

TITLE 18. LABOR AND EMPLOYMENT

Chapter 18.4

ENFORCEMENT

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18.4.1. Title. This chapter is the "Suquamish Labor and Employment Law Enforcement Ordinance." (Res. 2016-163, passed Oct. 3, 2016)

18.4.2. Findings. The Suquamish Tribal Council finds, as a matter of tribal public policy, the following:

(a) The Tribe has a primary interest in exercising its inherent sovereign authority to provide for a fair and productive working environment for employers and employees within the territorial jurisdiction of the Suquamish Tribe of the Port Madison Indian Reservation.

(b) As a sovereign government, the Suquamish Tribal Council finds that it is in its own best interests to govern employment relations within its territorial jurisdiction to ensure fair and productive working environments, and, to that end, to establish enforcement provisions for its laws governing labor and employment.

(c) The Tribe wishes to set forth the enforcement procedures and remedies for its laws governing labor and employment relations within its jurisdiction. (Res. 2016-163, passed Oct. 3, 2016)

18.4.3. Purpose. The purpose of this chapter is to establish remedies, authorities, and procedures for the enforcement of the rights title 18 provides. (Res. 2016-163, passed Oct. 3, 2016)

18.4.4. Definitions. (a) Unless otherwise provided in this chapter, or context shows otherwise, the definitions of subsections 18.1.4(a), (d), (e), and (f) are incorporated in this chapter.

(b) Elements of a prima facie case means, with respect to claims of unlawful discrimination under chapter 18.1, evidence of overt discrimination as set forth in section 18.1.5(c)(1), evidence of harassment as set forth in section 18.1.5(c)(2), evidence of unequal or disparate treatment as set forth in section 18.1.5(c)(3), or evidence of disparate impact as set forth in section 18.1.5(c)(4); and, in the case of claims of disability discrimination, evidence of discrimination on the basis of disability as set forth in section 18.1.6(a). A prima facie case cannot rest upon assertions that do not constitute employment discrimination according to section 18.1.8. (Res. 2016-163, passed Oct. 3, 2016)

18.4.5. Exhaustion of Employer's Grievance Process. An employee who makes a claim according to chapter 18.1, 18.2, or 18.3 of this title must timely and properly exhaust any and all available employer employment grievance procedures before filing a complaint with the administrative hearings office according to section 18.4.6. (Res. 2016-163, passed Oct. 3, 2016)

18.4.6. Complaint; Filing Deadline. Any employee who believes that he or she has been subjected to unlawful employment discrimination under chapter 18.1, unlawful denial of family medical leave protection under chapter 18.2, or unlawful denial of minimum wages or overtime pay under chapter 18.3 may invoke this chapter's procedures by filing a written complaint under oath with the clerk of the administrative hearings office, which will be a designated human resources employee until the clerk of the administrative hearings office is designated by the Tribal Council. The written complaint should be filed on a form the clerk of the administrative hearings office provides.

(a) The employee's sworn written complaint must: (1) set forth the facts of the alleged unlawful employment action or inaction; (2) attach a copy of the written decision of the employer's grievance decision maker(s), if any; and (3) attach any evidence in support of the complaint.

(b) Before the hearing and upon request, the employer will provide the employee the opportunity to review the employee's personnel file during normal business hours.

(c) In the written complaint the employee must state facts and evidence sufficient to establish a prima facie case that the rights protected in chapters 18.1, 18.2 and 18.3 may have been violated and for which relief available under the available remedies in section 18.4.8(d) can be granted.

(d) The complaint must be filed with the clerk of the administrative hearings office no more than forty-five (45) days after the exhaustion of the employee's grievance process as provided in section 18.4.5. The clerk of the administrative hearings office will send a copy of the complaint to the employer named in the complaint and to the administrative law judge. (Res. 2016-163, passed Oct. 3, 2016)

18.4.7. Administrative Law Judge. Appointment by Tribal Council; Qualifications; Compensation.

(a) The Tribal Council will appoint one or more administrative law judges (“ALJ”) for the purpose of holding hearings and reaching decisions on complaints that an employer’s grievance procedure has not resolved.

(b) The ALJ must be properly qualified and licensed to practice law before the Suquamish Tribal Court or any other tribal or federal court and be a member, in good standing, of a state court bar. Preference should be given to lawyers with experience in administrative law and/or government employment law.

(c) The Tribe will compensate the ALJ for his or her services on such terms as the Tribe and the ALJ agree, *provided that* said compensation should be close to the median rate for legal services provided in the State of Washington. The Tribe may retain more than one ALJ for hearings under this section.

(d) An ALJ appointment will be for one year and during this term compensation may not be reduced. An ALJ’s contract is not subject to termination unless the ALJ is disbarred in any jurisdiction or convicted of a crime. (Res. 2016-163, passed Oct. 3, 2016)

18.4.8. Administrative Appeal Process. (a) Preliminary Hearing.

(1) The ALJ will convene a preliminary hearing with the employee who filed the complaint and the employer’s representative(s), who have authority to address the allegations in the complaint. Within ten (10) business days of filing of a complaint, the ALJ will provide each party a notice of preliminary hearing that will set the hearing date and time and will define the elements of the prima facie case in accordance with section 18.4.4. The preliminary hearing must be set no later than ten (10) business days from the date the complaint was filed. To suit the convenience of the parties and the ALJ, the ALJ may hold a telephonic preliminary hearing.

(2) At the preliminary hearing, the employee has the burden of proof to establish a prima facie case in support of the complaint that requires allegations of fact upon which relief available under 18.4.8(d) can be granted. If the ALJ determines that the employee failed to exhaust grievance procedures under section 18.4.5 or failed in his or her case-in-chief to establish a prima facie case in support of the complaint, the ALJ must dismiss the complaint with prejudice.

(3) If a party fails to appear for hearing before the ALJ, the ALJ may enter a default order that may include one or more remedies in subsection (c).

(4) If the ALJ determines that the employee has established a prima facie case, the ALJ will set a hearing date no later than ten (10) business days after

the date of the preliminary hearing, set a date by which the parties will exchange a list of any witnesses who will be asked to provide testimony at the hearing, and set the date by which each party will produce and exchange any documents that they intend to file for the ALJ's consideration at the hearing. If both parties request a briefing schedule, the ALJ may set the briefing schedule and the date for the hearing no later than twenty (20) business days from the date of the preliminary hearing.

(b) Hearing.

(1) The ALJ lacks jurisdiction to compel witnesses or other evidence by subpoena. Where a party fails to produce a requested material witness or other material evidence, the ALJ should draw an adverse inference against that party regarding the expected testimony of that witness or evidence.

(2) The hearing before the ALJ will be closed to all persons except to the parties, their counsel, if any, and witnesses the parties call. The witnesses may be sequestered at the request of the ALJ or any party. The hearing will be scheduled in so as to accommodate schedules of the parties and witnesses. The ALJ will preside over the hearing and allow evidence and testimony relevant to the complaint and its defense. Telephonic testimony may be permitted. The hearing will be recorded in such manner that a complete and accurate transcript of the proceedings can be made.

(3) If a party fails to appear for hearing before the ALJ, the ALJ may enter a default order that may include one or more remedies in subsection (c).

(4) Within ten (10) business days after the close of the hearing, the ALJ must issue an order that provides written findings of fact and conclusions of law. The order must include a determination of whether the preponderance of the evidence on the record supports the employee's claim. If the ALJ finds that the employee's claim is supported by the preponderance of the evidence on the record, the ALJ will order remedies in accordance with subsection (c). If the ALJ finds that the claim is not supported by the preponderance of the evidence on the record, the ALJ will enter an order of dismissal with prejudice.

(c) Remedies. Upon finding for the employee, the ALJ may order an equitable remedy (or remedies) of one or more of the following:

(1) An order to cease and desist from the unlawful practice(s) specified in the order;

(2) Where an employee has been wrongfully separated from employment or not properly reinstated to an employment position:

(A) An order to employ or reinstate the employee,

(B) An order to restore the employee's back pay and benefits;

(3) In a case where reinstatement would be an appropriate remedy, but it is not feasible, an order of payment in place of reinstatement not to exceed twelve (12) weeks of pay;

(4) An order restoring wages, overtime pay or benefits wrongfully withheld or not paid;

(5) In the case of unlawful disability discrimination, an order to provide reasonable accommodations for an employee's disability.

(d) Additional Remedies Prohibited.

(1) The ALJ lacks jurisdiction to award compensatory or punitive damages.

(2) The ALJ lacks jurisdiction to award attorney fees or costs to any party.

(e) Notice to Parties and Clerk. The ALJ will mail a copy of any notice or decision affecting a party to that party's last known address and to the clerk of the administrative hearings office by first class U.S. Mail on the date that the ALJ issues such notice or decision. The ALJ will also mail copies to parties at their email addresses if known.

(f) ALJ Decision. The ALJ's decision issued under section 18.4.8(b)(4) may be appealed to the Suquamish Tribal Court according to section 18.4.10. (Res. 2016-163, passed Oct. 3, 2016)

18.4.9. Limited Waiver of Sovereign Immunity. The sovereign immunity of the Tribe and any employers possessing sovereign immunity subject to this title's provisions is hereby waived solely for the purpose of the enforcement of remedies ordered by the ALJ according to subsection 18.4.8(a)(3) and 18.4.8(c) and for an appeal to Tribal Court according to subsection 18.4.10. (Res. 2016-163, passed Oct. 3, 2016)

18.4.10. Appeal to Tribal Court. Within ten (10) business days after the ALJ's decision is mailed, an aggrieved party may appeal the decision to the Suquamish Tribal Court by filing a petition for Tribal Court review.

(a) Exhaustion of all administrative remedies is a jurisdictional requirement to seek judicial review of a final administrative order issued by the ALJ.

(b) Filing an appeal will not, in itself, stay enforcement of the ALJ decision. An application for a stay may be made to the Court. The Court may grant a stay of the ALJ's decision upon a showing of good cause.

(c) The party appealing an order is responsible for any filing fees, court costs to initiate an appeal, and for a certified copy of the administrative record to be filed with the Tribal Court in accordance with subsection (e). Copies of a petition for judicial review must be served upon the opposing party and all parties of record by certified mail, return receipt requested or by personal service.

(d) Within ten (10) business days after service of the petition or within such further time as the Tribal Court may allow, the administrative hearings office will transmit a certified copy of the entire record of the proceeding under review to the reviewing Tribal Court. The record may be shortened only by stipulation of all parties to the review proceedings.

(e) The Tribal Court will set a briefing schedule and a date for oral argument before a Tribal Court Judge.

(f) The Tribal Court will hear the appeal of the ALJ's decision without a jury and will be confined to the evidence in the record.

(g) The Court will affirm the ALJ's decision unless the Court finds the ALJ's findings of fact and/or conclusions of law are clearly erroneous, an abuse of discretion, or arbitrary and capricious and/or if the remedy exceeds the ALJ's statutory authority.

(h) The Tribal Court will issue a written order that either affirms the ALJ's decision or remands the matter to the ALJ to modify his or her decision in accordance with the Court's findings; orders the ALJ to require a particular action by the employer, if appropriate; or orders the employer to take such action as may be necessary to bring the Tribal Court's order into effect. Any ALJ order on remand may be appealed to the Suquamish Tribal Court according to this section.

(i) Finality of Tribal Court Decision. The decision of the Tribal Court is final, binding and enforceable and not subject to review by any court. (Res. 2016-163, passed Oct. 3, 2016)

Note: In the draft approved by the Tribal Council through Resolution 2016-163, sections 18.4.8(f) and 18.4.9 contained errors in cross-references. These sections were updated to reflect the correct cross-references before codification.