

72344-8

72344-8

No. 723448

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

AARON SWANSON,

Interested Party/Appellant/Cross-Respondent

v.

CITY OF SEATTLE,

Petitioner/Respondent/Cross-Appellant

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey M. Ramsdell)

Case No. 13-2-35992-8

BRIEF OF APPELLANT

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA # 41916
The Sheridan Law Firm, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949
jack@sheridanlawfirm.com
mark@sheridanlawfirm.com
Attorneys for Appellant

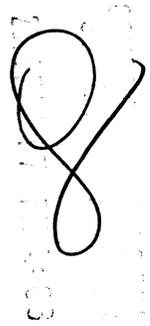
A large, stylized handwritten mark, possibly a signature or initials, is located on the right side of the page. It consists of a large, looping 'S' shape with a vertical line extending downwards from the bottom loop.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

 A. Assignments of Error..... 3

 B. Issues Pertaining to Assignments of Error 3

III. STATEMENT OF THE CASE 4

 A. Swanson observed improper governmental action within Seattle City Light’s Apprenticeship Office. 4

 B. After the alcohol incident, Swanson was treated differently. 7

 C. Swanson reported Ron Allen and then his treatment worsened as Allen “lobbied” other journeymen to evaluate Swanson poorly than was justified..... 9

 D. Swanson filed a whistleblower retaliation complaint to the Mayor, pursuant to SMC 4.20.860 and RCW 42.41.040. 15

 E. Swanson prevailed in the administrative adjudication of his retaliation claim and was awarded unspecified “legal costs and attorney’s fees ... incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW.” 16

 F. ALJ Dublin made no findings of fact regarding Swanson’s invoice for attorney’s fees and costs; and the City took no final action on Swanson’s request for fees and costs before the parties filed petitions for judicial review. 22

 G. King County Superior Court Judge Jeffrey Ramsdell affirmed Swanson’s claims under the substantial evidence standard, but held RCW 42.41 does not apply and that the retaliation that ALJ Dublin found had occurred was not

actionable under the Seattle Whistleblower Code.....	24
IV. ARGUMENT	25
A. Grounds for Review	25
B. Standard of Review	26
C. ALJ Dublin did not misinterpret or erroneously apply the Local Government Whistleblower Protection Act or the Seattle Whistleblower Code.	27
1. The State’s Whistleblower Protection Act sets a broad baseline for protecting local government employee- whistleblowers, which the City’s ordinance cannot contravene.	27
2. Even if RCW 42.41.020(3)(b)’s provision concerning “hostile actions” encouraged by a supervisor did not apply, a hostile work environment is an adverse change to the “terms and conditions of employment” under RCW 42.41.040(3) and SMC 4.20.850(D).	32
D. Taking all of Mr. Swanson’s evidence as true and drawing all inferences in his favor, ALJ Dublin’s finding that the City of Seattle unlawfully retaliated against Swanson is supported by “substantial evidence.”	35
1. The context of Ron Allen’s prior retaliatory acts supports a reasonable inference that the harassment from “unknown” individuals that Swanson suffered well into November 2012 were acts committed by persons encouraged by Allen, if not by Allen himself.....	36
V. ATTORNEY FEES AND COSTS.....	42
VI. CONCLUSION	44

TABLE OF AUTHORITIES

State Cases

<u>Ancier v. State, Dep't of Health,</u> 140 Wn. App. 564, 166 P.3d 829, 833 (2007).....	36
<u>Antonius v. King County,</u> 153 Wn.2d 256, 103 P.3d 729, 733-34 (2004).....	38, 39
<u>Bayless v. Cmty. Coll. Dist. No. XIX,</u> 84 Wn. App. 309, 927 P.2d 254, 257 (1996).....	44
<u>Brighton v. State Dep't of Transp.,</u> 109 Wn. App. 855, 38 P.3d 344 (2001).....	36
<u>Brown v. State, Dep't of Health, Dental Disciplinary Bd.,</u> 94 Wn. App. 7, 972 P.2d 101, 105 (1998).....	26
<u>Broyles v. Thurston Co.,</u> 147 Wn. App. 409, 195 P.3d 985 (2008).....	39
<u>Brundridge v. Fluor Federal Services, Inc.,</u> 164 Wn.2d 432, 191 P.3d 879 (2008).....	40, 41
<u>Callecod v. Washington State Patrol,</u> 84 Wn. App. 663, 929 P.2d 510 (1997), <i>review denied</i> , 132 Wn.2d 1004, 939 P.2d 215 (1997).....	37
<u>Campbell v. Bd. for Volunteer Firefighters,</u> 111 Wn. App. 413, 45 P.3d 216, 218 (2002).....	26, 36
<u>Campbell v. State Employment Sec. Dep't,</u> 180 Wn.2d 566, 326 P.3d 713, 715 (2014).....	27
<u>City of Bellingham v. Schampera,</u> 57 Wn.2d 106, 356 P.2d 292 (1960).....	31, 32
<u>City of Tacoma v. Franciscan Found.,</u> 94 Wn. App. 663, 972 P.2d 566 (1999).....	31, 32, 44
<u>City of Univ. Place v. McGuire,</u> 144 Wn.2d 640, 30 P.3d 453 (2001).....	36

<u>Daves v. Nastos,</u> 39 Wn. App. 590, 694 P.2d 686, <i>aff'd. in part, rev'd &</i> <i>remanded in part</i> , 105 Wn.2d 24, 711 P.2d 314 (1985).....	26
<u>Davis v. West One Automotive Group,</u> 140 Wn. App. 449, 456-57, 166 P.3d 807 (2007).....	33
<u>Faghih v. State Dep't of Health,</u> 148 Wn. App. 836, 202 P.3d 962, 969 (2009).....	36
<u>Gibson v. Washington State Dept. of Employment Sec.,</u> _ Wn. App. _, 340 P.3d 882 (2014).....	36
<u>Glasgow v. Georgia-Pac. Corp.,</u> 103 Wn.2d 401, 693 P.2d 708 (1985).....	33
<u>Green v. State, Dep't of Soc. & Health Servs.,</u> 163 Wn. App. 494, 260 P.3d 254, 261 (2011).....	26
<u>Henderson v. Pennwalt Corp.,</u> 41 Wn. App. 547, 704 P.2d 1256 (1985).....	39, 41
<u>Hollingsworth v. Washington Mutual Sav. Bank,</u> 37 Wn. App. 386, 681 P.2d 845 (1984).....	34
<u>In re Flint,</u> 174 Wn.2d 539, 277 P.3d 657, 661 (2012).....	44
<u>In re Perry,</u> 31 Wn. App. 268, 641 P.2d 178 (1982).....	26
<u>Kittitas County v. Kittitas County Conservation,</u> 176 Wn. App. 38, 308 P.3d 745 (2013).....	36
<u>Loeffelholz v. Univ. of Washington,</u> 162 Wn. App. 360, 253 P.3d 483 (2011).....	38
<u>Loeffelholz v. University of Washington,</u> 175 Wn.2d 264, 285 P.3d 854 (2012).....	34, 35, 38, 39
<u>Lowy v. PeaceHealth,</u> 174 Wn.2d 769, 280 P.3d 1078 (2012).....	27

<u>Motley-Motley, Inc. v. State,</u> 127 Wn. App. 62, 110 P.3d 812 (2005).....	36
<u>Payne v. Children’s Home Soc. of Washington, Inc.,</u> 77 Wn. App. 507, 892 P.2d 1102 (1995).....	33
<u>Seattle Newspaper-Web Pressmen’s Union Local No. 26 v. City of Seattle,</u> 24 Wn. App. 462, 604 P.2d 170 (1979).....	32
<u>State v. Jacobs,</u> 154 Wn.2d 596, 115 P.3d 281 (2005).....	28
<u>State v. Johnson,</u> 132 Wn. App. 400, 132 P.3d 737 (2006).....	27
<u>State v. Maxfield,</u> 125 Wn.2d 378, 886 P.2d 123 (1994).....	37
<u>State v. Torres,</u> 151 Wn. App. 378, 212 P.3d 573 (2009).....	27, 42
<u>Sunderland Family Treatment Services v. City of Pasco,</u> 127 Wn.2d 782, 903 P.2d 986 (1995).....	37, 42
<u>Suquamish Tribe v. Central Puget Sound Growth Mgmt. Hearings Bd.,</u> 156 Wn.App. 743, 235 P.3d 812 (2010)	45
<u>Tapper v. State Employment Sec. Dep’t,</u> 122 Wn.2d 397, 858 P.2d 494, 500 (1993).....	26
<u>US W. Commc’ns, Inc. v. Util. & Transp. Comm’n,</u> 134 Wn.2d 48, 949 P.2d 1321 (1997).....	36
<u>W.R. Grace & Co.--Conn. v. State, Dep’t of Revenue,</u> 137 Wn.2d 580, 973 P.2d 1011, 1027 (1999).....	44
<u>Wilmot v. Kaiser Aluminum & Chem. Corp.,</u> 118 Wn.2d 46, 821 P.2d 18 (1991).....	40, 41
<u>Woodbury v. City of Seattle,</u> 172 Wn. App. 747, 292 P.3d 134, 136 (2013) <i>review denied</i> , 177 Wn.2d 1018, 304 P.3d 114 (2013)	28

<u>Woodward v. Taylor</u> , _ Wn. App. _, 340 P.3d 869 (2014)	27
--	----

Federal Cases

<u>Diaz v. Jiten Hotel Management, Inc.</u> , 762 F. Supp. 2d 319 (D. Mass. 2011)	39
--	----

<u>Keenan v. Allan</u> , 889 F. Supp. 1320, 1365 (E.D. Wash. 1995) <i>aff'd</i> , 91 F.3d 1275 (9th Cir. 1996).....	29
---	----

<u>Meritor Sav. Bank v. Vinson</u> , 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).....	34
--	----

<u>National Railroad Passenger Corporation v. Morgan</u> , 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).....	38, 39
---	--------

<u>Rogers v. EEOC</u> , 454 F.2d 234 (5th Cir. 1971), <i>cert. denied</i> , 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972),	34
---	----

Constitutional Provisions

Washington Constitution, Art. XI, § 11	31
--	----

Statutes

RCW 34.05.526	26
RCW 34.05.570(1)(a)	26
RCW 34.05.570(3)(a)-(i)	27
RCW 34.05.570(3)(e)	36
RCW 34.05.570(3)(f).....	4, 45
RCW 34.05.598	29
RCW 42.40.050(1)(b)(xii)	31
RCW 42.41, <i>et seq.</i>	1, 2, 24, 25

RCW 42.41.010	28
RCW 42.41.020	21
RCW 42.41.020(3).....	1, 28
RCW 42.41.020(3)(a)	32
RCW 42.41.020(3)(b)	24, 30, 32, 35
RCW 42.41.040	1, 15, 16, 20, 29, 30, 35, 43
RCW 42.41.040(1).....	28
RCW 42.41.040(2).....	29
RCW 42.41.040(3).....	32
RCW 42.41.040(5).....	29
RCW 42.41.040(7).....	4, 42, 44
RCW 42.41.040(9).....	26, 29
RCW 42.41.050	29
RCW 49.60, <i>et seq.</i>	33
RCW 49.60.180(3).....	33, 35

Ordinances

current SMC 4.20.800.....	30
current SMC 4.20.805.....	35
current SMC 4.20.865(D)(1)(c)	4, 43
former SMC 4.20.800	29
former SMC 4.20.850(D).....	2, 21, 30, 31, 32
former SMC 4.20.860	29
former SMC 4.20.860(C).....	26, 42, 43

SMC 4.20.860 1, 15, 16, 20, 35

SMC 4.20.865 1

Rules

RAP 10.3(g) 26

I. INTRODUCTION

These three consolidated judicial review petitions¹ arise from the Findings of Fact and Conclusions of Law and Final Order issued by the Office of Administrative Hearings and Administrative Law Judge Lisa Dublin on September 17, 2013 (“the Order”), following an eight-day hearing held pursuant to the Local Government Whistleblower Protection Act, RCW 42.41, *et seq.*, the City of Seattle Whistleblower Code, SMC 4.20.865, and the Washington Administrative Procedures Act.

ALJ Dublin’s Order found that the City of Seattle unlawfully retaliated against Aaron Swanson under RCW 42.41.040 and SMC 4.20.860 for engaging in protected whistleblower activity. The ALJ also found that Seattle City Light’s supervisor, trainer, and evaluator Ron Allen either “encouraged” or himself engaged in actionable retaliation against Swanson.

King County Superior Court Judge Jeffery Ramsdell affirmed ALJ Dublin’s finding of fact that Allen retaliated or encouraged retaliation against Swanson. However, Judge Ramsdell held that Mr. Swanson’s allegations – while actionable under the definition of “retaliatory action” included in RCW 42.41.020(3), which explicitly protects against “hostile actions ... encouraged by a supervisor” – was not conduct that is

¹ *See* Petitions for Judicial Review filed by Ron Allen (CP 1), Aaron Swanson (CP 2821), and the City of Seattle (CP 2868).

actionable under the former definition of “retaliatory action” in the City of Seattle Whistleblower Code. *See* former SMC 4.20.850(D).² Mr. Swanson appeals this ruling by Judge Ramsdell.

ALJ Dublin’s Order also provided that the “City of Seattle will pay the legal costs and attorneys fees . . . incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW.” The ALJ never considered a fee petition by Mr. Swanson, despite inquiries from counsel. The Order likewise did not set forth any mechanism for calculating what Mr. Swanson’s reasonable attorney’s fees might be. Nor was any sum certain stated in the Order that the City was to pay to satisfy the obligation for “legal costs and attorney’s fees Mr. Swanson incurred in asserting his whistleblower retaliation claim.” Judge Ramsdell, upon ruling that the hostile actions against Swanson encouraged by a City supervisor were not actionable under the City’s Whistleblower Code, struck ALJ Dublin’s award of attorney’s fees and costs.

Mr. Swanson asks that ALJ Dublin’s Order be affirmed, that the fee award to Mr. Swanson be reinstated, and that this matter be remanded to ALJ Dublin for a determination on the amount of fees awarded to Mr. Swanson.

² In December 2013, months after the administrative adjudication of this matter had concluded, the City amended its code to include language similar to the State Whistleblower Protection Act, explicitly prohibiting “hostile actions” committed or encouraged by a supervisor. Appendix 19-68

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Judge Ramsdell erred in applying the definition for “retaliatory action” found in former SMC 4.20.850(D) and in concluding that the “retaliatory action” made unlawful by the Local Government Whistleblower Protection Act, RCW 42.41.020(3), was no longer unlawful as a result of the City enacting its ordinance. (CP 684, ¶¶ 2-4).
2. Judge Ramsdell erred in finding that there was no evidence of an adverse change in the terms and conditions of Mr. Swanson’s employment. CP 684-85, ¶ 4.
3. Judge Ramsdell erred in striking ALJ Dublin’s finding of actionable retaliation and in reversing Swanson’s award of legal costs and attorney’s fees. CP 685, ¶¶ 8-9.
4. ALJ Dublin erred in failing to determine the amount of attorney’s fees and costs that Swanson incurred in asserting his whistleblower retaliation claim. *See* AR 505; CP 59-60, CP73.

B. Issues Pertaining to Assignments of Error

1. Whether the city may enact an ordinance that contravenes general state law, resulting in a substantially more limited scope of protection from retaliation for local government whistleblowers? No.
2. Whether an abusive working environment is a “condition of employment”? Yes.
3. Whether harassment outside of the liability period is part of the totality of the circumstances that must be considered in determining whether harassment is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment? Yes.
4. Whether there is “substantial evidence” that Mr. Swanson was subjected to an abusive working environment within

30 days of his November 9, 2012 whistleblower retaliation complaint to the Mayor? Yes.

5. Whether under RCW 34.05.570(3)(f) this matter should be remanded to ALJ Dublin to make factual findings as to the amount of attorney's fees and costs Mr. Swanson is awarded under RCW 42.41.040(7)? Yes.
6. Whether the current SMC 4.20.865(D)(1)(c), which contravenes RCW 42.41.040(7), will be applied retroactively in the remand proceedings, such that Swanson's award of attorney fees would be limited to \$20,000? No.

III. STATEMENT OF THE CASE

A. Swanson observed improper governmental action within Seattle City Light's Apprenticeship Office.

Aaron Swanson is a college graduate with a degree in business administration who began working for Seattle City Light ("SCL") as an apprentice lineworker in 2009. AR 984,³ CP 943,⁴ CP 1217.⁵ The Apprenticeship Office administers SCL's apprenticeship program and it is headed by Karen DeVenaro, who for a part of the relevant time period reported to Gary Maehara and then directly to the head of SCL's Human Resources Department, DaVonna Johnson. CP 2354-55, 2179.⁶ Ms.

³ The clerk's papers designated for review include a Certified Record of Administrative Adjudicative Orders as defined by RAP 9.7(c). This brief will cite to the certified administrative record's internal pagination as "AR [#]".

⁴ Such clerk's papers are Administrative Report of Proceedings ("A-RP") (Feb. 13, 2013) at 350.

⁵ Such clerk's papers are A-RP (Apr. 24, 2013) at 622.

⁶ Such clerk's papers are A-RP (Jun. 25, 2013) at 1749-50; A-RP (Jun. 20, 2013) at 1576; A-RP (Jun. 25, 2013) at 1749.

Johnson reports directly to SCL Superintendent Jorge Carrasco. CP 2179.⁷

Also working in the Apprenticeship Office was Ron Allen, a journey-level line worker since 2003, CP 2535,⁸ who SCL hired into the position of Craft Instructor-Apprenticeship (“CI-A”) in September 2010. CP 2538-39, 2355.⁹ As CI-A, “Allen was the lead instructor for testing and training, and worked with curriculum development and personalized training of apprentices as needed.” AR 513. From 2006 to 2012, Allen was also a member of the Electrical Crafts Advisory Committee (“ECAC”), which oversaw the apprenticeship program and made recommendations about the advancement of apprentices in the program. AR 513, CP 2535-36.¹⁰ Allen was appointed to the ECAC by his uncle, Local 77 Business Manager Joe Simpson. AR 513; CP 886, 1002, 2124.¹¹

Aaron Swanson began “pre-apprenticeship” training in March 2009 and began the first step of his apprenticeship in late August 2009. AR 490. Swanson’s performance as an apprentice was evaluated several times before August 2010 and the evaluations were generally positive. Although early on, he had some issues with climbing, his groundwork was not an issue. AR 645-667.

⁷ Such clerk’s papers are A-RP (Jun. 20, 2013) at 1576

⁸ Such clerk’s papers are A-RP (Feb. 12, 2013) at 125.

⁹ Such clerk’s papers are A-RP (Feb. 12, 2013) at 128-29; A-RP (Jun. 25, 2013) at 1750.

¹⁰ Such clerk’s papers are A-RP (Feb. 12, 2013) at 125-26.

¹¹ Such clerk’s papers are A-RP (Feb. 13, 2013) at 293, 409; A-RP (Jun. 20, 2013) at 1521.

In August 2010, Ron Allen announced to the apprentices that there would be an oral exam on WAC 45. CP 985-86.¹² Allen had each of the apprentices enter a trailer individually and respond to vague questions he asked. *Id.* He then came out of the trailer and announced that everyone did poorly. *Id.* Allen then stated, “Okay, guys, you did bad, but I’ll give you another shot at it. We’ll do this again on Friday. And when you -- When we do it again Friday, you probably want to bring something with you.” *Id.* One of the apprentices responded, “Like a bottle of Jack?” and Allen responded, “Or Jameson.” CP 987.¹³ During the course of the next week, every apprentice except Swanson (who forgot to buy a bottle) went out and bought a half-gallon of either Jack Daniels or Jameson. CP 987-91.¹⁴ On the day of the re-test, the apprentices made a plan to cover for Swanson’s failure to buy a bottle. *Id.* As they were called into the trailer one at a time, whoever was called would bring in a bottle, while another apprentice went to the store and purchased a bottle. *Id.* Each bottle was worth about \$50. *Id.* By the time Swanson was called in, he had a bottle in hand, which had been purchased by another apprentice who had already been tested. *Id.* He saw Allen sitting on a desk in the trailer with all the bottles lined up. After a few words, Swanson gave Allen the bottle he was

¹² Such clerk’s papers are A-RP (Feb. 13, 2013) at 392-93.

¹³ Such clerk’s papers are A-RP (Feb. 13, 2013) at 394.

¹⁴ Such clerk’s papers are A-RP (Feb. 13, 2013) at 394, 397, 398.

carrying and then was given the oral exam. *Id.* After a few questions (Allen took no notes of the answers), Allen told Swanson to send in the next apprentice. *Id.* This time Allen said everyone passed. *Id.* For simplicity, this will be referred to as the “alcohol incident.”

B. After the alcohol incident, Swanson was treated differently.

The apprentices’ efforts to cover for Swanson's failure to bring a bottle were not a secret. CP 990, 1567-68.¹⁵ In fact, after the Seattle Ethics and Election Commission began an investigation into the alcohol incident, the apprentices freely discussed the incident with Kate Flack, the investigator, and identified Swanson as being the only apprentice not to bring a bottle to the test. CP 2484; 990-91; 1217-19; 1722-23.¹⁶ Allen denies he knew that Swanson was the only apprentice who did not bring a bottle to the test, but given the testimony that this omission was not a secret, and the speed with which rumors spread in the workplace, it is more likely than not that Allen knew. And within weeks of this incident, Allen began a systematic plan of retaliation against Swanson.

Allen became a CI-A at the Apprenticeship Office within weeks of the alcohol incident. CP 2549.¹⁷ Allen was also a member of the ECAC from 2006 until he was removed by his uncle (Simpson) in June 2012, and

¹⁵ Such clerk’s papers are A-RP (Feb. 13, 2013) 397; A-RP (May 29, 2013) at 968-969.

¹⁶ Such clerk’s papers are A-RP (Feb. 12, 2013) at 74-75; A-RP (Feb. 13, 2013) at 397-8; A-RP (Apr. 24, 2013) at 622-4; A-RP (May 29, 2013) at 1123-4.

¹⁷ Such clerk’s papers are A-RP (Feb. 12, 2013) at 139.

then appointed by Simpson to the Joint Apprenticeship and Training Committee (“JATC”) in July 2012. CP 2536, 2558-59.¹⁸ Thus, Ron Allen was well positioned to influence retaliation against Swanson.

After the alcohol incident, Swanson noticed an immediate change in how he was treated. CP 991-993.¹⁹ In his new position, Allen and Reddy Landon (Swanson’s crew chief at the time) brought Swanson into a room and sought to convince him to drop out of the apprenticeship program and become a material supplier—a position paying only a fraction of journey line worker pay. *Id.* About one week later, Swanson confronted Allen and stated that he thought the statements made at the meeting regarding dropping out of the apprenticeship program were unfair. CP 995-96.²⁰ Allen got mad and responded, “I don’t care what you think is fair.” *Id.*

In October 2010, Swanson received his first negative evaluation since being in the apprenticeship; it was signed by Reddy Landon, and contrary to procedure, was given to Swanson after he left Landon’s crew. CP 992-993,²¹ AR 639-44. Swanson was concerned about the negative evaluation, in part, because “ECAC” was checked on the evaluation, which he took to mean that he could have his apprenticeship extended or

¹⁸ Such clerk’s papers are A-RP (Feb. 12, 2013) at 126, 148-49.

¹⁹ Such clerk’s papers are A-RP (Feb. 13, 2013) at 398-400.

²⁰ Such clerk’s papers are A-RP (Feb. 13, 2013) at 402-403.

²¹ Such clerk’s papers are A-RP (Feb. 13, 2013) at 399-400.

terminated as a result of the evaluation. CP 997-98.²²

In the following months, Swanson received positive performance evaluations, but despite those positive evaluations, in February 2011, Swanson was sent a letter directing him to appear before the ECAC in March. AR 633-38, 562. At the March meeting of the ECAC, Allen moved the committee to extend Swanson's apprenticeship by six months; his motion was seconded by Karen DeVenaro and carried. AR 1064. The recommendation was forwarded to the JATC, which convened and extended Swanson's apprenticeship by six months. AR 560, AR 1068.

The JATC placed Swanson on an Individual Training Plan ("ITP"), which was administered by the Apprenticeship Office. AR 557, 1064. In the months that followed, there was no meaningful training, but the performance evaluations for Swanson became progressively worse and his treatment by crews deteriorated into a hostile work environment. AR 524. Another meeting with the ECAC, based on a negative evaluation by Dale Grant, was held in which the ECAC recommended cancellation of Swanson's apprenticeship. AR 574-625, 554-56; 1083; CP 1016-18.²³

C. Swanson reported Ron Allen and then his treatment worsened as Allen "lobbied" other journeymen to evaluate Swanson poorly than was justified.

In response to the pending threat to his apprenticeship, as

²² Such clerk's papers are A-RP (Feb. 13, 2013) at 404-405.

²³ Such clerk's papers are A-RP (Feb. 13, 2013) at 423-25.

expressed in the JATC letter, Swanson decided to fight back against Allen's retaliation, so in late August 2011 he went to Human Resources Manager Kim Tran and reported Allen's improper governmental actions during the alcohol incident in the hope of having Allen and another individual removed from the Apprenticeship Program. AR 696-703; CP 1027-28.²⁴ "Shortly thereafter, Mr. Swanson reported Mr. Allen to the Seattle Ethics and Elections Committee (SEEC)." AR 494; CP 790-91, 2474.²⁵

On September 15, 2011, Swanson reported the alcohol incident to the JATC. AR 1238. Swanson also reported Allen's misconduct to L&I and to the Apprenticeship Office's Training and Education Coordinator (Alice Lockridge), who reports to Karen DeVenaro and shared office space with Mr. Allen. 694-95; CP 892, 1028, 2550.²⁶ Owing to concerns of retaliation, DeVenaro moved Swanson from the North to the South Service Center. CP 1037-41.²⁷

When Allen saw Swanson at the South Service Center on September 19, 2011, Swanson's first day there, shortly after he had reported Allen to the JATC, Allen "became upset and stated, 'You're just a fucking squeak; you can't just decide to show up down South!'" AR

²⁴ Such clerk's papers are A-RP (Feb. 13, 2013) at 434-35

²⁵ Such clerk's papers are A-RP (Feb. 12, 2013) at 36-37, 64.

²⁶ Such clerk's papers are *id.*; A-RP (Feb. 13, 2013) at 299; A-RP (Feb. 12, 2013) at 140.

²⁷ Such clerk's papers are A-RP (Feb. 13, 2013) at 444-48.

494, 705, 1238. Allen was given Swanson's complaint by his uncle, Local 77 Business Manager Joe Simpson, and reviewed it. CP 2555-56.²⁸

On September 28, 2011, Swanson attended the JATC meeting and presented a PowerPoint presentation showing his good work and arguing against Allen's retaliation. CP 1063-77;²⁹ AR 786-819. The JATC did not cancel Swanson's apprenticeship. CP 1077-78;³⁰ AR 552-53. Swanson informed Tran and Tommy Howard (the person assigned to investigate the alcohol incident) that he felt retaliated against at the JATC meeting. AR 711.

Following Swanson's public report of Allen's improper governmental action, with a few exceptions, Swanson's performance evaluations continued to decline and his apprenticeship was considered for extensions in six-month increments as a result. AR 547-51, 626-632, 574-625. According to HR Manager Tran, Tran hired Ron Knox to investigate both the alcohol incident and Swanson's retaliation claims, but Knox only seems to have investigated the alcohol incident in 2011 and 2012. CP 2511-12.³¹ Investigations are supposed to be completed within 90 days. CP 1762-63.³² Yet, the February 11, 2013 Knox retaliation investigation report took more than one year to complete. AR 1303, 1306 (report claims

²⁸ Such clerk's papers are A-RP (Feb. 12, 2013) at 145-46; *see also* AR 1238.

²⁹ Such clerk's papers are A-RP (Feb. 13, 2013) at 470-84.

³⁰ Such clerk's papers are A-RP (Feb. 13, 2013) at 484-85.

³¹ Such clerk's papers are A-RP (Feb. 12, 2013) at 101-102.

³² Such clerk's papers are A-RP (May 31, 2013) at 1161-62

Knox retained December 8, 2011).

In September 2011, Swanson did not know that nothing was being done to investigate his *retaliation* claims, and he therefore contacted the Apprenticeship Office and HR to report further retaliation. AR 704-705; CP 1181-82.³³ In March and August 2012, Swanson contacted Knox thinking Knox was investigating the retaliation claim. AR 718-19. There is no evidence that Howard or Knox investigated Swanson's retaliation claims in 2011 or 2012. In December 2011, Howard issued a report, but it was limited to the alcohol incident. AR 1246-50. Knox issued a report in March, 2012, but it was limited to the alcohol issue. AR 1258-69.

In February 2012, Swanson met with Seattle Ethics and Election Commission ("SEEC") Investigator Kate Flack to report the alcohol incident. AR 1345. Mr. Ron Allen was notified of impending discipline in March 2012, and in May 2012 was suspended twenty working days based on the alcohol incident that Swanson reported. AR 754-60.

It is undisputed that Allen subsequently engaged in conduct that was "retaliatory" – "lobbying ... crews to evaluate [Swanson] more poorly than was justified." AR 1315-16; RP (Jun. 17, 2014) at 52. "Several witnesses told [City Investigator] Knox that Mr. Allen talked with them

³³ Such clerk's papers are A-RP (Apr. 24, 2013) at 586-587.

about Mr. Swanson. Journey-level workers reported that Mr. Allen lobbied them to negatively impact Mr. Swanson's evaluations." AR 501.

On or around July 13, 2012, SCL Employee Relations Manager Heather Proudfoot learned about a poster of Swanson with the word "RAT" written on his chest, which was hung in the hallway of the North Service Center. AR 495-96. Proudfoot ordered that the poster be taken down. *Id.*

On July 18, 2012, Swanson reported to Proudfoot that Ron Allen became combative with him at a union meeting held on July 12, 2012, calling Swanson a "fuck stick" and a "piece of shit," accusing Swanson of stabbing him in the back, and inciting a fight with Mr. Swanson by asking Mr. Swanson to step outside. AR 496, 726-27.

"In August 2012, Mr. Allen, who was speaking with his brother Josh (who is also a lineman) and others on the dock, stated it was no longer fun working there anymore. ... Mr. Swanson overheard Mr. Allen say this, and saw one of the lineman gesture toward Mr. Swanson. In response, Mr. Allen stated, 'Don't worry, we'll take care of him hook, line, and sinker.' " AR 496. Ken Busby, an SCL crew chief who trained and evaluated apprentices, including Swanson, testified that he observed "subtle forms of harassment" of Swanson; that it was "no secret to anybody." "It's looks. It's murmurs. It's stances. It's grouping. It's talking

while people are walking by. It's the entire atmosphere." CP 824-26.³⁴

On October 30, 2012, Mr. Swanson sent Ms. Proudfoot a photo of his locker, showing "Someone had removed a sticker from a nearby locker and applied it to [Swanson's] locker. The sticker is meant to designate a particular locker as reserved for *Pre*-Apprentice Lineworkers (PAL)." AR 734-35. Swanson reported this as an act of retaliation. *Id.*

On November 1, 2012, the Seattle Ethics and Elections Commission sent Mr. Allen correspondence stating that it intended to file a formal charge of ethics violations regarding the alcohol incident and provided Allen a copy of the charge. *See* AR 1348-51. On November 5, 2012, a *Seattle Times* news article appeared about Allen accepting liquor from the apprentices he was testing. AR 1352-53.

"On or around [November 6, 2012], Mr. Swanson overheard Mr. Kennedy mutter to another worker, while gesturing at Mr. Swanson, 'I was just sent to Ethics by your buddy.'" AR 500.

On or about November 9, 2012, HR Officer DaVonna Johnson received images of text messages from Mr. Swanson's cell phone, which were obtained by "unidentified crew members... while [Swanson] was up on a power pole doing work" and given to the union "anonymously" for forwarding to Ms. Johnson. AR 356. The text messages were between

³⁴ Such clerk's papers are A-RP (Feb. 13, 2013) at 231-33.

Swanson and the Apprenticeship Office's Training and Education Coordinator, Alice Lockridge, and concerned "possible whistleblower activity relative to alleged improper governmental conduct." See AR 357.

D. Swanson filed a whistleblower retaliation complaint to the Mayor, pursuant to SMC 4.20.860 and RCW 42.41.040.

On November 9, 2012, the same day that Ms. Johnson received Swanson's text messages, Swanson submitted a complaint of unlawful whistleblower retaliation under SMC 4.20.860 and RCW 42.41.040 to the Office of the Mayor. CP 836-38, Appendix 59-76.³⁵ The complaint alleged there had been "numerous retaliatory acts, including but not limited to:

... Repeated verbal harassment and intimidation by Ron Allen, which include threats of violence and verbal assaults;

Harassment by other Crew Chiefs and journey workers who support Ron Allen;

... and Retaliation by unknown SCL employees, including having a picture of me posted on the wall of the North Service Center in the Crew Chief desk room in July 2012, where someone had handwritten the word 'Rat' on the picture..., an incident on or around October 30, 2012 where someone moved a 'pre-apprentice' sticker to my locker..., and most recently where someone claiming to be me posted a comment [online to a *Seattle Times*] newspaper article about Ron Allen....

Id.

³⁵ The agency's reproduction of Mr. Swanson's whistleblower complaint and related photographic evidence ("Exhibit A" in the agency record) is very poor and nearly illegible. For this reason, a more legible reproduction is provided at Appendix 59-76.

In the “Relief Requested” section of the whistleblower retaliation complaint to the Mayor, Swanson’s proposed relief included, “Protection from the **hostile work environment** which now exists owing to my reports of improper governmental action.” AR 838, Appendix 61 (emphasis added).

E. Swanson prevailed in the administrative adjudication of his retaliation claim and was awarded unspecified “legal costs and attorney’s fees ... incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW.”

After an eight day administrative hearing with eleven witnesses, Administrative Law Judge (“ALJ”) Lisa Dublin weighing all of the evidence, including witness demeanor, issued Findings of Fact and Conclusions of Law that Seattle City Light “unlawfully retaliated against [Aaron] Swanson under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity.” AR 487-88. In the twenty-page order, ALJ Dublin made numerous findings (AR 494-502) including, *inter alia*:

Mr. Swanson Reports Mr. Allen

4.23 In late August 2011, Mr. Swanson contacted the Department of Labor and Industries and SCL’s Human Resources to report Mr. Allen extorted alcohol in exchange for passing test scores. [AR 694-703] Mr. Swanson also expressed concern that he was receiving poor and/or unfair performance evaluations because of Mr. Allen. Shortly thereafter, Mr. Swanson reported Mr. Allen to the Seattle Ethics and Elections Committee (SEEC). [See CP 790-91, 2474.³⁶] Mr. Swanson’s report was not the first report about improper behavior by Mr. Allen that the SEEC received.

...

4.25 On September 15, 2011, Mr. Swanson submitted a written

³⁶ Such clerk’s papers are A-RP (Feb. 12, 2013) at 36-37, 64.

complaint to the JATC regarding Mr. Allen. [AR 1238] When Mr. Allen saw Mr. Swanson at the South Service Center his first day there, September 19, 2011, he became upset and stated, 'You're just a fucking squeak; you can't just decide to show up down South!' [AR 705] Mr. Swanson was then assigned to Crew Chief Todd Warren's crew; Mr. Warren is Mr. Allen's personal friend and also on the ECAC. Mr. Swanson observed Mr. Allen with a copy of this report in hand, showing it to groups of lineworkers on the dock.

- 4.26 On September 28, 2011, ...When Mr. Swanson emailed SCL Human Resources that day that he felt Mr. Warren's crew was a hostile working environment, SCL made arrangements for Mr. Swanson to move to another crew. Mr. Swanson protested the lower marks he received from Kath Johnson's crew for October 2011, attributing them to Mr. Allen's coercion of journey-level worker Bruce Lee. See [AR 1181-91]. Mr. Swanson's performance evaluations and biweekly reports from Mr. Busby's crew for November 2011 showed higher marks. See [CP 1192-97].
- 4.27 On December 13, 2011, SCL determined that Mr. Allen improperly accepted alcohol from apprentices in exchange for a passing test score. (Ex. U) The investigative report containing this determination was sent to the SEEC. When the SEEC interviewed Mr. Allen about the incident, he was angry... [and] did not take personal responsibility for his behavior.... That month, Mr. Allen resigned as CIA, and SCL retained outside investigator Ron Knox of the law firm of Garvey, Schubert, Barer to investigate whether Mr. Allen solicited the alcohol in addition to accepting it, and to investigate Mr. Swanson's retaliation claims.
- 4.28 In approximately January 2012, Mr. Swanson observed a poster of himself with the word 'RAT' written on his chest, hung in the hallway of the North Service Center. [AR 783] Mr. Swanson observed this in approximately January 2012, when he attended night school at the North Service Center, but did not report it at that time or take it down because he did not want to cause commotion.
- 4.29 In February 2012, SCL notified Mr. Allen he had been recommended for suspension without pay for 20 working days for his improper extortion of alcohol. On or around February 3, 2012,

Mr. Swanson waived confidentiality regarding his whistleblower complaint to SEEC. ... That same day, he received an evaluation from his work on Crew Chief Campy's crew with eraser marks on scores that were altered down. ...

- 4.30 On April 3, 2012, the ECAC voted to extend Mr. Swanson's apprenticeship another six months for failure to progress. ... That month, on April 10, 2012, Mr. Knox issued a report finding that Mr. Allen ... accept[ed] alcohol in exchange for passing test scores. [AR 1258-69] This report did not address Mr. Swanson's retaliation claims because of the reticence of SCL employees to talk with Mr. Knox.
- 4.31 On May 2, 2012, SCL issued its determination that Mr. Allen violated ... the City of Seattle's Personnel Rules and Code of Ethics ... [and] suspended Mr. Allen for 20 work days effective May 3, 2012, and rendered him ineligible for any job promotion or discretionary out-of-class opportunities for one year. [AR 1270-73]
- ...
- 4.33 On May 31, 2012, Mr. Allen returned to work from his suspension. In approximately June 2012, Mr. Simpson removed Mr. Allen from the ECAC and appointed him to the JATC.
- 4.34 On July 18, 2012, Mr. Swanson reported to ... Proudfoot that Mr. Allen became combative at a union meeting on July 12, 2012, calling Mr. Swanson a 'fuck stick' and a 'piece of shit,' accusing Mr. Swanson of stabbing him in the back, and inciting a fight with Mr. Swanson by asking Mr. Swanson to step outside. [See AR 726-27] SCL assigned Mr. Knox to investigate this incident, but the investigation was hindered by the Local 77 because the incident took place at a union meeting, outside of work. ['[O]n January 25, 2013, Union Business Manager Joe Simpson, Mr. Allen's uncle, emailed Ms. Proudfoot ... stating: 'What happens at a Union meeting is none of SCL's business' AR 1355.]
- 4.36 On or around July 13, 2012, Ms. Proudfoot learned of the poster of Mr. Swanson with the word 'RAT' written on it. (AR 783) Mr. Swanson told Ms. Proudfoot he knew the poster had been there for several months and that he had left it up and had not worried about it because he did not want to stir the pot. ... Ms. Proudfoot ordered the poster taken down.

- 4.37 In August 2012, Mr. Allen, who was speaking with his brother Josh (who is also a lineman) and others on the dock, stated it was no longer fun working there anymore. Mr. Swanson overheard Mr. Allen say this, and saw one of the lineman gesture toward Mr. Swanson. In response, Mr. Allen stated ‘Don’t worry, we’ll take care of him hook, line, and sinker.’
- 4.38 ... Mr. Swanson testified that on October 30, 2012, he saw a sticker with the acronym PAL (‘Pre-Apprentice Lineworker’) on it, stuck to his locker when he arrived at work. Mr. Swanson testified that someone removed a sticker with the acronym PAL on it from a nearby locker and stuck it on the locker he was using. Mr. Swanson took a picture of the sticker on his locker, and emailed it to SCL Human Resources. [AR 734-35] SCL Division Administrator Debra Koopman, on the other hand, testified that Mr. Swanson first saw this sticker on his locker on or around September 11, 2012, but did not report it to a supervisor or crew chief at the time because he did not want any negative attention. [AR 1276] Based on the totality of the circumstances, I resolve conflicting testimony in favor of SCL. ...

Thirty Days Prior to Mr. Swanson’s Whistleblower Retaliation Complaint under Chapter 42.41 RCW and Chapter 4.20 SMC.

- ...
- 4.46 ...On or around [November 6, 2012], Mr. Swanson overheard Mr. Kennedy mutter to another worker, while gesturing at Mr. Swanson, ‘I was just sent to Ethics by your buddy.’
- 4.47 On November 7, 2012, at 2:56 a.m., someone claiming to be Mr. Swanson posted a response online to the November 5, 2012 Seattle Times article. This response stated:
- ‘Hi my name is Arron [sic] Swanson I was the one that brought all this up to save my job. I have not been doing well here at the city and this is my way of proving a point and saving my job that I might not have for much longer. I am saddened for what I have done to my union brother but it is already done. Sincerely Arron Swanson Seattle city light scc’ [AR 841, 772]. Neither Mr. Swanson nor Ms. Proudfoot could determine specifically who posted this [statement].
- 4.48 On or around November 7, 2012, while working on a crew,

someone took pictures of text messages on Mr. Swanson's cell phone, without Mr. Swanson's knowledge or authorization. These text messages were between Mr. Swanson and Training/Education Coordinator Alice Lockridge, and discussed the newspaper article response and Mr. Swanson's retaliation claims. These photos ended up at Local 77; Mr. Simpson then sent them to SCL Human Resources.

Mr. Swanson's Whistleblower Retaliation Complaint and Thereafter

- 4.49 On November 9, 2012, Mr. Swanson submitted a complaint of unlawful whistleblower retaliation under SMC 4.20.860 and RCW 42.41.040 to the Office of the Mayor. [CP 836-38, Appendix 59-76] Thereafter, Mr. Knox issued two supplemental investigative reports regarding retaliation against Mr. Swanson. The first of these, dated February 11, 2013, stated in pertinent part:

... I find that on a more probable than not basis, Allen engaged in lobbying activities directed at the Initiating Witness [Mr. Swanson]. There is evidence that the conduct escalated after the Initiating Witness provided information to SCL about Allen's alleged solicitation of alcohol from Apprentices. This involved at least lobbying efforts with crews to evaluate the Initiating Witness more poorly than was justified. This conduct appears retaliatory in nature.... [AR 1315-16]

- 4.50 Several witnesses told Mr. Knox that Mr. Allen talked with them about Mr. Swanson. Journey-level workers reported that Mr. Allen lobbied them to negatively impact Mr. Swanson's evaluations. None of the crew chiefs admitted being affected by Mr. Allen's lobbying. In the end, Mr. Knox was unable to conclusively determine specifically which performance reviews were the result of Mr. Allen's lobbying efforts.

...

- 4.52 Mr. Knox's second supplementary report dated May 23, 2013, addressed whether Mr. Allen retaliated against Mr. Swanson at the July 12, 2012 union meeting.... Mr. Knox stated he could not conclusively determine what exactly happened at the July 12, 2012 union meeting due to the conflicting, credible witness statements.... Mr. Knox found Mr. Swanson credible, and his notes of the incident credible. ...

4.54 ... In approximately March 2013, the ECAC again recommended extending Mr. Swanson's apprenticeship. Mr. Allen, though not a voting member of the JATC, attended the JATC meeting in May 2013 to serve as a subject matter expert. Despite Mr. Knox's reports that the evaluations may have been negatively influenced in retaliation against Mr. Swanson, the JATC voted to extend Mr. Swanson's apprenticeship another six months. Mr. Allen was present when the JATC voted. ...

AR 494-502.

ALJ Dublin's Order also issued Conclusions of Law, including

inter alia:

5.2 'Retaliatory action' means: (a) Any adverse change in a local government employee's employment status, or the terms and conditions of employment including unsatisfactory performance evaluations, transfer, and/or reassignment, or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official. SMC 4.20.850; RCW 42.41.020.

...

5.6 ... Mr. Swanson ... received an [Individualized Training Plan] and extension of his apprenticeship. ... [R]ather than working with Mr. Swanson to get him the resources he needed to improve quicker, Mr. Allen encouraged Mr. Swanson to drop out. When Mr. Swanson did not drop out, Mr. Allen then failed to provide Mr. Swanson with individualized training as his ITP required, bullied Mr. Swanson, and continued trying to persuade him to leave his apprenticeship, all of which undoubtedly impacted Mr. Swanson's confidence and the rate at which he learned and progressed in his apprenticeship. After Mr. Swanson reported improper governmental activity by Mr. Allen..., Mr. Allen lobbied line workers and crew chiefs to downgrade Mr. Swanson's performance evaluations in an attempt to cancel his apprenticeship.

...

5.10 The PAL sticker and the impersonation of Mr. Swanson to the Seattle Times were undoubtedly hostile actions taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself. Because I find that

the PAL sticker was first on Mr. Swanson's locker earlier than 30 days prior to Mr. Swanson's retaliation complaint to the Office of the Mayor, I do not consider it in determining whether SCL violated Chapter 42.41 RCW and Chapter 4.20 SMC. However, at the time the impersonation of Mr. Swanson to the Seattle Times took place, Mr. Allen was in a secondary supervisory position with the City over Mr. Allen because of his participation with the JATC, a City committee with authority to negatively impact Mr. Allen's apprenticeship. Consequently, Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times is actionable retaliation under Chapter 42.41 RCW.

AR 502-04.

ALJ Dublin's Order fined Mr. Allen \$1,000; recommended that Allen "be suspended from employment with Seattle City Light for six months without pay"; and stated that the "City of Seattle will pay the legal costs and attorney's fees Mr. Swanson incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW." AR 505.

F. ALJ Dublin made no findings of fact regarding Swanson's invoice for attorney's fees and costs; and the City took no final action on Swanson's request for fees and costs before the parties filed petitions for judicial review.

On October 11, 2013, Swanson's counsel tendered a bill for costs and attorney's fees to the City's counsel. CP 59, 65, 73-83. The City did not respond until October 15, 2013, and only then stated that it would get back to Swanson's counsel the following week. CP 59, 65. On October 15, Swanson's counsel inquired with ALJ Dublin about the appropriate procedure to effectuate the award of fees and costs given the City's failure

to respond, copying the City. CP 59, 70. The ALJ did not respond to Mr. Swanson. CP 61; RP (May 1, 2014) at 23-24.

On October 17, 2013, the City, Mr. Allen, and Mr. Swanson each filed separate petitions for judicial review in King County Superior Court.³⁷ The three cases were consolidated. CP 33.

On May 1, 2014, the King County Superior Court Judge Jeffrey Ramsdell granted a motion to dismiss Mr. Swanson's petition for review as untimely, "but without prejudice to [Swanson] fil[ing] a petition for enforcement." CP 573.

The City's petition for judicial review requested relief based on ALJ Dublin's factual finding in paragraph 5.10 that the *Seattle Times* website comment was "undoubtedly hostile action taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself." CP 509. The City's petition claimed that "there is no evidence in the record that it was even a Seattle City Light employee who posted the comment" and that the ALJ's finding was therefore not supported by "substantial evidence." *Id.* The City's petition also argued that the City was "exempt" from RCW 42.41, *et seq.*; that "the statute does not apply in this case"; and that ALJ Dublin erred by applying the state statute's definition for retaliation in Mr. Swanson's

³⁷ See Petitions for Judicial Review filed by Ron Allen (CP 1), Aaron Swanson (CP 60, 91-108, 161, 2821), and the City of Seattle (CP 2868).

case. CP 509-10.

G. King County Superior Court Judge Jeffrey Ramsdell affirmed Swanson’s claims under the substantial evidence standard, but held RCW 42.41 does not apply and that the retaliation that ALJ Dublin found had occurred was not actionable under the Seattle Whistleblower Code.

On June 18, 2014, Judge Ramsdell entered the superior court’s Order on Petition for Review. Judge Ramsdell found that “the ALJ erred as a matter of law in relying on the definition of retaliation found in RCW 42.41.020(3)(b),” and as a result “the finding of actionable retaliation set forth [by ALJ Dublin] in C.L. 5.10³⁸ is stricken” and “the award of legal costs and attorney’s fees to Mr. Swanson is reversed.” CP 685.

Judge Ramsdell nonetheless considered the City’s alternative argument that the record was insufficient to support a finding that a City Light employee posted the comment online or that Mr. Allen encouraged the conduct. *Id.* Regarding the sufficiency of the evidence, Judge Ramsdell wrote:

[I]t is clear that the individual who posted the comment had ‘insider’ information not known to the general public and was aligned with Mr. Allen. Given the historical context and Mr. Allen’s prior dealings with Mr. Swanson, **a reasonable inference can be drawn that the poster was a City Light insider who was encouraged to act by the behavior and conduct of Mr. Allen.** Other potential ‘suspects’ may exist, but the burden of proof is merely a preponderance of the evidence.... Accordingly, this Court finds that the record is sufficient to support the ALJ’s factual finding in C.L. 5.10.

³⁸ See AR 504.

Id.

Mr. Swanson filed a motion for reconsideration, making several arguments including that: (1) the City's code is void if it does not meet the intent of RCW 42.41, *et seq.*, nor protect against the forms of retaliation defined in the state statute; (2) the definition of retaliation in the City's code, which addresses adverse changes in "terms and conditions of employment," is expansive enough to include "one act in a long string of retaliatory conduct;" (3) the City's argument that the court cannot rely on conduct outside the liability period is unsupported by case law; and (4) events other than the *Seattle Times* online posting occurred within the statute of limitations and were actionable. *See* CP 688-706. Judge Ramsdell denied Swanson's motion for reconsideration.³⁹ Mr. Swanson filed a notice of appeal and the City filed a notice of cross-appeal.⁴⁰ *See* CP 2803, 2816.

IV. ARGUMENT

A. Grounds for Review

This Court has jurisdiction to review ALJ Dublin's September 17, 2013 order pursuant to former SMC 4.20.860(C), the Local Government Whistleblower Protection Act, RCW 42.41.040(9), and the Washington

³⁹ CP 710.

⁴⁰ Mr. Allen's union appealed his \$1,000 fine on primarily constitutional grounds, which Swanson did not challenge, resulting in Judge Ramsdell striking Allen's \$1,000 fine. *See* CP 175; CP 614-15. Such ruling has not been appealed by any party.

Administrative Procedure Act. RCW 34.05.526.⁴¹

B. Standard of Review

This Court must affirm ALJ Dublin's Order, unless the City can establish error. *See* Campbell v. Bd. for Volunteer Firefighters, 111 Wn. App. 413, 416, 45 P.3d 216, 218 (2002) *and* Green v. State, Dep't of Soc. & Health Servs., 163 Wn. App. 494, 507, 260 P.3d 254, 261 (2011), *citing* RCW 34.05.570(1)(a). All of the ALJ's findings of fact that the City leaves unchallenged are considered "a verity on appeal." *See* Tapper v. State Employment Sec. Dep't, 122 Wn.2d 397, 407, 858 P.2d 494, 500 (1993); *and* RAP 10.3(g), *cited in* Brown v. State, Dep't of Health, Dental Disciplinary Bd., 94 Wn. App. 7, 13, 972 P.2d 101, 105 (1998).⁴²

The appellate court sits in the same position as the superior court and applies the Administrative Procedure Act (APA) standards directly to the administrative record. Campbell v. State Employment Sec. Dep't, 180 Wn.2d 566, 571, 326 P.3d 713, 715 (2014). The Court reviews the record to determine, *inter alia*, whether the order "is based on an error of law, the order is not supported by substantial evidence, or the order is arbitrary and capricious." *Id.*, *citing* RCW 34.05.570(3)(a)-(i). This Court "may ...

⁴¹ Appendix 3, 17-18.

⁴² *Id.* ("[T]here must be specific assignments of error before we will go behind the trial court's findings." Daves v. Nastos, 39 Wn. App. 590, 595, 694 P.2d 686, *aff'd. in part, rev'd & remanded in part*, 105 Wn.2d 24, 711 P.2d 314 (1985). When there has been no specific assignment of error to findings of fact, 'the findings become the established facts....' In re Perry, 31 Wn. App. 268, 269, 641 P.2d 178 (1982).")

affirm on any basis supported by the record.” State v. Torres, 151 Wn. App. 378, 389, 212 P.3d 573 (2009).

Questions of law, such as statutory interpretation and whether the statute of limitations bars all or part of a hostile work environment claim, are reviewed *de novo*.⁴³

C. ALJ Dublin did not misinterpret or erroneously apply the Local Government Whistleblower Protection Act or the Seattle Whistleblower Code.

1. The State’s Whistleblower Protection Act sets a broad baseline for protecting local government employee-whistleblowers, which the City’s ordinance cannot contravene.

“The court’s duty in statutory interpretation is to discern and implement the legislature’s intent.” Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). “The plain meaning of a statute is determined from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole.”⁴⁴ Washington’s Local Government Whistleblower Protection Act (“Whistleblower Protection Act,” or “Act”) states that the Act has two purposes: [1] “to protect local governmental employees who make good-faith reports to appropriate governmental bodies and [2] to provide

⁴³ State v. Johnson, 132 Wn. App. 400, 406, 132 P.3d 737 (2006); Woodward v. Taylor, __ Wn. App. __, 340 P.3d 869, 871 (2014).

⁴⁴ Woodbury v. City of Seattle, 172 Wn. App. 747, 750, 292 P.3d 134, 136 (2013) *review denied*, 177 Wn.2d 1018, 304 P.3d 114 (2013), *citing* State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

remedies for such individuals who are subjected to retaliation for having made such reports.” RCW 42.41.010.

The Act makes it “unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith ... that an improper governmental action occurred.” RCW 42.41.040(1). For purposes of protecting Washington’s local government employee-whistleblowers, the legislature defines “retaliatory action” as:

- (a) Any adverse change in a local government employee’s employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action; or
- (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.

RCW 42.41.020(3).

Local government employee-whistleblowers who experience retaliation have the right to file a charge specifying the retaliatory action that occurred and to request relief. RCW 42.41.040(2). They may also request an administrative hearing under the Washington Administrative Procedures Act and have the right to subsequent judicial review under the WAPA. *See* RCW 42.41.040(5), *incorporating by reference* RCW

34.05.598; and RCW 42.41.040(9).⁴⁵

“The [Whistleblower Protection] Act contains a conditional exemption: ‘Any local government that has adopted or adopts a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting shall be exempt from this chapter *if the program meets the intent of this chapter.*’” Keenan v. Allan, 889 F. Supp. 1320, 1365 (E.D. Wash. 1995) *aff’d*, 91 F.3d 1275 (9th Cir. 1996), *quoting* RCW 42.41.050 (emphasis added). The Act thus sets a baseline minimum for the standards of whistleblower protection that a local government may enact to claim exemption from the Act.

One of the purposes of the City in promulgating the Seattle Whistleblower Code was to “implement” the Local Government Whistleblower Protection Act’s prohibition on retaliation against local government whistleblowers. *See* former SMC 4.20.800 (Appendix 8), *citing* RCW 42.41.040.⁴⁶ For purposes of protecting City employee-whistleblowers, the Seattle Whistleblower Code that was in effect at the time of the administrative hearing and which applies in this case⁴⁷ defined “retaliatory action” as including “unwarranted adverse change in an employee’s employment status or the **terms and conditions** of

⁴⁵ *Cf.* former SMC 4.20.860 (Appendix 17-18), *referencing* RCW 42.41.040.

⁴⁶ *See also* current SMC 4.20.800 (Appendix 22-23) (code’s purpose is to “**comply with RCW 42.41**”).

⁴⁷ Nearly six months after ALJ Dublin issued the findings of fact and conclusions of law in this case, the Seattle Whistleblower Code was amended. *See* Appendix 19.

employment including, but not limited to, denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes; refusal to assign meaningful work; unsubstantiated letters of reprimand or unsatisfactory performance evaluations; demotion, reduction in pay; denial of promotion; transfer or reassignment; suspension or dismissal; or other unwarranted disciplinary action.” AR 861 (former SMC 4.20.850(D), Appendix 16.

Language such as that used in the Whistleblower Protection Act, which clarifies that “hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official” are unlawful in Washington, is conspicuously absent from the former definition of “retaliatory action” in the Seattle Whistleblower Code that applies in this case.⁴⁸ See RCW 42.41.020(3)(b). Cf. former SMC 4.20.850(D) (Appendix 16). Compare also RCW 42.40.050(1)(b)(xii) (making it unlawful for a supervisor to “behav[e] in or encourag[e] coworkers to behave in a hostile manner” toward a State Government employee-whistleblower).

“Under their constitutionally granted police powers, cities may enact ordinances prohibiting the same acts state law prohibits as long as

⁴⁸ Recent amendments to the Seattle Whistleblower Code appear to have harmonized the definitions for “*retaliatory action*” in the Code and the State Act. The code now includes in its definition of “retaliatory action,” circumstances in which “a supervisor or superior who behaves in, or encourages coworkers to behave in, a hostile manner toward the employee.” See current SMC 4.20.805 (enacted Dec. 9, 2013), Appendix 24, 28.

the city ordinance does not conflict with the general laws of the state.”

City of Tacoma v. Franciscan Found., 94 Wn. App. 663, 668, 972 P.2d 566 (1999) (holding that to the extent City’s anti-discrimination ordinance conflicted with Washington’s Law Against Discrimination in its definition of “employer,” City’s ordinance was unenforceable), *citing* City of Bellingham v. Schampera, 57 Wn.2d 106, 109, 356 P.2d 292, 294 (1960). *Accord* Washington Constitution, Art. XI, § 11 (“Any ... city... may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”) Where “statutory language indicates an affirmative policy choice” and “the City’s ordinance contravenes this policy choice, [the City’s ordinance] must give way.”

City of Tacoma, 94 Wn. App. at 670.

Here, the legislature has chosen to protect local government employee-whistleblowers from retaliation that takes the form of “hostile actions by another employee ... that were encouraged by a supervisor or senior manager or official.” RCW 42.41.020(3)(b). To the extent that the City’s former ordinance could be construed as silent on whether “hostile actions by another employee ... that were encouraged by a supervisor” are protected under the ordinance’s “terms and conditions” provision, the City’s silence on the issue “must give way” to the policy choice that the legislature imbued in RCW 42.41, *et seq.* See City of Tacoma, 94 Wn.

App. at 670. The City lacks the power “to authorize by ... Ordinance what the legislature has forbidden.” Seattle Newspaper-Web Pressmen’s Union Local No. 26 v. City of Seattle, 24 Wn. App. 462, 469, 604 P.2d 170, 174 (1979), *citing* Schampera, 57 Wn.2d at 109.

2. **Even if RCW 42.41.020(3)(b)’s provision concerning “hostile actions” encouraged by a supervisor did not apply, a hostile work environment is an adverse change to the “terms and conditions of employment” under RCW 42.41.040(3) and SMC 4.20.850(D).**

The Whistleblower Protection Act uses unique language to define the scope of retaliatory actions it prohibits. For purposes of whistleblower protection, the legislature defined retaliation not only as adverse changes in “the terms of conditions of employment,” (RCW 42.41.020(3)(a)); but also included a separate provision to protect whistleblowers from “hostile actions by another employee ... that were encouraged by a supervisor or senior manager or official.” RCW 42.41.020(3)(b).

In contrast, the text of the Washington Law Against Discrimination (“WLAD”) includes no reference to “**hostile actions**.” *See generally* RCW 49.60, *et seq.* Nevertheless, the WLAD still prohibits harassment based on a protected status when it “affects the terms and conditions of employment.” *See* RCW 49.60.180(3). The requirement is satisfied if harassment is “sufficiently pervasive so as to alter the conditions of

employment and create an abusive working environment.”⁴⁹ This question is determined with regard to “the totality of the circumstances.” Glasgow v. Georgia-Pac. Corp., 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

When “harassment becomes a condition of employment, Washington courts have consistently held the harassment actionable under RCW 49.60.180(3),” the WLAD provision that bars discrimination in “other terms or conditions of employment.” Payne v. Children’s Home Soc. of Washington, Inc., 77 Wn. App. 507, 511, 892 P.2d 1102 (1995), *citing, e.g., Glasgow*, 103 Wn.2d at 405 (referring to “harassment . . . a working condition”); *see also* Davis v. West One Automotive Group, 140 Wn. App. 449, 166 P.3d 807 (2007) (describing claim for harassment as a claim for discrimination “in other terms or conditions of employment”).

Federal courts have also long-recognized that the environment in which an employee works is a protected “term” of employment under Title VII.⁵⁰ In the landmark case Rogers v. EEOC, 454 F.2d 234 (1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), the

⁴⁹ Loeffelholz v. University of Washington, 175 Wn.2d 264, 285 P.3d 854 (2012), *quoting Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985).

⁵⁰ “RCW 49.60 substantially parallels federal law, and thus in construing the Washington statute, Washington courts may look to interpretations of the federal law.” Hollingsworth v. Washington Mutual Sav. Bank, 37 Wn. App. 386, 681 P.2d 845 (1984). Although federal discrimination cases are not binding on this court, they are persuasive and their analyses may be adopted “where they further the purposes and mandates of state law.” Antonius v. King County, 153 Wn.2d 256, 266, 103 P.3d 729 (2004).

Court of Appeals for the Fifth Circuit was the first to hold that “the phrase ‘*terms, conditions, or privileges of employment*’ in [Title VII] is an **expansive concept** which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” *Id.*, at 238. *Accord Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), *discussing Rogers*, 454 F.2d at 238.

With respect to the quantum of abuse required to establish a hostile work environment as a working condition, the Washington Supreme Court in *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 285 P.3d 854 (2012), held – given a context of earlier non-recoverable harassment – that a supervisor’s comment in a group meeting that he was “going to come back [from Iraq] *a very angry man* ... could be severe enough, on its own, to alter the conditions of employment and establish a hostile work environment.” *Id.*, at 276-78 (emphasis added).

The plain language of RCW 42.41.020(3)(b), which includes not just a “terms and conditions” provision but also a separate ban on “hostile actions” encouraged by supervisors, suggests that the legislature intended for the Whistleblower Protection Act to guard against an *even broader* scope of harassment than the standard for a “hostile work environment” recognized in *Loeffelholz*. *Compare* RCW 49.60.180(3) *with* RCW

42.41.020(3)(b) (Appendix 2) and current SMC 4.20.805 (Appendix 24, 28).

As Mr. Swanson was subjected both to hostile actions encouraged by a supervisor and to an ongoing hostile work environment, the Court should affirm ALJ Dublin's Order and finding that the City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040.

D. Taking all of Mr. Swanson's evidence as true and drawing all inferences in his favor, ALJ Dublin's finding that the City of Seattle unlawfully retaliated against Swanson is supported by "substantial evidence."

Judge Ramsdell has already affirmed the sufficiency of the evidence supporting ALJ Dublin's Findings of Fact and Conclusions of Law and Final Order ("Order") concerning Mr. Swanson's whistleblower retaliation claim. *See* CP 685. "[I]t is not the province of the reviewing court to try the facts *de novo*...."⁵¹ ALJ Dublin's "resolution of the truth from conflicting evidence will not be disturbed on appeal."⁵² So long as the Order is supported by "substantial evidence," it must be upheld. RCW 34.05.570(3)(e).

"The reviewing court is to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who

⁵¹ *See Campbell*, 111 Wn. App. at 417.

⁵² *Faghih v. State Dep't of Health*, 148 Wn. App. 836, 850, 202 P.3d 962, 969 (2009).

prevailed at the administrative proceeding below” (*i.e.*, Mr. Swanson). Gibson v. Washington State Dept. of Employment Sec., _ Wn. App. _, 340 P.3d 882, 887 (2014). *See also* Kittitas County v. Kittitas County Conservation, 176 Wn. App. 38, 48, 308 P.3d 745 (2013), *quoting* City of Univ. Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Thus, the court takes Mr. Swanson’s evidence “as true,” and draws all inferences in his favor.⁵³ The substantial evidence standard is “highly deferential” to the administrative fact finder.⁵⁴ The reviewing court “neither weigh[s] the credibility of witnesses nor substitute [its] judgment” for that of the ALJ.⁵⁵

“Substantial evidence entails a relatively low threshold of proof and exists when ‘there is ‘a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.’”⁵⁶ In applying the substantial evidence test, “it does not matter that a reviewing court would likely have ruled differently had it been the trier of fact.”⁵⁷

1. The context of Ron Allen’s prior retaliatory acts supports a reasonable inference that the harassment

⁵³ *See Faghih*, 148 Wn. App. at 850, *citing* Ancier v. State, Dep’t of Health, 140 Wn. App. 564, 573, 166 P.3d 829, 833 (2007).

⁵⁴ Motley-Motley, Inc. v. State, 127 Wn. App. 62, 72, 110 P.3d 812, 818 (2005); ARCO Products Co. v. Washington Utilities & Transp. Comm’n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

⁵⁵ *See* Brighton v. State Dep’t of Transp., 109 Wn. App. 855, 862, 38 P.3d 344, 348 (2001), *citing* US W. Commc’ns, Inc. v. Util. & Transp. Comm’n, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997).

⁵⁶ Sunderland Family Treatment Services v. City of Pasco, 127 Wn.2d 782, 801, 903 P.2d 986 (1995) (Durham, C.J., dissenting), *quoting* State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994).

⁵⁷ Callecod v. Washington State Patrol, 84 Wn. App. 663, 676, 929 P.2d 510 (1997), *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

from “unknown” individuals that Swanson suffered well into November 2012 were acts committed by persons encouraged by Allen, if not by Allen himself.

In affirming ALJ Dublin’s fact-finding that determined that retaliation was encouraged or committed by Ron Allen, King County Superior Court Judge Ramsdell appropriately considered alleged hostile events within their “historical context and Mr. Allen’s prior dealings with Mr. Swanson.” CP 685. In this regard, it is important to remember that:

Hostile work environment claims ‘are different in kind from discrete acts’ and ‘[t]heir very nature involves repeated conduct.’ The ... ‘unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years.... Such claims are based on the cumulative effect of individual acts.’

Antonius v. King County, 153 Wn.2d 256, 264, 103 P.3d 729, 733-34

(2004), *quoting* National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

The Washington State Supreme Court has “expressed disfavor for parsing a hostile work environment claim into component parts ‘for statute of limitations purposes.’” Loeffelholz, 175 Wn.2d at 273, *citing* Antonius, 153 Wn.2d at 268. In Loeffelholz v. University of Washington, the Court of Appeals wrote:

A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice. A plaintiff is entitled to present evidence of harassment before the statutory limitations period to show the cumulative

effect of the acts, provided some of the objectionable conduct occurred within the limitations period.

Loeffelholz v. Univ. of Washington, 162 Wn. App. 360, 363, 253 P.3d 483, 485 (2011) *aff'd in part*, 175 Wn.2d 264, 285 P.3d 854 (2012); *accord* Antonius, 153 Wn.2d at 264, *quoting* Morgan, 536 U.S. at 117.

“The acts must have some relationship to each other to constitute part of the same hostile work environment claim.” Loeffelholz, 175 Wn.2d, at 276. Still, “[t]he standard for linking discriminatory acts together in the hostile work environment context is not high.” *Id.*

“[P]rovided that **an act** contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.” Antonius, 153 Wn.2d at 264, *quoting* Morgan, 536 U.S. at 117.

Even if prior hostile acts were not part of the same hostile work environment “condition,” the statute of limitations for a hostile work environment claim does not bar an employee from using prior acts as “background evidence in support of a timely claim”. Broyles v. Thurston Co., 147 Wn. App. 409, 433, 195 P.3d 985 (2008), *quoting* Morgan, 536 U.S. at 113-14. *See also* Loeffelholz, 175 Wn.2d 264 (“previous conduct” is part of “the totality of circumstances” and gives “context” to timely, recoverable conduct). *See also* Diaz v. Jiten Hotel Management, Inc., 762 F. Supp. 2d 319, 322 (D. Mass. 2011) (denying defendant’s motion for

summary judgment and invitation to “‘slice and dice’ the complex phenomenon of discrimination into pieces, and evaluate each piece out of the context of the whole....”)

Thus, evidence of the environment and acts occurring prior to the statute of limitations or the duration of the “hostile work environment” are admissible to “to show a pattern of illegal conduct, purpose, or motivation with regard either to independent violations that occur after the limitation period or to continuing violations that began before and continue after the limitations period.” Henderson v. Pennwalt Corp., 41 Wn. App. 547, 553-54, 704 P.2d 1256 (1985). *See also* Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 444-46, 191 P.3d 879 (2008) (holding that under ER 404(b), evidence of “prior bad acts” can be admissible to show motive or intent for harassment, including the intent to retaliate).

The Washington State Supreme Court, recognizing that “[p]roof of the employer’s motivation may be difficult for the employee to obtain,” aptly noted that “[e]vidence of an actual pattern of retaliatory conduct is, of course, very persuasive.” Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

It is undisputed that *after* Mr. Swanson filed a complaint with the Seattle Election and Ethics Commission about Mr. Allen’s misconduct, Mr. Allen engaged in conduct that was “retaliatory” by “lobbying ...

crews to evaluate [Swanson] more poorly than was justified.” AR 1315-16; RP (Jun. 17, 2014) at 52. “Several witnesses told [City Investigator] Knox that Mr. Allen talked with them about Mr. Swanson. Journey-level workers reported that Mr. Allen lobbied them to negatively impact Mr. Swanson’s evaluations.” AR 501.

Based on Mr. Allen’s uncontested prior acts of retaliation (*i.e.*, the “lobbying”) and the other hostile acts that followed Swanson’s whistleblowing, it is reasonable to infer that Ron Allen (and SCL employees who were encouraged by Allen) engaged in a “pattern of retaliatory conduct” toward Mr. Swanson.⁵⁸ It is likewise reasonable to infer that the pattern of retaliatory conduct included not only the November 7, 2012 impersonation of Swanson in comments made on the *Seattle Times* website;⁵⁹ but also:

- Mr. Allen telling Mr. Swanson “You’re just a fucking squeak” one month after Swanson reported Allen’s misconduct, AR 494;
- the “poster of [Swanson] with the word ‘RAT’ written on his chest, hung in the hallway of the North Service Center,” AR 495-96;
- Mr. Allen calling Mr. Swanson a ‘fuck stick’ and a ‘piece of shit’ in the middle of the union hall, accusing Mr. Swanson of stabbing him in the back, and inciting a fight with Mr. Swanson by asking Mr. Swanson to ‘step outside’ immediately before a union meeting began, AR 726-27;

⁵⁸ See Wilmot, 118 Wn.2d at 69; Henderson, 41 Wn. App. at 553-54; Brundridge, 164 Wn.2d at 444-46.

⁵⁹ AR 500.

- the placement and retention of the PAL (“Pre-Apprentice Lineworker”) sticker on Mr. Swanson’s locker, AR 496-97; and
- the intrusion into the privacy of Mr. Swanson’s cell phone text messages while Swanson was working on a crew on November 7, 2012, AR 500.

The City argued below that only “speculation” linked Mr. Allen or any SCL employee to the impersonation of Mr. Swanson on the *Seattle Times* website. CP 446. However, “it is clear that the individual who posted the comment had ‘insider’ information not known to the general public and was aligned with Mr. Allen.” Order (Ramsey, J.) CP 685. Given that fact and the context of the aforementioned pattern of retaliation, it was reasonable to infer that the comment posted on the *Seattle Times* website was likely “encouraged” or written by Mr. Allen.

ALJ Dublin’s factual findings should be affirmed. “[I]t does not matter that [this] court would likely have ruled differently had it been the trier of fact.”⁶⁰ The court should not substitute its judgment for that of the ALJ, who had the opportunity to determine the credibility of witnesses.⁶¹ Mr. Swanson’s presents more than enough evidence satisfy the “relatively low threshold of proof” required by the substantial evidence test.⁶² This Court “may ... affirm on any basis supported by the record.” *Torres*, 151 Wn. App. at 389.

⁶⁰ *Callecod*, 84 Wn. App. at 676.

⁶¹ *See Brighton*, 109 Wn. App. at 862, *citing US W. Commc’ns*, 134 Wn.2d at 62.

⁶² *Sunderland*, 127 Wn.2d at, 801.

V. ATTORNEY FEES AND COSTS

Pursuant to RCW 42.41.040(7) and former SMC 4.20.860(C),⁶³ Mr. Swanson requests attorney's fees and costs incurred in relation to this appeal. The City amended its whistleblower code not long after the administrative hearing took place and ALJ Dublin issued the Order awarding "legal costs and attorney's fees Mr. Swanson incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW." *See* Ord. 124362 (adopted Dec. 9, 2013), Appendix 21.

Unlike the Whistleblower Code in existence at the time Mr. Swanson filed his complaint, the City's new ordinance does not provide for adjudicative proceedings before an ALJ of the Office of Administrative Hearings. Rather, it provides a hearing before the City's Hearing Examiner, who it authorizes to award "reasonable attorneys fees ...not [to] exceed \$20,000." SMC 4.20.865(D)(1)(c) (amended Dec. 9, 2013), Appendix 47. The ordinance that was previously in effect contained no similar limitation; but instead incorporated its remedies directly from RCW 42.41.040. *See* former SMC 4.20.860(C), Appendix 18.

The new City ordinance should have no effect on the fees that ALJ Dublin awarded Mr. Swanson in September 2013, prior to the ordinance's enactment. The City's new framework for adjudicative proceedings under

⁶³ Appendix 3 and 18.

the code did not exist when the administrative adjudication of Mr. Swanson's whistleblower claim occurred and it played no part in that adjudication or in ALJ Dublin's award of fees. Only after ALJ Dublin issued the fee award and Mr. Swanson's counsel presented a detailed statement of costs and attorney's fees to the City and to the ALJ, did the City pass the ordinance purporting to limit the amount of attorney fees available to whistleblowers prevailing against the City. *See* CP 65-82, Appendix 19.

“Absent an explicit command otherwise, a court will apply a statute prospectively only.” W.R. Grace & Co.--Conn. v. State, Dep't of Revenue, 137 Wn.2d 580, 612, n.12, 973 P.2d 1011, 1027 (1999); *accord In re Flint*, 174 Wn.2d 539, 546, 277 P.3d 657, 661 (2012). “The antipathy to retroactive legislation is ... reflected in the Fifth Amendment's prohibition on takings.” W.R. Grace, 137 Wn.2d at 612, n. 12.

“Washington precedent clearly allows for retroactive application of statutes which are remedial and increase a remedy without affecting a vested right.” Bayless v. Cmty. Coll. Dist. No. XIX, 84 Wn. App. 309, 317, 927 P.2d 254, 257 (1996). However, the city's new ordinance is just the opposite. Its retroactive application would decrease Mr. Swanson's remedy and deprive him of a vested right.

Moreover, just as the City code's prior definition of “retaliatory

action” did, the attempt by the City’s new code to limit the amount of recoverable attorney’s fees in local government whistleblower retaliation cases contravenes the intent of the legislature in enacting RCW 42.41.040(7). The ordinance must “give way” to the intent of the legislature and its policy choice to provide local government whistleblowers with more robust remedies. *See City of Tacoma*, 94 Wn. App. at 670. ALJ Dublin’s award of the total “costs and attorney’s fees incurred” by Swanson should be reinstated, limited only by their “reasonableness” and without consideration of the \$20,000 limit applicable to orders by a City Hearing Examiner.

As the specific amount of fees to be awarded has not yet been determined, this Court should remand the case to the Office of Administrative Hearings and to ALJ Dublin to make such determination. *See Suquamish Tribe v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 778, 235 P.3d 812 (2010) (“When an agency fails to address an issue or inadequately decides an issue, there are grounds for remand under RCW 34.05.570(3)(f).”)

VI. CONCLUSION

For all of the foregoing reasons, ALJ Dublin’s order should be affirmed. The ALJ’s award of attorney’s fees and costs to Mr. Swanson should be reinstated and the matter should be remanded to the ALJ to

determine the exact amount of such award.

RESPECTFULLY SUBMITTED this 17th day of February, 2015.

THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan

John P. Sheridan, WSBA # 21473

Mark W. Rose, WSBA #41916

Hoge Building, Suite 1200

705 Second Avenue

Seattle, WA 98104

Tel: 206-381-5949 Fax: 206-447-9206

Attorney for Plaintiff/Appellant

DECLARATION OF SERVICE

Patti Lane states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On February 17, 2015, I caused to be delivered via email addressed to:

Katrina Kelly
Zahraa Wilkinson
City Attorney’s Office
600 4th Ave, 4th Floor
PO Box 94769
Seattle, WA 98124-4769

Mary C. Lobdel
Attorney General of Washington
Government Operations Division
7141 Cleanwater Drive SW
PO Box 40108
Olympia, WA 98504-0108

Kristina Detwiler
Robblee Detwiler & Black
2101 Fourth Avenue, Suite 1000
Seattle, WA 98121-2392

a copy of BRIEF OF APPELLANT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of February, 2015 at Seattle, King County, Washington.

s/Patti Lane
Patti Lane
Legal Assistant

2015 FEB 17 11:41 AM
U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE

No. 723448

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

AARON SWANSON,

Interested Party/Appellant/Cross-Respondent

v.

CITY OF SEATTLE,

Petitioner/Respondent/Cross-Appellant

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey M. Ramsdell)

Case No. 13-2-35992-8

APPENDIX TO BRIEF OF APPELLANT

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA # 41916
The Sheridan Law Firm, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949
jack@sheridanlawfirm.com
mark@sheridanlawfirm.com
Attorneys for Appellant

Chapter 42.41 RCW

LOCAL GOVERNMENT WHISTLEBLOWER PROTECTION

RCW Sections

- 42.41.010 Policy.
- 42.41.020 Definitions.
- 42.41.030 Right to report improper governmental action -- Policies and procedures.
- 42.41.040 Retaliatory action unlawful -- Relief by whistleblower -- Penalty.
- 42.41.045 Prohibition on intimidation of whistleblower -- Nondisclosure of protected information.
- 42.41.050 Exemptions.
- 42.41.060 Local government administrative hearings account.
- 42.41.900 Construction.
- 42.41.901 Effective dates -- 1992 c 44.
- 42.41.902 Severability -- 1992 c 44.

42.41.010

Policy.

It is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government officials and employees. The purpose of this chapter is to protect local government employees who make good-faith reports to appropriate governmental bodies and to provide remedies for such individuals who are subjected to retaliation for having made such reports.

[1992 c 44 § 1.]

42.41.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1)(a) "Improper governmental action" means any action by a local government officer or employee:

(i) That is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of the employee's employment; and

(ii) That is in violation of any federal, state, or local law or rule, is an abuse of authority, is of substantial and specific danger to the public health or safety, or is a gross waste of public funds.

(b) "Improper governmental action" does not include personnel actions including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the local government collective bargaining and civil service laws, alleged labor agreement violations, reprimands, or any action that may be taken under chapter 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 RCW or RCW 54.04.170 and 54.04.180.

Appendix 1

(2) "Local government" means any governmental entity other than the state, federal agencies, or an operating system established under chapter 43.52 RCW. It includes, but is not limited to cities, counties, school districts, and special purpose districts.

(3) "Retaliatory action" means: (a) Any adverse change in a local government employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action; or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.

(4) "Emergency" means a circumstance that if not immediately changed may cause damage to persons or property.

[1994 c 210 § 1; 1992 c 44 § 2.]

42.41.030

Right to report improper governmental action — Policies and procedures.

(1) Every local government employee has the right to report to the appropriate person or persons information concerning an alleged improper governmental action.

(2) The governing body or chief administrative officer of each local government shall adopt a policy on the appropriate procedures to follow for reporting such information and shall provide information to their employees on the policy. Local governments are encouraged to consult with their employees on the policy.

(3) The policy shall describe the appropriate person or persons within the local government to whom to report information and a list of appropriate person or persons outside the local government to whom to report. The list shall include the county prosecuting attorney.

(4) Each local government shall permanently post a summary of the procedures for reporting information on an alleged improper governmental action and the procedures for protection against retaliatory actions described in RCW 42.41.040 in a place where all employees will have reasonable access to it. A copy of the summary shall be made available to any employee upon request.

(5) A local government may require as part of its policy that, except in the case of an emergency, before an employee provides information of an improper governmental action to a person or an entity who is not a public official or a person listed pursuant to subsection (3) of this section, the employee shall submit a written report to the local government. Where a local government has adopted such a policy under this section, an employee who fails to make a good faith attempt to follow the policy shall not receive the protections of this chapter.

(6) If a local government has failed to adopt a policy as required by subsection (2) of this section, an employee may report alleged improper government action directly to the county prosecuting attorney or, if the prosecuting attorney or an employee of the prosecuting attorney participated in the alleged improper government action, to the state auditor. The cost incurred by the state auditor in such investigations shall be paid by the local government through the municipal revolving account authorized in RCW 43.09.282.

(7) The identity of a reporting employee shall be kept confidential to the extent possible under law, unless the employee authorizes the disclosure of his or her identity in writing.

[1995 c 213 § 1; 1992 c 44 § 3.]

Appendix 2

42.41.040**Retaliatory action unlawful — Relief by whistleblower — Penalty.**

(1) It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith in accordance with the provisions of this chapter that an improper governmental action occurred.

(2) In order to seek relief under this chapter, a local government employee shall provide a written notice of the charge of retaliatory action to the governing body of the local government that:

- (a) Specifies the alleged retaliatory action; and
- (b) Specifies the relief requested.

(3) The charge shall be delivered to the local government no later than thirty days after the occurrence of the alleged retaliatory action. The local government has thirty days to respond to the charge of retaliatory action and request for relief.

(4) Upon receipt of either the response of the local government or after the last day upon which the local government could respond, the local government employee may request a hearing to establish that a retaliatory action occurred and to obtain appropriate relief as defined in this section. The request for a hearing shall be delivered to the local government within fifteen days of delivery of the response from the local government, or within fifteen days of the last day on which the local government could respond.

(5) Within five working days of receipt of the request for hearing, the local government shall apply to the state office of administrative hearings for an adjudicative proceeding before an administrative law judge. Except as otherwise provided in this section, the proceedings shall comply with RCW 34.05.410 through 34.05.598.

(6) The employee, as the initiating party, must prove his or her claim by a preponderance of the evidence. The administrative law judge shall issue a final decision consisting of findings of fact, conclusions of law, and judgment no later than forty-five days after the date the request for hearing was delivered to the local government. The administrative law judge may grant specific extensions of time beyond this period of time for rendering a decision at the request of either party upon a showing of good cause, or upon his or her own motion.

(7) Relief that may be granted by the administrative law judge consists of reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action and to prevent any recurrence of retaliatory action. The administrative law judge may award costs and reasonable attorneys' fees to the prevailing party.

(8) If a determination is made that retaliatory action has been taken against the employee, the administrative law judge may, in addition to any other remedy, impose a civil penalty personally upon the retaliator of up to three thousand dollars payable by each person found to have retaliated against the employee and recommend to the local government that any person found to have retaliated against the employee be suspended with or without pay or dismissed. All penalties recovered shall be paid to the local government administrative hearings account created in RCW 42.41.060.

(9) The final decision of the administrative law judge is subject to judicial review under the arbitrary and capricious standard. Relief ordered by the administrative law judge may be enforced by petition to superior court.

[1992 c 44 § 4.]

42.41.045**Prohibition on intimidation of whistleblower — Nondisclosure of protected information.**

(1) A local government official or employee may not use his or her official authority or influence, directly or indirectly, to threaten, intimidate, or coerce an employee for the purpose of interfering with that employee's right to disclose information concerning an improper governmental action in accordance with the provisions of this chapter.

(2) Nothing in this section authorizes an individual to disclose information prohibited by law.

[1994 c 210 § 2.]

42.41.050**Exemptions.**

Any local government that has adopted or adopts a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting shall be exempt from this chapter if the program meets the intent of this chapter.

[1992 c 44 § 6.]

42.41.060**Local government administrative hearings account.**

The local government administrative hearings account is created in the custody of the state treasurer. All receipts from penalties in RCW 42.41.040 and the surcharges under RCW 43.09.2801 shall be deposited into the account. Expenditures from the account may be used only for administrative hearings under this chapter. Only the chief administrative law judge or his or her designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but no appropriation is required for expenditures.

[1992 c 44 § 7.]

42.41.900**Construction.**

This chapter shall not be construed to permit disclosures that would diminish the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

[1992 c 44 § 5.]

42.41.901

Effective dates — 1992 c 44.

Sections 1 through 10 of this act shall take effect January 1, 1993. Section 11 of this act shall take effect July 1, 1992.

[1992 c 44 § 13.]

42.41.902

Severability — 1992 c 44.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1992 c 44 § 14.]

ORDINANCE 117039

AN ORDINANCE relating to "whistleblower" reporting and protection; amending the City's whistleblower protection program in response to the enactment of Chapter 42.41 RCW; amending Sections 4.20.800, 4.20.810, 4.20.820, 4.20.830, 4.20.840, and 4.20.850 of the Seattle Municipal Code, and adding a new Section 4.20.860 in connection therewith.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Subchapter III of Chapter 4.20 of the Seattle Municipal Code (Sections 4.20.800 through 4.20.850) is amended as follows:

4.20.800 Policy -- Purpose.

Unless prohibited by State law, City employees are encouraged to report on improper governmental action to the appropriate City or other government official, depending on the nature of the improper governmental action. (~~the Executive Director of the Seattle Ethics and Elections Commission, the Mayor, the City Council and/or State Auditor, police misconduct to the Police Department's Internal Investigation Section, and violations of the Code of Judicial Conduct by Municipal Court judges to the Washington State Judicial Conduct Commission.~~) To assist such reporting and to implement Sections 42.41.030 and 42.41.040 of the Revised Code of Washington ("RCW"), Sections 4.20.800 through (~~4.20.830~~) 4.20.860 provide City employees a process for reporting improper governmental action and protection from ((interference and)) retaliatory action for reporting and cooperating in the investigation and/or prosecution of improper governmental action ((and/or disclosing such action to news media)) in good faith in accordance with this subchapter.

4.20.810 Reporting improper governmental action -- Employee protection.

A. Right. Every City (~~officer or~~) employee shall have the right to report, in good faith and in accordance with this subchapter, to (~~an auditing~~) a City official, another govern-

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 ment official or a member of the public, information concerning
2 an improper governmental action.

3 B. Limitations.

4 1. This section does not authorize a City (~~officer~~
5 ~~or~~) employee to report information that is subject (~~to~~) to an
6 applicable privilege against disclosure at law (e.g., RCW
7 5.60.060 privileged communications), unless waived, or to make
8 disclosure where prohibited at law. The only purpose of this
9 subchapter is to protect and encourage employees who know or in
10 good faith believe improper governmental action has occurred to
11 report those actions in good faith and in accordance with this
12 subchapter.

13 2. Except in cases of emergency where the employee
14 believes in good faith that substantial damage to persons or
15 property will result unless a report is made immediately to a
16 person or entity who is not the appropriate auditing official
17 listed in subsection 4.20.850A, an employee shall, before making
18 a report to a person who is not the appropriate auditing offi-
19 cial, first make a written report of the improper governmental
20 action to the appropriate auditing official. No emergency under
21 this subsection exists where prompt attention and reporting
22 under this subchapter by the employee could have avoided the
23 perceived need to report immediately to a person not the appro-
24 priate auditing official.

25 An employee making a written report as required by this
26 subsection is encouraged to wait at least thirty (30) days from
27 receipt of the written report by the appropriate auditing offi-
28 cial before reporting the improper governmental action to a
29 person who is not an appropriate auditing official.

30 3. An employee's reporting of his or her own improper
31 action does not grant an employee immunity from discipline or
32 termination under Section 4.04.230 or 4.08.100 insofar as his or

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 her improper action would be cause for discipline.

2 C. ~~((Interference Prohibited))~~ Employee Protections and
3 Protected Conduct

4 1. ~~((No City employee shall be subject to discipline~~
5 ~~or discrimination or retaliation with respect to his or her~~
6 ~~compensation, terms, conditions, or privileges of employment~~
7 ~~because he or she (or another acting pursuant to his or her~~
8 ~~request)+))~~ The following conduct by employees is protected if
9 carried out in good faith under this subchapter:

10 a. Reporting sexual harassment to the employee's
11 supervisor, EEO officer, department head, or other government
12 official as set out in the City's adopted procedure for report-
13 ing sexual harassment complaints; reporting violations of the
14 Fair Employment Practices ordinance to the Human Rights Depart-
15 ment; reporting police misconduct to the Police Department's
16 Internal Investigation Section; reporting violations of the Code
17 of Judicial Conduct by Municipal Court judges to the Washington
18 State Commission on Judicial Conduct; reporting violations of
19 criminal laws to the appropriate county prosecuting attorney;
20 and reporting violations of the Elections Code or the Ethics
21 Code, and any actions for which no other appropriate recipient
22 of a report is listed in this subsection, to the Executive
23 Director of the Seattle Ethics and Elections Commission;
24 ~~((Reports to the Executive Director of the Seattle Ethics and~~
25 ~~Elections Commission, the State Auditor, and/or, as to judicial~~
26 ~~conduct, the Washington State Judicial Conduct Commission, or as~~
27 ~~to police misconduct, the Police Department's Internal Investi-~~
28 ~~gations Section, as the case may be (called the "auditing~~
~~official"), another government official or a member of the~~
~~public, any "improper governmental action")+))~~

29 b. ~~((Cooperates))~~ Cooperating in an investigation
30 by an "auditing official" related to "improper governmental
31 action"; and/or

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

c. ~~((Testifies))~~ Testifying in a proceeding or prosecution arising out of an "improper governmental action."

~~((2. No City officer or employee shall directly or indirectly use or attempt to use his or her official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to intimidate, threaten, coerce, command, or influence any individual for the purpose of interfering with an employee's (a) reporting of information of "improper governmental action" to an auditing official, another government official or a member of the public, (b) cooperating in an investigation, or (c) testifying in a proceeding arising therefrom.))~~

~~((D. Retaliation Prohibited.))~~ 2. No City officer or employee shall retaliate against any employee ~~((on account of an activity protected by this section))~~ because that employee proceeded or is proceeding in good faith in accordance with this subchapter.

~~((E.))~~ D. Penalty. Any City officer or employee who ~~((shall))~~ engages in ~~((interference or in))~~ prohibited retaliatory action~~((7))~~ is subject to discipline by suspension without pay, demotion or discharge ~~((and,))~~ or, pursuant to Section 4.20.840, a civil fine up to Five Hundred Dollars (\$500.00), or both discipline and a fine.

F. Annual Restatement. Upon entering City service and at least once each year thereafter, every City officer and employee shall receive a written summary of this chapter, the procedures for reporting improper governmental actions to auditing officials, ~~((other government officials, or members of the public,))~~ the procedures for obtaining the protections extended, and the prohibition against ~~((interference or))~~ retaliation in this section. The Executive Director of the Ethics and Elections Commission shall ensure that such summaries are distributed and

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 that copies are posted where all employees will have reasonable
2 access to them.

3 **4.20.820 Confidentiality.**

4 To the extent allowed by law, the identity of an employee
5 reporting information about an improper governmental action
6 shall be kept confidential unless ~~((a))~~ the employee in
7 writing waives confidentiality. ~~((or (b) the disclosure of the~~
8 ~~informant's identity is necessary for the prosecution of an~~
9 ~~action arising out of the "improper governmental action.")~~

9 **4.20.830 Investigation.**

10 **A. Referral or Retention.** The Executive Director of the
11 Ethics and Elections Commission, upon receiving a report alleg-
12 ing improper governmental action, shall refer the complainant to
13 the appropriate auditing official listed in subsection 4.20.850A
14 if the Executive Director is not the appropriate auditing
15 official. If the Executive Director is the appropriate auditing
16 official, and the report alleges a violation of the Elections
17 Code or the Code of Ethics, the Executive Director shall handle
18 that allegation according to the ordinances and rules applicable
19 to the code alleged to have been violated. If the Executive
20 Director is the appropriate auditing official and the report
21 alleges improper governmental action that does not fall within
22 the prohibitions of the Ethics Code or the Elections Code, the
23 Executive Director may refer the report to the chief elected
24 official of the branch of government implicated in the allega-
25 tion, who shall ensure that the appropriate officer or agency
26 responds to the complainant in writing within thirty (30) days
27 of receipt of the report by the appropriate auditing official,
28 with a copy of the response to the Executive Director. If the
Executive Director does not refer the report to another
official, or if the other official's response is not timely or
satisfactory to the Executive Director, the Executive Director

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 may conduct an investigation. The procedures in subsections
2 4.20.830B through E shall apply only to the Executive Director
3 of the Ethics and Elections Commission when he or she is in-
4 vestigating an improper governmental action that does not fall
5 within the prohibitions of the Ethics Code or the Elections Code
6 and that should not have been referred to another auditing
7 official under the first sentence of this subsection; other
8 auditing officials investigating allegations of improper
9 governmental action appropriately referred to them are not bound
10 by these procedures.

11 B. Executive Director's Investigation. ((A. Authority
12 — Powers.)) At any stage in an investigation of an alleged
13 "improper governmental action" ((whether reported by an
14 employee or uncovered by office staff)), the Executive Director
15 of the Seattle Ethics and Elections Commission may issue
16 subpoenas, administer oaths, examine witnesses, compel the
17 production of documents or other evidence, enlist the assistance
18 of the City Attorney, the City Auditor, or the Chief of Police,
19 refer the matter to the State Auditor or law enforcement
20 authorities, and/or issue reports, each as deemed appropriate.

21 ((B. Preliminary Investigation.)) Within thirty (30) days
22 after receiving information about an "improper governmental
23 action" from a City ((officer or)) employee, the Executive
24 Director shall conduct a preliminary investigation, and ((upon))
25 provide the complainant with a written report of the general
26 status of the investigation which may include matters for
27 further research or inquiry.

28 C. Completion and Reports. Upon completion of the
29 ((preliminary)) investigation, the Executive Director shall
30 notify the ((informant)) complainant in writing of any deter-
31 minations made. ((and/or as to matters for further research or
32 inquiry, the general status of the investigation. C.

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 ~~Investigation Reports.~~) If the Executive Director determines
2 that an improper governmental action has occurred, the Executive
3 Director shall report the nature and details of the activity to
4 the ~~((informant))~~ complainant; to the head of the department
5 with responsibility for the action; and if a department head is
6 implicated, to the Mayor and City Council; and to such other
7 governmental officials or agencies as the Executive Director
8 deems appropriate. If satisfactory action to follow up the
9 report is not being taken within a reasonable time, the Execu-
10 tive Director shall report his or her determination to the Mayor
and advise the City Council.

11 D. Closure. The Executive Director may close an investi-
12 gation at any time he or she determines that no further action
13 is warranted and shall so notify the ~~((informant))~~ complainant.

14 E. ~~((Rules and Procedures. The Seattle Ethics and
15 Elections Commission may promulgate rules for implementing this
16 chapter. The rules shall be promulgated in accordance with the
17 Administrative Code, Seattle Municipal Code Chapter 3.02, and in
18 consultation with the City Council Finance Committee.))
19 Decisions of the Executive Director under this section are not
appealable to the Ethics and Elections Commission.~~

20 **4.20.840 Civil penalty.**

21 A violation of subsection~~((e))~~ C ~~((and D))~~ of Section
22 4.20.810 is a civil offense. A person who is guilty thereof may
23 be punished in the Seattle Municipal ~~((Code))~~ Court by a civil
24 fine or forfeiture not to exceed Five Hundred Dollars (\$500.00).

25 **4.20.850 Definitions.**

26 As used in Sections 4.20.800 through ~~((4.20.840))~~ 4.20.860,
the following terms shall have these meanings:

27 A. "Auditing official" means, each in connection with a
28 report of improper governmental action within his, her, or its
respective jurisdiction, the Executive Director of the Seattle

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 Ethics and Elections Commission(~~(, the Washington State~~
2 ~~Auditor,))~~; a person to whom sexual harassment was properly
3 reported according to City policy; the Human Rights Department;
4 ~~((or) the Washington State Commission on Judicial Conduct~~
5 ~~((Commission)); ((as to police misconduct,))~~ the Police Depart-
6 ment's Internal Investigations Section; the county prosecuting
7 attorneys of the State of Washington; and any authorized
8 assistant or representative of any of them in cases within their
9 respective appropriate jurisdictions.

10 B. "Employee" means anyone employed by the City, whether
11 in a permanent or temporary position, including full-time, part-
12 time, and intermittent workers. It also includes members of
13 appointed boards or commissions, whether or not paid(~~(, and for~~
14 ~~purposes of Sections 4.20.800 through 4.20.840 only, volunteers~~
15 ~~on assignment)).~~

16 C. 1. "Improper governmental action" means any action
17 ~~((or proposed action, which is related to an employee's per-~~
18 ~~formance of his or her duties or comes to his or her knowledge~~
19 ~~in that capacity))~~ by a City officer or employee that is under-
20 taken in the performance of the officer's or employee's official
21 duties, whether or not the action is within the scope of employ-
22 ment, and:

- 23 a. Violates any State or federal law or rule or
24 City ordinance, and, where applicable, King County ordinances,
25 or
- 26 b. Constitutes an abuse of authority, or
- 27 c. Creates a substantial or specific danger to
28 the public health or safety, or
- d. Results in a gross waste of public funds.

2. "Improper governmental action" excludes personnel
actions, including but not limited to: employee grievances,
complaints, appointments, promotions, transfers, assignments,

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 reassignments, reinstatements, restorations, re-employments,
2 performance evaluations, reductions in pay, dismissals,
3 suspensions, demotions, reprimands, violations of collective
4 bargaining or civil service laws, or alleged violations of
5 agreements with labor organizations under collective bargaining,
6 or any action that may be taken under chapter 41.08, 41.12,
7 41.14, 41.56, 41.59, or 53.18 RCW or RCW 54.04.170 and
8 54.04.180.

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

13 D. "Retaliate," and its kindred nouns, "retaliation" and
14 "retaliatory action," mean to ~~((take action (or action taken,~~
15 ~~respectively) directly or indirectly on account of, or with~~
16 ~~motivation from, the City employee's action protected under~~
17 ~~Section 4.20.810 . With an individual, it includes)) make,
18 because of an activity protected under section 4.20.810, any
19 unwarranted adverse change in an employee's employment status or
20 the terms and conditions of employment including, but ((is)) not
21 limited to, ((assignment of additional duties,)) denial of ade-
22 quate staff to perform duties; frequent staff changes; frequent
23 ((or)) and undesirable office change; refusal to assign
24 meaningful work; ((harassment, excessive supervision or other
25 discriminatory treatment of the employee; unwarranted and))
26 unsubstantiated letters of reprimand or unsatisfactory per-
27 formance evaluations; demotion, reduction in pay; denial of
28 promotion; transfer or reassignment; ((and)) suspension or
dismissal; or other unwarranted disciplinary action.~~

E. ~~((("Use of official authority or influence" means and~~
~~includes taking, directing others to take, recommending,~~
~~processing, or approving any personnel action such as an~~

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1 ~~appointment, promotion, transfer, assignment, reassignment,~~
2 ~~reinstatement, rectoration, re-employment, performance~~
3 ~~evaluation or any other disciplinary action.))~~ "Executive
4 Director" means the Executive Director of the Seattle Ethics and
5 Elections Commission.

6 Section 2. There is added to Subchapter III of Chapter
7 4.20 of the Seattle Municipal Code a new Section 4.20.860 as
8 follows:

9 **4.20.860 Reporting and Adjudicating Retaliation.**

10 A. Complaint. In order to seek relief, an employee who
11 believes he or she has been retaliated against in violation of
12 section 4.20.810C must file a signed written complaint within 30
13 days of the occurrence alleged to constitute retaliation. The
14 complaint shall be filed with the Office of the Mayor and must
15 specify the alleged retaliatory action and the relief requested.

16 B. Investigation and Response. The Mayor's office shall
17 forward the complaint to the head of the executive office or
18 department in which the retaliation is alleged to have occurred,
19 or, at the Mayor's option, to the President of the City Council
20 or the Presiding Judge of the Municipal Court if their respec-
21 tive branches are implicated in the complaint. The head of the
22 department, office, or branch to which the complaint was
23 referred shall ensure that the complainant is sent a response
24 within thirty (30) days after the filing of the complaint. If
25 the head of an executive office or department is alleged to have
26 retaliated in violation of section 4.20.810, the Mayor shall
27 ensure that the complainant is sent a response within thirty
28 (30) days after the filing of the complaint.

C. Hearing. If an employee who has filed a complaint of
retaliation under this section is dissatisfied with the response
and desires a hearing pursuant to section 42.41.040 RCW, the
employee shall deliver a request for hearing to the Office of

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE
IT IS DUE TO THE QUALITY OF THE DOCUMENT.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the Mayor within the time limitations specified in that section. Within five (5) working days of receipt of the request for hearing, the City shall apply to the state office of administrative hearings for a hearing to be conducted as provided in Section 42.41.040 RCW.

Section 3. The provisions of this ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance, or the invalidity of the application thereof to any person or circumstance shall not affect the validity of the remainder of this ordinance, or the validity of its application to other persons or circumstances.

Section 4. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the City Charter.

Passed by the City Council the 7th day of February, 1994, and signed by me in open session in authentication of its passage this 7th day of February, 1994.

[Signature]
President of the City Council

Approved by me this 9th day of February, 1994.

[Signature]
Norman B. Rice, Mayor

Filed this 9th day of February, 1994.

(SEAL)

By [Signature]
Deputy Clerk

Published _____

NOTICE: IF THE DOCUMENT IN THIS FRAME IS LESS CLEAR THAN THIS NOTICE IT IS DUE TO THE QUALITY OF THE DOCUMENT.

Ordinance No. 124362

Council Bill No. 117892

AN ORDINANCE relating to the Whistleblower Protection Code; amending the following sections of the Seattle Municipal Code (SMC): 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 allegations of retaliation are reported, investigated and resolved, Section 4.16.070.F adding retaliation to prohibited behavior under the Ethics Code, Section 3.70.010 and subsection 3.70.100.A redefining the jurisdiction of the Ethics and Elections Commission to include administration of the Whistleblower Protection Code; adding the following new sections to the SMC: Section 4.20.805 containing definitions of terms used in the Whistleblower Protection Code, Section 4.20.870 creating a private cause of action for retaliation against whistleblowers, Section 4.20.875 providing the Ethics and Elections Director investigative tools including subpoena power; repealing the following sections of the SMC: whose content had been replaced by amending or creating other sections, Section 4.20.820 concerning confidentiality provisions, Section 4.20.840 concerning civil penalties, and Section 4.20.850 concerning definitions.

Related Legislation File:

Date Introduced and Referred: <u>9.3.13</u>	To: (committee): <u>Government Performance and Finance</u>
Date Re-referred:	To: (committee):
Date Re-referred:	To: (committee):
Date of Final Action: <u>12/9/13</u>	Date Presented to Mayor: <u>12/10/13</u>
Date Signed by Mayor: <u>12.16.13</u>	Date Returned to City Clerk: <u>12.17.13</u>
Published by Title Only <input checked="" type="checkbox"/>	Date Vetoed by Mayor:
Published in Full Text	
Date Veto Published:	Date Passed Over Veto:
Date Veto Sustained:	Date Returned Without Signature:

The City of Seattle – Legislative Department

Council Bill/Ordinance sponsored by: 103 [Signature]

Committee Action:

Date	Recommendation	Vote
<u>12/4/13</u>	<u>substitute v. 9a</u>	<u>3-0 TB, NL, SC</u>
<u>12/4/13</u>	<u>PASS AS AMENDED</u>	<u>3-0 TB, NL, SC</u>

This file is complete and ready for presentation to Full Council.

Full Council Action:

Date	Decision	Vote
<u>Dec. 9, 2013</u>	<u>Passed</u>	<u>9-0</u>

Law Department

Ordinance No. 124367



ORDINANCE 124302

AN ORDINANCE relating to the Whistleblower Protection Code; amending the following sections of the Seattle Municipal Code (SMC): 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 allegations of retaliation are reported, investigated and resolved, Section 4.16.070.F adding retaliation to prohibited behavior under the Ethics Code, Section 3.70.010 and subsection 3.70.100.A redefining the jurisdiction of the Ethics and Elections Commission to include administration of the Whistleblower Protection Code; adding the following new sections to the SMC: Section 4.20.805 containing definitions of terms used in the Whistleblower Protection Code, Section 4.20.870 creating a private cause of action for retaliation against whistleblowers, Section 4.20.875 providing the Ethics and Elections Director investigative tools including subpoena power; repealing the following sections of the SMC: whose content had been replaced by amending or creating other sections, Section 4.20.820 concerning confidentiality provisions, Section 4.20.840 concerning civil penalties, and Section 4.20.850 concerning definitions.

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

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

WHEREAS, City employees who step forward as whistleblowers to make good faith reports of perceived improper governmental actions serve the public interest; and

WHEREAS, it is the policy of the City not to disclose the identity of a Cooperating Employee who in good faith reports alleged improper government action, a policy which is intended to ensure that Cooperating Employees report potential improper governmental action without concern that providing such information would endanger their physical safety or property, their right to privacy, or result in any form of retaliation; and



1 WHEREAS, City employees who step forward as whistleblowers uphold the principle that
2 holding a public office or employment is a public trust; and

3 WHEREAS, the efficient and honest use of public funds is of paramount importance to
4 upholding the public trust; and

5 WHEREAS, ensuring that government comports with the rule of law strengthens a democratic
6 government; and

7 WHEREAS, ensuring that governmental actions advance and protect both the public's health and
8 safety is critical to our communities; and

9 WHEREAS, the dissemination of thorough, accurate, truthful and necessary information is the
10 basis upon which decision makers make informed decisions and judgments; and

11 WHEREAS, it is the intent of the City of Seattle to protect City employees from retaliation for
12 reporting improper governmental actions regardless of whether the information arguably
13 relates to a policy decision, whether properly or improperly implemented; and

14 WHEREAS it is the intent of the City of Seattle to fund a robust, independent and effective
15 whistleblower protection program; and

16 WHEREAS, an effective whistleblower protection program should include: an accessible
17 reporting system; prompt, efficient, and independent investigation and evaluation of
18 allegations that whistleblowers have been subject to retaliation; and effective remedies in
19 cases where such retaliation has occurred; NOW, THEREFORE,

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

21 **Section 1.** Section 4.20.800 of the Seattle Municipal Code, last amended by Ordinance
22 117039, is amended as follows:

23 4.20.800 Policy – ~~((P))~~purpose ~~((:))~~

24 ~~((Unless prohibited by state law, City employees are encouraged to report on improper
25 governmental action to the appropriate City or other government official, depending on the
26 nature of the improper governmental action. To assist such reporting and to implement Sections
27 42.41.030 and 42.41.040 of the Revised Code of Washington ("RCW"), Sections 4.20.800~~



1 through 4.20.860 provide City employees a process for reporting improper governmental action
2 and protection from retaliatory action for reporting and cooperating in the investigation and/or
3 prosecution of improper governmental action in good faith in accordance with this subchapter.))

4 It is the purpose of this ordinance to:

5 A. Encourage City employees to report in good faith assertions of improper
6 governmental action and to provide employees with a clear process for making reports;

7 B. Provide City employees protection from retaliatory action for making a good faith
8 report or being perceived as making a report, or cooperating or being perceived as cooperating in
9 any subsequent inquiry or investigation;

10 C. Provide for an independent investigation of reports to inform the operation of City
11 government and promote the public confidence;

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

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

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

17 G. Adopt a whistleblower program to comply with RCW 42.41, Local Government
18 Whistleblower Protection; and

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

21 **Section 2.** A new Section 4.20.805 of the Seattle Municipal Code is added to
22 Subchapter III of Chapter 4.20 as follows:
23



4.20.805 Definitions

As used in Sections 4.20.800 through 4.20.880, the following terms are defined as follows:

“Adverse change” 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.

“City agency” means any department, office, board, commission, or committee of the City, or any subdivision thereof, but excludes public corporations and ad hoc advisory committees.

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



1 obligation owed the City when the non-collection is done in a manner grossly deviating from the
2 standard of care or competence that a reasonable person would observe in the same situation.

3 "Improper governmental action"

4 A. Improper governmental action means any action by an employee that is
5 undertaken in the performance of the employee's official duties, whether or not the action is
6 within the scope of employment, that:

- 7 1. Violates any federal, state, county or City statute, ordinance or rule;
8 2. Creates a substantial or specific risk of serious injury, illness, peril, or loss,

9 that is a gross deviation from the standard of care or competence that a reasonable person would
10 observe in the same situation;

- 11 3. Results in a gross waste of public funds or resources; or

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

17 B. Improper governmental action excludes:

18 1. Personnel actions, including but not limited to: employee grievances,
19 complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements,
20 restorations, reemployments, performance evaluations, reductions in pay, dismissals,
21 suspensions, demotions, reprimands, violations of collective bargaining or civil service laws, or
22 alleged violations of agreements with labor organizations under collective bargaining, or any



1 action that may be taken under RCW Chapters 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 or
2 RCW 54.04.170 and 54.04.180.

3 2. A properly authorized City policy, reasonable expenditure or activity
4 merely because an employee dissents from the City policy or considers the expenditure unwise.

5 "Interested Parties" means the Cooperating Employee who alleges retaliatory action, the
6 relevant agency, the Executive Director, and the individual employee the Executive Director
7 alleges to have retaliated.
8

9 "Report" means:

10 A. Reporting any assertion of improper government action to the Executive
11 Director including reporting violations of the Ethics and Elections Codes;

12 B. Reporting any assertion of improper government action to an employee's
13 supervisor, manager, officer or appointing authority or director;

14 C. Reporting any assertion of sexual harassment to the employee's
15 supervisor, Equal Employment Officer, agency head, or other government official as set out in
16 the City's procedure for reporting sexual harassment complaints;
17

18 D. Reporting alleged violations of the Fair Employment Practices ordinance
19 or the Health Insurance Portability and Accountability Act (HIPAA) to the Office for Civil
20 Rights;
21

22 E. Reporting alleged misconduct by Seattle Police Department personnel to
23 the Seattle Police Office of Professional Accountability;

24 F. Reporting alleged violations of the Code of Judicial Conduct to the
25 Washington State Commission on Judicial Conduct;
26



1 ~~A. Right. Every City employee shall have the right to report, in good faith and in accordance~~
2 ~~with this subchapter, to a City official, another government official or a member of the public,~~
3 ~~information concerning an improper governmental action.~~

4 ~~B. Limitations.~~

5 ~~1. This section does not authorize a City employee to report information that is subject to an~~
6 ~~applicable privilege against disclosure at law (e.g., RCW 5.60.060 privileged communications),~~
7 ~~unless waived, or to make disclosure where prohibited at law. The only purpose of this~~
8 ~~subchapter is to protect and encourage employees who know or in good faith believe improper~~
9 ~~governmental action has occurred to report those actions in good faith and in accordance with~~
10 ~~this subchapter.~~

11 ~~2. Except in cases of emergency where the employee believes in good faith that substantial~~
12 ~~damage to persons or property will result unless a report is made immediately to a person or~~
13 ~~entity who is not the appropriate auditing official listed in Section 4.20.850 A, an employee~~
14 ~~shall, before making a report to a person who is not the appropriate auditing official, first make a~~
15 ~~written report of the improper governmental action to the appropriate auditing official. No~~
16 ~~emergency under this subsection exists where prompt attention and reporting under this~~
17 ~~subchapter by the employee could have avoided the perceived need to report immediately to a~~
18 ~~person not the appropriate auditing official.~~

19 ~~An employee making a written report as required by this subsection is encouraged to wait at least~~
20 ~~thirty (30) days from receipt of the written report by the appropriate auditing official before~~
21 ~~reporting the improper governmental action to a person who is not an appropriate auditing~~
22 ~~official.~~



1 ~~3. An employee's reporting of his or her own improper action does not grant an employee~~
2 ~~immunity from discipline or termination under Section 4.04.230 or 4.08.100 insofar as his or her~~
3 ~~improper action would be cause for discipline.~~

4 ~~C. Employee Protections and Protected Conduct.~~

5 ~~1. The following conduct by employees is protected if carried out in good faith under this~~
6 ~~subchapter:~~

7
8 ~~a. Reporting sexual harassment to the employee's supervisor, EEO officer, department head, or~~
9 ~~other government official as set out in the City's adopted procedure for reporting sexual~~
10 ~~harassment complaints; reporting violations of the Fair Employment Practices ordinance to the~~
11 ~~Office for Civil Rights; reporting police misconduct to the Police Department's Internal~~
12 ~~Investigation Section; reporting violations of the Code of Judicial Conduct by Municipal Court~~
13 ~~judges to the Washington State Commission on Judicial Conduct; reporting violations of~~
14 ~~eriminal laws to the appropriate county prosecuting attorney; and reporting violations of the~~
15 ~~Elections Code or the Ethics Code, and any actions for which no other appropriate recipient of a~~
16 ~~report is listed in this subsection, to the Executive Director of the Seattle Ethics and Elections~~
17 ~~Commission;~~

18
19 ~~b. Cooperating in an investigation by an "auditing official" related to "improper governmental~~
20 ~~action"; and/or~~

21 ~~c. Testifying in a proceeding or prosecution arising out of an "improper governmental action."~~

22 ~~2. No City officer or employee shall retaliate against any employee because that employee~~
23 ~~proceeded or is proceeding in good faith in accordance with this subchapter.~~



1 ~~D. Penalty. Any City officer or employee who engages in prohibited retaliatory action is subject~~
2 ~~to discipline by suspension without pay, demotion or discharge or, pursuant to Section 4.20.840,~~
3 ~~a civil fine up to Five Hundred Dollars (\$500.00), or both discipline and a fine.~~

4 ~~E. Annual Restatement. Upon entering City service and at least once each year thereafter, every~~
5 ~~City officer and employee shall receive a written summary of this chapter, the procedures for~~
6 ~~reporting improper governmental actions to auditing officials, the procedures for obtaining the~~
7 ~~protections extended, and the prohibition against retaliation in this section. The Executive~~
8 ~~Director of the Ethics and Elections Commission shall ensure that such summaries are~~
9 ~~distributed and that copies are posted where all employees will have reasonable access to them.))~~

11 4.20.810 Employee rights, responsibilities and limitations

12 A. Rights

13
14 1. Every employee shall have the right to report in good faith pursuant to this
15 subchapter an assertion of improper governmental action and shall be free from retaliation.

16 2. The identity of a cooperating employee shall be kept confidential and shall
17 not be disclosed unless such disclosure is required under applicable law or the employee in
18 writing waives confidentiality.

19 B. Responsibilities

20
21 1. An employee may not disclose information when disclosure is prohibited
22 under the law (e.g., RCW 5.60.060 privileged communications).

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



1 ~~receipt of the report by the appropriate auditing official, with a copy of the response to the~~
2 ~~Executive Director. If the Executive Director does not refer the report to another official, or if the~~
3 ~~other official's response is not timely or satisfactory to the Executive Director, the Executive~~
4 ~~Director may conduct an investigation. The procedures in subsections B through E of Section~~
5 ~~4.20.830 shall apply only to the Executive Director of the Ethics and Elections Commission~~
6 ~~when he or she is investigating an improper governmental action that does not fall within the~~
7 ~~prohibitions of the Ethics Code or the Elections Code and that should not have been referred to~~
8 ~~another auditing official under the first sentence of this subsection; other auditing officials~~
9 ~~investigating allegations of improper governmental action appropriately referred to them are not~~
10 ~~bound by these procedures.~~

11
12 ~~B. Executive Director's Investigation. At any stage in an investigation of an alleged "improper~~
13 ~~governmental action," the Executive Director of the Seattle Ethics and Elections Commission~~
14 ~~may issue subpoenas, administer oaths, examine witnesses, compel the production of documents~~
15 ~~or other evidence, enlist the assistance of the City Attorney, the City Auditor, or the Chief of~~
16 ~~Police, refer the matter to the State Auditor or law enforcement authorities, and/or issue reports,~~
17 ~~each as deemed appropriate.~~

18
19 ~~Within thirty (30) days after receiving information about an "improper governmental action"~~
20 ~~from a City employee, the Executive Director shall conduct a preliminary investigation, and~~
21 ~~provide the complainant with a written report of the general status of the investigation which~~
22 ~~may include matters for further research or inquiry.~~

23
24 ~~C. Completion and Reports. Upon completion of the investigation, the Executive Director shall~~
25 ~~notify the complainant in writing of any determinations made. If the Executive Director~~
26



1 ~~determines that an improper governmental action has occurred, the Executive Director shall~~
2 ~~report the nature and details of the activity to the complainant; to the head of the department with~~
3 ~~responsibility for the action; and if a department head is implicated, to the Mayor and City~~
4 ~~Council; and to such other governmental officials or agencies as the Executive Director deems~~
5 ~~appropriate. If satisfactory action to follow up the report is not being taken within a reasonable~~
6 ~~time, the Executive Director shall report his or her determination to the Mayor and advise the~~
7 ~~City Council.~~

9 D. ~~Closure. The Executive Director may close an investigation at any time he or she determines~~
10 ~~that no further action is warranted and shall so notify the complainant.~~

11 E. ~~Decisions of the Executive Director under this section are not appealable to the Ethics and~~
12 ~~Elections Commission.)~~

13 4.20.830 Reports to the Executive Director

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

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

21 B. Inquiry. Within 14 days after receiving an assertion of alleged improper
22 governmental action, the Executive Director shall conduct a confidential preliminary inquiry to
23 determine if the facts as asserted would constitute improper governmental action. The Executive
24 Director shall report the results of the inquiry to the Mayor and the City Council.



1 Director shall communicate the results to the reporting individual along with the actions, if any,
2 that will be taken. If, after a preliminary inquiry, the Executive Director determines that the facts
3 as asserted would constitute improper governmental action, the Executive Director shall make a
4 mandatory or discretionary referral, or may open an investigation.

5 C. Mandatory and discretionary referral

6 1. Mandatory referral. The Executive Director shall refer an employee
7 making the following allegations as follows:

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

12 b. Violations of the Fair Employment Practices ordinance to the
13 Office for Civil Rights;

14 c. Allegations regarding misconduct by Seattle Police Department
15 personnel to the Seattle Police Office of Professional Accountability; or

16 d. Allegations of violations of the Code of Judicial Conduct to the
17 Washington State Commission on Judicial Conduct.

18 2. Discretionary referral. The Executive Director may refer a report to the
19 chief elected official of the branch of government named in the allegation or to other
20 governmental agencies the Executive Director believes better suited to investigate the allegation.

21 a. When the Executive Director makes a discretionary referral
22 pursuant to this chapter, the cooperating employee shall be notified before the referral is made.



1 b. Within 60 days of a discretionary referral being made by the
2 Executive Director, the City official or agency head receiving the referral shall personally or
3 through their designated representative, respond to the Executive Director with the agency's plan
4 to investigate and/or resolve the concern. If the Executive Director does not receive an agency's
5 plan or, if within a reasonable time the agency does not complete the plan, the Executive
6 Director may alert the Mayor and the City Council.

7
8 D. Investigation

9 1. The Executive Director shall investigate alleged violations of the
10 Elections Code according to Section 2.04.070 and the Ethics and Election Commission's
11 Administrative Rules; alleged violations of the Ethics Code according to Section 4.16.090 and
12 the Ethics and Election Commission's Administrative Rules; and, alleged violations of the
13 Lobbying Code according to Chapter 2.06 and the Ethics and Election Commission's
14 Administrative Rules.

15
16 2. Investigations of improper governmental action that do not assert
17 violations of the Ethics, Election or Lobbying Code shall be completed within a period of six
18 months. If an investigation cannot be completed within that time the Executive Director must
19 inform the employee who reported the concern as to the reason why and estimate the completion
20 date of the investigation.

21
22 3. Completion and Reports. Upon completion of the investigation, the
23 Executive Director shall issue a report summarizing the facts and determining whether there is
24 reasonable cause to believe that improper governmental action occurred.



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

6 E. Response by the City agency. The head of the agency in which the conduct took
7 place, or their designated representative, shall report to the Executive Director within 60 days
8 what action was taken to address the conduct. The Executive Director shall report the resolution
9 to the reporting employee. If the Executive Director determines that satisfactory action to follow
10 up the report is not being taken, the Executive Director shall report his or her determination to
11 the Mayor and the City Council.

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

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

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

19 ((4.20.840—Civil Penalty

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



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

3 ~~((4.20.850 Definitions~~

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

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

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

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

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

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

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



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

1
2 2. ~~"Improper governmental action" excludes personnel actions, including but not~~
3 ~~limited to: employee grievances, complaints, appointments, promotions, transfers, assignments,~~
4 ~~reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions~~
5 ~~in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or~~
6 ~~civil service laws, or alleged violations of agreements with labor organizations under collective~~
7 ~~bargaining, or any action that may be taken under Chapter 41.08, 41.12, 41.14, 41.56, 41.59, or~~
8 ~~53.18 RCW or RCW 54.04.170 and 54.04.180.~~

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

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

22
23 E. ~~"Executive Director" means the Executive Director of the Seattle Ethics and Elections~~
24 ~~Commission.)~~



1 complaint within the 180-day filing period. The time in which the Executive Director is
2 considering the sufficiency of the complaint is not included in the 180 day time frame.

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

5 a. the employee is a cooperating employee;

6 b. the employee was subjected to an adverse change or changes that
7 occurred within the prescribed time period; and

8 c. the employee's protected conduct reasonably appears to have been
9 a contributing factor.

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

13 C. Investigation of sufficient complaints

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

16 2. If the matter is not before another forum or if the Executive Director
17 decides to pursue a matter even though it is before another forum, the Executive Director shall
18 investigate sufficient complaints and endeavor to complete the investigation in 90 days. If the
19 investigation is not completed within 90 days, the Executive Director shall inform the interested
20 parties of the date the investigation is expected to be completed.

21 3. All investigations shall be conducted in an objective and impartial manner.



1 4. The Executive Director shall at the conclusion of the investigation
2 determine whether there is reasonable cause to believe that retaliation occurred.

3 D. No reasonable cause found

4 If the Executive Director finds no reasonable cause to believe that retaliation occurred,
5 the Executive Director shall dismiss the complaint and inform the employee.

6 E. Reasonable cause found

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

12 2. The Executive Director may submit a draft including findings and
13 recommendations to the interested parties for review and comment before issuing the final
14 investigative report and determination.

15 F. Settlement

16 Within 30 days of the Executive Director's final report finding reasonable cause, and
17 before the filing of a complaint with the Hearing Examiner pursuant to subsection 4.20.865.B,
18 the Director shall determine whether it is feasible to conduct a joint settlement conference with
19 the interested parties to attempt to agree on an appropriate remedy.

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



1 2. If after filing a complaint with the Executive Director, the complainant
2 files an action in another forum based upon the same conduct, the complainant shall inform the
3 Executive Director within 15 days.

4 3. After discovering or being informed of an action in another forum based
5 upon the same conduct the Executive Director may choose to continue with the proceedings or
6 suspend proceedings until either the other action is completed or the Executive Director
7 determines that another course of action is appropriate.
8

9 B. Filing a complaint with the Hearing Examiner

10 1. The Executive Director may file a complaint alleging retaliation with the
11 Hearing Examiner. The complaint shall:

- 12 a. name the interested parties;
13 b. provide a concise statement of the conduct constituting retaliation;
14 c. contain a request for relief.
15 and

16 c. contain a request for relief.
17 2. All cases are governed by the Hearing Examiner Rules of Practice and
18 Procedure. The Hearing Examiner may promulgate such additional administrative rules as
19 needed.
20

21 3. If the Cooperating Employee is a party to the enforcement action, the
22 employee may choose to be represented by a person of their own choosing.

23 C. Proof
24
25
26
27
28



1 c. The Hearing Examiner may award reasonable attorney fees. Any
2 award for attorneys' fees shall not exceed \$20,000.00.

3 d. The agency shall comply with the provisions of any order granting
4 relief and shall furnish proof of compliance to the Executive Director. In the event that the
5 agency refuses or fails to comply with the order, or does not seek timely judicial review, the
6 Executive Director shall notify the Mayor, the Council and the City Attorney. The Director may
7 request that the City Attorney seek enforcement of the order in an appropriate court.
8

9 2. If the Hearing Examiner finds that one or more employees retaliated
10 against a cooperating employee in violation of subsection 4.16.070.F and this subchapter:

11 a. The Hearing Examiner shall deliver the findings of fact and
12 conclusions of law to the Commission, and may include a recommendation to the Commission as
13 to an appropriate sanction under Section 4.16.100. Only the Commission has the authority to
14 impose a penalty against an individual employee.
15

16 b. The Hearing Examiner may recommend to the agency that
17 disciplinary action be commenced against an individual employee or employees found to have
18 retaliated.
19

20 3. Commission action. The Commission shall accept the Hearing
21 Examiner's Findings of Fact as dispositive. The Commission may impose sanctions as provided
22 by Section 4.16.100 on the employee found to have violated subsection 4.16.070.F.

23 4. The final order of the Hearing Examiner or the Commission shall include
24 a notice to the parties of the right to obtain judicial review of the order in accordance with
25 applicable law.
26



1 including reasonable attorneys' fees, without limitation; emotional distress damages not to
2 exceed \$20,000; and any other appropriate remedy authorized by this chapter, without limitation.
3 To prove retaliation in a civil-court action, the cooperating employee has the burden to prove by
4 a preponderance of the evidence that the employee's status as a cooperating employee was a
5 substantial factor in the decision making process that resulted in an adverse action against the
6 cooperating employee.

7
8 C. If the employee files a civil action, the Executive Director shall dismiss any
9 administrative action for relief for that employee in which the charged party is an agency, but
10 may still pursue administrative action against any employee alleged to have violated subsection
11 4.16.070.F.

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

14
15 4.20.875 Investigative powers

16 At any stage in an inquiry or investigation of an alleged improper governmental action, or
17 the investigation regarding an assertion of retaliation for engaging in conduct protected in this
18 subchapter, the Executive Director may issue subpoenas, administer oaths, examine witnesses,
19 submit written questions to be answered under oath and, compel the production of documents or
20 other evidence. If the subpoenaed party or agency does not respond to the request in a timely
21 manner, the Executive Director may ask for the assistance of the City Attorney to pursue
22 enforcement through order in superior court.
23

24 **Section 12.** A new Section 4.20.880 of the Seattle Municipal Code is added to
25 Subchapter III of Chapter 4.20 as follows:
26



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;

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;

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

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

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

4.16.070 Prohibited conduct((;-))

A ((€))covered ((f))individual may not:

((+)) A. Disqualification from ((A))acting on City ((B))business((-))

((a)) 1. Participate in a matter in which any of the following has a financial interest, except as permitted by Section 4.16.071

((+)) a. the ((€))covered ((f))individual;



1 ((F))individual's appointing authority, and the appointing authority or the authority's designee
2 either approves or does not within one week of the disclosure disqualify the ((E))covered
3 ((F))individual from acting. For an elected official to receive the same protection, the official
4 must file a disclosure with the Executive Director and the City Clerk. If a ((E))covered
5 ((F))individual is charged with a violation of this subsection, and asserts as an affirmative defense
6 that a disclosure was made, the burden of proof is on the ((E))covered ((F))individual to show
7 that a proper disclosure was made and that the ((E))covered ((F))individual was not notified that
8 he or she was disqualified from acting.

9 ((d.)) 4. Subsections ((Sections)) ((4.06.070.1.a)) 4.16.070.A.1 and ((1.b))
10 4.16.070.A.2 ((shall)) do not apply if the prohibited financial interest is shared with a substantial
11 segment of the City's population.

12 ((z.)) B. Improper ((U))use of ((O))official ((P))position((-))

13 ((a)) 1. Use or attempt to use his or her official position for a purpose that
14 is, or would to a reasonable person appear to be, primarily for the private benefit of the
15 ((E))covered ((F))individual or any other person, rather than primarily for the benefit of the City,
16 except as permitted by Section 4.16.071;

17 ((b.)) 2. Use or attempt to use, or permit the use of any City funds,
18 property, or personnel, for a purpose which is, or to a reasonable person would appear to be, for
19 other than a City purpose, except as permitted by Section 4.16.071; provided, that nothing shall
20 prevent the private use of City property which is available on equal terms to the public generally
21 (such as the use of library books or tennis courts), the use of City property in accordance with
22 municipal policy for the conduct of official City business (such as the use of a City automobile),
23 if in fact the property is used appropriately; or the use of City property for participation of the
24 City or its officials in activities of associations that include other governments or governmental
25 officials;



1 or obtain special consideration or influence as to any action by the ((C))covered ((F))individual in
2 his or her official capacity; provided, that nothing shall prohibit campaign contributions which
3 are solicited or received and reported in accordance with applicable law.

4 ((4.)) D. Disclosure of confidential information((:))

5 ((a.)) 1. Disclose or use any confidential information gained by reason of
6 his or her official position for other than a City purpose.

7 ((5.)) E. Interest in City ((C))contracts((:)).

8 ((a.)) 1. Hold or acquire a financial or beneficial interest, direct or indirect,
9 personally or through a member of his or her immediate family, in any contract which, in whole
10 or in part, is made by, through, or under the supervision of the ((C))covered ((F))individual, or
11 which is made by or through a person supervised, directly or indirectly, by the ((C))covered
12 ((F))individual, except as permitted by Section 4.16.071; or accept, directly or indirectly, any
13 compensation, gratuity, or reward in connection with such contract from any other person or
14 entity beneficially interested ((therein)) in the contract. This subsection ((shall)) does not apply
15 to the furnishing of electrical, water, other utility services or other services by the City at the
16 same rates and on the same terms as are available to the public generally.

17 ((b.)) 2. Unless prohibited by subsection ((a)) 1, have a financial interest,
18 direct or indirect, personally or through a member of his or her immediate family, in any contract
19 to which the City or any City agency may be a party, and fail to disclose such interest to the City
20 contracting authority ((prior to)) before the formation of the contract or the time the City or City
21 agency enters into the contract; provided, that this subsection ((b))2 ((shall)) does not apply to
22 any contract awarded through the public bid process in accordance with applicable law.

23 F. Retaliate against a City Employee as prohibited under Section 4.20.810 of the
24 Whistleblower Protection Code; or directly or indirectly threaten or intimidate a City employee
25 for the purposes of interfering with that employee's right to communicate with the Commission.
26



1 its employees, or its agents; or directly or indirectly threaten or intimidate an employee for the
2 purposes of interfering with or influencing an employee's cooperation in an inquiry or
3 investigation, or interfering or influencing testimony in any investigation or proceeding arising
4 from a report; or knowingly take or direct others to take any action for the purpose of:

- 5 1. influencing an employee's cooperation in an inquiry or investigation based
6 on a report of improper governmental action; or
7
8 2. interfering or influencing testimony in any investigation or proceeding
9 arising from a report.

10 ((6)) G. Application to Certain Members of Advisory Committees((-))

11 1. ((SMC)) Subsections ((4.16.070.1.a)) 4.16.070.A.1 and ((4.16.070.1.b))
12 4.16.070.A.2 ((shall)) apply to employee members of advisory committees. ((SMC-s))
13 Subsections ((4.16.070.1.a)) 4.16.070.A.1 and ((4.16.070.1.b shall)) 4.16.070.A.2 do not apply to
14 other members of advisory committees. This subsection ((6)) G ((shall)) instead ((apply)) applies
15 to all other members of advisory committees. No member of an advisory committee to whom
16 this subsection applies shall:
17

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

22 b. Engage or have engaged in any transaction or activity which would
23 to a reasonable person appear to be in conflict with or incompatible with the proper discharge of
24 official duties, or which would to a reasonable person appear to impair the member's
25



1 independence of judgment or action in the performance of official duties, without fully
2 disclosing on the public record of the advisory committee the circumstances of the transaction or
3 activity giving rise to such an appearance (~~((prior to))~~) before engaging in the performance of such
4 official duties. Such a member shall also file with the Commission a full written disclosure of the
5 circumstances giving rise to such an appearance (~~((prior to))~~) before engaging in such official
6 duties. If such prior written filing is impractical, the member shall file such a disclosure as soon
7 as practical.
8

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

11 3.70.010 Commission established – ~~((P))~~purpose(~~(:)~~)

12 ~~((There is hereby established a))~~ The Seattle Ethics and Elections Commission is
13 established to administer the City's Code of Ethics (Chapter 4.16); to administer the Election
14 Campaign Code and its campaign matching fund program (Chapter 2.04); to publish the City's
15 election pamphlets (Chapter 2.14(~~(:)~~)) and to administer the ~~((political sign ordinance (Chapter~~
16 ~~2.24) and to investigate certain complaints of improper governmental action under the~~
17 ~~whistleblower protection ordinance))~~ Whistleblower Protection Code ~~((SMC))~~ Sections 4.20.800
18 through ~~((4.20.860))~~ 4.20.880.
19
20

21 **Section 15.** Subsection 3.70.100.A of the Seattle Municipal Code, which section was last
22 amended by Ordinance 123361, is amended as follows:

23 3.70.100 Powers and duties(~~(:)~~)

24 The Commission shall have the following powers:
25
26

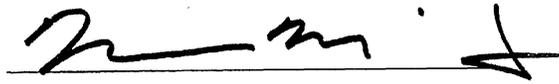


1 Passed by the City Council the 9th day of December, 2013, and signed by
2 me in open session in authentication of its passage this

3 9th Day of December; 2013.

4
5 
6 President _____ of the City Council

7
8 Approved by me this 16th day of December, 2013.

9
10 
11 Michael McGinn, Mayor

12
13 Filed by me this 17th day of December, 2013.

14
15 
16 Monica Martinez Simmons, City Clerk

17 (Seal)



The Sheridan Law Firm, P.S.

Attorneys at Law

Hoge Building, Suite 1200

705 Second Avenue

Seattle, WA 98104

John P. Sheridan
cell: 206-931-7430
jack@sheridanlawfirm.com

Office: 206-381-5949
Fax: 206-447-9206
www.sheridanlawfirm.com

November 9, 2012

VIA MESSENGER

Mayor Mike McGinn
Seattle City Hall, 7th Floor
600 Fourth Avenue
P.O. Box 94749
Seattle, WA 98124-4749

Re: Complaint of Retaliation pursuant to SMC 4.20.860 RCW 42.41.040

Dear Mayor McGinn:

Please find enclosed the Complaint of Retaliation pursuant to SMC 4.20.860 and RCW 42.41.040 of Seattle City Light Apprentice Aaron Swanson. Mr. Swanson alleges he has been retaliated against for reporting improper governmental action in violation of SMC 4.20.810(C).

Please direct all future correspondence related to this complaint to my office. I look forward to hearing from you.

Sincerely,



John P. Sheridan

Enclosures

COMPLAINT

DATE: November 8, 2012

FROM: Aaron Swanson

TO: Mayor Mike McGinn
Seattle City Hall, 7th Floor
600 Fourth Avenue
P.O. Box 94749
Seattle, WA 98124-4749

Re: Complaint of Retaliation pursuant to SMC 4.20.860

I am a third year lineworker apprentice at Seattle City Light. I am writing to you to make a formal complaint pursuant to Seattle Municipal Code ("SMC") 4.20.860 regarding whistleblower retaliation in violation of SMC 4.20.810(C).

On or about August 20, 2010, Seattle City Light ("SCL") employee Ron Allen, serving as the Second Period Trainer, solicited and received nine half-gallon bottles of alcohol during an apprenticeship exam. This oral exam was not part of the official curriculum of the training and testing approved by the Apprenticeship Office. Mr. Allen solicited the bottles from the nine apprentices, including myself, in exchange for a passing grade on the unofficial oral exam.

On or about August 24, 2011, I spoke with Kim Tran, then an SCL-Human Resources employee, about the treatment I had been receiving in the apprenticeship program. On Sunday, August 28, 2011, I sent Ms. Tran an email attaching a timeline I had drafted of my experiences. This timeline included a summary of Ron Allen's alcohol solicitation during the apprentice exam. The previous day, on Saturday, August 27, 2011, I sent an email to Todd Snider, an Apprenticeship Consultant with the State Department of Labor & Industries, requesting an investigation into Ron Allen's extortion as a trainer and his unethical and illegal conduct in this role.

My complaint related to Mr. Allen was investigated by Tommy Howard, SCL Employee Relations Coordinator, between September 2011 and December 2011. I also made a complaint to Kate Flack of the Seattle Ethics and Elections Committee ("SEEC") related to Mr. Allen's receipt of the alcohol.

Since making my complaint to the SEEC, I have been subjected to numerous retaliatory acts, including but not limited to:

- Unfair and inaccurate negative performance evaluations, which have threatened my ability to continue on as a lineworker apprentice because I have been sent to the Joint Apprentice Training Committee ("JATC") where my apprenticeship was subject to cancellation for alleged failure to meet performance standards;
- Repeated verbal harassment and intimidation by Ron Allen, which include threats of violence and verbal assaults;

- Harassment by other Crew Chiefs and journey workers who support Ron Allen;
- Improper and sometimes unsafe work assignments; and
- Retaliation by unknown SCL employees, including having a picture of me posted on the wall of the North Service Center in the Crew Chief desk room in July 2012 where someone had handwritten the word "Rat" on the picture (see enclosed photo), an incident on or around October 30, 2012 where someone moved a "pre-apprentice" sticker to my locker (see enclosed photo), and most recently, where someone claiming to be me posted a comment to a newspaper article about Ron Allen (see enclosed news article and comments)

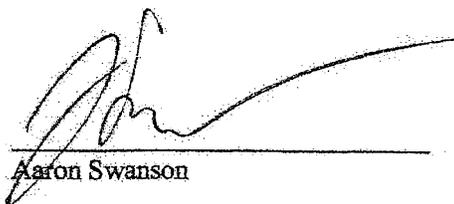
The most recent negative evaluation was given to me on October 11, 2012 (see enclosed). This negative evaluation is retaliation for making a whistleblower complaint to the SEEC and is in violation of SMC 4.20.810(C).

Relief Requested

I request the following relief:

- Protection from the hostile work environment which now exists owing to my reports of improper governmental action;
- SCL must ensure that my ongoing daily training is effective and professional, and that bias individuals are not permitted to evaluate or supervise me;
- Expungement of the biased and retaliatory performance evaluations;
- The formulation of a procedure to ensure that my upcoming evaluations are conducted in a fair and unbiased manner;
- In June 2013, I am scheduled to take the test to become a Journeyman. I request that this test be administered in an unbiased and non-retaliatory way.
- Attorney fees and costs;
- Action to hold accountable those who engage in retaliation against me;
- The imposition of workforce training on the rights of whistleblowers and of the consequences of whistleblower retaliation;
- Emotional harm damages;
- Whatever other relief is deemed to be just.

Dated this 9th Day of November, 2012, in Seattle, WA.



Aaron Swanson

The Seattle Times

Local News

Originally published Monday, November 5, 2012 at 8:31 PM

Ethics fines may follow gifts of liquor to City Light trainer

A Seattle City Light employee may face penalties under city ethics rules for accepting bottles of liquor from apprentices in a lineworker training program for which he administered the test to advance.

By Lynn Thompson

Seattle Times staff reporter

A Seattle City Light employee may face penalties under city ethics rules for accepting bottles of liquor from apprentices in a lineworker training program for which he administered the test to advance.

Ronald Allen, an instructor for the apprentice program since 2005, received nine bottles of whiskey or other liquor from trainees who were about to retake an oral exam that he said some had failed during a previous attempt.

Wayne Barnett, director of the Seattle Ethics and Elections Commission, said Allen's actions violate city ethics rules that prohibit the acceptance of gifts which, to a reasonable person, would appear to have been given with the intent to receive special consideration from a city employee.

Barnett said he felt strongly that Allen's actions were a clear violation of city ethics rules.

"We think that accepting liquor from people to whom you're about to administer a test is clearly inappropriate," Barnett said.

Barnett will present the charges under the ethics code to the commission Wednesday. The commission will decide whether to hear the matter and whether to levy a fine. It can impose fines up to \$5,000 per violation.

Allen, 41, received a 20-day suspension from City Light for his actions, Barnett said.

As a lineworker, Allen earned \$129,095 in 2011 including almost \$33,000 in overtime pay, according to city records. He was hired as a lineworker apprentice in 2002.

Barnett said Allen's union, Local 77 of the International Brotherhood of Electrical Workers, intends to contest the allegations of ethics violations because the union's contract with the city does not specify that members are subject to fines under the ethics rules.

Another city employees union won an unfair-labor-practices judgment against the city over an ethics violation in 1995. A hearings examiner for the state Public Employees Relations Commission ruled that employees were not subject to discipline except as specified in their contract and that being subject to an ethics fine in addition to city discipline could amount to double jeopardy.

Since then, Barnett said, many city contracts have been rewritten to specify that employees can be fined by the Ethics Commission. Local 77's contract doesn't include that language.

Neither Allen nor the union returned a call Monday requesting comment.

The charging document prepared for the commission says Allen was a trainer for a six-month lineworker apprenticeship program that began in February 2010. On the first day of testing, in August, Allen told the apprentices that they were taking an oral test on safety regulations under Washington law.

The charging document says that Allen called each apprentice individually into a classroom and asked them questions regarding the state rules.

When all the apprentices had finished the test, Allen told them that some had done poorly and failed, but that they would have another chance to retake the test several days later.

The charging document notes that there is no record of the testing, what was asked or the apprentices' responses.

When Allen announced the group's failure, the investigation says, an unnamed apprentice yelled, "Would a bottle help?"

On the day the apprentices were to be retested, all nine gave him bottles of liquor.

Allen acknowledged to the ethics investigator that he received nine bottles. He re-administered the test to each apprentice and all passed, according to the charging document. It notes that "Allen as the sole tester had the authority to pass or fail each apprentice."

The Ethics Commission could hear the matter in December, Barnett said.

In other action, a former Seattle Public Utilities customer-service representative, Enjolia McClure, agreed to pay a \$500 fine for adjusting her boyfriend's garbage and water bills. She resigned in September.

McClure is the ninth SPU employee to be fired or disciplined for making unauthorized adjustments to their own or relatives' city utility accounts. Utility spokesman Andy Ryan said the total loss is less than \$2,000.

Lynn Thompson: 206-464-8305 or lthompson@seattletimes.com. On Twitter @lthompsontimes.

ADVERTISING



Mold your future with a TIAA-CREF annuity account.



Log on today to get started

Mobile site | Mobile apps | Newsletters | RSS | Subscriber services  Your account | Log in | Contact/Help 

Wednesday, November 7, 2012 |  TRAFFIC |  45°F

Follow us:  

The Seattle Times
Winner of a 2012 Pulitzer Prize

Local News

 Search

Advanced Search | Events & Venues | Obituaries

Home | News | Business & Tech | Sports | Entertainment | Living | Homes | Travel |  Jobs |  Autos |  Real Estate

Opinion |  Classifieds

Comments: Ethics fines may follow gifts of liquor to City Light trainer

A Seattle City Light employee may face penalties under city ethics rules for accepting bottles of liquor from apprentices in a lineworker training program for which he administered the test to advance. [Read article](#)

You must be logged in to leave a comment. [Log in](#) / [Register](#)

Comments

Sort by: [Newest](#) | [Oldest](#) | [Highest rated](#)

Showing posts 1-20 of 45

[1](#) [2](#) [3](#) [NEXT >](#)

farwest
Rockport, WA
176 comments

November 7, 2012 at 3:30 AM Rating:  (1)  (0) [Log in to report abuse](#)

That's kind of what I was trying to say, when I mentioned that Felix knew what he was talking about. There were only 9 in the class, the article doesnt say it but people know. Likewise for the time line. Also for what happened. And while this article trashes Ron Allen, by name, people who know him and gork with him consider him a good guy who went above and beyond to help trainees. One trainee, who said nothing at the time according to other accounts, had an agenda and made this whole thing an issue. Where is the reporter skepticism concerning his statements? Note that I do not even mention where is City Light's skepticism and fair and impartial investigation. I already know better, HR investigations at City Light are a total joke and I know that for a fact. SCL management is all about the hype and you can believe it if you want but I know better. I'm watching them target one of our 40 year employees right now, a guy who has kept your lights on thru rain and snow his whole life. He is another target of a supervisor vendetta and Carrasco does nothing but rubberstamp his supervisor paperwork that gets sent to his office, Employees have no way to get the facts established without a lawyer and/or going to an outside arbitrator. I'm sorry this reporter fell for their PR but believe me, no one who knows the actual facts is falling for it.

Aswanson
Seattle
7 comments

November 7, 2012 at 2:56 AM Rating:  (0)  (0) [Log in to report abuse](#)

Hi my name is Arron Swanson I was the one that brought all this up to save my job. I have not been doing well here at the city and this is my way of proving a point and saving my job that I might not have for much longer. I am saddened for what I have done to my union brother but it is already done. Sincerely Arron Swanson Seattle city light scc

miz.calgary

November 6, 2012 at 6:38 PM Rating:  (1)  (0) [Log in to report](#)

SECTION SPONSOR

The Everett Clinic
For the whole you

ADVERTISING



Mold your future with a TIAA-CREF annuity account.

Financial Services

Marketplace

[pet classifieds](#)

seattle
1 comments

abuse

IF Mr. Allen truly makes \$120K+,one would think he could afford his own booze. There are two sides to every story, and the Seattle Times clearly did not perform due diligence in getting Allen's statement. Shame on you SeaTimes -- this kind of shoddy reporting, not to mention digging up a story 2 years old, is exactly why we no longer subscribe.

fallstaff
Lake Forest Park, WA
4084 comments

November 6, 2012 at 6:36 PM Rating: (1) (0) Log in to report abuse

farwest one of the last bureaucratic governmental agencies I would complement would be Seattle City Light, however, having said that, Felix outlines the issue under discussion as taking place in a completely different time sequence as in the article. Single most of all would be when were the bottles of booze given to Allen, i.e., before the test, or after the test? And when after the test if that is the case? Even if afterwards, did they have the booze in their hip pockets at the time of the test. All we know from the article is that nine applicants failed the test. We know nothing about how many took the test. We are told that after a very short period of time the nine re-took the test. We know nothing about the test given. All nine then passed the test. If this was a typical group of job seekers taking a test where nine of them failed, it is highly unlikely that all nine of them were able to pass the test three days later. The apologists are making this out to be a dead issue from the past being brought to light now by management with union contract negotiations coming up. Fact seems to be it is still very much a live issue about "a Seattle City Light employee (who) may face penalties...."

farwest
Rockport, WA
176 comments

November 6, 2012 at 5:39 PM Rating: (0) (1) Log in to report abuse

Read The Felix comment, he knows what happened. You need to be a little skeptical about what you read, this is just the start of City Light's campaign to make their workers look bad before the upcoming contract negotiations. But when your lights are out and the rain is falling it won't be Jorge Carrasco restoring your power, it'll be a line worker like Ron Allen. Carrasco is a terrible utility superintendent but he's very good at conning the City Council. I've listened to him tell the Council things I know are lies but nobody knows enough to question him. In 8 years the only good executive he's hired was John Prescott and Prescott left after a year because he wasn't going to ape Carrasco in managing by PR and ignoring the realities of the power business. Our facilities have been deteriorating when they could have been maintained with far less money than Carrasco wastes on incompetents and consultants. And here's a truth for you- your bill would be half what it is if we had competent management that worked with employees to run an efficient utility, rather than a PR-oriented management that substitutes wing bag pronouncements for actual knowledge. The City Council told Carrasco when he was hired to do employee surveys every two years and try to improve the working climate. Carrasco did the first two, which went downhill, and has avoided doing a real employee survey ever since. He knows what an unbiased outside survey would show and so does the City Council.

something newer
Right over There
473 comments

November 6, 2012 at 4:29 PM Rating: (0) (2) Log in to report abuse

What else do you expect from a union public employee?



Post a pet listing
general classifieds

Garage & estate sales
Furniture & home furnishings
Electronics

just listed
AKC SHIH TZU PUPPIES
baby Persian/Mainecoon and bobtail
himalaya...
City of Auburn Airport Master Plan
Planning...
More listings

Search classifieds
Sell your stuff
POST A FREE LISTING



New Rule for Washington Drivers
(Nov 2012) Poulsbo - If you drive in Washington you better read this... **Learn More** »
Insurance.Comparis

Most read Most commented
Most e-mailed

1. Voters approve I-502 legalizing marijuana
2. Mike Leach responds after another volatile day at WSU | Bud Withers
3. Gay-marriage measure passing in initial returns
4. Obama's lease renewed despite tough economic times
5. Lance Armstrong revelations leave cyclist's widow wondering | Take 2
6. Boeing considers wingtips that fold on its next big jet
7. What to watch for on Election Night, hour by hour
8. Inslee takes strong lead, but McKenna won't concede
9. Amazon.com ignites holiday sales booster: \$7.99 Prime | Brier Dudley's Blog
10. Inslee vs. McKenna could drag on

Most viewed images

	<p>Good job setting the bar at the curb SCL and city of Seattle!</p>
<p>divinab Seattle, WA 1 comments</p>	<p>November 6, 2012 at 3:42 PM Rating: (2) (0) Log in to report abuse</p> <hr/> <p>The fact that 1) the union contract is up in January, 2) this is old news involving a worker already disciplined, and 3) the article highlights salary which is otherwise completely irrelevant - there is no doubt that at best you(The SeattleTimes) were played by Seattle City Lights, and at worst agreed to play the part of puppet on a string. I'm sure Edward R. Murrow very proud – NOT.</p>
<p>fallstaff Lake Forest Park, WA 4084 comments</p>	<p>November 6, 2012 at 3:34 PM Rating: (0) (0) Log in to report abuse</p> <hr/> <p>Feel free to share "the truth" with us farwest.</p>
<p>gls2220 Edmonds, WA 100 comments</p>	<p>November 6, 2012 at 3:12 PM Rating: (1) (0) Log in to report abuse</p> <hr/> <p>Why is this in the newspaper? How is this even newsworthy?</p>
<p>farwest Rockport, WA 176 comments</p>	<p>November 6, 2012 at 2:44 PM Rating: (0) (3) Log in to report abuse</p> <hr/> <p>By the way what Felix says is the truth and quoting this article, which is very inaccurate, does not mean you are speaking the truth when he has actual knowledge that you do not.</p>
<p>farwest Rockport, WA 176 comments</p>	<p>November 6, 2012 at 2:36 PM Rating: (0) (0) Log in to report abuse</p> <hr/> <p>Since when has the Seattle Times become the propaganda arm for Seattle City Light? This story is totally one-sided and very inaccurate. It reads like it was written by the HR department at City Light, widely known as one of the most, if not the most, incompetent departments in the City of Seattle. Let's see this writer investigate some of the real issues at City Light, or at least rewrite this story after talking to both sides. How about a story concerning the excellent employee on the Skagit who collected 7 months of pay for not working following false accusations made by supervisors who never faced any consequences? A story repeated I might add and all ratepayer money wasted. Write about the culture of supervisor vendettas being funded by ratepayers and you'll have a real story, this is inaccurate and unfair.</p>
<p>rosepetal Seattle, WA 736 comments</p>	<p>November 6, 2012 at 1:28 PM Rating: (0) (0) Log in to report abuse</p> <hr/> <p>When I applied for my SS benefits, the SS employee worked very hard with me, since I never had an "original" birth certificate, having been born after the Dresden bombing. I received a "made-up" later on, which did not have the original stamp on it.</p>

We finally worked something out and I brought her a chocolate bar to thank her.

Her reaction could not have been more severe, had I held a grenade in my hand. She threw up her arms and exclaimed: " Oh, no, no, no, no"

There is one good employee who follows the rules!

A bit overdone, I think.

snookes
Seattle, wa
1 comments

November 6, 2012 at 1:00 PM Rating: (0) (0) [Log in to report abuse](#)

What type of fine/disciplinary action is going to be taken against the 9 employees who "bribed" the trainer with alcohol?

fallstaff
Lake Forest Park, WA
4084 comments

November 6, 2012 at 12:34 PM Rating: (1) (1) [Log in to report abuse](#)

Felix everything in the article says they gave him the booze BEFORE retaking the test contrary to what you state.

nwexplorer
Seattle, WA
4720 comments

November 6, 2012 at 12:12 PM Rating: (1) (1) [Log in to report abuse](#)

Even if he did not ask for a bribe, this gives the appearance of one. High stress oral exams for this are given for good reason. This is a trade where if you don't keep your cool, and you make a mistake, you can kill yourself and others very easily.

They need to perform confidently under an appropriate stress level, not be mollycoddled to pass.

HamiltonFelix
Marblemount, Washington
1 comments

November 6, 2012 at 12:02 PM Rating: (3) (3) [Log in to report abuse](#)

Why the hatchet job on Ron Allen? He did NOT solicit those bottles. He went out of his way to help those Apprentices without even getting Instructor pay. AFTER they studied hard and passed the retest, THEY gave him bottles, which is a tradition when Apprentices top out. The "would a bottle help?" comment never happened. The story as reported is NOT true.

Lynn, did you even interview Ron? Why write twisted hatchet jobs like this, when there's plenty of REAL muck to rake at City Light?

fallstaff
Lake Forest Park, WA
4084 comments

November 6, 2012 at 11:40 AM Rating: (1) (2) [Log in to report abuse](#)

Seems like most here are missing the real question to be asked. Nine people failed the first test. Nine people gave the tester a bottle of booze. All nine then passed the next test. Only the person administering the test had any control, insight, oversight, regarding the test. Seattle City Light business as usual. Conserve energy; pay more.

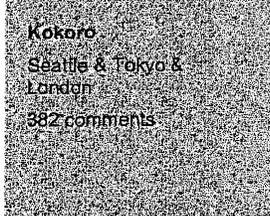
November 6, 2012 at 11:19 AM Rating: (0) (1) [Log in to report abuse](#)



Lake Forest Park, WA
4084 comments

And this guy was paid \$33,000 in overtime last year?

report abuse

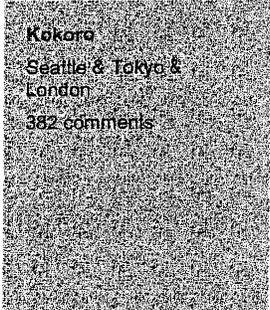


Kokoro
Seattle & Tokyo & London
382 comments

November 6, 2012 at 11:08 AM Rating: (1) (1) [Log in to report abuse](#)

"He's pulling in about \$150,000 a year in salary alone..."

Actually it's \$129,000 including overtime. You need to learn to read numbers correctly.
A \$31,000 difference is a big difference.



Kokoro
Seattle & Tokyo & London
382 comments

November 6, 2012 at 11:01 AM Rating: (0) (0) [Log in to report abuse](#)

The city has learned at least two things from this. The next contract has to include the right to fine any employee for an ethics violation. The oral tests need at least two people judge it OR it needs to be recorded and the recording somehow going missing needs to be an ethics violation.

One good thing is that the current contract has the reasonable person standard. That gets rid of most weasel worded justifications.

Post a comment



The opinions expressed in reader comments are those of the author only, and do not reflect the opinions of The Seattle Times.

SITE MAP Home Local Nation/World Business/Tech Sports Entertainment Living Travel Opinion Obituaries Extras
Forums Blogs

CONTACT/HELP

- Site feedback/questions
- Home delivery issues
- Send us news tips
- Send letters to the editor
- Submit event listings
- Request corrections
- Newsroom contacts
- Social media
- Report malware

CONNECT

- Facebook
- Twitter
- Mobile site
- Mobile apps
- Low-graphic site
- Newsletters
- RSS
- Today's News Index

ADVERTISING

- Advertise with us
- Digital advertising
- Classifieds
- Death notices
- Job listings
- Auto listings
- Real Estate listings
- Rental listings

COMPANY

- About us
- Employment
- Historical archives
- Pulitzer prizes
- Seattle Times store
- Purchase photos
- Newspapers In Education

SUBSCRIBER SERVICES

- Subscribe
- MyTimes
- Temporary stops
- Make a payment
- Print Replica
- Subscriber rewards

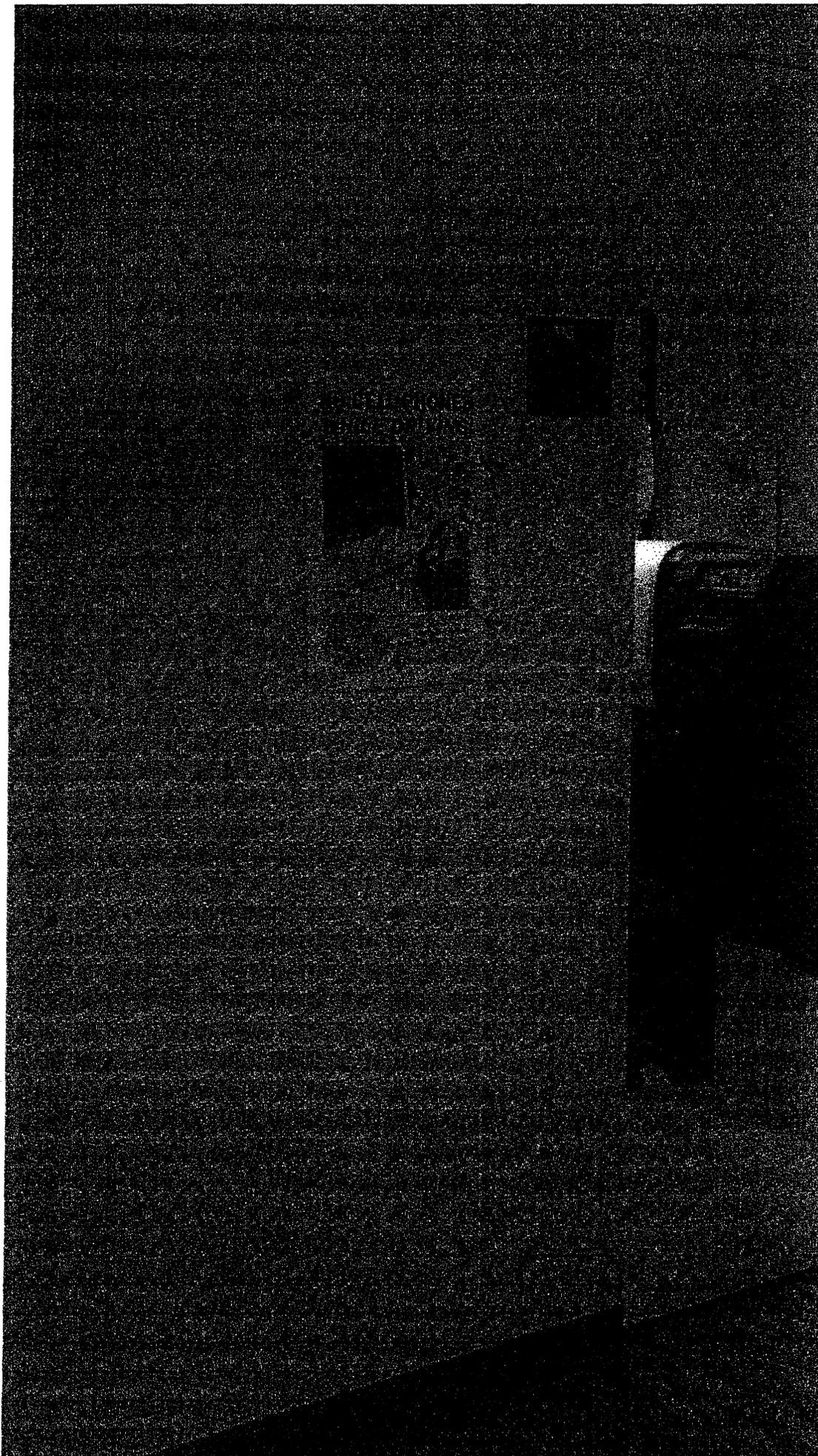


Today's front page (PDF)

The Seattle Times

The Seattle Times Company Network: [Seattletimes.com](#) | [Jobs](#) | [Autos](#) | [Homes](#) | [Classifieds](#) | [Rentals](#) | [Personals](#)

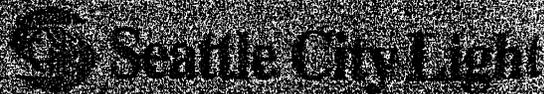
Copyright ©2012 The Seattle Times Company | [Advertise with us](#) | [Privacy statement](#) | [Terms of service](#)

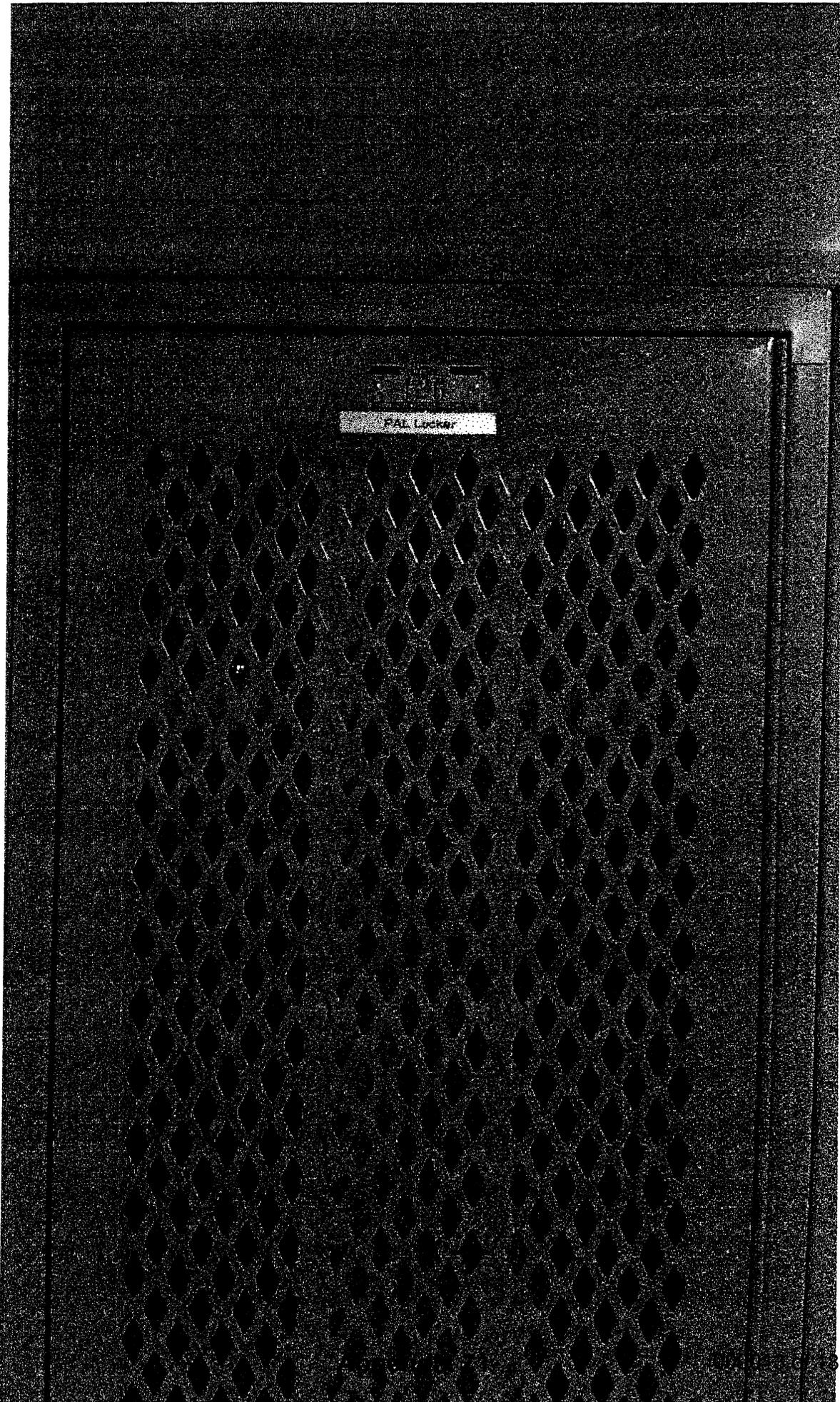


NO CELL PHONE USE WHILE DRIVING



It's the law!
Hands-free devices only for
emergency incoming calls!





Monthly Lineworker Apprentice Evaluation

Swanson
Apprentice Name & Period

Legere
Crew Chief

Sept 12
Month/Year

Yes No
EGAC? Circle

Pick The Letter Grade That Best Represents This Apprentice's Skill Level		
E = Exceeds Expectations:	Apprentice demonstrates an accelerated skill level and understanding for this period of training.	
M = Meets Expectations:	Apprentice shows solid progression and is where he or she should be for this period of training	
C= Concerns:	Apprentice shows some progression but needs more time to develop skills Specific Comments Please!	
D = Does Not Meet Expectations	Apprentice is not progressing at an acceptable level for this period. Specific Comments Please!	
N= Not Observed	Apprentice was not doing this particular body of work during the rotation	
In The Field	Grade	Comments
Works Safely	C	Always wares PPE's , sets up needed traffic controle as needed , Will ask questions at tailgates , the more complex the job/work at hand He has a much harder time with over all safety in the areas of 1. rigging 2. Knowing what equipment that is energized , deenergize , under clearances 3. watching out for the safety of lower step apprentices and all crew members this evaluation is based off of the step that He is at this time.
Recognizes Hazards	C	The more complex the work the harder it is for Aaron to understand the hazards of the work and the overall safety of crew for the step that he is at , should at this time be able to help lower step personal for the step that he is and at this time this is not the case.The crew has to spend more time than is needed to watch over Aarons for the level that he is at , examples: working on rigging moving wire , checking loads on trucks and ect.
Teamwork	M	Works hard at dock to stock trucks , orders equipment on MR's and dumps all salvage . In the field has to be helped more then should be needed to set up equipment and materials for work. Needs to be more self starting on tasks that are at his step and take on harder jods to build more confidence in his work. More training in rigging and hot work could help him find a better understanding of needed team work to get tasks done with more safety and on time .
Follows Directions	M	Asks question at tailgate to clarify work. Is behind in skills need to fully understand and be able to take more controle of work for step and be able to help out newer Apt. with directions as in secondary work ect. Having a higher understanding of the overall work would help Aaron with his Pri. work .

Attitude/Initiative	C	At the dock stocks and prep. work , asks for work and dumps all salvagé. Working in the field on the pole Aaron initiative needs improvement for step doesn't fully understand the job at hand and this leads to slow work for step and in the future be able to take on the harder skills needed for Pri. work and understanding end goal of job task .
Overhead Services	M	Single phase weather head make up are clean and done in good time , pole work he still needs help the more complexe the work the more help that he needs and time to complete the task for his step.
Climbing Ability	M	From ground to work location has overall safe clinding skills , when at work location needs to be able to set up hand line placement for working and safety , be in work hole to safely work on energize secondary conductors and work more as a team when working a pole with pole partner , one bucket or back to back buckets.
Test Equipment	M	Able to use test equipment as in volt meter , rotation equipment , amp. And with help high voltage phasing set/high voltage tester . Needs help when pole has multiple voltages from different bank or locations .
Transformers	M	Able to order needed equipment , build and load at the dock . In the field with help is able to install 1 and 3 phase banks (the more complex or with high work load the number of banks install work slows and has to be help more then is needed for his step).
Rigging	D	Still needed help at rigging 1. need to be able to use hand line for on and off of secondary work (meat hook) 2. be able to rig equipment and wire up and down (on and off loads) 3. safely rig conductors under clearances and cutting of the conductors as needed to move wire safety (needs to be watched to make sure of what side is to be cut and location to have needed wire to make up) .
Tool Usage		Take good care of tools .

	M	
Groundwork	M	Will work hard on the ground but doesn't have the overall understanding for the step that he is at , Needs help in areas that he should be able to do with out help and at this time should be able to show/help lower step Apts. learn this work. Taking on a more pro-active/leadershiprole would help the crew be able to complete work in the appropriate time for task and the crew wouldn't have to check/recheck work .
Work Readiness	M	On time . Works untill end of shift , takes all call out . When on the job needs to be able to self start to a high level with a better overall understanding of the work that has to be done .
Primary Work	M	At this time Aaron needs more help at the Pri. Work then he should for step this has a lot to do with the above report and being up to speed for step. Needs to have one on one training to help move ahead in primary work and overall understanding of OH-L work .

If More Comment Space Is Needed, Please Add Paper To Accommodate Or Use Long Form

LINEWORKER APPRENTICE OVERHEAD EVALUATION

Overall Comments: The crew has worked hard with Aaron over the last evaluation in the areas as listed above we feel that at this time he has to have one on one training and a work plan to help him catch up to the step that he is at . Areas to work on would be 1. rigging class as was given to the Journey level worker in the past , 2. primary school (off property) 3. work plan to be used on crew in the areas above .

REQUIRED SIGNATURES - Please Print and Sign Your Name

Journey-Worker Comments:

I feel in this trade that there are leaders and followers, Aaron seems to be the 2nd of the two. I dont believe that he has enough confidence in himself to do the Job. I Think he needs some different type of training to get him up to speed.

Journey-Worker Signature: *[Signature]*

Date: *10/5/12*

Crew Chief Comments: At this time Aaron is behind in many areas for the step that he is working at , the crew has worked hard at training on the job and at this time I feel that Aaron needs to have extra training to be able to catch up to the step he should be working at . As in the report above Aaron has a harder time with tasks when the work becomes more complex/more pressure (for the step he should be working at) . He has also made rigging mistakes in the feild that he should not be doing at this time , working below his step and his driving record has had problems. I would like to see the the Apts. office make up a work plan to help Aaron move to the level he should be working at this time .

Crew Chief Signature: *[Signature]*

Date: *10/5/12*

Apprentice Comments:

Apprentice Signature:

Date:

Supervisor Comments:

Supervisor Signature:

Date:

Manager Comments:

Manager Signature:

Date:

Director Comments:

Director Signature:

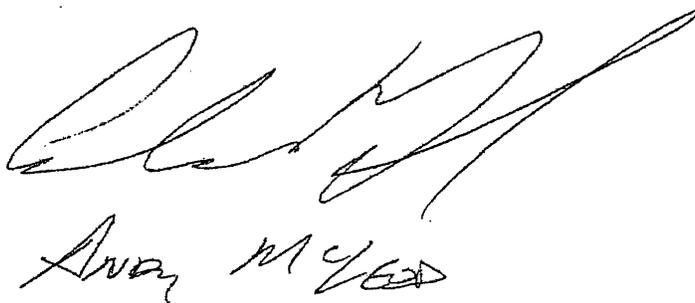
Date:

9/26/12

Aaron has been on our crew for a little while now, and as much as I hate to say it, has not improved. When he first started with us he was doing well, it seemed like he improved but he spiraled down hill fast. Aaron and I had a conversation after work about a week or so after he came on the crew. He asked me if I had a problem with him being on crew. I answered shortly and said no. Then he said it seemed like I was picking on him and he didn't know why. I replied with "because for your level you don't know what you're doing". I stated times and problems that I saw, and he agreed with those that I saw. He had excuses for almost all of them, which most according to Aaron were not his fault. The issues I have with that are, these are second year problems. At this point, with him being a hot apprentice he should know how to do everything but the primary. He does not, nor does he take responsibility for his mistakes. This in my eyes is unacceptable. At the end of our talk Aaron shook my hand and told me "I will proof to you that I can do this and that I'm ready" That's not the case. Here are the main issues I have.

1. Rigging - Does not know or see the angles, tools, or the reasons behind why we do it the way we do. Has a very hard time seeing the final picture or how we need to accomplish the tasks at hand.
2. Habits - Has terrible work habits that tend to work himself into a hole. I have been teaching him to always work far to near and I find him still not doing it. He should be able to work out a secondary pole in a timely manner and has not been able to show that to us.
3. Forgetful - Seems to have a hard time remembering what has been taught to him and the steps involved. Can not remember without being told each time.
4. Attitude - Does not show the drive to want to be a lineman, seems to be content letting other apprentices do the work rather than jumping at the chance to do it himself. Also seems to be preoccupied with other crap rather than have his mind on the task at hand. This is very dangerous!!!!
5. Adjustment - has a hard time rolling with the changes of the job. The more complex something becomes the more he loses sight of the job. Has problems seeing the how to finish the job, especially when he is not being told step by step.
6. Initiative - shows up everyday to work, but not ready to do the work on his own. Lacks any type of leadership ability towards younger step apprentices. Has not shown the ability to teach younger step apprentices much of anything.

In a whole Aaron is not leaning at the rate of which an apprentice should be. He is extremely behind for his even a second year step much less a hot apprentice. I'm worried for his safety and the safety of the workers around him. In my opinion, Aaron should take a good long look in the mirror and ask himself if this is really what he wants to do.



Aaron Meyer

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

In The Matter Of:

AARON SWANSON,

Petitioner.

OAH Docket No. 2013-LGW-0001

FINDINGS OF FACT, CONCLUSIONS
OF LAW, & FINAL ORDER

I. ISSUES PRESENTED

1.1 Did the City of Seattle unlawfully retaliate against Petitioner Aaron Swanson (herein "Mr. Swanson") under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity?

1.2 If so, what is the appropriate remedy?

II. ORDER SUMMARY

2.1 Yes. The City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity.

2.2 Because the City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040, Mr. Ron Allen is assessed a penalty of \$1,000.00, the City of Seattle will pay Mr. Swanson's attorney's fees incurred with his whistleblower retaliation claim, and Mr. Allen is recommended for suspension from employment for six months without pay. Under RCW 34.12.039, all costs for the services of Office of Administrative Hearings (OAH) in this case shall be paid by Respondent City of Seattle without apportionment to, or contribution by, Petitioner Mr. Swanson. Post-judgment interest shall accrue on the unpaid balance of all sums herein awarded at the rate of twelve percent per annum.

III. HEARING

3.1 **Hearing Dates:** February 12-13, 2013; April 24-25, 2013; May 29, 2013; May 31, 2013; June 20, 2013; June 25, 2013

3.2 **Administrative Law Judge:** Lisa N. W. Dublin

3.3 **Petitioner:** Aaron Swanson

3.3.1 **Representative:** John P. Sheridan, MacDonald Hoague & Bayless

3.3.2 **Witnesses:**

- 3.3.2.1 Katherine "Kate" Flack
- 3.3.2.2 Kim Tran
- 3.3.2.3 Ronald Allen
- 3.3.2.4 Margaret "Peggy" Owens
- 3.3.2.5 Ken Busby
- 3.3.2.6 Solomon Adams
- 3.3.2.7 Annette L Dokes
- 3.3.2.8 Ron Tarrant, URD Lineman
- 3.3.2.9 Alice Lockridge
- 3.3.10 Charles Kennedy
- 3.3.2.11 Aaron Swanson, Petitioner

3.4 **Respondent:** Seattle City Light

3.4.1 **Representatives:** Assistant City Attorneys Katrina R. Kelly and Zahraa V. Wilkinson; others present on varying hearing days included D.C. Bryan, Gary Maehara, and Davonna Johnson.

3.4.2 **Witnesses:**

- 3.4.2.1 Ron Knox
- 3.4.2.2 Michael Brooks
- 3.4.2.3 Richard Owen
- 3.4.2.4 Frank Beatty

- 3.4.2.5 Tom Caddy
- 3.4.2.6 Heather Proudfoot
- 3.4.2.7 Andy McLeod
- 3.4.2.8 Barry Myers
- 3.4.2.9 Gary Legere
- 3.4.2.10 Ed Hill
- 3.4.2.11 Darlene Koopman Sakahara
- 3.4.2.12 Davonna Johnson
- 3.4.2.13 Karen DeVenaro
- 3.4.2.14 Kim Tran

3.5 **Exhibits:** Petitioner's Exhibits 1-27, 29-39, 41-45, 47-49, 52-55, 57A, and 58-61, and Respondent's Exhibits A-NN were admitted.

3.6 **Court Reporter:** Jeanne Gersten

IV. FINDINGS OF FACT

Background

4.1 Seattle City Light ("SCL") is a department of the City of Seattle. SCL manages and maintains the city's electrical services. SCL maintains a paid lineworker apprenticeship program to train and employ journey-level lineworkers. Its lineworkers belong to the IBEW Local 177 labor union (herein "Local 177"). During all relevant times hereto, Joe Simpson was the business manager for the Local 177.

4.2 Petitioner Aaron Swanson, age 37, works as a lineworker apprentice for SCL. Mr. Swanson obtained a Bachelor of Science in Business Administration from Oregon State University before beginning his apprenticeship.

4.3 In 2005, Ronald Allen, a journey-level lineworker with SCL, became an instructor of apprentices, teaching pole-climbing and "hot stick school." (Ex. DD) Mr. Allen is Mr. Simpson's nephew.

The First Year of Mr. Swanson's Apprenticeship

4.4 In February 2009, SCL hired Mr. Swanson into the lineworker apprentice program. At the time Mr. Swanson joined this program, it consisted generally of 6000 hours of training, spread out over three years of reasonably continuous employment, and included coursework and exams as well as hands-on training in the field. (See Ex. LL) These three years were divided into six six-month increments called "steps," with a wage increase at each step. The final 2000 hours of the apprenticeship involved "Hot Sticking and/or rubber glove work on energized primary circuits." *Id.*

4.5 Apprentices rotated between the North and South Service Centers where they received on-the-job training and monthly evaluations from the crew chiefs and lineworkers with whom they worked. Failure to meet expectations could lead to the imposition of Individualized Training Programs (ITPs), and/or extension or cancellation of the apprenticeship. *Id.*

4.6 In March 2009 Mr. Swanson began pre-apprenticeship training, and on August 26, 2009, after graduating from climbing school, began the first step of his apprenticeship. (Ex. E) SCL initially assigned Mr. Swanson to the South Service Center, where Mr. Allen was involved with training apprentices.

4.7 During the first year of Mr. Swanson's apprenticeship, his monthly evaluations from crew chiefs established primarily that he met expectations. On October 28, 2009, Crew Chief Mims scored Mr. Swanson as meeting expectations in five out of seven categories. Mr. Mims gave Mr. Swanson I's for "Improvement Required" in the following categories: "Actively participates in work, where appropriate," and "Correctly demonstrates skills taught when asked to apply them to the job." Ex. 26. In conclusion, Mr. Mims stated, "Aaron needs to focus on his climbing skills and technique as well as practicing knots + needs to be more aggressive toward the work." *Id.*

4.8 In his evaluation of Mr. Swanson's work in December 2009 and January 2010, Crew Chief Stotts graded Mr. Swanson primarily with C's ("79-70%"). Mr. Stotts noted that Mr. Swanson struggled with pole climbing and pole work, and repeatedly recommended he learn from repetition on a small crew. Mr. Stotts concluded, "Everything scored in this evaluation is predicated upon Aaron's climbing and becoming confident and comfortable. At this time he has made slight improvements, but not enough to allow Aaron to really start learning what he should be learning at this stage of his apprenticeship." (Ex. Q, pp. 0-6) Mr. Swanson agreed that he was not climbing as fast as others were, and that he was not fully comfortable with maneuvers.

//

4.9 Crew Chief Doug Haven evaluated Mr. Swanson's work for April 2010, stating "Aaron has a good attitude and is willing to learn and works well with others. He needs a lot of work on the pole, with climbing and secondary work." *Id.*, pp. 11-12.

4.10 Over Summer 2010, Mr. Swanson received scores of "exceeds expectations" on his URD (underground work) evaluation. *Id.*, pp. 15-16. Regarding his linework, for July 2010, Crew Chief Tom Caddy documented that Mr. Swanson met or exceeded expectations in all categories. *Id.*, pp. 17-18. Regarding rigging in particular, Mr. Caddy noted, "the TRAINING NEEDS TO BE BETTER." Mr. Caddy concluded, "Aaron is a solid worker and is doing well in his progress!" *Id.*

4.11 In August 2010, Mr. Allen told the apprentices, including Mr. Swanson, that they would be orally tested on WAC 45. Although this oral exam was not prescribed by the apprenticeship program, each apprentice took it. (See Ex. 61, p.1) Afterward, Mr. Allen announced that they had all failed, and would be retested.

4.12 At this point, the testimony of the parties conflicted on material points. Mr. Swanson testified that Mr. Allen told the apprentices they "probably want to bring something with [them]" to the retest. When an apprentice asked, "Like a bottle of Jack?", Mr. Allen immediately responded, "Or Jameson." Mr. Allen, on the other hand, testified that after he announced the retest, an apprentice asked, "Would a bottle help?" Mr. Allen testified that he answered "no; know your Chapter 45". Mr. Allen denied saying "Jameson". Having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and as related to prior document submissions in connection with the claim and claim response, and the totality of the circumstances presented, I resolve conflicting testimony in favor of Mr. Swanson at times and Mr. Allen at other times. The preponderance of the evidence establishes that an apprentice asked something akin to, "Would a bottle help?" and that Mr. Allen responded affirmatively to the group that a bottle of whiskey would help. The weight of evidence, including multiple investigative reports regarding the incident, confirm that Mr. Allen both solicited and accepted alcohol as an incentive for giving the apprentices a passing score on an unauthorized oral exam. (See Exs. U, X and BB)

4.13 On the day of the retest every apprentice except Mr. Swanson brought a bottle of whiskey to give Mr. Allen. The other apprentices then arranged to obtain a bottle of whiskey for Mr. Swanson to give Mr. Allen. Mr. Allen accepted each apprentice's bottle of whiskey, including Mr. Swanson's, and gave each apprentice a passing grade.

The Second Year of Mr. Swanson's Apprenticeship

//

4.14 In September 2010, the second year of Mr. Swanson's apprenticeship, SCL hired Mr. Allen into the position of Craft Instructor-Apprenticeship (CIA); as such, Mr. Allen was the lead instructor for testing and training, and worked with curriculum development and personalized training of apprentices as needed. Mr. Allen also held a seat on a City subcommittee, the Electrical Crafts Advisory Committee (ECAC), which oversaw and made recommendations regarding the quality/control of all electrical crafts, including the lineworker apprenticeship program. Mr. Simpson appointed Mr. Allen to the ECAC.

4.15 During the second year of his apprenticeship, Mr. Allen became hostile toward Mr. Swanson, and Mr. Swanson's non-URD performance evaluations were increasingly negative. For August and September 2010, Crew Chief Reddy Landon rated Mr. Swanson with "meets expectations" in nine of thirteen areas, but noted concerns, specifically with rigging and climbing. (Ex. Q, pp. 19-20) Mr. Allen and Mr. Landon met with Mr. Swanson and asked him whether he wanted to be a line worker apprentice. Mr. Allen suggested that Mr. Swanson become a material supplier instead of a line worker; Mr. Swanson declined. Mr. Swanson did not agree with this evaluation, felt blindsided, and believed Mr. Landon and Mr. Allen were trying to get him to quit. Mr. Swanson believed Mr. Allen influenced this evaluation because he, i.e. Mr. Swanson, did not initially bring Mr. Allen a bottle of whiskey.

4.16 During the ensuing months, Mr. Allen made negative comments to and/or about Mr. Swanson, such as that Mr. Swanson had a reputation of hiding from work on the crews, and that Mr. Swanson had "better pull his head out of his ass." At a staff meeting in early 2011, Mr. Allen stated that SCL's aim should be getting apprentices out of the apprenticeship program who were not a good fit.

4.17 Mr. Swanson's performance evaluation from Crew Chief Mason for January and February 2011 again identified concerns with Mr. Swanson's climbing and rigging. Mr. Mason stated, "[Aaron] is not comfortable in his climbing and is clearly noticeable. When he reaches the work hole on the pole he has a difficult time doing his 2ndary work. He definitely needs more time before being advanced." (Ex. Q, pp. 25-26) Mr. Swanson did not challenge this evaluation; yet, he believed Mr. Allen negatively influenced his [Mr. Swanson's] daily interactions with the crew.

4.18 Mr. Swanson believed Mr. Allen influenced his evaluation from Crew Chief Stotts for March 2011. For March 2011, Mr. Stotts marked Mr. Swanson with "Concerns" or "Does Not Meet Expectations" in every aspect, including climbing and rigging, and concluded, "Aaron is struggling. Confidence seems to be his greatest area of concern. Especially on the pole. He's very tentative and doesn't lead. He will follow someone elses [sic] lead." (Ex. Q, pp. 29-33)

//

4.19 In March 2011, the ECAC recommended extending Mr. Swanson's apprenticeship; Mr. Swanson agreed. (See Exs. F, M p.13) On March 30, 2011, the City of Seattle Joint Apprenticeship Training Committee (JATC), consisting of three union representatives and three City members, voted unanimously to extend Mr. Swanson's apprenticeship by an additional six months, and develop an ITP to be administered by the apprenticeship office. (Ex. 10)

4.20 Despite this, Mr. Swanson's performance evaluations showed increasingly poor results. For Mr. Swanson's work during the second of half of April 2011, Crew Chief Stotts stated, "Aaron appears to suffer from the paralysis of analysis," and went on to address Mr. Swanson's lack of confidence on the pole, and speed issues. (Ex. Q, p.42) Regarding his May 2011 evaluations from Crew Chief Dale Grant and crew, Mr. Swanson observed his previous performance evaluations from Crew Chief Stotts lying alongside Mr. Grant's new evaluation, which found he "does not meet expectations" in the areas of pole climbing and timeliness. (Ex. Q, pp. 43-45, Ex. 18, pp. 87-89) Mr. Swanson disagreed with these evaluations, and speculated that Mr. Allen gave Mr. Swanson's previous evaluations to Mr. Grant, and otherwise influenced these results. When Mr. Swanson questioned Mr. Grant about the similarity in evaluations, Mr. Grant stated, "Well, not everyone's cut out for this."

4.21 In June 2011, Mr. Allen approached Mr. Swanson at a safety meeting and recommended he look into a different apprenticeship. In July 2011, Mr. Allen had a flyer delivered to Mr. Swanson containing four new apprenticeship openings along with the message that Mr. Swanson look into a different apprenticeship. In July 2011, Crew Chief Michael Brooks' evaluation of Mr. Swanson again found Mr. Swanson fell below expectations for a fourth-period apprentice with regard to climbing, rigging, and timeliness. (Ex. Q, pp. 46-48) Journeyman Richard Owen's comments regarding Mr. Swanson's job performance were similarly negative. (Ex. Q, p. 49) Mr. Owen worked with Mr. Swanson much of the time, thought his handline was all over the place, and felt he could not give Mr. Swanson more difficult tasks because he was unsatisfied with Mr. Swanson's performance of more basic tasks. Mr. Owen also believed Mr. Swanson understood how things worked when on the ground, but when it came time to put it all together on the pole, Mr. Swanson started and stopped and crossed his arms in thought, displaying an apparent lack of confidence.

4.22 On or around Friday July 29, 2011, Mr. Allen told Lineworker Peggy Owens that the best thing about going on vacation was having someone fired while he was gone. Mr. Allen stated his sit-in on the ECAC was going to vote to fire someone; Mr. Allen did not say who the "someone" was.¹ On August 4, 2011, the ECAC voted to recommend canceling Mr. Swanson's apprenticeship. (See Ex. H)

¹ Mr. Allen denied having this conversation with Ms. Owens. Under the totality of the circumstances, I find Mr. Allen's denial less credible than Ms. Owens' testimony regarding this conversation.

Mr. Swanson Reports Mr. Allen

4.23 In late August 2011, Mr. Swanson contacted the Department of Labor and industries and SCL's Human Resources to report Mr. Allen extorted alcohol in exchange for passing test scores. (Exs. 30 and 31) Mr. Swanson also expressed concern that he was receiving poor and/or unfair performance evaluations because of Mr. Allen. Shortly thereafter, Mr. Swanson reported Mr. Allen to the Seattle Ethics and Elections Committee (SEEC). Mr. Swanson's report was not the first report about improper behavior by Mr. Allen that the SEEC received.

4.24 SCL Human Resources commenced an investigation, and moved Mr. Swanson to the South Service Center, where he felt more comfortable, even though Mr. Allen also worked out of the South Service Center. This move bothered Mr. Allen because SCL moved Mr. Swanson without going through proper channels per the collective bargaining agreement. (Ex. 34)

4.25 On September 15, 2011, Mr. Swanson submitted a written complaint to the JATC regarding Mr. Allen. (Ex. T) When Mr. Allen saw Mr. Swanson at the South Service Center his first day there, September 19, 2011, he became upset and stated, "You're just a fucking squeak; you can't just decide to show up down South!" (Ex. 32) [Although, at the hearing, Mr. Allen denied making this statement, it is more likely than not that he did so, given Mr. Swanson's written report of the incident to Karen DeVenaro, the apprenticeship manager, the day it happened.] Mr. Swanson was then assigned to Crew Chief Todd Warren's crew; Mr. Warren is Mr. Allen's personal friend and also on the ECAC. Mr. Swanson observed Mr. Allen with a copy of this report in hand, showing it to groups of lineworkers on the dock.

4.26 On September 28, 2011, the JATC decided not to cancel Mr. Swanson's initiative. Although Todd Warren reported to the JATC that Mr. Swanson worked too slow, the JATC decided against cancellation because of evidence that Mr. Swanson had progressed in a number of areas, and because he had not received adequate individualized instruction under his ITP. (Ex. I) When Mr. Swanson emailed SCL Human Resources that day that he felt Mr. Warren's crew was a hostile working environment, SCL made arrangements for Mr. Swanson to move to another crew. Mr. Swanson protested the lower marks he received from Kath Johnson's crew for October 2011, attributing them to Mr. Allen's coercion of journey-level worker Bruce Lee. (See Ex. Q, pp. 55-65) Mr. Swanson's performance evaluations and biweekly reports from Mr. Busby's crew for November 2011 showed higher marks. See Ex. Q, pp. 66-71.

4.27 On December 13, 2011, SCL determined that Mr. Allen improperly accepted alcohol from apprentices in exchange for a passing test score. (Ex. U) The investigative report containing this determination was sent to the SEEC. When the SEEC interviewed Mr. Allen about the incident, he was angry, thought the incident

was a joke, and stated "this is the way we roll." Mr. Allen did not take personal responsibility for his behavior, but instead offered up excuses; Mr. Allen believed SCL passed through too many apprentices at too high a cost, and believed this was a big shortcoming of the apprenticeship program. That month, Mr. Allen resigned as CIA, and SCL retained outside investigator Ron Knox of the law firm of Garvey, Schubert, Barer to investigate whether Mr. Allen solicited the alcohol in addition to accepting it, and to investigate Mr. Swanson's retaliation claims.

4.28 In approximately January 2012, Mr. Swanson observed a poster of himself with the word "RAT" written on his chest, hung in the hallway of the North Service Center. (Ex. 57A) Mr. Swanson observed this in approximately January 2012, when he attended night school at the North Service Center, but did not report it at that time or take it down because he did not want to cause commotion.

4.29 In February 2012, SCL notified Mr. Allen he had been recommended for suspension without pay for 20 working days for his improper extortion of alcohol. On or around February 3, 2012, Mr. Swanson waived confidentiality regarding his whistleblower complaint to SEEC. (Ex. CC) That same day, he received an evaluation from his work on Crew Chief Campy's crew with eraser marks on scores that were altered down. (See Ex. Q, p.76) However, his evaluation from Crew Chief Fugate and crew for March 2012 fell short of "meets expectations" in only two areas, and stated, "Aaron has shown improvement while on the crew. Once he gets over the past evaluations and looks forward and at himself he will be fine!! Keep it up." (Ex. 17)

4.30 On April 3, 2012, the ECAC voted to extend Mr. Swanson's apprenticeship another six months for failure to progress. (See Ex. J) That month, on April 10, 2012, Mr. Knox issued a report finding that Mr. Allen accepted and received alcohol from all apprentices on test day, and on a more probable than not basis, responded affirmatively when asked, "Would a bottle help?," thus accepting alcohol in exchange for passing test scores. (Ex. X) This report did not address Mr. Swanson's retaliation claims because of the reticence of SCL employees to talk with Mr. Knox.

4.31 On May 2, 2012, SCL issued its determination that Mr. Allen violated SCL's Workplace Expectations, and the City of Seattle's Personnel Rules and Code of Ethics by admittedly accepting alcohol from each apprentice the day they were tested in August 2010. (Ex. Y) SCL suspended Mr. Allen for 20 work days effective May 3, 2012, and rendered him ineligible for any job promotion or discretionary out-of-class opportunities for one year. *Id.*

4.32 On May 23, 2012, the JATC decided not to accept the ECAC's recommendation to extend Mr. Swanson's apprenticeship, but rather to advance Mr. Swanson to the fifth period, i.e. primary, "hot" period, of his apprenticeship. (Ex. 4) By the time the JATC voted against this recommendation, Mr. Swanson had already spent an additional three months in his fourth step.

4.33 On May 31, 2012, Mr. Allen returned to work from his suspension. In approximately June 2012, Mr. Simpson removed Mr. Allen from the ECAC and appointed him to the JATC.

4.34 On July 18, 2012, Mr. Swanson reported to SCL Employee Relations Manager Heather Proudfoot that Mr. Allen became combative at a union meeting on July 12, 2012, calling Mr. Swanson a "fuck stick" and a "piece of shit," accusing Mr. Swanson of stabbing him in the back, and inciting a fight with Mr. Swanson by asking Mr. Swanson to step outside. (See Ex. 41) SCL assigned Mr. Knox to investigate this incident, but the investigation was hindered by the Local 177 because the incident took place at a union meeting, outside of work.²

4.35 Mr. Swanson's performance evaluations from Crew Chief Bob Hernandez for June and July 2012 showed Mr. Swanson "met expectations" for all listed criteria. The June 2012 evaluation stated Mr. Swanson "need [sic] to improve his rigging skill." A journeyworker's comment read in part: "Aaron is in the early stages of being hot. He is doing a good job at listening and giving a good effort. Needs to work on being more confident of his skills + not getting rattled." (Ex. 15, pp. 44-45) The June/July 2012 evaluation stated, "Aaron has improved in the last 60 days, as he gains confidence in his abilities, he should keep improving in his skill set. With the right journeyworkers he should do well. The lineworkers on crew have spent a lot of time working and coaching Aaron to do his best work and he has responded. They have taken the time to teach." (Ex. 16)

4.36 On or around July 13, 2012, Ms. Proudfoot learned of the poster of Mr. Swanson with the word "RAT" written on it. (See Ex. 57.) Mr. Swanson told Ms. Proudfoot he knew the poster had been there for several months and that he had left it up and had not worried about it because he did not want to stir the pot. Mr. Swanson told Ms. Proudfoot he was happy with his present crew and the South Service Center, and that he felt more supported than before. Ms. Proudfoot ordered the poster taken down.

4.37 In August 2012, Mr. Allen, who was speaking with his brother Josh (who is also a lineman) and others on the dock, stated it was no longer fun working there anymore. Crew Chief Legere was also present. Mr. Swanson overheard Mr. Allen say this, and saw one of the linemen gesture toward Mr. Swanson. In response, Mr. Allen stated, "Don't worry, we'll take care of him hook, line, and sinker."

² On January 25, 2013, Union Business Manager Joe Simpson, Mr. Allen's uncle, emailed Ms. Proudfoot regarding the investigation of the July 12, 2012 union hall incident, stating: "What happens at a Union meeting is none of SCL's business. ... SCL needs to stop pretending that the problems that they have with apprentices now, in the past, and probably in the future does not rest at the Union Hall but just down the hall at the apprenticeship office. I am not willing to spend the members money on silly investigations every time the apprenticeship office talks a apprentice into "crying wolf"." (Ex. FF)

4.38 At this point, the testimony of the parties again conflicted on material points. Mr. Swanson testified that on October 30, 2012, he saw a sticker with the acronym PAL ("Pre-Apprentice Lineworker") on it, stuck to his locker when he arrived at work. Mr. Swanson testified that someone removed a sticker with the acronym PAL on it from a nearby locker and stuck it on the locker he was using. Mr. Swanson took a picture of the sticker on his locker, and emailed it to SCL Human Resources. (Ex. 44; Ex. Z) SCL Division Administrator Debra Koopman, on the other hand, testified that Mr. Swanson first saw this sticker on his locker on or around September 11, 2012, but did not report it to a supervisor or crew chief at the time because he did not want any negative attention. *Id.* Based on the totality of the circumstances, I resolve conflicting testimony in favor of SCL. Ms. Koopman spoke with Mr. Swanson shortly after he reported the sticker, and then documented in her January 7, 2013 investigative report Mr. Swanson's account of the date and approximate time he first observed the sticker. Mr. Swanson's testimony on this issue, however, is self-serving and less credible.

Thirty Days Prior to Mr. Swanson's Whistleblower Retaliation Complaint under Chapter 42.41 RCW and Chapter 4.20 SMC.

4.39 On or around October 11, 2012, Mr. Swanson received his performance evaluation from Crew Chief Legere for September 2012, which contained 10 "M"s for "Meets Expectations", 3 "C"s for "Concerns", and 1 "D" for "Does Not Meet Expectations" in the area of Rigging. With regard to this "D", Mr. Legere wrote:

Still needed help at rigging 1. need to be able to use hand line for on and off of secondary work (meat hook) 2. be able to rig equipment and wire up and down (on and off loads) 3. safely rig conductors under clearances and cutting of the conductors as needed to move wire safely (needs to be watched to make sure of what side is to be cut and location to have needed wire to make up).

Mr. Legere wrote:

The more complex the work the harder it is for Aaron to understand the hazards of the work and the overall safety of crew for the step that he is at, should at this time be able to help lower step personal for the step that he is and at this time this is not the case. The crew has to spend more time than is needed to watch over Aarons for the level that he is at, examples: working on rigging moving wire, checking loads on trucks and etc.

Working in the field on the pole Aaron initiative needs improvement for step doesn't fully understand the job at hand and this leads to

slow work for step and in the future be able to take on the harder skills needed for Pri. work and understanding end goal of job task.

Mr. Legere concluded:

At this time Aaron is behind in many areas for the step that he is working at, the crew has worked hard at training on the job and at this time I feel that Aaron needs to have extra training to be able to catch up to the step he should be working at. As in the report above Aaron has a harder time with tasks when the work becomes more complex/more pressure (for the step he should be working at). He has also made rigging mistakes in the field that he should not be doing at this time, working below his step and his driving record has had problems. I would like to see the Apts. office make up a work plan to help Aaron move to the level he should be working at this time.

(Exs. R & 13) Mr. Legere also circled the word "Yes" over the question "ECAC?" in the top right-hand corner of the front page of the evaluation. *Id.*

4.40 Mr. Legere credibly testified that Mr. Allen did not influence the above evaluation, and that he circled "Yes" for ECAC in order to get Mr. Swanson additional training. Mr. Legere did not believe this evaluation was negative, did not think of it as costing Mr. Swanson money, and wanted Mr. Swanson to have the advantage of extra training like he himself had, before topping out, when such training opportunities would not be as readily available.

4.41 Mr. Swanson disagreed with Mr. Legere that he was behind or needed extra training. Mr. Swanson was unaware in the field that anyone had issues with his performance. Mr. Swanson believed this evaluation was retaliatory, given (a) his previous positive recommendation from Mr. Hernandez, (b) that the concerns in the evaluation were not expressed to him as he worked, (c) that he received the evaluation after he left the crew, and (d) because it was common knowledge that he was a whistleblower. Mr. Swanson also believed that Mr. Legere previously shunned him in retaliation for his whistleblowing. When repeatedly asked by Ms. Proudfoot to submit a written statement regarding why he believed Mr. Legere's recommendation was retaliation, Mr. Swanson did not do so, allegedly because this statement would not be kept confidential. (*See Ex. 53*)

4.42 Mr. Legere's evaluation was accompanied by an evaluation from lineworker Andy McLeod. Mr. Swanson and Mr. McLeod had previously worked together under Crew Chief Campy. During this time, Mr. McLeod had said everything Mr. Swanson was doing was wrong. Mr. Swanson had consequently sought to avoid working with Mr. McLeod. Mr. McLeod's evaluation of Mr. Swanson while working with Crew Chief

Legere contained the following negative comments about Mr. Swanson and his performance:

Aaron has been on our crew for a little while now, and as much as I hate to say it, has not improved. When he first started with us he was doing well, it seemed like he improved but he spiraled down hill fast. Aaron and I had a conversation after work about a week or so after he came on the crew. He asked me if I had a problem with him being on crew. I answered shortly and said no. Then he said it seemed like I was picking on him and he didn't know why. I replied with "because for your level you don't know what you're doing". I stated times and problems that I saw, and he agreed with those that I saw. He had excuses for almost all of them, which most according to Aaron were not his fault. The issues I have with that are, these are second year problems. At this point, with him being a hot apprentice he should know how to do everything but the primary. He does not, nor does he take responsibility for his mistakes. This in my eyes is unacceptable. At the end of our talk Aaron shook my hand and told me "I will proof to you that I can do this and that I'm ready" [sic] That's not the case.

...

In a whole Aaron is not leaning [sic] at the rate of which an apprentice should be. He is extremely behind for his even a second year step much less a hot apprentice. I'm worried for his safety and the safety of the workers around him. In my opinion, Aaron should take a good long look in the mirror and ask himself if this is really what he wants to do.

(Ex. R; Ex. 14)

4.43 At the request of SCL Human Resources, Mr. McLeod edited this letter to remove much of the above two paragraphs. (Ex. S) Left in place were the following sentences: "In a whole Aaron is not leaning [sic] at the rate of which an apprentice should be. I'm worried for his safety and the safety of the workers around him." *Id.*

4.44 Journeyman Barry Myers, who also worked with Mr. Swanson on Mr. Legere's crew, wrote on the performance evaluation as follows: "I fell in this trade that there are leaders and followers. Aaron Swanson seems to be the 2nd of the two. I don't believe [sic] that has enough [sic] confidence in himself to do the job. I think he needs some different type of training to get him up to speed." (Ex. R) Upon SCL Human Resources' request, Mr. Myers modified the above language minimally while conveying the same message. (Ex. S)

4.45 Both Mr. McLeod and Mr. Myers denied any influence by Mr. Allen or anyone else in preparing these evaluations. Mr. Swanson completed his fifth period testing in December 2012, and advanced to sixth period, the last period of his apprenticeship.

4.46 On November 1, 2012, the SEEC sent Mr. Allen correspondence stating it intended to file the attached charges of ethics violations. (Ex. DD) On November 5, 2012, a Seattle Times internet article appeared about Mr. Allen accepting liquor from apprentices whom he was testing. (Ex. EE) On November 6, 2012, the union filed a Complaint Charging Unfair Labor Practices with the Public Employment Relations Commission. On or around this same day, Mr. Swanson overheard Mr. Kennedy mutter to another worker, while gesturing at Mr. Swanson, "I was just sent to Ethics by your buddy."

4.47 On November 7, 2012, at 2:56 a.m., someone claiming to be Mr. Swanson posted a response online to the November 5, 2012 Seattle Times article. This response stated:

Hi my name is Arron [sic] Swanson I was the one that brought all this up to save my job. I have not been doing well here at the city and this is my way of proving a point and saving my job that I might not have for much longer. I am saddened for what I have done to my union brother but it is already done. Sincerely Arron Swanson
Seattle city light scc

(Ex. A, p.6; Ex. 54). Neither Mr. Swanson nor Ms. Proudfoot could determine specifically who posted this article.

4.48 On or around November 7, 2012, while working on a crew, someone took pictures of text messages on Mr. Swanson's cell phone, without Mr. Swanson's knowledge or authorization. These text messages were between Mr. Swanson and Training/Education Coordinator Alice Lockridge, and discussed the newspaper article response and Mr. Swanson's retaliation claims. These photos ended up at Local 177; Mr. Simpson then sent them to SCL Human Resources.

Mr. Swanson's Whistleblower Retaliation Complaint, and Thereafter

4.49 On November 9, 2012, Mr. Swanson submitted a complaint of unlawful whistleblower retaliation under SMC 4.20.860 and RCW 42.41.040 to the Office of the Mayor. (Ex. A) Thereafter, Mr. Knox issued two supplemental investigative reports regarding retaliation against Mr. Swanson. The first of these, dated February 11, 2013, stated in pertinent part:

//

Allen inappropriately accepted gifts of alcohol from nine pre-apprentices under circumstances that suggested providing such gifts would assure a passing grade in an oral examination.

The evidence also suggests and I find that on a more probable than not basis, Allen engaged in lobbying activities directed at the Initiating Witness [Mr. Swanson]. There is evidence that the conduct escalated after the Initiating Witness provided information to SCL about Allen's alleged solicitation of alcohol from Apprentices. This involved at least lobbying efforts with crews to evaluate the Initiating Witness more poorly than was justified. This conduct appears retaliatory in nature and contrary to SCL Policy (Rule 1.3.4) and the City of Seattle Code of Ethics. SMC 4.16.070.

(Ex. BB)

4.50 Several witnesses told Mr. Knox that Mr. Allen talked with them about Mr. Swanson. Journey-level workers reported that Mr. Allen lobbied them to negatively impact Mr. Swanson's evaluations. None of the crew chiefs admitted being affected by Mr. Allen's lobbying. In the end, Mr. Knox was unable to conclusively determine specifically which performance reviews were the result of Mr. Allen's lobbying efforts.

4.51 Mr. Knox documented the "considerable and significant unexpected limitations" regarding his investigation, which included: (a) "extraordinary delays and/or total refusals" by various journeymen and their union representatives to meet and/or answer specific questions concerning the various allegations", (b) "refusal of witness to provide critical information due to perceived fear of retaliation from other union members," (c) witnesses' fear of speaking freely to Mr. Knox with the union representative present; and (d) refusal to give specifics and details due to fear of being identified as the provider, resulting in limited access and relationship with those who shared the information with them. Some witnesses would not talk to Mr. Knox because their union representative was not present, or because their union representative told them they could not answer his questions, specifically regarding the altercation between Mr. Swanson and Mr. Allen at the union hall on July 12, 2012. Others felt they needed two meetings with Mr. Knox; one with the union representative, and a later one without. *Id.*

4.52 Mr. Knox's second supplementary report dated May 23, 2013, addressed whether Mr. Allen retaliated against Mr. Swanson at the July 12, 2012 union meeting, and whether Mr. Legere's performance evaluation approximately three months after this union meeting was retaliatory. (Exhibit MM) Mr. Knox documented similar difficulty talking with witnesses about the meeting as he documented in his February 11, 2013 report. Mr. Knox stated he could not conclusively determine what exactly happened at the July 12, 2012 union meeting due to the conflicting, credible witness

statements, and that he could "find no independent evidence of a nexus between the Legere evaluation and the July 12, 2012 meeting." Mr. Knox found Mr. Swanson credible, and his notes of the incident credible. Mr. Knox found Mr. Allen and Mr. Warren credible at times, and not credible at other times. Mr. Knox found Mr. Legere "very" credible. Mr. Knox concluded, "Based on the evidence available, I do not sustain the allegations of retaliation against Mr. Allen and Mr. Legere associated with the charges made."

4.53 Following his November 9, 2012 retaliation complaint to the Office of the Mayor, in approximately December 2012, Mr. Swanson received a negative performance review from Crew Chief Caddy and his crew for October 2012. This evaluation reflected Cs or Ds in most all areas, including rigging and primary work. (Ex. Q, pp. 98-100) According to this evaluation, Mr. Swanson no longer seemed afraid of heights, but his work was slow, methodical, and inefficient. Mr. Caddy concluded that Mr. Swanson "does not show proficiency or skills of a 5th period apprentice lineworker," and "is not at level of training to be a hot apprentice lineworker." *Id.* Mr. Swanson disputed this evaluation, claiming it was influenced by Mr. Allen. Mr. Swanson received subsequent evaluations from Crew Chiefs Fugate and Busby that stated Mr. Swanson continued to have difficulty with rigging, and had to be told repeatedly how to complete tasks.

4.54 As a result, in approximately March 2013, the ECAC again recommended extending Mr. Swanson's apprenticeship. Mr. Allen, though not a voting member of the JATC, attended the JATC meeting in May 2013 to serve as a subject matter expert. Despite Mr. Knox's reports that the evaluations may have been negatively influenced in retaliation against Mr. Swanson, the JATC voted to extend Mr. Swanson's apprenticeship another six months. Mr. Allen was present when the JATC voted. On June 24, 2013, Mr. Swanson began his sixth period testing.

V. CONCLUSIONS OF LAW

5.1 It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith that an improper governmental action occurred. SMC 4.20.810C; RCW 42.41.040.

5.2 "Retaliatory action" means: (a) Any adverse change in a local government employee's employment status, or the terms and conditions of employment including unsatisfactory performance evaluations, transfer, and/or reassignment, or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official. SMC 4.20.850; RCW 42.41.020.

5.3 The employee, as the initiating party, must prove his or her claim by a preponderance of the evidence. The administrative law judge shall issue a final decision consisting of findings of fact, conclusions of law, and judgment no later than forty-five days after the date the request for hearing was delivered to the local government. The administrative law judge may grant specific extensions of time beyond this period of time for rendering a decision at the request of either party upon a showing of good cause, or upon his or her own motion. RCW 42.41.040(6).

5.4 Relief that may be granted by the administrative law judge consists of reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action to prevent any recurrence of retaliatory action. The administrative law judge may award costs and attorneys' fees to the prevailing party. The administrative law judge may, in addition, impose a civil penalty personally upon the retaliator of up to three thousand dollars payable by each person found to have retaliated against the employee and recommend to the local government that any person found to have retaliated against the employee be suspended with or without pay or dismissed. All penalties recovered shall be paid to the local government administrative hearings account created in RCW 42.41.060. RCW 42.41.040(7),(8).

5.5 The hearing dates in this case, which were well past the 45 days prescribed by RCW 42.41.040(6) for conducting the hearing and issuing an order, were agreed by the parties, upon a showing of good cause. Consequently, this Initial Order is issued within the time prescribed by the Administrative Procedures Act, Chapter 34.05 RCW. See RCW 34.05.461(8). The close of record was Friday July 19, 2013, the day the parties submitted written post-hearing closing statements.

5.6 From the outset of his apprenticeship, Mr. Swanson's performance evaluations indicated Mr. Swanson had difficulty with climbing and rigging, and was not progressing in his apprenticeship as expected. Mr. Swanson admitted these difficulties, and received an ITP and extension of his apprenticeship. Mr. Allen is a competent lineworker and longtime SCL employee, who worked for years training future generations of lineworkers. However, rather than working with Mr. Swanson to get him the resources he needed to improve quicker, Mr. Allen encouraged Mr. Swanson to drop out. When Mr. Swanson did not drop out, Mr. Allen then failed to provide Mr. Swanson with individualized training as his ITP required, bullied Mr. Swanson, and continued trying to persuade him to leave his apprenticeship, all of which undoubtedly impacted Mr. Swanson's confidence and the rate at which he learned and progressed in his apprenticeship. After Mr. Swanson reported improper governmental activity by Mr. Allen, i.e. that Mr. Allen solicited and accepted alcohol from apprentices in exchange for a passing grade on an oral exam, Mr. Allen lobbied line workers and crew chiefs to downgrade Mr. Swanson's performance evaluations in an attempt to cancel his apprenticeship.

5.7 Over the ensuing months, Mr. Swanson received numerous performance evaluations, some of which were positive, and many of which identified ongoing issues, particularly regarding timing and rigging. While some of these evaluations may be suspect, given that they were drafted by Mr. Allen's sympathizers, others were given by crew chiefs and lineworkers including Ken Busby, Kath Johnson, and Barry Meyers whom Mr. Swanson respected and found unbiased.

5.8 By a preponderance of the evidence, I find that Mr. Legere's and Mr. McLeod's evaluations of Mr. Swanson for the month of approximately September 2012 do not amount to retaliation against Mr. Swanson under Chapter 42.41 RCW and Chapter 4.20 SMC. Although Mr. Legere's evaluation was unsatisfactory in that it stated Mr. Swanson was not performing up to step in all areas, and that he needed additional training, Mr. Swanson has not established by a preponderance of the evidence that Mr. Allen in any way influenced Legere's evaluation. Mr. Swanson's problem areas as identified by Mr. Legere were nothing new to Mr. Swanson; crew chiefs had made similar comments regarding Mr. Swanson's rigging skills and preparation for years. In addition, in ten out of fourteen categories Mr. Legere found Mr. Swanson "Met Expectations." Mr. Legere circled "ECAC" not to threaten Mr. Swanson's apprenticeship or hold him back, but to get him the training he needed to improve, for his own safety and the safety of his fellow lineworkers.

5.9 Mr. McLeod's evaluation, which critiqued Mr. Swanson personally as much as his work, appears to arise out of ongoing, unresolved interpersonal conflict, and lacks any tangible link to retaliation. In fact, Mr. Myers made similar personal remarks about Mr. Swanson, yet because of their rapport, Mr. Swanson thanked Mr. Myers and appreciated learning from him. Mr. Swanson and Mr. McLeod had no such rapport; Mr. McLeod and Mr. Swanson clashed from earlier times they worked together. More likely than not, Mr. McLeod's personality and teaching style, not Mr. Allen, caused this clash, and negatively impacted Mr. Swanson's ability to work, learn, and improve.

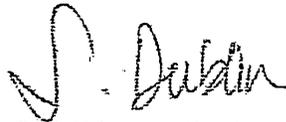
5.10 The PAL sticker and the impersonation of Mr. Swanson to the Seattle Times were undoubtedly hostile actions taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself. Because I find that the PAL sticker was first on Mr. Swanson's locker earlier than 30 days prior to Mr. Swanson's retaliation complaint to the Office of the Mayor, I do not consider it in determining whether SCL violated Chapter 42.41 RCW and Chapter 4.20 SMC. However, at the time the impersonation of Mr. Swanson to the Seattle Times took place, Mr. Allen was in a secondary supervisory position with the City over Mr. Allen because of his participation with the JATC, a City committee with authority to negatively impact Mr. Allen's apprenticeship. Consequently, Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times is actionable retaliation under Chapter 42.41 RCW.

VI. ORDER

IT IS HEREBY ORDERED that Respondent City of Seattle has violated Chapter 42.41 RCW. The following penalty is hereby assessed:

- (a) Mr. Allen is personally assessed a penalty of \$1,000.00, to be paid to the local government administrative hearings account created in RCW 42.41.060.
- (b) The undersigned recommends that Mr. Allen be suspended from employment with Seattle City Light for six months without pay.
- (c) The City of Seattle will pay the legal costs and attorney's fees Mr. Swanson incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW.
- (d) Under the provisions of RCW 4.56.110(4) and RCW 19.52.020(1), post-judgment interest shall accrue on the unpaid balance of all sums herein awarded at the rate of twelve percent per annum.
- (e) Under RCW 34.12.039, all costs for the services of Office of Administrative Hearings (OAH) in this case shall be paid by Respondent City of Seattle without apportionment to, or contribution by, Petitioner Mr. Swanson.

Signed and entered at Tacoma, Washington, this 17th day of September, 2013.



Lisa N. W. Dublin
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS

PETITION FOR RECONSIDERATION: This Final Order is subject to a petition for reconsideration if filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

JUDICIAL REVIEW AND ENFORCEMENT: Judicial review and enforcement of this Final Order is governed by RCW 42.41.040(9) and RCW 34.05.510 - .598. Relief ordered by the administrative law judge may be enforced by petition to superior court. The Final Order is subject to judicial review under the arbitrary and capricious standard. RCW 42.41.040(9). Proceedings for review shall be instituted by paying the fee required under RCW 36.18.020 and filing a Petition for Judicial Review in the superior court, at the petitioner's option, for (a) Thurston county, or (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514. Filing and service of a Petition for Judicial Review must be completed within thirty days after the date of mailing of the Final Order. RCW 34.05.514(1), .542; WAC 10-08-110(2)(c). If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3).

Filing and Service of a Petition for Judicial Review, is further specified in RCW 34.05.542 as follows: "... (2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

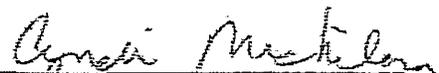
(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record."

Certificate of Service – OAH Docket No. 2013-LGW-0001

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Aaron Swanson c/o John P. Sheridan MacDonald Hoague & Bayless 705 Second Avenue, Suite 1500 Seattle WA 98104	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt
John P. Sheridan Partner MacDonald Hoague & Bayless 705 Second Avenue, Suite 1500 Seattle WA 98104	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt
Katrina R. Kelly Assistant City Attorney Seattle City Attorney's Office PO Box 94769 Seattle WA 98124-4769	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt
Zahraa Wilkinson, Co-Counsel Assistant City Attorney Seattle City Attorney's Office PO Box 94769 Seattle WA 98124-4769	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt
Carl Marquardt Counsel to the Mayor City of Seattle, City of the Mayor PO Box 94749 Seattle WA 98124-4749	<input checked="" type="checkbox"/> First Class US mail, postage prepaid <input type="checkbox"/> Certified mail, return receipt <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt

Date: September 17, 2013


 Cyndi Michelena
 Office of Administrative Hearings