

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

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September 15, 2004

To: District Discrimination Complaint Officers

From: Steve Bruckman
Interim General Counsel

Subject: Nondiscrimination Complaint Processing
Legal Advisory 04-04

Synopsis: In our review of discrimination complaints and nondiscrimination policies over the past several months, we have become aware of a number of issues that have arisen at multiple districts throughout the system. We thought it would be helpful to provide reminders and updates for all districts on those topics.

DFEH filings in employment-related title 5 cases

Some employees who file title 5 nondiscrimination complaints with their employing districts also file complaints with the Department of Fair Employment and Housing (DFEH). When this situation arises, the district should forward a copy of a claimant's DFEH complaint to the Chancellor's Office for a determination as to whether the issues presented require an independent investigation by the district under the title 5 regulations. (Cal. Code Regs., tit. 5, § 59328(f)(2).)¹

The regulations also require districts to advise employee complainants that they may be able to file employment discrimination complaints with the U.S. Equal Employment Opportunity Commission (EEOC) or the DFEH. Because the DFEH and EEOC have a work-sharing arrangement for overlapping complaints, we accept complaints that are filed with the EEOC pursuant to that arrangement under the same conditions as those filed with DFEH. That is, if a district forwards to us a copy of an employee's EEOC complaint that could have been filed with the DFEH, we will advise the district as to whether an independent title 5 investigation is needed.

Whether the employee complaint was filed with DFEH or EEOC, the district may discontinue the investigation required under title 5, unless this Office notifies it that further investigation is required. Generally, we will not require any further investigation if a DFEH or EEOC complaint is filed with regard to the same protected classes, issues and circumstances covered in the title 5 complaint.

¹ All further section references are to title 5 of the California Code of Regulations unless otherwise indicated.

In some instances a claimant who has filed a complaint with a district and with either the DFEH or EEOC is issued a right-to-sue letter before the DFEH or EEOC complaint is forwarded to the district for response. In such a case, a district may be unable to confirm that the complaints arise from the same set of facts or allege the same bases for discrimination. In this event it is within a district's discretion whether it wishes to obtain a copy of the DFEH or EEOC complaint; however, if the external complaint is obtained, it should then be forwarded to the Chancellor's Office for a determination of whether an investigation is required pursuant to title 5. If the district does not obtain and forward the complaint to this Office, it must continue the title 5 investigation even though the right-to-sue letter has been issued.

We must caution that nothing in our regulations prevents a district from conducting its own investigation of any complaint, regardless of whether an investigation is ultimately required pursuant to title 5. For example, a district may wish to investigate a pending matter to ensure nondiscrimination, or it may be obligated to investigate a matter pursuant to local district policies or other state or federal law.

Although the regulations do not require it, we believe that complainants are well-served by a clear statement that their failure to file with DFEH or EEOC may prevent their ability to bring a lawsuit. Additionally, districts may wish to underscore the fact that the title 5 investigatory process does not provide for monetary damages.

Intermediate Steps in the Appeal Process

It has come to our attention that many districts have adopted nondiscrimination complaint procedures that provide for intermediate administrative steps before allowing an appeal to the district governing board under section 59338. For example, some districts require students who are not satisfied with the results of the administrative determination to appeal to a college vice president and then to the college president before obtaining governing board review. Some multi-campus districts also require an appeal to the district chancellor before the appeal to the local board. Such procedures can help to resolve complaints at the lowest possible level, but if there are too many steps in the appeal process complainants may be discouraged from seeking resolution of legitimate complaints. Districts that choose to use this approach should carefully assess the processes they have developed to ensure that they are not unduly burdensome and complex. In addition, there are two important requirements that must be met if such intermediate steps are to be used.

First, because all of these intermediate processes concern the administrative determination, all such intermediate appeal processes must be completed within the ninety (90) days allowed for the district to reach its administrative determination pursuant to title 5, section 59336. This means that the time for the initial investigation, the time for the intermediate appeals to be filed, and the time needed for each administrator to render a decision on the appeal must all be fitted into the available ninety day period.

Second, district policies and communications with complainants should be clear about the effect of these intermediate appeal procedures. We have occasionally seen correspondence to complainants that says something like, "You may appeal this decision to the college President within 10 days from the date of this letter. If you do not appeal this decision will be final and

you will lose your right to appeal." This is not an accurate statement of the title 5 requirements. Whether or not a complainant elects to appeal an initial administrative determination to another administrative level, once the administrative process is complete (either because the complainant does not take advantage of one or more of the intermediate appeals or the intermediate administrative appeals have been exhausted), the district must still notify the complainant that the administrative determination is now final and that he or she may appeal to the governing board. In other words, offering multi-layered administrative processes cannot deprive the complainant of the right to appeal to the governing board, and district policies and communications with complainants should be careful to make this clear.

Employment-related discrimination complaints and appeals

Earlier this year we revised our procedures for handling employment-related unlawful discrimination complaints to provide that districts are no longer required to submit the materials described in sections 59336 and 59340 to the Chancellor's Office in employment-related cases.²

To provide guidance to districts, we developed a Model Discrimination Policy and Procedures which was updated this year to include these policy changes, and which is available at the following URL in PDF and Word formats:

<http://www.cccco.edu/divisions/legal/discrimination/discrimination.htm>

Please remember that, with regard to employment-related discrimination complaints:

- All complaints, whether or not employment-related, should be forwarded to this Office in a timely manner, pursuant to section 59330.
- It is no longer necessary to send the materials and notices required by sections 59336 and 59340 to the Chancellor's Office. However, all other requirements of section 59336 (aside from forwarding materials to this Office) must be followed, and the district should retain such records for a period of 3 years from the date on which a district's case file is closed.
- Although it is not necessary to send the materials and notices required by section 59336 to this Office, it is still necessary to seek an extension of time in cases where the district cannot meet the 90-day deadline set forth in that section. (The process for requesting an extension of time from this Office is discussed below.)

² On January 14, 2004, we informed all districts that:

"Please note that for the time being, with regard to employment related cases, due to budget reductions and severe staffing constraints the Chancellor's Office is no longer requiring districts to routinely send the information required by title 5, section 59336 to this Office, such as the administrative determination and investigative report. Should we determine that we need such a report in a particular case, we will specifically request it. We also request that districts not direct complainants to file appeals with the Chancellor's Office in employment related cases. Instead, you should continue to direct employment related matters to the Department of Fair Employment and Housing when resolution cannot be reached locally."

- The complainant should not be given appeal rights to the Chancellor's Office; instead, districts should continue to direct employment-related matters to the Department of Fair Employment and Housing when resolution cannot be reached locally.

Extensions of time

Title 5, section 59336 provides that within ninety (90) days from the date on which the complaint is received, the district must notify the complainant of its administrative determination, provide the complainant with a copy or summary of the investigative report, and notify the complainant of his or her appeal rights. In cases not involving employment discrimination, these materials, as well as the full investigation report, must be sent to this Office. Also, in cases not involving employment discrimination, the final district determination (after any appeal to the governing board) and a copy of the notice to the complainant of his or her appeal rights must be forwarded to the Chancellor within 150 days from the date on which the complaint was received. (Cal. Code Regs., tit. 5, § 59340.) The procedure for requesting an extension of these deadlines is contained in section 59342. To summarize:

- The request should be made to this office, in writing, at least 10 days before the deadline;
- A copy of the request must also be sent to the complainant; and
- The complainant must be informed that he or she may file written objections with this Office within five (5) days of receipt of the copy of the district's request for extension.
- If the request is for the extension of the 90-day deadline for completion of an investigation and administrative determination in an employment discrimination case, the district may presume that the extension has been granted if this Office does not notify the district, within 15 days from the date of the request, that the request has been denied.

Summaries of investigation reports

In general, most districts are doing thorough investigations and providing proper notice to the complainants. As you know, section 59336 requires that either the full investigation report or a summary of the investigation report be provided to the claimant along with the district's administrative determination. In a few instances where only summaries were provided, the summaries have not been meaningful and do not adequately inform complainants of the investigation and the district's conclusions. At a minimum, a summary of an investigative report should include all of the following:

- A description of the circumstances giving rise to the complaint.
- A summary and analysis of the relevant evidence (documents, data, or witness testimony) on which the determination rests.
- Specific findings as to whether there is probable cause to believe that discrimination did or did not occur with respect to each allegation in the complaint.

Without an adequate summary, complainants may be unable to file a meaningful appeal of the district's administrative determination with the local board, and, in student-related complaints, with this Office.

Complaint forms, policies and procedures

Complaint forms

Section 59328(c) requires that unlawful discrimination complaints be filed in "a form prescribed by the Chancellor." Such a form is available at the following URL, in PDF and Word:

<http://www.cccco.edu/divisions/legal/discrimination/discrimination.htm>.

Common problems in complaint filings:

- Outdated forms that do not include all the protected classes.
- Forms that do not inform complainants that they may file with the district or with this Office.
- Forms that contain classes that are not protected under title 5. A district may provide in its local policies that groups not covered by state or federal law are also protected from discrimination, but if it does so, the complaint form must make it clear that persons alleging discrimination on these grounds do not have the right to appeal district determinations to this Office.³
- Separate forms for sexual harassment complaints. We recognize that districts may wish to emphasize particular elements related to sexual harassment by issuing special explanations. With regard to title 5 complaints, we do not approve using separate forms that address only sexual harassment. A potential claimant must be made aware of all of the protected classes, rather than just one protected class, and should be able to include all allegations on one complaint form.⁴
- Forms that do not have a place to indicate whether the complainant is an employee, student, or "other."

Policies and Procedures

Section 59322 requires districts to establish and adopt written policies consistent with title 5, and to send adopted or amended policies to this Office within ninety (90) days of the adoption or amendment. Common problems are that some districts:

- Have not sent us their current policies and procedures, although letters went out to all districts in 2001 and 2002 requesting such materials.
- Have not sent subsequently amended policies and/or procedures to this Office.
- Have outdated policies and procedures. (Some contain provisions that are not lawful under title 5, such as requiring participation in informal complaint procedures.)

³ While we understand the desirability of comprehensive forms that include types of unlawful discrimination complaints which are not under this Office's jurisdiction in addition to title 5 complaints, the following should be made clear on such forms: 1) the protected classes that are covered by title 5; and 2) where complaints with regard to particular protected classes should be filed (i.e. title 5 complaints can be filed either with the District or with the State Chancellor's Office). Your district's policies and procedures should also be clear in this regard, and notify complainants that they can file title 5 complaints on the State Chancellor's form if they so choose.

⁴ A district may, however, have separate sexual harassment policy, and in less usual cases, separate sexual harassment complaint procedures, but only if they are properly referenced in the district's core unlawful discrimination complaint policy and procedures. The problem with separate procedures is that they must be kept in up-to-date compliance with title 5.

- Have separate policies and/or procedures for sexual harassment that are not properly referenced in the district's main unlawful discrimination policy and procedures.

Action/Date Requested: Advisory only. For technical assistance and questions you may wish to contact Francesca Reitano, Senior Legal Analyst at (916) 445-1997 (freitano@cccco.edu). Please continue to direct complainants or potential complainants to Suzanne Johnson, Legal Secretary at (916) 327-5493 (sjohnson@cccco.edu).

Contact: Francesca Reitano (916) 445-1997

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