
OFFICE OF THE SPOKANE CITY ATTORNEY

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SUBJECT: REVIEW OF POLICE OMBUDSMAN ORDINANCE PROPOSAL FROM
PJALS

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CC: TED DANEK, CITY ADMINISTRATOR

In 2008, the City Council adopted Chapter 4.32 SMC establishing the Office of Police Ombudsman (OPO). The ordinance provides the OPO certain functions and duties including, but not limited to, the authority to actively monitor all police department internal investigations, attend and observe IA interviews, obtain unimpeded access to all IA complaints and investigative files, and make determinations as to whether the IA investigation was thorough and objective.

The ordinance specifically provides that the OPO does not conduct independent disciplinary investigations, participate in criminal investigations of department employees, or have a role in disciplinary decisions.

The ordinance was developed following negotiations with the Police Guild and Captains and Lieutenants Association and reflects the agreement reached with those bargaining units concerning the issue of police oversight.

Proposed PJALS Ordinance Amendments

The Peace and Justice Action League of Spokane (PJALS) has submitted a proposed revised police ombudsman ordinance, which includes the authority to conduct independent investigations of alleged police misconduct complaints and mandates such investigation for all incidents involving deadly force. PJALS has submitted a legal memorandum, which concludes that granting non-disciplinary independent investigatory authority to the ombudsman is not a subject of mandatory bargaining. Implicit in the reasoning in the PJALS memorandum is the assumption that non-disciplinary

independent investigatory authority will not impact the day to day working conditions or safety of law enforcement officers.

The proposed ordinance includes the authority of the police ombudsman to conduct independent investigations of alleged police misconduct complaints. If the proposed ordinance were enacted, the ombudsman would prepare a report, which would include the opinion of the ombudsman as to whether the complaint was founded or unfounded, the evidentiary basis for the opinion and the recommendation of the ombudsman on how to prevent or reduce similar complaints in the future. "Founded" findings would mean that, in the opinion of the ombudsman, some or all of the law enforcement conduct alleged in the complaint is more likely than not to have occurred and that the misconduct involved violates applicable legal standards, City of Spokane policies and/or best law enforcement practices as determined by the ombudsman.

The proposed ordinance does not give the ombudsman authority to impose any type of discipline. The ombudsman may only make recommendations that are likely to prevent or minimize future complaints. Recommendations can be made even when the ombudsman determines the complaint was unfounded.

Legal Issues

The primary issue for the City is whether an amendment to the ordinance giving the police ombudsman non-disciplinary investigatory authority of alleged police misconduct complaints is a mandatory subject of bargaining under Chapter 41.56 RCW. If it is a mandatory subject, then the change must be bargained with the Police Guild and the Lieutenants and Captains Association. PJALS has argued that the change need not be bargained, focusing on the fact that the proposed ordinance grants only *non-disciplinary* investigatory authority.

1) Collective Bargaining Requirements

The City and the respective unions are obligated to collectively bargain personnel matters, including wages, hours, and working conditions. RCW 41.56.030(4). Categories of subjects of bargaining include mandatory, permissive, or illegal subjects.

Matters that directly affect employees, such as wages, hours, workload, safety, and other terms and conditions of employment, are mandatory bargaining subjects. The parties must bargain in good faith on these issues. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Public Empl. Relations Comm'n*, 113 Wn.2d 197, 200-01(1989).

A decision that is a predominately a management prerogative or only remotely affects employees, such as the procedures by which an employer determines the terms and conditions of employment, is a permissive bargaining subject. The parties may bargain

over these issues but are not obligated to do so. Fire Fighters Local 1052, 113 Wn.2d at 201.

Illegal subjects are those that the parties are forbidden by law from negotiating. Lieutenants Ass'n v. Sandberg, 88 Wn.App. 652, 657-58 (1997).

An employer's policy decision may be a managerial prerogative and still directly affect employees. If so, the court or labor board must balance the extent to which the decision relates to working conditions against its status as an essential managerial prerogative and determine which characteristics predominate. Fire Fighters Local 1052, 113 Wn.2d at 203. On one side of the balance is the relationship the subject bears to "wages, hours and working conditions," which would be a mandatory subject of bargaining. On the other side is the extent to which the subject lies "'at the core of entrepreneurial control,'" which would be a permissive subject as a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. Fire Fighters Local 1052, 113 Wn.2d at 203. The scope of bargaining is a question of law and fact for PERC to determine on a case by case basis.

PERC has issued a number of decisions weighing the balance between business needs of the employer and the impact on the employees' working conditions. In one case, PERC held that the high cost of allowing police officers to commute in their assigned vehicles was not a compelling business need that outweighed police officers' interest in retaining the benefit. *Serv. Employees Int'l Union, Local 120 v. City of Brier*, Decision 5089 A (PECB 1995). In another case, PERC held that 'declining cash reserves' was not a compelling business need in light of police officers' interest in negotiating over a commuting policy. *Kalama Police Guild v. City of Kalama*, Decision 6853 (PECB 1999).

The Washington State Supreme Court has yet to adopt the compelling-business-need test discussed above. Rather, the Court has adhered to the test that balances the extent to which an employment issue is customarily management's concern against its effect on the terms and conditions of employment. Fire Fighters Local 1052, 113 Wn.2d at 203. Unlike the compelling-business-need analysis, this test guarantees collective bargaining of any subject that directly affects employees.

2) Seattle PERC Decision

The legal memorandum from PJALS relies on the recent decision from PERC *Seattle Police Officers' Guild v. City of Seattle*, Decision 9957-A (2009 PECB). In that case, the City and the Police Guild negotiated a process for the investigation of citizens' complaints, which included a citizen's panel known as the Office of Professional Accountability Review Board (OPARB) reviewing redacted copies of the complaints. The OPARB never had authority to investigate complaints or impose or recommend any discipline.

The OPARB expressed frustration with only having hard-to-read redacted files. The Seattle City Council amended its ordinance to allow the OPARB to receive un-redacted complaints. The Police Guild filed an unfair labor practice complaint with PERC. The Hearing Examiner concluded that the City had violated its obligation to bargain. However, PERC reversed the Hearing Examiner on the grounds that the amendment to the ordinance allowing the release of un-redacted files was a management prerogative and did not impact any term or condition of employment that would require the City to engage in bargaining with the union. The question of releasing un-redacted files to an accountability board is not the question raised by PJALS' proposed ordinance.

A more complete and in-depth memorandum regarding the PERC decision was prepared by the Legal Department for the Council on October 17, 2009, a copy of which is attached.

Analysis

In analyzing the proposed ordinance from PJALS, the focus will be to determine where non-disciplinary investigatory authority lands in the balance between managerial prerogative and working conditions. The balancing test will examine whether non-disciplinary investigatory authority is predominately and customarily a management concern or directly impacts the terms or conditions of employment of the police officers. As noted above, this test guarantees collective bargaining on any subject that directly affects employees.

PERC's analysis of this issue would likely be a balance of the City's interest in having independent investigatory authority by the OPO versus the potential for harm to the individual officer. The Guild could argue that the harm to the officer would include public release of the OPO report (and this office is unaware of any exemption to the Public Records Act that would allow the City to redact any information from the required OPO report) and potential use in disciplinary actions against officers.

PJALS clearly anticipated those arguments and attempted to mitigate them by exempting the records from release under the public records law and by prohibiting the use of the OPO report in any disciplinary action. We explain below why those provisions are illusory.

Weighing against the City in any unfair labor practice charge hearing before PERC on this issue is the simple fact that the parties have already negotiated the issue and reached an agreement with which both parties were satisfied at the conclusion of negotiations. The City would have an uphill battle convincing PERC that, while we believed we should negotiate with the Guild on the issue in 2009, we are free to change it by legislative fiat – in direct contravention of the Collective Bargaining Agreement – in 2010.

The issue becomes even more problematic for PERC when we consider that the City took unilateral action at an earlier time and established a citizens' oversight panel for the Police Department. PERC quickly and forcefully reminded the City that the issue is one that has to be negotiated.

Given the history of the issue between the Guild and the City, including the City's prior unilateral change and the recent negotiation of the issue, we believe that any nuanced argument based on a not-particularly-relevant recent PERC case could easily backfire on the City. PERC has expressed in the past a particular dislike of revisiting the same issue between the same parties.

Current Collective Bargaining Agreement

There are several other issues to consider regarding the PJALS proposed ordinance. The first is in regards to the existing collective bargaining agreement between the City and the Police Guild. At the insistence of the City Council, the Mayor directed the City to negotiate with the Guild concerning the authority of the OPO. The issue was fully and fairly negotiated and is a part of the collective bargaining agreement between the parties. This CBA was approved by the City Council and by the members of the Guild.

As a matter of law, once the parties have negotiated an issue and reached an agreement, the subject is closed until the term of the CBA expires. Regardless of whether the subject matter was mandatory or permissive, the parties did collectively bargain this matter and reached an agreement reflected in the current ordinance.

Independent investigative authority for the OPO was not included in the CBA or the ordinance. At a minimum, the parties are bound by that agreement until the end of the contract term in 2011, when the City or the Guild is free to raise the issue again. Enacting the proposed ordinance, which is directly in contravention of the CBA, would force the City into one of two actions, both of which are indefensible. One, the City would protect its labor relations position by following the current CBA, resulting in the new ordinance being ineffectual and irrelevant. Two, the City would follow the new ordinance, in breach of its CBA.

Public Disclosure Requirements

Another issue to consider is that PJALS' proposed ordinance provides that names, contact information, addresses, telephone numbers, employee identification numbers and similar identifying information in OPO reports will be exempt from public disclosure unless the redacted information is considered a public record under applicable federal or state law. The language providing exemption of such information is illusory and should not be considered as incentive for granting the OPO non-disciplinary investigative authority.

Regardless of what a City ordinance may provide in terms of public disclosure and redaction of personal information, the Washington State Public Disclosure Act (PDA) will prevail. The City has absolutely no authority to make any record exempt from release under the state's public records law. All determinations regarding nondisclosure and redaction of personal information will be made based upon the PDA.

Criminal and Civil Proceedings

The proposed PJALS ordinance also includes a provision claiming that any final report or portion of a final report issued by the OPO shall not be used in any disciplinary, criminal, or civil legal proceeding either to prove or defend against any allegation made in that proceeding. This provision creates confusion in terms of whether the OPO could be called to testify in a separate legal proceeding or deposed in a lawsuit regard his or her finding as set forth in the Final Report. The civil and criminal rules of the federal and state courts will determine if and how the OPO's final report could be used. The City's ordinance will likely have no bearing on this issue.

Conclusion

In conclusion, it is our recommendation that the City Council not make any changes to the ordinance creating an OPO at this time. The OPO is scheduled to submit his annual report to the City Council in the next month. Subsequent to the submission of the report, the City Council is to review the OPO program. The contract will be re-opened in 2011, at which time the above-discussed issues can be revisited in the collective bargaining setting.
