

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 7, 2018

**SUBJECT:** Sexual and Other Workplace Discrimination Policy Update:  
Appeal Process (Work Order No. 30-LS1366)

**TO:** Representative Matt Claman  
Attn: Lizzie Kubitz

**FROM:** Megan A. Wallace  
Legislative Counsel 

You have asked for an opinion regarding consideration by the Sexual and Other Workplace Harassment Subcommittee of an appeal process for harassment complaints. The existing Sexual and Other Workplace Discrimination Policy<sup>1</sup> does not include an appeal process. As the Subcommittee discusses this issue at its next meeting, I recommend that the Subcommittee consider the following:

1. Despite the lack of a formal appeal process in our existing policy, with respect to victims of unlawful harassment, some appeal process does exist by law. For example, if a victim is not satisfied with the investigation or resolution reached under the existing policy, the person may file a complaint with the Alaska Human Rights Commission (HRC) under AS 18.80.100 or, if applicable, the U.S. Equal Employment Opportunity Commission (EEOC).<sup>2</sup> In addition, the victim may also file a civil action under state or federal law.<sup>3</sup>

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<sup>1</sup> Adopted by Legislative Council January 20, 2000.

<sup>2</sup> Nothing requires a complainant to wait until an employer investigation is complete before filing a complaint with the HRC or EEOC.

<sup>3</sup> Before a claim can be brought under Title VII of the Civil Rights Act of 1964, the plaintiff is required to first exhaust administrative remedies by filing an HRC or EEOC complaint. *See B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002) ("Under Title VII, a plaintiff must exhaust h[is] administrative remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge."). Similarly, the Alaska Supreme Court has held that collective bargaining grievance procedures must be followed if the collective bargaining agreement prohibits the same conduct. *See Barnica v. Kenai Peninsula Borough Sch. Dist.*, 46 P.3d 974, 977 (Alaska 2002) ("[A] claim subject to an agreement to arbitrate for which an independent statutory judicial remedy is also available must be

2. The existing policy states that "[i]f the investigation reveals conduct in violation of this policy by a Legislator, the matter will be referred to the appropriate legislative body for resolution."<sup>4</sup> Only the body can sanction a member. Even if the Human Resources Manager makes a finding of discrimination under the policy, the Human Resources Manager does not have the authority to issue a reprimand to a legislator. It has been the past precedent that unofficial sanctions (*i.e.* sanctions imposed without approval of the full body) have been instituted by the caucus. In that instance, the legislator would have the option to appeal, or present his or her case, to the caucus. In addition, the most recent precedent regarding release of an investigatory report has been for the Rules Committee to take up the matter. Under those circumstances, a legislator who is the subject of an investigation or complaint before the Rules Committee could appeal to the committee if the legislator disagreed with the contents of an investigatory report or with any recommendation given by the Rules Committee. Furthermore, if the legislature were in session, a legislator could make a floor motion, appealing to the full body if the legislator disagreed with any recommendation given by the caucus or Rules Committee.<sup>5</sup> Accordingly, despite the lack of a formal appeal process in the existing policy, there are procedural options available to legislators who are the subject of an investigation or complaint. Furthermore, I am not sure the appeal measures discussed in this section could be extinguished, even by the creation of other formal appeal measures to be added to the existing policy.

It should also be noted that the Subcommittee has not yet discussed whether there will be a separate investigation process for legislators.<sup>6</sup> In my opinion, the Subcommittee should consider this issue before determining what formal appeal process, if any, might be made available to a legislator.

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arbitrated.") A complainant or person against whom a complaint is filed can seek judicial review if they disagree with a decision of the HRC or EEOC. *See, e.g.*, AS 18.80.135.

<sup>4</sup> Sexual and Other Workplace Discrimination Policy (adopted by Legislative Council January 20, 2000).

<sup>5</sup> This would be similar to the relief available to a legislator where the Select Committee on Legislative Ethics recommends sanctions against the member. Under AS 24.60.174 the recommendation is forwarded to the presiding officer and the legislator would be limited to making his appeal to the body.

<sup>6</sup> While the Subcommittee has discussed the topic of discretionary retention of an outside investigator, it has not yet discussed who will receive investigatory reports or recommendations. Will it remain in the discretion of the "appropriate legislative body" or will the matter be sent to the Rules Committee or some other special committee, as proposed in the Oregon policy? The decision in this regard might alter the discussion on a potential appeal process for legislators.

3. There are not any other existing appeal rights for legislative staff or agency employees. Caution should be exercised before creating employment rights for employees that do not otherwise exist.<sup>7</sup> Nevertheless, the report of the Human Resources Manager is always a recommendation. The various appointing authorities make the ultimate decision regarding sanctions or termination.

4. In considering a formal appeal process, a one-size-fits-all appeal process will likely not work for the legislature given its unique composition of elected members, legislative staff, and agency employees. If it were the will of the Subcommittee to adopt a formal appeal process, the Subcommittee might consider the following options:

A. Legislative Affairs Agency employees could appeal the findings of an investigation or sanctions given to the Executive Director;

B. Legislative staff could appeal the findings of an investigation or sanctions given to the full Rules Committee during session, or the Senate President or Speaker of the House during the interim;

C. Legislators could appeal the findings of an investigation or sanctions recommended to the Rules Committee.<sup>8</sup>

D. If the person against whom the complaint is filed has additional information he or she wishes to be considered, it should be presented at the time of appeal.

If I can be of further assistance, please advise.

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<sup>7</sup> "Legislative employees are at-will employees and serve at the will of their supervisor. They can be separated at any time without cause." Handbook for Legislative Affairs Agency Employees, at p. 2. "Legislative employees are exempt and can be terminated at any time without cause." State of Alaska Legislative Staff Employee Handbook, at p. 4.

<sup>8</sup> As discussed above, however, the appeal process for legislators may be dependent on the manner in which complaints are treated. If there are substantial policy revisions in this regard, additional options for appeal will likely be available for consideration.