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Albuquerque Code of Ordinances

ARTICLE 7: WHISTLEBLOWER POLICY

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§ 3-7-1 SHORT TITLE.

This article may be known and cited as the "Whistleblower Ordinance."
(Ord. 2-2004)

§ 3-7-2 FINDINGS AND INTENT.

The public health, safety and welfare are better protected by instituting a procedure for reporting improper governmental action, encouraging such reporting and protecting those who properly report such action from retaliation. Proper reporting will provide the opportunity to minimize any adverse impacts of improper governmental actions.
(Ord. 2-2004)

§ 3-7-3 DEFINITIONS.

For the purpose of this article, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

ALLOWABLE COMPLAINT. A complaint that may be filed pursuant to this article alleging an improper governmental action and meets all other requirements of this article. An allowable complaint does not include a complaint that is frivolous or that discloses information (1) that the complainant knows to be false, (2) with disregard for the truth or falsity thereof or (3) that is a confidential record.

COMPLAINANT'S DEPARTMENT. The director of the department in which the city employee filing a complaint is assigned. If the complainant works for an agency of the city that is not designated as a department, then **COMPLAINANT'S DEPARTMENT** shall mean the highest ranking official of such agency.

CONFIDENTIAL RECORDS. Any record that is confidential under any provision of law, any record that is closed to public inspection pursuant to law, and records that are advisory in nature and preliminary to any final determination of policy or action. **CONFIDENTIAL RECORDS** do not include records that are purely factual materials and do not disclose the names of complainants or witnesses.

DIRECTOR. The Inspector General created by the Inspector General Ordinance, or its successor agency, and any investigators designated by the Director.

EMPLOYEE. Every appointed classified or unclassified employee of the city who receives compensation in the form of a salary. **EMPLOYEE** shall not include elected officials of the city.

FRIVOLOUS COMPLAINT. Any complaint or portion of a complaint that has no basis, or does not pertain to an improper governmental action, or is made for some purpose other than identifying an improper governmental action, such as complaints made for the purpose of retaliation or harassment.

GRIEVABLE and GRIEVANCE. These terms shall have the same meaning as provided in § 3-1-24 ROA 1994.

GROSS WASTE OF PUBLIC FUNDS. An unnecessary or unauthorized expenditure of a substantial amount of money or a series of unnecessary or unauthorized expenditures of smaller amounts of money cumulatively amounting to a substantial amount of money.

IMPROPER GOVERNMENTAL ACTION. Any action by a city employee, an appointed member of a board, commission or committee or an elected official of the city that is undertaken in the performance of such person's duties with the city that is in violation of a federal, state or local government law or rule, an abuse of authority, of substantial and specific danger to the public health or safety, or a gross waste of public funds that is in violation of city policy or rules. The action need not be within the scope of the employee's, elected official's or board, commission or committee member's official duties to be subject to a claim of improper governmental action. **IMPROPER GOVERNMENTAL ACTION** does not include city personnel actions, including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining agreements or the merit system ordinance, §§ 3-1-1 et seq. ROA 1994.

INSPECTOR GENERAL. The Inspector General and the Office of the Inspector General created by the Inspector General Ordinance, or its successor agency or department, and any investigators designated by the Inspector General.

INSPECTOR GENERAL INVESTIGATION. A special audit conducted by the Office of the Inspector General based on a complaint filed pursuant to this article.

RETALIATION or RETALIATORY ACTION. Any disciplinary action taken because (1) an employee lawfully disclosed information or filed an allowable complaint pursuant to this article, (2) an employee testified or assisted or is scheduled to testify or assist in any investigation, action or proceeding relating to the lawful disclosure of information by another employee pursuant to this article, or (3) the supervisor who imposed the disciplinary action believed the employee receiving the disciplinary action was involved in the activities described in parts (1) and (2) of this paragraph and such belief was the primary reason for the disciplinary action.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-4 PROCEDURES FOR REPORTING.

(A) *Complaints filed with the department.* The complainant shall submit a written report to the complainant's department stating in detail the factual basis for the complainant's reasonable belief that an improper governmental action has occurred. Upon receipt of a complaint, the complainant's department shall take prompt action to investigate the report of improper governmental action. Upon completion of the investigation, the complainant's department shall provide to the complainant a summary of the results of the investigation. Summaries of investigations shall not include personnel disciplinary actions taken as a result of the investigation. Summaries shall be provided to the complainant within 15 city business days of the receipt of the written complaint by the complainant's department or at such additional time beyond 15 days, but only when the complainant's department has good cause for extending the investigation and notifies the complainant when the summary of results will be provided and the reason for the extension of time. No extension shall be longer than an additional 15 city business days.

(B) *Alternative filing.* If the complainant's department director or the highest ranking official of a city agency is the subject of the complaint, then the complaint shall be filed with the Chief Administrative Officer or a member of his staff designated to receive such complaints. If the office of the chief administrative office is the subject of the complaint, the complaint shall be filed with the Mayor or his designee.

(C) *Complaints filed with the Inspector General.* If a complainant files a complaint with the Inspector General but does not file a complaint with complainant's department, the Inspector General shall determine whether the complaint shall first be investigated by the complainant's department, pursuant to the procedures required in subsections (A) or (B) of this section, or the Office of the Inspector General.

(D) *Complaints to be accepted by the Inspector General.* The Inspector General shall proceed with an investigation when (1) a complaint has been filed pursuant to subsections (A) or (B) of this section and the summary of the investigation is not provided to the complainant within 15 business days or the extension thereof, (2) after receipt of the summary of the investigation the complainant alleges that there is a reasonable basis for believing that insufficient action has been taken by the city to address the improper governmental action, (3) for other specified reasons, the improper governmental action is likely to recur or (4) a complaint alleges immediate harm. When applicable, a complaint filed with the Inspector General shall have attached to it the written complaint submitted to the complainant's department. The complaint filed with the Inspector General shall contain a statement explaining at least one of the following: (1) that the complainant's department did not provide a summary of the investigation, (2) the basis for the complainant's belief that the action taken by the city in response to the complaint is insufficient or (3) the basis for the complainant's belief that the improper governmental action is likely to recur or (4) the nature of the immediate harm and the basis for the complainant's belief that immediate and substantial harm may occur. When applicable, the complaint shall include a copy of all summaries of investigation provided to the complainant by the complainant's department. The Director shall not accept complaints related to discrimination or labor law matters, or other matters that are the subject of pending litigation.

(E) *Immediate harm.* Complainants shall file a complaint of improper governmental action with the Inspector General if the complainant believes that immediate and substantial harm to people or property will occur if immediate action is not taken. The complainant shall notify the Inspector General in the complaint as to whether the complainant has filed the same complaint with the complainant's department and, if applicable, attach a copy of such complaint. If the complaint has not been filed with complainant's department, the Inspector General shall determine if the complaint shall first be investigated by the complainant's department, pursuant to the procedures required in subsection (A) of this section, or the Inspector General. The Director shall immediately notify the complainant's department if the Inspector General determines that a threat of immediate harm may exist.

(F) Employees who fail to follow the procedures in this article in reporting improper governmental action shall not receive the protections provided in this article.

(G) If the complaint of improper governmental action includes allegations concerning the Inspector General, or anyone with supervisory authority over the Inspector General pursuant to the Inspector General Ordinance, the complaint shall be filed with the City Attorney.

(H) If the Department Director, the Chief Administrative Officer, the Mayor or the Inspector General (the appropriate office conducting the investigation) determines that the complaint involves allegations of criminal activity, the complaint may be referred to a law enforcement agency of proper jurisdiction. The party conducting the investigation may coordinate any further investigation with such law enforcement agency. If criminal charges are formally filed, the party conducting the investigation may suspend its investigation until completion of criminal action.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-5 DISCLOSURE OF INFORMATION.

(A) *Criminal activity.* Nothing in this article shall be construed to prohibit an employee from disclosing information to an appropriate law enforcement agency.

(B) *False information, frivolous complaints and confidential records.* The protections to employees provided by this article shall not apply to any complainant who files a frivolous complaint or who discloses information (1) that the complainant knows to be false, (2) with disregard for the truth or falsity thereof or (3) that is a confidential record.

(Ord. 2-2004)

§ 3-7-6 INVESTIGATIONS.

(A) The Inspector General shall conduct a preliminary investigation based on complaints filed pursuant to this article. Such preliminary investigation shall begin within 30 days of the receipt of the complaint by the Inspector General. The preliminary investigation shall determine if the complaint merits further investigation. If the Inspector General finds that the complaint has no merit or that proper corrective measures have been taken by the city, the Inspector General shall notify the complainant and the complainant's department of the decision and such decision shall be a final report. If the Inspector General finds that a further investigation is required, the Inspector General shall notify the complainant and the complainant's department of that decision. Decisions made pursuant to this subsection shall be public record only upon delivery of the decision to the complainant and the complainant's department.

(B) All employees, board, commission and committee members and elected city officials shall assist the Inspector General in the investigation of complaints filed pursuant to this article, including but not limited to providing records and making statements. Interviews shall be outside the presence of the complainant's and the witness' supervisor. Employees shall be interviewed without loss of pay and may have an employee representative present at the interview. The Inspector General shall give reasonable written notice to the person being interviewed of the time for the interview. Except as otherwise provided in this article, all records of interviews shall be kept confidential until the Director issues a final report concerning the complaint.

(C) If the Inspector General determines that the complaint (1) was made in bad faith, (2) is frivolous, (3) was made for purposes of harassment or in retaliation, (4) contains information that the complainant knows to be false or the complainant disclosed information with disregard for the truth or falsity thereof, (5) contains information that is confidential by any provision of law or (6) contains information from records which are closed to public inspection pursuant to law, such determination shall be included in a report to the complainant, the complainant's department and the Chief Administrative Officer. The report shall be a public record, state the basis for such determination and be filed in complainant's personnel file. The Chief Administrative Officer shall determine if disciplinary action concerning the complainant is appropriate based on the Inspector General's report and notify the complainant's department.

(D) The Inspector General may decline to investigate a complaint or portions of a complaint alleging improper governmental action if the same allegations have previously been investigated or have been

adjudicated in any court. The Inspector General may consolidate investigations when complaints allege the same or similar improper governmental action.

(E) Upon completion of a full investigation, a final written report containing the findings and conclusions of the investigation shall be delivered to the complainant and complainant's department. The report shall be public record upon delivery to the complainant and complainant's department. If the report concludes that improper governmental action occurred and that corrective measures have not taken place or are insufficient to prevent reoccurrence of the improper governmental action the report shall also be delivered to the Mayor and the City Council president.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-7 CONFIDENTIALITY.

The complainant's identity shall be kept confidential when a complaint is filed with the complainant's department until such time that the summary of the investigation is provided to the complainant. If a complaint is filed with the Inspector General, the complainant's identity shall be kept confidential until such time that the Inspector General delivers a final report as provided in this article. Nothing in this article shall preclude the Inspector General from disclosing the identity of a complainant or witness or other information to the extent necessary to conduct the Inspector General's investigation or from disclosing all information related to the complaint, including the identity of the complainant, to law enforcement agencies of proper jurisdiction.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-8 RETALIATION.

(A) *Retaliation prohibited.* Elected city officials and city employees are prohibited from taking retaliatory action against an employee because the employee participated in an action protected under this article.

(B) *Discipline.* It shall be a defense to any discipline that the disciplinary action was initiated in retaliation of the employee having filed an allowable complaint or participated in an action protected pursuant to this article.

(C) *Grievances.* Complaints of retaliation not involving discipline shall be submitted pursuant to the grievance resolution procedure provided in § 3-1-24 ROA 1994.

(D) *Proof of retaliation.* In order to establish retaliation as a defense to a disciplinary action, the complainant must demonstrate that the complainant's activity under this article was protected activity and was the primary reason for the action the employee is grieving or appealing. The city may rebut this defense if it demonstrates that it would have taken the same action regardless of the complainant's participation in the activity protected under this article, and that the disciplinary action was taken for legitimate business reasons.

(E) *Limitations.* Retaliation shall not be a defense to a disciplinary action unless the disciplinary action was initiated within two years of the date the complainant filed the complaint with the complainant's department or the Inspector General. The failure to raise a claim of retaliation in a grievance or an appeal shall bar any subsequent cause of action based on retaliation prohibited by this article arising out of the same set of facts at issue in the related grievance or appeal.

(F) *Remedies.* When retaliation is found to have occurred, either the remedies allowed pursuant to §§ 3-1-24 and 3-1-25 ROA 1994 of the Merit System Ordinance may apply or adverse materials relating to the retaliatory action in the employee's personnel file may be expunged, or both may apply.

(G) *Retaliation.* If a supervisor is found to have retaliated against an employee in violation of this article, one or more of the following remedies may be ordered by the supervisor's department: (1) placement of information describing the violation of this article in the supervisor's personnel file, (2) reprimand, (3) suspension without pay, (4) demotion or (5) termination of employment.

(H) When there is no finding of retaliation, such record shall be placed in the personnel file of each supervisor accused of retaliation and in the personnel file of the employee who made a claim of retaliation pursuant to this article.

(I) Retaliation shall not be a defense to a disciplinary action or grounds for a grievance if the complainant's complaint is found (1) to have been made in bad faith, (2) frivolous, (3) to have been made for purposes of harassment or in retaliation, (4) to have contained information that the complainant knew to be false, (5) to have disclosed information without regard for the truth or falsity thereof, (6) to have contained confidential records.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-9 RESERVATION OF AUTHORITY.

Nothing in this article shall interfere with the power of the city to take action with respect to any employee, provided that such action is justified on facts separate from activity protected under this article.

(Ord. 2-2004)

§ 3-7-10 NOTICE OF WHISTLEBLOWER PROTECTIONS.

The Inspector General shall prepare and each city department shall post a notice of allowable activities under this article.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)

§ 3-7-11 REPORTS TO THE CITY COUNCIL.

The Inspector General shall provide an annual report to the City Council which shall include (1) the number of complaints received, (2) the nature of each complaint, (3) the number of full investigations conducted, (4) findings or recommendations on policies or practices resulting from investigations, (5) the number of complaints found as valid claims and (6) the number of complaints found to be frivolous or without merit.

(Ord. 2-2004; Am. Ord. 1-2005; Am. Ord. 30-2010)