

No. 72344-8-I

DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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AARON SWANSON,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE, SEATTLE CITY LIGHT,

*Respondent/Cross-Appellant.*

FILED  
May 22, 2015  
Court of Appeals  
Division I  
State of Washington

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**BRIEF OF RESPONDENT / CROSS-APPELLANT**

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## **I. INTRODUCTION**

The Superior Court rightly concluded that the Administrative Law Judge's finding of whistleblower retaliation and award of attorney fees (in excess of \$127,000) against Seattle City Light should be set aside. The ALJ's finding and award was based solely on an anonymous comment posted on a public website managed by the Seattle Times. City Light had no control over the website. There was no evidence the comment was posted by a City Light employee. And the website comment did not impact Appellant Aaron Swanson's employment. Despite this lack of evidence connecting the Seattle Times website comment to City Light, the ALJ nevertheless erroneously found the utility had retaliated under a state statute from which the City is exempt as matter of law. City Light therefore respectfully requests this Court to (1) affirm the Superior Court's finding that it was legal error for the ALJ to apply RCW 42.41 instead of Seattle Municipal Code 4.20.800 et. seq., and (2) set aside the ALJ's finding that the Seattle Times website comment was posted by a City Light employee because that finding was not supported by substantial evidence.

### **A. Reply to Swanson's Appeal**

It was legal error for the ALJ to apply the state statute regarding local government whistleblower protection instead of the City of Seattle's whistleblower protection code. The trial court correctly found that the

parties had agreed the Seattle Municipal Code governed Swanson's retaliation claim and that under the Code's definition of retaliation in SMC 4.20.850(D), the Seattle Times website comment was not retaliatory action. This ruling should be affirmed.

Swanson asks this Court to find that RCW 42.41 should apply despite (1) an explicit exemption in RCW 42.41 (Local Government Whistleblower Protection) for local governments that have implemented their own whistleblower protection program, and (2) Swanson's own agreement throughout the underlying proceedings that the City of Seattle's whistleblower protection code (SMC 4.20.800 *et. seq.*) governs. Swanson's argument falls flat. As recognized by this Court in *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134 (Wash. App. Div. I. 2013), SMC 4.20.800 *et. seq.* meets the intent of RCW 42.41 and therefore governs claims of whistleblower retaliation by City of Seattle employees.

The application of the City of Seattle's whistleblower protection code is fatal to Swanson's claims. The Seattle Times comment does not meet the definition of retaliation under the Seattle Municipal Code and events outside the 30-day statute of limitations should not be considered in determining if retaliation occurred. The trial court's reversal of the ALJ's award of costs and fees to Swanson should be affirmed.

## **B. City of Seattle's Cross-Appeal**

Even if the definition of retaliation contained in RCW 42.41 did apply, which City Light does not concede, the ALJ's award should be reversed as there is not substantial evidence to support the conclusion that the Seattle Times comment was posted by Ron Allen, that Allen was Swanson's supervisor, that Allen encouraged another employee to post the comment, or that another employee did in fact post the comment. There is not a scintilla of evidence in the record that links any City Light employee to the Seattle Times comment. The only evidence in the record is Swanson's own speculation that the comment was posted by one of Ron Allen's sympathizers. Speculation alone is not substantial evidence. Swanson failed to present substantial evidence to prove that the Seattle Times comment met the definition of retaliation in RCW 42.41. Without some evidentiary connection between the Seattle Times comment and City Light, it is unjust to hold City Light liable for actions it did not empower, authorize, or control. The trial court and ALJ's finding regarding the Seattle Times comment should be reversed.

## **II. ASSIGNMENTS OF ERROR**

### **A. Counter Statement of Issues Pertaining to Appellant's Assignments of Error**

1. Did the trial court properly determine that the provisions of the Seattle Whistleblower Protection Code governed Swanson's retaliation

claim where (1) the parties agreed that it so governed and (2) the state statute regarding local government whistleblowing, Chapter 42.41 RCW, explicitly provides local governments an exemption from the statute if they adopt a whistleblower program that meets the intent of the statute, and the City of Seattle adopted a whistleblower program that met the intent of RCW 42.41 by enacting the Seattle Whistleblower Protection Code, Seattle Municipal Code § 4.20.800 *et. seq.*? Yes.

2. Did the trial court properly determine that a comment on the Seattle Times website did not meet the definition of retaliation set forth in the Seattle Whistleblower Protection Code because said comment did not result in an adverse change in the terms and conditions of Swanson's employment as there was no evidence that the comment had any effect on Swanson's employment? Yes.

3. Did the trial court properly consider only the comment on the Seattle Times website in determining that Swanson had failed to meet the definition of retaliation under the Seattle Whistleblower Protection Code where it was the only alleged retaliatory action that took place within the limitations period? Yes.

4. Should the events at issue in this matter, including attorney fees on remand if necessary, be analyzed under the provisions of the

Seattle Municipal Code that was in effect at the time Swanson filed his whistleblower retaliation complaint on November 9, 2012? Yes.

**B. Cross-Appellant’s Assignments of Error**

1. The trial court erred in finding that “the record [was] sufficient to support the ALJ’s factual finding in C.L.5.10.” CP 685.<sup>1</sup>

**C. Issues Pertaining to Cross-Appellant’s Assignments of Error**

1. Was there a lack of substantial evidence in the record to support the ALJ’s conclusion that “Mr. Allen’s encouragement and/or commission of the impersonation of Mr. Swanson publically to the Seattle Times is actionable retaliation under Chapter 42.41 RCW” where no evidence was presented that Mr. Allen was Swanson’s supervisor or that he impersonated Swanson to the Seattle Times or encouraged another Seattle City Light employee to post the Seattle Times comment? Yes.

**III. STATEMENT OF THE CASE**

**A. Nature of the Case**

Appellant Aaron Swanson filed a complaint of whistleblower retaliation with the City of Seattle Mayor’s Office, alleging that he had been retaliated against in violation of Seattle Municipal Code 4.20.810(C)

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<sup>1</sup> The Clerk’s Papers include a Certified Record of Administrative Adjudicative Orders pursuant to RAP 9.7(c). The Certified Record of Administrative Adjudicative Orders will be cited to herein using the acronym AR followed by the internal page number.

by Ron Allen, an employee of Respondent/Cross-Appellant City of Seattle, Seattle City Light. AR 836-838. Swanson requested an administrative hearing, which was held before ALJ Lisa Dublin. AR 3-4.

**B. The Parties**

Seattle City Light is a publicly-owned utility that generates and distributes electrical power in the Seattle area. City Light's electrical lineworkers build, repair and maintain City Light's electrical lines, including those that carry high voltage: because that work is dangerous, lineworkers must be skilled and knowledgeable to work safely. CP 1598 (999:4-8 Brooks); CP 1119-1120 (524:24-525:13 Kennedy); CP 1730 (1131:3-12 Caddy).<sup>2</sup> The lineworkers at City Light are members of the International Brotherhood of Electrical Workers, Local 77. AR 880-81 (collective bargaining agreement).

The City has various apprenticeship programs, including City Light's lineworker apprenticeship program in which Swanson participated. CP 2070-2071 (1467:9-1468:8 Hill). The City's apprenticeship programs are governed by a state entity, the Washington State Apprenticeship Training Council, which sets the standards for the apprenticeship

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<sup>2</sup> All CP citations that are followed by (page:line [witness name]) in this brief are citations to the stipulated transcript recorded during the administrative hearing. A stipulation of the parties describing, and agreeing to, the stipulated transcript was filed with the trial court. CP 456-461.

programs. CP 2073 (1470:2-14 Hill). These standards are administered by a Joint Apprenticeship Training Committee (“JATC”) made up of three union representatives and three management representatives from various City Departments. AR 1002-55 (apprenticeship standards); CP 2182 (1579:7-16 Johnson); CP 2283 (1680:12-23 Johnson); CP 2070-2071 (1467:19-1468:6 Hill). Neither City Light, nor the JATC has the ability to set, modify or deviate from the standards set by the state. CP 2182 (1579:7-25 Johnson); CP 2073 (1470:2-14 Hill). City Light does not have any control over the actions taken by the JATC. CP 2182 (1579:20-22 Johnson). The Washington State Apprenticeship Training Council has authority to review decisions made by the JATC, not City Light. CP 2182 (1579:7-11 Johnson); CP 2078-2079 (1475:9-1476:6 Hill).

Swanson started working at City Light as a lineworker Pre-Apprentice in February 2009. CP 966 (373:16-19 Swanson). He completed that program and started working as a lineworker apprentice at City Light on August 25, 2009. CP 966 (373:16-21 Swanson); AR 984 (Apprenticeship Agreement).

Although not a party to this appeal or the underlying administrative hearing, Ron Allen was the City Light employee who was the subject of Swanson’s retaliation complaint. AR 836-838 (complaint). City Light has employed Ron Allen as a City Light lineworker since 2003. CP 2534-2535

(124:24-125:22 Allen). From September 2010 until December 2011, Mr. Allen was assigned to work in the apprenticeship office as a Craft Instructor, and it was in that capacity that he interacted with Swanson during Swanson's apprenticeship. CP 2538-2539 (128:18-129:1 Allen), CP 2550-2551 (140:9-141:16 Allen), CP 2572-2575 (162:10-165:15 Allen), CP 2586 (176:8-13 Allen). In July 2012, Ron Allen was nominated by Local 77 as its union representative on the JATC, although City Light disagreed with the nomination. CP 2541-2542 (131:3-132:1 Allen); CP 2190 (1587:16-24 Johnson). During the time frame relevant to this matter, Mr. Allen was not a properly appointed member of the JATC and had not voted on any JATC decisions pertaining to Swanson's apprenticeship. CP 2591-2592 (181:21-182:1 Allen); CP 2190 (1587:13-24 Johnson). City Light attempted to reduce Allen's influence on the JATC, but had no authority to remove him. CP 2541-2542 (131:3-132:1 Allen); CP 2591-2592 (181:21-182:1 Allen); CP 2190 (1587:16-24 Johnson).

### **C. Background**

#### **1. The Alcohol Incident**

In August 2010, Mr. Allen gave an oral test to nine apprentices, including Swanson. CP 2542 (132:8-12 Allen); CP 2546 (136:22-25 Allen); CP 1237 (642:13-16 Swanson); AR 1317 (Knox report). After the test, Mr. Allen told them that they didn't do well and that they had to re-take the test.

CP 2547 (137:1-9 Allen); AR 1321 (Knox report). An unidentified apprentice then said something like “would a bottle of alcohol help?” in a joking or sarcastic way, and Mr. Allen responded in the affirmative. AR 1321 (Knox report); AR 512 (Agency Order, ¶ 4.12). At the re-test, each of the nine apprentices, including Swanson, brought a bottle of alcohol, and placed it on the desk at the end of the test. CP 2548 (138:13-139:2 Allen); CP 1240 (645:22-646:15 Swanson); AR 1321-22 (Knox report). All apprentices passed the test and Mr. Allen kept the bottles, placing them in a box. CP 2549 (139:3-4 Allen); AR 1322 (Knox report). Swanson did not report that Mr. Allen had taken the alcohol at the time of the incident. CP 1242-1243 (647:20-648:6 Swanson).

**2. After Receiving Notice that His Apprenticeship Was Recommended to be Cancelled, Swanson Reports the Year-Old Alcohol Incident to City Light.**

In early 2011, it was clear Swanson was struggling in his apprenticeship and in March 2011, the JATC extended Swanson’s apprenticeship for 6 months. AR 988-90 (JATC letter). Swanson agreed to the extension, but he continued to have difficulty, particularly with rigging and working proficiently at heights. CP 1264-1265 (669:8-670:1 Swanson); CP 1702-1708 (1103:13-1109:8 Brooks); AR 1172-1175 (July 2011

performance evaluation).<sup>3</sup> On August 9, 2011, Swanson was notified that the JATC was to consider a recommendation for his apprenticeship to be cancelled.<sup>4</sup> AR 991-93 (letter); CP 1218 (623:10-22 Swanson). After receiving this notice and a year after the alcohol incident occurred, Swanson reported to City Light that Ron Allen had accepted alcohol from apprentices during the administration of a test. CP 1218-1219 (623:23-624:5 Swanson); CP 2507-2508 (97:23-98:9 Tran). Six months later, Swanson reported the incident to the Ethics and Elections Commission. CP 2507-2508 (97:23-98:6 Kim Tran); CP 1218 (623:6-9 Swanson).<sup>5</sup> After making these reports, Swanson continued to receive negative comments on his performance evaluations, just as he had before he made the report. CP 1602-1615 (1003:6-1016:9 Brooks); AR 1172-75 (July 2011 performance evaluation); AR 1176-80 (August 2011 performance evaluation); CP 1700-1708 (1101:3-1109:8 Caddy); AR 1224-1226 (October 2012 performance evaluation).

After Swanson's reports, City Light investigated the alcohol incident and on May 2, 2012, Ron Allen was suspended for 20 working

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<sup>3</sup> Swanson had these performance issues during several rotations during his apprenticeship. E.g., CP 1731-1735 (1132:8-1136:20 Caddy); AR 1224-1226 (October 2012 performance evaluation).

<sup>4</sup> Swanson's apprenticeship was not cancelled. AR 994-996 (September 29, 2011 letter).

<sup>5</sup> Swanson was not the first City Light employee to report the alcohol incident to the Ethics and Elections Commission. CP 2474-2476 (64:17-66:6 Kate Flack). Mr. Allen testified that he assumed it was the Apprenticeship Manager, Karen DeVenaro, that had made the ethics complaint. CP 2585 (175:14-24 Allen).

days. CP 2509-2516 (99:21-106:16 Kim Tran); CP 2209-2210 (1606:18-1607:5 Johnson); AR 1264-69 (Knox report, April 10, 2012); AR 1270-74 (Allen discipline letter).

**3. Swanson Files a Complaint of Whistleblower Retaliation with the City of Seattle Mayor's Office.**

On November 9, 2012, Swanson filed a complaint of whistleblower retaliation, entitled "complaint of retaliation pursuant to SMC [Seattle Municipal Code] 4.20.860," with the City of Seattle Mayor's Office, claiming that he had been retaliated against for reporting the incident where Ron Allen took alcohol from apprentices. AR 836-38 (complaint). Although Swanson detailed a timeline of alleged events in his complaint dating back to August 20, 2010, under the timeliness provision of Seattle Municipal Code ("SMC") 4.20.860 only acts occurring in the 30 days prior to Swanson's complaint (October 10, 2012 or after) were timely.<sup>6</sup> AR 450-464 (City's Post-Hearing Brief); AR 525 (Agency Order, ¶ 5.10) (specifically finding that PAL sticker issue was untimely). Swanson requested an administrative hearing and the City of Seattle applied to the Office of Administrative Hearings for an adjudicative

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<sup>6</sup> Both SMC 4.20.860 and RCW 42.41.040(3) require that the employee provide written notice of the retaliation complaint within 30 days of the alleged retaliatory act. RCW 42.41.040(3) ("no later than 30 days after the occurrence of the alleged retaliatory action"); SMC 4.20.860(A) ("within 30 days of the occurrence alleged to constitute retaliation").

proceeding before an administrative law judge. AR 1-2.

**D. Proceedings Below**

**1. Administrative Hearing**

An administrative hearing on Swanson's whistleblower retaliation claims was held before Administrative Law Judge Lisa Dublin under RCW 34.05.419. AR 3. The hearing took place over eight days between February 12, 2013 and June 25, 2013. AR 508 (Agency Order, ¶ 3.1).

**a) The Parties Agree That the Seattle Municipal Code Is the Governing Law**

The pre-hearing order that was issued by the ALJ articulated the issue for hearing as whether the statute regarding local government whistleblower protection had been violated:

Whether Respondent City of Seattle retaliated against Petitioner Aaron Swanson in violation of RCW Chapter 42.41?

AR 101-104 at 102 (Prehearing Conference Order). The City of Seattle filed an objection to the issue statement requesting that it be changed to reference the Seattle Municipal Code provisions regarding whistleblower protection instead of the statute. AR 91-94 (City's Objection).

At the hearing, Swanson did not contest that the Seattle Municipal Code applied to the proceedings and stated that the state statute only applied insofar as the municipal code referred to procedures in the state statute. CP 766 (12:14-16 Mr. Sheridan "I think that from our perspective,

the Seattle Municipal Code is the code that is bringing us here today.”); CP 767 (13:10-16 Mr. Sheridan). Consistent with this statement, Swanson’s complaint of retaliation also articulated his complaint with respect to the Seattle Municipal Code. AR 836 (“Mr. Swanson alleges he has been retaliated against for reporting improper governmental action in violation of SMC 4.20.810(C).”) At the hearing, the ALJ stated she would “take out any specific mention of any statute in the issue.” CP 767-768 (13:25-14:1 ALJ). At the close of proceedings, each party submitted a closing brief that argued the retaliation issue based on the definition of retaliation in the Seattle Municipal Code. AR 464-474 (City’s post-hearing brief); CP 424-439 (Swanson’s post-hearing brief).

**b) Scope of Hearing**

Although Swanson claimed retaliation for alleged events outside the 30-day limitations period, the only alleged retaliatory events within the 30-day period were (1) performance evaluations given to Swanson in October 2012, and (2) a comment on the Seattle Times website. AR 525 (Agency Order, ¶¶ 5.8, 5.9, and 5.10) (only drawing legal conclusions regarding the performance reviews and the Seattle Times comment, and specifically finding that the PAL sticker issue was untimely because it occurred “earlier than 30 days prior to Mr. Swanson’s relation complaint”). The ALJ made it clear during the hearing that the time period

at issue was limited to the 30 days prior to Swanson's complaint. CP 2230 (1725:11-22 ALJ Dublin); CP 2367 (1762:3-9 ALJ Dublin). Although the vast majority of the administrative hearing was spent on evidence relating to Swanson's performance evaluations, the ALJ's retaliation finding relied exclusively on Swanson's claim regarding the Seattle Times website comment. AR 525 (Agency Order, ¶ 5.10).

**c) Evidence and Testimony Regarding the Seattle Times Comment**

In his whistleblower retaliation complaint, Swanson complained about an incident "where someone claiming to be me posted a comment to a newspaper article about Ron Allen (see attached news article and comments)." AR 838 (Swanson complaint). The comment was posted on the Seattle Times website in response to an article entitled "Ethics fines may follow gifts of liquor to City Light trainer" which reported that Ron Allen was facing charges by the Seattle Ethics and Elections Commission relating to the incident where Mr. Allen took alcohol from apprentices. AR 840 (Seattle Times article). The comment on the Seattle Times website was posted at 2:56 am on November 7, and stated in full:

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 [sic] Swanson Seattle city light scc

AR 841 (Seattle Times website printout). The Seattle Times website is a public forum, where anyone can write in. CP 1803 (1202:7-19 Proudfoot). On November 7, 2013, when Swanson became aware of the website comment, he emailed City Light's Employee Relations Manager, Heather Proudfoot, and sent her a link to the comment, noting that "someone is posting as me, but they cannot even spell my name correctly." AR 1363 (Swanson email). Swanson did not identify anyone specific whom he thought was responsible for the posting. 1204:13-20 (Proudfoot). Ms. Proudfoot immediately investigated. CP 1801-1803 (1200:14-1202:19 Proudfoot). When she could not determine who had posted the comment, or even whether the comment had been posted by a City Light employee, she responded to Swanson suggesting that he contact the Seattle Times directly to ask for information and report abuse.<sup>7</sup> AR 1364 (Proudfoot email). She asked Swanson to let her know if he learned more information so that City Light could determine if it could address the behavior. *Id.* Swanson never responded. 1203:22-1204:4 (Proudfoot).

Swanson called the Seattle Times and asked for the comment to be removed because he was not the author. CP 1205 (610:5-11 Swanson). The comment was removed from the website. CP 1805 (1204:7-12

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<sup>7</sup> Because it was Swanson, not City Light, who had been impersonated in the website comment, City Light had no standing to make a complaint to the Seattle Times. CP 1802-1803 (1201:18-1202:6 Proudfoot).

Proudfoot). Swanson did not find out who posted the comment. CP 1405-1406 (808:18-809:7 Swanson). However, he speculated the comment author was someone who sympathized with Ron Allen:

Q: Do you think Ron Allen put the comment out on the Seattle Times website?

A: It was somebody who didn't know how to spell my first name, I know that. I don't know that it was Ron.

Q: But who do you think did it?

A: That's a good question. I would imagine it was one of his sympathizers.

CP 1406 (809:8-15 Swanson). Significantly, Swanson called Ron Allen to testify at the hearing, but did not ask him any questions about the Seattle Times website comment or whether he authored the comment or encouraged someone else to do so. CP 2534-2596 (124:1-186:12 Allen). No witnesses other than Proudfoot and Swanson testified regarding the Seattle Times comment.

**d) ALJ's Findings of Fact, Conclusions of Law and Final Order**

The ALJ issued her Findings of Fact, Conclusions of Law and Final Order on September 17, 2013. AR 508-528 (Agency Order).

Although the findings of fact detail the events in each year of Swanson's apprenticeship (beginning in 2009), a specific section is designated as detailing events that occurred "Thirty Days Prior to Mr. Swanson's Whistleblower Retaliation Complaint under Chapter 42.41

RCW and Chapter 4.20 SMC.” AR 518-521 (Agency Order). Similarly, the conclusions of law were based entirely on events that took place 30 days prior to Swanson’s retaliation complaint. AR 525 (Agency Order, ¶¶ 5.8-5.10).

The ALJ found the performance evaluations were not retaliatory:

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 [received by Swanson on October 11, 2012] do not amount to retaliation against Mr. Swanson under Chapter 42.41 RCW and Chapter 4.20 SMC.

AR 525 (Agency Order, ¶ 5.8).

The ALJ found that the PAL sticker incident should not be considered as it was outside of the 30 day limitations period:

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 [sic – Swanson] because of his participation with the JATC, a City committee with authority to negatively impact Mr. Allen’s [sic – Swanson] 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 525 (Agency Order, ¶ 5.10). The Seattle Times comment was the only event that the ALJ found to constitute retaliation, and in so finding relied exclusively on RCW 42.41. AR 525 (Agency Order, at ¶ 5.10).

On the basis of her conclusion regarding the Seattle Times website comment, the ALJ imposed a penalty of \$1,000 against Mr. Allen, even though he had not been a party in the proceeding. AR 526 (Agency Order). The ALJ also ordered penalties against the City of Seattle which included a requirement for City Light to pay Swanson's legal costs and attorney fees. *Id.* The invoice submitted by Swanson for attorney fees and costs was for \$127,053.13. CP 74-83 (invoice).

## **2. Superior Court Judicial Review**

### **a) City Light, Swanson and Ron Allen All Petition for Judicial Review**

On October 17, 2013, City Light and Ron Allen each submitted a petition for judicial review pursuant to Administrative Procedure Act, RCW Chapter 34.05. CP 190-212 (City's Petition for Judicial Review); CP 1-4 (Allen's Petition for Judicial Review). On October 21, 2013 – four days late – Swanson submitted his petition for review. CP 97-108 (Swanson's Petition for Judicial Review). The three cases were subsequently consolidated. CP 32-32 (Trial Court Order Consolidating). Swanson's untimely petition was dismissed. CP 462-464 (Trial Court Order). Allen's Petition raised a troubling due process issue, namely that

he had been personally fined by the ALJ despite the fact that he was not a party to the administrative proceedings and had not been given notice of the potential for a fine or an opportunity to be heard. This due process violation was so striking that all three parties agreed the ALJ had violated Allen's due process rights and stipulated to removing the \$1,000 fine. CP 683-685 (Trial Court Order). Only the City of Seattle's petition for judicial review remained for consideration by King County Superior Court Judge Jeffrey Ramsdell. 683-685 (Trial Court Order).

City Light's petition raised two issues: (1) whether there was a lack of substantial evidence in the record supporting the ALJ's conclusion that the Seattle Times comment was actionable retaliation under Chapter 42.41 RCW, and (2) whether the ALJ committed legal error when she applied the definition of retaliation in Chapter 42.41 RCW instead of the definition used in Seattle's Whistleblower Protection Code (SMC 4.20.850(D)) as required by the statutory exemption in RCW 42.41.050. CP 190-212 (City's Petition for Judicial Review). In response, Swanson relied entirely on the definition of retaliation set forth in SMC 4.20.850(D); argued that all events should be considered in determining whether retaliation occurred; stated that the difference between the definitions of retaliation in RCW 42.41 and SMC 4.20.850(D) was "a distinction without a difference;" and that the ALJ's reference to only

RCW 42.41 in her conclusion regarding the Seattle Times comment was “likely simply a secretarial error rather than a legal error.” CP 631-632 (Swanson’s Response to Trial Briefs of City and Allen). Swanson did not argue that the definition of retaliation in RCW 42.41 should apply, nor did he identify anything in the record linking Ron Allen or another City Light employee to the Seattle Times comment. CP 612-633 (Swanson’s Response Brief).

**b) Order on Petition for Judicial Review**

In its June 18, 2014 order, the trial court held that the Seattle Municipal Code governed Swanson’s retaliation claim:

2. The parties agree that the Seattle Municipal Code (SMC) governs Mr. Swanson’s retaliation claims rather than the provisions of RCW 42.41. *Woodbury v. City of Seattle*, 122 [sic] Wn. App. 747 (2013); RCW 42.41.050.

3. The definitions of “retaliatory action” in RCW 42.41.030(3) and SMC 4.20.850(D) are different. In finding that the impersonation of Mr. Swanson in the Seattle Times Website constituted retaliation, the ALJ specifically found that the conduct was actionable under RCW 42.41. Despite numerous prior references to both the State and Municipal codes in conjunction, the ALJ’s statement in C.L. 5.10 is notable in that it refers solely to RCW 42.41. Furthermore, the language utilized by the ALJ reflects reliance on the definition of retaliatory action found in RCW 42.41.020(3)(b). Accordingly, it appears that the ALJ was deliberately relying solely upon the State statute definition and the reference to RCW 42.41 is not merely a “secretarial error” as asserted by Mr. Swanson.

4. While the impersonation of Mr. Swanson may be sufficient to constitute retaliatory action pursuant to RCW 42.41.020(3)(b), it is insufficient under SMC 4.020.850(D). No evidence was presented that the impersonation resulted in any unwarranted adverse change in Mr. Swanson's employment status or the terms and conditions of his employment. The ALJ's failure to cite SMC 4.20.850(D) in conjunction with RCW 42.41 appears to be a tacit acknowledgement of that deficiency.

CP 684-685 (Trial Court Order). The trial court then went on to make the following finding regarding the Seattle Times comment:

5. ...While the record on [the Seattle Times comment] is not well developed, 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. 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 and no other individuals were identified with similar interests or motives. Accordingly this Court finds that the record is sufficient to support the ALJ's factual finding in C.L. 5.10.

CP 685 (Trial Court Order).

Based on its findings in determining that the Seattle Municipal Code governed Swanson's retaliation claim (2-4 above) the Court ordered (1) that the ALJ erred as a matter of law in relying on the definition of retaliation found in RCW 42.41.020(3)(b); (2) that the finding of actionable retaliation set forth in C.L. 5.10 is stricken; and (3) that the award of legal costs and attorney's fees to Swanson is reversed. CP 685 (Trial Court Order).

Swanson filed a motion for reconsideration, to which the trial court did not request a response. CP 688-707 (Swanson's Motion for Reconsideration). The trial court denied Swanson's motion. CP 710-711 (Trial Court Order re Reconsideration). Swanson filed a notice of appeal and the City filed a notice of cross appeal. CP 2803-2815 (Swanson's Notice of Appeal); CP 2816-2820 (City's Notice of Cross Appeal).

#### **IV. LEGAL ARGUMENT IN RESPONSE TO APPELLANT'S BRIEF**

##### **A. Standard of Review**

Judicial review of the ALJ's final order is governed by the Administrative Procedure Act. RCW 34.05.570(3). The reviewing court shall grant relief from an agency order if the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). An agency's conclusions of law are reviewed de novo. *Timberlane Mobile Home Park v. Washington State Human Rights Commission*, 122 Wn. App. 896, 900, 95 P.3d 1288 (2004). Under this standard, a court may substitute its interpretation of the law for the agency's interpretation. *Ryan v. State Dept. of Social and Health Services*, 171 Wn. App. 454, 465, 287 P.3d 629 (2012). Although an agency's interpretation of a statute is afforded deference where the agency has expertise because it is charged with administering a field of law, it is ultimately for the court to determine the meaning and purpose of a statute. *City of Redmond v. Central Puget Sound*

*Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (conclusions of state law entered by an administrative agency are not binding on the court).

**B. Appellant Cannot Argue for the First Time on Appeal That the Seattle Whistleblower Protection Code Failed to Meet the Intent of RCW 42.41**

Swanson opens his brief by arguing for the first time that the definition of retaliation contained in the Seattle Whistleblower Protection Code contravenes the intent of RCW 42.41, therefore the City of Seattle Whistleblower Ordinance does not meet the exemption contained therein and the definition of retaliation found in RCW 42.41 should govern. Appellant's brief at 27-32. This is the first time Swanson has argued such a theory of relief – i.e., that the Seattle Whistleblower Protection Code fails to meet the intent of RCW 42.41. Indeed, Swanson has agreed at every stage of the proceedings below that the Seattle Municipal Code governs the issues in this matter – he agreed during the administrative hearing that the SMC governed, he cited and argued the definition of retaliation under the SMC in his post hearing brief, and he responded to the City of Seattle's petition for judicial review not by arguing that RCW 42.41 governed, but by arguing that the difference between the definitions of retaliation were a “distinction without a difference” and that a clerical error had likely occurred. CP 631-362 (Swanson's Response to City and

Allen's Trial Briefs). Not until his motion for reconsideration did Swanson mention this new theory. CP 688-707 (Motion for Reconsideration).

Swanson cannot present a theory for relief that he failed to plead, or that was not impliedly tried, in the proceedings below. *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999). Inclusion of this new theory in Swanson's motion for reconsideration (to which the Court did not require City Light to respond) is insufficient to argue that the issue was tried below. *Id.* ("A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along"). Swanson cannot now argue that the state statute governs, where all parties have proceeded up until now with the understanding that the provisions of the Seattle Municipal Code governed. *See Brownfield v. City of Yakima*, 178 Wn. App. 850, 868, 316 P.3d 520 (2014) (finding that the City of Yakima was exempt from RCW 42.41 due to its whistleblower policy in its employee handbook and holding that appellant could not argue for the first time on appeal that the City of Yakima violated its own whistleblower ordinance when up until the time of appeal appellant had claimed that the City of Yakima had violated RCW 42.41). For this reason alone, Swanson's appeal must fail.

**C. The Trial Court Correctly Applied the Definition of Retaliation Set Forth in the Seattle Municipal Code, Overturning the ALJ's Erroneous Application of the Definition of Retaliation Set Forth in State Statute**

Despite Swanson's contentions to the contrary, the superior court correctly found that the ALJ erred by basing her single finding of retaliatory conduct on the definition of retaliation found in RCW 42.41.020 rather than the definition under SMC 4.20.850(D). CP 683-685 (Trial Court Order). The definition of retaliation contained in SMC 4.20.850(D) applies because (1) as this Court held in *Woodbury*, 172 Wn. App. 747, the City of Seattle's own whistleblower program met the intent of the state statute, exempting it from RCW 42.41 (RCW 42.41.050) and (2) the parties agreed at all times during the hearing and on judicial review that the Seattle Municipal Code governed the agency proceedings.

**1. The Seattle Municipal Code Met the Intent of RCW 42.41 Rendering the City of Seattle Exempt from the Statute's Provisions**

RCW Chapter 42.41 explicitly permits local governments to exempt themselves from that statute if they adopt a whistleblower program that meets the intent of the chapter:

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.

RCW 42.41.050 (emphasis added). This is not a piecemeal exemption where the state statute applies to fill in gaps where the local government program is found to be lacking. Rather, as long as the local government program meets the intent of the statute, then the exemption operates. Courts have applied this exemption to find that the local government's program applies instead of the statute. *E.g.*, *Dewey*, 95 Wn. App. 18 (applying school district policy instead of Chapter 42.41 RCW); *Wilson v. City of Monroe*, 88 Wn. App. 113, 123, 943 P.2d 1134 (1997) (applying City policy instead of Chapter 42.41 RCW because remedies under City policy were "not substantially weaker than under the statute."); *Keenan v. Allen*, 889 F. Supp. 1320, 1365 (E.D. Wash. 1995) *aff'd* 91 F.3d 1275 (9<sup>th</sup> Cir. 1996) (finding state statute inapplicable, explaining RCW 42.41.050's exemption applies when local government has program in place – it is not necessary for the program's procedures to be followed to trigger the exemption).

Chapter 42.41 RCW is explicit about its purpose:

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.

RCW 42.41.010. Here, the purpose of the applicable City Code is essentially the same as the state statute, namely to:

Provide City employees a process for reporting improper governmental action and protection from retaliatory action for reporting and cooperating in the investigation and/or prosecution of improper governmental action in good faith.

AR 854 (SMC 4.20.800). Not only is the stated purpose of the state statute and the City's whistleblower protection code the same, but the procedures for an employee to seek relief through an administrative hearing and the remedies allowed are identical. AR 863 (SMC 4.20.860, incorporating by reference the remedies provided for in RCW 42.41.040).

This Court has found that the relevant Seattle Municipal Code's provisions meet the intent of Chapter 42.41 RCW. In *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134 (Wash. App. Div. I, 2013), which involved the same provisions of the Seattle Municipal Code that are at issue in this case, the court found that the City's whistleblower protection code provided an exemption from the state statute. *Woodbury*, 172 Wn. App. at 175 (quoting RCW 42.41.050, which provides for the exemption, and then stating "The City promulgated such rules"). In short, the City's whistleblower protection code triggered the exemption in RCW 42.41.050 and, as the trial court found, the ALJ should have applied the City's code – not the state statute – to Swanson's claims.

Although Swanson attempts to overcome *Woodbury* by encouraging the Court to look to the revised Seattle Municipal Code as

persuasive authority, this argument is unpersuasive. There is no real dispute that the prior version of the whistleblower protection code applies here. The City of Seattle's whistleblower protection code was amended effective January 2014 and explicitly states that its application is prospective only. Appellant's Appendix at 57. The version of the whistleblower protection code in the administrative record before this Court contains the provisions that were in effect in 2013 and that apply to this case. AR 854-864 (Seattle Municipal Code). Those are the same provisions that this Court considered in *Woodbury* and found sufficient to trigger the exemption in the state statute.

**2. Carbon Copy Definitions Are Not Required for the Seattle Municipal Code to Meet the Intent of RCW 42.41**

Swanson would lead the Court to believe that unless SMC 4.20 is a carbon copy of RCW 42.41 the City of Seattle is not exempt from the state statute. However, the clear import of the exemption provision in RCW 42.41 is that the legislature intended to allow local governments flexibility in enacting their own Whistleblower programs, so long as each program substantially accomplished the statute's stated purpose. *Wilson*, 88 Wn. App. at 123 (City of Monroe's Whistleblower program exempt from RCW 42.41 where remedies "not substantially weaker than under the statute," program permitted "appropriate relief provided by law," and no provisions permitted

City to disregard the ALJ's decision); *Keenan* , 889 F.Supp. at 1365 (Grant County whistleblower program met intent of RCW 42.41 because it provided protection for whistleblowing employees and provided remedies for retaliation) *Cf. Yakima v. Yakima Police and Fire Civil Service Comm.*, 29 Wn. App. 756, 762, 631 P.2d 400 (1981) (construing RCW 41.08.010, which establishes exemption from civil service provisions, and finding that the statute "does not mandate compliance with the methods used in the statute; rather, it requires substantial accomplishment of its purpose.") No Washington Court has found that a local government's whistleblower program failed to meet the intent of RCW 42.41. Indeed, the state and local government whistleblower statutes, both drafted by the state legislature, have a nearly identical stated purpose yet contain different definitions of retaliation. *Cf.* RCW 42.41 (Appellant's Appendix at 1-5) and RCW 42.40 (Respondent / Cross Appellant's Appendix at A-1-A-10). SMC 4.20's definition of retaliation is not required to mirror the definition contained in RCW 42.41 in order to exempt the City of Seattle from the state statute.

**3. The Parties Agreed the Seattle Municipal Code Governed and the ALJ Erred by Relying on RCW 42.41**

During the administrative proceedings, the parties did not dispute that the Seattle Municipal Code governed. CP 766 (12:14-16 Mr. Sheridan "I think that from our perspective, the Seattle Municipal Code is the code

that is bringing us here today.”) In their closing briefs, both parties relied on the definition of retaliation in the Seattle Municipal Code (SMC 4.20.850(D)). AR 464-474 (City’s post-hearing brief); AR 424-439 (Swanson’s post-hearing brief). However, in finding that there had been retaliation, the Administrative Law Judge did not look to the Seattle Municipal Code’s definition of retaliation, but instead relied solely on the definition of retaliation in RCW 42.41.020. AR 525 (Agency Order, ¶ 5.10) (emphasis added). It was legal error for her to apply the state statute, and this error directly impacted the result, prejudicing City Light.

The Seattle Municipal Code regarding whistleblower protection defines “retaliation” in a manner that requires some kind of adverse change in employment status or conditions of employment:

‘Retaliate,’ and its kindred nouns, “retaliation” and “retaliatory action,” mean to make, because of an activity protected under [Seattle Municipal Code] Section 4.20.810, any unwarranted adverse change in an employee’s employment status or the terms and conditions of 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 (SMC 4.20.850(D)) (emphasis added). RCW 42.41.020(3) is substantially similar to the above definition adopted by the Seattle

Municipal Code. However, the state statute includes within the definition of retaliation actions that are not connected to a change in terms and conditions of employment, namely:

[H]ostile 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)(b).

The ALJ relied upon RCW 42.41.020(3)(b) to find retaliation, essentially finding that Ron Allen had encouraged someone else to post the Seattle Times website comment. This finding – which is unconnected to the City Light workplace and which is unconnected to Swanson’s employment status or to the terms and conditions of his employment at City Light – cannot be sustained using the definition of retaliation in the Seattle Municipal Code. AR 861 (SMC 4.20.850(D)). The Seattle Times website, which is a forum open to comments by any member of the public, is not part of City Light’s workplace, and is not something that City Light has any control over. As demonstrated below, there is no evidence in the record that it was a City Light employee – as opposed to someone else – who posted the comment. And the comment was removed by the Seattle Times shortly after Swanson complained to the Seattle Times. As such, the website comment does not fall under the definition of retaliation in SMC 4.20.850(D), which requires an adverse change in employment

status or terms and conditions of employment.

**4. The Definitions of Retaliation in SMC 4.20.800 et. seq. and RCW 42.41 Are Different, but Are Not Conflicting – the Seattle Municipal Code Does Not “Give Way” to RCW 42.41**

Swanson makes a constitutionality argument, asserting that because of the slight difference in the definition of retaliation, SMC 4.20.800 et. seq. is in conflict with the general laws of the state, here RCW 42.41, and as such the Seattle Municipal Code must “give way” to RCW 42.41’s definition of retaliation. However, the law is well established that “a local ordinance does not conflict with a state statute in the constitutional sense merely because one prohibits a wider scope of activity than the other.” *City of Seattle v. Eze*, 111 Wn.2d 22, 33, 759 P.2d 366 (1988) (citing multiple Washington cases). In fact, the authority relied upon by Swanson in making this argument, *City of Tacoma v. Franciscan Foundation*, 94 Wn. App. 663, 669, 972 P.2d 566 (1999), notes that “[i]n determining whether an ordinance conflicts with general laws, the test is: ‘whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.’” *Id.* (citing *Bellingham v. Schampera*, 57 Wn.2d 106, 111, 356 P.2d 292 (1960)).

The slightly different definition of retaliation found in SMC 4.20.850(D) in no way permits or licenses that which RCW 42.41

prohibits, namely retaliation. To the contrary, both SMC 4.20 and RCW 42.41 prohibit retaliation. RCW 42.41 arguably prohibits a slightly different scope of retaliatory activity than SMC 4.20, but the difference in the scope does not render SMC 4.20 in conflict with RCW 42.41 in the constitutional sense. *Eze*, 111 Wn.2d at 33-34 (where an ordinance and a statute merely differ in terms of the scope of their prohibitions, the ordinance does not unconstitutionally conflict with state law).<sup>8</sup>

**D. Authorities Interpreting Hostile Work Environment Under the WLAD Have No Bearing on SMC Chapter 4.20**

If Swanson's arguments that RCW 42.41 should govern fall flat, as they should for the reasons set forth above, he poses an alternative argument asserting that the definition of retaliation found in SMC 4.20.800 et. seq. silently includes a claim of hostile work environment / harassment as it is analyzed under the Washington Law Against Discrimination and therefore SMC 4.20.800 et. seq. has no actual limitations period. Such an illogical argument should not be entertained.

**1. The Seattle Municipal Code's Whistleblower Protection Ordinance Is Unrelated to Harassment Claims Under the Washington Law Against Discrimination**

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<sup>8</sup> As noted above in section IV(C)(2) the SMC does not need to mirror the definition of retaliation set forth in RCW 42.41.

Swanson goes to great lengths citing an array of cases relating to harassment under RCW 49.60 (the Washington Law Against Discrimination - WLAD) instead of citing cases regarding whistleblower retaliation. The City of Seattle does not dispute that under the WLAD a harassment claim can be based on a hostile work environment where the analysis requires consideration of all circumstances, and where under limited circumstances claims may be based on acts that span beyond the 3-year limitations period and constitute a single unlawful employment practice. *See Antonius v. King County*, 153 Wn.2d 256, 103 P.3d 729 (2005). What the City of Seattle does dispute is that any analysis under the WLAD is relevant to Swanson's whistleblower retaliation claim. Swanson has made no harassment claim (or any other cognizable claim) under the WLAD, and nothing in the definition of retaliation contained in SMC 4.20.800 et. seq. alters the Code's 30 day limitations period. Swanson's attempt to merge the provisions of SMC 4.20.800 et. seq. with RCW 49.60 and the case law analyzing its provisions fails.

**2. Only Acts Occurring Within the Limitations Period may be Considered in Determining Whether Retaliation Occurred.**

Even if case law interpreting the WLAD, RCW 49.60, were persuasive, Swanson has a whistleblower retaliation claim not a hostile work environment claim. If any authorities interpreting the WLAD were

relevant it would be those regarding retaliation. A prima facie case of retaliation under the WLAD requires the plaintiff to show (1) s/he engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) a causal link exists between the employee's activity and the employer's adverse action. *Estevez v. Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005). Retaliation claims are based on discrete events under the WLAD, and events outside the limitations period are not actionable. Indeed, in *Antonius*, an authority heavily relied upon by Swanson, the Washington Supreme Court adopted the U.S. Supreme Court's analysis in *AMTRACK v. Morgan*, 536 U.S. 101 (2002) and noted that "for discrete acts, the limitations period runs from the act itself, and if the limitations period has run, a discrete act is not actionable even if it relates to acts alleged in timely filed charges." *Antonius*, 153 Wn.2d at 264 (citing *Morgan*, 536 U.S. at 108-113).

Under the Seattle Whistleblower Protection Code, any alleged retaliation is a discrete act that must be reported within 30 days of the occurrence of the retaliatory act. AR 863 (SMC 4.20.860 "an employee who believes he or she has been retaliated against...must file a signed written complaint within thirty (30) days of the occurrence alleged to constitute retaliation"). Given this language ("the occurrence alleged to constitute retaliation"), all alleged acts of retaliation that fall under the

Seattle Whistleblower Code are discrete acts and the 30-day limitations period runs from the act itself; for allegations falling outside this 30-day period the limitations period has run and the alleged act is not actionable even if it relates to acts alleged in timely filed charges. *Antonius*, 153 Wn.2d at 264 (citing *Morgan*, 536 U.S. at 108-113). Here, no adverse employment action was taken against Swanson within the 30-day limitations period, and Swanson cannot support his claim by relying on acts outside the limitations period.

**E. Even Under the State Statute, the Retaliatory Act Must Be Performed by an Employee**

Anticipating the City of Seattle's cross appeal, Swanson makes an additional alternative argument that the ALJ's order finding the Seattle Times comment amounted to retaliation under RCW 42.41 is supported by substantial evidence. Tellingly, however, Swanson does not present or cite to a scintilla of evidence regarding who wrote the Seattle Times comment or that Ron Allen encouraged anyone to do so. Instead he references at length testimony regarding other topics that the ALJ found to be entirely outside of the 30-day limitations period. Appellant brief at 39-41. Swanson's reliance on speculation, conjecture and hyperbole to fill the evidentiary gap is insufficient to cure the fact that no evidence, let alone

substantial evidence<sup>9</sup>, exists that Mr. Allen posted the Seattle Times comment or encouraged any other City Light employee to do so.<sup>10</sup>

## V. ATTORNEY FEES

Although the subject of attorney fees is not ripe for review<sup>11</sup>, City Light agrees with Swanson that all matters at issue in this Appeal should be governed by the Seattle Municipal Code in effect at the time of Swanson's retaliation complaint with the City of Seattle Mayor's Office through the close of the administrative hearing. As such, City Light agrees that its revised Whistleblower Code should have no effect on any determination of reasonable attorney fees by the ALJ.

Swanson's position is inconsistent regarding which version of the code should apply, as dictated by expediency and his own self-serving needs. He first infers this Court should consider the revised Seattle Municipal Code when examining the definition of retaliation and the relationship between the municipal code and RCW 42.41 (see Appellant's Brief at n. 46-48) but only pages later argues that the revised Code should

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<sup>9</sup> A finding supported only by highly speculative evidence does not meet the substantial evidence standard. *Hardcastle v. Greenwood Savings & Loan Ass'n*, 9 Wn. App. 884, 888, 516 P.2d 228 (1973) (overturning a finding that was supported only by "highly speculative evidence").

<sup>10</sup> The lack of evidence supporting the ALJ's finding regarding the Seattle Times comment is fully briefed in section VI below as it is the subject of the City of Seattle's cross appeal.

<sup>11</sup> The issue of whether Swanson should be awarded attorney fees, and the amount thereof, is not properly before the Court at this time as the trial court's order reversed the ALJ's award of legal costs and attorney's fees to Swanson. CP 685 (Trial Court Order).

not be considered regarding any fee award. Swanson cannot have it both ways. The statutes and codes relevant to this matter are those that were in effect at the time Swanson filed his whistleblower retaliation complaint on November 8, 2012. *See* Appellant's Brief at 43 (citing cases regarding the prospective application of statutes).

## **VI. ARGUMENT IN SUPPORT OF CROSS-APPEAL**

### **A. Grounds for Review**

This Court has jurisdiction to review the ALJ's Findings of Fact, Conclusions of Law, and Final Order dated September 17, 2013, under the Administrative Procedures Act, RCW 34.05.526.

### **B. Standard of Review**

Judicial review of the ALJ's final order is governed by the Administrative Procedure Act. RCW 34.05.570(3). In reviewing administrative action the appellate court sits in the same position as the superior court, applying the standards of the Administrative Procedures Act directly to the record before the ALJ. *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Under the Administrative Procedures Act, the reviewing court shall grant relief from an agency order in an adjudicative proceeding if the reviewing court determines that:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the

court under this chapter.

RCW 34.05.570(3)(e). The ALJ's finding that the Seattle Times comment was an "action[] taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself" was not supported by substantial evidence. AR 525 (Agency Order).

**C. The Trial Court Erred in Finding the Agency Record Was Sufficient to Support the ALJ's Factual Finding and Conclusion That the Comment on the Seattle Times Website Amounted to Retaliation.**

When considering whether there is substantial evidence to support an ALJ's factual finding, the Court looks to see whether there is a "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 47, 308 P.3d 745 (2013). Even assuming the definition of retaliation set forth in RCW 42.41 governed, the ALJ's legal conclusion that "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" is not supported by substantial evidence in the record.<sup>12</sup> AR 525 (Agency Order). Indeed, the trial court's

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<sup>12</sup> It is telling that this legal conclusion is also not supported by the ALJ's own factual findings, which state only that "[n]either Mr. Swanson nor Ms. Proudfoot could determine specifically who posted this article." AR 521 (Agency Order). It is only the legal conclusion portion of the ALJ's order that makes the leap connecting Mr. Allen to the Seattle Times website comment. For the purpose of this brief, it is assumed that the

order does not determine that substantial evidence existed to conclude Ron Allen or any other City Light employee posted the Seattle Times comment. Instead the trial court concluded “the individual who posted the comment had ‘insider’ information not known to the general public and was aligned with Mr. Allen.” CP 685 (Trial Court Order). An “insider” does not equate to employee – the standard required by RCW 42.41.

Simply put, there is no evidence at all in the record that Ron Allen posted the Seattle Times comment. Likewise, there is no evidence in the record that Ron Allen encouraged anyone else to post the Seattle Times website comment. Moreover, even assuming Ron Allen did encourage someone to post the comment, there is no evidence that the person he encouraged was another City Light employee. Finally, there is no evidence that Ron Allen was Swanson’s supervisor when the comment was posted. There is no evidence to support any of the essential elements that the definition of retaliation set forth in RCW 42.41 requires.<sup>13</sup> In light of this complete lack of evidence, the substantial evidence standard cannot be met, and the ALJ’s finding of retaliation cannot stand. It is fundamentally unfair to hold City Light responsible for acts of an employee, when no

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statement “Mr. Allen’s encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times” is a factual finding that the ALJ put into the wrong section of the order. AR 525 (Agency Order).

<sup>13</sup> RCW 42.41.020(3)(b) requires “hostile actions by another employee ... that were encouraged by a supervisor or senior manager or official.”)

tangible evidence, let alone substantial evidence, exists to show that a City Light employee engaged in those acts.

**1. No Evidence Exists That Ron Allen Posted the Comment**

Although the administrative record in this case is voluminous, very little testimony relates to the Seattle Times website comment. Importantly, there is no testimony by Swanson, Ron Allen or anyone else that Mr. Allen posted the comment. During the hearing, Mr. Allen was not asked any questions at all about the Seattle Times website comment. CP 2534-2596 (124:1-186:12 Allen). Importantly, it was Swanson that called Mr. Allen as a witness and failed to ask him any questions regarding the comment. CP 2533-2534 (123:23-124:1 Mr. Sheridan). Even Swanson admitted that “I don’t know if it was Ron” that posted the comment, speculating instead that he thought it was a sympathizer of Mr. Allen. CP 1406 (809:8-12 Swanson).

**2. No Evidence Exists That Ron Allen Encouraged Anyone to Post the Comment**

Given the complete lack of evidence that Ron Allen posted the Seattle Times website comment, if the ALJ’s finding is to be sustained it must be on the basis that Ron Allen encouraged a City Light employee to post the comment. But the record is equally flimsy in this respect. Again, Ron Allen provided no testimony regarding the Seattle Times website comment. And none of the other witnesses (City Light employees or

otherwise) testified that they posted the comment, or that Mr. Allen encouraged them to post the comment. Once again, the only testimony in this regard is Swanson's own speculation that "I would imagine it's one of [Mr. Allen's] sympathizers" who posted the comment. CP 1406 (809:14-15 Swanson). Even this does not go as far as the ALJ's finding – although Swanson speculates that a "sympathizer" posted the comment, he does not say that Mr. Allen must have encouraged that sympathizer to do so.

**3. No Evidence Exists That the Comment was Posted by a City Light Employee**

Even assuming the evidence established that the person who posted the Seattle Times website comment did so because of Ron Allen's encouragement, such evidence would still not be sufficient to support a finding of retaliation. Under the statute relied on by the ALJ, it is not enough for Ron Allen to have encouraged any other person to post the comment. Rather, that person must be a City Light employee. RCW 42.41.020(3)(b) (requiring "hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.") (Emphasis added).

There is simply no evidence at all in the record that the person who posted the Seattle Times website comment was a City Light employee. To the contrary, the record establishes that Seattle Times website comments

can be posted by anyone from the general public, and that there was no way for City Light – or Swanson or the ALJ – to determine whether a City Light employee posted the comment:

Q: Were you able to determine even whether or not this comment was posted by an employee of Seattle City Light?

A: No. I mean, the Seattle Times website is a publicly open forum, and anyone can write in. I have no idea who wrote it, whether it was an employee, whether it was a neighbor of an employee, a spouse of an employee, whether it was Mr. Swanson himself, although I doubt it.

CP 1803 (1202:7-14 Proudfoot). Swanson concedes “anyone with an email address can create a profile on the Seattle Times website.” CP 1406 (809:2-3 Swanson). Although he asked the Seattle Times for information, they did not provide it to him, and at the hearing he presented no information at all about the email address, IP address, or computer that was used to post the comment. CP 1405-1406 (808:23-809:7 Swanson). Only speculation can fill the void left by this absence of evidence.

Even assuming Swanson is correct that it is a Ron Allen “sympathizer” who posted the comment, there is nothing to indicate that the “sympathizer” was a City Light employee. To the contrary, the record contains evidence that there are several people who Swanson identifies as potential Allen “sympathizers” who are not City Light employees. If any of these non-employees had posted the comment, the statutory definition

of “retaliation” under RCW 42.41.020(3)(b) would not be met.

For example, there is evidence in the record indicating that Joe Simpson, IBEW Local 77’s business representative, is sympathetic towards Mr. Allen. Mr. Simpson is Mr. Allen’s uncle. CP 2537-2538 (127:23-128:1 Allen). In July 2012, Mr. Simpson nominated Mr. Allen to the JATC as Local 77’s representative, even although Mr. Allen had been recently disciplined for taking the alcohol from apprentices. CP 2541 (131:3-10 Allen); AR 1270-74 (May 2, 2012 Allen discipline letter). Mr. Allen also testified that Mr. Simpson gave him a copy of a document that Swanson presented to the JATC.<sup>14</sup> CP 2555 (145:8-25 Allen). If it was Mr. Simpson who had posted the comment, it would not fall under the definition of retaliation in RCW 42.41.020(3)(b) because Mr. Simpson is employed by Local 77, not City Light. CP 2283 (1680:19-23 Johnson).

The record shows there are several former City Light employees who Swanson believes were influenced by Ron Allen and who were no longer employed by the utility in November 2012 when the website comment was posted. For example, Steve Mason is a former City Light crew chief who Swanson identified as being influenced by Mr. Allen. CP

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<sup>14</sup> By way of further example, at the hearing, Swanson complained about copies of text messages from his phone provided to City Light by Mr. Simpson. CP 2229 (1626:16-22 Johnson); CP 1386 (789:2-9 Swanson); CP 1465-1466 (868:24-869:8 Swanson); AR 777-781 (text messages).

1257-1258 (662:24-663:9 Swanson). Mr. Mason left City Light in 2011, shortly after February 24, 2011, when he gave Swanson a performance evaluation. CP 1255 (660:10-15 Swanson); CP 1248 (663:20-23 Swanson). Similarly, former City Light crew chief Reddy Landon is another person Swanson identified as being influenced by Ron Allen. CP 1246-1247 (651:16-652:8 Swanson). Mr. Landon left City Light around October 2010, shortly after Swanson left Mr. Landon's crew. CP 1244 (649:17-23 Swanson); CP 1248 (653:24-654:3 Swanson). Mr. Mason and Mr. Landon were not City Light employees in November 2012, when the Seattle Times website comment was posted. If Mr. Mason, Mr. Landon or any other person who was not a City Light employee posted the Seattle Times website comment, then there could not be retaliation under the definition in RCW 42.41.020(3)(b), which requires the comment to have been posted by an employee.<sup>15</sup> Rather than supporting the ALJ's speculative finding that Ron Allen encouraged another City Light employee to post the comment, the record demonstrates that, even assuming Mr. Allen did encourage someone to post the comment, that person could have been Mr. Allen's uncle, the

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<sup>15</sup> There are other non-employees who may have had the information sufficient to post the Seattle Times comment. For example, Wade Ogg is a former City Light employee, who was fired for violating City Light's safety procedures. CP 2226-2228 (1623:23-1625:6 Johnson). Swanson admitted he talked to Mr. Ogg and exchanged email with him after Mr. Ogg left City Light. CP 1251-1252 (656:24-657:2 Swanson); AR 715 (Swanson email to Ron Knox, January 29, 2012).

union business representative, or another individual who does not work for City Light. And if we were to use speculation to fill this evidentiary gap – as Mr. Swanson did during his testimony – we can speculate that there are most likely other individuals – such as spouses or family members – who are Allen “sympathizers” who likely would have had the information necessary to post the comment.

**4. Ron Allen Was Not Swanson’s Supervisor When the Seattle Times Comment Was Posted**

Just as there is no evidence in the record that Ron Allen or any other City Light employee posted the Seattle Times comment, there is also no evidence that Ron Allen was Swanson’s supervisor at the time the comment was posted. RCW 42.41.020(3)(b) requires alleged retaliatory actions to be “encouraged by a supervisor or senior manager or official.” Ron Allen was not Swanson’s supervisor when the Seattle Times comment was posted. Recognizing this fact, the ALJ found that “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.”<sup>16</sup> AR 525 (Agency Order). What the ALJ failed to note was that the City had not nominated or placed Mr. Allen on the JATC. Mr. Allen had been selected by his union, not by City Light,

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<sup>16</sup> It is unclear what the ALJ meant by a “secondary supervisory position” as the term does not appear in RCW 42.41 or any case law interpreting the statute.

to serve as a union representative on the JATC. CP 2254 (1651:19-21 Johnson). During the time frame relevant to this case, Mr. Allen was not a properly appointed member of the JATC, had no voting ability, and did not vote on any JATC decisions that related to Swanson's apprenticeship. CP 2541-2542 (131:3-132:1 Allen); CP 2591-2592 (181:21-182:1 Allen); CP 2190 (1587:16-24 Johnson). And while the JATC could make decisions affecting Swanson's apprenticeship (subject to review by the State), there is nothing to establish the JATC had any authority over Swanson's employment relationship with City Light. CP 2183 (1580:1-23 Johnson); CP 2570-2571 (160:22-161:1 Allen). Simply put, City Light did not empower Mr. Allen with authority over Swanson.

To the contrary, City Light took steps to reduce Mr. Allen's power on the JATC. Before the ECAC and JATC voted on a recommendation to extend Mr. Swanson's apprenticeship, City Light's Human Resources Officer DaVonna Johnson took unprecedented steps to inform the ECAC and JATC about the outside investigator's finding that Mr. Allen had lobbied others to reduce Mr. Swanson's performance ratings. CP 2184-2195 (1581:18-1592:21 Johnson). These facts show that although City Light had no control over the JATC, City Light took affirmative steps to try to prevent and correct any negative impact by Allen on Swanson's apprenticeship.

Given this evidence, and lack of any evidence to the contrary, Mr.

Allen was not Swanson's "supervisor or senior [City Light] manager or official" as is required by RCW 42.41.020(3)(b) in order to hold the employer liable for retaliation. Without a connection between the Seattle Times comments and Swanson's supervisor or other senior City Light manager or official, City Light cannot be held liable.

**5. Speculation Alone Is Insufficient to Meet the Substantial Evidence Standard**

The ALJ's finding relies on pure speculation and fails to rely on any evidence, let alone a sufficient quantity of evidence, in its finding. Speculation alone is insufficient to meet the standard of persuading a fair-minded person that it is true Mr. Allen was Swanson's supervisor and encouraged another City Light employee to post the comment. Where the definition relied upon by the ALJ requires a finding that an employee engaged in the act after being encouraged to do so by the whistleblower's supervisor, and no evidence is presented to meet that definition, the substantial evidence standard has not been met. *Becker v. Employment Sec. Dept.*, 63 Wn. App. 673, 677, 821 P.2d 81 (1991) (finding that because no evidence was produced that met the definition of "misconduct" set forth in the applicable statute, the substantial evidence standard was not met). The requirement in the definition that the act be performed by an employee who has been encouraged by the whistleblower's supervisor is

not insignificant, indeed it is the nexus that ties the act, and liability therefrom, to the employer. Without evidence that the comment was posted by a City Light employee, there is no connection between the comment and the workplace. It would be patently unfair and illogical to hold an employer liable for an act that it cannot control.

Any member of the public can post a comment on the Seattle Times website. There is nothing in the record to establish that the comment was posted using a City email account, from a City computer, or by a City employee. Although the content of the comment itself may be an indication that the person who posted it knew something about the situation, there is no evidence showing that either (1) that person was encouraged to make the post by Ron Allen, or (2) that the person who posted it was a City Light employee. A union employee, former City Light employees or spouses / relatives of current City Light employees are all people who may have had access to the information that appears in the comment. In short, there is not sufficient evidence in the record to support the ALJ's finding that Ron Allen encouraged another City Light employee to post the Seattle Times comment. Without the evidence to support this finding, the conclusion that there was retaliation cannot be sustained.

## VII. CONCLUSION

For the foregoing reasons the trial court's order striking the ALJ's finding of retaliation and reversing the award of attorney's fees to Swanson should be affirmed. The ALJ's reliance on the definition of retaliation contained in RCW 42.41 was legal error and there was not substantial evidence to support her finding that the Seattle Times comment met that definition of retaliation.

DATED this 22nd day of May, 2015.

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I certify under penalty of perjury that on this date, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated:

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KIM FABEL

No. 72344-8-I

DIVISION I OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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AARON SWANSON,

*Appellant/Cross-Respondent,*

vs.

CITY OF SEATTLE, SEATTLE CITY LIGHT,

*Respondent/Cross-Appellant.*

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**APPENDIX TO BRIEF OF  
RESPONDENT / CROSS-APPELLANT**

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## **Chapter 42.40 RCW**

# **STATE EMPLOYEE WHISTLEBLOWER PROTECTION**

### **RCW Sections**

- 42.40.010 Policy.
- 42.40.020 Definitions.
- 42.40.030 Right to disclose improper governmental actions -- Interference prohibited.
- 42.40.035 Duty of correctness -- Penalties for false information.
- 42.40.040 Report of improper governmental action -- Investigations and reports by auditor, agency.
- 42.40.050 Retaliatory action against whistleblower -- Remedies.
- 42.40.070 Summary of chapter available to employees.
- 42.40.080 Contracting for assistance.
- 42.40.090 Administrative costs.
- 42.40.100 Assertions against auditor.
- 42.40.110 Performance audit.
- 42.40.900 Severability -- 1982 c 208.
- 42.40.901 Severability -- 2008 c 266.
- 42.40.910 Application of chapter.

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#### **42.40.010**

##### **Policy.**

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

[1995 c 403 § 508; 1982 c 208 § 1.]

##### **Notes:**

**Findings -- Short title -- Intent -- 1995 c 403:** See note following RCW 34.05.328.

**Part headings not law -- Severability -- 1995 c 403:** See RCW 43.05.903 and 43.05.904.

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#### **42.40.020**

##### **Definitions.**

As used in this chapter, the terms defined in this section shall have the meanings indicated unless the context clearly requires otherwise.

- (1) "Auditor" means the office of the state auditor.

(2) "Employee" means any individual employed or holding office in any department or agency of state government.

(3) "Good faith" means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information. An individual who knowingly provides or reports, or who reasonably ought to know he or she is providing or reporting, malicious, false, or frivolous information, or information that is provided with reckless disregard for the truth, or who knowingly omits relevant information is not acting in good faith.

(4) "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(5) "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

(6)(a) "Improper governmental action" means any action by an employee undertaken in the performance of the employee's official duties:

(i) Which is a gross waste of public funds or resources as defined in this section;

(ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;

(iii) Which is of substantial and specific danger to the public health or safety;

(iv) Which is gross mismanagement; or

(v) Which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless state law or a common law privilege prohibits disclosure. This provision is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings. Nothing in this subsection prevents or impairs a state agency's or public official's ability to manage its public resources or its employees in the performance of their official job duties. This subsection does not apply to de minimis, technical disagreements that are not relevant for otherwise improper governmental activity. Nothing in this provision requires the auditor to contract or consult with external experts regarding the scientific validity, invalidity, or justification of a finding or opinion.

(b) "Improper governmental action" does not include personnel actions, for which other remedies exist, 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 state civil service law, alleged labor agreement violations, reprimands, claims of discriminatory treatment, or any action which may be taken under chapter 41.06 RCW, or other disciplinary action except as provided in RCW 42.40.030.

(7) "Public official" means the attorney general's designee or designees; the director, or equivalent thereof in the agency where the employee works; an appropriate number of individuals designated to receive whistleblower reports by the head of each agency; or the executive ethics board.

(8) "Substantial and specific danger" means a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

(9) "Use of official authority or influence" includes threatening, taking, directing others to take, recommending, processing, or approving any personnel action such as an appointment, promotion, transfer,

assignment including but not limited to duties and office location, reassignment, reinstatement, restoration, reemployment, performance evaluation, determining any material changes in pay, provision of training or benefits, tolerance of a hostile work environment, or any adverse action under chapter 41.06 RCW, or other disciplinary action.

(10)(a) "Whistleblower" means:

(i) An employee who in good faith reports alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, initiating an investigation by the auditor under RCW 42.40.040; or

(ii) An employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, initiating an investigation by the auditor under RCW 42.40.040.

(b) For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means:

(i) An employee who in good faith provides information to the auditor or other public official, as defined in subsection (7) of this section, in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official, as defined in subsection (7) of this section, or to have provided information to the auditor or other public official, as defined in subsection (7) of this section, in connection with an investigation under RCW 42.40.040 but who, in fact, has not reported such action or provided such information; or

(ii) An employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

[2008 c 266 § 2; 1999 c 361 § 1; 1995 c 403 § 509; 1992 c 118 § 1; 1989 c 284 § 1; 1982 c 208 § 2.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** "The legislature finds and declares that government exists to conduct the people's business, and the people remaining informed about the actions of government contributes to the oversight of how the people's business is conducted. The legislature further finds that many public servants who expose actions of their government that are contrary to the law or public interest face the potential loss of their careers and livelihoods.

It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

This act shall be broadly construed in order to effectuate the purpose of this act." [2008 c 266 § 1.]

**Findings -- Short title -- Intent -- 1995 c 403:** See note following RCW 34.05.328.

**Part headings not law -- Severability -- 1995 c 403:** See RCW 43.05.903 and 43.05.904.

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**42.40.030**

**Right to disclose improper governmental actions — Interference prohibited.**

(1) An employee shall not directly or indirectly use or attempt to use the employee's 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 the right of the individual to: (a) Disclose to the auditor (or representative thereof) or other public official, as defined in RCW 42.40.020, information concerning improper governmental action; or (b) identify rules warranting review or provide information to the rules review committee.

(2) Nothing in this section authorizes an individual to disclose information otherwise prohibited by law, except to the extent that information is necessary to substantiate the whistleblower complaint, in which case information may be disclosed to the auditor or public official, as defined in RCW 42.40.020, by the whistleblower for the limited purpose of providing information related to the complaint. Any information provided to the auditor or public official under the authority of this subsection may not be further disclosed.

[2008 c 266 § 3; 1995 c 403 § 510; 1989 c 284 § 2; 1982 c 208 § 3.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** See note following RCW 42.40.020.

**Findings -- Short title -- Intent -- 1995 c 403:** See note following RCW 34.05.328.

**Part headings not law -- Severability -- 1995 c 403:** See RCW 43.05.903 and 43.05.904.

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**42.40.035**

**Duty of correctness — Penalties for false information.**

An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

[1999 c 361 § 2.]

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**42.40.040**

**Report of improper governmental action — Investigations and reports by auditor, agency.**

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

(b) Except as provided under RCW 42.40.910 for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received. In determining whether to conduct either a preliminary or further investigation, the auditor shall consider factors including, but not limited to: The nature and quality of evidence and the existence of relevant laws and rules; whether the action was isolated or systematic; the history of previous assertions regarding the same subject or subjects or subject matter; whether other avenues are available for addressing the matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The auditor has the sole discretion to determine the priority and

weight given to these and other relevant factors and to decide whether a matter is to be investigated. The auditor shall document the factors considered and the analysis applied.

(c) The auditor also has the authority to investigate assertions of improper governmental actions as part of an audit conducted under chapter 43.09 RCW. The auditor shall document the reasons for handling the matter as part of such an audit.

(2) Subject to subsection (5)(c) of this section, the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents to disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.

(3) Upon receiving specific information that an employee has engaged in improper governmental action, the auditor shall, within fifteen working days of receipt of the information, mail written acknowledgment to the whistleblower at the address provided stating whether a preliminary investigation will be conducted. For a period not to exceed sixty working days from receipt of the assertion, the auditor shall conduct such preliminary investigation of the matter as the auditor deems appropriate.

(4) In addition to the authority under subsection (3) of this section, the auditor may, on its own initiative, investigate incidents of improper state governmental action.

(5)(a) If it appears to the auditor, upon completion of the preliminary investigation, that the matter is so unsubstantiated that no further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower summarizing where the allegations are deficient, and provide a reasonable opportunity to reply. Such notification may be by electronic means.

(b) The written notification shall contain a summary of the information received and of the results of the preliminary investigation with regard to each assertion of improper governmental action.

(c) In any case to which this section applies, the identity or identifying characteristics of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith. If the auditor makes such a determination, the auditor shall provide reasonable advance notice to the employee.

(d) With the agency's consent, the auditor may forward the assertions to an appropriate agency to investigate and report back to the auditor no later than sixty working days after the assertions are received from the auditor. The auditor is entitled to all investigative records resulting from such a referral. All procedural and confidentiality provisions of this chapter apply to investigations conducted under this subsection. The auditor shall document the reasons the assertions were referred.

(6) During the preliminary investigation, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts and laws known at the time and the procedure for the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation. This notification does not limit the auditor from considering additional facts or laws which become known during further investigation.

(a) If it appears to the auditor after completion of the preliminary investigation that further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower, the subject or subjects of the investigation, and the agency head and either conduct a further investigation or issue a report under subsection (9) of this section.

(b) If the preliminary investigation resulted from an anonymous assertion, a decision to conduct further investigation shall be subject to review by a three-person panel convened as necessary by the auditor prior to

the commencement of any additional investigation. The panel shall include a state auditor representative knowledgeable of the subject agency operations, a citizen volunteer, and a representative of the attorney general's office. This group shall be briefed on the preliminary investigation and shall recommend whether the auditor should proceed with further investigation.

(c) If further investigation is to occur, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts known at the time and the procedure to be used by the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation.

(7) Within sixty working days after the preliminary investigation period in subsection (3) of this section, the auditor shall complete the investigation and report its findings to the whistleblower unless written justification for the delay is furnished to the whistleblower, agency head, and subject or subjects of the investigation. In all such cases, the report of the auditor's investigation and findings shall be sent to the whistleblower within one year after the information was filed under subsection (3) of this section.

(8)(a) At any stage of an investigation under this section the auditor may require by subpoena the attendance and testimony of witnesses and the production of documentary or other evidence relating to the investigation at any designated place in the state. The auditor may issue subpoenas, administer oaths, examine witnesses, and receive evidence. In the case of contumacy or failure to obey a subpoena, the superior court for the county in which the person to whom the subpoena is addressed resides or is served may issue an order requiring the person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The auditor may order the taking of depositions at any stage of a proceeding or investigation under this chapter. Depositions shall be taken before an individual designated by the auditor and having the power to administer oaths. Testimony shall be reduced to writing by or under the direction of the individual taking the deposition and shall be subscribed by the deponent.

(c) Agencies shall cooperate fully in the investigation and shall take appropriate action to preclude the destruction of any evidence during the course of the investigation.

(d) During the investigation the auditor shall interview each subject of the investigation. If it is determined there is reasonable cause to believe improper governmental action has occurred, the subject or subjects and the agency head shall be given fifteen working days to respond to the assertions prior to the issuance of the final report.

(9)(a) If the auditor determines there is reasonable cause to believe an employee has engaged in improper governmental action, the auditor shall report, to the extent allowable under existing public disclosure laws, the nature and details of the activity to:

- (i) The subject or subjects of the investigation and the head of the employing agency;
- (ii) If appropriate, the attorney general or such other authority as the auditor determines appropriate;
- (iii) Electronically to the governor, secretary of the senate, and chief clerk of the house of representatives; and
- (iv) Except for information whose release is specifically prohibited by statute or executive order, the public through the public file of whistleblower reports maintained by the auditor.

(b) The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines

that appropriate action has not been taken, the auditor shall report the determination to the governor and to the legislature and may include this determination in the agency audit under chapter 43.09 RCW.

(10) Once the auditor concludes that appropriate action has been taken to resolve the matter, the auditor shall so notify the whistleblower, the agency head, and the subject or subjects of the investigation. If the resolution takes more than one year, the auditor shall provide annual notification of its status to the whistleblower, agency head, and subject or subjects of the investigation.

(11) Failure to cooperate with such audit or investigation, or retaliation against anyone who assists the auditor by engaging in activity protected by this chapter shall be reported as a separate finding with recommendations for corrective action in the associated report whenever it occurs.

(12) This section does not limit any authority conferred upon the attorney general or any other agency of government to investigate any matter.

[2008 c 266 § 4; 1999 c 361 § 3; 1992 c 118 § 2; 1989 c 284 § 3; 1982 c 208 § 4.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** See note following RCW 42.40.020.

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**42.40.050**

**Retaliatory action against whistleblower — Remedies.**

(1)(a) Any person who is a whistleblower, as defined in RCW 42.40.020, and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies provided under chapter 49.60 RCW.

(b) For the purpose of this section, "reprisal or retaliatory action" means, but is not limited to, any of the following:

- (i) Denial of adequate staff to perform duties;
- (ii) Frequent staff changes;
- (iii) Frequent and undesirable office changes;
- (iv) Refusal to assign meaningful work;
- (v) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;
- (vi) Demotion;
- (vii) Reduction in pay;
- (viii) Denial of promotion;
- (ix) Suspension;
- (x) Dismissal;
- (xi) Denial of employment;
- (xii) A supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward

the whistleblower;

(xiii) A change in the physical location of the employee's workplace or a change in the basic nature of the employee's job, if either are in opposition to the employee's expressed wish;

(xiv) Issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or

(xv) Any other action that is inconsistent compared to actions taken before the employee engaged in conduct protected by this chapter, or compared to other employees who have not engaged in conduct protected by this chapter.

(2) The agency presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the agency action or actions were justified by reasons unrelated to the employee's status as a whistleblower and that improper motive was not a substantial factor.

(3) Nothing in this section prohibits an agency from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a whistleblower. However, the agency also shall implement any order under chapter 49.60 RCW (other than an order of suspension if the agency has terminated the retaliator).

[2008 c 266 § 6; 1999 c 283 § 1; 1992 c 118 § 3; 1989 c 284 § 4; 1982 c 208 § 5.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** See note following RCW 42.40.020.

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**42.40.070**

**Summary of chapter available to employees.**

A written summary of this chapter and procedures for reporting improper governmental actions established by the auditor's office shall be made available by each department or agency of state government to each employee upon entering public employment. Such notices may be in agency internal newsletters, included with paychecks or stubs, sent via electronic mail to all employees, or sent by other means that are cost-effective and reach all employees of the government level, division, or subdivision. Employees shall be notified by each department or agency of state government each year of the procedures and protections under this chapter. The annual notices shall include a list of public officials, as defined in RCW 42.40.020, authorized to receive whistleblower reports. The list of public officials authorized to receive whistleblower reports shall also be prominently displayed in all agency offices.

[2008 c 266 § 5; 1989 c 284 § 5; 1982 c 208 § 7.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** See note following RCW 42.40.020.

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**42.40.080**

**Contracting for assistance.**

The auditor has the authority to contract for any assistance necessary to carry out the provisions of this chapter.

[1999 c 361 § 4.]

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#### **42.40.090**

##### **Administrative costs.**

The cost of administering this chapter is funded through the auditing services revolving account created in RCW 43.09.410.

[1999 c 361 § 5.]

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#### **42.40.100**

##### **Assertions against auditor.**

A whistleblower wishing to provide information under this chapter regarding asserted improper governmental action against the state auditor or an employee of that office shall provide the information to the attorney general who shall act in place of the auditor in investigating and reporting the matter.

[1999 c 361 § 6.]

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#### **42.40.110**

##### **Performance audit.**

The office of financial management shall contract for a performance audit of the state employee whistleblower program on a cycle to be determined by the office of financial management. The audit shall be done in accordance with generally accepted government auditing standards beginning with the fiscal year ending June 30, 2001. The audit shall determine at a minimum: Whether the program is acquiring, protecting, and using its resources such as personnel, property, and space economically and efficiently; the causes of inefficiencies or uneconomical practices; and whether the program has complied with laws and rules on matters of economy and efficiency. The audit shall also at a minimum determine the extent to which the desired results or benefits established by the legislature are being achieved, the effectiveness of the program, and whether the auditor has complied with significant laws and rules applicable to the program.

The cost of the audit is a cost of operating the program and shall be funded by the auditing services revolving account created by RCW 43.09.410.

[1999 c 361 § 8.]

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#### **42.40.900**

##### **Severability — 1982 c 208.**

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.

[1982 c 208 § 14.]

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**42.40.901**

**Severability — 2008 c 266.**

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.

[2008 c 266 § 10.]

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**42.40.910**

**Application of chapter.**

Chapter 266, Laws of 2008 and chapter 361, Laws of 1999 do not affect the jurisdiction of the legislative ethics board, the executive ethics board, or the commission on judicial conduct, as set forth in chapter 42.52 RCW. The senate, the house of representatives, and the supreme court shall adopt policies regarding the applicability of chapter 42.40 RCW to the senate, house of representatives, and judicial branch.

[2008 c 266 § 9; 1999 c 361 § 7.]

**Notes:**

**Findings -- Intent -- 2008 c 266:** See note following RCW 42.40.020.