

LEGAL MEMORANDUM

From: Police Accountability Coalition: The Center for Justice; Coalition of Responsible Disabled; Eastern Washington Voters; Movimiento Estudiantil Chicano de Aztlan, EWU chapter; National Alliance on Mental Illness; National Association for the Advancement of Colored People, Spokane Chapter; Peace and Justice Action League of Spokane; Progressive Democrats of America, Spokane Chapter; SHAWL Society (Sovereignty, Health, Air, Water, Land); VOICES

Re: Legal Analysis of Proposed Amendment to Police Oversight Ordinance

Issue: Whether the proposed amendment to the Spokane Municipal Code (SMC) granting the Office of Police Ombudsman (the ombudsman) non-disciplinary independent investigatory authority violates Washington’s Public Employees’ Collective Bargaining Act (PECBA), RCW 41.56.

Analysis: The issue is whether the city’s grant of non-disciplinary independent investigatory authority to the ombudsman is a subject of mandatory bargaining. We recognize that city officials are concerned that a grant of such authority may violate our State’s collective bargaining statutes. Therefore, we have provided a legal analysis of the issue. After reviewing RCW 41.56, related case law, and a recent Public Employment Relations Commission¹ (PERC) ruling, we conclude that the proposed amendment does not violate RCW 41.56 because it will not impact the day to day working conditions or safety of law enforcement officers.

The proposed amended Ordinance provides in relevant part:

The Office of Police Ombudsman is authorized to conduct independent investigations of alleged police misconduct complaints.

The Office of Police Ombudsman shall conduct independent investigations of all incidents involving the use of deadly force.

We begin our review of these provisions with the governing statute, RCW 41.56. This statute, enacted in 1967, provides that a public employer’s duty to bargain extends to “personnel matters, including wages, hours and working conditions.” RCW 41.56.030(4). The duty to bargain is enforced through RCW 41.56.140(4)² and unfair labor practices proceedings under RCW 41.56.160³.

¹ PERC is an executive branch agency that administers the PECBA.

² “It shall be an unfair labor practice for a public employer . . . [t]o refuse to engage in collective bargaining.” RCW 41.56.140(4).

³ “The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders.” RCW 41.56.160

Collective bargaining subjects are either mandatory, permissive, or illegal subjects of bargaining. *Int'l Ass'n of Fire Fighters, Local Union 1052 v. Public Empl. Relations Comm'n*, 113 Wn.2d 197, 200-01, 778 P.2d 32 (1989). Employers are prohibited from changing mandatory subjects of bargaining except where such changes are made in conformity with the collective bargaining obligation or terms of a collective bargaining agreement. *City of Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 818 P.2d 1076 (1991). Matters that *directly* affect employees, such as wages, hours, workload, safety, and other terms and conditions of employment, are mandatory bargaining subjects. *Fire Fighters Local 1052*, 113 Wn.2d at 200-01. The parties must bargain in good faith on these issues. A decision that is a management prerogative or only remotely affects employees is a permissive bargaining subject. The parties may bargain over these issues but are not obligated to do so. *Id.* at 201. Illegal subjects are those that the parties are forbidden by law from negotiating.

We could find no Washington case that directly addresses our particular facts. However, a recent PERC ruling supports our analysis. We first point out that because PERC was created to prevent unfair labor practices, its interpretation of the collective bargaining statutes is afforded great weight and substantial deference. *City of Spokane v. Spokane Civil Service Comm'n*, 98 Wn. App. 574, 989 P.2d 1245 (1999); *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

The issue in the PERC case⁴ was whether the City of Seattle failed to satisfy its collective bargaining obligation when the Seattle City Council adopted an amendment to Seattle's municipal code to provide the Office of Professional Accountability Review Board (OPARB) with un-redacted closed files from Office of Professional Accountability (OPA)⁵ investigations.

Prior to the amendment, OPARB expressed frustration about being provided redacted files. It stated that such redaction limited its ability to effectively perform its review of the OPA's handling of complaints. The Seattle City Council agreed that OPARB's review was hindered by provision of redacted files. Therefore, it changed the city code to allow OPARB to review un-redacted reports. The Seattle Police Officers Guild filed an unfair labor practices complaint, arguing that this change was the subject of mandatory collective bargaining.

A hearing examiner agreed with the Police Guild, ruling that the changes to the city code impacted the terms and conditions of police employment. The Examiner found that the OPARB wanted the un-redacted files to discover which officers merited special scrutiny and that the OPARB was trying to interject itself into the disciplinary process. According

⁴ *Seattle Police Officers Guild v. City of Seattle*, No. 20402-U-06-5196 (Wash. Pub. Employment Relations Comm'n Oct. 6, 2009)

⁵ The Seattle City Council established the OPA in 1999 to review citizen complaints about police conduct. The OPA was granted independent review authority to examine and review arrest records and contacts between the police and citizens. At the same time it established the OPA, the city council also created the OPARB, an independent secondary review panel.

to the Examiner, this provided a “clear connection between redaction of investigatory files and employee working conditions.”

The City of Seattle appealed to PERC, pointing out that although the amendment allowed OPARB to review un-redacted files, OPARB’s duties had not changed, particularly its inability to discipline officers.

PERC agreed with the city, finding the Guild failed to establish that providing OPARB with un-redacted files would impact the terms and conditions of employment. PERC noted that the Seattle city code explicitly prohibited OPARB from participating in the “management of the day-to-day functions of the [police] Department”⁶ or from recommending officer discipline or civil or criminal liability. PERC stated, “[t]he union’s speculation (that the amendment would impact working conditions) does not transform the subject matter of the May 2006 amendment into a mandatory subject of bargaining because the OPARB’s authority is still limited by ordinance.” PERC therefore concluded that the city did not violate RCW 41.56, ruling, “The subject matter of that amendment was a permissive subject of bargaining that did not impact the terms and conditions of employment of the employees represented by the Seattle Police Officers’ Guild.”

Similarly here, the Spokane ombudsman’s authority is limited by ordinance. The ordinance explicitly provides, “[t]he Spokane Office of Police Ombudsman lacks the authority to discipline or recommend that any officer be disciplined.” It also states that the ombudsman’s final report “shall not be used in any disciplinary, criminal, or civil legal proceeding.” Without the power to discipline or recommend legal action against a police officer, the ombudsman’s work, including the authority to independently investigate complaints of police misconduct, does not impact any term or condition of employment. Accordingly, we conclude the amendment is not subject to mandatory collective bargaining under RCW 41.56.

Conclusion: Non-disciplinary independent investigatory police oversight is not subject to mandatory bargaining under Washington law.

⁶ **Note to coalition** – I am wondering whether we want to include similar language in Spokane’s ordinance- Our ordinance provides: “Whereas, the City of Spokane desires to clarify that the Office of Police Ombudsman shall engage in independent investigations that do not change the daily working conditions of its police officers.” I propose inserting an explicit prohibition, e.g., “The Office of Police Ombudsman shall not participate in the management of the daily functions of the Spokane City Police Department.”