MEMORANDUM

April 14, 2015

TO: Ben Stuckart, City Council President
Members of the City Council
Terri Pfister, City Clerk

FROM: Brian T. McGinn, Hearing Examiner

SUBJECT: Initiative No. 2015-2

CC: Mayor David Condon

Background

On March 24, 2015, the Envision Worker Rights Political Committee filed a proposed initiative, now designated as Initiative No. 2015-2, to amend the City Charter of the City of Spokane (the "Charter") to add a "Worker Bill of Rights."

On March 31, 2015, the City Council referred Initiative No. 2015-2 to the Hearing Examiner for legal review. As a result, and in accordance with SMC 2.02.040, the Hearing Examiner is charged with preparing a formal written opinion as to the legal validity and effect of the proposed measure. This memorandum is intended to fulfill this responsibility.

Summary of Initiative 2015-2

Initiative 2015-2 proposes to add Section 120, entitled "Worker Bill of Rights," to the Charter. There are four substantive rights that will be incorporated into the Charter if the Worker Bill of Rights is adopted. Those rights are summarized as follows.

First, the Worker Bill of Rights grants the workers of relatively large employers the right to a "family wage." The requirement to pay a family wage applies to employers with one hundred fifty or more full-time equivalent ("FTE") workers. In general, interns, apprentices, and probationary employees are not entitled to a family wage. For workers that do qualify, the family wage is intended to provide them with sufficient wages to meet their basic needs and ensure a limited ability to deal with future emergencies (without the need for public assistance). The City is required to consider the costs of basic necessities, such as food, housing, utilities, health care, etc., when calculating the family wage. The proposed initiative also sets forth formulas for calculating and periodically adjusting the family wage.

Second, the Worker Bill of Rights provides that all workers in the City of Spokane have a right to equal pay for equal work. To effectuate this right, the proposed initiative states that employers may not discriminate in the payment of wages or other compensation based on the "worker's gender, sexual orientation, gender identity, gender expression, familial status, race,

ethnicity, national origin, citizenship, economic class, religion, age or developmental, mental, or physical ability." The prohibition against discrimination applies when workers are performing jobs that require equal skill, effort and responsibility.

Third, the Worker Bill of Rights states that workers in the City of Spokane have the right to be free from wrongful termination. Under this provision, employers with ten or more full-time equivalent workers may not terminate a worker except for "just cause," as that term is generally defined by common law. In addition, an employer seeking to terminate a worker for just cause must demonstrate that it provided timely and adequate work performance warnings and opportunities to correct work performance; utilized a fair, objective, and non-discriminatory termination process; and made the termination for work performance reasons or as part of a layoff prompted by "economic hardship." If a court finds that a worker was wrongfully terminated, the worker will be entitled to back pay, reinstatement, attorneys' fees, costs, and damages.

Fourth, the Worker Bill of Rights provides that the rights of corporations are subordinate to the rights of the workers. Any corporations that violate or seek to violate workers' rights are stripped of their status as "persons" under the law. Further, corporations are denied any rights that "interfere" with workers' rights, including "standing to challenge this section in court, the power to assert state or federal preemptive laws in an attempt to overturn this section, and the power to assert that the people of this municipality lack the authority to adopt this section."

Initiative Law

The people of Spokane have the right to legislate directly, through the initiative process. *See* Spokane City Charter, Article IX, Section 81. The people's legislative authority is necessarily broad and includes the power to make and enforce any law or regulation in furtherance of the public health, safety, and welfare. *See e.g.* Const. art. 11, § 11 (conferring on cities the power to enact regulations not in conflict with general laws of the state). Although the power to legislate by initiative is far-reaching, there are limitations on the scope of that authority.

Initiatives cannot exceed the jurisdictional limits of the enacting body or transgress constitutional directives. *See City of Burien v. KIGA*, 144 Wn.2d 819, 824 (2001) (stating that the initiative power "is subject to the same constitutional restraints placed upon the Legislature when making laws."). In addition, Washington courts have described several specific limitations on initiative powers. Those limitations include the following:

1) The power of initiative only extends to matters that are legislative in nature. *Ruano v. Spellman*, 81 Wn.2d 820, 823, 505 P.2d 447 (1973). Administrative matters, particularly local administrative matters, are not subject to initiative. *Port Angeles v. Our Water-Our Choice*, 170 Wn.2d 1, 8, 239 P.3d 589 (2010). A matter is administrative if it furthers or hinders a plan that the local government or some power superior to it has previously adopted. *See id.*, at 10. A legislative action, by contrast, establishes new policy to be followed. *See id.*, at 11.

2) An initiative cannot interfere with the exercise of a power delegated by state law to the governing legislative body of a city. *City of Sequim v. Malkasian*, 157 Wash.2d 251, 264,

138 P.3d 943 (2006). A grant of power to the city's legislative body "means exclusively the mayor and city council and not the electorate." *City of Sequim*, 157 Wash.2d at 265.

3) To be valid, an initiative must be within the authority of the jurisdiction passing the measure. *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 719 (1996). Thus, a local initiative that conflicts with state law is invalid because it is outside the scope of the authority of a city to enact. *Seattle Bldg & Constr. Trades Council*, 94 Wn.2d 740, 747- 748 (1980) (citizen initiative could not prohibit the state from constructing limited access highways because the city had no jurisdiction over State facilities).

4) An initiative may not include more than one subject matter. *City of Burien v. KIGA*, 144 Wn.2d 819, 824-25 (2001). However, when an initiative has a general title, the body of the initiative may embrace several incidental subjects or subdivisions and not violate the single subject rule. *City of Burien,* 144 Wn.2d at 826.

Analysis of Initiative 2015-2

Initiative 2015-2, if enacted, would incorporate a "Worker Bill of Rights" into the Charter. That bill of rights seeks to create four substantive rights, namely the right to a family wage, the right to be free from wrongful termination, the right to equal pay for equal work, and the subordination of corporate rights. Each of these four elements of the bill of rights will be discussed in turn. In addition, this analysis will also address whether defining certain rights based on the number of employees is consistent with equal protection. Finally, the single subject matter rule will be briefly considered.

Family Wage. The Worker Bill of Rights provides that large employers, defined as employers with 150 or more FTE workers, must pay its workers a "family wage." In other words, the initiative establishes a minimum compensation level for the workers of a certain class of employers.

The family wage provisions appear to satisfy the threshold tests for an initiative. The establishment of a family wage is a policy decision, and therefore is legislative rather than administrative in character. There is no statute, to the Hearing Examiner's knowledge, that delegates authority to legislate on wages exclusively to the "legislative body" of the city. As such, the city council does not have sole authority to enact local laws on this subject matter. The proposed initiative does treat a particular class of employers differently from others. This raises a potential equal protection issue, which is discussed in greater detail elsewhere in this memorandum. The primary issue addressed here is whether the "family wage" requirement is consistent with existing statutes.

An initiative cannot enact legislation that is in conflict with existing statutes. *See e.g. King County v. Taxpayers of King County*, 133 Wn.2d 584, 608, 949 P.2d 1260 (1997). Further, if the legislature has exercised exclusive authority to regulate a particular subject, the initiative process would not be available to regulate the same subject matter. *See League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (holding that initiative was not valid because federal authority over immigration was exclusive). If existing statutes do not exclusively regulate a subject matter, and the proposed initiative supplements rather than

contradicts the existing statutes, then it would be permissible for the proposed initiative to establish new or additional standards on the same subject matter.

The Hearing Examiner's research did not reveal a statutory scheme that exclusively governed the subject of compensation. Further, that research did not lead to the conclusion that the proposed initiative contradicted or conflicted with any existing statutes. Therefore, it appears that the establishment of a "family wage" is the proper subject of an initiative, at least in the respect that it does not conflict with an existing statutory scheme. Even so, this conclusion should be explained further, in light of the existing minimum wage statutes, both at the state and federal level.

The state has adopted a minimum wage statute, called the Minimum Wage Act, codified at RCW 49.46. This statute establishes a minimum wage for employees in the State of Washington. There is no conflict between the proposed initiative and the Minimum Wage Act because, among other things, the Act only establishes a floor below which wages cannot drop. The statute explicitly provides that its requirements are "in addition to and supplementary to any other federal, state, or local law or ordinance." *See* RCW 49.46.120. The statute does not preclude the adoption of any standards or requirements that "are more favorable to employees than the minimum standards" applicable under the Act. *See id.* Thus, the state legislature did not purport to preempt the field by enacting this law. In addition, the if the initiative is adopted, it will undoubtedly set a wage for eligible employees substantially higher than the state minimum wage, given that the calculation of the "family wage" is based upon providing the "basic necessities" (including health care, child care, emergency savings, taxes, and the like) of a household of two people. As a result, the Hearing Examiner concludes that the proposed initiative does not conflict with the state's minimum wage statute.

The federal minimum wage statute operates in the same fashion as the Washington law. Specifically, the Federal Fair Labor Standards Act states:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter...

See 29 U.S.C. 218(a). The Washington Supreme Court has recognized that the state may enact its own minimum wage, so long as it is higher than the federal minimum. *See Peterson v. Hagan*, 56 Wn.2d 48, 56, 351 P.2d 127 (1960). Since the initiative will surely result in wages higher than the federal minimum, there is no inconsistency between the proposed initiative and federal law.

The Hearing Examiner concludes that the proposed initiative does not contradict existing law. Further, the proposed initiative does not attempt to regulate a subject matter that is the exclusive province of the state or federal legislature. As a result, the proposed initiative is not subject to challenge on such grounds.

Equal Pay For Equal Work. The Worker Bill of Rights prohibits wage discrimination amongst employees based on characteristics such as gender, familial status, citizenship, economic class,

and physical or mental ability, assuming those employees are performing equivalent jobs. These terms do not seem significantly different from existing state statutes.

The Washington Law Against Discrimination ("WLAD") provides comprehensive prohibitions against discriminatory practices. *See* RCW 49.60.010 *et seq.* The WLAD declares that all people have a right to be free from discrimination because of race, national origin, sex, sexual orientation, and sensory, mental or physical disability, among other things. *See* RCW 49.60.030(1). These rights specifically apply to employment. *See* RCW 49.60.030(1)(a). Washington has also adopted an equal pay act, codified at RCW 49.12.175. This state legislation is virtually identical to the federal Equal Pay Act, 29 USC 206(d)(1). *See Adams v. University of Washington*, 106 Wn.2d 312, 317, 722 P.2d 74 (1986). The equal pay legislation, both at the state and federal levels, is designed to preclude discrimination in the payment of wages based upon sex, and to provide remedies when this proscription is violated.

The existing state statutes broadly cover the subject matter addressed in the equal pay provisions of the proposed initiative. The question becomes, then, whether the existing statutes preclude the adoption of local legislation on the same subject matter. This question appears to have been answered in *Seattle Newspaper-Web Pressmen's Union v. Seattle*, 24 Wn.App. 462, 604 P.2d 170 (1979).

In *Pressman's Union*, a labor union challenged the validity of the Seattle Fair Employment Practices Ordinance (the "Ordinance"). The union contended that the Ordinance was (1) preempted by WLAD and (2) beyond the police power of the city to adopt. *See Pressman's Union*, 24. Wn.App. at 464. Considering the union's first argument, the Court of Appeals noted that the statute contained no clear or express intent to take away the power of a municipality to legislate on the subject matter. *See Pressman's Union*, 24. Wn.App. at 468. The statute also recognized that victims of discrimination should be allowed to pursue any civil or criminal remedy, indicating that WLAD was not intended to be exclusive. *See Pressman's Union*, 24. Wn.App. at 467. Looking to the statute as a whole, the Court of Appeals concluded that WLAD did not preempt the Ordinance and that there was room for the exercise of concurrent jurisdiction by the city. *See Pressman's Union*, 24. Wn.App. at 471.

Turning to the union's second argument, the Court of Appeals rejected the union's claim that there was a conflict between WLAD and the Ordinance. *See Pressman's Union*, 24. Wn.App. at 469. There was no conflict because the Ordinance did not authorize an act that the statute forbade, or vice versa. *See id.* The Court of Appeals also explained:

> An ordinance may be more restrictive than the state enactment so long as the statute does not forbid the more restrictive enactment. *Lenci v. Seattle, supra at* 670-71. The Seattle Ordinance does not attempt to authorize practices that have been forbidden by the state Statute. It merely provides further prohibition against unfair labor practices.

See id. The Court of Appeals therefore concluded that that Ordinance was a valid exercise of the city's police power under article 11, section 11 of the state constitution. *See Pressman's Union*, 24. Wn.App. at 471.

The Hearing Examiner concludes that the proposed initiative is not precluded by existing state law. The foregoing statutes do not contain an express restriction on the adoption of local legislation. The proposed measure does not authorize activity forbidden by statute, or forbid activity allowed by statute. The proposed initiative may be largely redundant with state law, but there is nothing precluding the exercise of concurrent jurisdiction in this case. It is also possible that the proposed initiative is more restrictive than state law, in some respects (e.g. the inclusion of "economic class" as a protected category). This is permitted because the state statutes do not preclude a more restrictive standard.

The proposed initiative also satisfies the limitations applicable to initiatives generally. The initiative sets forth a broad policy regarding discrimination, and thus is squarely legislative in nature. The Hearing Examiner is not aware of any constitutional or other limitation on the proposed legislative action. Thus, the provisions calling for equal pay for equal work are not vulnerable to legal challenge in any respect anticipated or considered by the Hearing Examiner.

Freedom From Wrongful Termination. The Worker Bill of Rights states that employers with ten or more full-time equivalent workers may not terminate a worker except for "just cause," and, in this way, intends to protect eligible employees from "wrongful termination."

As is true of the family wage provisions, the wrongful termination provisions treat a particular class of employers differently from others, raising concerns about equal protection. The equal protection issue, however, will be addressed separately below. The issue here is whether the wrongful termination provisions exceed any limitations on the initiative power.

The wrongful termination provisions meet the threshold tests governing initiatives. The wrongful termination provisions create new policies affecting a certain class of employers and their employees. Creating new policies is legislative, rather than administrative, in character. Further, there is no existing legislative enactment that delegates authority over this subject matter to the "legislative body" of the city. Therefore, the city council does not have exclusive power to legislate on this subject. Finally, the Hearing Examiner is not aware of any jurisdictional or constitutional restriction that would prevent the wrongful termination provisions from being enacted by initiative. In the Hearing Examiner's opinion, the proposal to incorporate wrongful termination provisions into the Charter does not suffer from any obvious legal defects.

Subordination of Corporate Rights. The Worker Bill of Rights states that the rights of corporations are subordinate to the rights of the workers. The subordination of corporate rights is accomplished by depriving corporations of access to the courts. The Hearing Examiner believes this component of the initiative is flawed and would not be sustained by the courts.

The initiative states that corporations that violate or seek to violate workers' rights are stripped of their legal status as "persons," and have no standing to challenge the initiative in court. The proposed initiative also attempts to limit the legal arguments that a corporation can assert in court. Specifically, the initiative states that a corporation cannot contend that state or federal law preempts the initiative, or that there is no jurisdiction to adopt the initiative. The Hearing Examiner does not believe that any of these provisions are valid.

The state constitution "makes no distinction between corporations and natural persons in the matter of access to the courts." *See State ex rel. Long v. McLeod*, 6 Wn. App. 848, 849, 596 P.2d 540 (1972). The state constitution, rather, specifically states that "**all corporations shall have the right to sue** and shall be subject to be sued, **in all courts**, in like cases **as natural persons**." *See* Const. art. 12, § 5 (emphasis added). Initiatives, just like enactments of the legislature, must be consistent with the state constitution. *See City of Burien v. KIGA*, 144 Wn.2d 819, 824 (2001). In the Hearing Examiner's opinion, the provisions of the proposed initiative that deprive corporations of access to the courts, directly or indirectly, are inconsistent with the state constitution and will not be sustained. *See id.* (stating that an initiative which runs afoul of the state constitution will be struck down by the courts).

The proposed initiative is also inconsistent with state law. The Washington Business Corporation Act, for example, provides that "every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business," including the power to "sue and be sued, complain, and defend in its corporate name." *See* RCW 23B.03.020(2)(a). Similar authority is granted to nonprofit corporations. The Washington Nonprofit Corporation Act states that each corporation "shall" have the power to "sue and be sued, complain and defend, in its corporate name." *See* RCW 24.03.035. In the Hearing Examiner's opinion, the proposed initiative directly contradicts existing state statutes. Therefore, in addition to the constitutional infirmity, these provisions also conflict with state statute and therefore exceed the jurisdictional limits of the initiative power.

The drafters attempt to insulate the initiative from legal challenges by declaring that corporations cannot challenge the initiative on jurisdiction or preemption theories. In the Hearing Examiner's opinion, these provisions are not legally effective. Federal law either supersedes inconsistent law adopted at the local level or it does not. Jurisdiction to enact an initiative either exists or it does not. An initiative cannot guard against such challenges by purporting to ban a corporation from raising the issues in the first place. This is just a different mechanism to deny corporations access to the courts. Ultimately, a corporation cannot be legally precluded from challenging the initiative as preempted by federal law or as being invalid for lack of jurisdiction.

Equal Protection. There are two provisions in the Worker Bill of Rights that could be challenged as violating equal protection: the "family wage" requirement and the "wrongful termination" provision. The Hearing Examiner believes that these parts of the initiative may raise equal protection concerns because they treat employers differently based upon the number of employees. This line of demarcation could be considered arbitrary and therefore may implicate equal protection rights.

For example, a "family wage" is only available to employees who work for large employers, i.e. those who employ one hundred fifty (150) or more FTE workers. Employees of small employers may assert, understandably, that there is little justification for depriving them of this benefit merely because they do not work for a larger enterprise. The large employers, meanwhile, may assert that smaller employers gain an unfair competitive advantage because they will not be required to compensate their employees to the same degree. A similar argument could be made regarding the right to be free from wrongful termination. Employees

who work for small employers, i.e. those who employ fewer than ten (10) FTE workers, cannot claim the right to be free from "wrongful termination" as defined by the initiative. An employer of twelve workers, one could anticipate, might question why having three less employees should insulate the smaller employer from the "wrongful termination" restrictions.

Ultimately, the question is whether it is improper discrimination to confer benefits or impose regulations based on the number of full-time employees. This question can best be answered, in the Hearing Examiner's view, by considering the principles of equal protection. The purpose of the privileges and immunities provision of Article I, Section 12, of the state constitution, and the equal protection clause of the fourteenth amendment of the federal constitution, is to secure equality of treatment for all persons. *See Mosebar v. Moore*, 41 Wn.2d 216, 222, 248 P.2d 385 (1952). To comply with these constitutional provisions, legislation must satisfy two requirements: (1) the legislation must apply alike to all persons in the designated class; and (2) there must be reasonable grounds for making distinctions between those who fall within the class and those who do not. *See id.*

The initiative appears to comply with the first prong of the equal protection test. All employers within the given class are subject to the same standard. For example, all large employers must pay the family wage to their employees. There does not appear to be any discrimination within the class. The issue, then, is whether there is improper discrimination between employers in the class and employers who are not.

The Hearing Examiner cannot provide a firm conclusion regarding whether the initiative satisfies the second prong of the equal protection test. The reason for the Hearing Examiner's hesitation is lack of information. The Hearing Examiner does not know, based solely from the language of the initiative, why only employers with more than one hundred fifty employees must pay a family wage, or why employers with fewer than ten employees need not follow the termination protocol of larger employers. There is no legislative history to review, so the rationale for these classifications is unknown to the Hearing Examiner. Even so, it is likely that the initiative sponsors can successfully defend these classifications from an equal protection challenge, for at least two reasons.

First, employers are not defined as a suspect or even a semi-suspect class. As a result, the proposed legislation is subject to the lowest level of scrutiny by the courts, i.e. the "rational basis" test. Under that test, the classification will be upheld against an equal protection challenge "if there is any conceivable set of facts that could provide a rational basis for the classification." *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). Stated another way, a challenger would have to show that the classification is "purely arbitrary." *See id.* If any reasonable explanation can be provided for the chosen classifications, the legislation will be upheld as consistent with equal protection. Presumably, the initiative sponsors can provide *some* justification for defining employers in the chosen manner. If so, the initiative will be sustained.

Second, the Washington Supreme Court, on at least one occasion, has upheld this type of classification. In *Griffin*, an employee challenged an exemption for small employers contained in Washington's law against discrimination, RCW 49.60. Under the statute, employers of fewer than eight employees are exempt from the statutory remedies. *See* RCW 49.60.040 (defining

"employer" for purposes of the statute). The employee asserted that the exemption violated her equal protection rights, secured by the federal and state constitutions. *See Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788 (1996). She argued, among other things, that there were no reasonable grounds for distinguishing between large and small employers. *See id.*, at 66. The Washington Supreme Court rejected her claim, concluding that there was a rational basis for exempting small employers, and that the Legislature was entitled to relieve small employers of the statutory and regulatory burdens of RCW 49.60. *See id.* Accordingly, the Court determined that the statute did not violate equal protection. *See id.*

Single-Subject Matter Rule. As stated above, initiatives are only allowed to address a single subject matter. The proposed initiative may seem to transgress this rule because it addresses multiple subjects under a general heading of "Worker Bill of Rights." However, the Hearing Examiner concludes that the proposed initiative satisfies the single-subject rule, for the reasons that follow.

When the title is general, an initiative can have several subdivisions without violating the rule. *City of Burien,* 144 Wn.2d at 826. The test to determine whether the subdivisions of the initiative are within the single subject rule is whether the subdivisions have a rational unity among all matters included within the measure and the general topic expressed in the title. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 209 (2000).

In the Hearing Examiner's opinion, the subdivisions are all logically related to the goal of establishing a bill of rights for workers. The individual components of the initiative are also sufficiently related to each other to form a coherent whole. If any one provision of the Worker Bill of Rights could be singled out as distinct from the rest, it is the provision regarding the subordination of corporate rights. Nonetheless, the Hearing Examiner believes that the provisions on corporate rights, as drafted, are sufficiently connected to worker's rights to avoid transgressing the rule.

Conclusion

This memorandum serves as the Hearing Examiner's written, legal opinion on the legal validity and effect of proposed Initiative 2015-2. In the Hearing Examiner's opinion, the Worker Bill of Rights can properly be adopted by initiative. The form of the initiative is proper because it addresses a single subject matter within the meaning of the law. The initiative addresses matters which are legislative, rather than administrative, in nature. The city council does not exclusive authority to legislate on the relevant subject matter. And, with one notable exception, the proposed initiative honors statutory and constitutional constraints.

One component of the proposed initiative is legally flawed, in the Hearing Examiner's view. The provisions regarding the subordination of corporate rights are not consistent with the state constitution or state statute, as explained above. The Hearing Examiner recommends that the initiative sponsors amend the proposed initiative to remove these provisions and to revise the preamble and ballot title accordingly. The Hearing Examiner is not able to suggest a less drastic revision because the essential purpose of these provisions is to strip corporations of rights guaranteed by the state constitution and protected by existing state legislation. A minor

amendment would neither be consistent with the drafter's intent nor curative of the legal shortcomings.

The Hearing Examiner expresses no opinion on whether or not Initiative 2015-2 *should* be adopted or not. That is a policy question that is beyond the scope of this memorandum.

DATED this 14th day of April 2015.

Brian T. McGinn
City of Spokane Hearing Examiner