

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

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November 22, 2004

Leo R. Middleton
Director of Staff and Student Diversity
Equal Employment Officer
El Camino Community College District
16007 Crenshaw Blvd.
Torrance, CA 90506-0001

Dear Dr. Middleton:

I am writing in response to your letter of October 12, 2004, in which you asked whether the El Camino Community College District (District) may accept a proposal advanced by faculty through the collegial consultation process which would provide those alleged to have engaged in discriminatory conduct the right to appeal an adverse finding to the local governing board and to the Chancellor's Office. Specifically, the proposal would define the word "appeal" to mean

"a request by a complainant or the accused made in writing to the El Camino Community College District governing board pursuant to section 59338 and/or to the Chancellor's Office pursuant to section 59339 to review the administrative determination of the District regarding a complaint of discrimination."

We interpret your letter as asking whether this Office would approve a revision to the District's policy pursuant to title 5, section 59322, if the District were to submit amendments to its policy which contained the above provision. For the reasons discussed below, we would not approve such a modification.

We note initially that the definition proposed by the faculty at El Camino is not consistent with the provisions of title 5, section 59311(a) which states,

"'Appeal' means a request by a complainant made in writing to a community college district governing board pursuant to section 59338 and/or to the Chancellor's Office pursuant to section 59339 to review the administrative determination of a community college district regarding a complaint of discrimination."

The regulation specifically mentions appeal rights for complainants but does not mention such rights for persons accused of discrimination.

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Furthermore, in Legal Opinion E 01-38 we concluded that the primary nondiscrimination statutes and regulations (Gov. Code, §§ 11135 et seq. and Cal. Code Regs., tit. 5, §§ 59300 et seq.) administered by this Office do not provide those accused of discrimination with appeal rights.

We stated that this is because

"Persons accused of unlawful discrimination are not protected under the statutes. Therefore, they are not provided appeal rights in the nondiscrimination provisions of title 5."

Thus, it is clear that those accused of discrimination have no appeal rights under the applicable law.

This leaves the question of whether a district could choose to accord persons accused of discrimination the right to appeal even if they are not entitled to such appeals as a matter of law. Certainly, it is not within the power of a community college district to compel the Chancellor's Office to entertain appeals from persons not accorded such rights under title 5, section 59336. On the other hand, it might be assumed that a district could afford those accused of discrimination the right to appeal to the district governing board if it so chose. However, we find that such a procedure cannot be permitted because it would fundamentally conflict with the appeal process laid out in title 5.

Title 5, section 59338 provides:

"59338. Final District Decision; Appeals to Local Governing Board.

(a) If the complainant is not satisfied with the results of the administrative determination rendered pursuant to section 59336, the complainant may submit a written appeal to the district governing board within fifteen (15) days from the date of the administrative determination. The governing board shall review the original complaint, the investigative report, the administrative determination, and the appeal and issue a final district decision in the matter within forty-five (45) days after receiving the appeal.

(b) A copy of the final district decision rendered by the governing board that includes complainant's right to appeal the district's decision to the Chancellor pursuant to section 59339 shall be forwarded to the complainant and to the Chancellor.

(c) If the governing board does not act within forty-five (45) days the administrative determination shall be deemed approved and shall become the final district decision in the matter. The district shall notify the complainant and the Chancellor that the board took no action and the administrative determination is deemed approved pursuant to this section. The complainant shall also be notified of his or her right to appeal the district's decision to the Chancellor pursuant to section 59339."

It is not clear from your letter whether it is intended that the person accused of discrimination would be able to appeal to the local governing board before or after the final district

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determination is rendered pursuant to section 59338. Obviously, if the accused were able to appeal after the determination required by section 59338, then that determination would not really be final and section 59338 would be violated. If the accused is allowed to appeal to the governing board before the district's administrative determination is made pursuant to title 5, section 59336, other difficulties arise. For one thing, the district would have to investigate the complaint and provide for an appeal for the accused within the 90-day period allowed by section 59336. Moreover, we think such a process would prejudice the subsequent review by the governing board of any appeal the complainant might thereafter file. If the governing board has already heard the matter on appeal by the accused, it might well feel bound to rule on the subsequent appeal by the complainant in a manner consistent with its earlier decision. Finally, if the administrative determination recommends disciplinary action against the accused, allowing the accused to appeal that decision to the governing board would likewise prejudice the board's ability to be involved in any subsequent disciplinary action that might be taken against the accused.

This latter point leads us to observe, as we did in Legal Opinion E 01-38, that,

"Before a district can take any type of disciplinary action against either a student or an employee, applicable due process procedures would need to be followed and the person accused of misconduct would then have the right, during that subsequent proceeding, to raise any objections he or she may have."

Thus, we see no compelling need for according those accused of discrimination a right to appeal since they will have the opportunity to challenge any possible disciplinary action based on the findings of the discrimination complaint process.

In summary then, persons accused of discrimination have no entitlement to appeal rights under the applicable statutes or regulations, according them such rights could interfere with the operation of the appeal process laid out in title 5, and there is no need to provide for such a process since the requirements of due process would have to be satisfied before the results of the discrimination complaint process could be used against the accused in a disciplinary process. For these reasons, we will not approve the District's nondiscrimination policy if it were submitted with the proposed amendment.

Sincerely,

Steven Bruckman
Interim General Counsel

SB:RB:sj

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