

Complaint Description

Glen Morgan reported an issue (Wed, 30 Jan 2019 at 1:43 PM)

To whom it may concern,

It has come to my attention that Ben Stuckart, candidate for Spokane County Mayor and current Spokane City Councilmember has violated, once again, Washington State's Fair Campaign Practices Act (**RCW 42.17A**)

1) **Failure to report in-kind contribution (Violation of RCW 42.17A.240)**

The political committee Yes for Public Safety PAC, which was created December 17, 2018 (see PDC **Tracking # 100877727** for reference), sponsored a mailing to promote Proposition 1, which is a proposed property tax levy increase in the City of Spokane for the February 12, 2019 election. At least 30,000 mailers at a cost of \$22,500 have been sent by this PAC (see attached mailer sample as Exhibit A, and also PDC **Tracking #100882020** – schedule B for reference) This mailing has been done, in part, to assist the campaign of Ben Stuckart for Mayor (see PDC **Tracking #100824078** for reference to Stuckart for Mayor C1) by identifying Mr. Stuckart by name and through prominent photographs placed on the front of the campaign mailers. Mr. Stuckart has failed to disclose Yes for Public Safety PAC's expenditures as in-kind contributions to his campaign, which is a clear violation of **RCW 42.17A.240**.

For reference to similar violations which the Public Disclosure Commission (and the State Attorney General's office) has identified and ruled on in the recent past, please see the Snohomish County Judge Cindy Larsen case (**PDC complaint #6928**). Attached to this complaint is a copy of both the PDC's conclusions and the AG's settlement which was made in that case.

Ben Stuckart has committed and is in the process of committing almost the exact same violation right now.

In January of 2019, the political committee Yes for Public Safety PAC has sponsored at least \$22,500 in expenditures for a mailing that promotes City of Spokane Proposition 1. Since the PAC has raised at least \$61,000 to date, it is reasonable to expect a second mailer is currently being produced as well. This first mailing includes most prominently a campaign photograph of Ben Stuckart, which is the largest photo in the mailer (not including background imagery), and a quote attributed to Mr. Stuckart, identifying him by name. The mailing was presented to City of Spokane residents this month. I believe that the Yes for Public Safety PAC mailing constituted an electioneering communication **under RCW 42.17A.005(19)** because it was 1) a United States postal Executive Summary and (see Staff Analysis Cindy Larsen, **PDC Case 6928 Page 2** for a similar analysis) service mailing that 2) clearly identified Ben Stuckart, a

candidate for Spokane County Mayor, including by specifically naming Ben Stuckart, 3) was mailed to the same voters in the City of Spokane who will be voting in the Mayoral primary later this year, and 4) has a value of far more than \$1,000.

Mr. Stuckart has failed to disclose expenditures by Yes for Public Safety for the committee's mailing as in-kind contributions in his PDC filings, a clear and unambiguous violation of **RCW 42.17A.240**.

Additionally, any attempt to argue that Mr. Stuckart did not collude with this PAC to promote himself in their campaign mailer is not accurate for a variety of reasons, included, but not limited to the following facts.

- Both Mr. Stuckart and Yes for Public Safety PAC share the same treasurer – Barbara Marney
- Both Mr. Stuckart and Yes for Public Safety PAC share the same graphics vendor Mike Lee (who designed the flyer in question) See **PDC Tracking #100882020** and **#100761011**.
- Both Mr. Stuckart and Yes for Public Safety PAC share the same largest donors (See Stuckart PDC donation report of \$1000 Jan 14, 2019 donation from Spokane Fire Fighters Union – **PDC Tracking #100881775** and Yes for Public Safety PAC donations from Spokane Fire Fighters Union – **PDC Tracking #100879056** which contributed \$30,000 to this new PAC on Jan 4, 2019)
- Mr. Stuckart has been caught and fined \$250 in 2015 for violating State Ethics laws by providing confidential information to the same firefighters union, and his largest campaign donor (see article dated October 31, 2014 in the Inlander – linked here - <https://www.inlander.com/Bloglander/archives/2014/10/31/city-attorney-says-stuckart-violated-ethics-rules>). See also attached Ethics Finding from the City of Spokane to explain the fine and violations.
- This same Firefighters Union has frequently been involved in other violations of **RCW 42.17A**, including most recently, receiving a penalty of \$10,000 from the PDC (See **PDC Enforcement Action #9059**). Please note, this same union attempted to skip out on paying this fine, which resulted in the unprecedented step of the PDC Executive Director Peter Lavalley forced to send a warning letter to this organization demanding that they pay their fines.
- Please note, one of the three contributors to the Yes for Public Safety PAC is Adam McDaniel (McDaniel Projects - \$1,000 in-kind contribution See **PDC Tracking #100882020** Schedule B). Adam McDaniel is a paid employee of the City of Spokane and Ben Stuckart's legislative assistant. Mr. McDaniel is quoted in this December 10, 2017 Spokesman Review article linked here - <http://www.spokesman.com/stories/2017/dec/10/shawn-vestal-spokane-council-president-ben-stuckart/> on behalf of Mr. Stuckart pushing for \$500 caps on local campaign contributions (which he apparently believes should only apply to others and not to his own contribution of \$1000 to the Yes for Public Safety PAC this month). It defies reason to believe that Mr. Stuckart's own paid legislative aid would not be willfully contributing to this violation of the state's campaign finance laws to the benefit of his supervisor Ben Stuckart.

2) Accepting illegal over limit in-kind contribution (Violation of RCW 42.17A.410)

Additionally, Mr. Stuckart has not only illegally failed to report the in-kind contribution referenced earlier, but this additional in-kind contribution to Mr. Stuckart's campaign exceeds the statutory maximum limit for an electioneering communication contribution to Mr. Stuckart's campaign exceeded the state's \$1,000 primary election contribution limit. Additionally, since the City of Spokane, in its infinite wisdom has decided to implement a local campaign finance organization to further restrict the maximum limits to \$500, and Mr. Stuckart was the author of this local ordinance, then this violation only becomes even more egregious and ridiculous. I believe that by accepting an over limit contribution, Mr. Stuckart has committed another clear violation of **RCW 42.17A.410**.

Please note, one particularly troubling aspect of Mr. Stuckart's campaign finance violations in this case is Mr. Stuckart's repeated association and involvement with violating campaign finance laws on a regular basis. For example, in **PDC Enforcement Case #17132 & Case #16286**, Nick Castrolang produced an illegal, unreported \$12,400 poll on behalf of Mr. Stuckart to determine Mr. Stuckart's chances of winning a mayoral race in the City of Spokane (an action he is now taking with his active campaign to run for mayor right now). Please note that the PDC has not formally resolved either of these cases, despite the fact they have been filed with the PDC for years now. They do appear to help provide relevant background on this current case.

The PDC should investigate the possibility (and near certainty) that Ben Stuckart and this PAC "Yes for Public Safety PAC" committed the above violation maliciously (in part based on his cavalier disregard for city ethics rules in regards to this same mega donor to his campaign), which would be a class C felony per **RCW 42.17A.750 (2)(c)**. If the PDC determines that is the case, they should refer the case to the Attorney General's office for criminal prosecution immediately.

Please don't hesitate to contact me if you need any additional information.

Best Regards,

Glen Morgan

What impact does the alleged violation(s) have on the public?

It is important for the public to know who is actually funding political campaigns, particularly high-profile races for positions like Mayor. This is particularly true, when these exact same politicians - like Ben Stuckart in this case - are the same ones who claim they want to restrict campaign finance laws while at the same time exempting themselves from those same laws because they don't believe the laws should apply to them equally.

List of attached evidence or contact information where evidence may be found.

All PDC Tracking numbers are referenced within complaint
Relevant Case files are also referenced in complaint

Newspaper articles are linked in complaint
Copies of referenced documents are attached as exhibits

List of potential witnesses with contact information to reach them.

Donors and managers of Yes for Public Safety PAC
Treasurer Barbara Marney
Ben Stuckart's legal aide and major in-kind donor to Yes for Public Safety PAC - Adam
McDaniel
Ben Stuckart

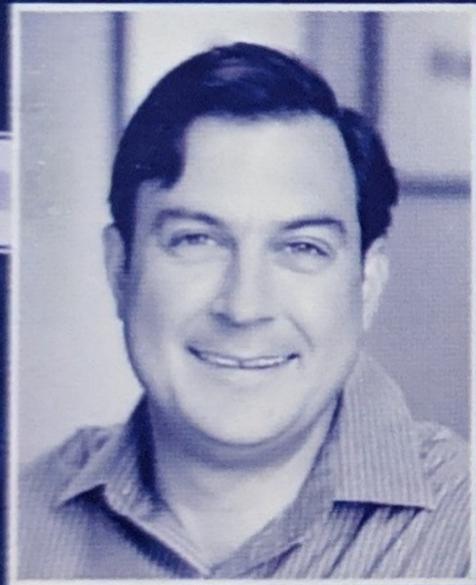
Complaint Certification:

I certify (or declare) under penalty of perjury under the laws of the State of Washington that information provided with this complaint is true and correct to the best of my knowledge and belief.

APPROVE



ENDORSED BY



-Ben Stuckart
Spokane
City Council
President

"I support Prop 1 because we need to keep our growing community safe. The city's Firefighters and Police Officers show up for us no matter what. In this February 12 special election, it's time for us to show up for them. Please join me in voting Yes to Approve Prop 1"



SPOKANE ALLIANCE
Organizing for the Common Good.



Paid for by: Yes For Public Safety 911 E Baldwin Ave Spokane, WA 99207
Top 5 contributors: Spokane Firefighters Local 29, Spokane Police Guild

Executive Summary and Staff Analysis

Cindy Larsen, PDC Case 6928

(Two Public Complaints and 45-Day Citizen Action Complaint)

This summary highlights staff's findings, conclusions, and recommendations regarding the allegations contained in PDC Case 6928, Cindy Larsen. Staff's investigation followed a public complaint against Ms. Larsen filed with the Public Disclosure Commission on July 25, 2016 by Beth Lucas, a second complaint filed with the PDC on August 4, 2016 by Melissa Day, and a 45-Day Citizen Action Notice complaint filed with the Washington State Attorney General and Snohomish County Prosecutor on August 21, 2016 by Robert Schiffner.

Background

PDC staff notified Ms. Larsen of the complaint from Beth Lucas on July 25, 2016, and sought a preliminary response. Staff notified Ms. Larsen of the complaint from Melissa Day on August 9, 2016, and informed her that staff's review of the matter was now a formal investigation. On August 23, 2016, staff contacted Ms. Larsen's counsel Greg Wong of Pacifica Law Group, and informed him that the PDC had received a copy of the Citizen Action Notice filed by Robert Schiffner under RCW 42.17A.765(4). Staff informed Mr. Wong that we would attempt to complete our investigation of the complaints within the notice periods provided under the law.

Allegations

In their complaints, Ms. Lucas and Ms. Day alleged that the political committee A Safer Snohomish County sponsored a mailing to promote Snohomish County Proposition 1 in the August 4, 2016 primary election, and that this mailing assisted the campaign of Cindy Larsen for Snohomish County Superior Court Judge by identifying Ms. Larsen by name and through two photographs. The complainants alleged that Ms. Larsen failed to disclose A Safer Snohomish County's expenditures as in-kind contributions to her campaign, an alleged violation of RCW 42.17A.240. Mr. Schiffner's Citizen Action Notice attached a copy of Melissa Day's public complaint filed with the PDC. The Notice stated, *"This e-mail serves as notification to the Attorney General's Office and Snohomish County Prosecuting Attorney's Office that there is reason to believe a provision of RCW 42.17A has been violated by Cindy Larsen in her campaign for Snohomish County Superior Court Judge."*

Investigative Findings and Conclusion

Based on the factors identified in the investigation, staff found and concluded as follows:

In July of 2016, the political committee A Safer Snohomish County sponsored \$53,924.74 in expenditures for a mailing that promoted Snohomish County Proposition 1. The mailing included two photographs of Cindy Larsen, one of which was the largest photo in the advertisement, and a quote attributed to Ms. Larsen, identifying her by name. The mailing was presented to Snohomish County residents on July 13, 2016. Staff believes that the A Safer Snohomish County mailing constituted an electioneering communication under RCW 42.17A.005(19) because it was 1) a United States postal

service mailing that 2) clearly identified Cindy Larsen, a candidate for Snohomish County Superior Court Judge, including by specifically naming Ms. Larsen, 3) was mailed in Snohomish County within sixty days before Ms. Larsen's August 4, 2016 primary election, and 4) had a value of \$1,000 or more.

Because Ms. Larsen participated in the photo shoot for Proposition 1 and in pre-production review of the mailing's content, it appears that the mailing was an expenditure conducted in cooperation, consultation, concert, or collaboration with a candidate. Accordingly, staff believes the mailing constituted a "contribution" to Ms. Larsen, as that term is defined by RCW 42.17A.005(13)(a)(ii) and WAC 390-05-210(3). Additionally, as an electioneering communication conducted in cooperation, consultation, or concert with a candidate, staff believes the mailing constituted a contribution under RCW 42.17A.310.

Brooke Davis, Ms. Larsen's professional campaign manager and a registered officer of her campaign committee through July 31, 2016, was also a paid political consultant to A Safer Snohomish County. In that role, she was the person with primary responsibility for managing production of the mailing that identified Ms. Larsen by name and photograph. Due to Ms. Davis' role in managing production of the mailing, staff believes that related expenditures by A Safer Snohomish County were made in consultation with or with the assistance of a person who had been an officer of Cindy Larsen's authorized committee during the twelve months preceding the expenditure, and thus constituted a contribution under WAC 390-05-210(3)(c). Finally, to the extent that the Larsen campaign's outstanding debts to Brooke Davis during July of 2016 constituted "compensation," staff believes that the Proposition 1 mailing represented a contribution under WAC 390-05-210(3)(d), as an expenditure made in consultation with a person who, during the twelve months preceding the expenditure, had been receiving campaign-related compensation from a candidate or the candidate's authorized committee.

Staff has concluded that Cindy Larsen failed to disclose expenditures by A Safer Snohomish County for the committee's mailing as in-kind contributions in her PDC filings, an apparent violation of RCW 42.17A.240. Additionally, staff believes the committee's expenditures for an electioneering communication contribution to Ms. Larsen exceeded the \$2,000 primary election contribution limit for judicial races. Staff believes that by accepting an over limit contribution, Ms. Larsen committed an apparent violation of RCW 42.17A.410.

Recommendation

Cindy Larsen, her campaign manager Brooke Davis, and officers and agents of A Safer Snohomish County offered consistent testimony that expenditures by A Safer Snohomish County were not conducted for the purpose of assisting or promoting Ms. Larsen's 2016 candidacy for Superior Court Judge. Ms. Larsen testified further that the committee's expenditures did not have the effect of assisting her campaign. Nevertheless, PDC staff recommends that the Commission find, as a matter of law, that the committee's expenditures constituted electioneering communications and in-kind

contributions that Ms. Larsen failed to disclose as required under RCW 42.17A.240, and that additionally exceeded Ms. Larsen's contribution limits under RCW 42.17A.410. Staff recommends that the Commission find apparent violations of those sections of law, and recommend to the Washington Attorney General that that office take appropriate action concerning the apparent violations.

Staff notes that in his August 21, 2016 Citizen Action Notice, Robert Schiffner did not notify the Washington State Attorney General and Snohomish County Prosecutor of an intent to sue any person other than Cindy Larsen. If the commission accepts staff's recommendation and finds apparent violations of RCW 42.17A.240 and RCW 42.17A.410 by Ms. Larsen, this finding may point to possible violations by A Safer Snohomish County for making contributions which exceeded the limits of RCW 42.17A.410. In that case, the Commission may wish to direct staff to open a separate case for the political committee, and schedule an adjudicative proceeding or report to the Commission for a future meeting.

FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

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STATE OF WASHINGTON
SNOHOMISH COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

NO. 16-2-19162-31

Plaintiff,

STIPULATION AND AGREED
JUDGMENT

v.

CINDY LARSEN and CINDY LARSEN
FOR JUDGE, a political committee,

EX PARTE

Defendants.

JUDGMENT SUMMARY (RCW 4.64.030)

- A. JUDGMENT CREDITOR: Plaintiff, STATE OF WASHINGTON
- B. JUDGMENT DEBTOR: CINDY LARSEN and CINDY LARSEN FOR JUDGE, a political committee
- C. PRINCIPAL JUDGMENT: \$2,000
- D. INTEREST: No prejudgment interest is owed. Principal judgment amount(s) due and owing shall not bear interest unless the principal judgment is unpaid by the due date specified herein
- E. COSTS AND FEES: None
- F. ATTORNEYS FOR JUDGMENT CREDITOR: ROBERT W. FERGUSON, Attorney General
LINDA A. DALTON, WSBA No. 15467
Senior Assistant Attorney General
S. TODD SIPE, WSBA No. 23203
Assistant Attorney General
- G. ATTORNEY FOR JUDGMENT DEBTORS: ERICA TEMPLE, WSBA No. 28458
Adams & Duncan, Inc. P.S.

STIPULATION AND AGREED
JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
Campaign Finance Unit
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

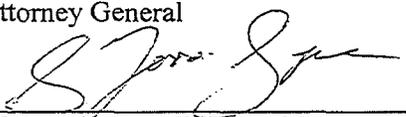
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STIPULATION

The parties to this stipulation, Plaintiff, STATE OF WASHINGTON (STATE), and the Defendants, CINDY LARSEN, a 2016 candidate, and CINDY LARSEN FOR JUDGE, a political committee, desiring to resolve all claims arising out of the State's complaint, hereby enter into the following stipulation:

1. Defendants CINDY LARSEN and CINDY LARSEN FOR JUDGE, a political committee, agree to pay Plaintiff State of Washington an assessed civil penalty in the amount of \$2,000 for the violations of RCW 42.17A enumerated in the complaint which occurred during election year 2016.
2. Defendants CINDY LARSEN and CINDY LARSEN FOR JUDGE, a political committee, agree to pay Plaintiff State of Washington the assessed civil penalty within 30 days of the date of entry of the Judgment.

DATED this 31ST day of October, 2017.

ROBERT W. FERGUSON
Attorney General


LINDA A. DALTON, WSBA No. 15467
Senior Assistant Attorney General
S. TODD SIPE, WSBA No. 23203
Assistant Attorney General
Attorneys for Plaintiff


ERICA TEMPLE, WSBA No. 28458
Adams & Duncan, Inc. P.S.
Attorney for Defendants

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JUDGMENT

THIS MATTER came on regularly before the undersigned judge of the above-entitled Court. Plaintiff, STATE OF WASHINGTON (STATE), appearing through its attorneys of record, ROBERT W. FERGUSON, Attorney General, LINDA A. DALTON, Senior Assistant Attorney General, and S. TODD SIPE, Assistant Attorney General, and Defendants, CINDY LARSEN and CINDY LARSEN FOR JUDGE, a political committee, appearing through their counsel ERICA TEMPLE, Attorney at Law, apprised the Court of their agreement to the entry of this judgment for the purpose of settling and compromising this action brought under RCW 42.17A. The Court, having reviewed the records and files herein, and having found the settlement to be a just and proper resolution of this matter as to all claims contained in the complaint, and being otherwise fully advised in the premises, it is hereby **ORDERED** as follows:

1. Defendants CINDY LARSEN and CINDY LARSEN FOR JUDGE, a political committee, are hereby assessed a civil penalty, under the provisions of RCW 42.17A, in the amount of \$2,000 payable to the State of Washington, said penalty to be paid within 30 days of the entry of this Judgment.

DONE IN OPEN COURT this 3rd day of ~~October~~ ^{November}, 2017.

Carol Murphy
JUDGE

Carol Murphy

Presented by:
ROBERT W. FERGUSON
Attorney General

S. Todd Sipe
LINDA A. DALTON, WSBA No. 15467
Senior Assistant Attorney General
S. TODD SIPE, WSBA No. 23203
Assistant Attorney General
Attorneys for Plaintiff

Approved as to Form:
Erica Temple
ERICA TEMPLE, WSBA No. 28458
Attorney for Defendants

BEFORE THE ETHICS COMMITTEE
CITY OF SPOKANE

RECEIVED

FEB 19 2015

CITY CLERK'S OFFICE
SPOKANE, WA

STIPULATIONS OF FACT, CONCLUSIONS, AND PENALTY

Concerning the Referral of Possible Ethics Violation by City Council President Ben Stuckart

The City of Spokane Ethics Committee, (the "Committee") and Council President Ben Stuckart ("Ben Stuckart") Stipulate and Agree to the following Findings of Fact, Conclusions and Penalty:

FINDING OF FACT

1. On October 30, 2014 Nancy Isserlis, City Attorney for the City of Spokane filed with the Committee a "Referral of possible ethics violation by City Council President Ben Stuckart". A copy of the referral was also provided to Ben Stuckart.
2. The matter was scheduled for a preliminary hearing on November 19, 2014, to determine if the Committee has jurisdiction to hear the matter and whether or not the Referral, on its face, alleges facts that, if true, would substantiate a violation. The Committee unanimously found that both determinations were in the affirmative.
3. At the preliminary meeting the Committee reviewed the documents submitted by the City Attorney, reviewed a document dated November 13, 2014 and submitted by Ben Stuckart in response to the October 30, 2014 referral letter from the City Attorney; asked questions and received responses from Assistant City attorney's Mike Piccolo and Erin Jacobson, and Ben Stuckart.
4. At the time of the action in question Ben Stuckart was an elected official of the City of Spokane and subject to the provisions of Spokane Municipal Code ("SMC"), Section 01.04.030.
5. Ben Stuckart received a confidential email from an Assistant City Attorney, clearly marked "attorney client privileged" on May 5, 2014, and, within minutes, forwarded that email to a third party involved in the litigation discussed in the email in question.
6. SMC, Section 01.040.030 Prohibited Conduct, subsection (H) "Disclosure of Confidential Information Prohibited", states, "No City officer or employee shall disclose or use any confidential, privileged or proprietary information gained by reason of his official position for a purpose which is for other than a city purpose or beyond the scope of the officer or employee's authority or responsibility; provided, that nothing shall prohibit the disclosure or use of information which is a matter of public knowledge, or which is available to public on request."
7. With respect to the provisions of SMC 01.040.030 (H):
 - a. The email in question was confidential and subject to the attorney client privilege;
 - b. Ben Stuckart did not have the authority to waive or breach that privilege, and
 - c. Disclosure of the document in question is not one, which, without redaction, would have been available to the public upon request.
8. There is no evidence of harm to the City resulting from this disclosure and Ben Stuckart had cooperated fully with the Committee and admitted that the disclosure did in fact occur.

CONCLUSIONS

Based upon the finding set forth above, the Committee and Ben Stuckart agree to the following Conclusions:

1. The Committee has jurisdiction to consider this referral.

2. That the actions of Ben Stuckart, as set forth in the complaint, and as supported by the information provided at time of the preliminary hearing, , constitute a violation of SMC 01.040030 (H).
3. That, pursuant to SMC Section 1.04.040 (G) (3) Section 01.04.060 and Section 2.8 of the "Ethics Committee Policy and Procedure Manual" the Committee and the accused may enter into a stipulation and agree to certain penalties.
4. That the Committee and Ben Stuckart have agreed to enter into such a Stipulation and end any further proceeding in this matter.

PENALTY

As penalty for the violation set forth above and pursuant to SMC 01.04.050 (B), Ben Stuckart and the Committee stipulate and agree to the following penalty:

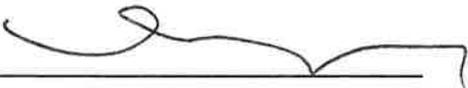
1. As a condition of this stipulation Ben Stuckart agrees to not in the future, disclose, forward or in any other way provide confidential or privileged documents or information prohibited by SMC Section 01.04.030 (H); and

2. That Ben Stuckart further agrees to pay a fine in the amount of \$250.00 to the City of Spokane.

Stipulated and agreed to on this ___ day of December, 2014:



Council President Ben Stuckart



Spokane City Ethics Committee by Troy Bruner - Chairperson

Troy Bruner, Chairman
City of Spokane Ethics Committee

Re: Response to October 30, 2014 referral letter from City Attorney Nancy Isserlis.

November 13, 2014

Dear Mr. Bruner:

I am writing to provide information to the Ethics Committee (the "Committee") in response to a letter sent to the Committee by City Attorney Nancy Isserlis and dated October 30, 2014, in an effort to assist the Committee in determining this matter. While I admit that my action in forwarding an email which was labeled as "confidential" was an error in judgment on my part, I do not believe that the referral letter is sufficient under the Committee's criteria to state a violation of the City's Ethics Code. Alternatively, should the Committee find that the referral letter establishes a violation, the Committee should find that the violation alleged was *de minimis* in nature, and should therefore dismiss this matter.

1. The complaint does not state a violation because the content of the email did not contain confidential information.

The crux of the complaint against me is that an email sent by Assistant City Attorney Erin Jacobsen to several individuals, forwarded by me on May 5, 2014, contained "highly confidential" information. The Spokane Municipal Code ("SMC") defines "confidential information" as "specific information, rather than generalized knowledge, that is not available to the general public on request, or information made confidential by law." SMC 01.04.020(I) (emphasis added). When viewed against these definitions, the email I forwarded was not confidential matter, much less "highly confidential."

Unfortunately, the Committee was only furnished a fully redacted version of the email in question, making it impossible for the Committee to determine whether the content of the email was publicly known at that time. Therefore, I am attaching copies of documents, such as press reports,¹ City Council documents,² and publicly-available court filings,³ which contain the same

¹ See "Judge rules against city's expansion of exempt positions," Heidi Groover, The Inlander, April 26, 2014, available at: <http://www.inlander.com/Bloglander/archives/2014/04/26/judge-rules-against-citys-expansion-of-exempt-positions> (last visited Nov. 5, 2014) (attached as Exhibit 1); David Wasson, "Condon's plan to raise number of fire department appointees halted," The Spokesman-Review, April 29, 2014, available at: <http://www.spokesman.com/stories/2014/apr/29/condons-plan-to-raise-number-of-fire-department/> (last visited Nov. 5, 2014) (attached as Exhibit 2); Shawn Vestal, "Ruling panning Spokane mayor's fire department shuffle may not reach police," The Spokesman-Review, May 3, 2014, available at: <http://www.spokesman.com/stories/2014/may/03/shawn-vestal-ruling-panning-spokane-mayors-fire/> (last visited Nov. 5, 2014) (attached as Exhibit 3).

² See Agenda Sheet for City Council Meeting of 05/12/2014 (noting that the repeal ordinance, Ordinance C 35096, was received by the City Clerk on April 30, 2014 for first reading at the City Council's May 12, 2014 meeting) (attached as Exhibit 4).

kind and tenor of the information contained in the email I forwarded. Simply put, the email I forwarded did not contain information which was not already known to the parties to the litigation or to the public at the time I forwarded the email. The email I forwarded was therefore not confidential information at the time, and was not legal advice, but was instead a compilation and reiteration of information which was publicly available before May 5, 2014. For those reasons, therefore, the email was not entitled to protection as confidential information, and the referral letter does not establish a violation of the Ethics Code.

Rather than containing confidential information, the email I forwarded was merely the reporting from the Mayor to City officials and staff, via a lawyer, of factual information. As we know, merely running factual information through a lawyer's hands does not necessarily clothe that information with confidentiality or attorney-client privilege. In that respect, this situation is like those cases which "evoke an image of 'attorney as messenger,' wherein the contents of a message that otherwise amounts to public information is not protected by the attorney-client privilege. The conveyance of public information from an attorney to his client, . . . is not covered by the privilege because there is nothing confidential about the communication." *U.S. v. Bauer*, 132 F.3d 504, 508 (9th Cir. 1997). Because Ms. Jacobson was merely the messenger for factual, and publicly-available, information from the Mayor to other City officials and staff, the email was not confidential information nor was it entitled to the protections of attorney-client privilege.

2. My forwarding of the email did no harm to the City's litigation, negotiation, or bargaining position; any violation of the Ethics Code due to my forwarding of the email was *de minimis*.

Even if the Committee understands the email's contents to have been confidential information, my release of that publicly-available information to a third party did nothing to endanger the City's litigation, negotiation, or bargaining positions, because it did not tell the Firefighter's Union anything it did not already know.

Nothing in the email I forwarded caused or could have caused the City any particular, substantial, or meaningful harm. As I have pointed out, the email contained information which repeated publicly-stated information, which, by definition, could not cause the City harm by being publicized again. Any harm to the City's litigation, negotiation, or bargaining positions was therefore *de minimis* in scope and extent.

That said, I recognize that my ill-advised decision to forward an email which was labeled "confidential" may have had a negative effect upon the public's perception of the City and City Officials. This is a serious issue, and one of which all City officials must be mindful. My action in this instance, when viewed against the facts in their totality and the standards by which the Committee is guided, constituted at most a *de minimis* violation of the Ethics Code.

3. I did not intend to personally benefit or intend to deprive anyone of a legal right or privilege by forwarding the email.

³ See Respondent's Response to Plaintiff's Motion for Summary Judgment, at 4 (attached as Exhibit 5); City of Spokane's Reply in Support of Motion for Summary Judgment, at 5-16 (Attached as Exhibit 6).

The Committee should decline to address allegations that I engaged in “official misconduct” as defined by RCW 9A.80.010(1) and SMC 42.23.050. Not only are those areas outside the scope of the Ethics Code, but they are simply unsupported by any facts, whether in evidence or otherwise.

First, there is no allegation, nor are there any facts in evidence or otherwise that I intended to obtain, or actually obtained, any personal benefit by forwarding of the email. And certainly the Committee faces an impossible task if it seeks to ascertaining my intent in forwarding an email, given that it only have before it at this point a fully-redacted document. To be clear: my intent in forwarding the email was to inform the public, not to gain anything personally. By forwarding the email, I obtained no personal benefit, nor did I intend to gain any personal benefit.

Second, there is no allegation, nor are there any facts in evidence to support, that my forwarding of an email was intended to deprive another of his, her, or its legal right or privilege. As stated above, the information contained in the email I forwarded was not confidential – that is, it was publicly available information. Even more to the point, to the extent the information contained in the email I forwarded was attorney-client privileged information rather than merely factual information channeled through an attorney, the Mayor may have waived that privilege himself by making the statements contained in the email to the press before I forwarded the email. Because no aspect of a claim of “official misconduct” is supported, the Committee should decline to address that allegation.

Conclusion.

I admit that I made a mistake when I forwarded the email in question here. I have apologized for that mistake publicly on more than one occasion and I do so here again. All City employees and elected and appointed officials must be highly cognizant of the requirements of the Ethics Code in all their dealings, and I am no exception.

The facts of this situation, when viewed in the totality of the circumstances, including the extent of actual and possible harm to the City and the fact that the information contained in an email labeled “confidential” was in fact publicly-available information, leads the Committee to the conclusion that any violation caused by my admittedly ill-advised action is and was *de minimis* in scope. For that reason, I respectfully request that the Committee dismiss this matter at its earliest opportunity.

Sincerely yours,



Ben Stuckart

City Council President

cc: Brian McClatchey, attorney at law

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Saturday, April 26, 2014

NEWS / POLITICS

Judge rules against city's expansion of exempt positions

Posted By Heidi Groover on Sat, Apr 26, 2014 at 11:11 AM

A Superior Court judge has ruled against the city's expansion of positions in the Spokane Fire Department that are exempt from civil service, according to the union representing local firefighters.



Young Kwak photo
Mayor David Condon has supported increasing the number of exempt positions in certain city departments.

The union brought the complaint against the city last summer arguing that increases in positions that are hired by appointment instead of through civil service testing violated state law and the Spokane City Charter. Mayor David Condon has led the push for more exempt positions in the fire, police and parks departments, increasing the total between them from six to 40 exempt positions, although not all have been filled. The changes were approved by the city council last year, though the political balance has since shifted. Condon and leaders of those departments have argued that hiring outside of civil service provides for more flexibility than outdated and rigid civil service testing. But some on the council, like Councilman Jon Snyder and Council President Ben Stuckart, argued exempt positions can encourage nepotism and the administration should instead look to reform the civil service process.

According to Stuckart and City Spokesman Brian Coddington, the judge issued an oral decision Friday. (Stuckart says he expects a written ruling by Monday or Tuesday.) The decision will not directly affect the changes to the parks or police departments, since the case was specifically about the changes to fire positions.

Coddington says he doesn't yet have many details, but offered this in an email to the *Inlander*: "The city is considering an appeal. We worked within the civil service rules and process and believe the City Council had the authority to create departments within the division."

Stuckart says he plans to bring an ordinance forward in coming weeks to overturn the changes to the fire department.

"I've heard that some of the language [the judge] used was pretty harsh and scathing to the city. I hope if we reverse it, that will be a clear enough signal [to the administration] not to appeal," Stuckart says. "[The change] was designed to undermine civil service. Everyone can differ on their opinion of civil service, but the way to change it is not to use words to try to undermine it."

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April 29, 2014 in City

Condon's plan to raise number of fire department appointees halted

David Wasson The Spokesman-Review

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Condon (Full-size photo)

Spokane Mayor David Condon's plan to boost the number of political appointees at City Hall has been dealt a potentially major setback.

Superior Court Judge Kathleen O'Connor has sided with city firefighters who challenged the legality of Condon's plan to increase the number of positions in the department that could be filled by mayoral appointment rather than by civil service testing.

"We felt this wasn't good for the city or the citizens," firefighter Don Waller, president of the labor union representing Spokane firefighters, said of the mayor's plan, which was approved last year by a divided City Council.

The same reorganization was used to increase the number of positions in the police department that could be filled by appointment as well, though O'Connor's ruling was specific only to the fire department changes. It's unclear whether police unions are contemplating a similar legal challenge.

Condon said today he and the city attorney's office have requested a written ruling from O'Connor and are reviewing their appeal options.

"The reality is we worked within the system," Condon said of the plan. "We believe the City Council has the power to create the departments."

The city charter limits the number of mayoral appointments in each department to two, which are generally reserved for department heads and assistant department heads.

Condon got around the limits by creating a new organizational structure that elevated the police and fire departments to "divisions," with each containing separate departments within them. The new "Fire Division" contained seven separate departments, for example, while the "Police Division" contained six separate departments. It increased the number of potential mayoral appointments by

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14 in the fire division and 12 in the police division.

The fire department was preparing to hire its first additional appointee, a physician who was to serve as a medical adviser on a part-time basis. The police department has filled five of its additional appointments.

Critics described the reorganization as little more than "word games," but the mayor and his backers have argued that greater flexibility is needed to address systemic problems within Spokane's bureaucracy and ensure that reforms demanded by voters, particularly within the police force, are carried out. The reorganization was narrowly approved last year with a 4-3 vote when the City Council was controlled by conservatives.

Control of the council has now shifted, however.

Council President Ben Stuckart, who opposed the reorganization last year, already has introduced a proposal to formally scrap the changes at the fire department but leave them intact for the police force.

Stuckart said efforts were made to negotiate a compromise that would have reduced the number of mayoral appointees within the police and fire departments in exchange for getting the fire union to drop its legal challenge, but the mayor's office was uninterested.

Civil service in Spokane was created by voters in 1910. It sets up hiring rules and tests to ensure employees are selected by merit and to prevent cronyism. Almost all city workers – except those working in the library system and the one or two managers of any department – are part of civil service.

O'Connor's ruling came Friday in response to both sides seeking what's called a summary judgment, with the judge reportedly describing the city's justification for the plan as "ludicrous." The decision halts the plan from being implemented within the fire department unless the city prevails on appeal.

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Furthermore, he said, his union has "absolutely no problem" with the underlying approach in the department's reorganization: the creation of neighborhood-based precincts to decentralize the department and connect it more strongly to the community. McCabe has also expressed tolerance, in the past, for the frequent shuffling that's happened on Chief Frank Straub's watch.

But McCabe's union and the Police Guild are both looking at other potential ramifications from the department-division metamorphoses. One possible downside that has nothing to do with appointees: It's possible that, if the Police Division remains a collection of separate departments, an officer with seniority in one department could be transferred to another and immediately drop to the bottom of the seniority scale there.

Those concerns would be the more likely basis for a legal challenge, but they wouldn't have to impinge on the larger structural goals, McCabe said.

"I don't view this as being a controversial issue at all," he said.

For now, the tenor at City Hall and on the City Council seems to be: Follow the ruling in the case of the fire department, ignore it if possible in the case of the police department. Unless someone challenges it specifically there, this strange and illogical combination could well move forward.

There's really no question that the mayor's plan was an end run around Civil Service. The arguments in favor of it make that clear – the administration says it needs flexibility to implement reforms in the departments.

The Spokane firefighters Local 29 sued, and theirs was the legal argument that O'Connor supported last Friday. The union argued that the state's Civil Service laws are intended to protect the public from cronyism and patronage and from a revolving door between administrations.

"The result of these practices was incompetent employees, high rates of employee turnover with each successive administration, and cultures of retaliation and political yes men," the union said in a statement. "The Civil Service system was created to promote the hiring and promotion of the most qualified applicants in a fair and transparent manner and retains the wisdom and experience of long-term workers."

Of course, the wisdom and experience of long-term workers has its flip side, and anyone who's worked in any organization of any size knows what it is: entrenched habits, refusal to change, burnout. There are also the large numbers of convictions and habits that result from conviction and habit: This is the way we've always done it.

Do we want mayors turning over the entire top tier of managers within departments every couple of years? A constant shuffling of political appointees? Of course not.

And yet it's hard to imagine the kind of dramatic cultural change that so many have called for within the city's police division without more flexibility in the leadership ranks. For now, those new distinctions stand. But if a legal lance is raised against it, O'Connor's brusque and definitive ruling leaves little doubt how it would fare.

Shawn Vestal can be reached at (509) 459-5431 or shawnv@spokesman.com. Follow him on Twitter at [@vestal13](https://twitter.com/vestal13).

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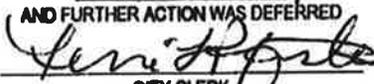
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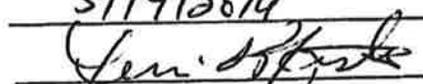
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		Agenda Sheet for City Council Meeting of: 05/12/2014		Date Rec'd	4/30/2014
				Clerk's File #	ORD C35096
				Renews #	
Submitting Dept	CITY COUNCIL			Cross Ref #	
Contact Name/Phone	BEN STUCKART 625-6269			Project #	
Contact E-Mail	AMCDANIEL@SPOKANECITY.ORG			Bid #	
Agenda Item Type	First Reading Ordinance			Requisition #	
Agenda Item Name	0320 REPEAL OF ORDINANCE CREATING FIRE DEPARTMENTS WITHIN FIRE				
Agenda Wording					
AN ORDINANCE relating to the establishment of fire departments within the fire division; repealing SMC sections 3.01A.270, 3.01A.275, 3.01A.280, 3.01A.285, 3.01A.290, 3.01A.295 and 3.01A.300.					
Summary (Background)					
On April 8, 2013, the City Council approved Ord. No. C-34964 relating to the executive and administrative organization of the City, including the creation of multiple departments within the fire division. The International Association of Fire Fighters local 29 and the Spokane Association of Fire Officers ("Plaintiffs") filed a lawsuit challenging the creation of multiple departments within the fire division.					
Fiscal Impact			Budget Account		
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Approvals			Council Notifications		
Dept Head	MCDANIEL, ADAM		Study Session		
Division Director			Other		
Finance	LESESNE, MICHELE		Distribution List		
Legal	PICCOLO, MIKE		Nathanial Odle, Legal		
For the Mayor	SANDERS, THERESA				
Additional Approvals					
Purchasing					

FIRST READING OF THE ABOVE ORDINANCE WAS HELD

ON 5/12/2014
AND FURTHER ACTION WAS DEFERRED

CITY CLERK

PASSED BY SPOKANE CITY COUNCIL ON

5/19/2014

CITY CLERK



Continuation of Wording, Summary, Budget, and Distribution

Agenda Wording

Summary (Background)

On April 25, 2014, the Spokane County Superior Court issued a written decision granting the Plaintiffs their motion for summary judgment and ordering that Ord. No. C-34964 is invalid and void as it relates to the fire department because it is in violation of the requirements of state law, Chapter 41.08 RCW. This ordinance will repeal SMC sections 3.01A.270, 3.01A.275, 3.01A.280, 3.01A.285, 3.01A.290, 3.01A.295 and 3.01A.300 so as to remove the seven departments created under the Fire Division consistent with the Court's decision. SMC 3.01A.265, which created the Fire Division with the potential of various departments, will remain in place.

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ORDINANCE NO. C35096

AN ORDINANCE relating to the establishment of fire departments within the fire division; repealing SMC sections 3.01A.270, 3.01A.275, 3.01A.280, 3.01A.285, 3.01A.290, 3.01A.295 and 3.01A.300.

WHEREAS, on April 8, 2014, the City Council approved Ord. No. C-34964 relating to the executive and administrative organization of the City, including the creation of multiple departments within the fire division; and

WHEREAS, the International Association of Fire Fighters local 29 and the Spokane Association of Fire Officers ("Plaintiffs") filed a lawsuit challenging the creation of multiple departments within the fire division; and

WHEREAS, on April 25, 2014, the Spokane County Superior Court issued a written decision granting the Plaintiffs' their motion for summary judgment and ordering that Ord. No. C-34964 is invalid and void as it relates to the fire department because it is in violation of the requirements of state law, Chapter 41.08 RCW; - - Now, Therefore,

The City of Spokane does ordain:

Section 1. That SMC sections 3.01A.270, 3.01A.275, 3.01A.280, 3.01A.285, 3.01A.290, 3.01A.295 and 3.01A.300 are repealed.

~~3.01A.270—Fire Communications~~

~~The communications department's primary responsibilities are to receive calls through the community's 9-1-1 system and dispatch appropriate resources to the public's request for assistance as well as to communicate with and provide documentation and other support to fire and EMS response agencies and their field units. Includes assuring that facilities, equipment and systems are in place and operational for interoperable communication to occur between the public and responders in order to support the mission of the fire division as well as fulfill the obligations to provide contract dispatching services to other fire agencies.~~

~~3.01A.275 Fire Emergency Medical Services~~

~~The fire emergency medical services department is responsible for the medical systems necessary to provide quality pre-hospital basic life support and paramedic level critical care. Includes the management and oversight of the 9-1-1 ambulance transport contract as well as participation in the coordination of the overall community emergency medical services system.~~

3.01A.280 Fire Logistics

~~The fire logistics department manages and maintains the emergency response fleet of specialized apparatus, equipment, physical buildings and inventory that are in place and necessary to support the fire division's mission.~~

3.01A.285 Fire Operations

~~The fire operations department primary responsibilities include response to fire, emergency medical services, rescue and other calls for service that typically occur through the community's 9-1-1 system. Consists of personnel and equipment deployed to field operations (stations and apparatus) as well as special operations and emergency incident management.~~

3.01A.290 Fire Planning and Information Management

~~The fire planning and information management department primary responsibilities are to develop and oversee the fire division's information technology plan and systems necessary to support the fire division's mission together with obligations to provide contract dispatching services to other fire agencies. Includes providing all aspects of information technology and information management services through development, purchase, installation and maintenance of routine and critical technological software and interoperable, secure infrastructure.~~

3.01A.295 Fire Prevention

~~The fire prevention department primary responsibilities are to manage and oversee the enforcement of the fire code and other applicable standards as well as other efforts to prevent injury and harm from fire and avoidable accidents. Includes the review of plans for new and remodel projects within the City; field inspections to insure compliance with required permits and codes; educational and other collaborative programs to minimize occurrence of fires, accidents and injuries in the community.~~

3.01A.300 Fire Training

~~The fire training department primary responsibilities are to lead and manage the training, educational and other systems necessary to assure operational readiness and compliance with governmental standards and regulations. Includes the management and oversight of the fire division's safety program.~~

PASSED by the City Council on

May 19, 2014

Ben Stuch

Council President

Attest:

Approved as to form:

Laura L. Ryznar
City Clerk

Michael Piccolo
Assistant City Attorney

Mayor

Date

(Returned after Mayoral Signature Deadline)
(Returned by Mayor 06.04.2014)

07.02.2014
Effective Date

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SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

**INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS LOCAL 29; SPOKANE
ASSOCIATION OF FIRE OFFICERS,**

No. 13-2-01969-2

Plaintiffs/Petitioners,

**THE CITY OF SPOKANE'S
RESPONSE TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

v.

CITY OF SPOKANE,

COPY

Defendant/Respondent.

The City of Spokane requests the Court deny Plaintiffs International Association of Fire Fighters Local 29's and Spokane Association of Fire Officers' (collectively hereafter as "Plaintiffs") Motion for Summary Judgment.

The City's Response is supported by the following Memorandum of Authorities, Declaration of Nathaniel Odle in Opposition to Plaintiffs' Motion for Summary Judgment, the City's Motion for Summary Judgment and forthcoming

**THE CITY OF SPOKANE'S RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 1**

**Nancy L. Iaserlis, City Attorney
OFFICE OF THE CITY ATTORNEY
5th Floor Municipal Building
Spokane, WA 99201-3326
(509) 625-6226
FAX (509) 625-6277**

1 Reply, the Court's complete file, and any oral argument the Court may choose to
2 entertain.

3 I. **CONTROVERTING STATEMENT OF FACTS**

4 The format of Plaintiffs' Statement of Facts does not easily lend itself to
5 objection and/or rebuttal. To best outline the City's position regarding Plaintiffs'
6 factual recitation, the City identifies the portions of Plaintiffs' Statement of Facts to
7 which it does not object. The City objects to all portions not specifically delineated
8 below and any inferences drawn there from.
9

10 The City does not dispute the following:

11
12 1 In 1991, the citizens of the City of Spokane voted against a proposition
13 to allow the Spokane City Administrator to hire additional exempt positions.

14 2. Spokane City Ordinance C-34964 was signed by Mayor Condon April
15 22, 2013, and became effective May 22, 2013.

16 3. Ordinance C-34964 enacted Spokane Municipal Code Ch. 3.01A.
17 Relevant to this controversy, SMC 3.01A.265-300 renamed the Fire Department the
18 Fire Division Department (hereafter abbreviated "Fire Division"), re-characterized
19 components of the former Fire Department as "departments" within the newly created
20 Fire Division, and assigned the codified components of the former Fire Department
21 into specific SMC section numbers. Within Title 3, Chapter 01A the following
22 departments were created: .270 Fire Communications, 275 Fire Emergency Medical
23
24
25

26
27 **THE CITY OF SPOKANE'S RESPONSE**
28 **TO PLAINTIFFS' MOTION FOR**
SUMMARY JUDGMENT - 2

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6th Floor Municipal Building
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(509) 625-6226
FAX (509) 625-6277

1 Services, .280 Fire Logistics, .285 Fire Operations, .290 Fire Planning and
2 Information Management, .295 Fire Prevention, and .300 Fire Training.

3 4. SMC Ch. 3.01A renamed the Spokane Police Department the Police
4 Division Department and created departments similar to those discussed herein.

5 5. Prior to Ordinance C-34964 and enactment of SMC Ch. 3.01A,
6 subcategories within the Fire Department were commonly referred to as "divisions."
7 The fire divisions included: communications, emergency medical services, logistics,
8 operations, planning & information management, fire prevention, and training.
9

10 6. The majority (but not all) of pre-Ordinance (formerly-named) Fire
11 Department employees "fell within the auspices of the city's civil service program."
12 See Pls.' Mot. at p. 7.

13 7. Article IV, § 24 of the Spokane City Charter permits the Mayor to
14 appoint and remove administrative heads.
15

16 8. Following enactment of Ch. SMC 3.01A, the Mayor of Spokane is
17 authorized to appoint a head and assistant head of the departments identified in
18 SMC 3.01A.270-300.
19

20 9. Including the Fire Chief and Assistant Fire Chief, the number of
21 positions in the Fire Division to which the City may appoint employees totals sixteen.

22 10. If and when the City appoints a department head or assistant
23 department head within the newly-created Fire Division, the appointed employee will
24 be exempt from the Civil Service System.
25

26
27 **THE CITY OF SPOKANE'S RESPONSE**
28 **TO PLAINTIFFS' MOTION FOR**
SUMMARY JUDGMENT - 3

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1 11. Spokane City Ordinance No. C35062, effective January 1, 2014,
2 adopted the 2014 annual budget of the City of Spokane and "ratifie[d] and
3 confirm[ed] all administrative departments created and established in 2013."
4

5 **II. LEGAL ARGUMENT**

6 **A. Plaintiffs' lack of standing precludes their suit and warrants denial
7 of their Motion.**

8 The City reasserts its argument that Plaintiffs lack standing to challenge the
9 legality of Ordinance C-34964 or SMC Ch. 3.01A. The City's position is briefed in its
10 Motion for Summary Judgment. Supplementing the City's argument are Plaintiffs'
11 recently-received responses to the City's requests for admission.¹ Plaintiffs admit that
12 no member of either union has: 1) been appointed to an exempt position with the
13 City of Spokane; or 2) turned down an appointment to an exempt position.
14 Additionally, Plaintiffs do not allege that a union member was passed over for
15 promotion in favor of a non-union candidate, that the City discriminated against union
16 members or utilized otherwise unlawful hiring processes.² Plaintiffs' inability to show
17 present injury to anyone in their membership justifies denying Plaintiffs' Motion on
18 that basis alone.
19
20

21 ///
22

23 ¹ See Plaintiffs' Response to Defendant's Requests for Admission Nos. 6 and 7, Declaration
24 of Nathaniel Odle ("Odle Decl."), Ex. C.

25 ² See International Ass'n of Firefighters, AFL-CIO, Local 404 v. City of Walla Walla, 90
26 Wn.2d 828, 831-832 (1978) (summary judgment was appropriate absent allegation of
discrimination or unlawful hiring process).

27 **THE CITY OF SPOKANE'S RESPONSE
28 TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 4**

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1 **B. Neither Ordinance C-34964 nor SMC Ch. 3.01A violates the**
2 **Spokane City Charter.**

3 Plaintiffs argue that Ordinance C-34964 and Ch. SMC 3.01A violate the
4 Spokane City Charter³ but, outside of an obvious misreading of Article VI, § 53(A) of
5 the Charter buried in a footnote in Plaintiffs' submittal, Plaintiffs identify no language
6 in the Charter with which the legislation conflicts. Plaintiffs' Motion (and case) is
7 based on what the Charter doesn't say – specifically, the absence of a definition of
8 the word "department." The absence prompts Plaintiffs' attempts to define the term
9 themselves through various extraneous sources.⁴ Plaintiffs' exercise is unnecessary
10 as the City has permitted the Mayor and City Council the discretion to define what
11 makes a "department" through the other avenue of municipal governance, City
12 Ordinance. While Plaintiffs feel they are in the best position to assign meaning to
13 words in the City Charter, the City suggests the Court permit the holders of all
14 legislative power under the City Charter - the Mayor and City Council - to continue to
15 define terms through direct legislation. To do otherwise would be a violation of the
16 separation of powers doctrine.
17
18

19 The City of Spokane is governed by the City Charter and Spokane Municipal
20 Code. The Municipal Code is amended via City Ordinance. Plaintiffs make no
21

22
23 _____
24 ³ Plaintiffs, at least for the purpose of this Motion, abandon their argument that Ordinance C-
25 34964 and SMC 3.01A are, as alleged in their Complaint, arbitrary and capricious. As a
26 result, the City will rest on its argument set forth in its Motion for Summary Judgment that
27 Plaintiffs have not met their burden of establishing arbitrary and capricious action.

28 ⁴ See Pls.' Mot. in support of Summary Judgment at 10-12.

**THE CITY OF SPOKANE'S RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 5**

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1 argument that the Mayor of Spokane or Spokane City Council lacks the authority to
2 propose and define the law of the City of Spokane. Such an argument would be
3 misplaced as, with limited exception, "all power of the City of Spokane is exercised
4 by the mayor and city council."⁵ When a majority of the City Council supports an
5 ordinance and it is signed by the Mayor, it becomes law. Similarly, when the Mayor
6 and City Council enact an Ordinance creating or modifying a "department," they
7 conclude that the entity created constitutes a "principle branch or division of
8 [Spokane city] government," a "major and separate administrative segment of the
9 City organization," or more succinctly (and importantly), the City of Spokane's
10 definition of what constitutes a "department."⁶ The City has been functioning in this
11 manner for a number of years. In 1890, the City created the Spokane Falls Fire
12 Department via ordinance.⁷ More recently, the City created other departments by
13 ordinance, including:⁸ Arts Department, Building Services Department, Community
14 Development Department, Historic Preservation Department, Neighborhood Services
15 Department, Planning Services,⁹ Real Estate Department, Facilities Department,¹⁰

20 ⁵ See Spokane City Charter at Art. I, § 4.

21 ⁶ Though the City disputes the relevance of any of the definitions of "department" drawn
22 from sources outside the City Charter or SMC, the Spokane Civil Service Commission
23 definition, identified by Plaintiffs at p. 11 and 12 of their Motion, accepts administrative
24 segments created by ordinance. (*citing* Comm'n Rule II (definition 20)). "Department" is
25 defined as "a major and separate administrative segment of the City organization, the head
26 of which gains operational authority from the Charter or Ordinance and is responsible
27 directly to the Mayor, or those delegated to act in the Mayor's behalf." (emphasis added)

28 ⁷ See Ordinances of the City of Spokane p. 260-271, Odle Decl., Ex. A, Pfister Aff., Ex. 1.

⁸ The list provided is only some of the departments created by ordinance and not exhaustive.

⁹ *Id.* at Ex. A, Ex. 2.

27 THE CITY OF SPOKANE'S RESPONSE
28 TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 6

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1 Regional Solid Waste Department,¹¹ Regional Communications Systems
2 Department,¹² Grants Management and Financial Assistance Department,¹³ and
3 Capital Management Department.¹⁴ Despite the absence of a definition in the City
4 Charter, the City has been able to define what constitutes a "department," without the
5 assistance of Plaintiffs, since the 19th Century.
6

7 Plaintiffs also argue that City departments with a small number of employees
8 violate Washington statutory law (RCW 41.08) and the Washington State
9 Constitution.¹⁵ Nowhere in RCW Title 41 does the State legislature place a minimum
10 on the number of employees necessary to make a department. The alleged violation
11 of the state Constitution, on the other hand, is limited in Plaintiffs' Motion to vague
12 references to violation of "general law" and "state supremacy law."¹⁶ Plaintiffs do not
13 explain either argument, hoping the Court will fill in the blanks. None of the
14 authorities cited mention the number of employees required within a "department" or
15 how a limited number of employees may violate the state Constitution.¹⁷
16
17
18

19 ¹⁰ *Id.* at Ex. A, Ex. 3.

20 ¹¹ *Id.* at Ex. A, Ex. 4.

21 ¹² *Id.* at Ex. A, Ex. 5.

22 ¹³ *Id.* at Ex. A, Ex. 6.

23 ¹⁴ *Id.* at Ex. A, Ex. 7.

24 ¹⁵ See Pls.' Mot. at p. 12 stating cryptically "...if the charter were read to allow two political
25 appointees in literally *any* unit of government simply because it bears the superficial title of
26 'department,' the charter would violate 41.08 RCW, the civil service statute."

27 ¹⁶ *Id.* at p. 12-13.

28 ¹⁷ *Id.* *citing* Wash. Const., Art. XI, § 10 (... "the charter of every city 'shall be subject to and
controlled by general law.'" The question as to which general law the City is violating is left
unanswered); and Clallam County Deputy Sheriff's Guild v. Bd. Of Clallam County Comm'rs,
925 Wn.2d 844, 849 (1979). Plaintiffs cite the proposition in the Clallam holding "...this case

THE CITY OF SPOKANE'S RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 7

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1 Plaintiffs omit reference to the number of employees necessary for a
2 department to avoid being too small by their definition – they only argue that small
3 departments are *per se* illegal under the Charter. Many City departments have few
4 employees but are nonetheless important and necessary components of the City of
5 Spokane and, according to the City Council and the Mayor, constitute “departments.”
6 For example, the following City Departments have fewer than ten employees:¹⁸ City
7 Clerk (6 employees), Police Ombudsman (2), Grants Management (2), Risk
8 Management (1), Employee Benefits (3), Historic Preservation (1), Neighborhood
9 Services (3), and Workers Compensation (4).¹⁹ The City Finance Division has a
10 similar employee distribution to the Fire Division, in that, under the Finance Division
11 umbrella are large Departments (IT and Accounting) and several small Departments
12 (Management Budget (2 employees), Treasury Services (2), and Grants
13 Management(1)). Each Finance department, like the departments in the Fire
14 Division, has a distinct responsibility necessary to proper City functioning. While
15 Plaintiffs apparently prefer to combine responsibilities into single municipal entities,
16 this is not an intuitive separation of power nor how the City’s governing bodies have
17
18
19
20

21 _____
22 raises an important constitutional question about the supremacy of state law.” *Id.* Continuing
23 the court’s thought reveals the context of the statement and that no reference is made to the
24 number of employees necessary to comply with the Washington state definition of
25 “department.” “Because a judicial opinion will benefit the public, other branches of
26 government and, in particular, other Home Rule Charter counties, a declaratory
27 judgment to resolve this constitutional question is proper.” (internal citations omitted)

¹⁸ Again, the list provided represents only some examples and not an exhaustive list.

¹⁹ See Dunivant Affidavit, Odle Decl., Ex. B.

28 **THE CITY OF SPOKANE’S RESPONSE
TO PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT - 8**

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1 chosen to organize the City's administrative structure, or the Fire Division's 312
2 employees.

3 Though the heading of § VI(B) of Plaintiffs' Motion reads "Ordinance C-34964
4 Violates the City's Charter," Plaintiffs, aside from providing their definition of
5 "department," spend very little time discussing exactly how the Charter has been
6 violated by Ordinance C-34964. In the interests of brevity, to best address the tertiary
7 arguments touched upon by Plaintiffs in § VI(B), the City provides the following:
8

9 i. Plaintiffs allege violation of Washington state law (RCW 41.08 in
10 particular) throughout their analysis. Purported violation of state law is irrelevant to
11 Plaintiffs' premise – that Ordinance C-34964 violates the City Charter – and confuses
12 the issues alleged by Plaintiffs. The City separately addresses the merits of Plaintiffs'
13 state law argument below.
14

15 ii. Plaintiffs utilize the Spokane Civil Service Commission's definition of
16 "department" to argue that the departments created within the Fire Division that
17 report to the Assistant Fire Chief instead of the Fire Chief are unlawful.²⁰ As a
18 mayoral appointed employee, the Assistant Fire Chief, as with the Fire Chief, reports
19 to the Mayor.
20

21 iii. In footnote 11 of Plaintiffs' Motion, Plaintiffs argue that Ordinance C-
22 34964 violates Article VI, § 53(A), of the City Charter. The subject section permits the
23 Civil Service Commission to "classify all positions of the City...except seasonal
24
25
26

27 **THE CITY OF SPOKANE'S RESPONSE**
28 **TO PLAINTIFFS' MOTION FOR**
SUMMARY JUDGMENT - 9

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1 positions and the appointed officers mentioned in the Charter.²¹ Pursuant to
2 Spokane City Charter Art. IV, § 24 (also cited and quoted in Plaintiffs' Motion), the
3 Mayor of Spokane has the power to "appoint and remove the administrative heads
4 and assistant administrative heads in each department of the City government."
5 Appointed positions are not "classified" positions and fall outside the jurisdiction of
6 the Civil Service Commission. Plaintiffs, of course, understand the relative merit of
7 this argument which is why the lone discussion of a specific section of the City
8 Charter Ordinance C-34964 allegedly violates is limited to a footnote, six pages into
9 their argument.
10

11
12 Finally, Plaintiffs cite a single Washington case, Larson v. Civil Serv. Comm'n
13 of City of Everett,²² in support of their argument that the Departments created by
14 Ordinance C-34964 are not actually "departments" under Washington law. The
15 distinction between the Larson case and this matter further illustrates the erroneous
16 nature of Plaintiffs' argument.
17

18 In 1932, Roy Larson, sustained actual injury (as distinguished from Plaintiffs'
19 hypothetical injury) when he was terminated from his job as a City of Everett
20 firefighter by the Everett Fire Chief.²³ The Everett civil service commission upheld the
21 termination. At the time of Larson's termination, the Everett Fire Department was
22

23
24 ²⁰ See Pls.' Mot. at p. 12.

25 ²¹ Emphasis added.

26 ²² 175 Wash. 687 (1934).

27 ²³ Id. at 688.

28 **THE CITY OF SPOKANE'S RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 10**

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1 subsumed within a larger City of Everett entity, the Department of Safety. Larson
2 argued, successfully, that because the Fire Chief was not the "head of the
3 department" (i.e. the head of the Department of Safety) under which Larson was
4 employed, the termination was ineffectual. Distinct from this case, the Everett City
5 Charter *defined* the term "department" as "a lesser division -- a subdivision of one of
6 the three executive and administrative departments of the city."²⁴ The Court applied
7 the plain language assigned by the City of Everett Charter and agreed with Larson
8 that the Fire Chief was not the head of a department with authority to terminate
9 Larson (the Department of Safety) but instead head of a lesser subdivision.
10

11
12 The City of Spokane, unlike the City of Everett, does not define "department"
13 in its Charter, instead allowing the Mayor and the City Council the discretion to define
14 the term. On April 8, 2013, when the City Council enacted Ordinance C-34964 and
15 SMC Ch. 3.01A, it defined the Fire Communications Department, Fire Emergency
16 Medical Services Department, Fire Logistics Department, Fire Operations
17 Department, Fire Planning and Information Management Department, Fire
18 Prevention Department, and Fire Training Department as "departments." When
19 Mayor Condon signed the Ordinance, he, likewise, adopted the definitions. Plaintiffs'
20 Motion takes the impossible position that they are better suited to establish the
21 definition of "department" in the City of Spokane than both the Mayor and City
22 Council. Once Plaintiffs' attempt to usurp the legislative power of the governing
23
24

25
26 ²⁴ *Id.* at 697.

1 bodies of the City is eliminated, Plaintiffs' claim consists of nothing more than the
2 argument that Ordinance C-34964 and SMC Ch. 3.01A conflict with the City Charter.
3 With the exception of the poorly reasoned citation to Art. VI, § 53(A) of the City
4 Charter, with what portion of the Charter the legislation conflicts is left unanswered.
5 Plaintiffs' contentions and allegations are insufficient to carry their burden on
6 summary judgment. Plaintiffs' Motion should be denied.
7

8 **C. Neither Ordinance C-34964 nor SMC 3.01A violate State law but
9 even if they did Plaintiffs are not the proper party to bring forth
10 such a challenge.**

11 Plaintiffs' argument on this topic is surprisingly economical, particularly based
12 on the number of references to statutory violation found in the preceding sections of
13 their Motion. As an initial matter, municipal ordinances are presumed to be valid, and
14 grants of municipal power are liberally construed.²⁵ Plaintiffs, as challengers, bear
15 the burden of proving Ordinance C-34964 is unconstitutional or otherwise invalid.²⁶
16 Plaintiffs cannot meet their burden.
17

18 *First*, RCW 41.08.010, cited repeatedly throughout Plaintiffs' Motion, states
19 RCW 41.08 is inapplicable to "cities and towns which at the present time have
20 provided for civil service in the fire department...which said local charter or
21 regulations substantially accomplish the purpose of the statute."²⁷ Washington cities
22

23
24 ²⁵ Heinsma v. City of Vancouver, 114 Wn.2d 556, 561 (2001) (citing City of Bothell v.
Gutschmidt, 78 Wn. App. 654, 659-660 (1995)).

25 ²⁶ Id.

26 ²⁷ Emphasis added.

27 **THE CITY OF SPOKANE'S RESPONSE
28 TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 12**

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1 are permitted flexibility and discretion in handling their civil service system - strict
2 adherence to the state civil service prototype is not required.²⁸ It is undisputed that
3 the City has a civil service system serving the Fire Division and all departments. All
4 members of the Fire Division represented by Plaintiffs' unions are covered by the
5 Spokane civil service system. Yet, Plaintiffs argue that a civil service system which
6 provides protection for every one of their members somehow fails to "substantially
7 comply" with state law. Plaintiffs' argument that at some point in the future, a member
8 of their unions *may* become exempt from the Civil Service System overlooks RCW
9 41.08.010's "present time" requirement. Nowhere in the statute is future
10 noncompliance anticipated as a basis for challenge. The Spokane Civil Service
11 System is in substantial compliance with state law.
12
13

14 The second apparent reason for Plaintiffs' concision is the language of RCW
15 41.08.140. Entitled "Enforcement by civil action – Legal Counsel," RCW 41.08.140
16 states:

17
18 "it shall be the duty of the commission²⁹ to begin and conduct all civil suits
19 which may be necessary for the proper enforcement of this chapter and of the
20 rules of the commission. The commission shall be represented in such suits
21 by the chief legal officer of the city, but said commission may in any case be
22 represented by special counsel appointed by it."
23

24 ²⁸ See Local 404 v. City of Walla Walla, *supra*, 90 Wn.2d at 831-832; see also Police Guild v.
25 City of Seattle, 151 Wn.2d 823, 832 (2003).

26 ²⁹ "Commission" is defined by RCW 41.08.220 to mean "the civil service commission herein
27 created."

1 To the extent suit is necessary to challenge a possible conflict with state civil service
2 laws, it is the duty of the Spokane Civil Service Commission to bring *all* challenges.
3 Prior to filing, Plaintiffs' approached the Spokane Civil Service Commission, which
4 declined to bring suit. A reoccurring theme of this suit, Plaintiffs, pursuant to RCW
5 41.08.140, are not the proper parties to challenge the constitutionality of Ordinance
6 C-34964 and SMC 3.01A. The City fully incorporates this argument as a basis for the
7 grant of its Motion for Summary Judgment.
8

9 Plaintiffs' arguments as to statutory violation are misleading, without merit, and
10 should not be given additional consideration. Plaintiffs have not demonstrated the
11 absence of a genuine issue of material fact or their entitlement to summary
12 judgment. Plaintiffs' Motion should be denied.
13

14 **III. CONCLUSION**

15 For the reasons set forth above, Plaintiffs fail to demonstrate the absence of a
16 genuine issue of material fact. Plaintiffs' Motion should be denied.
17

18 DATED this 14th day of April, 2014.

19
20 
21 Nathaniel Odle, WSBA #39602
22 Assistant City Attorney
23 Attorney for Defendant
24

25
26
27 **THE CITY OF SPOKANE'S RESPONSE**
28 **TO PLAINTIFFS' MOTION FOR**
SUMMARY JUDGMENT - 14

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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 11 day of April, 2014, I caused a true and correct copy of the foregoing "THE CITY OF SPOKANE'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT," to be delivered to the parties below in the manner noted:

David A. Bricklin	<input type="checkbox"/> VIA FACSIMILE
Claudia M. Newman	<input type="checkbox"/> VIA U.S. MAIL
Bricklin & Newman, LLP	<input type="checkbox"/> VIA OVERNIGHT SERVICE
1001 Fourth Avenue, Suite 3303	<input checked="" type="checkbox"/> VIA EMAIL BY AGREEMENT
Seattle, WA 98154	
Attorneys for Plaintiffs/Petitioners	


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**THE CITY OF SPOKANE'S RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT - 15**

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

**INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS LOCAL 29; SPOKANE
ASSOCIATION OF FIRE OFFICERS,**

No. 13-2-01989-2

Plaintiffs/Petitioners,

**THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

v.

CITY OF SPOKANE,

COPY

Defendant/Respondent.

The City of Spokane submits this Reply in support of its Motion for Summary Judgment of Plaintiffs International Association of Fire Fighters Local 29's and Spokane Association of Fire Officers' (collectively hereafter as "Plaintiffs") Complaint. Plaintiffs do not address the City's argument requesting dismissal of Plaintiffs' claim of arbitrary and capricious action. The City requests this claim be dismissed. As to Plaintiffs remaining claims, Plaintiffs allege standing without injury; conflict with the Spokane City Charter without citation; and violation of state law despite being the

**THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 1**

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1 Improper parties to bring such a challenge, failing to sue a necessary party, and
2 generally without meeting their burden of proof. Plaintiffs' Complaint should be
3 dismissed in its entirety.

4
5 The City's Reply is supported by the following Memorandum of Authorities, all
6 pleadings in support of the City's Motion for Summary Judgment and in response to
7 Plaintiffs' Motion for Summary Judgment, the Court's complete file, and any oral
8 argument the Court may choose to entertain.

9
10 **I. INTRODUCTION**

11 In its Motion for Summary Judgment, the City attempted to explain aspects of
12 the City's personnel system pertinent to Plaintiffs and this suit. As is clear from
13 Plaintiffs' Response, additional clarification is needed. The following prefatory
14 comment is offered to clarify issues consistent with Plaintiffs' stated concerns.

15 The challenged legislation, Ordinance C-34964 which enacted Spokane
16 Municipal Code Ch. 3.01A, for purposes relevant to this suit, provides the Mayor of
17 Spokane the option to appoint employees to two positions, a department head and
18 assistant department head, for seven departments within the Spokane Fire Division
19 Department (hereafter "Fire Division"). Before the Ordinance in question, only the Fire
20 Chief and Assistant Fire Chief were Mayoral appointees and exempt from the
21 Spokane Civil Service System. If an individual is appointed to a position within the
22 City, the employee is exempt from the civil service. Therefore, the terminology is an
23 "exempt" employee versus a "commissioned" employee, which is an employee within
24
25

26
27 **THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 2**

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1 the civil service system. Many City employees (for example, Assistant City attorneys)
2 are exempt employees.

3 The power to appoint City department heads and assistant heads is outlined in
4 the Spokane City Charter at Article IV, § 24. Per Article IV, § 24, the Mayor has the
5 power to
6

7 "appoint and remove administrative heads and assistant department heads in
8 each department of the city government, provided the appointment of an
9 administrative head shall be subject to the approval of the city council and,
10 further provided, that the head and assistant head of any department shall not
11 be deprived by any such removal of any standing under the civil service
12 provisions of this Charter which employee may have had before appointment
13 as head or assistant head of a department."

14 All three clauses of this section of the Charter are relevant to this litigation.

15 Beginning with the first clause, the Mayor "has the power to appoint and
16 remove administrative heads..." Contrasted with the second and third clauses the
17 term "shall," which creates a mandatory duty, is absent.¹ While the Mayor has the
18 power to fill Fire Division department head and assistant department head openings
19 through appointment, he does not have the obligation.

20 The second clause of Art. IV, § 24 provides that the "appointment of an
21 administrative head *shall* be subject to the approval of the city council."² Plaintiffs
22

23 ¹ Eugster v. City of Spokane, 118 Wn. App. 383, 407 (App. 2003); see also State ex rel. Bd.
24 of County Comm'rs v. Clausen, 95 Wn. 214, 224 (1917) (the legislature has the constitutional
25 'power' of taxation, it thereby has the 'discretion' to say what burdens of taxation shall be
26 borne by whom.); State v. Mountain Timber Co., 75 Wash. 581, 589 (1913) (the state
27 Constitution gives the police power to the legislature. "Large discretion was necessarily
28 vested in legislature when exercising police power.").

² Emphasis added.

27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 3

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1 point to no City Council action approving the appointment of member of Plaintiffs'
2 union to a department head or assistant department head. The City likewise makes
3 no such reference because there has been no such appointment since enactment of
4 the SMC Ch. 3.01A.
5

6 The third clause of Art. IV, § 24, states that following the appointment of an
7 exempt employee "the head and assistant head of any department shall not be
8 deprived by any such removal of any standing under the civil service provisions of
9 this Charter which employee may have had before appointment as head or assistant
10 head of a department." So, if a member of Plaintiffs' unions (or any other classified
11 employee) is appointed to an exempt position within the City, and later vacates the
12 exempt position (through a voluntary decision or termination), the employee retains
13 all civil service rights he/she had prior to the appointment. Argument that civil service
14 protections vanish completely after appointment is inaccurate.
15

16 The City hopes this comment resolves confusion, for example this sentence in
17 Plaintiffs' Response - "pursuant to the Charter, the top two positions in each of the
18 new "departments" is exempt – and have been since the ordinance became effective
19 five days after it was adopted."³ The Mayor has not exercised his power to appoint a
20 member of Plaintiffs' union to an exempt position.⁴ The Spokane City Council has not
21
22

23
24 ³ See Pls.' Response to the City's Mot. for Summ. J. (Plaintiffs' Response") at p. 5.

25 ⁴ Since the filing of the City's Motion and Response to Plaintiffs' Motion, the City has begun a
26 search for an Assistant Director of Integrated Medical Service (the assistant department head
of the EMS department). Though this position is being hired through Human Resources as an
exempt employee, the City continues to maintain that each opening will be filled on a case-

27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
JUDGMENT - 4

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1 been asked to approve the appointment of a member of Plaintiffs' union to an exempt
2 position. Thus, no member of Plaintiffs' unions is exempt from the Spokane civil
3 service system. In the future, if a union member is appointed to an exempt position
4 and subsequently leaves that exempt position, the employee is entitled to return to
5 his/her former civil service position. That return is because the City Charter protects
6 civil service employees who take exempt positions with the City.
7

8 **II. LEGAL ARGUMENT**

9 **A. Plaintiffs lack standing to bring this suit.**

10 Plaintiffs make two substantive arguments in favor of invalidating Ordinance C-
11 34964 and SMC Ch. 3.01A – violation of the Spokane City Charter and violation of
12 state law, specifically RCW 41.08. Plaintiffs' standing argument does not bolster
13 either claim. Even if Plaintiffs are correct and they have standing to challenge
14 Ordinance C-34964 or SMC Ch. 3.01A, they still fail to present a genuine issue of fact
15 supportive of a finding that they have met their burden of proof and established they
16 are entitled to declaratory relief. With that in mind, Plaintiffs are without standing to
17 challenge the subject legislation.
18
19

20 Plaintiffs offer no argument directly opposing the City's assertion that they lack
21 standing to pursue their Petition for Constitutional Writ of Review, instead asserting
22

23
24 by-case basis utilizing mayoral appointment when appropriate or civil service when
25 appropriate, depending upon the needs of the Fire Division. Further, there is no indication
26 that a member of Plaintiffs' union will fill the opening. If the opening is filled by a member of
27 Plaintiffs' union, all safeguards (collective bargaining, the protections of Art. IV, § 24 of the
28 City Charter) will remain in place.

**THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 5**

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1 standing under Washington's Declaratory Judgment Act.⁵ The City therefore requests
2 the Court apply the test for a justiciable controversy in the context of a declaratory
3 judgment set forth in its Motion.⁶ The test is as follows: 1) an actual, present and
4 existing dispute, or the mature seeds of one, as distinguished from a possible,
5 dormant, hypothetical, speculative or moot argument; 2) between parties having
6 genuine and opposing interests; 3) which involves direct and substantial interests, as
7 opposed to potential, theoretical, abstract, or academic; and 4) a judicial
8 determination of which will be final and conclusive.⁷ Applying the test (referred
9 henceforth as "Ripley") to Plaintiffs' claimed present and future harms illustrates the
10 absence of standing.
11
12

- 13 1. Fear of future appointment of union members to exempt
14 positions does not constitute "actual, concrete harm" and is
15 insufficient to confer standing.

16 In their Complaint Plaintiffs allege "Ordinance [C-34964] will eliminate civil
17 service protections for twelve positions that currently are covered by civil service."⁸
18 Use of the word "will," as opposed to "has" or another past tense verb, explains that
19 the alleged harm is to occur in the future. The time of occurrence is unspecified.
20
21
22

23 ⁵ See Pls.' Resp. at p. 4 ("this case was brought pursuant to the Uniform Declaratory
Judgments Act"), p. 6.

24 ⁶ Plaintiffs at p. 4 of their Response adopt this test as determinative.

25 ⁷ Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-815 (1973); *standing test*
26 *applied in To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411-412 (2001) and Walker v.
Munro, 124 Wash. 2d 402, 411-412 (1994).

27 ⁸ See Pls.' Compl. at ¶ 3.23.

28 **THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 6**

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1 As stated many times previously, no member of Plaintiffs' unions has been
2 appointed to an exempt position within the Fire Division. Plaintiffs concede this point.⁹
3 Plaintiffs' Response including the declaration of union members do not oppose the
4 City's position that every member of Plaintiffs' unions remains within the Spokane
5 civil service system.¹⁰ It is therefore undisputed that the City has not "eliminated" or
6 impacted civil service protections for any of Plaintiffs' members.
7

8 Applying prong one of the Ripley test, "possible, dormant, hypothetical, [or]
9 speculative" injury is directly excluded as a basis for demonstrating standing. With the
10 above facts in mind, Plaintiffs' fear of future appointment is nothing more than a
11 series of "ifs." *If* a department head or assistant department head position comes
12 open, a member of Plaintiffs' unions may apply. *If* that member is qualified for the
13 position, the City may choose to place the employee in the position through Mayoral
14 appointment.¹¹ *If* the City Council approves the hire, the City is then required to
15 bargain the hire with Plaintiffs' unions.¹² *If* Plaintiffs' unions object to the appointment,
16 the City cannot go through with the hiring.¹³ Then, finally, *if* all of the following occur,
17 the union member would be exempt from civil service. Though discounted by
18
19

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21 ⁹ See Pls.' responses to the City's requests for admission attached as Exhibit C to counsel's
22 declaration submitted in support of City's Response to Plaintiffs' Mot. for Summ. J. (hereafter
23 as "City's Response"); see also D. Waller depo. at 15:14-16, attached hereto as Exhibit B to
24 Odle Decl., filed herewith.

25 ¹⁰ See E. Jacobson affidavit at ¶ 13 (Ex. B to counsel's declaration in support of Mot. Summ.
26 J.); see also H. Lowe affidavit at ¶ 14 (Ex. C to counsel's declaration.); see also D. Waller
27 depo. at 32:10-14 (every member of Local 29 is covered by the Civil Service system) Odle
28 Decl., Ex. B.

¹¹ See § I, *supra*. See also E. Jacobson depo. at p. 8:24-9:6, Odle Decl., Ex. C.

¹² *Id.* at 13:7-15:17

¹³ *Id.*

THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 7

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1 Plaintiffs, the City also has the option of filling open department head or assistant
2 head positions, as it did with assistant department head Lorena Markham, through
3 civil service.¹⁴ While it is possible that a member of Plaintiffs' union could be
4 appointed to an exempt position in the future, Plaintiffs' argument consists of no more
5 than speculation and hypothetical scenarios. Plaintiffs' contention of concrete,
6 present injury arising from the City's ability to appoint employees to leadership
7 positions is a fallacy.

9 Plaintiffs also fail prong three of the Ripley test which precludes standing on
10 claims alleging violation of "potential, theoretical, abstract, or academic" interests.
11 While civil service enrollment may very well qualify as a direct and substantial
12 interest, as is undisputed, every member of Plaintiffs' unions remains within the civil
13 service system. Therefore, the analysis is whether Plaintiffs' members have a direct
14 and substantial interest in not being appointed to an exempt position. As this has not
15 occurred and there are no plans for it to occur, the threat is no more than "potential,
16 theoretical, abstract, or academic."
17

19 If a union member is chosen for appointment to an exempt position, and the
20 appointment is made by the Mayor and approved by the City Council, and bargained
21 with the union, a newly-minted exempt employee is created. If that were to happen,
22

23 ¹⁴ Plaintiffs argue that the City's option to hire through civil service is both a legal and factual
24 fiction. The argument is largely focused on things other than Ms. Markham's hire. The point
25 remains, the lone assistant department head position filled after the enactment of SMC Ch.
26 3.01A was accomplished through the civil service system. It is the City's position that this is
at least a "shred" of evidence (Pls.' Resp. at 18) that future hirings can and will be
accomplished through civil service.

27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 8

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1 Plaintiffs' members have yet another safeguard of their civil service rights. As set
2 forth above, Art. IV, § 24 of the City Charter provides that any appointee "shall not be
3 deprived by any such removal of any standing under the civil service provisions of
4 this Charter which employee may have had before appointment as head or assistant
5 head of a department." The appointed employee, for lack of a better phrase, checks
6 his/her civil service rights at the door when stepping into their new role as an exempt
7 employee. If the union employee resigns from his/her exempt position, or even if
8 terminated, the employee reclaims the full gambit of civil service rights upon exit from
9 the exempt position. This scenario, as applied by the City, is summarized by Civil
10 Service Chief Examiner Glenn Kibbey in a document entitled "Indefinite Leave of
11 Absence from the Classified Service," attached as Exhibit A to counsel's declaration
12 filed herewith.
13
14

15 Contrasted with Plaintiffs' citation to Clallam County Deputy Sheriff's Guild v.
16 Bd. of Clallam County Comm'rs.,¹⁵ where the local (non-civil service) personnel
17 system conflicted with state civil service guidelines, all members of Plaintiffs' unions
18 are presently enrolled and protected by the Spokane civil service system. No member
19 of Plaintiffs' unions is exempt from civil service, they cannot say when or if they will
20 become exempt, and, if they are appointed to an exempt position in the future, they
21 will retain all civil service rights following their tenure as an exempt employee.
22 Washington courts have repeatedly refused to find a justiciable controversy where
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26 ¹⁵ 601 P.2d 943 (1979).

27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 9

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1 the event at issue has not yet occurred or remains a matter of speculation.¹⁶ And
2 while courts acknowledge a complaint for declaratory judgment provides a procedure
3 "peculiarly well suited to the judicial determination of controversies concerning
4 constitutional rights and...the constitutionality of legislative action," decisions have
5 "resolutely maintained that no decisions should be made under the Act absent a
6 'justiciable controversy.'"¹⁷

8 Plaintiffs cannot articulate actual and concrete injury and do not meet the test
9 for standing under applicable case law. They therefore fail to present a justiciable
10 controversy and their claims for future harm related to possible exempt hirings should
11 be dismissed.

12
13 2. Plaintiffs' allegation of impaired bumping rights is speculative
14 and, as such, insufficient to confer standing.

15 Plaintiffs' argument on this subject finds conflict at page 9 of their Response -
16 "there are several ways in which the creation of new, smaller departments impairs
17 employment opportunities. *Perhaps the plainest example is when layoffs arise.*" No

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20 ¹⁶ To-Ro, supra, 144 Wn.2d at 412; see, e.g., Diversified Indus. Dev. Corp., supra, 82 Wn.2d
21 at 815 (where minor child's tort claim against lessor remained "an unpredictable
22 contingency," the matter was "not ripe for declaratory relief"); Port of Seattle v. Wash. Utils. &
23 Transp. Comm'n. 92 Wn.2d 789, 806 (1979) (where issue of Port's future actions on certain
24 contract rights "appear[ed] to be founded on a hypothetical factual situation," declaratory
25 judgment was inappropriate); DiNino v. State ex rel. Gorton, 102 Wn.2d 327, 331 (1984)
(where party who was neither pregnant nor terminally ill challenged statute nullifying health
26 care directive of pregnant or terminally ill patient, cause was not "ripe" for declaratory
27 judgment); Lawson v. State, 107 Wn.2d 444, 460 (1986) (where railroad had not abandoned
28 right-of-way and county had expressed no intent to acquire it, property owners' challenge to
statutes permitting recreational public use of rights of way was "premature.").

¹⁷ To-Ro, supra, 144 Wn.2d at 417.

29 THE CITY OF SPOKANE'S REPLY IN
30 SUPPORT OF MOTION FOR SUMMARY
31 JUDGMENT - 10

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1 fire fighter has been laid off since 2004.¹⁸ No bumping rights have been utilized.¹⁹
2 Therefore, though premised as a present injury, Plaintiffs concede this is argument is
3 yet another exercise in speculation.

4 Plaintiffs' recitation of "bumping" rights is more or less accurate.²⁰ A senior
5 employee faced with a potential lay-off may "bump" back to a previously held
6 position, displacing a less senior employee. The less senior employee can bump
7 back to an even lesser senior employee, and so on. The least senior employee then
8 may be subject to layoff. Union bargaining can impact bumping rights and will take
9 place prior to any lay-off.²¹ As applied in the past, employee bumping rights were
10 limited to an employee's particular City department. Plaintiffs' argument focuses on
11 the hypothetical fact pattern of what may happen if lay-offs take place in a
12 department within the Fire Division with few employees.

13 Plaintiffs concur that, fortunately, no member of the Fire Division has been laid
14 off for a long time, prior to the recession, and certainly not since Ordinance C-34964
15 went into effect. Plaintiffs do not point to the possibility of City downsizing in the near
16 future, or even the distant future. Until layoffs occur, bumping rights are dormant,
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22 ¹⁸ See D. Haward [sic] depo. at p. 15:17-22, attached to Odle Decl., Ex. D.

23 ¹⁹ D. Haworth depo. at 16:16-19, Odle Decl., Ex. D; D. Waller depo. 17:8-10 Odle Decl., Ex.
24 B.

25 ²⁰ Plaintiffs have previously made similar statements regarding Ordinance C-34964's alleged
26 impairment of "return rights." Return rights apply to employees who have been laid off, as
27 opposed to those facing a layoff. As Plaintiffs' do not raise this issue herein, the City refrains
28 from further argument on the subject.

²¹ See G. Kibbey depo at p. 39:10-24, Odle Decl., Ex. E; see also D. Waller depo. at 38:20-
25, Odle Decl., Ex. B.

27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
JUDGMENT - 11

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1 existing in theory only. Though speculative, the City offered to allay Plaintiffs'
2 concerns through use of a Memorandum of Understanding ("MOU").²² The MOU was
3 circulated to all unions serving the City's employees. Per the MOU, the City agreed to
4 treat departments within a division as a single entity for bumping purposes. Every
5 union signed the MOU, with the exception of Plaintiffs' unions.²³ Plaintiffs admit the
6 MOU would have addressed their bumping issues but opted to ignore their members'
7 apparent concerns. Plaintiffs cannot now argue that their own failure to act in their
8 members' best interests provide them with a basis to sue.

10 Additionally, increased likelihood of harm is not "injury" for standing purposes.
11 In Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima,²⁴
12 homeowners outside the city limits signed agreements binding them to support a
13 future annexation. The homeowners and the local fire district later sought a
14 declaratory judgment nullifying the agreements. Though the court found that the
15 agreements increased the likelihood of annexation, the fire department's complaint
16 was dismissed for lack of standing. The court reasoned that the homeowners'
17 annexation agreements did not directly affect the fire district because those
18 agreements did not *ensure* annexation. They provided only 66 percent of the
19 necessary 75 percent of the property value required for annexation, and a successful
20 annexation petition would remain susceptible to invalidation through governmental
21
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23

24 ²² See D. Waller depo. at p. 33:7-24, Odle Decl., Ex. B; D Haworth depo. at 27:7-24, Odle
25 Decl., Ex. D.

26 ²³ See E. Jacobson depo. at 20:5-16, Odle Decl., Ex. C.

27 ²⁴ 122 Wn.2d 371, 858 P.2d 245 (1993).

28 THE CITY OF SPOKANE'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 12

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1 review. Thus, although the agreements increased the likelihood of annexation, the
2 fire district could not satisfy the justiciability requirement of a direct and substantial
3 interest in the dispute.

4
5 The dispute over bumping rights involves dormant concerns which are
6 hypothetical and speculative in nature. The interests purportedly impacted by
7 Ordinance C-34964 and SMC Ch. 3.01A are potential, theoretical, abstract, and
8 academic. Just as in Yakima County where the fire district's injury was dependent on
9 the intervening prospect of annexation, Plaintiffs alleged impairment of bumping
10 rights is dependent on the intervening prospect of future City budget cuts resulting in
11 lay-offs. Plaintiffs were offered the opportunity to treat all departments as a single
12 entitle but refused. Plaintiffs therefore fail the Ripley test and their allegations of
13 infringement of bumping rights are insufficient to satisfy standing requirements.

14
15 3. Plaintiffs' allegations of present harm are insufficient to confer
16 standing.

17 In addition to future injury, Plaintiffs' Response attempts to survive the City's
18 Motion by manufacturing "immediate" injury purportedly experienced by their
19 members. Plaintiffs argue the following: the inability to vote on a change to the City
20 Charter, impairment of employment rights, and violation of the City's collective
21 bargaining agreement ("CBA") with Plaintiffs' unions. None of the new allegations is
22 sufficient to establish standing.

23
24 a. *The City did not amend the City Charter.*
25

26
27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 13

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1 As to the first allegation of present harm, the inability to vote on a change to
2 the City Charter, Plaintiffs cite portions of Art. XIV, § 125 of the City Charter which
3 provides that the City Charter may only "be amended by a majority vote of the
4 electorate of the City." Plaintiffs' citation is accurate – their argument is not.
5

6 From Complaint until Response, Plaintiffs argued that the City violated terms
7 of the Charter when it enacted Ordinance C-34964. Here, Plaintiffs' argument
8 changes course and for the first time takes the position that the City actually
9 amended the Charter. When the Charter was purportedly amended, Plaintiffs were
10 denied the opportunity to vote on the amendment. There are several problems with
11 this argument, the most glaring being the City did not amend the Charter. Even if the
12 argument is the City, through Ordinance C-34964, implicitly amended the Charter,
13 such an argument is unfounded. As discussed in depth in prior pleadings, the Charter
14 allows for two exempt appointments per City department. The Charter places no
15 limitation on the number of City departments the Mayor and the City Council can
16 create or the minimum number of employees within a department.
17

18
19 The City did not amend the Charter. Plaintiffs' Complaint does not allege that
20 the City amended the Charter. As the Charter was not amended, Plaintiffs were
21 deprived of no rights. History lesson aside, this argument does nothing to address
22 Plaintiffs' lack of standing.
23

24 b. *Plaintiffs' member's employment rights have not been*
25 *impacted by the subject legislation.*
26

27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
JUDGMENT - 14

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1 This argument is similar to Plaintiffs' bumping rights argument addressed in §
2 II(A)(2), *supra*. Plaintiffs argue the Ordinance makes certain positions within the Fire
3 Division "less attractive" and support this argument through the declarations of two
4 union members (McCann and Golladay). The declarations highlight the hypothetical
5 nature of this argument. Both McCann and Golladay remain employed by the City,
6 are protected by civil service, mention no impending lay-offs impacting their positions,
7 and have not had to utilize bumping rights since the enactment of Ordinance C-
8 34964. Their alleged harm is that the language of SMC Ch. 3.01A caused them to
9 turn down jobs within the Fire Division. Mr. McCann cites "unforeseen consequences
10 down the road" as the basis to decline a job transfer. Unforeseen circumstances do
11 not qualify as actual, concrete injury sufficient to generate standing.
12

13
14 Both Golladay and McCann turned down jobs they, apparently, did not want.
15 Neither had any inherent right to the jobs they refused. The City has no obligation to
16 ensure jobs remain attractive to union members. The lone case cited by Plaintiffs
17 allowed standing under the Administrative Procedures Act and is completely
18 distinguishable from the subject matter.²⁵ Unjustified fears of possible future lay-off
19
20
21
22

23 ²⁵ Plaintiffs cite Wash. Fed'n of State Employees, AFL-CIO v. Higher Ed. Personnel Bd., 87
24 Wn.2d 823 (1976) for the proposition that the union had standing to challenge regulations
25 concerning seniority and layoff procedures. The Administrative Procedures Act has its own
26 section on standing, inapplicable to this matter. See RCW 34.04.070(1). Under the
27 administrative procedures act, it must be shown that "it appears that the rule, or its
28 threatened application...immediately threatens to interfere with or impair, the legal rights or
privileges of the petitioner."

27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 15

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1 based on hypothetical fact patterns do not confer standing under Ripley. Plaintiffs
2 have not been harmed and do not have standing to challenge the subject legislation.

3 c. *The City's purported violation of the CBA is a separate*
4 *matter without relevance to this proceeding.*

5 Plaintiffs allege Ordinance C-34964 undermines the terms of the existing
6 Collective Bargaining Agreement between the City and Plaintiffs' unions. Plaintiffs'
7 Complaint does not allege violation of the CBA. Further, this is not the proper forum
8 to adjudicate a violation of the CBA. This argument is without merit.

9 **B. Neither Ordinance C-34964 nor SMC Ch. 3.01A violates the**
10 **Spokane City Charter**

11 Plaintiffs devote only a short section of their Response to the merits of their
12 claimed violation of the City Charter and RCW 41.08, apparently resting on the
13 argument contained in their Motion for Summary Judgment. As has been the case
14 throughout, Plaintiffs intertwine elements of their claim of Charter violation with their
15 claim of state law violation. In fact, in their Response to the City's Motion the
16 arguments are presented under a single heading with Plaintiffs drawing from both
17 sources of law in hopes of confusing the issues and surviving the City's Motion.
18 Evaluating each on its own merit demonstrates that no genuine issue of material fact
19 remains, Plaintiffs have not and cannot demonstrate that Ordinance C-34964 or SMC
20 Ch. 3.01A violate the City Charter.
21

22 Plaintiffs broadly assert Charter violation but, outside of a footnote reference to
23 Art. VI, § 53(A), provide no direct citation. Plaintiffs' position is the legislation simply
24
25

26
27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
JUDGMENT - 16

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1 violates the Charter - no support necessary. The fact is neither Ordinance C-34964
2 nor SMC Ch. 3.01A violate any portion of the Charter.

3 Spending any time on Plaintiffs' argument regarding Art. VI, § 53(A) is too
4 much time. As mentioned in the City's Response, this argument appears only in a
5 footnote, deep in Plaintiffs' analysis, following pages and pages of argument
6 pertaining to some alleged Charter violation. The identified section outlines the
7 powers and duties of the Civil Service Commission. Plaintiffs' argument is that once a
8 position is classified by civil service, it can never be appointed. Exempt positions,
9 including heads and assistant heads of departments within the Fire Division, are not
10 "classified" – they are not civil service position. They have never been classified. This
11 is the Plaintiffs' major point of contention with the subject legislation, that the City can
12 appoint exempt employees outside civil service. This argument is completely
13 meritless but since it's the lone portion of the Charter Plaintiffs identify as violated by
14 Ordinance C-34964, the City addresses it separately.

15 Plaintiffs' lengthiest argument revolves around the Charter's absence of a
16 definition of the word "department." Plaintiffs step into the shoes of the City legislative
17 branch and tell the Court how they think the term is defined and that small
18 departments are illegal for a variety of reasons. The City has shown a consistent
19 ability to define what constitutes a "department" through ordinance. Many City
20 departments have a small number of employees but significant responsibility. The
21
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27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 17

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1 Spokane Mayor and City Council are capably tasked with defining what makes a
2 "department" within the City of Spokane and did so through Ordinance C-34964.

3 Plaintiffs may not like how the term "department" is defined but that does not
4 make Ordinance C-34964 or SMC Ch. 3.01A illegal. Plaintiffs' arguments in support
5 of a Charter violation are unfounded and fail to present a genuine issue of material
6 fact. As Plaintiffs fail to meet their burden of proof, the City requests their allegation of
7 Charter violation be dismissed with prejudice.
8

9 **C. Neither Ordinance C-34964 nor SMC Ch. 3.01A violates state law**

10 As with the City's argument regarding Plaintiffs' assertions of Charter violation,
11 the City's position as to Plaintiffs' allegations of state law violation by Ordinance C-
12 34964 is largely briefed in the City's Motion and Response to Plaintiffs' Motion. The
13 City summarizes its position below.²⁶
14

15 Plaintiffs argue that after Ordinance C-34964 and SMC Ch. 3.01A were
16 enacted the Spokane civil service system no longer "substantially accomplish[es]" the
17 purpose of the state civil service law. This argument is misplaced for two reasons:
18 *first*, RCW 41.08.010 requires that cities which, at the present time, have provided for
19 civil service in the fire department "substantially accomplish the purpose of the
20 statute." It is undisputed that the City of Spokane has a civil service system serving
21 all firefighters within Plaintiffs' unions. Any impact of the Ordinance upon non-union
22
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24

25 ²⁶ Though Plaintiffs' are "confused" by the City's position that Plaintiffs' have not met their
26 burden of proof that state law prohibits multiple entities to fight fires, the City rests on the
argument set forth in its Motion for Summary Judgment.

27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
JUDGMENT - 18

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1 firefighters (such as Deputy Chief Bob Hanna, referenced at p. 17 of Plaintiffs'
2 Response) is irrelevant to this suit as they are not parties. Plaintiffs' argument that a
3 civil service system in which all of their members are enrolled and protected does not
4 substantially accomplish the goals of the state civil service system is absurd.
5

6 *Second*, RCW 41.08.140 specifically makes it the duty of a local civil service
7 commission to institute any and all civil suits "necessary for the property enforcement
8 of this chapter and the rules of the commission." Plaintiffs approached the Spokane
9 Civil Service Commission before initiating suit and the Commission declined to bring
10 suit.²⁷ Plaintiffs are not the proper parties to prosecute this matter.
11

12 *Finally*, prior to their Response, Plaintiffs claims were brought in the dual
13 capacity of a Petition for Constitutional Writ of Review and as a Complaint for
14 Declaratory Judgment. In their Response to the City's Motion, Plaintiffs offer no
15 opposition regarding the validity of their Petition for Constitutional Writ of Review
16 instead arguing only the portion of their claim brought pursuant to the Declaratory
17 Judgments Act (RCW 7.24). They apparently overlook the requirements of RCW
18 7.24.110. While this omission was arguably harmless when their claims were still
19 housed in a Writ of Constitutional Review, their failure to sustain this aspect of their
20 claim warrants dismissal of their Complaint.
21

22 Entitled "Parties -- City as party -- Attorney general to be served, when," RCW
23 7.24.110 states in its entirety:
24
25

26 ²⁷ See Kibbey depo. at 39:17-40:3, Odle Decl., Ex. E.

27 THE CITY OF SPOKANE'S REPLY IN
28 SUPPORT OF MOTION FOR SUMMARY
JUDGMENT - 19

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1 When declaratory relief is sought, all persons shall be made parties who have
2 or claim any interest which would be affected by the declaration, and no
3 declaration shall prejudice the rights of persons not parties to the proceeding.
4 In any proceeding which involves the validity of a municipal ordinance or
5 franchise, such municipality shall be made a party, and shall be entitled
6 to be heard, and if the statute, ordinance or franchise is alleged to be
7 unconstitutional, the attorney general shall also be served with a copy of
8 the proceeding and be entitled to be heard.²⁸

9 Plaintiffs ask the Court to declare municipal Ordinance C-34964 and SMC Ch. 3.01A
10 invalid. Per RCW 7.24.110, the attorney general is a necessary party to proceedings
11 for declaratory judgment as to constitutionality of municipal ordinance.²⁹ The
12 requirement that the attorney general be served is jurisdictional.³⁰ When an
13 indispensable party is not served, an action for declaratory judgment is subject to
14 dismissal.³¹ The City requests the Court dismiss Plaintiffs' claims based on their
15 failure to join the attorney general, an indispensable party.

16 IV. CONCLUSION

17 For the reasons set forth above, Plaintiffs fail to establish standing to challenge
18 Ordinance C-34964 and SMC Ch. 3.01A. Future harm without a showing of direct,
19 substantial, significant injury is insufficient. Further, Plaintiffs fail to meet their burden
20 of proof and establish that the subject legislation conflicts with the Spokane City
21 Charter or Washington state civil service law. For these reasons, the City requests
22 the Court dismiss Plaintiffs' claims in their entirety.

23
24 ²⁸ Emphasis added.

25 ²⁹ Parr v. City of Seattle, 197 Wash. 53, 84 P.2d 375 (1938).

26 ³⁰ Westford v. Chamberlain, 52 Wn.2d 497, 326 P.2d 741 (1958).

27 ³¹ See Manlove v. Johnson, 198 Wash. 280, 88 P.2d 397 (1939); Langlie v. United Fireman's
28 Ins. Co., 40 F. Supp. 24 (W.D. Wash. 1941).

29 THE CITY OF SPOKANE'S REPLY IN
30 SUPPORT OF MOTION FOR SUMMARY
31 JUDGMENT - 20

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1 **Finally, the City requests the court dismiss Plaintiffs' claims regarding alleged**
2 **arbitrary and capricious action as the City's argument was not addressed in Plaintiffs'**
3 **Response.**

4 DATED this 22nd day of April, 2014.

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7 
8 Nathaniel Odle, WSBA #39602
9 Assistant City Attorney
10 Attorney for Defendant

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27 **THE CITY OF SPOKANE'S REPLY IN**
28 **SUPPORT OF MOTION FOR SUMMARY**
 JUDGMENT - 21

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5th Floor Municipal Building
Spokane, WA 99201-3328
(509) 625-6225
FAX (509) 625-6277

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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 22nd day of April, 2014, I caused a true and correct copy of the foregoing "THE CITY OF SPOKANE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT," to be delivered to the parties below in the manner noted:

David A. Bricklin	<input type="checkbox"/> VIA FACSIMILE
Claudia M. Newman	<input type="checkbox"/> VIA U.S. MAIL
Bricklin & Newman, LLP	<input type="checkbox"/> VIA OVERNIGHT SERVICE
1001 Fourth Avenue, Suite 3303	<input checked="" type="checkbox"/> VIA EMAIL BY AGREEMENT
Seattle, WA 98154	

Attorneys for Plaintiffs/Petitioners



Sheila Hansen
City Attorney's Office
808 W. Spokane Falls Blvd.
Spokane, WA 99201-3326

THE CITY OF SPOKANE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 22	Nancy L. Isserlis, City Attorney OFFICE OF THE CITY ATTORNEY 5 th Floor Municipal Building Spokane, WA 99201-3326 (509) 625-6225 FAX (509) 625-6277
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NANCY L. ISSERLIS
CITY ATTORNEY

PAT J. DALTON
SENIOR ASSISTANT CITY ATTORNEY

ASSISTANT CITY ATTORNEYS

SALVATORE J. FAGGIANO	MICHAEL J. PICCOLO
MATTHEW M. FOLSOM	JAMES A. RICHMAN
ERIN A. JACOBSON	ELIZABETH L. SCHOEDEL
ASHLEY C. MARSHALL	TIMOTHY E. SZAMBELAN
MARY F. MURAMATSU	HUNT M. WHALEY
NATHANIEL J. ODLE	

October 30, 2014

RECEIVED
OCT 30 2014
CITY CLERK'S OFFICE
SPOKANE, WA

Troy Bruner, Chair
City of Spokane Ethics Committee

Re: Referral of possible ethics violation by City Council President Ben Stuckart

Dear Mr. Bruner:

I am referring what I believe to be a violation of the Code of Ethics for the City of Spokane to you for investigation and disposition.

Summary:

Council President Stuckart received a highly confidential email regarding a pending matter in litigation, clearly marked "attorney client privileged" and forwarded the email to the opposing party at his personal email address.

Background:

This matter came to my attention inadvertently during the course of an investigation performed by me at the request of Don Waller, President of Local 29 of the International Association of Firefighters. Mr. Waller's August 18, 2014 letter which requested investigation into a potential violation of the Spokane Municipal Code involving a budget transfer is attached hereto (exhibits not included). My August 26, 2014 response to Mr. Waller, and a letter from Local 29's counsel, SaNni Lemonidis, regarding the issue are also attached.

To properly investigate Mr. Waller's claims, I requested that the City's IT department collect relevant emails relating to the issue. Through my review of the results compiled by IT, I discovered an email dated May 5, 2014 from Spokane City Council President Ben Stuckart to Mr. Waller. Council President Stuckart's email to Mr. Waller consisted of a forwarded copy of an email drafted by an attorney in my office, Assistant City Attorney Erin Jacobson. Ms. Jacobson's email, addressed to the Mayor of Spokane and all members of the Spokane City Council (including Mr. Stuckart), was clearly marked "attorney client privileged" in the subject line and contained highly confidential

information about pending litigation, specifically, the course of conduct the City would be undertaking with respect to a law suit brought against the City by Mr. Waller's organization, Local 29. Within twenty minutes of receipt of Ms. Jacobson's email, Council President Stuckart forwarded the email, in its entirety, to Mr. Waller at his personal email address. I believe Mr. Stuckart was aware he was forwarding confidential information to the party opposing the City in pending litigation. These email messages are attached in redacted form.

Analysis:

The Spokane City Charter and Municipal Code vest in the City Attorney the authority and duty to act as the City's legal advisor. While work is regularly performed at the request of individual elected officials or departments, the client of the City Attorney is the City of Spokane.¹ Under these principles, when the City Attorney provides confidential written advice to the Mayor or the Council, only the Mayor or the Council may waive any attorney-client privilege on behalf of the City. No other person, including the official aides or staff members, may waive the privilege without authorization from the recipient of the confidential correspondence. Where confidential written advice or information is provided to an official department or body, for example the Spokane City Council, only the body – not individual members – can agree to waive the attorney-client privilege.

Here, the Council President provided confidential information from the City Attorney's Office to the plaintiff in a law suit pending against the City of Spokane. In doing so, he violated the attorney-client privilege held by Spokane City Council. There was no vote to waive the privilege and, thus, no authority. Further, since Mr. Stuckart emailed Ms. Jacobson's confidential legal advice to the personal email address of Mr. Waller, it is unknown at this time if the information was further disseminated.

The Spokane Code of Ethics prohibits disclosure of confidential or privileged information gained by reason of a public official's position.² The local prohibition mirrors the mandate of Washington State law. See RCW 42.23.070 ("No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit"). Disclosure of privileged or confidential information gained through official channels constitutes "official misconduct" under both State³ and Spokane municipal law.⁴

¹ See also Rule of Professional Conduct 1.13(a) (A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents).

² SMC 01.04.030(H).

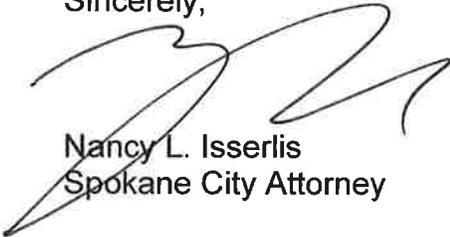
³ RCW 9A.80.010 (1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege: (a) He or she intentionally commits an unauthorized act under color of law; or (b) He or she intentionally refrains from performing a duty imposed upon him or her by law. (2) Official misconduct is a gross misdemeanor. See also RCW 42.23.050 (Any officer violating the provisions of this chapter is liable to the municipality of which he or she is an officer for a

Troy Bruner
October 15, 2014
Page 3

Next Steps.

I believe I have a professional ethical obligation to my client and employer, the City of Spokane, to disclose what I believe to be an instance of official misconduct.⁵ I met with Mr. Stuckart this afternoon to advise him that I am sending this letter. I will cooperate with any subsequent investigation. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Nancy L. Isserlis
Spokane City Attorney

cc: Ben Stuckart, Council President

penalty in the amount of five hundred dollars, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law. In addition to all other penalties, civil or criminal, the violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.)

⁴ SMC Section 10.07.132(A) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege, he intentionally: (1) commits an unauthorized act under color of law; or (2) refrains from performing a duty imposed upon him by law. (B) Official misconduct is a gross misdemeanor (RCW 9A.80.010).

⁵ See RPC 1.13(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

DON WALLER
President

JOHN GOODMAN
Vice President

THAD FRATER
Secretary-Treasurer



IAFF- LOCAL 29
911 E. Baldwin
Spokane, WA
99207-2512

BUS 509-484-5598
FAX 509-484-3752
www.local29.org
iaff129@gmail.com

International Association of Fire Fighters

August 18, 2014

Office of the City Prosecuting Attorney
909 West Mallon Avenue
Spokane, Washington 99201-2129
cityprosecutor@spokanecity.org

RECEIVED

AUG 19 2014

OFFICE OF THE
CITY PROSECUTOR

Re: Complaint Regarding Spokane Municipal Code Violation
Prohibited Intrafund Budget Transfer; SMC 07.09.010

Dear City Prosecuting Attorney:

My name is Don Waller and I am the president of the International Association of Fire Fighters, Local 29, in Spokane. I am writing this complaint to inform you that Local 29 has identified an apparent violation of Spokane Municipal Code Section 07.09.010, governing "Intrafund Budget Transfers." Under SMC 01.05.030, an investigation and written finding should follow when a written complaint, like this one, is submitted to a Code Enforcement Officer. SMC 01.05.020(B)(4) ("the code enforcement officer is ... a city prosecutor."); SMC 01.05.030(A) ("If the alleged violation came to the officer's attention by way of a written complaint, and, after investigation, a code violation is not found, the officer should inform the complainant of the finding.") Attached to this written complaint are documents that Local 29 hopes will aid in your investigation.

This violation is unusual in that it does not involve the ordinary matters of unkempt property, obstructions, zoning issues, and the like. Instead, it involves a failure to proceed through the required democratic channels specified in the Spokane Municipal Code, constituting, in my opinion, a more serious issue of governance than the usual gamut of SMC violations.

SMC Title 7, Chapter 9 sets forth minimum requirements for any transfer of City budget funds from one departmental fund to another. Put differently, it draws a line between the authority of the Executive to spend the budget and the authority of the City Council to allocate the budget. SMC 07.09.010 reads: "Intrafund budget transfers may be made during the current fiscal year by order of the mayor ... Provided, however, that the following transfers *shall be approved by ordinance passed by the vote of one more than the majority of all members of the city council.*" SMC 07.09.010(A) (emphasis added). This obligation is not discretionary, as evidenced by the use of mandatory language, i.e., "shall." *See id.* The first type of intrafund transfer for which City Council approval is mandatory is: "The creation or abolishment of employee positions." SMC 07.09.010(A)(1). This subsection is the focus of Local 29's complaint.

Subsections (a) and (b) then set forth just two scenarios in which City Council approval is not required for the creation or abolishment of employee positions. *Id.* ("except for:"). The first exception applies to

“*classified employee positions* which are created or abolished solely for the purpose of downgrading a specific position in order to hire at a lower level of classification.” SMC 07.09.010(A)(1)(a) (emphasis added). The second exception applies to “progressive promotions, certification advancements or position reclassifications of *classified employees governed by civil service rules or bargaining unit contracts.*” SMC 07.09.010(A)(1)(b) (emphasis added).

These sections can only be read to permit intrafund transfers for the creation or abolishment of employee positions, and without City Council approval, *if* those positions are *classified* employee positions, i.e., the position is already subject to and governed by civil service rules. An intrafund transfer to create an employee position outside the civil service system simply cannot occur under SMC 07.09.010 without City Council approval.

As the attached exhibits show, an Assistant Director of Integrated Medical Services (“Assistant Director”) position was created and filled by appointment on April 10, 2014. (Ex. 1; Ex. 2) The job description for this new, exempt position was created outside the Civil Service Commission’s classification plan. (Ex. 3; Ex. 4) There was no existing or dormant position of “Assistant Director of Integrated Medical Services.” I expect that your investigation will show that the budget assets used to fund this position were obtained by intrafund transfer, specifically the transfer listed on the last line of the “Intrafund Budget Transfer Report” for April 2014. (Ex. 5) (“Deputy Fire Chief” is a position that was budgeted for but never filled) It appears the assets to fund the Assistant Director position were obtained in part via transfer from the EMS Fund: “I’ll need to move EMS Fund money over ...” (Ex. 6) Ordinarily, these intrafund transfers are authorized by emergency budget ordinance (“EBO”) through the City Council. See (Ex. 7) Similar authorization by the City Council was required for this transfer, under SMC 07.09.010, but was never obtained. In addition, SMC 07.08.113(B) limits how EMS funds may be expended. The City’s transfer of funds without City Council approval and in violation of SMC 07.09.010 is suspect because it circumvents the representative body of the City Council. I expect that your office will investigate this apparent violation and look forward to hearing from you about the results of your investigation.

In the event that a Code Enforcement Officer finds a violation, the officer must “attempt to secure voluntary correction by contracting the responsible person(s), explaining the violation and requesting correction before issuing a notice of violation or notice of infraction.” SMC 01.05.030(B). I believe this is the appropriate course of action here. However, even if your office does not decide to issue a notice of violation/infraction, this complaint constitutes a request for your office to take action on behalf of the taxpayers of the City of Spokane. In the absence of statutory authorization to bring private suit, Washington recognizes taxpayer standing to challenge the acts of public officers once a request has been made to a proper public official, here, a Code Enforcement Officer, and that request has been refused or “would have been useless.” Farris v. Munro, 99 Wn.2d 326, 329 (1983).

Please contact me to confirm receipt of this complaint. I look forward to hearing from you shortly.

Sincerely,



Don Waller



OFFICE OF THE CITY ATTORNEY
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3326
509.625.6225
509.625.6277 FAX

NANCY L. ISSERLIS
CITY ATTORNEY

Exhibit 2

PAT J. DALTON
SENIOR ASSISTANT CITY ATTORNEY

ASSISTANT CITY ATTORNEYS

SALVATORE J. FAGGIANO	MICHAEL J. PICCOLO
MATTHEW M. FOLSOM	JAMES A. RICHMAN
ERIN A. JACOBSON	ELIZABETH L. SCHOEDEL
ASHLEY C. MARSHALL	TIMOTHY E. SZAMBELAN
MARY F. MURAMATSU	HUNT M. WHALEY
NATHANIEL J. ODLE	

August 26, 2014

Don Waller
IAFF – Local 29
911 East Baldwin
Spokane, WA 99207

Re: Complaint Regarding Spokane Municipal Code Violation
Your letter dated August 18, 2014 to Office of the Prosecuting Attorney

Dear Don:

Justin Bingham, the City Prosecutor, received your letter on August 19 and forwarded it to me for response.

Initially, please let me clarify that Code Enforcement Officers under the Spokane Municipal Code have limited roles and responsibilities under the SMC with respect to matters specifically delineated under SMC. Code Enforcement Officers do not have the authority to enforce all provisions of the SMC. The City Prosecutors office has the responsibility to prosecute misdemeanors inside the City limits and to adjudicate certain civil infractions over which it has jurisdiction.

With that clarification in mind, it does not appear that any of the concerns you have raised in your letter could be handled in the City Prosecutor's office because there has been no allegation of a crime committed under the SMC, nor any civil infraction reported by a Code Enforcement Officer that would fall under the Prosecutor's jurisdiction. A violation of SMC 07.09.010 is not linked to or referenced in the SMC to acts prosecuted by the City Prosecutor's office.

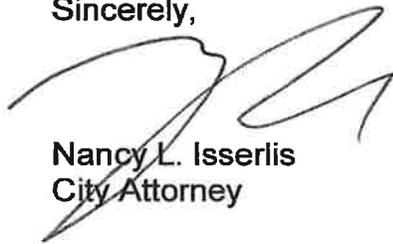
The City Code Enforcement Officers have a *limited* commission granted by the Spokane Police Department. Title Seven of the Spokane Municipal Code is not part of the Code Enforcement Officers limited commission. Code Enforcement Officers investigate various land use, building and zoning violations. The Code Enforcement Department is not involved with any financial or budgetary functions for the City of Spokane.

Don Waller
August 26, 2014
Page 2

The issues you raise in your letter are certainly worthy of further investigation, but I am not able to respond to your request that my office take legal action on behalf of the taxpayers of the City of Spokane at this time. The ethics of my profession and the Rules of Civil Procedure in the State of Washington prevent me from filing suit without performing the necessary due diligence required.

As you requested, I will be taking this matter under advisement and asking for further investigation into the matters that you have raised. I am working on how best to handle that.

Sincerely,

A handwritten signature in black ink, appearing to be 'Nancy L. Isserlis', written over a printed name and title.

Nancy L. Isserlis
City Attorney

cc. Justin Bingham

Jacobson, Erin

From: Stuckart, Ben
Sent: Monday, May 05, 2014 14:35
To: Don
Subject: FW: ATTORNEY-CLIENT PRIVILEGED Appeal Decision

Ben Stuckart
City of Spokane
City Council President
(509)625-6258

From: Jacobson, Erin
Sent: Monday, May 05, 2014 2:15 PM
To: Allen, Michael; Fagan, Mike; Mumm, Candace; Salvatori, Steve; Snyder, Jon; Stuckart, Ben; Waldref, Amber
Cc: Condon, David; Sanders, Theresa; Isserlis, Nancy; Odle, Nathaniel; Williams, Bobby; Schaeffer, Brian; Lowe, Heather
Subject: ATTORNEY-CLIENT PRIVILEGED Appeal Decision

Council Members,

[REDACTED]

*Confidential & Privileged Legal Materials
No Disclosure Authorized Without Express Consent of Chenail & City Attorney*



Erin A. Jacobson | Assistant City Attorney
office 509.625.6889 | cell 509.710.8028

FIND US LIKE US

ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT INFORMATION. THIS INFORMATION IS UNLAWFULLY DISCLOSED TO THE PUBLIC. ANY DISCLOSURE OF THIS INFORMATION IS UNLAWFUL. ANY DISCLOSURE OF THIS INFORMATION IS UNLAWFUL. ANY DISCLOSURE OF THIS INFORMATION IS UNLAWFUL.

Imus, Roxanne

From: Imus, Roxanne
Sent: Thursday, October 30, 2014 10:59 AM
To: Imus, Roxanne

FW: ATTORNEY-CLIE

Message Insert Options Format Text Time Matters

Cut Copy Paste Format Painter Clipboard

Calibri 11 A⁺ A⁻ [List Icons] [Link Icon]

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Address Book Check Names Attach File Attach Item Business Card Calendar

Basic Text Names Include

To... Don <dukewaller@yahoo.com>

Cc...

Subject: FW: ATTORNEY-CLIENT PRIVILEGED Appeal Decision

Ben Stuckart
City of Spokane
City Council President
(509)625-6258

From: Jacobson, Erin
Sent: Monday, May 05, 2014 2:15 PM
To: Allen, Michael; Fagan, Mike; Mumm, Candace; Salvatori, Steve; Snyder, Jon; Stuckart, Ben; Waldref, Amber
Cc: Condon, David; Sanders, Theresa; Isserlis, Nancy; Odle, Nathaniel; Williams, Bobby; Schaeffer, Brian; Lowe, Heather
Subject: ATTORNEY-CLIENT PRIVILEGED Appeal Decision

Council Members,

[REDACTED]





STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112 • Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

November 8, 2017

Sent electronically by email to:

Danielle Franco-Malone: franco@workerlaw.com

Randy Marler: spokaneforhonestgovernment@gmail.com

Danielle Franco-Malone
Schwerin Campbell Barnard
Iglitzin & Lavitt LLP
18 West Mercer St, Ste 400
Seattle, WA 98119

Subject: Commission Final Order, Spokane for Honest Government, PDC Case 9059

Dear Ms. Franco-Malone:

Enclosed is a copy of the Public Disclosure Commission's Final Order Imposing Fine that was entered in the above-referenced case concerning Spokane for Honest Government.

At its October 26, 2017 meeting, the Commission found Spokane for Honest Government in violation of RCW 42.17A.260, 42.17A.305, and 42.17A.240, and assessed a total civil penalty of \$10,000, with \$3,000 suspended on the condition that the Respondent is in compliance with all current reporting requirements, has no further violations of law or PDC rules for four years from the date of this Order, and pays the non-suspended portion of the penalty within 90 days from the date of this Order.

Please make your \$7,000 check or money order payable to the WA State Treasurer, and mail the payment to the address listed below:

**WA State Treasurer - Public Disclosure Commission
Financial Office
PO Box 41465
Olympia, WA 98504-1465**

In the event Spokane for Honest Government fails to meet any of the above terms of this order, the entire \$10,000 penalty will become immediately due without any further intervention of the Commission.

Spokane for Honest Government
Hearing Order Cover Letter
PDC Case 9059
Page 2

If you have questions, please contact Phil Stutzman at (360) 664-8853; toll free at (877) 601-2828 or by email at phil.stutzman@pdc.wa.gov.

Sincerely,



Philip E. Stutzman
Sr. Compliance Officer

Enclosure: Final Order

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6
7 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**
8 **OF THE STATE OF WASHINGTON**

9 IN RE THE MATTER OF ENFORCEMENT
10 ACTION AGAINST

11 SPOKANE FOR HONEST GOVERNMENT

12 Respondent.

PDC CASE NO. 9059

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER IMPOSING FINE

13 **I. INTRODUCTION**

14 This matter came before the Washington State Public Disclosure Commission on October
15 26, 2017, at the PDC office, Room 206, Evergreen Plaza Building, 711 Capitol Way, Olympia,
16 Washington. The matter was held in accordance with Chapters 34.05 and 42.17A RCW and
17 Chapter 390-37 WAC.

18 Commissioners present included Anne Levinson, Commission Chair (presiding); Jack
19 Johnson, Commission Vice-Chair; and Commissioners John Bridges, Katrina Asay, and David
20 Ammons. Assistant Attorney General Chad Standifer presented the matter on behalf of PDC
21 Staff. Respondent Spokane for Honest Government (SFHG) was represented through its attorney
22 Danielle Franco-Malone, who participated by phone. Also present were Assistant Attorney
23 General Scott Douglas representing the Commission; PDC Executive Director Peter Lavallee;
24 and PDC staff member Jana Greer as recorder of the proceedings. The proceeding was open to
25 the public and recorded.

26 The PDC had before it the following materials:

- 1 1. Commission Staff's Witness and Exhibit List submitted July 18, 2017;
- 2 2. Complaint received on October 15, 2016 from Gretchen McDevitt against SFHG, with
- 3 exhibits (Exhibit 1);
- 4 3. Form C-1 pc filed by SFHG on May 1, 2015 (Exhibit 2);
- 5 4. SFHG's response to complaint dated October 25, 2016 (Exhibit 3);
- 6 5. C-6 report filed by SFHG on October 16, 2015 (Exhibit 4);
- 7 6. C-6 report filed by SFHG on October 22, 2015 (Exhibit 5);
- 8 7. C-6 report filed by SFHG on October 27, 2015 (Exhibit 6);
- 9 8. C-6 report filed by SFHG on June 20, 2016 (Exhibit 7);
- 10 9. Summary of late-filed C-6 reports filed by SFHG (Exhibit 8);
- 11 10. C-4 report for period of September 1, 2015 - October 12, 2015 (Exhibit 9);
- 12 11. Report of Investigation, PDC Case 9059, dated June 12, 2017 (Exhibit 10);
- 13 12. Addendum to Report of Investigation, PDC Case 9059, dated June 29, 2017 (Exhibit 11);
- 14 13. Amended Notice of Administrative Charges; and
- 15 14. Table of comparable PDC cases listing violations and penalties assessed.

16 The hearing concerned allegations that SFHG violated RCW 42.17A.260 and .305 by
17 failing to timely file C-6 reports of independent expenditures and electioneering communications
18 within 24 hours of presenting or mailing the ads and communications to the public, and violated
19 RCW 42.17A.240 by failing to adequately describe the purpose of \$50,000 of expenditures.

20 **II. PROCEDURAL HISTORY**

21 This matter first came before the Commission on July 27, 2017, at which time a proposed
22 stipulation was presented which included a proposed penalty of \$10,000 with \$5,000 suspended.
23 The Commission voted to reject the stipulation on the grounds that the penalty was insufficient
24 for the violations alleged. At a subsequent pre-hearing conference held on September 7, 2017,
25 the matter was set for evidentiary hearing before the Commission.
26

1 On September 29, 2017, counsel for SFHG sent a letter to AAG Standifer and AAG
2 Douglas stating that SFHG would not participate in the evidentiary hearing, but would honor the
3 terms of the stipulated agreement previously rejected by the Commission if the Commission
4 were to accept that stipulation. Counsel for SFHG further stated that if a monetary penalty was
5 ordered in excess of what had been proposed in the stipulation, SFHG intended to cease
6 operations as a political committee.

7 Counsel for Respondent SFHG presented no testimony and submitted no exhibits. AAG
8 Standifer submitted eleven exhibits, listed above as document 2 through 12. Ms. Franco-Malone
9 was asked if she had any objections to admission of Staff's exhibits. She stated that she had not
10 reviewed the exhibits but had no objection to their admittance. Staff's Exhibits 1 through 11
11 were admitted into evidence. Chair Levinson made note of the September 29, 2017 letter sent by
12 counsel for SFHG to AAGs Standifer and Douglas. The Chair had been provided a copy of the
13 letter prior to the hearing, and asked the parties if there was any objection to it being included in
14 the record. The letter was admitted into evidence as Exhibit 12 without objection.

15 Philip Stutzman, Senior Compliance Officer, was sworn in and presented testimony on
16 behalf of PDC Staff. Mr. Stutzman's testimony included discussion of three prior PDC cases
17 with fact patterns comparable to this case, and the penalties assessed therein. In all three
18 comparable cases, the C-6 reports were filed untimely but within roughly one month or less of
19 the required reporting date.

20 Each party was provided the opportunity to make a closing argument. AAG Standifer
21 summarized the evidence presented, and addressed the factors in this case which warrant a higher
22 penalty than had been assessed by the Commission in three specific comparable PDC cases with
23 similar fact patterns. SFHG failed to timely file seven C-6 reports, exceeding the number of late-
24 filed reports in the comparable cases. The late reports filed by SFHG were between 212 and 283
25 days late, far exceeding the timeframe in the comparable cases, where the latest-filed report was
26

1 42 days late. SFHG did not file the required C-6 forms until well after the election in which the
2 expenditures were made, thus depriving the public of material information about who was
3 making the expenditures at the time when voters were making their decisions and casting their
4 ballots. The amount unreported until after the election - \$94,134.75 – is a significant amount of
5 money, especially for a local municipal election. Staff reiterated their recommendation that a
6 penalty of \$10,000 be assessed, but did not make a specific recommendation on whether or how
7 much of the penalty should be suspended.

8 **III. FINDINGS OF FACT**

9 1. Spokane for Honest Government is a political committee that participated in the
10 2015 Spokane City Council elections by supporting Lori Kinnear and Karen Stratton with
11 independent expenditures and electioneering communications. Both candidates were successful
12 in the November 3, 2015 general election.

13 2. On October 15, 2016, Gretchen McDevitt filed a complaint with the PDC, alleging
14 that Spokane for Honest Government had failed to timely file reports of independent
15 expenditures during the 2015 Spokane City Council elections.

16 3. Spokane for Honest Government first filed a committee registration (Form C-1 pc) on
17 May 1, 2015, listing Deborah Gaddess, Campaign Manager; Melissa Olson, Treasurer; and
18 Rich Bruce, Renee Barkart, and Randy Marler, Committee Members.

19 4. On October 16, 2015, Spokane for Honest Government paid Lawton Printing
20 \$2,938.00 for mailers supporting Karen Stratton for Spokane City Council.

21 5. On October 22, 2015, Spokane for Honest Government paid Lawton Printing
22 \$2,512.16 for mailers supporting Lori Kinnear.

23 6. On October 27, 2015, Spokane for Honest Government paid Lawton Printing
24 \$4,992.30 for mailers supporting Lori Kinnear (\$2,598.15) and Karen Stratton (\$2,394.15).
25
26

1 7. Melissa Olson, Treasurer for Spokane for Honest Government, filed all three C-6
2 reports related to the October 16, 22, and 27, 2015 expenditures in a timely manner, within 24
3 hours of presenting or mailing the ads and communications to the public.

4 8. On June 20, 2016, Spokane for Honest Government filed a C-6 report disclosing
5 multiple independent expenditures and electioneering communications totaling \$94,134.75
6 made between September and November 2015, supporting Lori Kinnear and Karen Stratton.
7 The report disclosed \$46,080.40 supporting Ms. Kinnear and \$48,054.35 supporting Ms.
8 Stratton. The expenditures were required to be reported on seven separate C-6 reports within
9 24 hours of presenting or mailing the ads and communications to the public, but were reported
10 between 212 and 283 days late, and more than seven months after the 2015 election. The
11 expenditures were primarily for political ads in the form of broadcast advertising and direct
12 mail pieces.

13 9. Spokane for Honest Government timely filed a Campaign Summary Receipts and
14 Expenditures Report (PDC Form C-4) covering the period September 1, 2015 through October
15 12, 2015 (the 21-day pre-general election report) on October 12, 2015. It included an
16 expenditure dated September 10, 2015 totaling \$50,000, to API, PO Box 251, Spokane, WA
17 99210. The Purpose of Expense column stated only "Media Buy." It did not identify the two
18 candidates supported by the media buy, or include a listing of the media outlets used.

19 **IV. CONCLUSIONS OF LAW**

20 1. Spokane for Honest Government violated RCW 42.17A.260 and .305 by failing to timely
21 file C-6 reports disclosing expenditures for political advertising and electioneering
22 communications.

23 2. Spokane for Honest Government violated RCW 42.17A.240 by failing to adequately
24 describe the purpose of \$50,000 of expenditures as required in RCW 42.17A.240 and WAC
25 390.16.037.
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V. ORDER

Spokane for Honest Government is hereby ordered to pay a penalty of \$10,000 of which \$3,000 is suspended on the condition that the Respondent is in compliance with all current reporting requirements, has no further violations of law or PDC rules for four years from the date of this Order, and pays the non-suspended portion of the penalty within 90 days from the date of this Order. The Executive Director is authorized to enter this Order on behalf of the Commission.

SO ORDERED this 8th day of November, 2017.

WASHINGTON STATE PUBLIC
DISCLOSURE COMMISSION

FOR THE COMMISSION:


Peter Lavallee
Executive Director

This order sent by mail to:

Danielle Franco-Malone
Schwerin Campbell Barnard
Iglitzin & Lavitt LLP
18 West Mercer St, Ste 400
Seattle, WA 98119

And by email to:
franco@workerlaw.com

I, Phil Stutzman certify that I emailed a copy of this order to the Respondent at his respective email address.

Philip E. Stutzman 11/8/2017
Signed Date

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3 **Appeals and Enforcement of Commission Final Order**

4 NOTICE: RECONSIDERATION

5 PURSUANT TO THE PROVISIONS OF RCW 34.05.470 AND WAC 390-37-150 YOU MAY
6 FILE A PETITION FOR RECONSIDERATION WITH THE PDC WITHIN TWENTY-ONE
7 (21) DAYS FROM THE DATE THIS FINAL ORDER IS SERVED UPON YOU. ANY
8 REQUEST FOR RECONSIDERATION MUST STATE THE SPECIFIC GROUNDS FOR
THE RELIEF REQUESTED. PETITIONS MUST BE DELIVERED OR MAILED TO THE
WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, 711 CAPITOL WAY,
ROOM 206, BOX 40908, OLYMPIA WA 98504-0908.

9
10 NOTICE: PETITION FOR JUDICIAL REVIEW

11 YOU HAVE THE RIGHT TO APPEAL THIS FINAL ORDER TO SUPERIOR COURT,
12 PURSUANT TO THE PETITION FOR JUDICIAL REVIEW PROVISIONS OF RCW
13 34.05.542. ANY PETITION FOR JUDICIAL REVIEW OF THIS FINAL ORDER MUST BE
FILED WITH THE COURT AND ALSO SERVED UPON BOTH THE COMMISSION AND
THE OFFICE OF THE ATTORNEY GENERAL WITHIN THIRTY (30) DAYS AFTER THE
DATE THIS FINAL ORDER IS SERVED UPON YOU.



STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX
(360) 753-1112 • Toll Free 1-877-601-2828 • E-mail: pdcc@pdcc.wa.gov • Website: www.pdcca.wa.gov

December 15, 2017

Sent electronically by email to:

Danielle Franco-Malone: franco@workerlaw.com

Randy Marler, Campaign Manager: spokaneforhonestgovernment@gmail.com

Brandon Bacon, Treasurer: spokaneforhonestgovernment@gmail.com

Rich Bruce, Committee Member, spokaneforhonestgovernment@gmail.com

Renee Barkart, Committee Member, spokaneforhonestgovernment@gmail.com

Deborah Gaddess, Committee Member, spokaneforhonestgovernment@gmail.com

Danielle Franco-Malone
Schwerin Campbell Barnard
Iglitzin & Lavitt LLP
18 West Mercer St, Ste 400
Seattle, WA 98119

Subject: Public Disclosure Commission's Final Order - Spokane for Honest Government,
PDC Case 9059

Dear Ms. Franco-Malone:

The Public Disclosure Commission's Final Order in PDC Case 9059 assessed a total civil penalty of \$10,000, with \$3,000 suspended on the condition that the Respondent — your client, Spokane for Honest Government — is in compliance with all current reporting requirements, has no further violations of law or PDC rules for four years from the date of the Order, and pays the non-suspended portion of the penalty within 90 days from the date of the Order. The Commission did not require immediate payment, as stated in your November 27, 2017 letter (copy enclosed), but allowed the committee 90 days to make payment, giving Spokane for Honest Government until February 6, 2018 to make payment. The Committee's officers could also ask for additional time to pay the penalty, or ask for a payment plan.

Conditions for Suspended Penalty

Spokane for Honest Government must comply with all current reporting requirements to have \$3,000 of the penalty suspended. I am enclosing a copy of C-4 Report No. 100800480, covering the period 10/31/17 to 11/30/17, filed November 13, 2017. The report is certified by Spokane for Honest Government Treasurer Brandon Bacon in accordance with RCW 42.17A.240. By submitting the report, Mr. Bacon stated, "I

certify that the information herein and on accompanying schedules and attachments is true and correct to the best of my knowledge." The report is marked as a Final Report. However, this C-4 report is not accurate because it does not include a Schedule B, which in Part 3 requires the filer to show outstanding debts of more than \$250.00. [RCW 42.17A.240\(8\)](#). In addition, the C-4 report does not reflect any debt on line 19 of the report, as required by RCW 42.17A.240(8). Spokane for Honest Government had an outstanding debt during the period covered by this report of \$7,000.00 owed to the State of Washington for a penalty assessed by the Commission on October 26, 2017 in PDC Case 9059. Spokane for Honest Government was notified of this outstanding debt on November 8, 2017 by email and U.S. mail, and had a responsibility to inform its treasurer so Mr. Bacon could file an accurate report. Failure to amend this C-4 report could put the committee, and the committee's treasurer or other officers individually, at risk of being in violation of RCW 42.17A.240(8).

Procedures to "wind down operations" and no longer function as a political committee

In your November 27, 2017 letter, you stated that Spokane for Honest Government has complied with the procedures provided by the Public Disclosure Commission to wind down operations, and is no longer a political committee. [RCW 42.17A.005\(37\)](#).

Staff disagrees with your assertion that Spokane for Honest Government has complied with the procedures provided by the Public Disclosure Commission to wind down operations and stop filing reports. [RCW 42.17A.235\(8\)](#) states: "When there is no outstanding debt or obligation, the campaign fund is closed, and the campaign is concluded in all respects or in the case of a political committee, the committee has ceased to function and has dissolved, the treasurer shall file a final report. Upon submitting a final report, the duties of the treasurer shall cease and there is no obligation to make any further reports." (Emphasis added). Spokane for Honest Government has on-going reporting obligations, except that [RCW 42.17A.235\(2\)\(c\)](#) states that on the 10th day of the month in which no other reports are required to be filed under RCW 42.17A.235, C-4 reports are only required to be filed if the committee has received contributions or made expenditures that exceed \$200 during the preceding calendar month.

Your November 27, 2017 letter also stated that Spokane for Honest Government chose to honor the intent of those who contributed to it, to spend those funds in support of candidates in the November 2017 general election. You stated that Spokane for Honest Government went ahead and spent what little money it had in the manner its donors intended, and as a result, by the time the election was over, it no longer had the funds that would have been necessary to pay the fine imposed on it by the Commission, and had no reasonable way of obtaining such funds.

I am sure the committee's supporters also intend for the committee to comply fully with the law. It appears from the record that Spokane for Honest Government has supporters that could help it meet its financial obligations before it winds down its operations and is no longer a political committee.

Spokane for Honest Government
Letter Concerning Commission's Final Order
PDC Case 9059
Page 3

Please contact me if you would like to discuss this matter. You can contact me by phone at (360) 664-2735, or by email at peter.lavallee@pdc.wa.gov.

Sincerely,



Peter Lavallee
Executive Director

Enclosures:

C-4 Report Covering 10/31/17 to 11/30/17
November 27, 2017 letter
September 29, 2017 letter