

September 26, 2011

Dear Mayor Verner and members of the Spokane City Council

We are writing today to once again implore you not to repeal the 2010 Police Ombudsman ordinance, and to request of the Mayor that if the council does vote to repeal the ordinance, that the vote to repeal be vetoed.

As city consultant Sam Pailca documented in her 2007 report, there is deep public support in Spokane for credible and independent oversight of the Spokane Police Department. If anything, the public desire for credible police oversight is stronger now than it was four years ago. That support arises out of a still escalating sense of frustration that the Spokane Police Department is either unwilling or incapable of policing itself. It is a frustration also fueled by the recent revelations in the Otto Zehm case and the deepening sense that top elected and unelected officials in city government are impervious to the problem; that they are much more concerned with defending the conduct of the department and its officers than they are with restoring public trust in the police and in city government itself.

Judging by both arbitrator Michael Beck's account, and that of Public Employment Relations Commission (PERC) Unfair Labor Practice Manager David Gedrose in his September 1st letter (attached), the City has greatly complicated progress on this critical issue by simply making a mess of its defense of the 2010 ordinance. Indeed, the very fact that an ordinance to gut the independence of the Office of Police Ombudsman (OPO) is before you tonight is a direct consequence of the City's inexplicable mishandling of this important public and legal controversy. In simplest terms, the choices you've made thus far have prevented the central, salient issue—that of whether the City was within its legal rights to broaden the powers of the OPO—from being heard on the merits by either PERC or a court of appropriate jurisdiction.

Just because the City has dug itself into a deep hole doesn't mean it should give up. A vote by the council to repeal the 2010 Police Ombudsman before either the PERC or a court of competent jurisdiction addresses the legal merits of the 2010 ordinance is unnecessary at this time. To repeal the ordinance will only deepen public frustration and undermine the City's efforts to secure a collective bargaining agreement with the Guild that removes the union's opposition to a credibly independent OPO.

It's worth reviewing the recent history of how we got here.

Sam Pailca's 2007 recommendations were not fully implemented in 2008 because, according to City officials, the City tried and failed to get the Spokane Police Guild to agree to the functional independence of the office that the public supported and the council said it favored. The public was told the City would then pursue the needed changes for the office when negotiations with the police guild on a new contract took place in fall 2009. The council even passed a resolution on October 19, 2009 imploring the Mayor to secure these changes as part of the new contract. Yet, without any other explanation, City Administrator Ted Danek confirmed to the *Spokesman-Review* on 11/21/2009 that none of the proposed changes to the OPO even made it into the contract that the Guild submitted to its members. <http://www.spokesman.com/stories/2009/nov/22/union-releases-deals-terms/>.

Danek only explained that the ombudsman issue "was discussed" with the Guild before the agreement was sent to the Guild's members. And, thus, the new contract the City approved did absolutely nothing to enhance the independence of the Ombudsman office.

As a result of this unexplained failure, citizens implored the council in 2010 to exercise the City's clear rights under state law to add functions and duties to the OPO that would bolster the office's independence and credibility. These functions and duties do not affect officer discipline or other working conditions. The October 2009 ruling by the PERC board in *Seattle Police Officer's Guild v. Seattle* strongly supports the view that the changes enacted in 2010 are well within the City's legally protected managerial prerogatives. Accordingly, we then worked with the council to draft an ordinance that was legal and which could withstand an expected unfair labor practice complaint from the Guild.

It is the City's painfully inept mishandling of the defense of the 2010 ordinance that brings us to this juncture. Rather than defending the Guild's challenge before the PERC as an unfair labor practice, the City chose—without any transparency or public explanation—to contest the Guild's challenge to the ordinance before an arbitrator. Here, our lawyers actually agree with both the arbitrator and PERC's David Gedrose: this dispute (like the dispute resolved in the City's favor in *Seattle Police Officer's Guild v. Seattle*) belonged before PERC. Because it involved a matter of law and fact, it simply was not appropriate to even attempt to resolve it by arbitration. (According to PERC, the arbitration hearing could have been opened to the public to observe had the parties agreed to it being open. They didn't.)

Here is a summary of the City's conduct before PERC as recounted in David Gedrose's September 1st letter.

- On September 23, 2010, more than a month after the Guild filed an unfair labor practice complaint with PERC, the City requested arbitration and did so by certifying that the complaint was appropriate for arbitration because it involved a contract dispute.
- At the same time, in order to obtain PERC's consent for the arbitration request, the City certified that there were "no procedural defenses" to arbitration. "Had the Employer declined to waive procedural defenses at that time," wrote Mr. Gedrose, "then deferral [to arbitration] would not have been ordered."
- What the City did not disclose to PERC is that it ultimately intended to argue a scope of bargaining issue—in other words, that the City intended to argue that, by law, the changes in the 2010 Ombudsman ordinance were outside the scope of the issues requiring mandatory collective bargaining. "Had the Employer's answer to the unfair labor practice complaint stated that the issue was whether the Ordinance violated Chapter 41.56 RCW," Mr. Gedrose pointed out, "the case would not have been deferred to arbitration."
- Once the matter was assigned to arbitration, Mr. Gedrose noted, the City "did not present a case-in-chief, offering no witness testimony or exhibits" and instead waited until after the April 5, 2011 arbitration hearing to submit a "post-hearing brief," one "which alleged that the dispute was statutory and concerned the scope of bargaining."

Obviously, both arbitrator Michael Beck's and Gedrose's account of the City's mysterious conduct beg explanation.

As Mr. Gedrose put it: "An employer who asserts a contractual defense to a unilateral change complaint, requests and is granted deferral [to arbitration], and then mounts a surprise statutory defense assumes the risk that an arbitrator will rule on the evidence and argument presented and find against the employer. An employer who adopts such a course of action cannot legitimately cry foul and ask that the arbitration award be nullified based upon circumstances it alone generated."

Thus, it is clear from Mr. Gedrose's letter that the City, by its own as yet unexplained choices, has created a hostile atmosphere at PERC.

Nevertheless, it is also clear that the actual merits of the dispute—whether in fact the 2010 ordinance is protected as a matter of law under RCW 41. 56—have not yet received the hearing they should have before PERC or, in the alternative, a court of appropriate jurisdiction.

While we have no reason to dispute the basis for Mr. Gedrose’s agitation and frustration with the City, this still doesn’t change the fact that: a) the actual merits of the dispute—whether the City properly exercised its managerial prerogatives with the 2010 ordinance—have yet to be considered by PERC and; b) Pursuant to WAC 391-45-550 it remains PERC’s role to determine the “question of law and fact” as to whether a particular subject is a mandatory or nonmandatory subject of collective bargaining, and this is a determination that “is not subject to waiver by the parties by their action or inaction.”

In other words, our view is that even if the City acted in bad faith before PERC (i.e. in certifying that the dispute was appropriate for arbitration when, in fact, it wasn’t) that doesn’t dispose of either the public interest or the legal requirement that PERC and/or a court of appropriate jurisdiction reach the dispute on its merits.

In short, the City should not just throw in the towel, now, and walk away. It should not abandon the 2010 ordinance until it has reasonably exhausted its rights to obtain a hearing on the actual merits of the dispute before PERC or a court of competent jurisdiction. Moreover, it makes no sense for the City to abandon its appeal rights until it has reached a new collective bargaining agreement with the Spokane Police Guild.

The City Council and the Mayor should, instead, focus their efforts on finding the right course to take to obtain a fair and substantive ruling on the legality of the 2010 ordinance. You can and should do this while you negotiate a new contract with the Guild that will—this time around—incorporate the reforms in the 2010 ordinance.

Given the serious charges made against the City in Mr. Gedrose’s letter, we also believe the City has a responsibility to hold itself accountable to the citizens for its conduct. For starters, it should explain how and why it chose arbitration to resolve an unfair labor practice complaint that should have been heard by PERC.

In the meantime, we have additional observations and requests of the City Council and the Mayor.

1) You alone had the responsibility to competently defend the 2010 ordinance. The strong criticisms directed at the City in Mr. Gedrose's September 1st letter all derive from choices the City made or which were made on the City's behalf by its lawyers.

2) Members of the council have, in the past, complained that citizens seeking a credible, independent Ombudsman, were misdirecting their energy; that they should really be going to Olympia to try to change state public employment law. The notion that the Legislature will be open to changing the law, just for Spokane, when Spokane inexplicably squandered its opportunity to get a hearing on the legality of its ordinance is, we think, delusional at best. It remains the Mayor's and City Council's responsibility to mount a proper and well-executed defense of the 2010 Ombudsman ordinance or similar ordinance that can comply with the Code of Ethics promulgated by the National Association for Civilian Oversight of Law Enforcement (NACOLE). And the City has yet to do that.

3) Current members of the council have openly suggested that a local citizens initiative is needed to accomplish by initiative what the Council cannot accomplish by ordinance. We see no legal basis or merit for such an approach. Thus far, no one on the City Council has offered a legal opinion, let alone a legal theory, as to why a city initiative would succeed in place of an ordinance. There's no reason to think a citizen initiative in Spokane would not just lead us back to the same place, with another unfair labor practice from the guild, and no confidence that the City would mount a competent defense.

Finally, as you consider whether to repeal the 2010 ordinance, you should carefully weigh the consequences. To return to the 2008 ordinance (which all of you have acknowledged to be inadequate) would, at best, inflict deep damage on both the local and national credibility of the Spokane Office of Police Ombudsman. As Police Ombudsman Tim Burns has confirmed, it was after the passage of the 2010 ordinance that the Spokane OPO was able to announce and promote its compliance with the Code of Ethics promulgated by NACOLE. Going back to the 2008 ordinance would not only cost Spokane its compliance with the NACOLE code, it will deepen public cynicism about the Spokane Police Department and the City's subservience to the Spokane Police Guild.

The fact that we're at this troubling juncture is, to us, simply a reflection of the intense resistance we have felt from City officials and the police guild to enacting the reforms necessary to begin building public confidence in a badly damaged police

department. From the start, we've sought constructive partners in City Hall for accomplishing what really are simple, common sense reforms that comport with the law. With but a few exceptions, we've been bitterly disappointed by the lack of urgency, and the overall lack of political will and commitment to get this done.

Repealing this ordinance, now, would be a huge step in the wrong direction and would only exacerbate the eroding public confidence in city officials.

You do have a choice. You can, and should, find the right course to appeal the arbitrator's opinion, and get the issue heard on the merits by PERC or by a court of appropriate jurisdiction.

Sincerely,

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