is~~ the intent of the City of Seattle to fund a robust, independent and effective
Whistleblower Protection program; and,
11 WHEREAS, an effective whistleblower protection program should include: an accessible
reporting system; prompt, efficient, and independent investigation and evaluation of
12 allegations that whistleblowers have been subject to retaliation; and effective remedies in
cases where such retaliation has occurred,
13

14 NOW, THEREFORE,

15 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

16 **Section 1.** Section 4.20.800 of the Seattle Municipal Code, last amended by Ordinance
17 117039, is amended as follows:

18 Seattle Municipal Code 4.20.800 - Policy -- Purpose.

19 It is the purpose of this ordinance to:

- 20 A. Encourage City employees to report in good faith assertions of improper
21 governmental action and to provide employees with a clear process for making reports;
- 22 B. Provide City employees protection from retaliatory action for making a good faith
23 report or being perceived as making a report, or cooperating or being perceived as cooperating in
any subsequent inquiry or investigation;
- 24 C. Provide for an independent investigation of reports to inform the operation of City
25 government and promote the public confidence;

Comment [A1]: WB: This whereas clause is missing a few words.

Comment [A2]: WB: words are flipped

1 D. Provide for an independent investigation and determination of alleged retaliation;

2 E. Provide an administrative forum in which to address the harm caused by
3 retaliatory behavior;

4 F. Provide for the assessment of penalties against individuals who retaliate against a
5 City employee;

6 G. Adopt a City Whistleblower program so as to comply with RCW 42.41.050,
7 Local Government Whistleblower Protection~~4~~; and

Comment [A3]: WB

8 H. In adopting this subchapter do nothing to diminish employee rights under any
9 collective bargaining agreement.

10 **Section 2.** A new section 4.20.805 of the Seattle Municipal Code is added to Subchapter
11 III of Chapter 4.20 as follows:

12 **Definitions**

13 As used in Sections 4.20.800 through 4.20.880, the following terms shall have these
14 meanings:

15 “Adverse change” includes, but is not limited to:

16 **denial** of adequate staff to perform duties;

Comment [kmf4]: Check convention for capitalization?

17 frequent staff changes;

18 frequent and undesirable office changes or changes in the physical location of the
19 employee’s workplace or a change in the basic nature of the employee’s job, if either is in
20 opposition to the employee’s expressed wish;

21 refusal to assign meaningful work;

22 unsubstantiated letters of reprimand or unsatisfactory performance evaluations;

23 reduction in pay;

24 denial of promotion;

25 transfer or reassignment;

26 demotion, suspension or dismissal or other disciplinary action;

27 a supervisor or superior who behaves in, or encourages coworkers to behave in, a hostile
28 manner toward the employee;

1 issuance of or attempt to enforce any nondisclosure policy or agreement in a manner
2 inconsistent with prior practice~~;~~ or

Comment [A5]: WB

3 any other significant action that is inconsistent compared to actions taken before the
4 employee engaged in action protected by this chapter, or compared to other employees who have
5 not engaged in action protected by this chapter.

6 "City Agency" means any department, office, board, commission, or committee of the
7 City, or any subdivision thereof, but excludes public corporations and ad hoc advisory
8 committees.

9 "City Employee" or "Employee" means, every individual who is, or was at the time
10 actions under this chapter were taken, appointed to a position of employment in any City agency,
11 whether in a permanent, temporary or intermittent position..

12 "City Officer" means every individual elected or appointed to an office in any City
13 agency, whether such individual is paid or unpaid.

14 "Commission" means the Seattle Ethics and Elections Commission.

15 "Cooperating Employee" means a City employee who:

16 in good faith makes a report of alleged improper governmental action pursuant to
17 SMC 4.20.810.C;

18 is perceived by the ~~employer~~ City as having reported pursuant to this chapter, but
19 whom in fact, did not report;

Comment [kmf6]: R.C. 12/6

20 in good faith provides information in connection with an inquiry or investigation
21 of a report or testifies in any proceeding resulting from a report, or

22 is perceived by the employer as providing information in connection with an
23 inquiry or investigation of a report made pursuant to this chapter, but who in fact has not done
24 so.

25 "Executive Director" means the Executive Director of the Seattle Ethics and Elections
26 Commission.

27 "Good Faith" means the individual reporting or providing information has a reasonable
28 basis in fact for reporting or providing the information.

1 “Gross Waste of Public Funds or Resources” means to spend or use funds or resources, or
2 to allow the use of any funds or resources, in a manner grossly deviating from the standard of
3 care or competence that a reasonable person would observe in the same situation. The term
4 “gross waste of public funds or resources” also includes the non-collection of a debt or other
5 obligation owed the City when the non-collection is done in a manner grossly deviating from the
6 standard of care or competence that a reasonable person would observe in the same situation.

7 “Improper governmental action” means any action by an employee that is undertaken in
8 the performance of the employee’s official duties, whether or not the action is within the scope of
9 employment, **that:**

10 Violates any federal, state, county or City statute, ordinance or rule;

11 Creates a substantial or specific risk of serious injury, illness, peril, or loss, that is
12 a gross deviation from the standard of care or competence that a reasonable person would
13 observe in the same situation;

14 Results in a gross waste of public funds or resources, or

15 Prevents the dissemination of scientific opinion or alters technical findings
16 without scientifically valid justification, unless disclosure is legally prohibited. This provision is
17 not meant to preclude the discretion of agency management to adopt a particular scientific
18 opinion or technical finding from among differing opinions or technical findings to the exclusion
19 of other scientific opinion or technical findings.

20 “Improper Governmental Action” excludes personnel actions, including but not
21 limited to: employee grievances, complaints, appointments, promotions, transfers, assignments,
22 reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions
23 in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or
24 civil service laws, or alleged violations of agreements with labor organizations under collective
25 bargaining, or any action that may be taken under RCW Chapters 41.08, 41.12, 41.14, 41.56,
26 41.59, or 53.18 or RCW 54.04.170 and 54.04.180.

27 A properly authorized City policy, reasonable expenditure or activity does not
28 become an “improper governmental action” because an employee dissents from the City policy
or considers the program or expenditures unwise.

Comment [kmf7]: JS 12/6

1 “Interested Parties” means the Cooperating Employee who alleges retaliatory action, the
2 relevant agency, the Executive Director, and the individual employee the Executive Director
3 alleges to have retaliated.

4 “Report” shall mean:

5 reporting any assertion of improper government action to the Executive Director
6 including reporting violations of the Ethics and Elections Codes;

7 reporting any assertion of improper government action to an employee’s supervisor,
8 manager, officer or appointing authority or director;

9 reporting any assertion of sexual harassment to the employee's supervisor, Equal
10 Employment Officer, agency head, or other government official as set out in the City's procedure
11 for reporting sexual harassment complaints;

12 reporting alleged violations of the Fair Employment Practices ordinance ~~or the Health
Insurance Portability and Accountability Act (HIPAA) to the Office for Civil Rights;~~

~~to the Office for Civil Rights;~~

13 reporting alleged misconduct by Seattle Police Department personnel to the Seattle Police
14 Office of Professional Accountability;

15 reporting alleged violations of the Code of Judicial Conduct to the Washington State
16 Commission on Judicial Conduct;

17 reporting alleged violations of criminal laws to ~~any law enforcement agency, local law
enforcement or the county prosecuting attorney;~~

18 reporting when the employee believes in good faith that a crime is about to be committed,
19 to any law enforcement agency, ~~the County Prosecuting Attorney, the Executive Director, or~~
20 agency head, manager or supervisor;

21 reporting ~~outside of City government~~ if an employee is, in good faith, seeking advice,
22 counsel or opinion on their rights and responsibilities under this subchapter to determine whether
23 to make a report under this chapter;

24 reporting outside of City government if 30 days have passed since the employee made a
25 written report pursuant to this chapter; or

Comment [REC8]: I added HIPAA because the City has a self-insured medical group plan and related Privacy Notice as required by HIPAA.

Comment [A9]: WB: Typo

Comment [kmf10]: Per our discussion 12/18

Comment [A11]: WB: I didn't think we'd taken out the prosecuting attorney.

Comment [kmf12]: See 7 above

Comment [A13]: WB: I don't recall making this change

Comment [kmf14]: Per 12/18 discussion

1 reporting in an emergency, to any person who has the ability to address the danger or
2 risk, where the Employee believes in good faith that there is a substantial and specific danger or
3 risk of serious injury, illness, peril, or loss to any person. No emergency under this subsection
4 exists where prompt attention and reporting under this subchapter by the employee could have
5 avoided the perceived need to report immediately.

6 “Retaliate,” and its kindred nouns, “retaliation” and “retaliatory action,” means,

7 To make, or use one’s authority to make, an adverse change in a Cooperating Employee’s
8 employment status or terms and conditions of employment where the employee’s status as a
9 Cooperating Employee was a contributing factor in the decision making process; ~~or,~~

10 ~~[To use one’s authority to directly or indirectly threaten or intimidate an employee for the~~
11 ~~purposes of: interfering with an employee’s right make a report of improper governmental~~
12 ~~action; or, interfering with or influencing an employee’s cooperation in an inquiry or~~
13 ~~investigation based on a report of improper governmental action; or, interfering or influencing~~
14 ~~testimony in any investigation or proceeding arising from a report; or,~~

15 ~~To knowingly take or direct others to take any action for the purpose of: interfering with~~
16 ~~an employee’s right to report information; or, influencing an employee’s cooperation in an~~
17 ~~inquiry or investigation based on a report of improper governmental action; or, interfering or~~
18 ~~influencing testimony in any investigation or proceeding arising from a report.~~

19 **Section 3.** Section 4.20.810 of the Seattle Municipal Code, last amended by Ordinance
20 118392, is amended as follows:

21 4.20.810 Employee ~~R~~ights, ~~R~~esponsibilities and ~~L~~imitations.

22 A. Rights.

23 1. Every employee shall have the right to report in good faith pursuant to this subchapter
24 an assertion of improper governmental action and shall be free from retaliation.

25 2. To the extent allowed by law, the identity of a Cooperating Employee shall be kept
26 confidential and shall not be disclosed unless the employee in writing waives confidentiality.

27 B. Responsibilities.

28 1. An Employee may not disclose information when disclosure is prohibited under
the law (e.g., RCW 5.60.060 privileged communications).

Comment [kmf15]: JS 12/6; now placed in Ethics Code see Section 13 this draft

Comment [A16]: WB: Is interfering with an employee’s cooperation “retaliation” or does this whole section deserve to be dumped into the Ethics Code?

Comment [JMS17]: All of this language should be moved to the Ethics Code, because it doesn’t involve action taken after a person has cooperated.

1 2. An employee who reports his or her own improper governmental action will not
2 be free from discipline or termination under Section 4.04.230 or 4.08.100 if his or her improper
3 action would be cause for discipline or **termination**.

4 C. Prohibitions. No City agency, officer or employee shall retaliate against any
5 Cooperating Employee.

6 **Section 4.** Section 4.20.820 of the Seattle Municipal Code, last amended by Ordinance
7 117039 and that currently reads as follows, is repealed:

8 ~~((4.20.820 Confidentiality~~

9 ~~— To the extent allowed by law, the identity of an employee reporting information about an
10 improper governmental action shall be kept confidential unless the employee in writing waives
11 confidentiality.))~~

12 **Section 5.** Section 4.20.830 of the Seattle Municipal Code, last amended by Ordinance
13 117039, is amended as follows:

14 4.20.830 Reports to the Executive Director

15 Reports: The following applies to any report of improper governmental action made to
16 the Executive Director.

17 A. A report of improper governmental action should be made within 12 months of the
18 occurrence of the alleged improper governmental action, or within 12 months of when a
19 reasonable person similarly situated to the reporting employee would have become aware of the
20 occurrence. The Executive Director may initiate an inquiry of an occurrence falling outside of
21 this time limitation if he or she believes that doing so is in the public interest.

22 B.. Inquiry - Within 14 days after receiving an assertion of alleged improper
23 governmental action, the Executive Director shall conduct a confidential preliminary inquiry to
24 determine if the facts as asserted would constitute improper governmental action. The Executive
25 Director shall communicate the results to the reporting individual along with the actions, if any,
26 that will be taken. If, after a preliminary inquiry, the Executive Director determines that the facts
27 as asserted would constitute improper governmental action, the Executive Director shall make a
28 mandatory or discretionary referral, or may open an investigation.

Comment [kmf18]: Discussion point for Commission.

Comment [A19]: WB: I think this comment should be deleted in light of the 12/18 discussion.

C. Mandatory and Discretionary Referral.

1 1. Mandatory Referral. The Executive Director shall refer an employee making the
2 following allegations as follows:

3 a. Sexual harassment to any management representative, the Seattle Office of for
4 Civil Rights, Equal Employment Opportunity Commission, the Washington Human Rights
5 Commission, or other governmental official as set out in the City's adopted procedure for
6 reporting sexual harassment complaints;

7 b. Violations of the Fair Employment Practices ordinance to the Office for Civil
8 Rights;

9 c. Allegations regarding misconduct by Seattle Police Department personnel to the
10 Seattle Police Office of Professional Accountability; or,

11 d. Allegations of violations of the Code of Judicial Conduct to the Washington State
12 Commission on Judicial Conduct.

13 2. Discretionary Referral. The Executive Director may refer a report to the chief
14 elected official of the branch of government named in the allegation or to other governmental
15 agencies the Executive Director believes better suited to investigate the allegation.

16 a. When the Executive Director makes a discretionary referral pursuant to this
17 chapter, the Cooperating Employee shall be notified before the referral is made. The Executive
18 Director shall not disclose the identity of the Cooperating Employee without a written waiver of
19 confidentiality by the Cooperating Employee.

20 b. Within 60 days of a discretionary referral being made by the Executive Director,
21 the City official or agency head receiving the referral shall personally or through their designated
22 representative, send to the Executive Director the agency's plan to resolve the concern with a
23 date at which the agency anticipates the planned action will be completed. If the Executive
24 Director does not receive an agency's plan or, if within a reasonable time the agency does not
25 complete the plan, the Executive Director may alert the Mayor and advise the City Council.

D. Investigation.

26 1. ~~When~~ The Executive Director shall investigate ~~s~~ alleged violation~~s~~ of the
27 Elections Code, according to SMC 2.04.070 and the Ethics and Election Commission's

Comment [kmf20]: RC 12/6

Comment [kmf21]: RC 12/6

Comment [A22]: WB: With the "when," this paragraph doesn't make sense.

1 Administrative Rules; alleged violations of the Ethics Code, according to SMC 4.16.090 and the
2 Ethics and Election Commission's Administrative Rules; and, alleged violations of the Lobbying
3 Code, according to SMC 2.06 and the Ethics and Election Commission's Administrative Rules.

4 2. Investigations of improper governmental action that do not assert violations of the
5 Ethics, Election or Lobbying Code shall be completed within a period of six months. If an
6 investigation cannot be completed within that time the Executive Director must inform the
7 employee who reported the concern as to the reason why and estimate the completion date of the
8 investigation.

9 3. Completion and Reports. Upon completion of the investigation, the Executive
10 Director shall issue a report summarizing the facts and determining whether there is reasonable
11 cause to believe that improper governmental action occurred.

12 4. If the Executive Director determines there is reasonable cause to believe an
13 improper governmental action has occurred, the Executive Director shall report the nature and
14 details of the activity to the reporting employee; the head of the agency with responsibility for
15 the action; and, if an agency head is implicated, to the Mayor and City Council, and such other
16 governmental officials or agencies as the Executive Director deems appropriate.

17 E. Response by the City Agency: The head of the agency in which the conduct took
18 place, or their designated representative, shall report to the Executive Director within 60 days
19 what action was taken to address the conduct. The Executive Director shall report the resolution
20 to the reporting employee. If the Executive Director determines that satisfactory action to follow
21 up the report is not being taken, the Executive Director shall report his or her determination to
22 the Mayor and advise the City Council.

23 F. Closure. The Executive Director may close an inquiry or investigation at any
24 time he or she determines that no further action is warranted and shall so notify the reporting
25 employee.

26 G. Decisions of the Executive Director under this section are not appealable to the
27 Ethics and Elections Commission.

28 **Section 6.** Section 4.20.840 of the Seattle Municipal Code, last amended by Ordinance
117039 and that currently reads as follows is repealed:

1 ~~((4.20.840— Civil Penalty~~

2 ~~A violation of subsection C of Section 4.20.810 is a civil offense. A person who is guilty~~
3 ~~thereof may be punished in the Seattle Municipal Court by a civil fine or forfeiture not to exceed~~
4 ~~Five Hundred Dollars (\$500.00)-.)~~

5 **Section 7.** Section 4.20.850 of the Seattle Municipal Code, last amended by Ordinance
6 118392 and that currently reads as follows is repealed:

7 ~~((4.20.850 Definitions~~

8 ~~As used in Sections 4.20.800 through 4.20.860, the following terms shall have these~~
9 ~~meanings:~~

10 ~~A. "Auditing official" means, each in connection with a report of improper governmental~~
11 ~~action within his, her, or its respective jurisdiction, the Executive Director of the Seattle Ethics~~
12 ~~and Elections Commission; a person to whom sexual harassment was properly reported~~
13 ~~according to City policy; the Office for Civil Rights; the Washington State Commission on~~
14 ~~Judicial Conduct; the Police Department's Internal Investigations Section; the county prosecuting~~
15 ~~attorneys of the State of Washington; and any authorized assistant or representative of any of~~
16 ~~them in cases within their respective appropriate jurisdictions.~~

17 ~~B. "Employee" means anyone employed by the City, whether in a permanent or~~
18 ~~temporary position, including full time, part time, and intermittent workers. It also includes~~
19 ~~members of appointed boards or commissions, whether or not paid.~~

20 ~~C. 1. "Improper governmental action" means any action by a City officer or employee~~
21 ~~that is undertaken in the performance of the officer's or employee's official duties, whether or not~~
22 ~~the action is within the scope of employment, and:~~

23 ~~a. Violates any state or federal law or rule or City ordinance, and, where~~
24 ~~applicable, King County ordinances, or~~

25 ~~b. Constitutes an abuse of authority, or~~

26 ~~c. Creates a substantial or specific danger to the public health or safety, or~~

27 ~~d. Results in a gross waste of public funds.~~

1 2. "~~Improper governmental action~~" excludes personnel actions, including but not
2 limited to: ~~employee grievances, complaints, appointments, promotions, transfers, assignments,~~
3 ~~reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions~~
4 ~~in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or~~
5 ~~civil service laws, or alleged violations of agreements with labor organizations under collective~~
6 ~~bargaining, or any action that may be taken under Chapter 41.08, 41.12, 41.14, 41.56, 41.59, or~~
7 ~~53.18 RCW or RCW 54.04.170 and 54.04.180.~~

8 3. A properly authorized City program or activity does not become an "improper
9 governmental action" because an employee or auditing official dissents from the City policy or
10 considers the expenditures unwise.

11 D. "Retaliate," and its kindred nouns, "retaliation" and "retaliatory action," mean to make,
12 because of an activity protected under Section 4.20.810, any unwarranted adverse change in an
13 employee's employment status or the terms and conditions of employment including, but not
14 limited to, denial of adequate staff to perform duties; frequent staff changes; frequent and
15 undesirable office changes; refusal to assign meaningful work; unsubstantiated letters of
16 reprimand or unsatisfactory performance evaluations; demotion, reduction in pay; denial of
17 promotion; transfer or reassignment; suspension or dismissal; or other unwarranted
18 disciplinary action.

19 E. "Executive Director" means the Executive Director of the Seattle Ethics and Elections
20 Commission.))

21 **Section 8.** Section 4.20.860 of the Seattle Municipal Code, last amended by Ordinance
22 117039, is amended as follows:

23 4.20.860 Retaliation.

24 A. Complaint - Alleging Retaliation

25 1. Timeliness. In order to seek relief, an employee who believes he or she has been the
26 subject of **retaliation**, must file a signed written complaint within 180 days of the occurrence
27 alleged to constitute retaliation or within 180 days of when they reasonably should have known
28 that an occurrence alleged to constitute retaliation occurred.

Comment [kmf23]: Inadvertent deletion

Comment [A24]: WB: Spare comma

1 2. Place of Filing. The complaint shall be filed with the Executive Director.
2 3. Contents of the Complaint. The complaint alleging retaliation must state:
3 a. The adverse change or changes alleged to be retaliation and the date or dates it
4 occurred;
5 b. The person or persons responsible for the adverse change or changes;
6 c. The conduct that establishes that the employee is a Cooperating Employee;
7 d. The relief the employee is requesting and,
8 e. If the protected conduct is based on an employee's report to a person other than
9 the Executive Director, some independent evidence that a report was made on a specific date and
10 some evidence of its content.

11 f. Whether the complainant has filed an action in any other forum based upon the
12 same conduct.

Comment [kmf25]: This was added by JS as he mentioned at our 12/18 meeting;

13 B. Initial Determination.

14 1. The Executive Director shall make an initial determination as to the sufficiency of
15 the complaint within 14 days.

16 2. If the Executive Director finds the complaint to be insufficient, he or she shall dismiss
17 the complaint and give notice to the employee. The employee may re-submit the complaint
18 within the 180-day filing period. The time in which the Executive Director is considering the
19 sufficiency of the complaint is not included in the 180 day time frame.

20 3. The Executive Director shall find the complaint sufficient if the complaint asserts
21 facts that, if true, would show:

Comment [A26]: WB

22 i. the employee is a Cooperating Employee; and,

23 ii. the employee was subjected to an adverse change or changes ~~which~~ that occurred
24 within the proscribed time period; and ;

Comment [kmf27]: JS 12/6

Comment [A28]: WB

25 iii. the employee's protected conduct reasonably appears to have been a contributing
26 factor.

27 4. The Executive Director shall not dismiss a complaint -as insufficient because it fails
28 to include all required information so long as it substantially satisfies the informational
requirements.

C. Investigation of Sufficient Complaints.

1
2 1. The Executive Director may choose not to investigate a complaint if the matter is
3 being pursued in another forum.

Comment [kmf29]: JS 12/18 discussion

4 2. If the matter is not before another forum or if the Executive Director decides to
5 pursue a matter, even though it is before another forum, the Executive Director shall investigate
6 sufficient complaints and endeavor to complete the investigation in 90 days.

7 2. All investigations shall be conducted in an objective and impartial manner.

8 3. The Executive Director shall at the conclusion of the investigation determine
9 whether there is ~~or is not~~ reasonable cause to believe that ~~an adverse act was or is being taken~~
10 ~~and that~~ retaliation occurred.

Comment [kmf30]: JS 12/6

Comment [kmf31]: JS 12/6

11 D. No Reasonable Cause Found. If the Executive Director finds no reasonable cause to
12 believe ~~that retaliation has~~ occurred, the Executive Director shall dismiss the complaint and
13 inform the employee.

Comment [kmf32]: JS 12.6

E. Reasonable Cause Found:

14 1. If the Executive Director finds reasonable cause to believe that retaliation occurred,
15 the Executive Director shall issue a written report to the interested parties ~~which that~~ shall
16 include a statement of the facts which provide the basis for the finding. The report may also
17 include the identity of the individual employee or employees responsible for the retaliation and
18 recommendations for agency action.

Comment [kmf33]: JS 12/6

19 2. The Executive Director may submit a draft including findings and recommendations
20 to the interested parties for review and comment prior to issuing the final investigative report and
21 determination.

22 D. Settlement. Within 30 days of the Executive Director's final report finding
23 reasonable cause, the Director shall determine whether the interested parties would attend a joint
24 settlement conference in an attempt to agree on an appropriate remedy.

25 1. Interested parties may be represented at a settlement conference by a person of their
26 own choosing.

1 2. The Executive Director may utilize the services of the City of Seattle’s Alternative
2 Dispute Resolution office or the King County Inter-local Conflict Resolution Group or similar
3 service to aid in determining an appropriate remedy.

4 3. A settlement may include any terms agreed upon by the parties and not otherwise
5 precluded by law, including the Cooperating Employee’s reasonable attorney fees attributed
6 directly to attendance at the settlement discussion.

7 4. Any settlement between a City agency and the Cooperating Employee must include a
8 provision in which the employee releases the City from further liability for acts giving rise to the
9 retaliation complaint.

10 5. Any agreement between the Executive Director and a specific employee or
11 employees settling a violating 4.16.070.6 shall be subject to Commission approval under the
12 Seattle Ethics and Elections Commission Administrative Rule.

13 **Section 9.** A new Section 4.20.865 of the Seattle Municipal Code is added to Subchapter
14 III of Chapter 4.20 as follows:

15 4.20. 865 - Enforcement:

16 A. Election of ~~A~~administrative ~~F~~forum:

17 1. Nothing in this subchapter prohibits an employee from filing in any administrative
18 forum or effects the remedies available in that forum.

19 2. ~~If an employee has also filed a timely retaliation complaint with the Executive~~
20 ~~Director, the employee must give notice to the Executive Director whether they elect to proceed~~
21 ~~in another administrative forum or elect to proceed under this subchapter. This election must be~~
22 ~~made within 30 days after filing in the other administrative forum. If after filing a complaint with~~
23 ~~the Executive Director, the complainant files an action in another forum based upon the same~~
24 ~~conduct, the complainant ~~must~~should inform the Executive Director within 15 days.~~

25 3. ~~After being informed of an action in another forum based upon the same conduct the~~
26 ~~Executive Director may choose to continue with the proceedings or suspend proceedings until~~
27 ~~either the other action is completed or the Executive Director determines that another course of~~
28 ~~action is appropriate. In any circumstance, the employee electing to pursue protections under this~~
subchapter must make a timely complaint to the Executive Director

Comment [kmf34]: Discussion 12/18; based on JS

Comment [A35]: WB: Is this the right word? If we’re just starting an investigation, is that a “proceeding?”

Comment [A36]: WB: See prior comment.

Comment [kmf37]: See Comment 19

B. Filing a Complaint with the Hearing Examiner. .

1
2 1. The Executive Director may file a Complaint alleging retaliation with the Hearing
3 Examiner. The Complaint shall:

- 4 a. name the interested parties;
5 b. provide a concise statement of the conduct constituting retaliation; and,
6 c. contain a request for relief.

7 2. All cases shall be governed by the Hearing Examiner Rules of Practice and
8 Procedure. The Hearing Examiner may promulgate such additional administrative rules as
9 needed to aid in the Determination of Reasonable Cause.

10 3. If the Cooperating Employee is a party to the Enforcement action, ~~the employee~~^{they}
11 may choose to be represented by a person of their own choosing.

C. Proof.

12 1. The burden of proof in any proceeding against an individual employee or employees
13 for retaliating against a Cooperating Employee in violation of 4.16.070.6 is with the Executive
14 Director. Retaliation must be shown by a preponderance of the evidence.

15 2. The burden of proof in any proceeding against an agency is as follows:

16 a) The Executive Director has the burden to prove by a preponderance of the evidence
17 that the subject employee is a Cooperating Employee as defined by section 4.20.805, and ~~that~~
18 the Cooperating Employee was subjected to an adverse action.

19 b) If the Hearing Examiner finds the Executive Director has met that burden, the agency
20 then has the burden of proving by a preponderance of the evidence that there was a legitimate
21 non-retaliatory reason for the adverse action and that the employee's status as a Cooperating
22 Employee was not a contributing factor in the decision making process. Evidence of a series of
23 documented personnel problems or a single, egregious event, or other evidence to support a
24 finding that the agency conduct or action was based on ~~wholly independent~~, separate and non-
25 retaliatory reasons shall be admitted.

26 3. The Executive Director may present ~~evidence~~ rebuttal evidence.

27 4. All interested parties may present evidence at the discretion of the Hearing Examiner.

28 ~~The burden is on the Cooperating Employee to present any evidence of emotional distress.~~

Comment [A38]: WB

Comment [B39]: What is our drafting convention? Do we use the fake plural "they," or do we use "he or she"?

Comment [A40]: WB

Comment [A41]: WB

Comment [kmf42]: J.S. 12/6; contrary to contributory factor analysis

Comment [A43]: WB: Typo

Comment [kmf44]: JS

1 D. Findings of the Hearing Examiner: After hearing the evidence, the Hearing Examiner
2 shall issue written findings of fact and conclusions of law as to whether this sub-chapter was
3 violated.

4 1. If the Hearing Examiner concludes that an agency retaliated against a Cooperating
5 Employee in violation of this subchapter;

6 a. The Hearing Examiner may order ~~actual damages and such other relief~~ actual
7 ~~damages and such other~~ relief deemed necessary to effectuate the purpose of this chapter and to
8 secure future compliance, including such relief and action that could be ordered by a court,
9 ~~including but not limited to hiring, reinstatement, or upgrading with or without back pay, all lost~~
10 ~~benefits, including executive and vacation leave, any increases in compensation that would have~~
11 ~~occurred with interest if applicable, admittance or restoration to membership in a labor~~
12 ~~organization, admittance to participation in a guidance, apprentice training or retraining program~~
13 ~~or other relief necessary to return the Cooperating Employee to their pre-retaliatory status.~~

14 b. If proven by the Cooperating Employee, the Hearing Examiner may award the
15 Cooperating Employee damages for humiliation and mental suffering emotional distress. Any
16 award for emotional distress shall not exceed Twenty Thousand Dollars (\$20,000.00).

17 c. If a Cooperating Employee chooses to be represented by an attorney and is awarded
18 damages for humiliation and mental suffering emotional distress, the Hearing Examiner may
19 award reasonable attorney fees attributed to presentation of the evidence at the Enforcement
20 hearing. Any award for attorneys fees that shall not exceed up to but not exceeding Twenty
21 Thousand Dollars (\$ 20,000.00).

22 d. The agency shall comply with the provisions of any order ~~effecting~~ granting relief
23 and shall furnish proof of compliance to the Executive Director. In the event that the agency
24 refuses or fails to comply with the order, or does not seek timely judicial review, the Executive
25 Director shall notify the Mayor, the Council and the City Attorney. The Director may request
26 that the City and the City Attorney ~~shall seek to enforcement of~~ the order in an appropriate court.

27 2. If the Hearing Examiner finds that one or more employees retaliated against a
28 Cooperating Employee in violation of 4.16.070.6 and this subchapter:

Comment [kmf45]: KMF FOR DISCUSSION

Comment [kmf46]: Restored per B.S. 12/19/

Comment [kmf47]: JS 12/6

Comment [kmf48]: Definitional suggestion by JS

Comment [A49]: WB: Keep the sentence construction the same as the preceding paragraph.

Comment [kmf50]: Change made per A51 WB

Comment [kmf51]: JS 12/6

Comment [kmf52]: JS

1 a. The Hearing Examiner shall deliver the findings of fact and conclusions of law to the
2 Commission, and may include a recommendation to the Commission as to an appropriate
3 sanction under 4.16.100. Only the Commission has the authority to impose a penalty against an
4 individual employee.

5 b. The Hearing Examiner may recommend to the agency that disciplinary action be
6 commenced against an individual employee or employees found to have retaliated.

Comment [A53]: WB

7 3. Commission Action. The Commission shall accept the Hearing Examiner's Findings
8 of Fact as dispositive. The Commission may impose sanctions as provided by SMC 4.16.100 on
9 the employee found to have violated 4.16.070.6. .

10 4. The final order of the Hearing Examiner or the Commission shall include a notice to
11 the parties of the right to obtain judicial review of the order in accordance with applicable law.

12 **Section 10.** A new Section 4.20.870 of the Seattle Municipal Code is added to
13 Subchapter III of Chapter 4.20 as follows:

14 4.20.870 – Private Cause of Action.

15 1. The Cooperating Employee may pursue a private cause of action under this subchapter
16 if a timely complaint of retaliation has been filed with the Executive Director and the cause of
17 actions is:

18 a. Filed no later than 24 months after the Executive Director's notice of insufficiency; or,
19 b. Filed within 21 months after the Executive Director's notice of a finding of no
20 reasonable cause; or,

21 c. Filed within 18 months after the Executive Director's finding of reasonable cause; or,

22 d. Filed within 12 months of the Executive Director ending Settlement discussions.

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

26 2. ~~The Cooperating employee injured by any violation of this chapter shall have a civil
27 action in a court of competent jurisdiction may seek~~ to enjoin further violations, or to recover the
28 actual damages sustained by the person, or both, together with the cost of suit including
reasonable attorneys' fees or any other appropriate remedy authorized by this chapter. The

Comment [kmf54]: This now tracks RCW
49.60.030

Cooperating employee shall have the burden to prove by a preponderance of the evidence a violation occurred.

3. If the employee files a civil action the Executive Director shall dismiss any administrative action for relief for that employee.

Section 11. A new Section 4.20.875 of the Seattle Municipal Code is added to Subchapter III of Chapter 4.20 as follows:

4.20.875 - Investigative Powers. At any stage in an inquiry or investigation of an alleged improper governmental action, or the investigation regarding an assertion of retaliation for engaging in conduct protected in this sub-chapter, the Executive Director may issue subpoenas, administer oaths, examine witnesses, submit written questions to be answered under oath and, compel the production of documents or other evidence. If the subpoenaed party or agency does not respond to the request in a timely manner, the Executive Director may, the Executive Director may ask for the assistance of the City Attorney to pursue enforcement through order in superior court.

Section 12. A new Section 4.20.880 of the Seattle Municipal Code is added to Subchapter III of Chapter 4.20 as follows:

4.20.880 - Annual Restatement and Training. The Seattle Ethics and Election Commission and City Personnel shall, within six months of the effective date of this ordinance, develop and present a plan for adoption by City Personnel and the Seattle Ethics and Elections Commission that reaches the following goals ensuring:

A. City employees attend a Whistleblower Protection Code training offered by the Seattle Ethics and Elections Commission within six months of entering City service; and,

B. All City employees who are acting in a management or supervisory capacity at the time this ordinance becomes effective will, within one year of the effective date attend a Whistleblower Protection Code training offered by the Seattle Ethics and Elections Commission; and,

Comment [A55]: WB: I thought the Commission on 12/5 agreed to include the language from the RCW for damages.

Comment [kmf56]: R.C 12/6 – 90 is more of the standard in healthcare.

1 C. Every City employee who acts within a supervisory capacity will, within 6 months of
2 undertaken supervisory responsibilities, attend a Whistleblower Protection Code training offered
3 by the Seattle Ethics and Elections Commission, and

4 D. On annual basis each City employee receives a written summary of this chapter as
5 prepared by the Ethics and Elections Commission.

6 **Section 13.** Section 4.16.070 of the Seattle Municipal Code, last amended by Ordinance
7 123010, is amended as follows:

8 SMC 4.16.070 Prohibited ~~C~~conduct

9 —A Covered Individual may not:

10 ...

11 6. . Retaliate against a City Employee as prohibited under SMC 4.20.810 of the
12 Whistleblower Protection Code, or directly or indirectly threaten or intimidate a City employee
13 for the purposes of interfering with that employee’s right to communicate with the Commission,
14 its employees, or its agents. Engage in any activity prohibited under SMC 4.20.810 of the
Whistleblower Protection Code.

Comment [kmf57]: Replaces the deletion from page 7; removes threats from definition of retaliation.

15 7. Application to Certain Members of Advisory Committees.

16 A. SMC subsections 4.16.070.1.a and 4.16.070.1.b shall apply to employee members of
17 advisory committees. SMC subsections 4.16.070.1.a and 4.16.070.1.b shall not apply to other
18 members of advisory committees. This subsection 6 shall instead apply to all other members of
19 advisory committees. No member of an advisory committee to whom this subsection applies
20 shall:

21 1. Have a financial interest, direct or indirect, personally or through a member of his or
22 her immediate family, in any matter upon which the member would otherwise act or participate
23 in the discharge of his or her official duties, and fail to disqualify himself or herself from acting
24 or participating in the matter.

25 2. Engage or have engaged in any transaction or activity which would to a reasonable
26 person appear to be in conflict with or incompatible with the proper discharge of official duties,
27 or which would to a reasonable person appear to impair the member's independence of judgment

1 or action in the performance of official duties, without fully disclosing on the public record of
2 the advisory committee the circumstances of the transaction or activity giving rise to such an
3 appearance prior to engaging in the performance of such official duties. Such a member shall
4 also file with the Commission a full written disclosure of the circumstances giving rise to such an
5 appearance prior to engaging in such official duties. If such prior written filing is impractical, the
6 member shall file such a disclosure as soon as practical.

7 **Section 14.** Section 3.70.010 of the Seattle Municipal Code, last amended by
8 Ordinance 116005, is amended as follows:

9 SMC 3.70.010 Commission established -- Purpose.

10 - There is hereby established a Seattle Ethics and Elections Commission to administer
11 the City's Code of Ethics (Chapter 4.16); to administer the Election Campaign Code and its
12 campaign matching fund program (Chapter 2.04); to publish the City's election pamphlets
13 (Chapter 2.14) and to administer the Whistleblower Protection Code (SMC Sections 4.20.800
14 through 4.20.880).

15 **Section 15.** Section 3.70.100 of the Seattle Municipal Code, last amended by
16 Ordinance 116005, is amended as follows:

17 SMC 3.70.100 Powers and duties.

18 The Commission shall have the following powers:

19 A. To administer the City's Code of Ethics (Code Chapter 4.16); the Election Campaign Code
20 and its campaign matching fund program (Code Chapter 2.04); the City's election pamphlet
21 ordinance (Code Chapter 2.14); the lobbying disclosure ordinance (Code Chapter 2.06) and the
22 whistleblower protection ordinance (SMC Sections 4.20.800 through 4.20.880 inclusive) (called
23 collectively "Commission-administered ordinances").

24 **Section 16.** Effective Date: This ordinance shall take effect and be in force 30 days after
25 its approval by the Mayor, but if not approved and returned by the Mayor within ten days after
26 presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

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Passed by the City Council the ____ day of _____, 2013, and signed by
me in open session in authentication of its passage this
____ Day of _____, 2013.

President _____ of the City Council

Approved by me this ____ day of _____, 2013.

Michael McGinn, Mayor

Filed by me this ____ day of _____, 2013.

Monica Martinez Simmons, City Clerk

(Seal)