SUMMIT
LAW GROUP

315 Fifth Ave S Suite 1000
Seattle, Washington 98104-2682
phone · (206) 676-7000
fax · (206) 676-7001

Memorandum

CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT

TO: Mayor David Condon
City Administrator Theresa Sanders
Council President Ben Stuckart
Spokane City Council

FROM: Otto G. Klein III

DATE: October 3, 2013

RE: Proposed Police Ombudsman Ordinance

The Spokane City Council is considering an ordinance that will amend Chapter 4.32 of the Spokane Municipal Code (the "2013 Ordinance Amendment"), dealing with the Office of Police Ombudsman ("OPO"). This memo addresses several legal issues related to the 2013 Ordinance Amendment.

1. Likelihood of a Guild Challenge.

You have asked whether I believe the Guild will file an unfair labor practice charge in the event the City proceeds with the ordinance amendment. Without question, I believe the Guild will challenge the new ordinance. Over the last two decades, the Guild has vigorously protected its right to bargain over matters related to police oversight. Having recently invested a substantial amount of time in bargaining with the City in an effort to comply with the provisions of Proposition 1, the Guild will now feel even more strongly (if that is possible) about ensuring the City resolves matters at the bargaining table rather than through unilateral action.

2. The Scope of the Duty to Bargain.

The Public Employees Collective Bargaining Act requires that an employer must engage in good faith collective bargaining over wages, hours and working conditions. In determining whether a working condition is a subject that requires bargaining, the Public Employment Relations Commission ("PERC") balances the employees' interest in the terms and conditions of their employment against the employer's need for entrepreneurial control. This requires an assessment of (1) the extent to which managerial action impacts the wages, hours, or working

conditions of employees; and (2) the extent to which managerial actions are deemed to be an essential management prerogative. *International Association of Fire Fighters, Local 1052 v. PERC*, 113 Wn.2d 197, 200 (1989) (*City of Richland*). The inquiry focuses on which characteristic predominates. *City of Richland,* 113 Wn.2d (1989). The Supreme Court in *City of Richland* held that "the scope of mandatory bargaining is limited to matters of direct concern to employees" and that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominately 'managerial prerogatives,' are classified as non-mandatory subjects."

If a working condition is a mandatory subject, an employer must bargain with the union about it prior to implementation of the change. For uniformed employees, such as Spokane police officers, if no resolution can be reached the employer must proceed to interest arbitration rather than unilaterally implementing the subject. Conversely, if a matter is a permissive subject of bargaining, an employer may implement the change without bargaining.

One area in which the PERC routinely finds that employee interests outweigh those of the employer is in matters related to discipline. Over the years, the PERC has zealously protected a union's right to bargain over any matter that could impact discipline or the discipline process. For example, the PERC recently ruled that a change in the process utilized to review accidents is a mandatory subject of bargaining, because it could impact the discipline a police officer might receive. *City of Mountlake Terrace*, PD 11702 (2013). Similarly, in *City of Pasco*, the City sought to change the point system used to evaluate accidents and firearms discharges through a "board of review" process. *City of Pasco*, PD 4197-A, 4198-A (1994). The PERC required bargaining with the union over the change. In *City of Pullman*, the employer sought to change the way it conducted investigatory interviews, providing that the interviews would no longer be tape recorded. The City argued that it should be able to control the process used by the City to conduct an investigation of a police officer, and that changes in the process need not be bargained. The PERC disagreed, finding that "like other aspects of the discipline process, the presence or absence of tape recording at investigatory interviews is a mandatory subject of collective bargaining." *City of Pullman*, PD 8086 (2003); *upheld*, PD 8086-A (2003).

In order to establish a violation, the union must establish that the change could reasonably impact the disciplinary process. In *City of Seattle*, PD 9957-A (2009), the City unilaterally changed the process used by its Civilian Review Board to review closed investigative files. Historically, before the closed files were sent to CRB members, they were redacted by removing police officer and witness names. The redaction process was very cumbersome, and resulted in a significant delay in providing the files to the CRB. Under the new procedure, the CRB members were provided unredacted files. Significantly, from the PERC's perspective, the CRB members were specifically prohibited from releasing this information. The union asserted that the change constituted a mandatory subject of bargaining, because it was theoretically possible that a CRB member might disclose the confidential information. Given the explicit prohibition against disclosure in the recommended procedure, and the fact that only closed (as opposed to open or ongoing investigations) were at issue, the PERC found that the potential for any impact on the disciplinary process was remote, and found the change a permissive subject of bargaining.

The good faith bargaining obligation also impacts the manner in which a party approaches and conducts bargaining. While a party is not required to make concessions, it must be willing to consider possible alternatives in good faith. In a *Walla Walla County* case, the Examiner explained this requirement: "On one hand, a public employer has the right to refuse a demand made by a union. In other words, 'no' can be a legitimate bargaining response, if made in good faith.... The collective bargaining process must take place in an atmosphere where the parties are at least receptive to consider the proposals made by the opposing side. If one of the parties states its unequivocal opposition to a bargaining topic before meaningful discussions can take place, the bargaining process shall undoubtedly fail." *Walla Walla County,* PD 2932 (1988), *affirmed* in PD 2932-A. The obligation to bargain in good faith "encompasses a duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and employees. A party is not entitled to reduce collective bargaining to an exercise in futility." *Mansfield School District*, PD 4552-B (1995).

3. Can the City Unilaterally Implement the 2013 Ordinance Amendment?

A. Impact on Discipline and the Discipline Process. The 2013 Ordinance Amendment makes many changes to the existing OPO Ordinance. The most significant changes provide the OPO with authority to engage in independent investigations. For example, "the OPO may conduct an independent investigation of any complaint filed with the OPO at any time, regardless of IA action on the complaint." SMC Section 4.32.035.D.1. Similarly, whenever a matter has been determined to be a Community Impact Case,[1] the OPO may conduct an independent investigation. The authority to conduct an "immediate" investigation is granted regardless of whether a complaint has been filed with either IA or the OPO. SMC Section 4.32.035.E.1. Finally, "if a complaint is filed solely with the OPO, or with both the OPO and IA, the OPO may conduct an independent investigation at any time, regardless of IA action, as provided in this chapter." SMC Section 4.32.035.B.2.b.

Presumably in recognition of the fact that the PERC has previously found the City guilty of an unfair labor practice for instituting a form of civilian oversight that impacted the disciplinary process, the new ordinance explicitly provides that the newly-created Office of Police Ombudsman Commission (the "Commission") shall not have authority to "participate in the Police Department's disciplinary process." SMC Section 4.32.150.C.1. Similarly, the "OPO shall not have a role in the discipline of police officers," Section 4.32.035.B.3.

Despite these disclaimers, I believe that the PERC will find that these provisions of the 2013 Ordinance Amendment impact discipline and the discipline process, and thus trigger a bargaining obligation.[2] Unlike the Seattle case, which was limited to confidential review of closed files, the 2013 Ordinance Amendment allows the OPO to conduct its own investigations,

[1] A Community Impact Case involves an incident or complaint that because of "public visibility, media exposure, and/or allegations of serious or willful misconduct" by officers, warrants "immediate independent investigation" by the OPO. Section 4.32.020.C.

[2] The purpose of this memo is not to review each of the proposed changes and assess whether bargaining may be required. Rather, I have sought to identify those aspects of the 2013 Ordinance Amendment most likely to require bargaining, and provide advice on how I believe the PERC will assess them.

and in many cases allows it to do that prior to the time the Police Department has even determined whether to conduct an investigation. Indeed, the 2013 Ordinance Amendment explicitly provides that in Community Impact Cases the OPO may commence an investigation based entirely on public visibility or media exposure, irrespective of whether a complaint has been filed.

The underlying purpose of any such OPO investigation will be to determine whether police officers acted properly in the performance of their duties. Unlike the attenuated possibility of impact on working conditions in the Seattle case, it is relatively easy to see how this process ultimately could impact the discipline of police officers. For example, suppose the OPO conducts the initial investigation (prior to the Department taking action) and concludes that City police officers acted improperly. In such a circumstance, the Guild will be able to argue this finding necessarily increases the likelihood that the Department will conduct its own IA. Indeed, after a finding of misconduct by the OPO, it is hard to imagine any circumstance under which the Department would simply ignore that finding and not conduct an investigation. From a risk management standpoint, the City would have an increased risk of civil liability in any situation where the OPO found misconduct while the Police Department took no action, and failed to even start an investigation.

Stated somewhat differently, even though the OPO does not have direct involvement in the discipline process, that does not mean that actions taken by the OPO pursuant to his/her duties on behalf of the City will not impact the discipline process. The 2013 Ordinance Amendment does not prohibit the City from considering determinations made by the OPO as part of its own disciplinary decision making process.[3] Moreover, as a practical matter, the City has a strong interest in considering all relevant facts when making discipline decisions. If the OPO concludes improper conduct occurred, the Department will certainly want to consider that information when determining whether to discipline the officer. In making any discipline decision, the City will want to take into account any and all relevant information, regardless of whether it is generated by the OPO or IA.

In conducting independent investigations, the OPO does not have the ability to compel an officer to answer questions. SMC Section 4.32.035.D.3. Rather, the OPO "may request voluntary interviews with SPD officers at any time and disclose both the request and the response to the request by the SPD and/or the officers to whom the request is made." *Id.* The Guild will argue that this puts the officer in a very difficult position. On the one hand, if the officer refuses to attend the interview, that leads to a suggestion that the officer acted improperly. Since the OPO may "disclose" the failure of the officer to cooperate, this puts the officer in a potentially negative light in the community. On the other hand, if the officer attends the interview "voluntarily," the officer becomes subject to separate investigations with potentially different conclusions. The PERC will view this as impacting the discipline process.

---

[3] Even if such a requirement were in place, it is difficult to see how the City could ever establish that it did not consider either the fact of or results generated by an OPO investigation. In addition, any such prohibition would provide officers challenging City-imposed discipline with another procedural means to get the discipline overturned (*e.g.*, the City considered the OPO investigation, contrary to the requirement in the Ordinance, and therefore my discipline should be overturned). Such a result would be antithetical to the underlying purpose of civilian review.

The 2013 Ordinance Amendment also amends the process by which the OPO can challenge the Department's failure to open an IA investigation, and whether a completed IA investigation should be reopened because it is not thorough and objective. SMC Section 4.32.035.C.4. Under the amendment, the newly-formed Commission will make the "final" decision on whether an IA investigation must be opened, and whether additional investigation is required. This changes the procedure for determining whether to start or re-open an IA investigation on an officer. Again, I believe the PERC will find that this is a change in the process used to determine whether an officer should be disciplined, and thus a mandatory subject of bargaining.

Another potential impact of the ordinance involves the criminal investigation of a police officer. One section of the ordinance provides that the OPO "shall not participate in criminal investigations against police officers." SMC Section 4.32.035.B.3. One of the amendments in the 2013 Ordinance Amendment, however, allows the OPO to observe any criminal investigation of a police officer that grows out of a Critical Incident (whenever an electronic control device was used, whenever the SWAT team is called out, etc.). SMC Section 4.32.040. This right of observation includes criminal investigations conducted by other agencies. Given the significant potential impact of a criminal investigation of an officer, and since such investigations usually occur prior to the time an administrative IA is conducted, the Guild will assert that it impacts working conditions. While I think this will be a closer call since the City can argue that mere observation without more does not have any potential impact, there is a reasonable likelihood the PERC will find a violation given the significant impact a criminal investigation can have on a police officer.

I also expect the Guild will assert that the 2013 Ordinance Amendment seeks to unlawfully skim bargaining unit work. Historically, almost all investigations of potential police misconduct have been conducted by members of the Department (either the Guild unit or the Lieutenants and Captains). Under the 2013 Ordinance Amendment, some investigative work will be performed by the OPO. The Guild made a similar assertion during the original OPO bargaining, but ultimately backed off since the OPO investigations were done in conjunction with the Department investigations, and thus did not in any way take away or remove work from the bargaining unit. Under the new 2013 Ordinance Amendment, however, that will change, with the OPO performing its own independent investigation of police officers. Indeed, the amendment requires that the Department affirmatively notify each complainant of their "right" to have the matter independently investigated by the OPO rather than IA. SMC Section 4.32.035.C.1.b. An employer is required to bargain with a union whenever it removes work from a bargaining unit, and thus this is another avenue the Guild can use to successfully challenge unilateral implementation of the 2013 Ordinance Amendment.[4]

---

[4] I have not been asked to analyze potential public disclosure issues related to the records generated by the OPO. When the first PERC Hearing Examiner found City Council Resolution 92-67 unlawful, one basis for doing so was a conclusion that the process could lead to the release of investigatory information involving a police officer that otherwise would have remained confidential. While the 2013 Ordinance Amendment seeks to make the records generated and maintained by the OPO "subject to any applicable exemptions in the Washington Public Records Act" (SMC Section 4.32.035.B.5.d), the ultimate determination of the applicability of exemptions is controlled by the Public Records Act and state law. To the extent additional records related to officer conduct would be subject to public disclosure as a result of the amended ordinance, that could also trigger an obligation to bargain.

B. Impact on Future Bargaining.

The 2013 Ordinance Amendment prohibits the City from entering into "any collective bargaining agreement that limits the duties or powers of the police ombudsman commission or the office of police ombudsman as set forth in this chapter unless such change is required to comply with existing federal or state law." SMC Section 4.32.010.C.

The issue created by this provision is best understood by example. The current collective bargaining agreement provides for mediation of complaints that do not involve matters that could result in suspension, demotion or discharge. The mediation process is a way to facilitate communication between a complainant and an officer, and provides a process for resolution of relatively minor matters. The amended ordinance provides that any officer who has a "continuing pattern of unprofessional conduct" may not participate in the mediation process. SMC Section 4.32.020.F. A continuing pattern exists when the officer has a founded complaint of unprofessional conduct, or two or more allegations (regardless of whether founded or unfounded) in the previous five years.[5] There is no such provision in the current bargaining agreement. Pursuant to the 2013 Ordinance Amendment, in the next round of bargaining the City must get this limitation on the availability of mediation inserted into the new agreement. If the City is unsuccessful, the City is prohibited by the 2013 Ordinance Amendment from entering into the new bargaining agreement.

There is nothing in state labor law that requires the City to seek this change; rather, state labor law only requires that the City bargain in good faith. While the PERC certainly allows a party to take hard bargaining positions, it does require that party to be willing in good faith to consider alternatives. During bargaining, the Guild would undoubtedly claim that it is unfair to remove the mediation alternative from an officer simply because on two different occasions in a five-year period a citizen filed a complaint that was investigated and found to be without merit. Under the amended ordinance, in order to get a new bargaining agreement, the City team would be required to steadfastly insist on insertion of the new limitation. The City bargaining team would not be able to consider the possibility of retaining the existing language on mediation, and rather would be required to attain the change if the bargaining agreement was to be approved.

The PERC has repeatedly found violations when an employer brings a preordained "take it or leave it" position to the bargaining table. The explicit language of the 2013 Ordinance Amendment limits the City's flexibility at the bargaining table, and effectively mandates that the only acceptable change in the bargaining agreement will be one that is consistent with the 2013 Ordinance Amendment. Given the plethora of differences in the new Ordinance from the existing bargaining agreement, I believe the PERC would find that the new Ordinance unduly restricts the bargaining process and the City's ability to engage in good faith bargaining, and is thus unlawful.

---

[5] The stigma created for an officer by having been labeled as an officer with a "continuing pattern of unprofessional conduct" is another basis upon which the PERC would likely require bargaining. The City would have a very hard time convincing the PERC that there will be no working condition consequences to an officer labeled as having a continuing pattern of unprofessional conduct. The fact that the label attaches even if an officer has only two complaints, both of which are found to be without merit, exacerbates the concern.

4. Another Legal Impediment: the Beck Decision

The second unfair labor practice charge filed by the Guild resulted in the 2011decision by Arbitrator Beck. While the decision itself was a bit unusual in that Arbitrator Beck was required to determine whether certain subjects were mandatory subjects of bargaining (a determination that is generally the province of the PERC), the parties agreed to submit the matter to Arbitrator Beck rather than have the PERC conduct a hearing.[6] While the City may be able to argue that this part of the decision was either "dicta" or beyond the scope of his authority, Arbitrator Beck did reference that the bargaining agreement specifically preserved the right of the City to "implement changes that are not subjects of bargaining…" See Article 18 of the 2010-2011 Guild agreement. As such, the Guild may be able to successfully assert that Arbitrator Beck was in fact required by language in the contract to determine whether the changes were mandatory or permissive, and thus he was acting fully within his authority.

That case involved changes implemented by the City in the OPO Ordinance. One of the changes specifically referenced by Arbitrator Beck was expansion of the OPO's independent investigatory authority, with the changes relatively similar to many of the changes currently under consideration. Under that Ordinance, upon receiving a complaint, the OPO had authority to interview the complainant and any non-member witnesses, and determine facts and circumstances as necessary to create a closing report. The proposed ordinance explicitly provided that "the OPO shall not have a role in any disciplinary matter. All disciplinary decisions will be made by the Chief (or designee)." In finding that the OPO's independent investigatory authority could impact discipline, Arbitrator Beck stated as follows: "While it is true that the OPO does not get to make the disciplinary decision, the changes made by the ordinance make it so that OPO can put substantial pressure on the Chief of Police and/or the Mayor due to its expanded role in the investigatory process and expansion of its right to communicate with the public." Arbitrator Beck found that that the ordinance constituted a "substantial change in the OPO's authority with respect to discipline and, as such, constitutes a mandatory subject of bargaining." *Id.* at 19.

I suspect the Guild will argue that many of the changes in the 2013 Ordinance Amendment are substantially similar to (or the same as) those that were previously litigated in the Beck arbitration. Under generally accepted arbitration law, once an issue has been resolved in arbitration, that resolution is final and binding on the parties, and is a precedent for purposes of their future relations. The Guild thus may assert that these matters have already been litigated and decided. Given the many similarities between the two Ordinances, I am concerned the Beck arbitration will be a significant barrier to the City's ability to implement the 2013 Ordinance Amendment.

---

[6] The PERC, much like the National Labor Relations Board, will "defer" to grievance arbitration those issues that involve contractual interpretation. It is perhaps also worth noting that Arbitrator Beck has expertise in determining what is a mandatory or permissive subject of bargaining since he served as one of the three PERC Commissioners for many years.

5. The Possibility of an Extraordinary Remedy.

Over the last several years, the PERC has taken an expansive view of its ability to award extraordinary remedies.[7] While the agency has been fairly creative in crafting such awards, the most frequent is imposition of attorney fees. In one recent case, for example, the PERC awarded attorney fees against the employer even though the union had not made a request for that remedy. *University of Washington,* PD 11499-B (2013). The agency has stated that "attorney fees have been awarded as a punitive remedy in response to egregious conduct, recidivist conduct, or to frivolous defenses asserted by a party." *City of Tukwila,* PD 10536-B (2010); see also *Western Washington University*, Decision 9309-A (PSRA, 2008), citing *Lewis County*, 644-A (PECB, 1979), *aff'd*, 31 Wn. App. 853 (1982) (attorney fees awarded where it is clear that history of underlying conduct evidenced patent disregard for statutory mandate to engage in good faith negotiations).

On two previous occasions, the Police Guild has gone to the PERC complaining about City actions related to civilian oversight. In the first case, the PERC Hearing Examiner ruled for the Guild. In the second case, the parties agreed to defer the matter to a grievance arbitrator. Arbitrator Beck ruled that the changes in the new ordinance involved mandatory subjects of bargaining, and were inconsistent with the existing bargaining agreement. As such, he ruled for the Guild. While this was not a ruling by the PERC, it was the result of a charge filed with the agency, and the PERC subsequently stated that the Beck ruling constituted a final resolution of the matter. Thus, from PERC's perspective, the agency will view the City as having litigated unsuccessfully the issue of unilateral implementation of civilian oversight on two different occasions. If the City passes the 2013 Ordinance Amendment and is found to have violated the duty to bargain in good faith, it is very likely the PERC will award extraordinary remedies, and in particular require that the City pay the Guild's attorney fees. The PERC has a strong and fundamental bias in favor of collective bargaining. I believe the agency will view the City as a pattern (or "recidivist") offender on the issue of civilian oversight, and thus will want to take strong affirmative action to ensure that the City understands its bargaining obligations in this area.

6. Would the 2013 Ordinance Amendment Violate the Charter Language?

The Spokane Charter provides:

> The OPO shall independently investigate any matter necessary to fill its duties under Subsection A of Section 129, within the limits of the Revised Code of Washington, Washington state case law, Public Employment Relations Commission decisions, the Spokane Municipal Code, and any collective bargaining agreements in existence at the time this amendment takes effect, but only until such agreement is replaced by a successor agreement.

---

[7] As stated by the PERC, "in crafting extraordinary remedies for cases such as this, our responsibility should focus not only on ensuring that the employees' free exercise of collective bargaining rights is protected, but also to educate the offending party on how to comply with its statutory responsibility." *Western Washington University,* PD 9309-A (2008); see also *University of Washington*, PD 11414-A (2013).

As noted above, I believe the passage of the ordinance is inconsistent with PERC precedent and decisions. In addition, especially in the context of Arbitrator Beck's decision, I believe the ordinance is inconsistent with the OPO language in the Guild bargaining agreement. For these reasons, I believe the 2013 Ordinance Amendment is contrary to the Charter.

7. Is the Severability Clause in the Amended Ordinance Meaningful?

The 2013 Ordinance Amendment contains a severability clause providing as follows:

> Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be preempted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

I have had some difficulty understanding the language in the severability clause. The first part of the clause is consistent with a typical severability clause in that it provides that if any section is found to be invalid or unconstitutional, the remainder of the ordinance stays in place. Generally, in order for such language to have effect, a court or agency must make a ruling. Until such time as a matter is submitted to PERC and a decision issued, no section of the ordinance would be declared unconstitutional or unlawful. The use of the word "decision" later in the severability clause supports this interpretation.

With regard to the remainder of the clause, it is not clear how "preemption" would be determined to have occurred. Would a legal decision be required, or is something else envisioned? The phrase "decision or preemption" suggests that something other than a decision would trigger preemption. Without an understanding of the intent, I am not able to assess how this clause would work in practice.

In the event of a successful challenge by the Guild, the severability clause will preserve all remaining sections of the 2013 Ordinance Amendment. In that sense it is meaningful. Unless the preemption language is somehow effective without a definitive decision of some kind, however, the severability clause will only be effective upon the issuance of a decision, and thus will not be a mechanism that can be used to avoid a successful challenge by the Guild to those sections of the 2013 Ordinance Amendment that are inconsistent with labor law requirements.

8. Conclusion.

As described above, I believe the PERC will find that the 2013 Ordinance Amendment triggers a bargaining obligation, and that unilateral implementation of the Ordinance constitutes a violation of the duty to bargain. Please let me know if you have additional questions, or if any of the above analysis is unclear.