

TOHONO O'ODHAM CODE

TITLE 13 – EMPLOYMENT

CHAPTER 3 – WHISTLEBLOWER PROTECTION

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Section 3101 Definitions

(A) “District” means a political subdivision of the Nation as defined by Article IX of the Constitution of the Tohono O’odham Nation.

(B) “Employee” means a current or former full-time, part-time, occasional, contract, appointed, or other employee of the Nation, a district, or an enterprise of the Nation or a district.

(C) “Enterprise” means a corporation, association, development authority, or other entity owned by the Nation or a district, whether organized for profit, or for non-profit or charitable purposes.

(D) “Internal auditor” means an employee within the internal audit section of the Nation’s office of the treasurer who is assigned, in part, to perform independent and objective internal audits, or an independent contractor assigned pursuant to Section 3103(B)(2).

(E) “Misconduct” means:

(1) any conduct involving fraud as defined by 26 T.O.C. Chapter 1, Article 5, Section 1502(G);

(2) the violation of an applicable conflict of interest policy or other policy, law, or regulation related to financial corruption, fraud, gross waste of funds, or mismanagement of the assets;

(3) an action or practice that violates applicable laws or that violates rules of ethics or conduct;

(4) the use of a position within the Nation, a district, or enterprise to obtain any personal or financial benefit, gain, advantage, or privilege to which the individual is not entitled; or

(5) any conduct that creates a danger to public safety or welfare occurring in the Nation, a district, or an enterprise.

(F) “Official” means an elected officer as that term is defined by 12 T.O.C. Chapter 1, Article II, Section 1201(I), Nation’s judge, or an individual serving on a Nation’s board, committee, or commission.

(G) “Protected employee” means a current or former Nation, district, or enterprise employee who (1) has a good faith belief that a misconduct occurred and provides an oral or written statement describing the facts and information about the misconduct under Section 3103(A), or (2) cooperates in the internal auditor’s initial review or investigation of misconduct, or any subsequent administrative or judicial proceeding.

(H) “Retaliatory action” means any action or threatened action against a protected employee for disclosing a misconduct or cooperating in the internal auditor’s initial review or investigation of misconduct, or any subsequent administrative or judicial proceeding, including, but not limited to, discharge, suspension, demotion, an unsupported negative performance evaluation, unjustified denial or cancellation of leave, significant changes in duties or responsibilities inconsistent with the protected employee’s salary or grade level, involuntary transfer or reassignment, adverse or derogatory licensing or permitting action, or other adverse employment action taken against a protected employee in the terms and conditions of employment.

Section 3102 Office of Administrative Appeals

(A) The Office of Administrative Appeals (“OAA”) is established as the Nation’s administrative hearing body that is independent of the Nation’s branches and that is vested with authority to:

- (1) adopt necessary rules and procedures;
- (2) issue subpoenas, orders, and rulings; and
- (3) conduct proceedings authorized under this Chapter.

(B) The OAA shall consist of a licensed attorney in good standing who has the experience necessary to conduct proceedings as the administrative hearing officer.

(C) The administrative hearing officer shall be appointed for not less than two years pursuant to a contract approved by Legislative Council resolution and may be removed solely by a resolution passed by a majority of two-thirds of the votes cast in the Legislative Council.

Section 3103 Reporting of Information to the Internal Auditor; Investigation of Misconduct

(A) Statement. An employee may submit a statement describing the facts and information about a misconduct, anonymously or with the disclosure of his or her identity, in-person, in-writing, or by other means of communication:

- (1) to the internal audit section of the office of the treasurer; or
- (2) to an official or Legislative Council committee who shall promptly forward the statement to the internal audit section for investigation of misconduct.

(B) Investigation of Misconduct.

- (1) Upon receipt of the statement, the internal audit manager shall assign a case number. The internal audit manager shall provide the case number to the protected employee and the official or Legislative Council committee who forwarded the disclosure statement to the internal audit section under Section 3103(A)(2).
- (2) The internal audit manager shall make a written determination of whether a conflict of interest prevents the internal audit section from investigating a misconduct under this Chapter. Upon a determination of a conflict of interest, the Nation's treasurer shall forward the statement to an independent contractor retained by the Executive Branch. The Executive Branch shall retain at all times an independent contractor to perform the duties of the internal auditor under this Chapter when a conflict of interest exists.
- (3) The internal audit manager shall assign an internal auditor who will complete an initial review of the statement within fifteen (15) business days. If the internal auditor determines that the statement alleges a misconduct as defined in this Chapter, may reasonably lead to evidence of misconduct, or otherwise warrants investigation, the internal auditor shall conduct an investigation into the misconduct.
- (4) If the internal auditor determines that the statement clearly does not allege misconduct, could not reasonably lead to evidence of misconduct, and does not otherwise warrant investigation, then no further investigation is required. The internal auditor shall then close the case and notify the protected employee and the official or Legislative Council committee who forwarded the statement to the internal audit section under Section 3103(A)(2). The internal auditor shall reopen the case if additional information is provided.

(5) The internal auditor shall complete the investigation into each misconduct within sixty (60) business days of completing the initial review. The internal auditor shall have all the same powers that are vested in the internal auditor by 26 T.O.C. Chapter 1, Article 5, including, but not limited to, the power to question witnesses and require the production of any necessary evidence including, but not limited to, books, papers, or other documents, where necessary, for the purpose of the investigation.

(6) Upon the conclusion of the investigation, the internal auditor shall report his or her findings to the appropriate head of the Nation's branch of government, the district council, or the board or other entity overseeing an enterprise, and to the relevant Legislative Council committee; provided that the internal auditor shall not report to an individual who the internal auditor determines has committed a misconduct. The internal auditor shall report any criminal conduct to the Tohono O'odham Police Department.

(7) The internal auditor shall notify the protected employee in writing of the conclusion of the investigation and provide written notice of the protected employee's rights under this Chapter. If an official or Legislative Council committee forwarded the statement of misconduct to the internal audit section under Section 3103(A)(2), the internal auditor shall notify that official or Legislative Council committee of the conclusion of the investigation.

(8) If the internal auditor finds that misconduct occurred, a copy of the internal auditor's report shall be made available for the protected employee to inspect; provided that the protected employee shall not be authorized to retain a copy of the internal auditor's report unless an appeal is filed under Section 3104(B), in which case the internal auditor's report shall be provided to the assigned administrative hearing officer or judge, who shall provide it to the protected employee and other party subject to orders protecting it as a confidential record.

Section 3104 Protection from Retaliation

(A) Prohibited Retaliatory Action. No official or employee shall take or threaten to take retaliatory action against any protected employee.

(B) Remedies. In addition to any grievance rights under applicable personnel policies, if a protected employee alleges a retaliatory action, the protected employee may:

- (1) file an administrative appeal with the OAA; or
- (2) file an action in the Tohono O'odham Judicial Court.

(C) Limitations. An administrative or judicial proceeding alleging a retaliatory action must be filed within one (1) year of the protected employee receiving notice of the retaliatory action.

(D) Introduction of Evidence. An administrative or judicial proceeding alleging a retaliatory action shall be informal. Any non-privileged relevant evidence may be received that will assist the OAA or Judicial Court to arrive at a just and equitable decision, provided, however, that the OAA or Judicial Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.

(E) Confidentiality. Unless the parties to an administrative or judicial proceeding filed under Section 3104(B) agree in writing, the parties and the OAA or Judicial Court shall treat proceedings under this Section, the internal auditor's report, and any related discovery and the decisions of the OAA or Judicial Court, as confidential, except in connection with judicial proceedings ancillary to the retaliatory action proceedings, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party.

(F) Settlement. Without creating unnecessary delay or prejudicing any person's rights under this Chapter or other applicable law, parties to an administrative or judicial proceeding alleging a retaliatory action are encouraged to engage in negotiations for a just and equitable resolution. Any settlement must be approved by the OAA or Judicial Court.

(G) The protected employee shall be protected from the retaliatory action if the OAA or Judicial Court finds by a preponderance of the evidence that:

- (1) the employee is a protected employee as defined in this Chapter;
- (2) the official or employee alleged to have taken retaliatory action against the protected employee was aware or became aware that the protected employee had disclosed a misconduct or cooperated in the internal auditor's initial review or investigation of a misconduct, or any subsequent administrative or judicial proceeding; and
- (3) the action taken against the protected employee was a retaliatory action as defined in this Chapter.

(H) Upon a finding of a retaliatory action under this Chapter, the OAA or Judicial Court may order reinstatement of the protected employee, removal of adverse information in the protected employee's file or other records, actual damages including lost wages and benefits to the protected employee, or the protected employee's legal fees and costs.

(I) An official or employee who the OAA or Judicial Court finds to have retaliated against a protected employee under this Chapter, may be subject to:

(1) disciplinary action, up to and including termination, in accordance with applicable laws and policies;

(2) removal from office pursuant to the Nation's Constitution and laws if an elected official; or

(3) termination from a board, committee, or commission.

(J) False Claims. Any employee who the OAA or Judicial Court finds knowingly made a false statement under the provisions of this Chapter may be subject to disciplinary action by his or her employer up to and including termination.

(K) Appeal. A final decision by the OAA under Section 3104(G) may be appealed to the Judicial Court within thirty (30) days after the final decision is transmitted to the parties. A final decision of the Judicial Court may be appealed in accordance with the Tohono O'odham Rules of Appellate Procedure.

Section 3105 Limited Waiver of Sovereign Immunity

The Nation waives its sovereign immunity from suit against the Nation, a district, or an enterprise for actions before the OAA and Judicial Court based on a retaliatory action. Nothing herein shall be construed as a waiver of the sovereign immunity from suit against the Nation, a district, or an enterprise in state or federal court, or in any action before any state or federal agency, or in any other forum or context.

Section 3106 Notice to Employees; Training

The Nation, districts, and enterprises shall conspicuously display notices reasonably designed to inform all employees of their protection and obligations under this Chapter, and use other appropriate means to keep employees so informed.

Section 3107 Prohibited Disclosures

Nothing in this Chapter shall be interpreted to authorize an individual to disclose information otherwise expressly prohibited by law.