

FISCAL NOTE
Requested by Legislative Council
02/23/2017

Bill/Resolution No.: HB 1246

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB 1246 would allow classified state employees to bring an action in court without exhausting administrative remedies.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Subsections 2 and 3 of the proposed new section to Chapter 54-44.3 of the North Dakota Century Code would allow classified employees to immediately sue the State for employment discrimination in district court without first pursuing available administrative remedies. Due to the many variables involved, it is difficult to provide any direct estimate of the increased cost to the State. However, it is clear that formal employment litigation is far more expensive to defend than processing employment grievances internally and resolution through the administrative process established by NDCC 54-44.3-12.2. A review of recent cases reveals an estimated average in defense costs of \$60,000 with historical defense costs as high as \$192,000. Defense costs in court proceedings are estimated to exceed those in an administrative forum by at least a factor of four. In addition, the cost of settling a case in court far exceeds the cost of settling in an administrative forum due to the increased attorney time involved and fees that may be recovered through fee shifting provisions. A recent employment case against the State that was settled early in the litigation exceeded \$140,000 in defense and indemnity costs. With an estimated 10-15 employee appeals and 5 employee appeals claiming discrimination only per biennium, increased costs to the State could range from \$0 to more than \$500,000, depending on the number of employees that bypass the administrative process and the nature of the allegations.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The increased expenditures that would result from HB 1246 will come through the Risk Management Fund established in Chapter 32-12.2 of the North Dakota Century Code.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Required agency contributions to the Risk Management Fund will correspondingly increase as costs to the Risk Management Fund increase.

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Date Prepared: 02/27/2017

2017 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1246

2017 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1246
1/30/2017
27580

- Subcommittee
 Conference Committee

Committee Clerk Signature

Ellen Letang

Explanation or reason for introduction of bill/resolution:

Employee claims of employment discrimination.

Minutes:

Attachment 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

Vice Chairman Sukut: Opens the hearing of HB 1246.

Chairman Keiser~District 47-Bismarck: Introduces the HB 1246. One recurring issue is employee's concern on discrimination for state agencies. Shares what happens on the private sector that have extensive policies. This bill addresses the state sector. The process is very convoluted for a state employee. Attachment~1, 2, 3, 4, 5, 6.

16:30

Rep Becker: Why is chapter 54 rather than in chapter 4 where there is the grievance & recourses are handled.

Chairman Keiser: I don't know the answer, legislative council put it there?

Rep Bosch: Where in the process does the administrative hearing fall, in the beginning or end of the process?

Chairman Keiser: I'm not sure.

Rep Ruby: Do you see a potential, told their option to take that directly to court or hearing, that it would not give the department supervisor or head an opportunity to rectify it before it gets to that level?

Chairman Keiser: I'm not sure exactly how they would do it. What I'm saying at this point, once a claim is filed, it's pretty serious claim. If goes federal right away. I would hate to see us limit the access to the courts for an objective decision.

Rep Boschee: Would you say, if this were enacted, it almost becomes a leverage piece for the employer to not put us in road blocks to work efficiently through the process so there isn't a lawsuit.

Chairman Keiser: That might be an outcome, it certainly a possibility.

Sandra Young~Employee of the Dept of Health Lab Service: (Attachment 7).

36:45

Chris Young~Husband of Sandra Young: I was the person who told my wife to go to HR when there is an issue. That is not the case here in ND. There is no help unless you are fired. During the process, the state didn't have a set rules. (Attachment 8). Also, refers to Sandra Young's testimony, (Attachment 7), going over the 2nd half of her testimony.

1:11:25

Timothy Brosz~Employed with the ND Depart of Health Laboratory Services: (Attachment 9).

1:22:20

Rep Kasper: Do you get any attorney fees if you win?

Brosz: I don't know.

Chairman Keiser: Anyone else here to testify in support, opposition?

Tag Anderson~Director of the Risk Management Division of OMB: (Attachment 10).

1:27:30

Anderson: Answer to Rep Kasper question, is yes.

Rep Ruby: When the claim was settled, how did that reflects on the employment status of the people that were responsible?

Anderson: I don't know what the settlement document provided, I didn't see it, not sure.

Chairman Keiser: In the private section, what can my employees do if they file with the Dept of Labor or with the feds?

Anderson: Under the current process, they cannot go to federal court under most federal antidiscrimination statues without first filing a charge with the EOC or the ND Dept of Labor to go through the conciliation process.

Chairman Keiser: Can my employees do that?

Anderson: Yes

Chairman Keiser: Without any notification to me.

Anderson: No,

Chairman Keiser: They don't have to come to me?

Anderson: No & a state employee doesn't have to either.

Chairman Keiser: My employee then can go to court.

Anderson: Right.

Rep Boschee: The Dept of Labor would pause the process at the recommendation of various state agencies to the Attorney General's office, can a private employer be impeded by the Attorney General or any other office in the state?

Anderson: My guess, the Dept of Labor was directed by the Attorney General's office to stop, that didn't happen. My guess, the Dept of Labor, saw it as an entirely proper thing to do to follow through to use it as a resource.

Rep Boschee: Would the Dept of Labor, traditionally follow that same process with the private employer?

Anderson: I believe yes.

Chairman Keiser: If somebody files a complaint of discrimination & this bill were to pass & going to court, if the department said, we agree or we are not certain, but we will make a correction. Can they still do that even though it's still going to court?

Anderson: I understand where you are coming from, but when you are talking about litigation that has been brought in the state or federal court, there is a level of formality & complexity involved that drives the cost up.

Chairman Keiser: I understand that, but you could remedy it by saying that you will look into it & there may be merit.

Anderson: I think the concern is that if they have the ability to go into district court, your ability as the employing agency, will appropriately investigate the issue & take appropriate corrective action is going to be hampered because it is now in court.

Chairman Keiser: Remember, the individual has to do their investigation without any of the resources. It can't be, he said/she said. If these folks didn't have the audio tapes, they wouldn't have received the settlement. Suddenly, they did their work in a timely fashion, it's a difficult playing field they are operation in.

Anderson: I agree completely, the workplace investigation by HR shouldn't have taken that long. This bill doesn't address that.

Rep Ruby: Would you be able to defend how so many people considered not credible in the investigation?

Anderson: Yes, the investigative team that was assigned by HRMS, went in & they are sitting down & interviewing people, they are trained to make investigation.

Anderson: I just want to make one comment; we are not talking about minor costs.

1:36.40

Becky Seibel~Interim Director of HRMS: I'm here to testify in opposition of the bill. Ask for testimony. Ask Chairman Keiser what spurred this bill. In discussion, it was enlightening, we basically agreed to disagree. The time line is important. Gave a time line of the grievance.

Rep Ruby: Are you aware of any consequences that were to the people that were responsible? There was a settlement which was an admission of wrong doing. What were the consequences?

Seibel: I don't agree that a settlement is an admission of wrong doing. Based on the situation on hand, the attorneys who were carrying the case will make the decision for that situation. I don't necessarily agree on that point. But in relation to this specific situation, I do know that there was a vary extended period where there were conversation going on between HRMS. As far as the specifics of the individuals involved, I don't know, I wasn't close to the case on hand.

Rep Ruby: Is Eric, potentially still in his position?

Seibel: I don't know off hand.

Rep Ruby: Is this case unique or are they not unusual?

Seibel: I do believe that the internal agency grievance process, most often times, resolves the issues on hand.

Rep Ruby: It seems anyone who would dare to testify in support of this, are the former employees. That concerns me, maybe someone would like to have this opportunity but doesn't want to testify because there will be more retribution. Do you think that's possible?

Seibel: What I do know is that, the bases on this bill, was founded on the Young's concern. I can't respond as to the complexity of this case & if it's typical, but do I think that it is? I don't think it's typical.

Rep Laning: Do you think the HRMS should have timelines, 6 months seems to be a long time?

Seibel: I feel this case was especially complex. For the 6 month timeline, I don't think it is.

Rep Bosch: Do you think it's necessary for each individual agency to have their own personnel policy?

Seibel: There is a whole section in century code. The parameters are pretty specific. The agencies should have the flexibility for them.

Rep Bosch: Do you think it would cause confusion on your part, wouldn't it be simpler for a personal policy that is standard? Why is it so confusing for state government?

Seibel: Again, there are pros & cons when you talk about centralizing something versus decentralizing something. When we become involved in a situation, one of the first things we do is to make sure the copy we have on file is the most current so that we are aware of what that agency is doing.

Rep Boschee: Do any agencies or HMRS have (inaudible).

Seibel: Yes, some agencies do. As to employment, more often than not, it falls on the HR person to provide that middle point of conversation.

Rep Boschee: So beyond the pamphlets, if I have a grievance, there is no one to guide me through the process.

Seibel: I would not agree with that perspective. Yes, there are pamphlets within state government, but I also believe, within the larger agencies, they have their inter-function. They do have professional HR staff. In the smaller agencies without the HR professionals in house, they have individuals identified as to be the contact person for those situations. Then they contact us & our division provides that service to that agency. Yes, we have brochures but we also have more than that.

Rep Boschee: In those instances, the same person who is helping me with the grievance, is also the person who is signing off on the file with a letter of determination.

Seibel: It depends on the situation.

Rep Boschee: Do you have the collective years of experience in HRMS or Collective HR professional throughout the state?

Seibel: Off the cuff, no I don't. I can tell you I have over 20.

Chairman Keiser: You made interesting comments. I have been contacted by a lot of employees, when I say many, it's like over 10, who would like to file these lawsuits. The process doesn't work; they need to keep their job but there are a lot of other issues. You made the point about the lengthy extended process that these folks were forced to go through, may have resulted in a quicker settlement. That being 6 months & then you reached an agreement. In the courts, you have to have the information to win & in any civil lawsuit

that is in the court & pending, the parties can always reach an agreement prior to going to court. It may be argued that going to court might expedite settlement.

Seibel: At some point everybody feels they've been discriminated against. My true fear is that if we were to build in this language, that in some ways, employees have a false sense of exiting the internal process, going directly to the court, faster resolution. What they will come to find, again my fear, is that they will have to interview multiple attorneys want cash up front, then you sit & wait. I feel it's a false hope.

Chairman Keiser: The argument was made; if they lose it comes out of their department. The system is designed to minimize risk & exposure.

Seibel: If this bill were to proceed & goes to district court, this triggers risk management to take the case. The agency stays on the hook. There is value to keep them involved in the case. If it were to go into district court, it's up to Tag & his team to take care of it. There is a benefit to keeping the agency with the tab.

Chairman Keiser: If it goes to court, the agency will be involved. We can modify the bill to say, even if it goes to risk management, the agency owns the debt.

Travis Engleheart~Director of Human Resources on behalf of ND Dept of Corrections & Rehabilitation: Attachment 11. From a state agency, primarily I feel, as an agency, I will lose the most important tool I have to hear about a complaint & then work with the complaint & address it at the lowest level possible.

Chairman Keiser: Anyone else here to testify in the neutral position? Closes the hearing on HB 1246.

Attachment 12 submitted after the hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1246
1/30/2017
27606

- Subcommittee
 Conference Committee

Eileen LeTang

Explanation or reason for introduction of bill/resolution:

Minutes:

[Empty box for minutes]

Chairman Keiser: Reopens the hearing of HB 1246.

Rep Boschee: Moves a Do Pass.

Rep Ruby: Second.

Chairman Keiser: Further discussion?

Rep Becker: I see that it would be very easy to have a significant barrier when you are in an institution like the state government to having proper recourse. I also am concerned about the ability to increase the cost & clog things up by everyone going straight to the court. Are there any thoughts, I'm struggling?

Rep Kasper: If you passed this bill, it would seem to me that the employer will have to make things happen & better in that work environment or go to court.

Chairman Keiser: I don't know if any of you have ever gone through a court action. The first thing, if you go to an attorney, they are going to have to pay a retainer. This isn't something that happens easily & certainly isn't inexpensively. If all the agencies are behaving properly, you don't have an issue. Number 2, if they are not behaving properly, the system is stacked against them, in my opinion.

Rep Bosch: In the private sector, HR generally sides with the employee. I don't get the sense that is how happening right now. Maybe process is part of the problem. I would support this legislature.

Vice Chairman Sukut: This is another option to whether they want to go that route. I'm going to support this.

Rep Louser: After an extensive investigation & an allegation of age discrimination is very difficult thing to prove. We heard, if it's not age discrimination, then what is it? I don't know if the employer is required to say what they are discriminating against. I think the process generally works & I agree with Rep Becker, that opens the options beyond reasons we don't know, to go to court. The state is on the hook for a number of discrimination cases that are both hard to prove or defend but the tax payer is going to have to defend. I will not support the motion.

Rep Lefor: I'm going to resist the motion. It went through the process.

Chairman Keiser: Further discussion?

Roll call was taken on HB 1246 for a Do Pass with 8 yes, 5 no, 1 absent & Rep Boschee is the carrier.

Date: Jan 30, 2017

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1246

House _____ Industry, Business and Labor _____ Committee

Subcommittee

Amendment LC# or
Description: _____

Recommendation

- Adopt Amendment
- Do Pass Do Not Pass Without Committee Recommendation
- As Amended Rerefer to Appropriations
- Place on Consent Calendar
- Other Actions Reconsider _____

Motion Made By Rep Boschee Seconded By Rep Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep Laning		X
Vice Chairman Sukut	X		Rep Lefor		X
Rep Beadle	Ab		Rep Louser		X
Rep R Becker		X	Rep O'Brien	X	
Rep Bosch	X		Rep Ruby	X	
Rep C Johnson		X	Rep Boschee	X	
Rep Kasper	X		Rep Dobervich	X	

Total (Yes) 8 No 5

Absent 1

Floor Assignment Rep Boschee

REPORT OF STANDING COMMITTEE

HB 1246: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO PASS** (8 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING).
HB 1246 was placed on the Eleventh order on the calendar.

2017 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1246

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1246
3/7/2017
Job Number 28839

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to state employees claims of employment discrimination

Minutes:

14 Attachments

Chairman Klein: Opened the hearing.

Representative Keiser: Introduced the bill. What I handed out our documents that exist in law or they are a personal policy manual written for each department. If a department doesn't have one they typically take OMBs and possibly modify it slightly and make it fit. What this bill does in affect is try to level the playing field. If you really take the time and read through this, there is a very, very formalized procedure if you want to file a complaint as an employee in the State of North Dakota. I just handed out the documents that are involved in that procedure that an employee has to go through. There are specific steps that an employee has to take and specific steps that the department has to take and there are time frames built in to the statute and other areas. This bill is specific to one type of complaint and that is discrimination. If you have a discrimination complaint and wish to file it and that can be sexual, discrimination, age discrimination, your genetic background or some other variable, any kind of discrimination that would qualify as discrimination, especially federally, you file a complaint. Let's take a case of age discrimination. Once you file a complaint you are in affect required to go back through the channels within your organization, the very ones that treated you in a manner in which your supervisor and the supervisor of that supervisor, you have to go through a series of steps with those very same people to file a sexual discrimination or age discrimination lawsuit. That brings into play a whole lot of variables. Discrimination lawsuits are different they put the state of North Dakota at risk because if it does go to court and the plaintiff wins there is the potential for a significant settlement as well as other issues. So risk management become very engaged in discrimination complaints, as well as everyone else. Becky Sicble from HR is here today along with some of my other constituents. She tried to resolve this thing and it wasn't satisfactory to us so we went forward with the legislation. What this does is generally, in my opinion try to level the playing field. We will never get it level. You have to stop a minute and think about the resources of the State. This particular complaint came out of the health department and no way am I indicting the health department, it just happened to be there. The health department, what kind of resources do they have? Do they have an attorney on staff, yes they do one or more? Do they have an HR

person on staff, probably if the department is large enough or they can certainly go to the State HR and use HR department and get advice and consulting? The employee is just out there filing their complaint and they are being forced to go through this very, very lengthy process where the employee literally can be worn down. This is not a pleasant thing and to bring a discrimination lawsuit is not fun. It is certainly not fun for the state and it is not fun for the employee. After we get through the department we have to go right back to the people that may have been responsible for the discrimination. Attachments: Appeals of Employer Actions, see attachment #1, Central Personnel System, see attachment #2, Appeals of Discrimination or Reprisal, see attachment #3, Alternative Dispute Resolution, see attachment #4, Grievance Procedures, see attachment #5, Central Personnel System, see attachment #6 and Personnel Policy Manual for the North Dakota Department of Health, see attachment #7. (:30-11:23)

Senator Casper: Why would this not then become just a direct conduit where every discrimination case in the state would immediately go to district court which isn't exactly efficient. No disrespect to our district court but the way things currently are, they are clogged up now. Did you feather that out at all or have much discussion on that?

Representative Keiser: Yes, we had a lot of discussion about that subject and the conclusion we came to was that the district court is probably faster than the current system. Keep in mind the current system may take you six months to go through this process at which time if you still disagree, now you initiate district court. If people become so overwhelmed with the process so that they give up and they drop out, what we have is a cancer where the discrimination potential is still there without any correction. That to me is a much more important risk than the fact that there might be a few more claims. The bottom line is most of our departments operate efficiently, effectively and properly. There are not that many discrimination cases but when they are filed, boy is it difficult. You go up against this array of paperwork, procedure and process and try to see what the cost is to you physically, mentally and then just walk away and say I am just not going to do it.

Senator Campbell: Who is driving this bill? I see that the only sponsor is you.

Representative Keiser: I will share with you that you can see today and yesterday that I don't go around getting a lot of co-sponsors that never testify on a bill that I sponsored or vote with you. So this comes from me and it comes as a result as interaction from two constituents in my district. This is a bad thing that is happening and this happened to us. I don't support discrimination in any form and I certainly don't support the state of North Dakota having a system that pretty much guarantees we win. Whether we are right or not.

Sandra Young: In support. Written testimony, see attachment #8. (15:40-30:48)

Christopher Young: In support I am the husband of Sandra Young. I tried to think of a good word to describe the situation. I have an undergrad and masters in economics from the North Dakota State University. I am a data analyst and have done a lot of work in the human resources across North America. I have never seen anything like this. I might describe it as a unicorn, I might describe it as an albino buffalo. I can tell you that my wife and my family, we are real. These things really did happen. I am going to share the handout material. The top document is actually the report. You have the ability to find this document good luck in finding

it. It is buried somewhere. I think as a taxpayer one of my concerns is, how much of these types of behaviors are being allowed in the state, age discrimination. I can assure you after hearing my wife for years sharing these stories, I kept saying let it go, let it go, nothing is going to happen with this. It eventually got to the point where I said, you have to start taking some action here or you need to live with it, it's just the way things are going to be. April 10, 2014 occurred and there was a lot of frustration that day. What I am going to share with you in looking at these documents, this is the report and I have made some highlighted areas that I may point to throughout my testimony. You will see a document with the top page letter A, this is a document from the department of health, actually all of them are from the department of health. He begins going over his testimony @ 33:38. Written testimony, see attachment #9. Handed out the North Dakota Human Resource Management Services Investigation Report, see attachment #10 and also North Dakota Department of Health Intradepartmental Memorandum, A, B1, B2 and C, see attachment #11. (31:20-51:40)

Chairman Klein: Going back to the bill and I appreciate you bringing all of these issues forward. In your view then, what are we providing here in 1246, what difference will that make for Sandra? Obviously there was a lot of things that certainly raise eyebrows but what in this bill will make things better?

Christopher Young: It will open the door by a sliver for the employee. (52:30-54:35)

Chairman Klein: This will provide a shorter timeline, this will save you money in attorney's fees, this will bring resolution quickly to your favor?

Christopher Young: I believe it will do all of the above. We blindly trusted HRMS, we did, we thought they would do the right thing. I just shared a small number of instances where they weren't telling the truth.

Senator Casper: I am most interested in the process. So there is a complaint made to the agency and there is a meeting with the agency and another meeting at the top of the agency. What happens before it goes to HRMS? It sounded like there were two and then there was HRMS and then you can go to district court and that all took six months and in the six-month period you could have gone to district court which would have cost you potentially up to two hundred thousand bucks.

Christopher Young: Pretty close, that's a good approximation.

Chairman Klein: Opposition.

Tag Anderson, Director of the Risk Management Division of OMB: Written testimony, see attachment #12. He also goes over the fiscal note and the cost. As I indicated in the fiscal note the cost at a minimum is four times greater just in our cost with the attorneys involved. (57:20-1:07:10)

Chairman Klein: We've heard a compelling story on how Miss Young was treated. Looking through that and following through Chris's comments, I guess I am still... I also heard you say and that is what I was trying to get to with Chris, does the bill help them or the next person

who would have that same problem? You listen to that and you certainly want to reach out and help but are you saying that this wouldn't do it?

Tag Anderson: I believe that is exactly correct. As I understand, the frustration the Young's felt was with the investigative process that was conducted by HRMS. You have to keep in mind, ordinarily when a workplace investigation is conducted the agency does it themselves. If the agency doesn't think it has the expertise to handle it or if there are some conflict issues or even if they just don't have HR folks on staff that can do it, they will call HRMS to come in and do the investigation. That is simply the investigative process, that has nothing to do with the statewide appeals mechanism by which employees ultimately can appeal termination, dismissal, discrimination, whistle blowing and can have an administrative hearing in front of the administrative law judge. I think there is a huge disconnect between what this bill does and the perceived concerns that were expressed by the Young's as well as Representative Keiser.

Chairman Klein: I know you are the risk management guy. I suppose I should be asking these questions of the director or someone who is going to speak for HRMS.

Senator Casper: I am interested in the risk management fund stuff. Do you charge that by employee per agency? What I am trying to figure out is what we are spending now and how does that compare to the private sector?

Tag Anderson: We've got a claims management software system where we code all of the various incidents we get and the various claims that are paid out. If you take from our general liability standpoint, our top five, just our top five employee related litigation will be a very, very small number of claims but a disproportionately large percentage of those top five claims. Overall total fund, it is approximately fifteen percent of the cost that we pay out.

Becky Sicble, Interim Director of the OMB Human Resource Management Services: In opposition. Written testimony, see attachment #13. (1:11:35-1:13:20)

Chairman Klein: Is there anybody coaching those folks or are they looking through all of this stuff to figure it out on their own?

Becky Sicble: It varies. I would assume in most situations the employee communicates with the in house HR staff to figure out what the steps of the process would be. I can also share with you that there is an employee who has called be personally a couple of times. This individual works with a large agency that has an HR division and actually wanted to ask me what the steps of the process would be and so I gave him that information. She continues with her testimony @ 1:14:20.

Chairman Klein: This one seems like a big deal to me. Are you working on these constantly? Do you have grievances coming in on a regular basis and some just get to grow and grow? Obviously this one took a long time until we finished it up and I guess you were accused of having god like powers and we dragged it on and on. Are you so busy that this is why you're buried under all of this paperwork and that is why these folks just wound up not getting in on a timely basis and the timeline kept getting extended?

Becky Sicble: I will start responding to your questions and if I miss anything please let me know. In the Young's situation, what I believe they were primarily referring to taking so long, was this investigation that HRMS was tasked to complete. I was not directly involved in that investigation. I wasn't on the team conducting the work but from my understanding there were a very large number of complaints that kept getting filed by the Young's and others. When the investigation team took a look at these great number of complaints, they had to make a determination as to, do we focus in on this or do we consider all of them and they decided to consider all of them. I do believe that is what took so long as far as the investigation timeline. As far as the grievances we received through HRMs the vast majority of them never get to our office because the first step is to file a grievance with the individual agency, the actual employer for that individual. When that is done that agency would look at that situation, investigate and resolve and precede from there. It is only the ones that are appealed to our office after the internal review has been completed, that it ever comes to us. I would say within the last year we have had maybe five that have come to our office and have been forwarded on to the office of administrative hearings. This is not something we spend a lot of time on but it does happen from time to time. (1:19-1:21:33)

Senator Marcellais: Does human resources have an equal employment opportunity officer within the department?

Becky Sicble: No we do not a position titled that.

Senator Marcellais: You mentioned in your testimony that when a grievance is submitted by an employee it is either processed through the agencies grievance procedure or forwarded to your office for review by OAH. Who makes that determination?

Becky Sicble: Everyone goes onto OAH. I don't know when that was established. They send it to us and we forward it onto the office of administrative hearings because they have administrative law judges on staff and as Tag mentioned earlier they do conduct that independent review of the claim and make a determination.

Senator Casper: This came to your office and it took your office six months to make a determination. This was sent to OAH and they made that decision and after that is made the employee with a claim can go to the ALJ and then get a determination from the ALJ and then they go to the district court?

Becky Sicble: Close. Our office was requested to conduct an investigation as to the claims and so that is the file report that was prepared as a result of that investigation. About the same time there were grievances going on and being filed but that is a result of the investigation that we conducted.

Senator Casper: So this file report is a result of your investigation that you conducted and then it would go to OAH and the ALJ and then district court. How many claims of discrimination do you investigate a year for the state of North Dakota and how many do you determine there is actual discrimination existing?

Becky Sicble: We do not receive a large number of claims, that claim discrimination occurred. We didn't receive any last year and there might have been two the year before. In the Young's

case our process wasn't completed because there was a settlement reached. So our process was stopped before there was any finality to that claim. (1:24:44-1:25:40)

Travis Engelhardt, Director of Human Resource: Written testimony, see attachment #14. (1:29:45-1:32:48)

Senator Campbell: Is this the same information that you presented to the House or is this new or additional information that the House didn't see?

Travis Engelhardt: Pretty much the same.

Chairman Klein: You've done this for a while?

Travis Engelhardt: I have been there for about ten months now.

Chairman Klein: And you are able to quickly turn things around with the way things are going, you are saying the process works?

Travis Engelhardt: Yes, that is correct. There is always going to be situations or cases that are more complicated than others but most our resolved within the department.

Michelle Kommer, North Dakota Labor Commissioner: There were a few comments made specific to the department of labor and I just wanted to add some incite relative to those comments. It was stated that the department of labor's investigation was delayed multiple times, that was in fact true. Unfortunately, the delay was a result of the case load our department is experiencing. At the time of the situation it was about 350 days and today it is still around that same average day. In this particular situation the respondent asked for an extension and we granted that extension and that is the practice that is in place even today because we know that the case is going to have a likely sit time of about a year. While the investigation was in fact delayed it wasn't because of the attorney general, it wasn't because of HRMS or the department of health. It was stated that today's process is that there is the administrative process and then the North Dakota Department of Labor and then the court. I just wanted to clarify that employees can file with the North Dakota Department of Labor at any time as Miss Young did. (1:35:25-1:37:50)

Chairman Klein: Closed the hearing.

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1246
3/22/2017
Job Number 29544

- Subcommittee
 Conference Committee

Committee Clerk Signature

Eva Liebelt

Explanation or reason for introduction of bill/resolution:

Relating to state employees claims of employment discrimination

Minutes:

No Attachment

Chairman Klein: As I explained with my visit with Becky Sicble, I was trying to understand the forty-thousand-dollar payout. The reason it took so long in the grievance process was that she filed a grievance once a week. Each grievance has to go through the process and they kept mounting. It reached a point where their attorney, against the will of HRMS said, we should probably just cut our loses, because we know they are going to continue to go through the court system and let's just pay them out. They gave this lady forty-thousand dollars. She originally wanted one hundred and sixty thousand dollars they were going to give her ten and the attorney made that forty-thousand-dollar decision.

Senator Casper moved for a do not pass.

Senator Poolman seconded the motion.

Chairman Klein: I guess there isn't much more discussion. I think we have aired this out.

Senator Casper: I have one thing that I would add to the record. I did do a little digging and I did contact WSI. There are routes to process a WSI injured claim to get to district court but we don't allow them to circumvent the process. The process is the process for a reason. There are decades of thought that went into this. This is something that is routinely done in other states and major corporations to go through the process of a complaint. There is a time and a place for district court but I don't think we should have a whole system and process in place and then allow that to be immediately circumvented. Which we don't allow in WSI so we shouldn't allow it here. I also think that the timeline in this was made to sound in the testimony that it was extreme and I didn't find it to be extreme. I think the proponent's strongest argument is that we would be making them, as an employee go through an overly burdensome system to get to a fair and just result or remedy. I just don't find that our current system is unfair or unjust. I think considering the constant onslaught of complaints and the particular situation that was brought forth to the committee that resolving that in six months, they had their opportunity to go to court. They were the ones that continued to bring the

complaints and if they wanted the system to go faster they shouldn't have kept bringing more issues up. Our court system is jammed the way it is and I don't think they are going to get a better or quicker result or less expensive results going to state court. That is my justification for making the motion and offering a do not pass motion.

Chairman Klein: The issue of going immediately to district court has been a WSI issue over the years. Many injured workers thought that was their sure and certain relief was by passing all of the middle people. We go through a very careful process and the injured worker is afforded the money to cover that if they continue to win.

Senator Campbell: I think we are all on the same page.

Chairman Klein: Okay any other discussion? The clerk will call the roll for a do not pass on House Bill 1246.

Roll Call Vote: Yes-7 No-0 Absent-0

Senator Casper will carry the bill.

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1246**

Senate Industry, Business and Labor Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Casper Seconded By Senator Poolman

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Marcellais	x	
Vice Chairman Campbell	x				
Senator Roers	x				
Senator Burckhard	x				
Senator Casper	x				
Senator Poolman	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Casper

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1246: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1246 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1246

**CHAPTER 54-44.3
CENTRAL PERSONNEL SYSTEM**

54-44.3-01. Purpose of chapter.

The general purpose of this chapter is to create North Dakota human resource management services in order to establish a unified system of human resource management for the classified service of the state based upon merit principles and scientific methods, governing the position classification, pay administration, and transfer of its employees. All appointments and promotions to positions in the state classified service must be made without regard to sex, race, color, national origin, age, religious affiliations, or political opinions on the basis of merit and fitness.

54-44.3-01.1. Compensation relationships - Policy.

It is the policy of this state to establish equitable, nondiscriminatory compensation relationships among all positions and classes within the state's classification plan.

54-44.3-01.2. Compensation philosophy statement.

The compensation program for classified state employees must be designed to recruit, retain, and motivate a quality workforce for the purpose of providing efficient and effective services to the citizens of North Dakota. For purposes of this section, "compensation" is defined as base salary and related fringe benefits.

The compensation program must:

1. Provide a competitive employee compensation package based on job content evaluation, internal equity, and external competitiveness balanced by the state's fiscal conditions.
2. Be based on principles of fairness and equity.
3. Include a consistent compensation policy which allows for multiple pay structures to address varying occupational specialties.
4. Set the external competitiveness target for salary range midpoints at a competitive level of relevant labor markets. For purposes of this section, "relevant labor markets" is defined as the labor markets from which the state attracts employees in similar positions and the labor markets to which the state loses employees in similar positions.
5. Include a process for providing compensation adjustments that considers a combination of factors, including achievement of performance objectives or results, competency determinations, recognition of changes in job content, and acquisition and application of advanced skills or knowledge.
6. Provide funding for compensation adjustments based on the dollar amounts determined necessary to provide competitive compensation in accordance with the state's compensation philosophy. Funding for compensation adjustments may not be provided as a statewide percentage increase attributable to all employees nor as part of a statewide pool of funds designated for addressing equity issues.
7. Consider the needs of the state as an employer and the tax effect on North Dakota citizens.

The office of management and budget shall develop and consistently administer the compensation program for classified state employees and ensure that state agencies adhere to the components of the state's compensation philosophy. The office of management and budget shall regularly conduct compensation comparisons to ensure that the state's compensation levels are competitive with relevant labor markets.

The legislative assembly recognizes the importance of providing annual compensation adjustments to employees based on performance and equity to maintain the market competitiveness of the compensation system.

54-44.3-02. Definitions.

As used in this chapter, unless the context clearly requires otherwise:

1. "Appointing authority" means the authority to appoint to positions in the classified service and is reserved to officials and heads of departments and agencies within the government.
2. "Board" means the state personnel board.
3. "Director" means the director of North Dakota human resource management services.
4. "Division" means North Dakota human resource management services.
5. "Employee" means any person who occupies a position in the classified service.
6. "Officer" means an employee of the state government who is appointed and serves at the pleasure of an official, board, or commission.
7. "Official" means a member of the state government elected by popular vote.

54-44.3-03. State personnel board - Composition - Terms - Vacancies - Qualifications.

1. The state personnel board is composed of the director, who must be the chairman of the board; one member appointed by the governor; two members elected by employees classified under sections 54-44.3-19 and 54-44.3-20; and one member with a professional human resource background appointed by the governor.
2. The term of each member of the board, except the director, must be for six years. The director's term coincides with employment as director. Any permanent vacancy in office must be filled for the unexpired term in the same manner as the selection of the person vacating the office.
3. Each member of the board must be a resident of the state for at least sixty days and must be known to be in sympathy with the application of merit principles to public employment. No member of the board may have held a position in a political party within four years immediately preceding the member's appointment or election to the board, and those members of the board elected by classified employees must be full-time employees in good standing of the classified service.

54-44.3-04. Compensation and expenses of members of board.

Each member of the board is entitled to compensation at the rate of fifty dollars for each day employed in the official duties of the board and other expenses as provided for by law.

54-44.3-05. Election committee.

The governor, the secretary of state, and the attorney general shall constitute a three-member committee to develop rules and regulations for a secret ballot election among all employees eligible under sections 54-44.3-19 and 54-44.3-20 to carry out the election of the two members of the board elected by classified employees. All elections of members of the board are the responsibility of the director who will ensure that proper and due notification is given to all employees in sufficient time to enable potential candidates to initiate necessary petitions and conduct campaigns. Nominees for candidacy are required to submit petitions containing no less than two hundred names of employees in good standing classified under sections 54-44.3-19 and 54-44.3-20. All elections will be conducted through a secret ballot process.

54-44.3-06. Meetings.

The board shall organize annually at the first meeting of each fiscal year. It shall meet at least once a year and at such times and places as are specified by call of the chairman or any three members of the board. All meetings must be open to the public. Three members constitute a quorum for the transaction of business. Three favorable votes are necessary for the passage of any resolutions or taking of any official action by the board at any meeting.

54-44.3-07. Duties of board.

The primary responsibility of the board is to foster and assure a system of personnel administration in the classified service of state government. In carrying out this function, the board shall:

1. Adopt any rules and hold any hearings as are necessary to properly perform the duties, functions, and powers imposed on or vested in the board by law. The adoption of rules must be accomplished in accordance with chapter 28-32.
2. Hear, consider, and determine appeals by nonprobationary employees in the classified service related to position classifications and pay grade assignments.
3. Ensure that the director includes the activities of the board in the office of management and budget's biennial report.
4. Keep minutes and maintain records necessary to assure the equitable administration of this chapter.

54-44.3-08. Testimony - Call witnesses - Request production of papers.

The board, as a body, may invite and hear witnesses, and request the production of books and papers or any other physical evidence pertinent to any investigation or hearing authorized by this chapter. Witnesses who testify at the invitation of the board shall receive remuneration in the same amount and manner received by witnesses in North Dakota district courts.

54-44.3-09. Board secretariat.

The division shall serve as the secretariat to the board.

54-44.3-10. Action to secure compliance with chapter.

The board may maintain such action or proceeding at law or in equity as the board considers necessary or appropriate to secure compliance with this chapter and its rules and orders thereunder. The attorney general may assign an assistant attorney general as legal adviser and counsel to both the board and the division. The attorney general is responsible for representing the personnel system in all legal contexts.

54-44.3-11. North Dakota human resource management services - Director - Appointment - Removal.

North Dakota human resource management services is created within the office of management and budget under the supervision and control of a director who is responsible for the performance and exercise of the duties, functions, and powers imposed upon the division.

1. The director must be experienced in the field of human resource management and shall hold considerable knowledge of merit principles, goals, and their methods of operation.
2. The director of the office of management and budget shall appoint the director. The position of director is not a classified position and the director shall serve at the pleasure of the director of the office of management and budget.

54-44.3-12. Duties of director.

The director shall direct and supervise, with the approval of the director of the office of management and budget, all the administrative and technical activities of the division. In addition to the duties imposed elsewhere in this chapter, the director shall:

1. Establish general policies, rules, and regulations, subject to the approval of the board, which are binding on the agencies affected, and which apply to the employees in the classified service. These rules must provide for:
 - a. Establishing and maintaining a classification plan.
 - b. Establishing and maintaining a compensation plan.
 - c. Promoting a consistent application of personnel policies.
 - d. Enhancing greater uniformity in matters relating to probationary periods, hours of work, leaves of absence, separations, transfers, disciplinary actions, grievance procedures, and performance management.
 - e. Ensuring fair treatment and compliance with equal employment opportunity and nondiscrimination laws.
2. Establish and maintain a roster of all employees in the state classified service in which there must be set forth, as to each employee, the class title of the position occupied,

- the salary or pay, change in class title, and any other personnel data that the division deems necessary.
3. Select for appointment under this chapter such employees of the division and such experts and special assistants as are necessary to carry out effectively the provisions of this chapter. Salaries and positions of personnel in the division must conform to the classification and pay plan provided by this chapter.
 4. Assist the employee-appointing authorities, in accordance with the provisions of this chapter and the rules adopted thereunder, in the preparation and administration of appropriate selection procedures.
 5. Encourage and assist in the development of personnel administration within the various departments and agencies of the state.
 6. Cooperate with employee-appointing authorities and other supervisory officers in the conduct of employee training programs.
 7. Develop procedures that, notwithstanding any other law, must be followed by all state agencies and institutions for employees in the state classified service, to ensure that all salaries are paid in a manner consistent with the state's compensation, classification, and salary administration policies.
 8. Consult with state agencies and institutions in the development of salary administration procedures for employees in the state classified service.
 9. Recognize knowledge, skills, complexity, accountability, and working condition hazards as compensable factors of the state's classification plan, required in the performance of work for all positions in the state classified service.
 10. Develop guidelines for allowing exceptions to the rules of the classification and compensation plans for use when the market salaries of specific positions are not consistent with the state's compensation policy.
 11. Conduct in-state and out-of-state labor market surveys that are representative of the state's classified service occupations to enable the state to position itself accurately against the market.
 12. Communicate classification and compensation policies to the managers and employees in the state-classified service by providing written information on the state's classification and compensation procedures.
 13. Adopt rules, subject to the approval of the board, to ensure compliance with and resolve compliance issues relating to agencies required by state or federal law or rule to be subject to a merit personnel system.

54-44.3-12.1. Revisions to compensation plan.

Revisions to the compensation plan may only be made on July first, following the close of a regular legislative session, except that new classifications may be added to the compensation plan during a biennium when deemed necessary by the director. Revisions to the compensation plan for county employees covered by the plan become effective on January first of the first full calendar year following the revision or on July first following the close of a regular legislative session, based on official action by the board of county commissioners. Revisions to the compensation plan may only be made to the extent the legislative assembly appropriates funds to implement such plans.

54-44.3-12.2. Employee complaints - Cooperation in development and implementation of basic agency grievance procedures and a statewide appeal mechanism - Appeals.

It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees by requiring affected agencies to adopt grievance procedures and through the creation of a statewide appeals mechanism with primary jurisdiction to entertain and resolve classified employee appeals. It is the policy of this state to resolve bona fide employee complaints as quickly as possible. The division shall cooperate with and assist the various departments, agencies, and institutions of the state in the development and implementation of basic agency grievance procedures and a statewide appeal mechanism. The division shall certify appeals from nonprobationary employees in the classified service which are related to discrimination, merit system qualification, reprisals, reduction in

force, forced relocation, demotion with loss of pay, suspension without pay, and dismissal, and from applicants for positions in the classified service and probationary employees in the classified service which are related to discrimination or reprisal. Upon receipt of an appeal, the division shall submit a written request to the director of the office of administrative hearings to designate an administrative law judge for the division to conduct the hearing and related proceedings, including receiving evidence and preparing findings of fact, conclusions of law, and issuing a final decision. The moving party in the initial action bears the burden of proof in the appeal. An appeal to the district court from the determination of the administrative law judge must be filed according to chapter 28-32, including proper service upon the division, but neither the division nor the office of administrative hearings may be named as a party to the appeal under chapter 28-32 unless an employee of one of those two agencies is involved in the grievance.

54-44.3-13. Records and information to be furnished.

All departments and agencies covered by the personnel system shall furnish any reasonably necessary, nonprivileged records and information to the division which the division requests, except records made confidential by statute.

54-44.3-14. Records public.

The records of the division and the board, except such records as the statutes may require to be held confidential, are public records and must be open to public inspection, subject to regulations as to the time and manner of inspection which may be prescribed by the division or board.

54-44.3-14.1. Mediation - Open records exemption - Retaliation prohibition.

Records of the division relating to mediation services provided by the division are exempt from section 44-04-18. An employee may not be discharged, disciplined, or penalized concerning the employee's compensation, conditions, location, or other privileges of employment because of the employee's request for or participation in the mediation services provided by the division.

54-44.3-15. Payment disapproved by director.

The director may disapprove the payment for personal service for any person holding a position in the classified service, except a person appointed to a position for the duration of an emergency, if the director determines that the person named therein has not been classified and is not imminently to receive classification in accordance with the provisions of this chapter and the rules and orders thereunder or that the rate of pay is not authorized.

54-44.3-16. Agency personnel officers.

The elected or appointed chief officer of each agency or department of the service shall designate a staff employee to serve as personnel officer for that division of the service to assist the chief officer in that person's duty to administer personnel responsibilities specified in this chapter and by the personnel rules. The designated personnel officer of each agency or department shall certify to the agency elected or appointed chief officer that each person holding a position in the classified service authorized for payment through payroll has been classified in accordance with the provisions of this chapter and the rules and orders under this chapter and that the rate of pay is within established current salary ranges or excepted from the ranges by written authorization by the director.

54-44.3-17. Grant-in-aid programs.

Whenever the provisions of any law, rule, order, or regulation of the United States or of any federal agency or authority providing or administering federal funds for use in North Dakota require civil service or merit standards or classifications other than those required by the provisions of this chapter and rules and regulations promulgated under this chapter, then the provisions of such law, rule, order, or regulation must prevail and must govern the employees

affected thereby. The division shall provide those services necessary to comply with merit standards for federal grant-in-aid agencies.

54-44.3-18. Authority to provide services to cities and political subdivisions.

The division may enter into agreement with any city or political subdivision of the state to furnish services and facilities of the division to the city or political subdivision in the administration of its personnel on merit principles. Any such agreement must provide for the reimbursement to the state of the cost of the services and facilities furnished, such reimbursements to be deposited to the credit of the general fund. All cities and political subdivisions of the state may enter into such agreements.

54-44.3-19. Board authority to provide service to cities, political subdivisions, and other entities.

The board may enter into agreement with any city or political subdivision of this state to furnish any of its services and facilities, other than factfinding or conciliation services, and the agreement must provide for reimbursement to the state of the cost of the services and facilities furnished. All cities and political subdivisions of this state may enter into the agreements. The board and division shall provide coverage to other agencies or political subdivisions as may be required by federal laws or regulations to be subject to a personnel system in order to obtain federal grants-in-aid. The board and division shall provide coverage to political subdivisions upon the request of the subdivisions. Other agencies, departments, or divisions or positions may be placed under the complete or limited board and division personnel plan in the manner and to the extent the legislative assembly shall by law direct.

54-44.3-20. Categories of positions in the state service.

All positions in the state service are included in the classified service except:

1. Each official elected by popular vote and each person appointed to fill vacancies in an elective office, one principal assistant, and one private secretary.
2. Members of boards and commissions required by law.
3. Administrative heads of departments required by law, other than the superintendent of North Dakota vision services - school for the blind, the superintendent of the school for the deaf, and the state librarian.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry, investigation, or examination for the legislative branch of government or a department of the state government.
7. Positions deemed to be inappropriate to the classified service due to the special nature of the position as determined by the division and approved by the board.
8. Employees of the institutions of higher education under the control of the state board of higher education.
9. Members and employees of occupational and professional boards.
10. Officers and employees of the North Dakota mill and elevator association.
11. The director of the committee on employment of people with disabilities of the department of human services.
12. Positions referred to under law as serving at the pleasure of or at the will of the appointing authority.
13. Licensed teachers engaged in teaching at the North Dakota youth correctional center, North Dakota vision services - school for the blind, and the school for the deaf.
14. Officers of workforce safety and insurance.
15. Officers and employees of the department of commerce.
16. Attorneys employed by the insurance commissioner.
17. Engineers, engineering technicians, and geologists employed by the director of mineral resources.

54-44.3-21. Employment only under approved class title.

No person may be appointed to or employed in a position in the classified service under a class title which has not been approved by the director as appropriate to the duties to be performed.

54-44.3-22. Limitations on inquiries in application or test - Discrimination prohibited.

No question in any form of application or in any test may be so framed as to elicit any information concerning the political or religious opinions or affiliations of any applicant, nor may any inquiry be made concerning such opinions or affiliations. All disclosures thereof must be discountenanced. No discrimination may be exercised, threatened, or promised by any person in the employ of any division of the service or of the personnel division against or in favor of any applicant, eligible, or employee because of sex, race, color, national origin, age, or religious or political opinions or affiliations.

54-44.3-23. Veterans' preferences.

Veterans' preferences must be in accordance with chapter 37-19.1.

54-44.3-24. Application of chapter to existing employees.

All employees in positions which are in the classified service as defined in this chapter and who, prior to July 1, 1975, have served continuously for a period of six months or more, or as regular seasonal employees have satisfactorily served in such positions through one seasonal service period, shall be certified to such positions, and grades and classifications, under the personnel system, and shall not be subject to examination or trial service periods of employment.

54-44.3-25. Prohibited conduct.

1. No person may make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under this chapter, or in any manner commit or attempt to commit any fraud preventing the impartial execution of this chapter and the rules.
2. No person may, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.
3. No employee of the division, examiner, or other person may defeat, deceive, or obstruct any person in that person's right to examination, eligibility, certification, or appointment under this chapter, or furnish to any person any special or confidential information for the purpose of affecting the rules or prospects of any person with respect to employment in the classified service.

54-44.3-26. Penalty.

Any person who intentionally violates any provision of this chapter is guilty of an infraction and, upon conviction thereof, is, for a period of one year, ineligible for appointment or employment in the classified service.

54-44.3-27. Transfer of records of merit system council.

All personnel and records of the North Dakota merit system council are hereby transferred to the division created by this chapter.

54-44.3-28. College student cooperative education or intern program - Eligibility.

The director shall establish and administer within the executive and legislative branches of state government a program through which college students may receive stipends and academic credit for participating in a cooperative education or internship program. The program must be open to any student enrolled in a public or private educational institution in this state which has been accredited by an agency recognized by the United States department of

education. The director shall establish classifications and develop uniform application procedures for the cooperative education or internship program.

54-44.3-29. Acceptance of federal funds.

The director is authorized to accept federal funds through grant-aided agencies or directly for the purpose of operating or ensuring operation of a merit personnel system.

54-44.3-30. Agencies subject to merit system.

All personnel employed by the department of human services, the regional offices of that department, job service North Dakota, North Dakota human resource management services, the state department of health, and other agencies or political subdivisions as may by federal law or rule be required to be subject to a merit system in order to obtain federal grants-in-aid are covered by the merit system provided in this chapter. Merit system coverage must also be provided to personnel employed as purchasing agents or buyers in the purchasing division of the office of management and budget. Other agencies, departments, or divisions and positions must be placed under a merit system in the manner and to the extent required by law.

54-44.3-31. Political subdivision may request to be exempted from state merit system.

A political subdivision subject to the merit system under this chapter may file a request with the division and the director of the department of human services to be exempted from the merit system. The request must describe a plan and policy that assures the political subdivision has developed a merit system plan that meets federal standards for personnel administration. The division and the director of the department of human services shall authorize the political subdivision plan within sixty days of receiving a request under this section if the plan and policies meet federal requirements. If the division and the director of the department of human services determine that the proposed plan and policies fail to meet the federal requirements, the division and the director shall deny the request and notify the requester of the specific reasons for the denial.

54-44.3-32. Political subdivision merit system compliance.

The division and the department of human services shall develop oversight and audit procedures for political subdivision merit systems to assure compliance with federal merit system principles. If the division and the department of human services determine that a political subdivision has failed to maintain compliance with federal merit system principles, the division and the department shall notify the political subdivision of the noncompliance and order the political subdivision to take corrective action. If a political subdivision does not take the necessary corrective action to comply with federal merit system principles, the division and the department of human services shall revoke the political subdivision's exemption from the state merit system and return the political subdivision to the state merit system. The political subdivision is responsible for any penalty assessed by a federal authority for a noncompliant political subdivision merit system.

**CHAPTER 4-07-20
GRIEVANCE PROCEDURES**

Section

- 4-07-20-01 Scope of Chapter
- 4-07-20-02 Requirements for Grievance Procedures
- 4-07-20-02.1 Waiver of Agency Grievance Procedure
- 4-07-20-03 Absence of Established Written Agency Grievance Procedure

4-07-20-01. Scope of chapter.

This chapter applies to all state and local government agencies, departments, institutions, and boards and commissions that employ individuals in positions classified by human resource management services.

History: Effective May 1, 1994; amended effective November 1, 1996; July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-20-02. Requirements for grievance procedures.

Each agency, department, institution, board, and commission subject to this chapter shall establish internal grievance procedures that include the following:

1. A provision that allows an employee to grieve an employer action of demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, reprisal, or discrimination in employment. The provision must require the employee to begin the agency grievance procedure within fifteen working days from the date of notice of the employer action, except in the case of reprisal. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery. The provision must also require that in the case of reprisal the employee shall begin the agency grievance procedure within fifteen working days from the date of the reprisal action.
2. Specific steps to be followed in processing the grievance, limitations on the amount of time the parties have to respond, and any procedures for extending time limitations.
3. A requirement that the parties must respond to the issues raised in the grievance.
4. A method of counting time that is in working days.
5. Provisions that allow an employee a reasonable amount of time to process a grievance without loss of pay during regular working hours.
6. An option that if the appointing authority misses an established deadline in the grievance procedure, the grievance may be advanced to the next step.
7. The use of a standard grievance form.

History: Effective May 1, 1994; amended effective November 1, 1996; July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-20-02.1. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the employee and appointing authority. Each party must sign the waiver within fifteen working days of the employer action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.1-08. An additional fifteen working days is not available if the requested waiver is denied.

History: Effective July 1, 2004; amended effective July 1, 2008.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20-03. Absence of established written agency grievance procedure.

In the absence of an established written agency grievance procedure, the aggrieved employee may appeal an employer action as covered in subsection 1 of section 4-07-20.1-02 and section 4-07-20.2-04 directly to human resource management services by following the applicable appeal procedures outlined in section 4-07-20.1-08 or 4-07-20.2-07. Human resource management services shall act upon the appeal in the same manner as an appeal processed through an agency grievance procedure. This avenue of appeal does not negate the requirements for an agency grievance procedure.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

**CHAPTER 4-07-20.1
APPEALS OF EMPLOYER ACTIONS**

Section

4-07-20.1-01	Scope of Chapter
4-07-20.1-02	Definitions
4-07-20.1-03	A Regular Employee May File a Grievance Regarding an Employer Action
4-07-20.1-04	Commencement of Agency Grievance Procedure - Time Limitations
4-07-20.1-05	Waiver of Agency Grievance Procedure
4-07-20.1-06	A Regular Employee May Appeal to Human Resource Management Services
4-07-20.1-07	Limitations for Reduction-in-Force Appeal
4-07-20.1-08	Procedure for Appeals of Employer Actions to Human Resource Management Services

4-07-20.1-01. Scope of chapter.

This chapter applies to regular employees.

History: Effective November 1, 1996.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Date of service" means the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery of electronic means, the date of actual delivery.
2. "Employer action" means an action taken by an appointing authority that affects a regular employee through a demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, or reprisal.
3. "Forced relocation" means the involuntary transfer or reassignment of a regular employee from one work location in the state to another work location in the state that requires the employee to move to a different place of residence. Telecommuting and other alternative work location agreements are not considered forced relocations.
4. "Reduction-in-force" means the loss of employment by a regular employee as a result of a reduction in funding, lack of work, curtailment of work, or reorganization.
5. "Regular employee" means a person who has completed the probationary period and who is or was in a position classified by human resource management services at the time the employer action occurred.
6. "Reprisal" means an unfavorable employment-related action taken against an applicant or employee by an appointing authority for appealing to human resource management services or the state personnel board; for exercising the employee's rights under the Public Employees Relations Act of 1985, North Dakota Century Code chapter 34-11.1; for testifying before a legislative committee; or for employees who request timely assistance under the employee assistance program.
7. "Waiver" means a written agreement between a regular employee and the appointing authority not to proceed with the agency grievance procedure and to permit an appeal to be made directly to human resource management services.

8. "Working days" means Monday through Friday exclusive of holidays.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

4-07-20.1-03. A regular employee may file a grievance regarding an employer action.

A regular employee may, in accordance with the respective agency's grievance procedure, file a grievance regarding demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, or reprisal. A grievance must be processed through the agency grievance procedure prior to submitting an appeal to human resource management services, unless a waiver is agreed upon as provided for in section 4-07-20.1-05.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-04. Commencement of agency grievance procedure - Time limitations.

The employee shall begin the agency grievance procedure within fifteen working days from the date of notice of the employer action, except in the case of reprisal. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery. The employee grieving reprisal action shall begin the agency grievance procedure within fifteen working days from the date of the reprisal action. Failure to begin the procedure within time limitations may cause the employee to lose the right to appeal to human resource management services. The agency appointing authority or designee, for good cause shown, may waive the time limitations for filing a grievance. Good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion. In no event may a grievance be deemed timely after sixty days have elapsed from the date of the employer action.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-05. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the employee and appointing authority. The waiver must be signed by both parties within fifteen working days of the employer action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.1-08. An additional fifteen working days is not available if the requested waiver is denied.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-06. A regular employee may appeal to human resource management services.

A regular employee may appeal an employer action to human resource management services if:

1. The employee has processed a grievance through the agency grievance procedure and is dissatisfied with the result;

2. The employee and the appointing authority have agreed to a waiver of the agency grievance procedure; or
3. The agency has not established a grievance procedure or has failed to respond to a grievance in a timely manner.

No other employer actions except as defined in this chapter or otherwise specifically provided by administrative rule are appealable to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-07. Limitations for reduction-in-force appeal.

A regular employee may appeal a reduction-in-force only on the basis that the agency did not utilize a uniform comparative analysis as required by section 4-07-11-03 or that the reduction-in-force was conducted in a discriminatory manner that would violate the state's policy against discrimination as stated in North Dakota Century Code section 14-02.4-01. A former regular employee who was reduced in force may appeal a denial of reemployment only on the basis that the agency did not follow section 4-07-11-07 or that the denial of reemployment was conducted in a discriminatory manner that would violate the state's policy against discrimination as stated in North Dakota Century Code section 14-02.4-01. The assessment of whether an individual meets the qualifications necessary for successful performance shall remain with the agency.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-08. Procedure for appeals of employer actions to human resource management services.

1. The employee shall file the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure or within fifteen working days from the date of the waiver. An additional fifteen working days is not available if the requested waiver is denied. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
2. The director, human resource management services, shall within two working days submit a written request to the director, office of administrative hearings, to conduct a hearing on behalf of the division and shall forward a copy of the appeal form to the appointing authority.
3. The administrative law judge shall initially consider whether the appeal was filed within required time limitations. If the administrative law judge determines the time limitations have not been met, the administrative law judge shall prepare an appropriate order dismissing the appeal, which shall be final, and provide a copy of it to the parties. The administrative law judge may, for good cause shown, waive the time limitations for filing an appeal. Good cause means those circumstances that reasonably and without any fault on the part of the appellant prevented the filing of an appeal in a timely fashion. In no event may an appeal be deemed timely after sixty days have elapsed from the date of the employer action.

4. The administrative law judge shall consider whether human resource management services has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the internal agency grievance process. If the administrative law judge is unable to establish whether human resource management services has jurisdiction over the subject matter of the appeal or whether the appropriate rules were followed, a hearing may be conducted to ascertain the facts related to those issues.
5. If the administrative law judge determines that human resource management services does not have jurisdiction in the matter of the appeal, the administrative law judge shall prepare findings of fact and conclusions of law, if appropriate; issue a final decision dismissing the appeal; and provide a copy of them to the parties.
6. If it is determined that human resource management services has jurisdiction over the appeal, the administrative law judge shall schedule a hearing. The administrative law judge shall conduct the hearing and related proceedings, receive evidence related to the issues, prepare findings of fact and conclusions of law, and issue a final decision.
7. The administrative law judge shall notify the employee and the appointing authority of the final decision by sending each of them a copy of the findings of fact, conclusions of law, and final decision. Notification shall be accomplished in the same manner as for notification of final orders required by subsection 3 of North Dakota Century Code section 28-32-39. The parties shall implement the final decision within any time periods specified by the administrative law judge.
8. The administrative law judge shall return the completed appeal file to human resource management services.
9. Any party to the appeal may review the recordings of the hearing by making a request to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

CHAPTER 4-07-20.2
APPEALS OF DISCRIMINATION OR REPRISAL

Section

- 4-07-20.2-01 Scope of Chapter
- 4-07-20.2-01.1 Employees Not in the Classified Service May Appeal Claims of Reprisal
- 4-07-20.2-02 Definitions
- 4-07-20.2-03 Statutory Definitions
- 4-07-20.2-04 Applicants, Probationary Employees, or Regular Employees May Appeal Reprisal or Discrimination in Employment
- 4-07-20.2-04.1 Procedure for Applicant Appeals of Discrimination or Reprisal in Employment to Agency Appointing Authority
- 4-07-20.2-05 Completion of Agency Grievance Process Prior to Appeal to Human Resource Management Services
- 4-07-20.2-06 Waiver of Agency Grievance Procedure
- 4-07-20.2-07 Procedure for Appeals of Discrimination or Reprisal to Human Resource Management Services

4-07-20.2-01. Scope of chapter.

This chapter applies to applicants for positions classified by human resource management services, probationary employees or regular employees in classified positions who want to appeal reprisal or who want to appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-01.1. Employees not in the classified service may appeal claims of reprisal.

This chapter also applies to employees not in the classified service who appeal a claim of reprisal under subsection 5 of North Dakota Century Code section 34-11.1-04.

History: Effective July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5)

4-07-20.2-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Applicant" means a person who has applied for a position classified by human resource management services and who has complied with the application procedures required by the employing agency.
2. "Date of service" means the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery of electronic means, the date of actual delivery.
3. "Regular employee" means a person who has completed the probationary period and who is or was in a position classified by human resource management services at the time the alleged action occurred.

4. "Working days" means Monday through Friday exclusive of holidays.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-03. Statutory definitions.

Unless otherwise defined, or made inappropriate by context, all words used in this chapter have meanings given to them under North Dakota Century Code chapter 14-02.4 and subsection 5 of North Dakota Century Code section 34-11.1-04.

History: Effective November 1, 1996; amended effective July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

4-07-20.2-04. Applicants, probationary employees, or regular employees may appeal reprisal or discrimination in employment.

Applicants for positions classified by human resource management services and probationary or regular employees in classified positions may appeal reprisal or may appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-04.1. Procedure for applicant appeals of discrimination or reprisal in employment to agency appointing authority.

1. An applicant who has completed a timely and properly completed application for a classified position within an agency and who alleges discrimination or reprisal in employment shall file a written appeal to the agency appointing authority. The letter of appeal must specify what alleged discriminatory or reprisal action against the applicant was taken by the agency. The appeal information must be delivered, mailed, or transmitted by electronic means and must be received in the office of the agency appointing authority by five p.m. within fifteen working days of the alleged discriminatory or reprisal action.
2. The agency appointing authority has fifteen working days from the receipt of the appeal to review the appeal and provide a written response to the applicant.
3. If the applicant does not agree with the response of the agency appointing authority, the applicant may further appeal to human resource management services in accordance with section 4-07-20.2-07.

History: Effective July 1, 2008; amended effective July 1, 2010.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12

4-07-20.2-05. Completion of agency grievance process prior to appeal to human resource management services.

A probationary or regular employee shall complete the agency grievance process prior to submitting an appeal to human resource management services for an appeal hearing, unless a waiver

is granted as provided for in section 4-07-20.2-06. The employee shall begin the agency grievance procedure within fifteen working days from the date of the alleged discriminatory or reprisal action. Failure to begin the procedure within time limitations may cause the employee to lose the right to appeal to human resource management services. The agency appointing authority or designee, for good cause shown, may waive the time limitations for filing a grievance. Good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion. In no event may a grievance be deemed timely after sixty days have elapsed from the date of the employer action. If an agency does not have an established written grievance procedure, the employee shall submit the appeal to human resource management services within fifteen working days from the date of the alleged discriminatory or reprisal action.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-06. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the probationary or regular employee and appointing authority. The waiver must be signed by both parties within fifteen working days of the alleged discriminatory or reprisal action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.2-07.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-07. Procedure for appeals of discrimination or reprisal to human resource management services.

1. A probationary or regular employee shall file the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure or within fifteen working days from the date of the waiver. An additional fifteen working days is not available if the requested waiver is denied. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
2. An applicant shall file the appeal form by delivery, mail, or transmittal by electronic means, and the form must be received in the human resource management services office by five p.m. within fifteen working days of the service of notice of the agency appointing authority's response to the alleged discriminatory or reprisal action. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
3. An employee in a nonclassified position may appeal claims of reprisal by filing the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure, or within fifteen working days of the date of the reprisal action if an agency does not have an established

grievance process. When an employee is using an agency internal grievance procedure, the date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.

4. The director, human resource management services, shall within two working days submit a written request to the director, office of administrative hearings, to conduct a hearing on behalf of human resource management services and shall forward a copy of the appeal form to the affected appointing authority.
5. The administrative law judge shall initially consider whether the appeal was filed within required time limitations. If the administrative law judge determines the time limitations have not been met, the administrative law judge shall prepare an appropriate order dismissing the appeal, which shall be final, and provide a copy of it to the parties. The administrative law judge may, for good cause shown, waive the time limitations for filing an appeal. Good cause means those circumstances that reasonably and without any fault on the part of the appellant prevented the filing of an appeal in a timely fashion. In no event may an appeal be deemed timely after sixty days have elapsed from the date of the employer action.
6. The administrative law judge shall consider whether human resource management services has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the internal agency grievance process. If the administrative law judge is unable to establish whether human resource management services has jurisdiction over the subject matter of the appeal or whether the appropriate rules were followed, a hearing may be conducted to ascertain the facts related to those issues.
7. If the administrative law judge determines that human resource management services does not have jurisdiction in the matter of the appeal, the administrative law judge shall prepare findings of fact and conclusions of law, if appropriate; issue a final decision dismissing the appeal; and provide a copy of them to the parties.
8. If it is determined that human resource management services has jurisdiction over the appeal, the administrative law judge shall schedule a hearing. The administrative law judge shall conduct the hearing and related proceedings, receive evidence related to the issues, prepare findings of fact and conclusions of law, and issue a final decision.
9. The administrative law judge shall notify the employee or the applicant and the affected appointing authority of the final decision by sending each of them the findings of fact, conclusions of law, and final decision. Notification shall be accomplished in the same manner as for notification of final orders required by subsection 3 of North Dakota Century Code section 28-32-39. The parties shall implement the final decision within any time periods specified by the administrative law judge.
10. The administrative law judge shall return the completed appeal file to human resource management services.
11. Any party to the appeal may review the recordings of the hearing by making a request to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

CHAPTER 4-07-21
ALTERNATIVE DISPUTE RESOLUTION

Section	
4-07-21-01	Scope of Chapter
4-07-21-02	Definitions
4-07-21-03	Alternative Dispute Resolution
4-07-21-04	Grievance Time Limits Suspended

4-07-21-01. Scope of chapter.

This chapter applies to all state and local government agencies, departments, institutions, and boards and commissions that employ individuals in positions classified by human resource management services.

History: Effective September 1, 1992; amended effective November 1, 1996; July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except "alternative dispute resolution" means a method of resolving disputes, outside the grievance process, that involves a neutral person to assist in identifying issues, developing options, and arriving at a resolution.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-03. Alternative dispute resolution.

Alternative dispute resolution may be used to resolve disputes that occur within an agency. All parties involved in the dispute must agree to the use of alternative dispute resolution prior to using the method.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-04. Grievance time limits suspended.

During the time period when the agency appointing authority and the employee involved in a dispute are utilizing alternative dispute resolution, the time limits of the internal agency grievance procedure must be suspended. If a resolution is not agreed to by the participants at the conclusion of the resolution process, then the time limits of the agency grievance procedure must be activated. The alternative dispute resolution process facilitator shall determine the date of conclusion of the resolution process and notify the parties.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

Personnel Policy Manual



NORTH DAKOTA
DEPARTMENT *of* HEALTH

Job Description Questionnaires (JDQ) – Content and Access

The department maintains a job description questionnaire (JDQ) on file for every position. The JDQ is located in the Human Resources Division. The JDQ contains detailed information about the position and is used to classify positions. Employees may request their JDQ by contacting Human Resources.

Discipline Policy

Supervisors are encouraged to consult early and as often as needed with the Human Resources Department, since the proper handling of disciplinary actions may impact DOH's ability to adequately address workplace issues.

Discipline of Temporary and Probationary Employees

An employee on probation may be separated at will from employment and may be terminated without cause and without progressive discipline. The employee may not grieve or appeal a lawful separation.

The division director shall notify the employee of the separation in writing. However, a supervisor may, in the supervisor's sole discretion, use progressive discipline to correct the job performance of a probationary employee, including extending the probationary period for up to and additional six months

Temporary employees may be terminated without cause and without progressive discipline. However, a supervisor may, in the supervisor's sole discretion, use progressive discipline to correct the job performance of temporary employees.

Discipline of Regular Employees

Progressive discipline must be used to correct a regular employee's job performance problems or for a violation of rules or standards. Supervisors should work with Human Resources Division throughout the entire progressive discipline process.

The steps discussed below are those typically used in a progressive discipline process.

Informal Discussions

These are meetings between the employee and supervisor to talk one-on-one about work-related problems. This provides an opportunity to discuss performance and behavior as follows: the impact on the work place, the employer's expectations of the employee, any assistance that will be provided, and possible consequences if improvement does not occur. These discussions should be documented by the supervisor. It is recommended that a copy of the documentation of the meeting be given to the employee. Documentation will not go in the personnel file.

CARIS
SANDRA
KIM BROSS

Verbal Warning

This is the first formal step of the disciplinary process. In the event that performance problems continue or a work-related offense occurs, the employee should receive a verbal warning. The warning should describe the problem, the impact on others, the employer's expectations of the employee and the consequences if the performance problem continues or the offense occurs again. In the case of an offense, the expectation of the employee generally will include a specific time frame and the fact that the degree of discipline will increase if the offense occurs again during that time. Documentation will not go in the personnel file.

The verbal warning should be documented by the supervisor. It is recommended that a copy of the oral warning documentation be given to the employee.

Written Warning

Generally, the second step of the disciplinary process requires the supervisor to compose and deliver a written warning to the employee. This would normally occur where the performance problem continues, or the same or a similar violation occurs. The written warning will contain a description of the problem or offense and the effect on the work place or the policy or administrative rule that was broken. The warning also will say that if the conduct is repeated the employee will be disciplined again more severely. A final warning also may be included in the written warning that specifies that dismissal will result if another infraction occurs.

A written warning containing special restrictions about attendance, conduct or imposing special procedures should be reviewed by the supervisor every 30 days, when it may be modified with a follow-up letter. Otherwise, the provisions, restrictions or directives will automatically continue until the next review. Documentation will go in the personnel file.

Progressive Discipline Exception

These steps of the progressive discipline process may be bypassed when an infraction or a violation of a serious nature is committed such as, but not limited to, insubordination; theft; falsification of pay records; assaulting a supervisor or coworker, patient or client; and for which the imposition of less severe disciplinary action would be inappropriate.

Pre-Action Notice

Prior to suspending, demoting or terminating a classified employee who has successfully completed the probationary period, the division director shall give the employee a written notice of the reasons for such action, an explanation of the allegations and the supporting evidence, and provide an opportunity for the employee to respond.

The written notice of the reasons and explanation of the allegations must include:

- a) A statement of the division director's intent to take disciplinary action that may result in demotion, suspension without pay, or termination of the employee.
- b) An explanation of the allegations against the employee; citing behavior, dates or occurrences, witnesses and other evidence.

- c) A statement of specific policy, administrative rule or practice violations or a statement citing what work expectation was violated and how the employee would have known of the work expectation.
- d) Notice that the employee may provide the division director with evidence, explanation or other information in writing which contradicts the allegations and evidence.
- e) Notice that the employee will have five working days to provide the written response.
- f) Notice of the employee's status (to continue working or placement on leave of absence with pay) until the final decision is made.
- g) A statement that a written notice of the final action taken will be provided to the employee.
- h) A statement at the end such as "I have read and understand this document. I am aware that it is being placed in my personnel file. I acknowledge that my signature does not necessarily indicate agreement with the contents of this document. I understand that I have the right to attach a response if I so choose."
- i) A signature line for the employee to acknowledge receipt or a witness to acknowledge the employee's receipt and/or refusal to sign.

Any time a pre-action notice is sent to an employee via US Postal service, an Affidavit of Service by Mail form must be used to document the date the letter was sent to the employee.

Opportunity to Respond

The employee must be given no less than five working days following receipt of the notice in which to respond in writing to the allegations. The employee must be given reasonable access to the employee's personnel file and all information upon which the allegations are based. If necessary, the employee may be placed on a leave of absence with pay during this time

Dismissal

This is the last step of the disciplinary process. This generally occurs after the supervisor has followed the complete progressive discipline process. This results after the manager has reviewed the employee's response to the pre-action letter and has determined that dismissal is the appropriate action for the violations or behavior.

Division Director, Manager and Supervisor Responsibilities

Supervisor's responsibilities related to disciplinary actions include documenting incidents of poor performance, inappropriate workplace behavior and violation of laws, rules and policies; documenting meetings with employees regarding their poor performance, inappropriate workplace behavior and violation of laws, rules and policies; establishing and monitoring adherence to plans for corrective action; drafting letters to employees and other documentation of disciplinary actions, investigating poor work performance and other job-related problems, and ascertaining and carrying out proper procedures.

Division directors, managers and supervisors are responsible to ensure full documentation and review of all disciplinary actions. Documentation must always be completed at the time of the action.

Supervisors may maintain a supervisory file containing written notes or documentation of an employee's performance separate from the official personnel file. If contents of the supervisory file are used for disciplinary purposes, such content must be made a permanent part of the employee's personnel file.

No documents that address an employee's character or performance may be placed in the personnel file unless the employee has had the opportunity to read the material. The employee must acknowledge that the employee has read the material by signing the actual copy to be filed or an attachment to the actual copy to be filed, with the understanding that the signature merely signifies that the employee has read the material to be filed and does not necessarily indicate agreement with its content. If the employee refuses to sign the copy to be filed, the division director shall indicate on the copy that the employee was shown the material, was requested to sign the material to verify that the material had been read, and that the employee refused to sign the copy to be filed. In the presence of the employee and a witness, the division director shall sign and date a statement verifying the refusal of the employee to sign the copy to be filed. The material must then be placed in the personnel file.

The employee has the right to answer any material filed and any answer must be attached to the file copy. If any material is found to be without merit or unfounded through a grievance procedure, it must be immediately removed from the file and may not be used in any subsequent actions or proceedings against the employee.

No anonymous letters or materials may be placed in the employee's personnel file.

Personnel Files – Content and Access

The department maintains a personnel file on each employee. The personnel file is located in the Human Resources Division. The personnel file shall include name, title, position held, payroll forms, salary, change of status, performance appraisals, date of employment, application for employment, letter of hire, acceptance letter, records of any disciplinary actions taken against the employee (written warnings, demotions, suspensions without pay or termination), occupational license, continuing education and information of a positive nature, including information indicating special competencies, achievements, performances or contributions of a professional or civic nature.

Any information addressing an employee's character or performance will not be placed in the personnel file unless the employee has had the opportunity to read the material. The employee must sign the actual copy to be filed, with the understanding that the signature merely signifies that the employee has read the material to be filed and does not necessarily indicate agreement with the content. If the employee refuses to sign the copy to be filed, the division director or section chief should indicate on the copy that the employee was shown the material, was requested to sign the material to verify that the material had been read, and that the employee refused to sign the copy to be filed. In the presence of the employee and a witness, the division director or section chief should sign and date the statement verifying refusal of the employee to sign the copy to be filed. The material will then be placed in the file.

Employees can answer any material placed in their personnel file and the answer will be attached to the file copy. Employees or their designated representative can examine their personnel files by appointment during normal business hours. Employees can reproduce any material in their personnel file at their personal expense. Personnel files can only be reviewed in the presence of the human resources director or a designated agency representative and the review will be conducted within the premises of Administrative Services.

Managers may maintain written notes or records of the employee's performance separate from the personnel file for the purpose of preparing evaluations or possible disciplinary action.

Reduction-In-Force (RIF) Procedures

The decisions of the Department of Health regarding where and how its resources, including its employees, will be assigned are necessary management decisions. Decisions on reduction-in-force are made in the context of overall budget cuts and reallocation of work.

RIF procedures will be initiated when it has been approved by the state health officer based on information provided by a section chief that a reduction-in-force is necessary in a division(s) or work unit(s) of a division(s) because of a reduction in funding, lack of work, curtailment of work or because of reorganization.

When a reduction-in-force is approved, the director of the division or work unit(s) will:

- a) Determine the division or work unit to be affected by the reduction-in-force.
- b) Determine the number of positions to be reduced and the classification(s) affected.
- c) Review vacant positions within the designated division or work unit and within the designated classification(s) for possible elimination.
- d) Reduce temporary employees performing the same or similar work in the designated division or work unit. (N.D. Admin. Code § 4-07-11-05)
- e) Reduce probationary employees in positions assigned the same classification(s) as those designated for reduction in the designated division or work unit. (N.D. Admin. Code § 4-07-11-05)
- f) Conduct a written reduction-in-force analysis if more than one regular employee occupies positions in the designated division or work unit with the same classification targeted to be reduced. A reduction-in-force analysis must show a comparison of the employees' knowledge, skills, length of classified service, other experience and level of performance with the knowledge, skills and experience determined necessary to accomplish the work to be done following the reduction-in-force. (N.D. Admin. Code § 4-07-11-03) (SFN 17168, Reduction-In-Force Analysis Worksheet)
- g) If a position to be eliminated is the only position in the division or work unit assigned a single classification, no reduction-in-force analysis is necessary but this fact must be documented.
- h) Reduce regular employees in positions selected for reduction through the analysis, providing to affected employees, in person, a written notification of at least two weeks. More time is desirable when possible. Written notification must include the reason(s) for the reduction-in-force, notice of grievance and appeal procedures and outplacement services available to the employee.

implementing suggested changes. The employee may submit their request to the Human Resources Division.

In the event that the concern is not resolved or the employee does not feel comfortable following these steps, there are other options available to you.

- The human resources director is available for advice or assistance.
- The Employee Assistance Program at St. Alexius is available to all employees and their families. The EAP can be reached by dialing 701-530-7195 or 1-800-327-7195.
- HRMS offers Alternative Dispute Resolution services. They can be reached at 701-328-3345.

When an employee informs management of a concern or problem, management will try to respond as soon as possible. All information obtained in attempting to solve the problem will be held in strict confidence as much as possible.

Grievance Procedures

Should normal steps of problem resolution fail, Section 4-07-20-02 of the Administrative Code states that each agency, department, institution, board and commission shall establish internal grievance procedures. Under the Administrative Code, only certain employer actions are grievable. Those actions are:

- a) Demotion.
- b) Dismissal.
- c) Suspension without pay.
- d) Forced relocation.
- e) Reduction-in-force.
- f) Reprisal.
- g) Discrimination in employment.

If an employee feels they have been subject to one of the above listed actions, the employee may submit the North Dakota Department of Health Internal Grievance form to the Human Resources Division within 15 working days of the action, notice of action or reprisal.

Management will provide a written response from management within 15 working days after receiving your written grievance. If additional time is needed to investigate the allegations made in the grievance, the employee will be notified in writing within 15 working days. Extensions for a formal written response to the grievance are allowable up to 15 working days.

Employees will be allowed reasonable time during the workday to process a grievance without loss of pay.

Employees may waive their right to grievance by notifying management in writing.

The aggrieved employee may appeal management's response by sending a letter within five working days of the response to his or her section chief. The section chief will have 10 working

days to respond. This response may be appealed by sending a letter within five working days to the state health officer. The state health officer will investigate and make a determination within 10 working days.

If dissatisfied with the response or action taken by the state health officer, the employee may appeal to the State Personnel Board if the grievance is an appealable issue. The appeal must be filed with the State Personnel Board by filing the proper documentation with the human resource management services director. The appeal must be forwarded to Human Resource Management Services within ten working days after the receipt of the response from the state health officer. Employees should consult North Dakota Administrative Code, Article 59.5-03-03-12 for details regarding appeals to the State Personnel Board.

My name is Sandra Young. I was a proud employee of the Department of Health Lab Servicew8us for almost 11 years.

I experienced age discrimination during the last two years of my employment. I know firsthand the Human Resource Management Service (HRMS) grievance process is not fair for people in my situation.

I will share some high-level background because it is important in providing context.

In my last two years of employment with the Department of Health (DoH), I worked under a new assistant director - Eric Hieb. While under his direction, I noticed what I believed to be age discrimination. Some background on Eric Hieb: In his 2004 performance evaluation his supervisor noted the following: *"Eric developed a personal relationship with a staff member that he supervised and he failed to inform his supervisor. His subsequent actions (training and travel authorizations for example) could be viewed as questionable as they could be seen as favoritism and possible inappropriate use of funds."*

In Human Resources Management's notes from their interview with Lab Services Director (Myra Kosse), she told them she did not recommend Eric Hieb for the position of Assistant Director because she had been told by the previous Director that Eric Hieb cannot be in a management role.

While there were numerous small instances I believed to be age discrimination the first bigger instance that affected me was when I did not receive the 2013 Legislated Performance Based Raise in **July 2013**.

My performance had never been in question up to at that point. I had gone above and beyond in doing numerous additional projects. I loved my job and had put my heart into it. Eric Hieb told me he wanted to give me the Legislated Performance Based Raise but since I was the highest paid Microbiologist II, he was giving it to others to bring up their pay. I was the highest paid because I had the most tenure. One employee in her 20's had received this raise after being employed just six months. I shared my concerns of age discrimination with the Director (Myra Kosse) and Assistant Director (Eric Hieb) of Lab Services. No investigation took place

nor was my concern shared with Human Resources. It is standard protocol when an employee comes forth with a concern of discrimination or sexual harassment that Human Resources be notified and an investigation be conducted. This did not happen.

In November 2013, I was passed over for a promotion for the Quality Assurance coordinator position. I had been the assistant to the Quality Assurance coordinator for ten years. In those ten years I was never told my performance was unsatisfactory in fact in my last performance evaluation (May 2014) I was given the highest score possible for this job duty.

The individual who was promoted to that position had less than one year of tenure with the department and was in her 20's. She was the only candidate told prior to the job interviews by Eric Hieb, the assistant director, to prepare examples of changes that could be made to our quality assurance program and bring them to her interview.

I shared my concerns with the Director (Myra Kosse) and Assistant Director (Eric Hieb) of Lab Services as well as Department of Health Human Resources. Again, my concerns were no.

In early 2014, a coworker and I expressed concerns of age discrimination to the Section Chief (Dave Glatt). We shared our frustrations regarding the Quality Assurance promotion. We had both applied for it. Again, our concerns were not shared with Human Resources and nor were our concerns looked into.

Morale in our area of the lab was very low. Those over the age of 40 noticed Eric Hieb's obvious favoritism and attention toward those under the age of 40. One prime example was committee assignments. Committees are comprised of members due to job duties and those who are appointed by the assistant director, Eric Hieb. Every committee appointment by Eric Hieb was given to a women under the age of 40. This did not go unnoticed, one of Eric Hieb's team leaders requested a particular employee over the age of 40 be on a committee and he refused instead putting a person with considerably less tenure and experience, under the age of 40 on the committee.

April 10, 2014

In the early hours of April 10, 2014 my grandmother passed away. I had spent the evening into the morning at the hospital heading home in time to shower and get to work. I knew we were short staffed and the work load would be heavy because we were in the middle of a syphilis outbreak. As it turned out some of the computers were not working. My coworker had told Eric Hieb about the computer problems the day before. She felt she had been ignored by him because he was preparing to go to a conference. He was going to the conference in Montana with the twenty something year old that was promoted to the Quality Assurance position. It is worthwhile to note that the individual who previously held the Quality Assurance position was a male over the age of 40 and had never been asked to attend this conference with Eric Hieb.

Since Eric was not able to help get the computers working, two people from another department came over to help troubleshoot.

The two people troubleshooting had a recently-hired coworker also in her twenties working in their area and I made the following statement.

“How would you feel if XXXX were promoted over you.”

They replied, “That would never happen.”

I said, “It happened to us.”

I then went on to say something completely inappropriate while pointing to my chest. I said, “These are real.”

I regret this statement.

April 24, 2014 Investigation

The two individuals that I made the inappropriate statement to took their concern to the Director, Myra Kosse. Myra in turn notified the Department of health Human Resources. On April 24, 2014 Department of Health Human Resources came to the lab to complete a sexual harassment investigation. During my interview we discussed what I said, how it was

wrong and I again shared my frustration with Eric Hieb's favoritism and concerns of age discrimination. There was no investigation of my age discrimination concerns that I was aware of.

On May 19, 2014 I received an email notification from Eric Hieb after my normal working hours that my performance evaluation would take place the following morning. I was told not to defend myself.

On May 20, 2014 I received my performance review. It was devastating. I heard lies and misrepresentations regarding my performance. My performance review did not reflect my performance over the prior year. At no time prior had any concerns been raised by Eric Hieb regarding my performance. In fact, quite the opposite.

On June 6, 2014 I met with Kim Wassim at HRMS to share my concerns.

On June 10, 2014 I filed a grievance with the DoH HR / HRMS.

I filed a grievance because I felt my performance evaluation was retaliation for my multiple claims of age discrimination.

There was no age discrimination investigation by DoH Human Resources that I was aware of.

The HRMS investigation began on June 20, 2014.

I was interviewed in July, 2014.

Coworkers were interviewed July and August.

In August, I filed a complaint with the Department of Labor. When I shared with HRMS that I had done so, I noticed a temperature change. I filed with the Department Of Labor (DOL) because timelines required me to do so and I wanted the seriousness of the age discrimination I had experienced to be recognized.

The Department of Labor investigation was delayed multiple times. I was told by the Department of Labor that they were waiting for the findings of the HRMS investigation prior to beginning their own investigation. We

shared our concerns about the delay and asked them how HRMS could delay the Department of Labor investigation.

This is not allowed in the private sector. In the private sector if an employee files with the Department of Labor the employer nor their legal counsel is able interfere nor interrupt the Department of Labor's investigation.

I believe if the Department of Labor's investigation had not been delayed by HRMS I would still have my job.

From June 2014 until the HRMS report in January 2015 I lived a life of professional hell. What should have taken HRMS a couple of months to investigate took six long months.

During this time I was ostracized and shunned. Eric Hieb did not speak to me nor did he acknowledge me. I believe he encouraged others to ostracize and shun me as well. At the very least my coworkers did what he did - particularly those under the age of 40. In staff meetings where I sat down first, coworkers would not sit in a chair next to me. In fact they picked up the chairs next to me and moved them across the room away from me, leaving a wide berth of space around me. If I walked into a room where people were talking, the conversation stopped. To say it was uncomfortable is an understatement. I needed an independent outsider to look into what was occurring.

This legislation begins to level the playing field. It provides an avenue that those employed in the private sector already have. That is if you believe you have been discriminated against you can file a claim with the Department of Labor and go to court. Employees of the State of North Dakota are required to engage in the HRMS process, then the Department of Labor and court.

I can speak from painful, personal experience the emotional and financial toll it takes to endure this process. This process seems intended to grind you down until you are emotionally spent. I would happily recommend to people to go through the HRMS process if it were truly objective and unbiased. But it is not.

When the HRMS report did come out in January 2015 it was a punch to the gut. The authors seemingly took every liberty to give Eric Hieb and the Department of Health management the benefit of the doubt while portraying Tim Brosz and I as collaborators who were unhappy.

After the HRMS report was issued in January 2015, a bad situation was only made worse. The report seemed to embolden my coworkers to ostracize and retaliate against me even more. My work was scrutinized more than others. I was held to a higher standard. I filed grievances with DoH Human Resources who ignored my concerns. I was fired on April 29, 2015 for misuse of the grievance process and insubordination for requesting interim performance reviews.

After my termination I hired a lawyer. He shepherded me through the HRMS processes leading to the ALJ (Administrative Law Judge) hearings. I had a strong case. I had the evidence that I was mistreated by management and DoH Human Resources. After the obvious one-sided perspective HRMS demonstrated, I had ZERO hope of being treated fairly through the ALJ process.

To just engage in the ALJ process to discovery cost my family \$12,000.

My "hail Mary" hope was the Department of Labor and the courts.

I saw HRMS delay my Department of Labor investigation multiple times.

I observed the AG's office delay the Department of Labor investigation more than once.

HRMS has God-like powers that do not serve an employee going through what I went through. The process is extremely one-sided. Management has all the resources to shape their story. HRMS backs up management.

Until we experienced this, we had no idea the tactics HRMS and the AG's office could use. No one should have these abilities. A company in the private sector does not have the ability to delay a the Department of Labor investigation yet HRMS does.

In January 2016 the Department of Health settled for \$40,000. It wasn't about the money but I was unwilling to go further. The toll on my family was too great.

In summary

The current HRMS grievance and ALJ process seems designed to wear out those who share concerns. I have experienced first hand that people like me do not stand a chance.

The process is extremely one-sided towards management. The process does not fairly hear the voices of people like me.

The process has people engaging in it who are not objective nor unbiased and the state has unlimited resources and intimate knowledge of the process while people like me do not.

HB 1246 really isn't new. As a private sector employee, one can file a complaint with the Department of Labor and retain legal counsel and pursue their concerns through the courts.

State employees should have the ability when it comes to age discrimination.

My example, while seemingly unique, is an unfortunate reflection of the reality of human beings. We are not objective. We are not unbiased.

State employees deserve the same rights and privileges those in the private sector do.

I ask for your support of HB 1246.

Thank you for your time and consideration,

Sandy Young
Skyoung9700@outlook.com

Please refer to the HRMS Report of January 2, 2015:

Page 1 – *“Arvy Smith contacted Human Resource Management Services to conduct a workplace investigation.”*

- Sandy Young made the first contact.

Page 3 – *“Ms. Young was alleged to have said, “And these are real”, while pointing to her breasts in reference to Ms. Massen getting the Quality Assurance Coordinator position.”*

- This is a misrepresentation of what occurred. It suggests the incident was principally a sexual harassment issue.
- Multiple witnesses shared that the statement was, “How would you feel if Annalise O’Toole (a newly hired Chemist I out of college) was promoted over you? Well that is what happened to us.” Then Sandy grabbed her boobs and stated, “and these are real” in front of the chemists.

Page 4 – *“Mr. Hieb also told us that he had conversations with Ms. Young regarding her performance issues through the year.”*

- Not true. There was no documentation of this whatsoever.
- See Eric Hieb’s January 12, 2015 action plan – page 1.

Page 5 – *“Mr. Hieb stated he was under a strict deadline to complete all his staff’s performance evaluations...”*

- Isn’t it a requirement that all state employees receive annual performance evaluations? Why would there be a deadline issue if Mr. Hieb were doing his job?

Page 7 – *“Based on our analysis, it is difficult to see how salary administration correlates to scores on the evaluation.”*

- How is a manager who doesn’t tie performance to compensation credible?

Page 7 – *“Our review indicated that there is a slight difference between age and performance; however, we do not believe it is due to age discrimination.”*

- What is it based on then?
- Would it be reasonable for employees to sense this and have concerns?

Page 7 – *“Additionally, performance reviews are signed by Ms. Kosse and Mr. Hieb, which makes it more difficult for any bias of either employee to be reflected in the final annual performance review.”*

- Yet Ms. Kosse missed the fact that Eric Hieb copy and pasted comments that were meant for Tim Brosz’s performance evaluation in Sandra Young’s performance evaluation.

Page 7 – *“However, we are not going to second guess the supervisor in how he rates Ms. Young’s or Mr. Brosz’s performance during the entire year. Mr. Hiebe needs to correct the reference to “Tim” in Ms. Young’s 2014 performance review document.”*

- Why not second guess how the supervisor rated Ms. Young and Mr. Brosz when the supervisor had zero concerns with their performance until the DoH investigation a month prior to their performance evaluations?

Page 8 – *“Mr. Hieb was under a tight deadline to complete all performance evaluations.”*

Page 8 – *“We did not sense that management was angry at Mr. Brosz or Ms. Young; they were more confused and overwhelmed by the amount of allegations Mr. Brosz and Ms. Young discussed at the April interviews.”*

- How does one “sense” this? Is there training for this? Certifications?

Page 9 – *“Mr. Hieb stated that if there’s a problem with personnel, Mr. Brosz needs to communicate with Mr. Hieb about that, just like if there’s a problem with equipment.”*

- That is what Mr. Brosz did on April 24, 2014 and he was labeled as collaborating with Sandra Young.

Page 9 – *“Mr. Hieb has worked in the lab for many years. Mr. Hieb stated that in inappropriate topics of conversation in room 305 have been known for years by some people to some extent.”*

Page 10 – *“and when management received a sexual harassment complaint, they investigated and followed up.”*

- Yet they didn't follow up on the multiple of occasions Sandra Young shared concerns of age discrimination.

Page 13 – *“We did sense that some people we interviewed were holding back information, not because they were afraid of Mr. Hieb, but because they were trying to protect co-workers or didn't want to get involved.”*

- How does one “sense” this? Is there training for this? Certifications?

Page 13 – *“There is a difference in the performance scores and number of outstanding performance increases and bonuses between the groups of employees over 40 and under 40; however, we do not find it reasonable to conclude that age was a determining factor.”*

- Would it be reasonable for people over the age of 40 to perceive this and feel wronged?

Page 14 – Committees

- Every single time Eric Hieb had discretion, he put an employee under the age of 40 on the committee.
- Those over the age of 40 are going to notice favoritism of this nature.

Page 15 – *“In our opinion, we find it demeaning to Ms. Massen and her credentials for Ms. Young to suggest that Ms. Massen's promotion was based on age and attractiveness.”*

- All but three team members thought Sandra Young would be promoted to the QA Coordinator role.

Page 16 – *“While we do not believe Mr. Hieb is favoring or promoting younger staff, Ms. Young, Mr. Brosz, and Ms. Trythall have that perception.”*

- Perception is reality.

Page 17 – *Ms. Young and Mr. Brosz accused Ms. Kuklok of being an instigator, a “pot-stirrer.” Only one other person also said this about Ms. Kuklok. Nine people we interviewed, including Ms. Kuklok told us that Ms. Young is the instigator and “pot-stirrer”.*

- Maggie Kuklok admitted to sharing information between the lab rooms in her HRMS investigation – yet she wasn’t the pot stirrer.
- There was great concern regarding Maggie Kuklok’s unwillingness to follow direction and lab protocol. In fact in June 2014, Maggie Kuklok’s conduct lead to a live rabies exposure of a coworker – see Maggie Kuklok’s January 12, 2015 Action Plan.
- Wrote multiple emails to upper DoH management in an effort to get Sandra Young terminated.
- She was deemed credible by HRMS.

Page 18 – *“She (Sandra Young) implied that it was impacting her work but she didn’t want to say it was impacting her work because she didn’t want to be removed from the workplace. This statement is an example of Ms. Young’s pattern of inconsistent responses.”*

Pages 18-19 – Credibility of those interviewed.

- Sandy Young, Tim Brosz, Kristie Schwarzkopf, Dawn Wilhelmi and Jan Trythall – all deemed largely not credible or not entirely forthcoming.
- Every single one of these people were over the age of 40 with a decade or multiple decades of experience.
- Five out of seven of those over the age of 40.

Page 19 – *“It is interesting to us that Ms. Young and Mr. Brosz have followed similar paths in the course of this investigation.”*

- They witnessed the same things.
- They had the intestinal fortitude to do something about it.
- Mr. Brosz was a member of management – it was his duty to share risk concerns.

Page 20 – *“In our opinion, this type of behavior borders on insubordination.”*

- Engaging your long-winded manager in a dialogue to understand how to receive a raise / promotion you believe you deserved borders on insubordination?

Page 20-21 – *“We strongly recommend a consistent performance evaluation process be utilized going forward, where all employees receive a performance evaluation at least once annually. We recommend utilizing the actual performance evaluation scores to justify any performance increases, including the outstanding performance increases, to ensure a direct link between the performance score and salary increases...”*

North Dakota Department of Health

INTRADEPARTMENTAL MEMORANDUM

TO: Investigation File
FROM: Dirk Wilke, Human Resources Director
DATE: May 2, 2014
RE: Harassment complaint filed by John Gabriel

I. Identification of Problems

Jim Quarnstrom, Assistant Director of Chemistry, received the report from John Gabriel and reported to Myra Kosse, Lab Manager, who reported to Stacy Hoffman, HR Officer. Reported statement involved Kristie Schwartzkopf and Sandy Young. The reported statement indicated a possible violation of the Department of Health sexual harassment policy. Due to the nature of the complaint, Human Resources determined an investigation was needed.

II. Investigation Process

The interview team was comprised of four individuals: Lab Director Myra Kosse, Human Resources Director Dirk Wilke, Eric Hieb, Assistant Director of Microbiology, and Stacy Hoffman, Human Resources Officer. The scope was determined to be those who might have witnessed or experienced the harassment in question and could be expanded depending on findings. Prior to beginning the interviews with staff members, Dirk asked Eric and Myra for background regarding the situation.

During the interviews, Dirk informed the staff members that they were responding to a harassment complaint. Dirk also stressed that following the previous year's investigation into the workplace environment that it was important the lab continue to move forward in a positive way. The investigation had a goal of ensuring that. The interview team asked two primary questions to each employee: What happened in regards to the specific complaint and "Are you aware of any harassment that has taken place in the lab?" As the employee provided specific information and offered first-hand experiences, the team asked more detailed follow-up questions to provide clarity. The interview team did not limit employees from discussing anything they wished, nor did they require the employees to provide an answer if they preferred not to answer. Employees were also given the opportunity to talk directly with anyone on the interview team if they had additional comments after their interview.

After the employee interviews were concluded, the interview team discussed their findings and recommendations. Follow-up interviews were taken into account and discussed with Dirk, Eric, Myra, and Dave Glatt, Environmental Health Chief, when determining the final course of action.

III. Interviews

On April 24th, 2014, the interview team met with eight staff members from Chemistry and Microbiology. The process began with a background discussion of what the general report was before the individual interviews took place.

General Lab Report

Eric informed everyone that Jim Quarnstrom, Assistant Director of Chemistry, received the report and reported to Myra who reported to Stacy Hoffman. When describing the situation in Room 305 of micro, John Gabriel called it a "vortex of negativity." Eric stated that Tom Nemeth and John Gabriel were the chemists involved.

The reported statement involved Kristie Schwartzkopf and Sandy Young. The comments were "How would you feel if Annalise O'Toole (a newly hired Chemist I out of college) was promoted over you? Well that is what happened to us." Then Sandy grabbed her boobs and stated, "and these are real" in front of the chemists.

Eric informed the team that he had heard rumblings of Chrissie Massen bashing since she was hired for the QA/QC position over Sandy and Krissie but never got reported. Sandy did have a 4 ½ hour discussion with him regarding the hiring. She felt it was her job to get. Eric indicated after the conversation that he told her she needed to come to terms with the situation.

Dirk asked for his reference why was she not chosen. Eric stated that interview team for QA/QC position was Myra, Stacy, Eric and Michelle Feist from Disease Control. Chrissie was hired because she came into the interview very prepared, had a binder full of QA/QC examples and ideas of how to move lab forward. Myra also stated that Chrissie had good experience while working at school. Sandy gave an OK interview but didn't provide ideas to grow and improve. Eric indicated that he had told all applicants that he and Myra wanted examples of how to improve.

Jim Quarnstrom

Jim was asked as first receiver of the report what was reported to him. Jim said that John Gabriel was doing IT work. John had described the room with Sandy and Kristy as a negativity vortex. And comments were made by Sandy which John felt were not appropriate. He reported she said "How would you feel if Annalise O'Toole was promoted over you? Well that is what happened to us." Then Sandy grabbed her boobs and stated, "And these are real." This was said to John and Tom Nemeth. Jim followed up with Tom who verified the claim. He then reported the claim to Myra.

John Gabriel

John stated that he was fixing computers when Sandy Young randomly asked "How would you feel if Annalise O'Toole was promoted over you?" John thought comment was weird and tried to ignore it but



NORTH DAKOTA
DEPARTMENT of HEALTH

Intrdepartmental Memorandum

B1

DIVISION of LABORATORY SERVICE

2635 EAST MAIN AVE
P O BOX 1
BISMARCK ND 58506-0001
(701) 328-4

To: Eric Heib

From: Dave Glatt, Section Chief of Environmental Health Section

Cc: Myra Kosse, Director of Laboratory Services
Dirk Wilke, Director of Human Resources

Date: January 12, 2015

Re: Action Plan

As I stated in the laboratory meeting on January 6, 2015, we have received the final report from the workforce investigation conducted independently by Human Resource Management Services (HRMS). In reviewing the report recommendations and conclusions, several areas of improvement and clarification involving you were identified. I believe, in order to successfully move forward, improve your overall performance, and improve the working atmosphere in the lab, we need to implement these suggestions.

With that in mind, we have created an action plan to provide specific guidance and clarification of our expectations moving forward. This memorandum and action plan are not disciplinary in nature, but serve to address issues raised in the investigation and answer questions you have raised. Please note that these expectations are also designed to address not only the HRMS recommendations, but additional Department of Health concerns.

Effective immediately, you will be expected to follow the following action plan:

Provide clear examples of issues on future performance evaluations

Although the HRMS report verified that Sandy and Tim's performance evaluations reflected the entire year, it also suggested that you could have provided more specific examples to better emphasize that the review looked at the entire year. It is very important as a supervisor to discuss performance issues with staff so that they are aware of your expectations and where they need to improve. In order to do this effectively, clear and concise communications are best and should take place throughout the year. This allows employees an opportunity to improve and address areas of concern.

Clarify the purposes of the lab committees to all staff

pg 15

One area of confusion noted by HRMS was the lab committees. Staff and HRMS both are confused by the responsibilities and purpose of the existing committees. As Assistant Director, you are in an appropriate position to clarify the purpose of the committees to all lab staff. The best way to do this might be with a face to face meeting so that staff can ask questions followed by an email to summarize your discussion.

Ensure staff have been appropriately trained in multiple analytical areas and laboratory competencies and clarify customer service focus

One of the goals of the lab is to provide high quality, cost effective, accurate and timely specimen results to our customers. This can be accomplished through effective teamwork and ensuring staff have been appropriately trained in multiple analytical areas and laboratory competencies. One of the areas of concerns noted by HRMS is the pride and ownership staff feels with the testing they perform. They also mentioned that there may be lingering effects from Mike Tryhall where cross training and help with testing was discouraged. HRMS also indicated that Mike's practice in regards to cost efficiency may be a reason testing has been delayed in some circumstances. We want to be a customer driven lab and cross training will allow the lab to meet one of its goals of providing timely, accurate and, more efficient service. Clarify that customer service is our focus and discuss with staff our expectations in regards to turnaround times and cost efficiency. It is important to note that although we are evaluated as individuals for the work that we accomplish we are also evaluated collectively as a laboratory. How we function to serve and interact with customers collectively as a laboratory is as equally important as our individual accomplishments. We know that examples of exemplary work effort and customer service do reflect positively on the lab but also know that missed specimen holding times or inaccurate analyses can have the opposite or negative public opinion regarding lab effectiveness as a whole.

Be mindful of the perceptions of your decisions and communicate the reasons for your decisions more clearly, frequently, and consistently with all staff.

While HRMS confirmed that they do not believe you are favoring or promoting younger staff, they did recommend that you are mindful of that perception. A solution for addressing this perception is more clear, frequent, and consistent communication of decisions with staff. A suggestion provided by HRMS is that you communicate concisely to the lead analysts with the expectation that the information is passed on. Following this process will allow all areas of the lab to receive the information without taking too much of your individual time.

Improve your verbal and written communication

In reviewing the report with HRMS, one area of concern was the method in which you communicate. During the investigation, they noticed that you responded to a lot of questions by providing a lot of background and analysis prior to directly answer a question. While knowledge of background and analysis are good to determining an appropriate response, statements should be made in clear and concise language. By focusing so much on background, the message can get lost or skewed. A good example of this was the email you sent Sandy and Tim in preparation

for their evaluation. Your goal was to have a constructive discussion during the evaluation, however because you wanted to provide additional information to explain your goal it hurt your message. Instead of a simple, "I hope to have a constructive discussion during the evaluation" you wrote a five sentence paragraph which included "From a place of personal concern for you, please reconsider thoughts of defensiveness or other counter-productive approaches on your behalf or in defense of others." While we understand the intent, this was an inappropriate comment which could have been avoided by concisely and clearly stating what you mean. As a supervisor, it is important to be able to communicate your ideas and expectations with staff. The best way to do this is by providing clear and concise language. This makes the message the main focus. It is our expectations that you work to improve your communication in this way moving forward.

Move Forward

The HRMS investigation was independent and very thorough. It has provided us with some recommendations on how to move forward in our efforts to maintain a professional microbiological laboratory while establishing a constructive work environment. We believe that although you might not have agreed with all the outcomes of the investigation, it is important that you accept the results and move forward with the rest of the lab employees.

We also expect that you will follow the action plan that was sent to the entire lab. Eric, please understand that we are trying to work with you to ensure that you are aware of our expectations. Thank you for your help as we strive together to better serve the public and make the microbiological laboratory a great place to work.

I have been given a copy of this document have had an opportunity to read it. I understand that my signature does not indicate that I agree with the content, only that I have had an opportunity to read this document.

Eric Stiel
Name

2-23-2015
Date



NORTH DAKOTA
DEPARTMENT of HEALTH

Intrdepartmental Memorandum

C

DIVISION of LABORATORY SERV

2635 EAST MAIN AVI
P O BOX
BISMARCK ND 58506
(701) 328

To: Maggie Kuklok

From: Dave Glatt, Section Chief of Environmental Health Section

Cc: Myra Kosse, Director of Laboratory Services
Dirk Wilke, Director of Human Resources
Eric Heib, Assistant Director of Microbiology

Date: January 12, 2015

Re: Action Plan

As I stated in the laboratory meeting on January 6, 2015, we have received the final report from the workforce investigation conducted independently by Human Resource Management Services (HRMS). In reviewing the report recommendations and conclusions, several areas of improvement and clarification involving you were identified. I believe, in order to successfully move forward, improve your overall performance, and improve the working atmosphere in the lab, we need to implement these suggestions.

With that in mind, we have created an action plan to provide specific guidance and clarification of our expectations moving forward. This memorandum and action plan are not disciplinary in nature, but serve to address issues raised in the investigation and answer questions you have raised. Please note that these expectations are also designed to address not only the HRMS recommendations, but additional Department of Health concerns.

Effective immediately, you will be expected to follow the following action plan:

Follow all protocols as directed

In the HRMS report is stated that in response to the allegation that you have a continuous disregard for following protocol you responded, "it depends on the protocol; I follow the CDC protocol through the line." It is important, especially in a laboratory setting, that all protocols are followed as directed. While you may not agree with all protocols in place, they are in place to protect you, the lab and others. If you feel that you have a better solution or protocol, we encourage that you pass that suggestion through Tim, Eric and Myra. This allows for management review and ensures all aspects of the protocol have been reviewed before implementation.

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Move Forward

The HRMS investigation was independent and very thorough. It has also provided us with some recommendations on how to move forward in our efforts to maintain a professional microbiological laboratory while establishing a constructive work environment. We believe that although you might not have agreed with the outcomes of the investigation, it is important that you accept the results and move forward with the rest of the lab employees.

We also expect that you will follow the action plan that was sent to the entire lab. Maggie, please understand that we are trying to work with you to ensure that you are aware of our expectations. Thank you for your help as we strive together to better serve the public and make the microbiological laboratory a great place to work.

I have been given a copy of this document have had an opportunity to read it. I understand that my signature does not indicate that I agree with the content, only that I have had an opportunity to read this document.

Margaret K. Kuhl
Name

2.23.15
Date

Jan 30, 2017

HB 1246

8



NORTH DAKOTA
HUMAN RESOURCE MANAGEMENT SERVICES

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TO: Dr. Dwelle, State Health Officer
Department of Health

Arvy Smith, Deputy State Health Officer
Department of Health

Tag Anderson, Director
OMB Risk Management Division

FROM: Travis Engelhardt, Human Resource Officer 
Human Resource Management Services

Kim Wassim, PHR, Human Resource Officer 
Human Resource Management Services

SUBJ: Workplace Investigation Report
To be attached to the Department of Health Risk Management Incident Report.
This investigation was conducted at the request of the Department of Health
and Risk Management.

DATE: January 2, 2015

We have completed our workplace investigation into allegations of age discrimination, sexual harassment, hostile work environment, and retaliation/reprisal at the Department of Health, Microbiology Lab.

Scope of Investigation

Arvy Smith contacted Human Resource Management Services to conduct a workplace investigation. Laurie Sterioti Hammeren, Director, Human Resource Management Services, assigned Travis Engelhardt and Kim Wassim to conduct the investigation.

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We conducted the interviews, which consisted of pre-established questions, in Kim Wassim's office on the 14th floor of the Capitol. Opening and closing statements were read to each individual interviewed.

Those interviewed from the Department of Health included:

- Sandy Young, Microbiologist II
- Tim Brosz, Microbiologist III
- Kristie Schwarzkopf, Microbiologist II
- Margaret (Maggie) Kuklok, Microbiologist II
- Dawn Wilhelmi, Medical Lab Tech II
- Heather Sease, Microbiologist II
- Tracy Hoke, Microbiologist II
- Laura Mastel, Microbiologist II
- Lisa Wingerter, Microbiologist II
- Lori Carter, Medical Lab Tech I
- Karla Reinhardt, Administrative Assistant II
- Jan Trythall, Microbiologist III
- Lisa Well, Microbiologist III
- Stacy Hoffman, HR Officer I
- Dirk Wilke, Human Resource Director
- Michelle Feist, ELC Program Manager
- Myra Kosse, Director of Lab Division
- L. David Glatt, Chief – Environmental Health Section
- Christie (Chris) Massen, QA & CLIA Coordinator
- Eric Hieb, Assistant Director, Division of Lab Services - Microbiology

Second interviews were conducted with Sandy Young and Tim Brosz. Third interviews were requested by Sandy Young and Tim Brosz. The persons interviewed were provided an opportunity to review the interviewer's notes for accuracy at the conclusion of each interview. Each person was afforded an opportunity to make changes, amendments, and additions to the notes. Each person then signed and dated the notes. The investigators also reviewed the personnel files, disciplinary files, and training records of staff, and the Department of Health's Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution policies.

Investigative Findings of Complaints/Allegations

Ms. Young's and Mr. Brosz's complaints included allegations of retaliation/reprisal, age discrimination, sexual harassment, and hostile work environment. During the course of the investigation, we attempted to verify statements made by Ms. Young, Mr. Brosz and others to arrive at conclusions and recommendations regarding the allegations. There were hundreds of individual allegations; we investigated each allegation. For the purpose of this report, however, we have summarized our findings and only addressed the major allegations. We provided our conclusions and recommendations after each

section. We attempted to categorize the allegations into retaliation/reprisal, sexual harassment, age discrimination, and hostile work environment. The following includes our summary of findings regarding the allegations. Details of the allegations and responses are listed on the investigation notes. Wherever and whenever possible, the words of interviewees are reflected in these sections.

Standard of Proof: As a basis for our determination, we considered whether there was a reasonable basis to conclude that inappropriate behavior occurred.

April 10, 2014 Incident

We talked to Ms. Wilhelmi, Ms. Schwarzkopf, and Ms. Young who were present in the lab at the time of the incident. Ms. Young was alleged to have said, "And these are real", while pointing to her breasts in reference to Ms. Massen getting the Quality Assurance Coordinator position. Ms. Young was reluctant to admit her involvement in the April 10, 2014 incident. Although Ms. Young and Mr. Brosz allege that others were engaging in inappropriate behaviors and topics of conversation this does not excuse Ms. Young's behavior and language on April 10, 2014. The two Chemistry employees who originated the complaint of misconduct on April 10, 2014 were not interviewed in the course of our investigation. Our intent was not to re-investigate the allegation of misconduct that occurred on April 10, 2014 since an investigation of that incident and follow-up actions have been completed by the Department of Health. For the purposes of our investigation, we asked about the incident that occurred on April 10, 2014, because that incident and the subsequent investigation appear to be a catalyst for what followed.

Conclusions/Recommendations - April 10, 2014 Incident

We believe Mr. Wilke should have interviewed Ms. Wilhelmi when he conducted the investigation into the April 10, 2014 incident. Mr. Wilke told us Ms. Wilhelmi was not in the lab the day the interviews were conducted. Mr. Wilke stated he decided not to interview Ms. Wilhelmi as he already had multiple witnesses who verified what Ms. Young said on April 10, 2014. The decision not to interview Ms. Wilhelmi may have given Ms. Young the impression that not all important witnesses were interviewed and that only a select group were chosen. Clearly, Mr. Wilke was in charge of the investigation and decided who was on the interview team and who was to be interviewed. Mr. Wilke included supervisors on the investigation team because he wanted them to hear what was going on in their areas. In the future, we recommend that Mr. Wilke not include supervisors on the interview team. The investigation team must be neutral and objective and not have a vested interest in the outcome of the investigation; the investigation team should not contain either a subordinate or supervisor of any of the participants. The decision to include supervisors on the investigation team may have given Ms. Young the impression that what she stated in the interview was used against her by her supervisors. This likely contributed to the

charge of retaliation. Ms. Young believes that since other people have also made sexually related comments in the workplace, she should have not been taken to task for what she said on April 10, 2014 – she felt she was being held to a different standard. However, to our knowledge, no Microbiology Lab staff have reported being offended or harassed prior to the April 10, 2014 incident. The Chemistry employees that complained about the April 10, 2014 incident with Ms. Young apparently knew who Ms. Young was referring to with her comment, were offended, and reported this to their manager who had an obligation to act.

Retaliation/Reprisal

Ms. Young and Mr. Brosz alleged that the statements they made on April 24, 2014 during the interview to investigate allegations of sexual harassment caused Mr. Hieb to give them a poor evaluation for the 2014 annual performance period. Ms. Young stated she was previously unaware of the issues brought up in her performance evaluation and felt that the evaluation only reflected recent events. On her evaluation, a reference was made to Mr. Brosz which Mr. Hieb explained was an error. Mr. Hieb also told us that he had conversations with Ms. Young regarding her performance issues throughout the year. For example, Mr. Hieb stated that Ms. Young missed some turnaround times on influenza and he discussed it with her. In addition, Ms. Young did not always accept help when offered and this gave the perception that she was controlling of her workload. In her performance evaluation, it stated Ms. Young followed/watched/manipulated people. Under the Basic Work Expectations of Ms. Young's performance review, it stated incidents involving criticism of other's work abilities, workloads, and personal life issues should be discontinued. Mr. Hieb explained that Ms. Young creates friction and tension in the organization and although Ms. Young claims that others in the office were also critical of coworkers, Mr. Hieb has not really experienced this critical behavior from others. Ms. Young's criticisms stand out as they were said in front of Ms. Kosse, Mr. Glatt, and Mr. Wilke. No one else in the office has a pattern of criticizing others like Ms. Young. Mr. Hieb stated, for example, that Ms. Young criticized Ms. Hoke for not having enough work to do, and stated that Ms. Schwarzkopf should not be a Microbiologist II. What Ms. Young believes to be casual observations on her part actually create a great deal of tension in the office. Mr. Hieb told us that Ms. Young has told him that she has no respect for Ms. Kosse as Lab Director, that she didn't accept the hiring process for the QA Coordinator position, and a hiring algorithm that she provided should have been used. Ms. Young told Ms. Kosse that Ms. Kosse doesn't care and said Mr. Hieb is not responsive. Mr. Hieb said Ms. Young has made similar comments many times throughout the last year to such an extent that he questioned whether her level of criticism for her supervisor amounted to insubordination.

Mr. Hieb stated that he sent Ms. Young's and Mr. Brosz's 2014 evaluations to Mr. Wilke, Ms. Kosse, and Mr. Glatt for review. Mr. Wilke told Mr. Hieb that Mr. Brosz's was a solid review and on Mr. Wilke's advice, Mr. Hieb incorporated the April 10, 2014 incident on Mr. Brosz's review.

Mr. Hieb stated that Ms. Young received a "2" (signifying the employee's performance is fully acceptable and that the employee has a competent and dependable level of performance) on her primary job for 2014 because she didn't do anything outstanding over the past year that would merit a higher rating; additionally, Ms. Young missed turnaround times due to attempts to achieve cost efficiency. Ms. Young did meet expectations for the year – a "2" means "meets expectations." On her performance evaluation, Mr. Hieb said Ms. Young needs to use other trained staff when needed in order to complete testing more efficiently and effectively.

Ms. Young stated Mr. Hieb told her on May 28, 2014 she would have received a "3" instead of a "2" for HIV and hepatitis if not for recent events. Mr. Hieb stated he doesn't remember saying that. Mr. Hieb said he didn't put everything in Ms. Young's performance evaluation, such as Ms. Young's not getting all her procedures done, but also said that in the last few months she has gotten almost all of them done. Mr. Hieb said he had a conversation with the whole staff about getting procedures done and he gave the task to the QA Committee. Mr. Hieb said he expected Mr. Brosz and Ms. Young to lead this charge.

Ms. Young stated she did not follow, watch, or manipulate people. Mr. Hieb stated Ms. Young was taking "following or watching" too literally; he meant it metaphorically and tried to explain it to her as more monitoring – particularly of Ms. Kuklok, as Ms. Young felt Ms. Kuklok was young, new, and didn't want her to make mistakes. Mr. Hieb stated that he tried to tell Ms. Young that her trying to keep Ms. Kuklok from making mistakes looks like following or monitoring to Ms. Kuklok. Mr. Hieb stated he tried to share examples with Ms. Young after the QA Coordinator position was filled and prior to her performance evaluation. Mr. Hieb stated that Ms. Kuklok is trying to do her best and he has no doubts in Ms. Kuklok's abilities.

Both Ms. Young and Mr. Brosz were surprised at the short notice they were given for their performance evaluation meeting; they felt they had little time to prepare and a comment Mr. Hieb made in an email before the evaluation meetings intimidated them and caused them to not fully participate in the meeting. In his email, Mr. Hieb stated, "From a place of personal concern for you, please reconsider any thoughts of defensiveness or other counter-productive approaches on your behalf or in defense of others." Mr. Hieb stated he was under a strict deadline to complete all his staff's performance evaluations and he also gave other staff short notices of their evaluation meetings. This was confirmed by other staff. Mr. Hieb also stated that they had to work around multiple people's schedules including Mr. Glatt and Mr. Wilke to find time for Ms. Young's and Mr. Brosz's evaluation meetings. Both Ms. Young and Mr. Brosz indicated they felt intimidated by a statement Mr. Hieb made in his email to them. When asked about this statement, Mr. Hieb said he wanted them both to come to the meeting in a constructive manner. He typed and deleted this statement and typed it again. He had a strange feeling its meaning would be misunderstood in this manner. Mr. Hieb thought this situation could be overcome and they could get to a better place.

Ms. Young alleged she was the only Microbiologist and oldest in a non-management position to not receive a legislated performance based raise in 2013 when her scores were equal to those who received increases. For several reasons, 2013 was a transitional year and not all staff had actual performance reviews or evaluation documents including Mr. Brosz and Ms. Young. Because of time constraints, Mr. Hieb only did evaluations for those who would be getting the additional 1% outstanding performance increase. Mr. Hieb stated only 40% of staff could get the additional 1% and he concluded that there were others performing above Ms. Young, but she was not a poor performer. Mr. Hieb said it was a difficult decision deciding who would get the additional 1%; he felt many deserved it and would have preferred everyone got it. However, most of the lab staff could not receive it.

Ms. Young received competent performance ratings ("2") or above on all of her technical skill areas of her 2014 performance evaluation. She received deficient performance ratings ("1") on several of her soft skills areas such as communication, team work/cooperation, and attitude, and unacceptable ratings on positive attitude, working relationships, courtesy and respect. Ms. Young received a 1% performance increase and a 2% equity increase for 2014.

On his 2014 performance evaluation, Mr. Brosz received a deficient performance rating ("1") on lead analyst – virology/immunology and competent performance ratings ("2") or above on all other critical job duties; he received a deficient performance rating ("1") on team work/cooperation, and an unacceptable rating on working relationships. Mr. Brosz received a 3% performance increase and a 2% equity increase for 2014. Mr. Hieb stated that both Ms. Young's and Mr. Brosz's performance reviews were based on the entire previous year. Mr. Hieb wondered how Mr. Brosz could claim retaliation based on his performance review since he received a 3% performance increase along with the 2% equity increase.

Mr. Hieb said his goal with performance reviews is not to destroy people but to improve people and point out improvement opportunities; he wasn't trying to point out every little incident or example or criticize everything, just general principles.

Conclusions/Recommendations - Retaliation/Reprisal

Ms. Young alleged a high correlation between age and performance. Ms. Young did receive a 4% legislated performance based raise in 2013. The additional 1% is not guaranteed to anyone and only awarded to staff whose performance is rated as outstanding. In Microbiology, two staff over 40 and five staff under 40 received the additional 1% in 2013. For 2014, the overall average performance score of those over 40 is 2.11; those under 40 is 2.33. There are 13 lab staff included in our analysis which showed that of the seven over the age of 40, three received an outstanding performance increase (additional 1%) in 2014; of the six under the age of 40, four received an outstanding performance increase in 2014. For 2014, one of the seven

over the age of 40 received a performance bonus; three of the six under the age of 40 received a performance bonus. Ms. Young and Mr. Brosz provided their own performance scoring analyses which we reviewed and found to be misleading. For example, Ms. Young's analysis compares the total number of "3" ratings on the annual reviews of all employees supervised by Mr. Hieb and claims there is a correlation between the number of "3" ratings an employee receives on their annual reviews and salary increases. We found there to be no relationship between the number of "3" ratings on an employee's annual review and salary increases. Based on our analysis, it is difficult to see how salary administration correlates to scores on the evaluation. For example, Tracy Hoke who is under 40, received the 2nd highest overall average rating of 2.38; she did not receive the outstanding performance increase. Kristie Schwarzkopf, who is over the age of 40, received the 3rd lowest overall average rating of 2.10 and received the outstanding performance increase. This is further evidenced by Laboratory Services using a seven point questionnaire to determine outstanding pay increases, which is separate from the performance review document. We reviewed and analyzed the 2013 and 2014 performance documents in the personnel files. Our review indicated that there is a slight difference between age and performance; however, we do not believe this is due to age discrimination. (See attachments.) Mr. Hieb stated that he did not know the age of his staff until these allegations came up and that he has not used age as a factor in determining performance increases or in any other personnel action. Additionally, performance reviews are signed by Ms. Kosse and Mr. Hieb, which makes it more difficult for any bias of either employee to be reflected in the final annual performance review. We find that there are not reasonable grounds to believe that Mr. Hieb discriminated against Ms. Young on the basis of her age in either her 2013 or 2014 annual performance reviews and decisions regarding the rate of performance based increase Ms. Young received in 2013 and 2014. Further, all outstanding performance increase and bonus documents are signed by Ms. Kosse, Mr. Glatt, and Ms. Arvy Smith. We find it unreasonable that with all the higher levels of review and approval, Mr. Hieb could discriminate based on age.

We reviewed Mr. Brosz's and Ms. Young's 2014 performance reviews and find that overall, the performance review documents and content for Mr. Brosz and Ms. Young are reasonable. Ms. Young did receive performance and equity increases in 2014. Due to deficiencies in several soft skill areas of her performance, there could have been no increase for Ms. Young. However, we are not going to second guess the supervisor in how he rated Ms. Young's or Mr. Brosz's performance during the entire year. Mr. Hieb needs to correct the reference to "Tim" in Ms. Young's 2014 performance review document.

Upon initial review of Ms. Young's and Mr. Brosz's 2014 performance reviews, it seemed like the April 10, 2014 incident and their interviews could have had a negative impact on their performance reviews and their performance reviews did not seem to reflect the entire year. It appeared to us the language used in their reviews primarily related to the April 10, 2014 incident. However, in discussions with Mr. Hieb, it became

apparent to us that the performance reviews reflected the entire year based on a number of incidents and a pattern of behavior that occurred throughout the past year. We do believe that Mr. Hieb could have provided more specific examples that occurred during the year in the performance reviews so Ms. Young and Mr. Brosz would have clearly understood the evaluation reflected the entire year.

We too wonder how Mr. Brosz could claim retaliation based on his performance review since he received a 3% performance increase along with the equity increase – considered a “full increase” for lab staff and the same amount received by many others. Mr. Brosz did not receive the additional 1% outstanding performance increase, however, this is not guaranteed to anyone. We believe Mr. Brosz is fortunate to have received the full performance increase given the fact that his performance was deficient in several areas. We do not believe that any low ratings in the 2014 employee evaluations were based on the interviews to investigate the April 10, 2014 incident but were instead based on work performance over the entire year; therefore we can find no evidence of retaliation by Mr. Hieb against Ms. Young and Mr. Brosz.

Mr. Hieb was under a tight deadline to complete all performance evaluations. The staff we interviewed indicated they too received short notice for their performance review meetings. Mr. Hieb was trying to coordinate the schedules of Mr. Glatt, Ms. Kosse, and Mr. Wilke in conducting the performance review meetings for Mr. Brosz and Ms. Young. Both Ms. Young and Mr. Brosz indicated they felt intimidated by a statement Mr. Hieb made in his email to them. Mr. Hieb, Ms. Kosse, Mr. Wilke, and Mr. Glatt indicated that Mr. Brosz and Ms. Young participated in the meetings and did not appear to be intimidated. The meeting with Mr. Brosz was reported as productive and focused on ways he could improve. It was reported that Ms. Young didn't seem intimidated and went on and on during her review. We understand Mr. Hieb's intent (productive performance evaluation meeting) with sending the cover letter; however, it was poorly worded. We understand Mr. Hieb had a tight deadline in completing performance evaluations and that other staff actually had less time to prepare for their meetings than Mr. Brosz and Ms. Young, however, it is reasonable that based on the nature of these reviews (covering some deficient ratings), more time should have been provided to Ms. Young and Mr. Brosz to reflect on the information in their reviews and prepare for their performance review meetings. We understand why Mr. Hieb invited Mr. Glatt, Ms. Kosse, and Mr. Wilke to the performance evaluation meeting (he wanted everyone in the room to answer questions since they were the next level of review), however, that many people and senior managers involved in a performance review can be intimidating to an employee.

We did not sense that management was angry at Mr. Brosz or Ms. Young; they were more confused and overwhelmed by the amount of allegations Mr. Brosz and Ms. Young discussed at the April interviews.

To our knowledge, Ms. Young has not reported being offended or harassed by what coworkers said in the workplace. After she was accused of sexual harassment, Ms. Young discussed numerous incidents that occurred prior to April 2014. Ms. Young reported these incidents to us and others as examples of everybody else's inappropriate behavior, which we believe in her mind excused her inappropriate behavior on April 10, 2014. We do not agree with Ms. Young and find it unreasonable to ignore any instance of sexual harassment even if there are other alleged incidents of misconduct. Alleged inappropriate behavior by others does not excuse Ms. Young's behavior on April 10, 2014.

Sexual Harassment/Hostile Work Environment

Ms. Young alleged that other staff in the lab besides her made sexually related comments, these types of comments were known to management, and she was held to a different standard than other staff when she was accused of sexual harassment in April 2014.

Mr. Brosz stated that he has heard sexually related comments from a number of staff in the workplace and when he does he tries to block that stuff away. Mr. Brosz stated Mr. Hieb handles all personnel issues and he was not aware that he had personnel related duties as lead analyst. When asked how he feels regarding the allegation that lab management knew of the sexually offensive culture in the lab, Mr. Brosz responded that Mr. Hieb has ears, Ms. Kosse sees these people socially, and they never said anything about stopping this kind of talk. Mr. Hieb stated that bringing personnel issues regarding staff to management is in Mr. Brosz's job description and he needs to keep Mr. Hieb apprised of issues. Mr. Hieb stated his assumption is that if Mr. Brosz needs help, he would come ask for assistance. Mr. Hieb stated that if there's a problem with personnel, Mr. Brosz needs to communicate with Mr. Hieb about that, just like if there's a problem with equipment.

Mr. Hieb has worked in the lab for many years. Mr. Hieb stated that inappropriate topics of conversation in room 305 have been known for years by some people to some extent. Mr. Hieb stated that in room 305, conversations were inappropriate at different times and he's aware that this has been going on for years. Mr. Hieb stated he didn't think sexually related conversations in room 305 stopped when he became Assistant Director. Mr. Hieb stated he had not had any conversations with staff in room 305 about stopping sexually related conversations once he became Assistant Director; he was focusing on his new role and the reorganization per Mr. Glatt's expectations.

Several lab staff admitted to us they made sexually related comments in the workplace.

Ms. Young alleged that a vendor made an inappropriate comment towards her in the fall of 2011 and she told Mr. Brosz and Mike Trythall the day it happened. Mr. Brosz stated he also reported this the same day to Mr. Trythall. Mr. Brosz stated he brought this up

at various times to Mr. Trythall, Mr. Hieb, and Ms. Kosse and nothing was done about it. Mr. Brosz stated he brought it up again to Mr. Hieb and Ms. Kosse in 2013 and they acted like it was the first time they heard about it. Mr. Hieb and Ms. Kosse stated they were unaware of the incident until 2013 and they immediately contacted HR when they became aware of the alleged incident. It was determined there wasn't enough time to get a new vendor for 2013 so Ms. Young was provided several options, including paid administrative leave when the vendor was there. Ms. Young chose to stay at the workplace and stay away from the vendor. Ms. Kosse and Mr. Hieb stated they are currently in the process of an RFP to procure a new vendor for this service.

Conclusions/Recommendations - Sexual Harassment/Hostile Work Environment

The employees we interviewed are aware of the Department of Health's Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution Policies. For 2014, the Department of Health required all employees to review certain policies as part of the performance evaluation including Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution. There were a variety of responses when we asked if and when they had attended any training related to these policies; however, in general, it is our belief that lab staff have not had any recent training in these areas.

We confirmed that a number of staff in the Microbiology Lab made sexually related comments - mostly sharing information about their own personal lives. Some of these comments were made in the lab, some during breaks in the break room. To our knowledge, other than the complaint regarding the April 10, 2014 incident, no one reported sexual harassment by coworkers in the Microbiology Lab. Even though no one complained to management or HR, these types of sexually related conversations in the workplace are clearly inappropriate. It appears sexually related conversations became somewhat common in the workplace, which led to the sexual harassment complaint against Ms. Young on April 10, 2014. Even though others made sexually related comments in the workplace, this does not excuse Ms. Young's behavior on April 10, 2014. We do not find a reasonable basis to believe that Ms. Young was being held to a different standard than other employees, because although other inappropriate comments may have been made in the workplace by other employees, no report of sexual harassment was made, and when management received a sexual harassment complaint, they investigated and followed up.

We reviewed the job posting for the lead analyst position Mr. Brosz currently has and it contains a bullet including personnel related duties as part of his job description; Mr. Brosz stated he read the job posting when he applied for the lead analyst position and he did not recall that's what it said. We believe that both Mr. Brosz and Mr. Hieb were aware of these types of sexually related comments and conversations and should have addressed them immediately and appropriately. It is everyone's obligation to keep the workplace free of any type of inappropriate comments or behavior, especially anyone in

a management, supervisory, or lead position. We found a basic lack of understanding of the difference between appropriate work related discussions and inappropriate sexually related conversations. We strongly recommend that the entire lab, including management, receive in-person Harassment Prevention education and training. Human Resource Management Services offers such training.

Since we did not talk with Mr. Trythall, we were not able to verify the incident involving the vendor and when it was reported to management. However, it appears that management addressed this issue with Ms. Young in 2013 and are in the process of selecting a new vendor. It appears management addressed this issue when they became aware of it.

Age Discrimination/Hostile Work Environment

In her grievance, Ms. Young stated that Mr. Hieb's management and leadership style creates a hostile work environment. Ms. Young stated that Mr. Hieb has divided staff age wise; those over 40 feel they are not important to Mr. Hieb and that the group under 40 is his everything. Ms. Young stated she feels that Mr. Hieb won't call on the group of employees over 40 for projects and committees, and that Mr. Hieb doesn't engage or spend time with the group of employees over 40.

Mr. Hieb stated he doesn't know how his management and leadership style can create a hostile work environment and doesn't know what he'd be doing to create a hostile work environment. Mr. Hieb described his management and leadership style as fairly hands off, provides resources and tools to staff, expects staff to achieve job goals or ask for help, has an open door, wants success for the whole organization, aspires greatly not to be a micro-manager, tries to be a mentor and develop people professionally, and has the big picture in mind, including who can replace him in 8-10 years when he decides to retire (it takes someone 3-5 years to comprehend everything that's going on at that level).

We asked staff we interviewed to describe Mr. Hieb's management and leadership style and most staff generally described his style in positive terms.

Ms. Young alleged that others are very afraid of what Mr. Hieb will do to them if they say anything. Ms. Young said Ms. Schwarzkopf and Ms. Wilhelmi have said similar things since April 24, 2014 and especially since May 20, 2014 in the lab in response to Ms. Young's performance evaluation. Mr. Hieb stated he completely disagrees with that and that people were interviewed multiple times so they could say whatever they wanted. Ms. Wilhelmi stated she is not afraid of what's happened here with Ms. Young. Ms. Wilhelmi also stated that she and Ms. Schwarzkopf have talked about financially needing their jobs and Ms. Young may have been present during those conversations. Ms. Schwarzkopf stated she is not afraid of Mr. Hieb; she thinks one needs to be cautious and have tact with management and not be accusatory. Ms. Schwarzkopf

stated she needs her job but if she felt strongly about something, she would take it to management.

Ms. Young alleged that Mr. Hieb gives preferential treatment regarding placement of younger, less-tenured employees on "limited term" strategic committees and special projects and that older staff members have not been afforded the same opportunities to serve on special committees not part of their job description and complete special projects. Ms. Young also stated that Mr. Hieb does not collaborate with all members of the lab team because he effectively divides the lab by including primarily younger team members on the committees.

Mr. Hieb stated that participation on committees is voluntary and committee members are given appropriate tasks. Mr. Hieb stated he gave the QA Committee the procedures manual project. Mr. Hieb stated that special projects are voluntary, role-based, or a combination of the two. Mr. Hieb stated that everyone is very busy and people work at different paces – if someone has the time and ambition to work on a special project or a committee, he does not remember turning anyone away.

Mr. Brosz stated committees are made up of only those under 40. Mr. Brosz stated there is not a mix of new and experienced staff on the Building, QA, and Biosafety Committees, and that it seems critical to have experienced and younger staff on committees. Mr. Brosz said there should be a balance of young and old staff on committees.

There are a number of committees in the Lab: Building Safety (includes Chemistry and Microbiology staff), Lab Improvement (includes Chemistry and Microbiology staff), Biosafety (includes Microbiology staff), Log In (Microbiology staff), QA (Quality Assurance – Microbiology staff), and CQI (Continuous Quality Improvement – Dr. Linz, Lead Analysts, QA Coordinator, Ms. Young, Mr. Hieb, and Ms. Kosse). All of the committees, with the exception of QA, have staff over and under 40.

Several staff over the age of 40 told us they were not interested in serving on committees and did not volunteer for the Lab Improvement or the Quality Assurance Committees. Four people under the age of 40 volunteered for the Lab Improvement & QA Committees; two over the age of 40 volunteered for these Committees; all six volunteers were placed on one of the two committees, including Ms. Young.

On July 28, 2014, Ms. Massen emailed to Microbiology staff a check list of training documents not yet completed arranged by testing area. Ms. Young and Mr. Brosz alleged that all Microbiologists II under the age of 40 had prior knowledge of the training documents and were able to complete them by the time of Ms. Massen's email. Ms. Massen stated she wanted each bench to have training guidelines and asked a few individuals to do it. Ms. Massen stated she presented it to the CQI group and they liked the idea.

Ms. Young alleged that the promotion of Ms. Massen to the QA/QC Coordinator role was due to her being a young, attractive female and Ms. Young felt Ms. Massen's looks played a role in her being hired for the QA position. Mr. Hieb was one of four people on the interview panel for the QA position; the other three were women that included Ms. Hoffman from HR, Ms. Feist from Disease Control, and Ms. Kosse. Mr. Hieb and Ms. Kosse felt all four candidates that applied for the QA position could do the job. Only internal candidates were interviewed for the position: Ms. Young, Ms. Hoke, Ms. Schwarzkopf, and Ms. Massen. Each interviewer scored the candidates individually and Ms. Massen was the top scorer for three of the four interviewers; Ms. Young was the top scorer for one interviewer with Ms. Massen one point behind. After a group discussion, the interview panel agreed to offer Ms. Massen the position.

Ms. Young's allegation of Mr. Hieb creating a hostile work environment was not corroborated by any other staff; no one indicated that Mr. Hieb created a hostile work environment. Many staff made positive comments about Mr. Hieb's management and leadership style.

Conclusions/Recommendations - Age Discrimination/Hostile Work Environment

We did not find it reasonable to believe that staff in the Microbiology Lab are afraid of Mr. Hieb. This investigation was carried out independently of Mr. Hieb and anyone else in the Department of Health. We did sense that some people we interviewed were holding back information, not because they were afraid of Mr. Hieb, but because they were trying to protect co-workers or didn't want to get involved.

There is a difference in the performance scores and number of outstanding performance increases and bonuses between the groups of employees over 40 and under 40; however, we do not find it reasonable to conclude that age was a determining factor. (See our analysis under Conclusions/Recommendations - Retaliation/Reprisal.)

We made a comprehensive review of the creation and assignment of committee members. Mr. Hieb created the QA Committee in late 2012/early 2013. Mr. Glatt directed the creation of the Lab Improvement Committee about this same time. These Committees were discussed at a staff meeting on November 8, 2012. A total of six people volunteered and three people were put on each committee. Ms. Young was already on the CQI Committee and she was placed on the Lab Improvement Committee. Ms. Young stated this Committee has not been active other than developing a lab call schedule which was initially assigned by management. Since Mr. Glatt directed the creation of the Lab Improvement Committee, this appears to be a high-level assignment. However, it does not appear that committee members initiated any further projects beyond creating the call schedule. This is unfortunate since we believe this is an important committee with opportunities to impact the entire Lab Services Division. We do not find that it is Mr. Hieb's or Ms. Kosse's fault that the Lab Improvement Committee has not been active. The fact is Ms. Young is on two high-

level committees, one of which (CQI) is for lead analysts, management, and the QA Coordinator; Ms. Young is not in any of those roles, but still on the committee. Mr. Hieb has told us Ms. Young can remain on this committee if she wants to. Further, Mr. Hieb has stated Ms. Young can be on the QA Committee and this invitation has been open since the QA Coordinator position was filled by Ms. Massen. However, both Mr. Hieb and Ms. Massen told us that Ms. Young was noncommittal about being on the QA Committee. There may have been some miscommunication about Ms. Young's involvement with QA since there are two committees that both have a quality focus and Ms. Young was doing some QA duties in assisting Mr. Brosz in that role prior to Ms. Massen being promoted to the position. We do not believe that age was a factor in any committee assignments. There does appear to be confusion regarding the QA and CQI Committees and Building Safety and Biosafety Committees; initially, we were confused ourselves. We recommend management clarify the purpose of these Committees to all lab staff.

Ms. Young and Mr. Brosz alleged that all Microbiologists II under the age of 40 had prior knowledge of the training documents referenced in Ms. Massen's email on July 28, 2014. Ms. Massen provided information to the CQI Committee in March and June, 2014 regarding the new employee training documents and completed areas. This information was documented on the agendas as well as in the meeting minutes. Mr. Brosz and Ms. Young were not at these meetings. Ms. Massen brought up the training documents to the QA Committee as well (the QA Committee members are currently under the age of 40). Ms. Kuklok heard about Ms. Massen working on this and gave her training documents to Ms. Massen. This explains how the Microbiologists II under the age of 40 were aware of the training documents. It appears this information was readily available and we believe it was the responsibility of both Mr. Brosz and Ms. Young that as CQI Committee members, they should have reviewed this information or at the very least, asked about it if they were absent. To claim that Mr. Brosz and Ms. Young were not made aware of these documents because of their age is disingenuous, as Mr. Brosz and Ms. Young did not take the initiative or make any minimal effort to become aware of information that was readily available and provided to all CQI members. Both Mr. Hieb and Ms. Kosse do not believe Ms. Massen's email on July 28, 2014 reflects poorly on any lab employee whose primary areas were not completed. There does not appear to be any effort by Ms. Massen to make the training documents a secret or to exclude anyone. Further, we find it unreasonable to conclude that lab staff over the age of 40 were purposely excluded from knowing about and completing the training documents and checklist.

In reviewing the assignment of special projects, it appears that projects are generally tied to either committee work (the procedures manual was given to the QA Committee) or phase training (such as the Directory of Services which has been given to several staff over the years). If Ms. Young is interested in being more active with committees and special projects, we recommend she allow others who are cross trained and have

the time to do her bench work to free up more of her time. We suggest Ms. Young volunteer like others and not expect special projects to be assigned or given to her.

There seems to be a lot of pride and ownership amongst the staff with the testing they perform. With more experience in a particular type of testing comes a certain level of expertise, efficiency, and comfort. We believe there are lingering effects from Mr. Trythall where cross training and allowing others outside of room 305 to help with testing was discouraged. In addition, cost efficiency appears to have been very important to Mr. Trythall and this may be why testing is delayed or not run until more samples are available to be tested. We recommend management discuss with staff the importance of balancing patient/customer needs with cost efficiency and ensuring expectations regarding turnaround times are clear.

Mr. Brosz and Ms. Young contend that older staff should be working on projects along with younger staff in order for the workplace to be fair and to ensure no mistakes are made. That would be making a management decision based on age which is inappropriate. Less tenured or younger staff may not have as much experience at the Department of Health but may be experienced Microbiologists with work experience outside of the Department. Mr. Brosz and Ms. Young seem to believe that if someone has less tenure at the Department of Health, they should not be assigned certain projects, or only be assigned projects when working with a more tenured staff member. However, just because staff are younger or less tenured does not mean they are less qualified. Again, we found no evidence and believe it to be unreasonable to conclude that age was a factor in determining who would work on projects.

We thoroughly investigated Ms. Young's claim that age and attractiveness played a part in Ms. Massen's promotion to the QA position. We reviewed all interviewer notes, talked with each interviewer and each candidate, evaluated and discussed the process for this promotion with Mr. Wilke and Ms. Hoffman, and reviewed the applications. Ms. Young admitted to us that she could have prepared more for the interview and was not expecting the level of questions asked of her, and she felt she did not do well in the interview. During an interview, candidates must be able to communicate their experience and skills; they cannot assume everyone on the interview panel knows about their past experience and skills. It does not appear Ms. Young is taking responsibility for her own actions during the interview and instead has presumed that the only reason someone other than her received the QA position must have been due to age or attractiveness. In our opinion, we find it demeaning to Ms. Massen and her credentials for Ms. Young to suggest that Ms. Massen's promotion was based on age and attractiveness. Ms. Massen is highly educated – she has her master's degree in Clinical Lab Science and has run an MLT degree program at a college and got it accredited – all valuable to the QA role. We could find nothing to suggest that age, attractiveness, favoritism, or anything other than the candidates' qualifications and interviews had any bearing on the hiring decision.

We asked Ms. Trythall for clarification on her response to the allegation Mr. Hieb discriminates against older workers and whether there is a belief or perception by older staff members that he favors younger staff members. Ms. Trythall stated that, "it's based on who he wants to communicate with and who he doesn't." Ms. Trythall said Mr. Hieb is not communicating with her. Ms. Trythall stated that Mr. Hieb needs to be a little more careful he's not favoring certain employees over others because sometimes it looks that way. Ms. Trythall also stated she thinks Mr. Hieb would rather promote younger people into positions or put them forward for committees. While we do not believe Mr. Hieb is favoring or promoting younger staff, Ms. Young, Mr. Brosz, and Ms. Trythall have that perception. We recommend Mr. Hieb be more mindful of the perception of his decisions and communicate the reasons for his decisions more clearly, frequently, and consistently with all staff. For example, Mr. Hieb may want to concisely communicate information directly with the Lead Analysts with the expectation information is passed along to all other staff.

Other Allegations

Both Ms. Young and Mr. Brosz made a number of allegations against Ms. Kuklok. Ms. Kuklok stated that she cares about results going out; that's what drives her – customers. Mr. Hieb stated Mr. Brosz and Ms. Young have brought complaints to him about Ms. Kuklok in the last 6 months; he doesn't remember any complaints prior to April 2014.

Ms. Young reported to us that she feels ostracized in the workplace since this investigation has begun. Some allegations provided to us include: some people won't say hi or good morning to her, some people ignore her at the break table or won't sit next to her, minimal conversation, some people communicate only through email, someone moved her coffee cup in the break room, and some people turn their heads when passing her in the hallway.

Ms. Young feels her performance evaluation reflects negative comments she has made, but that negative comments others have made are not in their evaluations. Both Ms. Young and Mr. Brosz stated they have made negative comments in the workplace. Other staff have also reported making negative comments.

Ms. Young alleged that Mr. Hieb told her she would get a salary increase with roll-up dollars after she was informed she would not get the additional 1% outstanding performance increase in 2013. Mr. Hieb stated that is not what he said; he talked about the opportunity for roll-up dollars in 2013 when positions were all filled. Ms. Kosse stated that after filling the positions, there were only a few hundred dollars left over. Mr. Glatt stated that roll up dollars are used for an investment in staff. Mr. Glatt stated that looking at funding cuts from the CDC last year and the year before, money available can change month to month, and the goal is to get through the biennium; the majority of staff have no clue about this.

Conclusions and Recommendations - Other Allegations

Ms. Young and Mr. Brosz accused Ms. Kuklok of being an instigator, a "pot-stirrer." Only one other person also said this about Ms. Kuklok. Nine people we interviewed, including Ms. Kuklok, told us that Ms. Young is the instigator and "pot-stirrer" in the workplace. Ms. Kuklok stated that she does tell people to go to HR; she believes HR is there to help. We do not believe Ms. Kuklok encouraged others to go to HR to share negative information about Ms. Young. Ms. Young felt that Ms. Kuklok was after Ms. Young's job and would perform some of Ms. Young's work without asking. Ms. Kuklok told us that she got tired of asking Ms. Young if she wanted help and being told no, and subsequently seeing the samples setting there untested for a week or a week and one-half. Ms. Kuklok previously worked in a hospital lab where you get results out quickly. Ms. Kuklok didn't want patients waiting for results unnecessarily when she had the time and training to process the samples. Mr. Hieb stated that Mr. Brosz voiced concern about Ms. Kuklok processing samples without asking for permission; Ms. Kuklok sees things that need to be done and just does them. Mr. Hieb told Mr. Brosz that he can't slow Ms. Kuklok down – Mr. Brosz has to find ways for Ms. Kuklok to be satisfied and successful. It seemed that Ms. Young and Mr. Brosz were concerned about cost control which may be due to influences from Mr. Trythall. We recommend that Mr. Hieb and Ms. Kosse communicate lab priorities in regards to cost control and timeliness of patient results. We do not believe Ms. Kuklok is after Ms. Young's job or harassing Ms. Young. We do not believe that Ms. Kuklok has malicious intent to mess with Ms. Young's work, but rather just to get the testing done. Clearly, Ms. Young, Ms. Kuklok, and Mr. Brosz have very different working styles; we believe they should make an effort to understand each other's working styles to ensure a successful and respectful workplace while meeting all customer needs.

In response to the allegation that Ms. Kuklok has a continuous disregard for following protocol, Ms. Kuklok responded, "it depends on the protocol; for example, I follow CDC through the line." Ms. Kuklok also stated that certain protocols are dumb and we can serve customers better. Ms. Kuklok gave an example where chlamydia equipment was contaminated and a service had to come in to sterilize the equipment. The service recommended cleaning with a solution of bleach. Ms. Kuklok told us she disagreed with using bleach because it was corrosive to the metal and she has used NucleoClean to sterilize the instrument a few times since the rep was there. Ms. Kuklok doesn't think she is doing anything wrong with using NucleoClean as they've used it for the same thing the last 10 years. We recommend Ms. Kuklok follow all protocols as directed, unless told otherwise by Mr. Hieb or Mr. Brosz.

In regard to ostracizing, Ms. Young reported these alleged incidents to a number of management staff and HR at the Department of Health. Mr. Hieb told us he asked Ms. Young what she wanted him to do; he couldn't tell people to talk to her and say good-morning. Ms. Young contacted us several times about these incidents. Up until the last time we met, Ms. Young did not feel this behavior was impacting her work. During the

last time we met, which was at Ms. Young's request, she implied that it was impacting her work but she didn't want to say it was impacting her work because she didn't want to be removed from the workplace. This statement was an example of Ms. Young's pattern of inconsistent responses. The examples and responses Ms. Young gave us previously about ostracizing did not demonstrate to us that it impacted her work. We believe it reasonable to conclude the reason staff may not be interacting with Ms. Young as they had previously may be due to the nature of the personal, sensitive, and negative information Ms. Young shared with us, which we were bound to investigate and ask others about. Management cannot force co-workers to have personal conversations with Ms. Young or any other coworker. However, employees can and must be expected to interact in a professional manner in the workplace so as not to negatively impact the agency's mission. Management can expect professional behavior in the work place at all times. We also find it reasonable to conclude that Ms. Young and Mr. Brosz chose to share their various allegations of misconduct and personal, sensitive, and negative information in an attempt to take the focus off Ms. Young's actions and behavior specifically related to the April 10, 2014, incident. At no time did Ms. Young refer to the personal, sensitive, and negative comments made by others as offensive to her or as harassment.

In regard to negative workplace comments, there appears to be a basic misunderstanding of what is appropriate and what is not appropriate conversation in the workplace. Employees in the Microbiology Lab need to be taught that negative comments, gossip, rumors, etc. are detrimental in the workplace and employees should be encouraged to constructively address any concerns they have with each other directly and with their direct supervisors in private if attempts to resolve their concerns personally are not successful.

In regard to roll-up dollars, Mr. Glatt, Ms. Kosse, and Mr. Hieb all had the same story – roll up dollars *may* be available after filling all positions. Further, Ms. Wilhelmi recalled Mr. Hieb mentioning the *possibility* of roll-up dollars. The availability of roll-up dollars is not a guarantee of salary increases. Management must make difficult decisions in the administration of limited salary dollars.

Additional Conclusions and Recommendations

An important consideration of a workplace investigation is the assessment of the credibility of witnesses. As for the people we interviewed for this investigation:

- Sandy Young – we found Ms. Young largely not credible. We found it interesting and suspect that Ms. Young brought forward many of her allegations after she was accused of sexual harassment in April 2014. We could not corroborate many of the allegations and claims made by Ms. Young. She was reluctant to admit her involvement in the incident on April 10, 2014. We believe her

allegations were initiated to deflect and defuse her behavior on April 10, 2014. This diminishes the credibility of her allegations.

- Tim Brosz – we found Mr. Brosz largely not credible - his allegations and examples were very similar to Ms. Young's. We found it interesting and suspect that Mr. Brosz brought forward many of his allegations only after Ms. Young was accused of sexual harassment in April 2014. We believe his allegations were initiated in support of his co-worker and friend, Ms. Young.
- Kristie Schwarzkopf – we believe Ms. Schwarzkopf was not entirely forthcoming in her interview and withheld information likely due to her friendship with Ms. Young and because she did not want to involve herself in the investigation.
- Dawn Wilhelmi - we believe Ms. Wilhelmi was not entirely forthcoming in her interview and withheld information likely due to her friendship with Ms. Young.
- Jan Trythall – we believe Ms. Trythall was not entirely forthcoming in her interview and withheld information.
- Eric Hieb – we found Mr. Hieb largely credible, but there were certain areas where he was not entirely forthcoming.

As for the rest of the people interviewed for this investigation, we found them to be largely credible.

Clearly the Microbiology Lab needs to work on trust and communication issues going forward; this will take time. We recommend the following training either by HRMS or an EAP provider:

- Harassment Prevention – available through HRMS
- Generations in the Workplace – available through HRMS
- Conflict Management – available through HRMS
- Communication
- Trust/Team Building – EAP

We recommend reviewing applicable policies to determine if any policies need updating or creating. During the course of our investigation, we discovered there appears to be some confusion regarding the policies for annual leave, sick leave, flextime, and overtime/compensatory time. We recommend the Department of Health discuss and clarify these and any other relevant policies with Microbiology staff.

It appears that a number of staff are confused about the chain of command or line of supervision. Some staff mentioned Mr. Hieb as their supervisor; others mentioned their lead analyst. Mr. Hieb changed the lead analyst role; previously the lead analysts had more supervisory responsibility. We recommend that these roles again be clarified to all staff.

It is interesting to us that Ms. Young and Mr. Brosz have followed similar paths in the course of this investigation. Both brought forth a barrage of allegations during the April

investigation into charges of sexual harassment even though Mr. Brosz was not present, both filed grievances at about the same time with very similar allegations, both filed a similar complaint regarding training documents around the same time, and both requested a third interview with us.

We believe that sexually related comments were made in the Microbiology Lab, including the break room. It appears that many of these comments were in regard to one's own personal sex life. However, these comments are still inappropriate in any workplace.

Ms. Young was dissatisfied with a number of things during the past year – Ms. Massen's promotion to QA Coordinator, Ms. Young not getting the additional 1% salary increase in 2013, committees, special projects, etc. Ms. Young sought out explanations for these decisions from several people, several times over the course of many hours. Ms. Young does not seem willing to accept the decisions of management. For example, Mr. Hieb stated Ms. Young was in his office for 8-10 hours after she did not get the QA Coordinator position and Ms. Young told Mr. Hieb what he should have graded her and how he should have graded others for the salary increase in 2013. It appears Ms. Young continues to ask questions (often the same questions) until she gets the answer or outcome she wants. In our opinion, this type of behavior borders on insubordination. It's reasonable and encouraged for management to obtain input from staff; however, ultimately management must make decisions that may differ from employees' input and employees must respect those decisions. Displaying a pattern of frequent and continual asking of the same questions in hopes of getting a different answer or outcome can become a waste of staff time and taxpayer resources.

Mr. Brosz appears to be a technical expert; however, he needs to be given tools and support by management to be a stronger leader. Mr. Hieb is currently meeting with Mr. Brosz on a weekly basis and we recommend this continue to ensure further clarity in regards to Mr. Brosz's job expectations. In addition, the Department of Health may want to consider sending Mr. Brosz to Supervisory/Management training offered by HRMS.

Mr. Hieb stated Ms. Young and Mr. Brosz did a great job in QA with the amount of time they had to perform this work in addition to their bench work over the past few years. However, Mr. Hieb recognized a need for a dedicated full-time position to take QA to the next level of quality management. A full time QA Coordinator will be able to build upon the good work Ms. Young and Mr. Brosz have done and take even bigger strides toward an effective quality management program for the Microbiology Lab.

We strongly recommend a consistent performance evaluation process be utilized going forward, where all employees receive a performance evaluation at least once annually. We recommend utilizing the actual performance evaluation scores to justify any performance increases, including the outstanding performance increase, to ensure a

direct link between the performance score and salary increase, and to streamline the process.

In a workplace where the level of discord is high, hypersensitivity can occur. In our opinion, a number of staff seem to be assuming the worst of other's behavior, communications, and intentions. We would encourage staff to ask questions and speak to each other if something is bothering them and encourage management to clearly communicate important issues to all staff. This will lead to greater transparency and increased trust in the workplace.

The Microbiology Lab has been reorganized within the last two years and Mr. Hieb supervises most of the lab staff directly, including approving annual and sick leave. As an Assistant Director, Mr. Hieb's time may be better spent focusing on high level strategic issues and allowing the lead analysts to supervise the day to day activities of the lab, including approving leave, scheduling, and performance evaluations. The Department of Health may want to follow up and review the organizational structure in the Microbiology Lab in six months to a year to ensure the appropriate organizational structure exists in the lab now and in the future.

Based on our investigation and review of all allegations, we have concluded that Ms. Young and Mr. Brosz were not subject to sexual harassment, retaliation/reprisal, age discrimination, or a hostile work environment.

Whenever employees have personal issues that impact work productivity, management should remember to recommend the employee assistance program to help employees address and work through these issues.

All employees must be reassured that retaliation will not occur for reporting these or any future incidents. Employees must also understand that management directs them to report incidents.

We are available to assist you with any further questions.

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2014

	Sandy Young	Tim Brosz	Kristie Schwarzkopf	Lisa Wingerter	Dawn Wilhelmi	Lisa Well	Jan Trythall	Chris Massen	Tracy Hoke	Heather Sease	Maggie Kuklok	Laura Mastel	Lori Carter	Overall
Critical Job Duty 1	2	1	2	3	2	2	2	3	3	3	3	2	2	2.3
Critical Job Duty 2	2	2	3	2	2	2	2	2	2	2	2	2	3	2.2
Critical Job Duty 3	2	2	2	2	3	2	3	3	2	2	3	2	2	2.3
Critical Job Duty 4	2	2	2	2	2	2	2	2		2	2	2	2	2.0
Critical Job Duty 5	3	2	2	2			3				2	3	2	2.4
Critical Job Duty 6	2	3												2.5
Knowledge and innovation demonstrated	2	2	2	3	3	2	2	3	2	2	2	2	2	2.2
Communication	1	2	2	2	2	2	2	2	2	2	2	2	2	1.9
Teamwork/ Cooperation	1	1	2	2	2	3	2	2	3	2	2	2	3	2.1
Self Management	2	2	2	2	2	2	3	3	3	3	3	3	2	2.5
Attitude	1	2	2	2	2	3	2	2	2	3	2	2	3	2.2
Outstanding Performance			X		X		X	X		X	X	X		
Performance Bonus					\$500			\$500	\$500	\$500				
Basic Work Expectations - # Unacceptable	3**	1*	0	0	0	0	0	0	0	0	0	0	0	
Average Ratings	1.82	1.91	2.10	2.20	2.22	2.22	2.30	2.44	2.38	2.33	2.30	2.30	2.20	2.2
Age Group Overall Average	2.11							2.33						

*Develop and maintain positive and effective working relationships with other employees, agencies, departments, stakeholders and the public

**Maintain a positive attitude; Develop and maintain positive and effective working relationships with other employees, agencies, departments, stakeholders and the public; Use courtesy and respect in all interactions

House Bill 1246

Timothy Brosz Testimony

01/30/2017

My name is Timothy Brosz. I was employed with the ND Department of Health Laboratory Services as a microbiologist for 32 years. I am licensed to practice as a Clinical Laboratory Scientist in the State of ND by the ND Board of Clinical Laboratory Practice.

My dedication to laboratory science, my abilities, my professionalism, my passion for public health and patient care had never been questioned.

It was after 30 years as a microbiologist in 2014 when I as a lead analyst (technical supervisor) was asked by our upper management to relay to staff members in my area that there was a sexual harassment complaint reported against them. An investigation of this complaint included interviews of all the laboratory staff by our upper management and lead by the Department Human Resources Director. During my interview, I made comments in support or defense of my staff members and gave examples of past complaints that were reported that in my opinion never were properly investigated and age discrimination that I thought needed to be reported as was my job as a manager.

A month later I had my performance review which was the first since 2009. The review procedure that I was put through was threatening, intimidating and was direct retaliation for defending my staff and age discrimination complaints I raised during the sexual harassment interviews.

I for the first time in my life filed a grievance of retaliation and discrimination regarding my performance review. My grievance was straight forward and the outcome that I requested was a fair performance review. Without my knowledge, my grievance was sent to Human Resource Management Services for resolution. My grievance was lumped together with a grievance filed by Sandy Young to be investigated together. The HRMS investigation turned into a bazaar and grandiose affair that lasted several months and became nothing about my grievance but a process designed to protect the Department and the State even if it meant ruining the careers of two employees, including myself. I poured my heart out in the investigation and all I wanted was for HRMS to seek truth and justice. Their conclusion was that I was not credible. It hurt more than you could know.

During this time, I filed my complaint to the North Dakota Department of Labor. They followed the lead of HRMS and investigated my complaint and Sandy Young's complaint jointly. They were also in communication with the Attorney General's office which at one point directed the Department of Labor to put a temporary halt to the investigation.

In May of 2015, I was demoted. I went through the proper review process and filed a grievance with the Department of Health. The grievance went to HRMS and they forwarded it to

Administrative Law Office for judgement with an administrative law judge. I had no choice but to accept going through the administrative law hearing process or drop my grievance.

I left the department of health in February of 2016.

It is difficult to find attorneys that have employee labor interest. The Administrative Law office has a brochure that describes the process for you to represent yourself. I after a difficult time, found an excellent and caring attorney team. My hearing did not take place until November and December of 2016 and lasted 6 days. The Department of Health had three attorneys at the hearing and took up four days of testimony from their witnesses. Between my testimony and my one witness we needed two days. I could not imagine representing myself against three attorneys with their lead being the solicitor general. It has so far cost me and my wife over \$28,000 of retirement savings with more expense to come. I do not expect a decision for at least a few more months.

When employed by the laboratory, I requested open records pertaining to my case. It was going to be costly, according to the Health Department. I pared my request down but the estimate became even higher. I believe it would have cost me over \$1000.00 in the end for the information.

I would not wish what I have gone through on anyone, but I would do this all over again in a heartbeat. I believe there must be an option for an employee when filing a discrimination complaint. It is too important to leave to the sole judgement of Department management and HR management.

I sincerely thank you for your time.

Testimony on HB 1246
Tag Anderson, Director
OMB Risk Management Division
January 30, 2017

Chairman Keiser, and members of the House Industry, Business and Labor Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today in opposition to HB 1246.

The requirement that a party exhaust administrative remedies is a firmly established legal principle in North Dakota. The North Dakota Supreme Court has repeatedly required exhaustion of administrative remedies as a prerequisite to the ability to bring an action in court, both for parties challenging the actions of a governmental entity as well as private entities that have established remedies. This principle is further frequently reinforced in statute. In addition, under federal law addressing most forms of discrimination, conciliation/settlement is the primary intended means of resolving disputes, with parties required to first file a charge of discrimination with the EEOC or a deferral agency under a work sharing agreement.

NDCC 54-44.3-12.2 establishes the state-wide appeals mechanism for classified employees, providing an administrative process for employees to appeal and challenge certain enumerated employer actions. The state-wide appeals mechanism also provides an administrative remedy for non-classified employees asserting retaliation under the Public Employees Relations Act. HB 1246 would allow state employees that are classified to avoid exhaustion of administrative remedies and bring an action immediately in state district court. Because this will increase costs to the State in defending these claims and could interfere with an agency's ability to properly investigate and take appropriate action as required under state and federal law, Risk Management opposes HB 1246.

Employment litigation brought against the State is very expensive to defend and often takes many years to resolve. The state-wide appeals mechanism provides a timely, cost effective and efficient means of resolving these claims. An administrative law judge can provide the same equitable remedies that a court can provide including reinstatement of an employee with back pay and benefits. A successful employee

claiming discrimination can also apply to the district court and receive an award for the costs of attorney's fees incurred in successfully pursuing a discrimination claim through the state-wide appeals mechanism.

It is also important to note that the costs of the state-wide appeals administrative process is the responsibility of the employing administrative agency. This creates a strong incentive for an agency to thoroughly and fairly address its employment practices and decisions impacting classified employees.

This concludes my prepared remarks and I would be happy to answer any questions you may have.

Thank you.

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**HOUSE BILL 1246
HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
JANUARY 30, 2017**

TO: George Keiser, Chairman, House Industry, Business and Labor Committee, and Members of the House Industry, Business and Labor Committee.

I, Travis Engelhardt, Director of Human Resources, submit this testimony in opposition of House Bill 1246 on behalf of the North Dakota Department of Corrections and Rehabilitation ("ND DOCR").

A diverse and large employer such as the DOCR respects, values and needs workplace complaints brought to the attention of the Department. An internal grievance is the only opportunity the Department has to review, investigate, and rectify workplace wrongdoing, including employment discrimination claims.

The current process allows for the Department and employee to waive the internal grievance process, if both parties agree. At worst to an employee, if the Department does not agree to waive the grievance process, the Department will investigate and respond in a reasonable amount of time. If the ultimate department finding is unfavorable to the employee, the employee still has the right to file a charge with ND Department of Labor and Human Rights, the EEOC, and district court. The Department fears this bill could increase litigation costs for discrimination claims the Department is willing and able to address at the lowest level.

Also, the Department feels it important to note that a records request related to an employment discrimination claim often takes the DOCR time reviewing and redacting exempt or confidential information from records related to an investigation. If this bill were to pass, the Department would in a sense become a no-cost research resource for employee and employee representatives claiming employment discrimination for which the Department has no opportunity to address.

In closing this bill removes the opportunity a Department has to address employment discrimination claims. The DOCR takes the responsibility to investigate and rectify any discrimination claim very seriously and finds it crucial to continue to allow the Department an opportunity to fix what may be wrong inside its own workplace.

Therefore, the ND DOCR respectfully requests do not pass for House Bill 1246.

**Testimony HB 1246
January 30, 2017**

Good morning, Chairman Keiser and members of the House Industry, Business and Labor Committee. I am Becky Sicble, Interim Director of Human Resource Management Services (HRMS), a division of the Office of Management and Budget. I am here to testify in opposition to this bill because of the proposed change to our current grievance process.

Simply stated, a grievance is a disagreement between an employee and the employer over some term or condition of employment or over the interpretation or application of policy, rule, or law. Each state agency is required to have a grievance procedure. Under our current law, a regular employee may file a grievance regarding demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, or reprisal in accordance with the respective agency's grievance procedure. A grievance is either processed through the agency's grievance procedure or forwarded to our office / OAH for review. Any appeal to the agency's grievance procedure is handled through our office / OAH. After the internal process concludes and a determination is made, the employee may appeal to district court.

Understanding that our current century code and administrative code already provide the steps to remedy disagreements between an employee and the employer, I was surprised by the content of the bill and wanted to better understand the background of why the change was being proposed. Chairman Keiser (the sponsor of the bill) and I met to discuss the situation. With his approval, I later met with his constituent to discuss it further.

Prior to meeting with the Chairman's constituent, I researched the situation more and learned:

- May 2015 – Was terminated from employment with a state agency.
- June 2015 – Filed a grievance to the state agency director.
- June 2015 – State agency director upheld the termination.
- July 2015 – Appealed termination to HRMS / Office of Administrative Hearings (OAH).
- January 2016 – Both parties agreed to settlement (was represented by an attorney). She was provided a seven day window to rescind the agreement; however, rescission did not occur.
- February 2016 – ND Department of Labor and Human Rights (DOLHR) closed investigation due to settlement agreement dismissing all claims.
- February 2016 – HRMS / OAH dismissed appeal due to settlement agreement dismissing all claims.

In this one situation, neither the appeal to HRMS nor the NDDOLHR investigation was allowed to continue because a settlement agreement was signed. Both processes were stopped as a result of her agreement to the terms. I explained this to Chairman Keiser's constituent, and later to Chairman Keiser via email.

I fully believe our current grievance and appeal process works and provides the most cost-effective, time efficient, and resolution-focused outcome for any and all employee complaints. I do not believe our current grievance and appeal process should change for all classified employees because of one constituent's ongoing concerns, which again, were legally resolved over one year ago. I respectfully request a "Do Not Pass" recommendation from this committee.

This concludes my remarks. I would be happy to answer any questions at this time.

CHAPTER 4-07-20.1
APPEALS OF EMPLOYER ACTIONS

Section	
4-07-20.1-01	Scope of Chapter
4-07-20.1-02	Definitions
4-07-20.1-03	A Regular Employee May File a Grievance Regarding an Employer Action
4-07-20.1-04	Commencement of Agency Grievance Procedure - Time Limitations
4-07-20.1-05	Waiver of Agency Grievance Procedure
4-07-20.1-06	A Regular Employee May Appeal to Human Resource Management Services
4-07-20.1-07	Limitations for Reduction-in-Force Appeal
4-07-20.1-08	Procedure for Appeals of Employer Actions to Human Resource Management Services

4-07-20.1-01. Scope of chapter.

This chapter applies to regular employees.

History: Effective November 1, 1996.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Date of service" means the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery of electronic means, the date of actual delivery.
2. "Employer action" means an action taken by an appointing authority that affects a regular employee through a demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, or reprisal.
3. "Forced relocation" means the involuntary transfer or reassignment of a regular employee from one work location in the state to another work location in the state that requires the employee to move to a different place of residence. Telecommuting and other alternative work location agreements are not considered forced relocations.
4. "Reduction-in-force" means the loss of employment by a regular employee as a result of a reduction in funding, lack of work, curtailment of work, or reorganization.
5. "Regular employee" means a person who has completed the probationary period and who is or was in a position classified by human resource management services at the time the employer action occurred.
6. "Reprisal" means an unfavorable employment-related action taken against an applicant or employee by an appointing authority for appealing to human resource management services or the state personnel board; for exercising the employee's rights under the Public Employees Relations Act of 1985, North Dakota Century Code chapter 34-11.1; for testifying before a legislative committee; or for employees who request timely assistance under the employee assistance program.
7. "Waiver" means a written agreement between a regular employee and the appointing authority not to proceed with the agency grievance procedure and to permit an appeal to be made directly to human resource management services.

8. "Working days" means Monday through Friday exclusive of holidays.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

4-07-20.1-03. A regular employee may file a grievance regarding an employer action.

A regular employee may, in accordance with the respective agency's grievance procedure, file a grievance regarding demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, or reprisal. A grievance must be processed through the agency grievance procedure prior to submitting an appeal to human resource management services, unless a waiver is agreed upon as provided for in section 4-07-20.1-05.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-04. Commencement of agency grievance procedure - Time limitations.

The employee shall begin the agency grievance procedure within fifteen working days from the date of notice of the employer action, except in the case of reprisal. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery. The employee grieving reprisal action shall begin the agency grievance procedure within fifteen working days from the date of the reprisal action. Failure to begin the procedure within time limitations may cause the employee to lose the right to appeal to human resource management services. The agency appointing authority or designee, for good cause shown, may waive the time limitations for filing a grievance. Good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion. In no event may a grievance be deemed timely after sixty days have elapsed from the date of the employer action.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-05. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the employee and appointing authority. The waiver must be signed by both parties within fifteen working days of the employer action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.1-08. An additional fifteen working days is not available if the requested waiver is denied.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-06. A regular employee may appeal to human resource management services.

A regular employee may appeal an employer action to human resource management services if:

1. The employee has processed a grievance through the agency grievance procedure and is dissatisfied with the result;

2. The employee and the appointing authority have agreed to a waiver of the agency grievance procedure; or
3. The agency has not established a grievance procedure or has failed to respond to a grievance in a timely manner.

No other employer actions except as defined in this chapter or otherwise specifically provided by administrative rule are appealable to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-07. Limitations for reduction-in-force appeal.

A regular employee may appeal a reduction-in-force only on the basis that the agency did not utilize a uniform comparative analysis as required by section 4-07-11-03 or that the reduction-in-force was conducted in a discriminatory manner that would violate the state's policy against discrimination as stated in North Dakota Century Code section 14-02.4-01. A former regular employee who was reduced in force may appeal a denial of reemployment only on the basis that the agency did not follow section 4-07-11-07 or that the denial of reemployment was conducted in a discriminatory manner that would violate the state's policy against discrimination as stated in North Dakota Century Code section 14-02.4-01. The assessment of whether an individual meets the qualifications necessary for successful performance shall remain with the agency.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.1-08. Procedure for appeals of employer actions to human resource management services.

1. The employee shall file the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure or within fifteen working days from the date of the waiver. An additional fifteen working days is not available if the requested waiver is denied. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
2. The director, human resource management services, shall within two working days submit a written request to the director, office of administrative hearings, to conduct a hearing on behalf of the division and shall forward a copy of the appeal form to the appointing authority.
3. The administrative law judge shall initially consider whether the appeal was filed within required time limitations. If the administrative law judge determines the time limitations have not been met, the administrative law judge shall prepare an appropriate order dismissing the appeal, which shall be final, and provide a copy of it to the parties. The administrative law judge may, for good cause shown, waive the time limitations for filing an appeal. Good cause means those circumstances that reasonably and without any fault on the part of the appellant prevented the filing of an appeal in a timely fashion. In no event may an appeal be deemed timely after sixty days have elapsed from the date of the employer action.

4. The administrative law judge shall consider whether human resource management services has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the internal agency grievance process. If the administrative law judge is unable to establish whether human resource management services has jurisdiction over the subject matter of the appeal or whether the appropriate rules were followed, a hearing may be conducted to ascertain the facts related to those issues.
5. If the administrative law judge determines that human resource management services does not have jurisdiction in the matter of the appeal, the administrative law judge shall prepare findings of fact and conclusions of law, if appropriate; issue a final decision dismissing the appeal; and provide a copy of them to the parties.
6. If it is determined that human resource management services has jurisdiction over the appeal, the administrative law judge shall schedule a hearing. The administrative law judge shall conduct the hearing and related proceedings, receive evidence related to the issues, prepare findings of fact and conclusions of law, and issue a final decision.
7. The administrative law judge shall notify the employee and the appointing authority of the final decision by sending each of them a copy of the findings of fact, conclusions of law, and final decision. Notification shall be accomplished in the same manner as for notification of final orders required by subsection 3 of North Dakota Century Code section 28-32-39. The parties shall implement the final decision within any time periods specified by the administrative law judge.
8. The administrative law judge shall return the completed appeal file to human resource management services.
9. Any party to the appeal may review the recordings of the hearing by making a request to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

CHAPTER 54-44.3
CENTRAL PERSONNEL SYSTEM

54-44.3-01. Purpose of chapter.

The general purpose of this chapter is to create North Dakota human resource management services in order to establish a unified system of human resource management for the classified service of the state based upon merit principles and scientific methods, governing the position classification, pay administration, and transfer of its employees. All appointments and promotions to positions in the state classified service must be made without regard to sex, race, color, national origin, age, religious affiliations, or political opinions on the basis of merit and fitness.

54-44.3-01.1. Compensation relationships - Policy.

It is the policy of this state to establish equitable, nondiscriminatory compensation relationships among all positions and classes within the state's classification plan.

54-44.3-01.2. Compensation philosophy statement.

The compensation program for classified state employees must be designed to recruit, retain, and motivate a quality workforce for the purpose of providing efficient and effective services to the citizens of North Dakota. For purposes of this section, "compensation" is defined as base salary and related fringe benefits.

The compensation program must:

1. Provide a competitive employee compensation package based on job content evaluation, internal equity, and external competitiveness balanced by the state's fiscal conditions.
2. Be based on principles of fairness and equity.
3. Include a consistent compensation policy which allows for multiple pay structures to address varying occupational specialties.
4. Set the external competitiveness target for salary range midpoints at a competitive level of relevant labor markets. For purposes of this section, "relevant labor markets" is defined as the labor markets from which the state attracts employees in similar positions and the labor markets to which the state loses employees in similar positions.
5. Include a process for providing compensation adjustments that considers a combination of factors, including achievement of performance objectives or results, competency determinations, recognition of changes in job content, and acquisition and application of advanced skills or knowledge.
6. Provide funding for compensation adjustments based on the dollar amounts determined necessary to provide competitive compensation in accordance with the state's compensation philosophy. Funding for compensation adjustments may not be provided as a statewide percentage increase attributable to all employees nor as part of a statewide pool of funds designated for addressing equity issues.
7. Consider the needs of the state as an employer and the tax effect on North Dakota citizens.

The office of management and budget shall develop and consistently administer the compensation program for classified state employees and ensure that state agencies adhere to the components of the state's compensation philosophy. The office of management and budget shall regularly conduct compensation comparisons to ensure that the state's compensation levels are competitive with relevant labor markets.

The legislative assembly recognizes the importance of providing annual compensation adjustments to employees based on performance and equity to maintain the market competitiveness of the compensation system.

54-44.3-02. Definitions.

As used in this chapter, unless the context clearly requires otherwise:

1. "Appointing authority" means the authority to appoint to positions in the classified service and is reserved to officials and heads of departments and agencies within the government.
2. "Board" means the state personnel board.
3. "Director" means the director of North Dakota human resource management services.
4. "Division" means North Dakota human resource management services.
5. "Employee" means any person who occupies a position in the classified service.
6. "Officer" means an employee of the state government who is appointed and serves at the pleasure of an official, board, or commission.
7. "Official" means a member of the state government elected by popular vote.

54-44.3-03. State personnel board - Composition - Terms - Vacancies - Qualifications.

1. The state personnel board is composed of the director, who must be the chairman of the board; one member appointed by the governor; two members elected by employees classified under sections 54-44.3-19 and 54-44.3-20; and one member with a professional human resource background appointed by the governor.
2. The term of each member of the board, except the director, must be for six years. The director's term coincides with employment as director. Any permanent vacancy in office must be filled for the unexpired term in the same manner as the selection of the person vacating the office.
3. Each member of the board must be a resident of the state for at least sixty days and must be known to be in sympathy with the application of merit principles to public employment. No member of the board may have held a position in a political party within four years immediately preceding the member's appointment or election to the board, and those members of the board elected by classified employees must be full-time employees in good standing of the classified service.

54-44.3-04. Compensation and expenses of members of board.

Each member of the board is entitled to compensation at the rate of fifty dollars for each day employed in the official duties of the board and other expenses as provided for by law.

54-44.3-05. Election committee.

The governor, the secretary of state, and the attorney general shall constitute a three-member committee to develop rules and regulations for a secret ballot election among all employees eligible under sections 54-44.3-19 and 54-44.3-20 to carry out the election of the two members of the board elected by classified employees. All elections of members of the board are the responsibility of the director who will ensure that proper and due notification is given to all employees in sufficient time to enable potential candidates to initiate necessary petitions and conduct campaigns. Nominees for candidacy are required to submit petitions containing no less than two hundred names of employees in good standing classified under sections 54-44.3-19 and 54-44.3-20. All elections will be conducted through a secret ballot process.

54-44.3-06. Meetings.

The board shall organize annually at the first meeting of each fiscal year. It shall meet at least once a year and at such times and places as are specified by call of the chairman or any three members of the board. All meetings must be open to the public. Three members constitute a quorum for the transaction of business. Three favorable votes are necessary for the passage of any resolutions or taking of any official action by the board at any meeting.

54-44.3-07. Duties of board.

The primary responsibility of the board is to foster and assure a system of personnel administration in the classified service of state government. In carrying out this function, the board shall:

1. Adopt any rules and hold any hearings as are necessary to properly perform the duties, functions, and powers imposed on or vested in the board by law. The adoption of rules must be accomplished in accordance with chapter 28-32.
2. Hear, consider, and determine appeals by nonprobationary employees in the classified service related to position classifications and pay grade assignments.
3. Ensure that the director includes the activities of the board in the office of management and budget's biennial report.
4. Keep minutes and maintain records necessary to assure the equitable administration of this chapter.

54-44.3-08. Testimony - Call witnesses - Request production of papers.

The board, as a body, may invite and hear witnesses, and request the production of books and papers or any other physical evidence pertinent to any investigation or hearing authorized by this chapter. Witnesses who testify at the invitation of the board shall receive remuneration in the same amount and manner received by witnesses in North Dakota district courts.

54-44.3-09. Board secretariat.

The division shall serve as the secretariat to the board.

54-44.3-10. Action to secure compliance with chapter.

The board may maintain such action or proceeding at law or in equity as the board considers necessary or appropriate to secure compliance with this chapter and its rules and orders thereunder. The attorney general may assign an assistant attorney general as legal adviser and counsel to both the board and the division. The attorney general is responsible for representing the personnel system in all legal contexts.

54-44.3-11. North Dakota human resource management services - Director - Appointment - Removal.

North Dakota human resource management services is created within the office of management and budget under the supervision and control of a director who is responsible for the performance and exercise of the duties, functions, and powers imposed upon the division.

1. The director must be experienced in the field of human resource management and shall hold considerable knowledge of merit principles, goals, and their methods of operation.
2. The director of the office of management and budget shall appoint the director. The position of director is not a classified position and the director shall serve at the pleasure of the director of the office of management and budget.

54-44.3-12. Duties of director.

The director shall direct and supervise, with the approval of the director of the office of management and budget, all the administrative and technical activities of the division. In addition to the duties imposed elsewhere in this chapter, the director shall:

1. Establish general policies, rules, and regulations, subject to the approval of the board, which are binding on the agencies affected, and which apply to the employees in the classified service. These rules must provide for:
 - a. Establishing and maintaining a classification plan.
 - b. Establishing and maintaining a compensation plan.
 - c. Promoting a consistent application of personnel policies.
 - d. Enhancing greater uniformity in matters relating to probationary periods, hours of work, leaves of absence, separations, transfers, disciplinary actions, grievance procedures, and performance management.
 - e. Ensuring fair treatment and compliance with equal employment opportunity and nondiscrimination laws.
2. Establish and maintain a roster of all employees in the state classified service in which there must be set forth, as to each employee, the class title of the position occupied,

- the salary or pay, change in class title, and any other personnel data that the division deems necessary.
3. Select for appointment under this chapter such employees of the division and such experts and special assistants as are necessary to carry out effectively the provisions of this chapter. Salaries and positions of personnel in the division must conform to the classification and pay plan provided by this chapter.
 4. Assist the employee-appointing authorities, in accordance with the provisions of this chapter and the rules adopted thereunder, in the preparation and administration of appropriate selection procedures.
 5. Encourage and assist in the development of personnel administration within the various departments and agencies of the state.
 6. Cooperate with employee-appointing authorities and other supervisory officers in the conduct of employee training programs.
 7. Develop procedures that, notwithstanding any other law, must be followed by all state agencies and institutions for employees in the state classified service, to ensure that all salaries are paid in a manner consistent with the state's compensation, classification, and salary administration policies.
 8. Consult with state agencies and institutions in the development of salary administration procedures for employees in the state classified service.
 9. Recognize knowledge, skills, complexity, accountability, and working condition hazards as compensable factors of the state's classification plan, required in the performance of work for all positions in the state classified service.
 10. Develop guidelines for allowing exceptions to the rules of the classification and compensation plans for use when the market salaries of specific positions are not consistent with the state's compensation policy.
 11. Conduct in-state and out-of-state labor market surveys that are representative of the state's classified service occupations to enable the state to position itself accurately against the market.
 12. Communicate classification and compensation policies to the managers and employees in the state-classified service by providing written information on the state's classification and compensation procedures.
 13. Adopt rules, subject to the approval of the board, to ensure compliance with and resolve compliance issues relating to agencies required by state or federal law or rule to be subject to a merit personnel system.

54-44.3-12.1. Revisions to compensation plan.

Revisions to the compensation plan may only be made on July first, following the close of a regular legislative session, except that new classifications may be added to the compensation plan during a biennium when deemed necessary by the director. Revisions to the compensation plan for county employees covered by the plan become effective on January first of the first full calendar year following the revision or on July first following the close of a regular legislative session, based on official action by the board of county commissioners. Revisions to the compensation plan may only be made to the extent the legislative assembly appropriates funds to implement such plans.

54-44.3-12.2. Employee complaints - Cooperation in development and implementation of basic agency grievance procedures and a statewide appeal mechanism - Appeals.

It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees by requiring affected agencies to adopt grievance procedures and through the creation of a statewide appeals mechanism with primary jurisdiction to entertain and resolve classified employee appeals. It is the policy of this state to resolve bona fide employee complaints as quickly as possible. The division shall cooperate with and assist the various departments, agencies, and institutions of the state in the development and implementation of basic agency grievance procedures and a statewide appeal mechanism. The division shall certify appeals from nonprobationary employees in the classified service which are related to discrimination, merit system qualification, reprisals, reduction in

force, forced relocation, demotion with loss of pay, suspension without pay, and dismissal, and from applicants for positions in the classified service and probationary employees in the classified service which are related to discrimination or reprisal. Upon receipt of an appeal, the division shall submit a written request to the director of the office of administrative hearings to designate an administrative law judge for the division to conduct the hearing and related proceedings, including receiving evidence and preparing findings of fact, conclusions of law, and issuing a final decision. The moving party in the initial action bears the burden of proof in the appeal. An appeal to the district court from the determination of the administrative law judge must be filed according to chapter 28-32, including proper service upon the division, but neither the division nor the office of administrative hearings may be named as a party to the appeal under chapter 28-32 unless an employee of one of those two agencies is involved in the grievance.

54-44.3-13. Records and information to be furnished.

All departments and agencies covered by the personnel system shall furnish any reasonably necessary, nonprivileged records and information to the division which the division requests, except records made confidential by statute.

54-44.3-14. Records public.

The records of the division and the board, except such records as the statutes may require to be held confidential, are public records and must be open to public inspection, subject to regulations as to the time and manner of inspection which may be prescribed by the division or board.

54-44.3-14.1. Mediation - Open records exemption - Retaliation prohibition.

Records of the division relating to mediation services provided by the division are exempt from section 44-04-18. An employee may not be discharged, disciplined, or penalized concerning the employee's compensation, conditions, location, or other privileges of employment because of the employee's request for or participation in the mediation services provided by the division.

54-44.3-15. Payment disapproved by director.

The director may disapprove the payment for personal service for any person holding a position in the classified service, except a person appointed to a position for the duration of an emergency, if the director determines that the person named therein has not been classified and is not imminently to receive classification in accordance with the provisions of this chapter and the rules and orders thereunder or that the rate of pay is not authorized.

54-44.3-16. Agency personnel officers.

The elected or appointed chief officer of each agency or department of the service shall designate a staff employee to serve as personnel officer for that division of the service to assist the chief officer in that person's duty to administer personnel responsibilities specified in this chapter and by the personnel rules. The designated personnel officer of each agency or department shall certify to the agency elected or appointed chief officer that each person holding a position in the classified service authorized for payment through payroll has been classified in accordance with the provisions of this chapter and the rules and orders under this chapter and that the rate of pay is within established current salary ranges or excepted from the ranges by written authorization by the director.

54-44.3-17. Grant-in-aid programs.

Whenever the provisions of any law, rule, order, or regulation of the United States or of any federal agency or authority providing or administering federal funds for use in North Dakota require civil service or merit standards or classifications other than those required by the provisions of this chapter and rules and regulations promulgated under this chapter, then the provisions of such law, rule, order, or regulation must prevail and must govern the employees

affected thereby. The division shall provide those services necessary to comply with merit standards for federal grant-in-aid agencies.

54-44.3-18. Authority to provide services to cities and political subdivisions.

The division may enter into agreement with any city or political subdivision of the state to furnish services and facilities of the division to the city or political subdivision in the administration of its personnel on merit principles. Any such agreement must provide for the reimbursement to the state of the cost of the services and facilities furnished, such reimbursements to be deposited to the credit of the general fund. All cities and political subdivisions of the state may enter into such agreements.

54-44.3-19. Board authority to provide service to cities, political subdivisions, and other entities.

The board may enter into agreement with any city or political subdivision of this state to furnish any of its services and facilities, other than factfinding or conciliation services, and the agreement must provide for reimbursement to the state of the cost of the services and facilities furnished. All cities and political subdivisions of this state may enter into the agreements. The board and division shall provide coverage to other agencies or political subdivisions as may by federal laws or regulations be required to be subject to a personnel system in order to obtain federal grants-in-aid. The board and division shall provide coverage to political subdivisions upon the request of the subdivisions. Other agencies, departments, or divisions or positions may be placed under the complete or limited board and division personnel plan in the manner and to the extent the legislative assembly shall by law direct.

54-44.3-20. Categories of positions in the state service.

All positions in the state service are included in the classified service except:

1. Each official elected by popular vote and each person appointed to fill vacancies in an elective office, one principal assistant, and one private secretary.
2. Members of boards and commissions required by law.
3. Administrative heads of departments required by law, other than the superintendent of North Dakota vision services - school for the blind, the superintendent of the school for the deaf, and the state librarian.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry, investigation, or examination for the legislative branch of government or a department of the state government.
7. Positions deemed to be inappropriate to the classified service due to the special nature of the position as determined by the division and approved by the board.
8. Employees of the institutions of higher education under the control of the state board of higher education.
9. Members and employees of occupational and professional boards.
10. Officers and employees of the North Dakota mill and elevator association.
11. The director of the committee on employment of people with disabilities of the department of human services.
12. Positions referred to under law as serving at the pleasure of or at the will of the appointing authority.
13. Licensed teachers engaged in teaching at the North Dakota youth correctional center, North Dakota vision services - school for the blind, and the school for the deaf.
14. Officers of workforce safety and insurance.
15. Officers and employees of the department of commerce.
16. Attorneys employed by the insurance commissioner.
17. Engineers, engineering technicians, and geologists employed by the director of mineral resources.

54-44.3-21. Employment only under approved class title.

No person may be appointed to or employed in a position in the classified service under a class title which has not been approved by the director as appropriate to the duties to be performed.

54-44.3-22. Limitations on inquiries in application or test - Discrimination prohibited.

No question in any form of application or in any test may be so framed as to elicit any information concerning the political or religious opinions or affiliations of any applicant, nor may any inquiry be made concerning such opinions or affiliations. All disclosures thereof must be discountenanced. No discrimination may be exercised, threatened, or promised by any person in the employ of any division of the service or of the personnel division against or in favor of any applicant, eligible, or employee because of sex, race, color, national origin, age, or religious or political opinions or affiliations.

54-44.3-23. Veterans' preferences.

Veterans' preferences must be in accordance with chapter 37-19.1.

54-44.3-24. Application of chapter to existing employees.

All employees in positions which are in the classified service as defined in this chapter and who, prior to July 1, 1975, have served continuously for a period of six months or more, or as regular seasonal employees have satisfactorily served in such positions through one seasonal service period, shall be certified to such positions, and grades and classifications, under the personnel system, and shall not be subject to examination or trial service periods of employment.

54-44.3-25. Prohibited conduct.

1. No person may make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under this chapter, or in any manner commit or attempt to commit any fraud preventing the impartial execution of this chapter and the rules.
2. No person may, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.
3. No employee of the division, examiner, or other person may defeat, deceive, or obstruct any person in that person's right to examination, eligibility, certification, or appointment under this chapter, or furnish to any person any special or confidential information for the purpose of affecting the rules or prospects of any person with respect to employment in the classified service.

54-44.3-26. Penalty.

Any person who intentionally violates any provision of this chapter is guilty of an infraction and, upon conviction thereof, is, for a period of one year, ineligible for appointment or employment in the classified service.

54-44.3-27. Transfer of records of merit system council.

All personnel and records of the North Dakota merit system council are hereby transferred to the division created by this chapter.

54-44.3-28. College student cooperative education or intern program - Eligibility.

The director shall establish and administer within the executive and legislative branches of state government a program through which college students may receive stipends and academic credit for participating in a cooperative education or internship program. The program must be open to any student enrolled in a public or private educational institution in this state which has been accredited by an agency recognized by the United States department of

education. The director shall establish classifications and develop uniform application procedures for the cooperative education or internship program.

54-44.3-29. Acceptance of federal funds.

The director is authorized to accept federal funds through grant-aided agencies or directly for the purpose of operating or ensuring operation of a merit personnel system.

54-44.3-30. Agencies subject to merit system.

All personnel employed by the department of human services, the regional offices of that department, job service North Dakota, North Dakota human resource management services, the state department of health, and other agencies or political subdivisions as may be federal law or rule be required to be subject to a merit system in order to obtain federal grants-in-aid are covered by the merit system provided in this chapter. Merit system coverage must also be provided to personnel employed as purchasing agents or buyers in the purchasing division of the office of management and budget. Other agencies, departments, or divisions and positions must be placed under a merit system in the manner and to the extent required by law.

54-44.3-31. Political subdivision may request to be exempted from state merit system.

A political subdivision subject to the merit system under this chapter may file a request with the division and the director of the department of human services to be exempted from the merit system. The request must describe a plan and policy that assures the political subdivision has developed a merit system plan that meets federal standards for personnel administration. The division and the director of the department of human services shall authorize the political subdivision plan within sixty days of receiving a request under this section if the plan and policies meet federal requirements. If the division and the director of the department of human services determine that the proposed plan and policies fail to meet the federal requirements, the division and the director shall deny the request and notify the requester of the specific reasons for the denial.

54-44.3-32. Political subdivision merit system compliance.

The division and the department of human services shall develop oversight and audit procedures for political subdivision merit systems to assure compliance with federal merit system principles. If the division and the department of human services determine that a political subdivision has failed to maintain compliance with federal merit system principles, the division and the department shall notify the political subdivision of the noncompliance and order the political subdivision to take corrective action. If a political subdivision does not take the necessary corrective action to comply with federal merit system principles, the division and the department of human services shall revoke the political subdivision's exemption from the state merit system and return the political subdivision to the state merit system. The political subdivision is responsible for any penalty assessed by a federal authority for a noncompliant political subdivision merit system.

CHAPTER 4-07-20.2
APPEALS OF DISCRIMINATION OR REPRISAL

Section

4-07-20.2-01	Scope of Chapter
4-07-20.2-01.1	Employees Not in the Classified Service May Appeal Claims of Reprisal
4-07-20.2-02	Definitions
4-07-20.2-03	Statutory Definitions
4-07-20.2-04	Applicants, Probationary Employees, or Regular Employees May Appeal Reprisal or Discrimination in Employment
4-07-20.2-04.1	Procedure for Applicant Appeals of Discrimination or Reprisal in Employment to Agency Appointing Authority
4-07-20.2-05	Completion of Agency Grievance Process Prior to Appeal to Human Resource Management Services
4-07-20.2-06	Waiver of Agency Grievance Procedure
4-07-20.2-07	Procedure for Appeals of Discrimination or Reprisal to Human Resource Management Services

4-07-20.2-01. Scope of chapter.

This chapter applies to applicants for positions classified by human resource management services, probationary employees or regular employees in classified positions who want to appeal reprisal or who want to appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-01.1. Employees not in the classified service may appeal claims of reprisal.

This chapter also applies to employees not in the classified service who appeal a claim of reprisal under subsection 5 of North Dakota Century Code section 34-11.1-04.

History: Effective July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5)

4-07-20.2-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Applicant" means a person who has applied for a position classified by human resource management services and who has complied with the application procedures required by the employing agency.
2. "Date of service" means the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery of electronic means, the date of actual delivery.
3. "Regular employee" means a person who has completed the probationary period and who is or was in a position classified by human resource management services at the time the alleged action occurred.

4. "Working days" means Monday through Friday exclusive of holidays.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-03. Statutory definitions.

Unless otherwise defined, or made inappropriate by context, all words used in this chapter have meanings given to them under North Dakota Century Code chapter 14-02.4 and subsection 5 of North Dakota Century Code section 34-11.1-04.

History: Effective November 1, 1996; amended effective July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

4-07-20.2-04. Applicants, probationary employees, or regular employees may appeal reprisal or discrimination in employment.

Applicants for positions classified by human resource management services and probationary or regular employees in classified positions may appeal reprisal or may appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-04.1. Procedure for applicant appeals of discrimination or reprisal in employment to agency appointing authority.

1. An applicant who has completed a timely and properly completed application for a classified position within an agency and who alleges discrimination or reprisal in employment shall file a written appeal to the agency appointing authority. The letter of appeal must specify what alleged discriminatory or reprisal action against the applicant was taken by the agency. The appeal information must be delivered, mailed, or transmitted by electronic means and must be received in the office of the agency appointing authority by five p.m. within fifteen working days of the alleged discriminatory or reprisal action.
2. The agency appointing authority has fifteen working days from the receipt of the appeal to review the appeal and provide a written response to the applicant.
3. If the applicant does not agree with the response of the agency appointing authority, the applicant may further appeal to human resource management services in accordance with section 4-07-20.2-07.

History: Effective July 1, 2008; amended effective July 1, 2010.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12

4-07-20.2-05. Completion of agency grievance process prior to appeal to human resource management services.

A probationary or regular employee shall complete the agency grievance process prior to submitting an appeal to human resource management services for an appeal hearing, unless a waiver

is granted as provided for in section 4-07-20.2-06. The employee shall begin the agency grievance procedure within fifteen working days from the date of the alleged discriminatory or reprisal action. Failure to begin the procedure within time limitations may cause the employee to lose the right to appeal to human resource management services. The agency appointing authority or designee, for good cause shown, may waive the time limitations for filing a grievance. Good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion. In no event may a grievance be deemed timely after sixty days have elapsed from the date of the employer action. If an agency does not have an established written grievance procedure, the employee shall submit the appeal to human resource management services within fifteen working days from the date of the alleged discriminatory or reprisal action.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-06. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the probationary or regular employee and appointing authority. The waiver must be signed by both parties within fifteen working days of the alleged discriminatory or reprisal action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.2-07.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20.2-07. Procedure for appeals of discrimination or reprisal to human resource management services.

1. A probationary or regular employee shall file the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure or within fifteen working days from the date of the waiver. An additional fifteen working days is not available if the requested waiver is denied. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
2. An applicant shall file the appeal form by delivery, mail, or transmittal by electronic means, and the form must be received in the human resource management services office by five p.m. within fifteen working days of the service of notice of the agency appointing authority's response to the alleged discriminatory or reprisal action. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.
3. An employee in a nonclassified position may appeal claims of reprisal by filing the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure, or within fifteen working days of the date of the reprisal action if an agency does not have an established

grievance process. When an employee is using an agency internal grievance procedure, the date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.

4. The director, human resource management services, shall within two working days submit a written request to the director, office of administrative hearings, to conduct a hearing on behalf of human resource management services and shall forward a copy of the appeal form to the affected appointing authority.
5. The administrative law judge shall initially consider whether the appeal was filed within required time limitations. If the administrative law judge determines the time limitations have not been met, the administrative law judge shall prepare an appropriate order dismissing the appeal, which shall be final, and provide a copy of it to the parties. The administrative law judge may, for good cause shown, waive the time limitations for filing an appeal. Good cause means those circumstances that reasonably and without any fault on the part of the appellant prevented the filing of an appeal in a timely fashion. In no event may an appeal be deemed timely after sixty days have elapsed from the date of the employer action.
6. The administrative law judge shall consider whether human resource management services has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the internal agency grievance process. If the administrative law judge is unable to establish whether human resource management services has jurisdiction over the subject matter of the appeal or whether the appropriate rules were followed, a hearing may be conducted to ascertain the facts related to those issues.
7. If the administrative law judge determines that human resource management services does not have jurisdiction in the matter of the appeal, the administrative law judge shall prepare findings of fact and conclusions of law, if appropriate; issue a final decision dismissing the appeal; and provide a copy of them to the parties.
8. If it is determined that human resource management services has jurisdiction over the appeal, the administrative law judge shall schedule a hearing. The administrative law judge shall conduct the hearing and related proceedings, receive evidence related to the issues, prepare findings of fact and conclusions of law, and issue a final decision.
9. The administrative law judge shall notify the employee or the applicant and the affected appointing authority of the final decision by sending each of them the findings of fact, conclusions of law, and final decision. Notification shall be accomplished in the same manner as for notification of final orders required by subsection 3 of North Dakota Century Code section 28-32-39. The parties shall implement the final decision within any time periods specified by the administrative law judge.
10. The administrative law judge shall return the completed appeal file to human resource management services.
11. Any party to the appeal may review the recordings of the hearing by making a request to human resource management services.

History: Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008; July 1, 2010.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 34-11.1-04(5), 54-44.3-12.2

CHAPTER 4-07-21
ALTERNATIVE DISPUTE RESOLUTION

Section	
4-07-21-01	Scope of Chapter
4-07-21-02	Definitions
4-07-21-03	Alternative Dispute Resolution
4-07-21-04	Grievance Time Limits Suspended

4-07-21-01. Scope of chapter.

This chapter applies to all state and local government agencies, departments, institutions, and boards and commissions that employ individuals in positions classified by human resource management services.

History: Effective September 1, 1992; amended effective November 1, 1996; July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except "alternative dispute resolution" means a method of resolving disputes, outside the grievance process, that involves a neutral person to assist in identifying issues, developing options, and arriving at a resolution.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-03. Alternative dispute resolution.

Alternative dispute resolution may be used to resolve disputes that occur within an agency. All parties involved in the dispute must agree to the use of alternative dispute resolution prior to using the method.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

4-07-21-04. Grievance time limits suspended.

During the time period when the agency appointing authority and the employee involved in a dispute are utilizing alternative dispute resolution, the time limits of the internal agency grievance procedure must be suspended. If a resolution is not agreed to by the participants at the conclusion of the resolution process, then the time limits of the agency grievance procedure must be activated. The alternative dispute resolution process facilitator shall determine the date of conclusion of the resolution process and notify the parties.

History: Effective September 1, 1992; amended effective November 1, 1996.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1)

CHAPTER 4-07-20
GRIEVANCE PROCEDURES

Section	
4-07-20-01	Scope of Chapter
4-07-20-02	Requirements for Grievance Procedures
4-07-20-02.1	Waiver of Agency Grievance Procedure
4-07-20-03	Absence of Established Written Agency Grievance Procedure

4-07-20-01. Scope of chapter.

This chapter applies to all state and local government agencies, departments, institutions, and boards and commissions that employ individuals in positions classified by human resource management services.

History: Effective May 1, 1994; amended effective November 1, 1996; July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-20-02. Requirements for grievance procedures.

Each agency, department, institution, board, and commission subject to this chapter shall establish internal grievance procedures that include the following:

1. A provision that allows an employee to grieve an employer action of demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, reprisal, or discrimination in employment. The provision must require the employee to begin the agency grievance procedure within fifteen working days from the date of notice of the employer action, except in the case of reprisal. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery. The provision must also require that in the case of reprisal the employee shall begin the agency grievance procedure within fifteen working days from the date of the reprisal action.
2. Specific steps to be followed in processing the grievance, limitations on the amount of time the parties have to respond, and any procedures for extending time limitations.
3. A requirement that the parties must respond to the issues raised in the grievance.
4. A method of counting time that is in working days.
5. Provisions that allow an employee a reasonable amount of time to process a grievance without loss of pay during regular working hours.
6. An option that if the appointing authority misses an established deadline in the grievance procedure, the grievance may be advanced to the next step.
7. The use of a standard grievance form.

History: Effective May 1, 1994; amended effective November 1, 1996; July 1, 2004; July 1, 2010.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

4-07-20-02.1. Waiver of agency grievance procedure.

A waiver of the agency grievance procedure is allowed by mutual agreement of the employee and appointing authority. Each party must sign the waiver within fifteen working days of the employer action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.1-08. An additional fifteen working days is not available if the requested waiver is denied.

History: Effective July 1, 2004; amended effective July 1, 2008.

General Authority: NDCC 54-44.3-12(1)

Law Implemented: NDCC 54-44.3-12.2

4-07-20-03. Absence of established written agency grievance procedure.

In the absence of an established written agency grievance procedure, the aggrieved employee may appeal an employer action as covered in subsection 1 of section 4-07-20.1-02 and section 4-07-20.2-04 directly to human resource management services by following the applicable appeal procedures outlined in section 4-07-20.1-08 or 4-07-20.2-07. Human resource management services shall act upon the appeal in the same manner as an appeal processed through an agency grievance procedure. This avenue of appeal does not negate the requirements for an agency grievance procedure.

History: Effective November 1, 1996; amended effective July 1, 2004.

General Authority: NDCC 54-44.3-12

Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12.2

**CHAPTER 54-44.3
CENTRAL PERSONNEL SYSTEM**

54-44.3-01. Purpose of chapter.

The general purpose of this chapter is to create North Dakota human resource management services in order to establish a unified system of human resource management for the classified service of the state based upon merit principles and scientific methods, governing the position classification, pay administration, and transfer of its employees. All appointments and promotions to positions in the state classified service must be made without regard to sex, race, color, national origin, age, religious affiliations, or political opinions on the basis of merit and fitness.

54-44.3-01.1. Compensation relationships - Policy.

It is the policy of this state to establish equitable, nondiscriminatory compensation relationships among all positions and classes within the state's classification plan.

54-44.3-01.2. Compensation philosophy statement.

The compensation program for classified state employees must be designed to recruit, retain, and motivate a quality workforce for the purpose of providing efficient and effective services to the citizens of North Dakota. For purposes of this section, "compensation" is defined as base salary and related fringe benefits.

The compensation program must:

1. Provide a competitive employee compensation package based on job content evaluation, internal equity, and external competitiveness balanced by the state's fiscal conditions.
2. Be based on principles of fairness and equity.
3. Include a consistent compensation policy which allows for multiple pay structures to address varying occupational specialties.
4. Set the external competitiveness target for salary range midpoints at a competitive level of relevant labor markets. For purposes of this section, "relevant labor markets" is defined as the labor markets from which the state attracts employees in similar positions and the labor markets to which the state loses employees in similar positions.
5. Include a process for providing compensation adjustments that considers a combination of factors, including achievement of performance objectives or results, competency determinations, recognition of changes in job content, and acquisition and application of advanced skills or knowledge.
6. Provide funding for compensation adjustments based on the dollar amounts determined necessary to provide competitive compensation in accordance with the state's compensation philosophy. Funding for compensation adjustments may not be provided as a statewide percentage increase attributable to all employees nor as part of a statewide pool of funds designated for addressing equity issues.
7. Consider the needs of the state as an employer and the tax effect on North Dakota citizens.

The office of management and budget shall develop and consistently administer the compensation program for classified state employees and ensure that state agencies adhere to the components of the state's compensation philosophy. The office of management and budget shall regularly conduct compensation comparisons to ensure that the state's compensation levels are competitive with relevant labor markets.

The legislative assembly recognizes the importance of providing annual compensation adjustments to employees based on performance and equity to maintain the market competitiveness of the compensation system.

54-44.3-02. Definitions.

As used in this chapter, unless the context clearly requires otherwise:

1. "Appointing authority" means the authority to appoint to positions in the classified service and is reserved to officials and heads of departments and agencies within the government.
2. "Board" means the state personnel board.
3. "Director" means the director of North Dakota human resource management services.
4. "Division" means North Dakota human resource management services.
5. "Employee" means any person who occupies a position in the classified service.
6. "Officer" means an employee of the state government who is appointed and serves at the pleasure of an official, board, or commission.
7. "Official" means a member of the state government elected by popular vote.

54-44.3-03. State personnel board - Composition - Terms - Vacancies - Qualifications.

1. The state personnel board is composed of the director, who must be the chairman of the board; one member appointed by the governor; two members elected by employees classified under sections 54-44.3-19 and 54-44.3-20; and one member with a professional human resource background appointed by the governor.
2. The term of each member of the board, except the director, must be for six years. The director's term coincides with employment as director. Any permanent vacancy in office must be filled for the unexpired term in the same manner as the selection of the person vacating the office.
3. Each member of the board must be a resident of the state for at least sixty days and must be known to be in sympathy with the application of merit principles to public employment. No member of the board may have held a position in a political party within four years immediately preceding the member's appointment or election to the board, and those members of the board elected by classified employees must be full-time employees in good standing of the classified service.

54-44.3-04. Compensation and expenses of members of board.

Each member of the board is entitled to compensation at the rate of fifty dollars for each day employed in the official duties of the board and other expenses as provided for by law.

54-44.3-05. Election committee.

The governor, the secretary of state, and the attorney general shall constitute a three-member committee to develop rules and regulations for a secret ballot election among all employees eligible under sections 54-44.3-19 and 54-44.3-20 to carry out the election of the two members of the board elected by classified employees. All elections of members of the board are the responsibility of the director who will ensure that proper and due notification is given to all employees in sufficient time to enable potential candidates to initiate necessary petitions and conduct campaigns. Nominees for candidacy are required to submit petitions containing no less than two hundred names of employees in good standing classified under sections 54-44.3-19 and 54-44.3-20. All elections will be conducted through a secret ballot process.

54-44.3-06. Meetings.

The board shall organize annually at the first meeting of each fiscal year. It shall meet at least once a year and at such times and places as are specified by call of the chairman or any three members of the board. All meetings must be open to the public. Three members constitute a quorum for the transaction of business. Three favorable votes are necessary for the passage of any resolutions or taking of any official action by the board at any meeting.

54-44.3-07. Duties of board.

The primary responsibility of the board is to foster and assure a system of personnel administration in the classified service of state government. In carrying out this function, the board shall:

1. Adopt any rules and hold any hearings as are necessary to properly perform the duties, functions, and powers imposed on or vested in the board by law. The adoption of rules must be accomplished in accordance with chapter 28-32.
2. Hear, consider, and determine appeals by nonprobationary employees in the classified service related to position classifications and pay grade assignments.
3. Ensure that the director includes the activities of the board in the office of management and budget's biennial report.
4. Keep minutes and maintain records necessary to assure the equitable administration of this chapter.

54-44.3-08. Testimony - Call witnesses - Request production of papers.

The board, as a body, may invite and hear witnesses, and request the production of books and papers or any other physical evidence pertinent to any investigation or hearing authorized by this chapter. Witnesses who testify at the invitation of the board shall receive remuneration in the same amount and manner received by witnesses in North Dakota district courts.

54-44.3-09. Board secretariat.

The division shall serve as the secretariat to the board.

54-44.3-10. Action to secure compliance with chapter.

The board may maintain such action or proceeding at law or in equity as the board considers necessary or appropriate to secure compliance with this chapter and its rules and orders thereunder. The attorney general may assign an assistant attorney general as legal adviser and counsel to both the board and the division. The attorney general is responsible for representing the personnel system in all legal contexts.

54-44.3-11. North Dakota human resource management services - Director - Appointment - Removal.

North Dakota human resource management services is created within the office of management and budget under the supervision and control of a director who is responsible for the performance and exercise of the duties, functions, and powers imposed upon the division.

1. The director must be experienced in the field of human resource management and shall hold considerable knowledge of merit principles, goals, and their methods of operation.
2. The director of the office of management and budget shall appoint the director. The position of director is not a classified position and the director shall serve at the pleasure of the director of the office of management and budget.

54-44.3-12. Duties of director.

The director shall direct and supervise, with the approval of the director of the office of management and budget, all the administrative and technical activities of the division. In addition to the duties imposed elsewhere in this chapter, the director shall:

1. Establish general policies, rules, and regulations, subject to the approval of the board, which are binding on the agencies affected, and which apply to the employees in the classified service. These rules must provide for:
 - a. Establishing and maintaining a classification plan.
 - b. Establishing and maintaining a compensation plan.
 - c. Promoting a consistent application of personnel policies.
 - d. Enhancing greater uniformity in matters relating to probationary periods, hours of work, leaves of absence, separations, transfers, disciplinary actions, grievance procedures, and performance management.
 - e. Ensuring fair treatment and compliance with equal employment opportunity and nondiscrimination laws.
2. Establish and maintain a roster of all employees in the state classified service in which there must be set forth, as to each employee, the class title of the position occupied,

- the salary or pay, change in class title, and any other personnel data that the division deems necessary.
3. Select for appointment under this chapter such employees of the division and such experts and special assistants as are necessary to carry out effectively the provisions of this chapter. Salaries and positions of personnel in the division must conform to the classification and pay plan provided by this chapter.
 4. Assist the employee-appointing authorities, in accordance with the provisions of this chapter and the rules adopted thereunder, in the preparation and administration of appropriate selection procedures.
 5. Encourage and assist in the development of personnel administration within the various departments and agencies of the state.
 6. Cooperate with employee-appointing authorities and other supervisory officers in the conduct of employee training programs.
 7. Develop procedures that, notwithstanding any other law, must be followed by all state agencies and institutions for employees in the state classified service, to ensure that all salaries are paid in a manner consistent with the state's compensation, classification, and salary administration policies.
 8. Consult with state agencies and institutions in the development of salary administration procedures for employees in the state classified service.
 9. Recognize knowledge, skills, complexity, accountability, and working condition hazards as compensable factors of the state's classification plan, required in the performance of work for all positions in the state classified service.
 10. Develop guidelines for allowing exceptions to the rules of the classification and compensation plans for use when the market salaries of specific positions are not consistent with the state's compensation policy.
 11. Conduct in-state and out-of-state labor market surveys that are representative of the state's classified service occupations to enable the state to position itself accurately against the market.
 12. Communicate classification and compensation policies to the managers and employees in the state-classified service by providing written information on the state's classification and compensation procedures.
 13. Adopt rules, subject to the approval of the board, to ensure compliance with and resolve compliance issues relating to agencies required by state or federal law or rule to be subject to a merit personnel system.

54-44.3-12.1. Revisions to compensation plan.

Revisions to the compensation plan may only be made on July first, following the close of a regular legislative session, except that new classifications may be added to the compensation plan during a biennium when deemed necessary by the director. Revisions to the compensation plan for county employees covered by the plan become effective on January first of the first full calendar year following the revision or on July first following the close of a regular legislative session, based on official action by the board of county commissioners. Revisions to the compensation plan may only be made to the extent the legislative assembly appropriates funds to implement such plans.

54-44.3-12.2. Employee complaints - Cooperation in development and implementation of basic agency grievance procedures and a statewide appeal mechanism - Appeals.

It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees by requiring affected agencies to adopt grievance procedures and through the creation of a statewide appeals mechanism with primary jurisdiction to entertain and resolve classified employee appeals. It is the policy of this state to resolve bona fide employee complaints as quickly as possible. The division shall cooperate with and assist the various departments, agencies, and institutions of the state in the development and implementation of basic agency grievance procedures and a statewide appeal mechanism. The division shall certify appeals from nonprobationary employees in the classified service which are related to discrimination, merit system qualification, reprisals, reduction in

force, forced relocation, demotion with loss of pay, suspension without pay, and dismissal, and from applicants for positions in the classified service and probationary employees in the classified service which are related to discrimination or reprisal. Upon receipt of an appeal, the division shall submit a written request to the director of the office of administrative hearings to designate an administrative law judge for the division to conduct the hearing and related proceedings, including receiving evidence and preparing findings of fact, conclusions of law, and issuing a final decision. The moving party in the initial action bears the burden of proof in the appeal. An appeal to the district court from the determination of the administrative law judge must be filed according to chapter 28-32, including proper service upon the division, but neither the division nor the office of administrative hearings may be named as a party to the appeal under chapter 28-32 unless an employee of one of those two agencies is involved in the grievance.

54-44.3-13. Records and information to be furnished.

All departments and agencies covered by the personnel system shall furnish any reasonably necessary, nonprivileged records and information to the division which the division requests, except records made confidential by statute.

54-44.3-14. Records public.

The records of the division and the board, except such records as the statutes may require to be held confidential, are public records and must be open to public inspection, subject to regulations as to the time and manner of inspection which may be prescribed by the division or board.

54-44.3-14.1. Mediation - Open records exemption - Retaliation prohibition.

Records of the division relating to mediation services provided by the division are exempt from section 44-04-18. An employee may not be discharged, disciplined, or penalized concerning the employee's compensation, conditions, location, or other privileges of employment because of the employee's request for or participation in the mediation services provided by the division.

54-44.3-15. Payment disapproved by director.

The director may disapprove the payment for personal service for any person holding a position in the classified service, except a person appointed to a position for the duration of an emergency, if the director determines that the person named therein has not been classified and is not imminently to receive classification in accordance with the provisions of this chapter and the rules and orders thereunder or that the rate of pay is not authorized.

54-44.3-16. Agency personnel officers.

The elected or appointed chief officer of each agency or department of the service shall designate a staff employee to serve as personnel officer for that division of the service to assist the chief officer in that person's duty to administer personnel responsibilities specified in this chapter and by the personnel rules. The designated personnel officer of each agency or department shall certify to the agency elected or appointed chief officer that each person holding a position in the classified service authorized for payment through payroll has been classified in accordance with the provisions of this chapter and the rules and orders under this chapter and that the rate of pay is within established current salary ranges or excepted from the ranges by written authorization by the director.

54-44.3-17. Grant-in-aid programs.

Whenever the provisions of any law, rule, order, or regulation of the United States or of any federal agency or authority providing or administering federal funds for use in North Dakota require civil service or merit standards or classifications other than those required by the provisions of this chapter and rules and regulations promulgated under this chapter, then the provisions of such law, rule, order, or regulation must prevail and must govern the employees

affected thereby. The division shall provide those services necessary to comply with merit standards for federal grant-in-aid agencies.

54-44.3-18. Authority to provide services to cities and political subdivisions.

The division may enter into agreement with any city or political subdivision of the state to furnish services and facilities of the division to the city or political subdivision in the administration of its personnel on merit principles. Any such agreement must provide for the reimbursement to the state of the cost of the services and facilities furnished, such reimbursements to be deposited to the credit of the general fund. All cities and political subdivisions of the state may enter into such agreements.

54-44.3-19. Board authority to provide service to cities, political subdivisions, and other entities.

The board may enter into agreement with any city or political subdivision of this state to furnish any of its services and facilities, other than factfinding or conciliation services, and the agreement must provide for reimbursement to the state of the cost of the services and facilities furnished. All cities and political subdivisions of this state may enter into the agreements. The board and division shall provide coverage to other agencies or political subdivisions as may be required by federal laws or regulations to be subject to a personnel system in order to obtain federal grants-in-aid. The board and division shall provide coverage to political subdivisions upon the request of the subdivisions. Other agencies, departments, or divisions or positions may be placed under the complete or limited board and division personnel plan in the manner and to the extent the legislative assembly shall by law direct.

54-44.3-20. Categories of positions in the state service.

All positions in the state service are included in the classified service except:

1. Each official elected by popular vote and each person appointed to fill vacancies in an elective office, one principal assistant, and one private secretary.
2. Members of boards and commissions required by law.
3. Administrative heads of departments required by law, other than the superintendent of North Dakota vision services - school for the blind, the superintendent of the school for the deaf, and the state librarian.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry, investigation, or examination for the legislative branch of government or a department of the state government.
7. Positions deemed to be inappropriate to the classified service due to the special nature of the position as determined by the division and approved by the board.
8. Employees of the institutions of higher education under the control of the state board of higher education.
9. Members and employees of occupational and professional boards.
10. Officers and employees of the North Dakota mill and elevator association.
11. The director of the committee on employment of people with disabilities of the department of human services.
12. Positions referred to under law as serving at the pleasure of or at the will of the appointing authority.
13. Licensed teachers engaged in teaching at the North Dakota youth correctional center, North Dakota vision services - school for the blind, and the school for the deaf.
14. Officers of workforce safety and insurance.
15. Officers and employees of the department of commerce.
16. Attorneys employed by the insurance commissioner.
17. Engineers, engineering technicians, and geologists employed by the director of mineral resources.

54-44.3-21. Employment only under approved class title.

No person may be appointed to or employed in a position in the classified service under a class title which has not been approved by the director as appropriate to the duties to be performed.

54-44.3-22. Limitations on inquiries in application or test - Discrimination prohibited.

No question in any form of application or in any test may be so framed as to elicit any information concerning the political or religious opinions or affiliations of any applicant, nor may any inquiry be made concerning such opinions or affiliations. All disclosures thereof must be discountenanced. No discrimination may be exercised, threatened, or promised by any person in the employ of any division of the service or of the personnel division against or in favor of any applicant, eligible, or employee because of sex, race, color, national origin, age, or religious or political opinions or affiliations.

54-44.3-23. Veterans' preferences.

Veterans' preferences must be in accordance with chapter 37-19.1.

54-44.3-24. Application of chapter to existing employees.

All employees in positions which are in the classified service as defined in this chapter and who, prior to July 1, 1975, have served continuously for a period of six months or more, or as regular seasonal employees have satisfactorily served in such positions through one seasonal service period, shall be certified to such positions, and grades and classifications, under the personnel system, and shall not be subject to examination or trial service periods of employment.

54-44.3-25. Prohibited conduct.

1. No person may make any false statement, certificate, mark, rating, or report with regard to any test, certification, or appointment made under this chapter, or in any manner commit or attempt to commit any fraud preventing the impartial execution of this chapter and the rules.
2. No person may, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.
3. No employee of the division, examiner, or other person may defeat, deceive, or obstruct any person in that person's right to examination, eligibility, certification, or appointment under this chapter, or furnish to any person any special or confidential information for the purpose of affecting the rules or prospects of any person with respect to employment in the classified service.

54-44.3-26. Penalty.

Any person who intentionally violates any provision of this chapter is guilty of an infraction and, upon conviction thereof, is, for a period of one year, ineligible for appointment or employment in the classified service.

54-44.3-27. Transfer of records of merit system council.

All personnel and records of the North Dakota merit system council are hereby transferred to the division created by this chapter.

54-44.3-28. College student cooperative education or intern program - Eligibility.

The director shall establish and administer within the executive and legislative branches of state government a program through which college students may receive stipends and academic credit for participating in a cooperative education or internship program. The program must be open to any student enrolled in a public or private educational institution in this state which has been accredited by an agency recognized by the United States department of

education. The director shall establish classifications and develop uniform application procedures for the cooperative education or internship program.

54-44.3-29. Acceptance of federal funds.

The director is authorized to accept federal funds through grant-aided agencies or directly for the purpose of operating or ensuring operation of a merit personnel system.

54-44.3-30. Agencies subject to merit system.

All personnel employed by the department of human services, the regional offices of that department, job service North Dakota, North Dakota human resource management services, the state department of health, and other agencies or political subdivisions as may by federal law or rule be required to be subject to a merit system in order to obtain federal grants-in-aid are covered by the merit system provided in this chapter. Merit system coverage must also be provided to personnel employed as purchasing agents or buyers in the purchasing division of the office of management and budget. Other agencies, departments, or divisions and positions must be placed under a merit system in the manner and to the extent required by law.

54-44.3-31. Political subdivision may request to be exempted from state merit system.

A political subdivision subject to the merit system under this chapter may file a request with the division and the director of the department of human services to be exempted from the merit system. The request must describe a plan and policy that assures the political subdivision has developed a merit system plan that meets federal standards for personnel administration. The division and the director of the department of human services shall authorize the political subdivision plan within sixty days of receiving a request under this section if the plan and policies meet federal requirements. If the division and the director of the department of human services determine that the proposed plan and policies fail to meet the federal requirements, the division and the director shall deny the request and notify the requester of the specific reasons for the denial.

54-44.3-32. Political subdivision merit system compliance.

The division and the department of human services shall develop oversight and audit procedures for political subdivision merit systems to assure compliance with federal merit system principles. If the division and the department of human services determine that a political subdivision has failed to maintain compliance with federal merit system principles, the division and the department shall notify the political subdivision of the noncompliance and order the political subdivision to take corrective action. If a political subdivision does not take the necessary corrective action to comply with federal merit system principles, the division and the department of human services shall revoke the political subdivision's exemption from the state merit system and return the political subdivision to the state merit system. The political subdivision is responsible for any penalty assessed by a federal authority for a noncompliant political subdivision merit system.

Personnel Policy Manual



NORTH DAKOTA
DEPARTMENT *of* HEALTH

Job Description Questionnaires (JDQ) – Content and Access

The department maintains a job description questionnaire (JDQ) on file for every position. The JDQ is located in the Human Resources Division. The JDQ contains detailed information about the position and is used to classify positions. Employees may request their JDQ by contacting Human Resources.

Discipline Policy

Supervisors are encouraged to consult early and as often as needed with the Human Resources Department, since the proper handling of disciplinary actions may impact DOH's ability to adequately address workplace issues.

Discipline of Temporary and Probationary Employees

An employee on probation may be separated at will from employment and may be terminated without cause and without progressive discipline. The employee may not grieve or appeal a lawful separation.

The division director shall notify the employee of the separation in writing. However, a supervisor may, in the supervisor's sole discretion, use progressive discipline to correct the job performance of a probationary employee, including extending the probationary period for up to and additional six months

Temporary employees may be terminated without cause and without progressive discipline. However, a supervisor may, in the supervisor's sole discretion, use progressive discipline to correct the job performance of temporary employees.

Discipline of Regular Employees

Progressive discipline must be used to correct a regular employee's job performance problems or for a violation of rules or standards. Supervisors should work with Human Resources Division throughout the entire progressive discipline process.

The steps discussed below are those typically used in a progressive discipline process.

Informal Discussions

These are meetings between the employee and supervisor to talk one-on-one about work-related problems. This provides an opportunity to discuss performance and behavior as follows: the impact on the work place, the employer's expectations of the employee, any assistance that will be provided, and possible consequences if improvement does not occur. These discussions should be documented by the supervisor. It is recommended that a copy of the documentation of the meeting be given to the employee. Documentation will not go in the personnel file.

CHRIS
SANDRA
KIM BROS

Verbal Warning

This is the first formal step of the disciplinary process. In the event that performance problems continue or a work-related offense occurs, the employee should receive a verbal warning. The warning should describe the problem, the impact on others, the employer's expectations of the employee and the consequences if the performance problem continues or the offense occurs again. In the case of an offense, the expectation of the employee generally will include a specific time frame and the fact that the degree of discipline will increase if the offense occurs again during that time. Documentation will not go in the personnel file.

The verbal warning should be documented by the supervisor. It is recommended that a copy of the oral warning documentation be given to the employee.

Written Warning

Generally, the second step of the disciplinary process requires the supervisor to compose and deliver a written warning to the employee. This would normally occur where the performance problem continues, or the same or a similar violation occurs. The written warning will contain a description of the problem or offense and the effect on the work place or the policy or administrative rule that was broken. The warning also will say that if the conduct is repeated the employee will be disciplined again more severely. A final warning also may be included in the written warning that specifies that dismissal will result if another infraction occurs.

A written warning containing special restrictions about attendance, conduct or imposing special procedures should be reviewed by the supervisor every 30 days, when it may be modified with a follow-up letter. Otherwise, the provisions, restrictions or directives will automatically continue until the next review. Documentation will go in the personnel file.

Progressive Discipline Exception

These steps of the progressive discipline process may be bypassed when an infraction or a violation of a serious nature is committed such as, but not limited to, insubordination; theft; falsification of pay records; assaulting a supervisor or coworker, patient or client; and for which the imposition of less severe disciplinary action would be inappropriate.

Pre-Action Notice

Prior to suspending, demoting or terminating a classified employee who has successfully completed the probationary period, the division director shall give the employee a written notice of the reasons for such action, an explanation of the allegations and the supporting evidence, and provide an opportunity for the employee to respond.

The written notice of the reasons and explanation of the allegations must include:

- a) A statement of the division director's intent to take disciplinary action that may result in demotion, suspension without pay, or termination of the employee.
- b) An explanation of the allegations against the employee; citing behavior, dates or occurrences, witnesses and other evidence.

- c) A statement of specific policy, administrative rule or practice violations or a statement citing what work expectation was violated and how the employee would have known of the work expectation.
- d) Notice that the employee may provide the division director with evidence, explanation or other information in writing which contradicts the allegations and evidence.
- e) Notice that the employee will have five working days to provide the written response.
- f) Notice of the employee's status (to continue working or placement on leave of absence with pay) until the final decision is made.
- g) A statement that a written notice of the final action taken will be provided to the employee.
- h) A statement at the end such as "I have read and understand this document. I am aware that it is being placed in my personnel file. I acknowledge that my signature does not necessarily indicate agreement with the contents of this document. I understand that I have the right to attach a response if I so choose."
- i) A signature line for the employee to acknowledge receipt or a witness to acknowledge the employee's receipt and/or refusal to sign.

Any time a pre-action notice is sent to an employee via US Postal service, an Affidavit of Service by Mail form must be used to document the date the letter was sent to the employee.

Opportunity to Respond

The employee must be given no less than five working days following receipt of the notice in which to respond in writing to the allegations. The employee must be given reasonable access to the employee's personnel file and all information upon which the allegations are based. If necessary, the employee may be placed on a leave of absence with pay during this time

Dismissal

This is the last step of the disciplinary process. This generally occurs after the supervisor has followed the complete progressive discipline process. This results after the manager has reviewed the employee's response to the pre-action letter and has determined that dismissal is the appropriate action for the violations or behavior.

Division Director, Manager and Supervisor Responsibilities

Supervisor's responsibilities related to disciplinary actions include documenting incidents of poor performance, inappropriate workplace behavior and violation of laws, rules and policies; documenting meetings with employees regarding their poor performance, inappropriate workplace behavior and violation of laws, rules and policies; establishing and monitoring adherence to plans for corrective action; drafting letters to employees and other documentation of disciplinary actions, investigating poor work performance and other job-related problems, and ascertaining and carrying out proper procedures.

Division directors, managers and supervisors are responsible to ensure full documentation and review of all disciplinary actions. Documentation must always be completed at the time of the action.

Supervisors may maintain a supervisory file containing written notes or documentation of an employee's performance separate from the official personnel file. If contents of the supervisory file are used for disciplinary purposes, such content must be made a permanent part of the employee's personnel file.

No documents that address an employee's character or performance may be placed in the personnel file unless the employee has had the opportunity to read the material. The employee must acknowledge that the employee has read the material by signing the actual copy to be filed or an attachment to the actual copy to be filed, with the understanding that the signature merely signifies that the employee has read the material to be filed and does not necessarily indicate agreement with its content. If the employee refuses to sign the copy to be filed, the division director shall indicate on the copy that the employee was shown the material, was requested to sign the material to verify that the material had been read, and that the employee refused to sign the copy to be filed. In the presence of the employee and a witness, the division director shall sign and date a statement verifying the refusal of the employee to sign the copy to be filed. The material must then be placed in the personnel file.

The employee has the right to answer any material filed and any answer must be attached to the file copy. If any material is found to be without merit or unfounded through a grievance procedure, it must be immediately removed from the file and may not be used in any subsequent actions or proceedings against the employee.

No anonymous letters or materials may be placed in the employee's personnel file.

Personnel Files – Content and Access

The department maintains a personnel file on each employee. The personnel file is located in the Human Resources Division. The personnel file shall include name, title, position held, payroll forms, salary, change of status, performance appraisals, date of employment, application for employment, letter of hire, acceptance letter, records of any disciplinary actions taken against the employee (written warnings, demotions, suspensions without pay or termination), occupational license, continuing education and information of a positive nature, including information indicating special competencies, achievements, performances or contributions of a professional or civic nature.

Any information addressing an employee's character or performance will not be placed in the personnel file unless the employee has had the opportunity to read the material. The employee must sign the actual copy to be filed, with the understanding that the signature merely signifies that the employee has read the material to be filed and does not necessarily indicate agreement with the content. If the employee refuses to sign the copy to be filed, the division director or section chief should indicate on the copy that the employee was shown the material, was requested to sign the material to verify that the material had been read, and that the employee refused to sign the copy to be filed. In the presence of the employee and a witness, the division director or section chief should sign and date the statement verifying refusal of the employee to sign the copy to be filed. The material will then be placed in the file.

Employees can answer any material placed in their personnel file and the answer will be attached to the file copy. Employees or their designated representative can examine their personnel files by appointment during normal business hours. Employees can reproduce any material in their personnel file at their personal expense. Personnel files can only be reviewed in the presence of the human resources director or a designated agency representative and the review will be conducted within the premises of Administrative Services.

Managers may maintain written notes or records of the employee's performance separate from the personnel file for the purpose of preparing evaluations or possible disciplinary action.

Reduction-In-Force (RIF) Procedures

The decisions of the Department of Health regarding where and how its resources, including its employees, will be assigned are necessary management decisions. Decisions on reduction-in-force are made in the context of overall budget cuts and reallocation of work.

RIF procedures will be initiated when it has been approved by the state health officer based on information provided by a section chief that a reduction-in-force is necessary in a division(s) or work unit(s) of a division(s) because of a reduction in funding, lack of work, curtailment of work or because of reorganization.

When a reduction-in-force is approved, the director of the division or work unit(s) will:

- a) Determine the division or work unit to be affected by the reduction-in-force.
- b) Determine the number of positions to be reduced and the classification(s) affected.
- c) Review vacant positions within the designated division or work unit and within the designated classification(s) for possible elimination.
- d) Reduce temporary employees performing the same or similar work in the designated division or work unit. (N.D. Admin. Code § 4-07-11-05)
- e) Reduce probationary employees in positions assigned the same classification(s) as those designated for reduction in the designated division or work unit. (N.D. Admin. Code § 4-07-11-05)
- f) Conduct a written reduction-in-force analysis if more than one regular employee occupies positions in the designated division or work unit with the same classification targeted to be reduced. A reduction-in-force analysis must show a comparison of the employees' knowledge, skills, length of classified service, other experience and level of performance with the knowledge, skills and experience determined necessary to accomplish the work to be done following the reduction-in-force. (N.D. Admin. Code § 4-07-11-03) (SFN 17168, Reduction-In-Force Analysis Worksheet)
- g) If a position to be eliminated is the only position in the division or work unit assigned a single classification, no reduction-in-force analysis is necessary but this fact must be documented.
- h) Reduce regular employees in positions selected for reduction through the analysis, providing to affected employees, in person, a written notification of at least two weeks. More time is desirable when possible. Written notification must include the reason(s) for the reduction-in-force, notice of grievance and appeal procedures and outplacement services available to the employee.

implementing suggested changes. The employee may submit their request to the Human Resources Division.

In the event that the concern is not resolved or the employee does not feel comfortable following these steps, there are other options available to you.

- The human resources director is available for advice or assistance.
- The Employee Assistance Program at St. Alexius is available to all employees and their families. The EAP can be reached by dialing 701-530-7195 or 1-800-327-7195.
- HRMS offers Alternative Dispute Resolution services. They can be reached at 701-328-3345.

When an employee informs management of a concern or problem, management will try to respond as soon as possible. All information obtained in attempting to solve the problem will be held in strict confidence as much as possible.

Grievance Procedures

Should normal steps of problem resolution fail, Section 4-07-20-02 of the Administrative Code states that each agency, department, institution, board and commission shall establish internal grievance procedures. Under the Administrative Code, only certain employer actions are grievable. Those actions are:

- a) Demotion.
- b) Dismissal.
- c) Suspension without pay.
- d) Forced relocation.
- e) Reduction-in-force.
- f) Reprisal.
- g) Discrimination in employment.

If an employee feels they have been subject to one of the above listed actions, the employee may submit the North Dakota Department of Health Internal Grievance form to the Human Resources Division within 15 working days of the action, notice of action or reprisal.

Management will provide a written response from management within 15 working days after receiving your written grievance. If additional time is needed to investigate the allegations made in the grievance, the employee will be notified in writing within 15 working days. Extensions for a formal written response to the grievance are allowable up to 15 working days.

Employees will be allowed reasonable time during the workday to process a grievance without loss of pay.

Employees may waive their right to grievance by notifying management in writing.

The aggrieved employee may appeal management's response by sending a letter within five working days of the response to his or her section chief. The section chief will have 10 working

days to respond. This response may be appealed by sending a letter within five working days to the state health officer. The state health officer will investigate and make a determination within 10 working days.

If dissatisfied with the response or action taken by the state health officer, the employee may appeal to the State Personnel Board if the grievance is an appealable issue. The appeal must be filed with the State Personnel Board by filing the proper documentation with the human resource management services director. The appeal must be forwarded to Human Resource Management Services within ten working days after the receipt of the response from the state health officer. Employees should consult North Dakota Administrative Code, Article 59.5-03-03-12 for details regarding appeals to the State Personnel Board.

My name is Sandra Young. I was a proud employee of the Department of Health Lab Services for almost 11 years.

I experienced age discrimination during the last two years of my employment. I know firsthand the Human Resource Management Service (HRMS) grievance process is not fair for people in my situation.

I will share some high-level background because it is important in providing context.

In my last two years of employment with the Department of Health (DoH), I worked under a new assistant director - Eric Hieb. While under his direction, I noticed what I believed to be age discrimination. Some background on Eric Hieb: In his 2004 performance evaluation his supervisor noted the following: *"Eric developed a personal relationship with a staff member that he supervised and he failed to inform his supervisor. His subsequent actions (training and travel authorizations for example) could be viewed as questionable as they could be seen as favoritism and possible inappropriate use of funds."*

In Human Resources Management's notes from their interview with Lab Services Director (Myra Kosse), she told them she did not recommend Eric Hieb for the position of Assistant Director because she had been told by the previous Director that Eric Hieb cannot be in a management role.

While there were numerous small instances I believed to be age discrimination the first bigger instance that affected me was when I did not receive the 2013 Legislated Performance Based Raise in **July 2013**.

My performance had never been in question up to at that point. I had gone above and beyond in doing numerous additional projects. I loved my job and had put my heart into it. Eric Hieb told me he wanted to give me the Legislated Performance Based Raise but since I was the highest paid Microbiologist II, he was giving it to others to bring up their pay. I was the highest paid because I had the most tenure. One employee in her 20's had received this raise after being employed just six months. I shared my concerns of age discrimination with the Director (Myra Kosse) and Assistant Director (Eric Hieb) of Lab Services. No investigation took place

nor was my concern shared with Human Resources. It is standard protocol when an employee comes forth with a concern of discrimination or sexual harassment that Human Resources be notified and an investigation be conducted. This did not happen.

In November 2013, I was passed over for a promotion for the Quality Assurance coordinator position. I had been the assistant to the Quality Assurance coordinator for ten years. In those ten years I was never told my performance was unsatisfactory in fact in my last performance evaluation (May 2014) I was given the highest score possible for this job duty.

The individual who was promoted to that position had less than one year of tenure with the department and was in her 20's. She was the only candidate told prior to the job interviews by Eric Hieb, the assistant director, to prepare examples of changes that could be made to our quality assurance program and bring them to her interview.

I shared my concerns with the Director (Myra Kosse) and Assistant Director (Eric Hieb) of Lab Services as well as Department of Health Human Resources. Again, my concerns were no.

In early 2014, a coworker and I expressed concerns of age discrimination to the Section Chief (Dave Glatt). We shared our frustrations regarding the Quality Assurance promotion. We had both applied for it. Again, our concerns were not shared with Human Resources and nor were our concerns looked into.

Morale in our area of the lab was very low. Those over the age of 40 noticed Eric Hieb's obvious favoritism and attention toward those under the age of 40. One prime example was committee assignments. Committees are comprised of members due to job duties and those who are appointed by the assistant director, Eric Hieb. Every committee appointment by Eric Hieb was given to a women under the age of 40. This did not go unnoticed, one of Eric Hieb's team leaders requested a particular employee over the age of 40 be on a committee and he refused instead putting a person with considerably less tenure and experience, under the age of 40 on the committee.

April 10, 2014

In the early hours of April 10, 2014 my grandmother passed away. I had spent the evening into the morning at the hospital heading home in time to shower and get to work. I knew we were short staffed and the work load would be heavy because we were in the middle of a syphilis outbreak. As it turned out some of the computers were not working. My coworker had told Eric Hieb about the computer problems the day before. She felt she had been ignored by him because he was preparing to go to a conference. He was going to the conference in Montana with the twenty something year old that was promoted to the Quality Assurance position. It is worthwhile to note that the individual who previously held the Quality Assurance position was a male over the age of 40 and had never been asked to attend this conference with Eric Hieb.

Since Eric was not able to help get the computers working, two people from another department came over to help troubleshoot.

The two people troubleshooting had a recently-hired coworker also in her twenties working in their area and I made the following statement.

“How would you feel if XXXX were promoted over you.”

They replied, “That would never happen.”

I said, “It happened to us.”

I then went on to say something completely inappropriate while pointing to my chest. I said, “These are real.”

I regret this statement.

April 24, 2014 Investigation

The two individuals that I made the inappropriate statement to took their concern to the Director, Myra Kosse. Myra in turn notified the Department of health Human Resources. On April 24, 2014 Department of Health Human Resources came to the lab to complete a sexual harassment investigation. During my interview we discussed what I said, how it was

wrong and I again shared my frustration with Eric Hieb's favoritism and concerns of age discrimination. There was no investigation of my age discrimination concerns that I was aware of.

On May 19, 2014 I received an email notification from Eric Hieb after my normal working hours that my performance evaluation would take place the following morning. I was told not to defend myself.

On May 20, 2014 I received my performance review. It was devastating. I heard lies and misrepresentations regarding my performance. My performance review did not reflect my performance over the prior year. At no time prior had any concerns been raised by Eric Hieb regarding my performance. In fact, quite the opposite.

- A coworker - Maggie Kuklok - exposed a coworker to rabies yet she received the highest score on that area of her performance evaluation.
- Dawn Wilhelmi given credit for work she never did - my work - an area she never worked in.
- There was a section of my evaluation that contained a copy of a section of a coworker's that was identical. It was not reflective of my work. It was an editing mistake. It showed carelessness.

On June 6, 2014 I met with Kim Wassim at HRMS to share my concerns.

On June 10, 2014 I filed a grievance with the DoH HR / HRMS.

I filed a grievance because I felt my performance evaluation was retaliation for my multiple claims of age discrimination.

There was no age discrimination investigation by DoH Human Resources that I was aware of.

The HRMS investigation began on June 20, 2014.

I was interviewed in July, 2014.

Coworkers were interviewed July and August.

In August, I filed a complaint with the Department of Labor. When I shared with HRMS that I had done so, I noticed a temperature change. I filed with the Department Of Labor (DOL) because timelines required me to do so and I wanted the seriousness of the age discrimination I had experienced to be recognized.

The Department of Labor investigation was delayed multiple times. I was told by the Department of Labor that they were waiting for the findings of the HRMS investigation prior to beginning their own investigation. We shared our concerns about the delay and asked them how HRMS could delay the Department of Labor investigation.

This is not allowed in the private sector. In the private sector if an employee files with the Department of Labor the employer nor their legal counsel is able interfere nor interrupt the Department of Labor's investigation.

I believe if the Department of Labor's investigation had not been delayed by HRMS I would still have my job.

From June 2014 until the HRMS report in January 2015 I lived a life of professional hell. What should have taken HRMS a couple of months to investigate took six long months.

During this time I was ostracized and shunned. Eric Hieb did not speak to me nor did he acknowledge me. I believe he encouraged others to ostracize and shun me as well. At the very least my coworkers did what he did - particularly those under the age of 40. In staff meetings where I sat down first, coworkers would not sit in a chair next to me. In fact they picked up the chairs next to me and moved them across the room away from me, leaving a wide berth of space around me. If I walked into a room where people were talking, the conversation stopped. To say it was uncomfortable is an understatement. I needed an independent outsider to look into what was occurring.

This legislation begins to level the playing field. It provides an avenue that those employed in the private sector already have. That is if you believe you have been discriminated against you can file a claim with the

Department of Labor and go to court. Employees of the State of North Dakota are required to engage in the HRMS process, then the Department of Labor and court.

I can speak from painful, personal experience the emotional and financial toll it takes to endure this process. This process seems intended to grind you down until you are emotionally spent. I would happily recommend to people to go through the HRMS process if it were truly objective and unbiased. But it is not.

When the HRMS report did come out in January 2015 it was a punch to the gut. The authors seemingly took every liberty to give Eric Hieb and the Department of Health management the benefit of the doubt while portraying Tim Brosz and I as collaborators who were unhappy.

After the HRMS report was issued in January 2015, a bad situation was only made worse. The report seemed to embolden my coworkers to ostracize and retaliate against me even more. My work was scrutinized more than others. I was held to a higher standard. I filed grievances with DoH Human Resources who ignored my concerns. I was fired on April 29, 2015 for misuse of the grievance process and insubordination for requesting interim performance reviews.

After my termination I hired a lawyer. He shepherded me through the HRMS processes leading to the ALJ (Administrative Law Judge) hearings. I had a strong case. I had the evidence that I was mistreated by management and DoH Human Resources. After the obvious one-sided perspective HRMS demonstrated, I had ZERO hope of being treated fairly through the ALJ process.

To just engage in the ALJ process to discovery cost my family \$12,000.

My "hail Mary" hope was the Department of Labor and the courts.

I saw HRMS delay my Department of Labor investigation multiple times.

I observed the AG's office delay the Department of Labor investigation more than once.

HRMS has God-like powers that do not serve an employee going through what I went through. The process is extremely one-sided. Management has all the resources to shape their story. HRMS backs up management.

Until we experienced this, we had no idea the tactics HRMS and the AG's office could use. No one should have these abilities. A company in the private sector does not have the ability to delay a the Department of Labor investigation yet HRMS does.

In January 2016 the Department of Health settled for \$40,000. It wasn't about the money but I was unwilling to go further. The toll on my family was too great.

In summary

The current HRMS grievance and ALJ process seems designed to wear out those who share concerns and are fired.

I have experienced first hand that people like me do not stand a chance.

The process is extremely one-sided towards management. The process does not fairly hear the voices of people like me.

The process has people engaging in it who are not objective nor unbiased and the state has unlimited resources and intimate knowledge of the process while people like me do not.

HB 1246 really isn't new. As a private sector employee, one can file a complaint with DOL and retain legal counsel and pursue their concerns through the courts.

State employees should have the ability when it comes to age discrimination.

My example, while seemingly unique, is an unfortunate reflection of the reality of human beings. We are not objective. We are not unbiased.

State employees deserve the same rights and privileges those in the private sector do. It is only fair.

I ask for your support of HB 1246.

Please refer to the HRMS Report of January 2, 2015:

Page 1 – *“Arvy Smith contacted Human Resource Management Services to conduct a workplace investigation.”*

- Sandy Young made the first contact.

Page 3 – *“Ms. Young was alleged to have said, “And these are real”, while pointing to her breasts in reference to Ms. Massen getting the Quality Assurance Coordinator position.”*

- This is a misrepresentation of what occurred. It suggests the incident was principally a sexual harassment issue.
- Multiple witnesses shared that the statement was, “How would you feel if Annalise O’Toole (a newly hired Chemist I out of college) was promoted over you? Well that is what happened to us.” Then Sandy grabbed her boobs and stated, “and these are real” in front of the chemists.

Page 4 – *“Mr. Hieb also told us that he had conversations with Ms. Young regarding her performance issues through the year.”*

- Not true. There was no documentation of this whatsoever.
- See Eric Hieb’s January 12, 2015 action plan – page 1.

Page 5 – *“Mr. Hieb stated he was under a strict deadline to complete all his staff’s performance evaluations...”*

- Isn’t it a requirement that all state employees receive annual performance evaluations? Why would there be a deadline issue if Mr. Hieb were doing his job?

Page 7 – *“Based on our analysis, it is difficult to see how salary administration correlates to scores on the evaluation.”*

- How is a manager who doesn’t tie performance to compensation credible?

Page 7 – *“Our review indicated that there is a slight difference between age and performance; however, we do not believe it is due to age discrimination.”*

- What is it based on then?

- Would it be reasonable for employees to sense this and have concerns?

Page 7 – *“Additionally, performance reviews are signed by Ms. Kosse and Mr. Hieb, which makes it more difficult for any bias of either employee to be reflected in the final annual performance review.”*

- Yet Ms. Kosse missed the fact that Eric Hieb copy and pasted comments that were meant for Tim Brosz’s performance evaluation in Sandra Young’s performance evaluation.

Page 7 – *“However, we are not going to second guess the supervisor in how he rates Ms. Young’s or Mr. Brosz’s performance during the entire year. Mr. Hiebe needs to correct the reference to “Tim” in Ms. Young’s 2014 performance review document.”*

- Why not second guess how the supervisor rated Ms. Young and Mr. Brosz when the supervisor had zero concerns with their performance until the DoH investigation a month prior to their performance evaluations?

Page 8 – *“Mr. Hieb was under a tight deadline to complete all performance evaluations.”*

Page 8 – *“We did not sense that management was angry at Mr. Brosz or Ms. Young; they were more confused and overwhelmed by the amount of allegations Mr. Brosz and Ms. Young discussed at the April interviews.”*

- How does one “sense” this? Is there training for this? Certifications?

Page 9 – *“Mr. Hieb stated that if there’s a problem with personnel, Mr. Brosz needs to communicate with Mr. Hieb about that, just like if there’s a problem with equipment.”*

- That is what Mr. Brosz did on April 24, 2014 and he was labeled as collaborating with Sandra Young.

Page 9 – *“Mr. Hieb has worked in the lab for many years. Mr. Hieb stated that inappropriate topics of conversation in room 305 have been known for years by some people to some extent.”*

Page 10 – *“and when management received a sexual harassment complaint, they investigated and followed up.”*

- Yet they didn't follow up on the multiple of occasions Sandra Young shared concerns of age discrimination.

Page 13 – *“We did sense that some people we interviewed were holding back information, not because they were afraid of Mr. Hieb, but because they were trying to protect co-workers or didn't want to get involved.”*

- How does one “sense” this? Is there training for this? Certifications?

Page 13 – *“There is a difference in the performance scores and number of outstanding performance increases and bonuses between the groups of employees over 40 and under 40; however, we do not find it reasonable to conclude that age was a determining factor.”*

- Would it be reasonable for people over the age of 40 to perceive this and feel wronged?

Page 14 – Committees

- Every single time Eric Hieb had discretion, he put an employee under the age of 40 on the committee.
- Those over the age of 40 are going to notice favoritism of this nature.

Page 15 – *“In our opinion, we find it demeaning to Ms. Massen and her credentials for Ms. Young to suggest that Ms. Massen's promotion was based on age and attractiveness.”*

- All but three team members thought Sandra Young would be promoted to the QA Coordinator role.

Page 16 – *“While we do not believe Mr. Hieb is favoring or promoting younger staff, Ms. Young, Mr. Brosz, and Ms. Trythall have that perception.”*

- Perception is reality.

Page 17 – *Ms. Young and Mr. Brosz accused Ms. Kuklok of being an instigator, a “pot-stirrer.” Only one other person also said this about Ms. Kuklok. Nine people we interviewed, including Ms. Kuklok told us that Ms. Young is the instigator and “pot-stirrer”.*

- Maggie Kuklok admitted to sharing information between the lab rooms in her HRMS investigation – yet she wasn't the pot stirrer.
- There was great concern regarding Maggie Kuklok's unwillingness to follow direction and lab protocol. In fact in June 2014, Maggie Kuklok's conduct lead to a live rabies exposure of a coworker – see Maggie Kuklok's January 12, 2015 Action Plan.
- Wrote multiple emails to upper DoH management in an effort to get Sandra Young terminated.
- She was deemed credible by HRMS.

Page 18 – *“She (Sandra Young) implied that it was impacting her work but she didn't want to say it was impacting her work because she didn't want to be removed from the workplace. This statement is an example of Ms. Young's pattern of inconsistent responses.”*

Pages 18-19 – Credibility of those interviewed.

- Sandy Young, Tim Brosz, Kristie Schwarzkopf, Dawn Wilhelmi and Jan Trythall – all deemed largely not credible or not entirely forthcoming.
- Every single one of these people were over the age of 40 with a decade or multiple decades of experience.
- Five out of seven of those over the age of 40.

Page 19 – *“It is interesting to us that Ms. Young and Mr. Brosz have followed similar paths in the course of this investigation.”*

- They witnessed the same things.
- They had the intestinal fortitude to do something about it.
- Mr. Brosz was a member of management – it was his duty to share risk concerns.

Page 20 – *“In our opinion, this type of behavior borders on insubordination.”*

- Engaging your long-winded manager in a dialogue to understand how to receive a raise / promotion you believe you deserved borders on insubordination?

Page 20-21 – *“We strongly recommend a consistent performance evaluation process be utilized going forward, where all employees receive a performance evaluation at least once annually. We recommend utilizing the actual performance evaluation scores to justify any performance increases, including the outstanding performance increases, to ensure a direct link between the performance score and salary increases...”*

- How was Eric Hieb credible as a manager?
- Why wouldn't employees be concerned with a manager who did this?



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TO: Dr. Dwelle, State Health Officer
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Arvy Smith, Deputy State Health Officer
Department of Health

Tag Anderson, Director
OMB Risk Management Division

FROM: Travis Engelhardt, Human Resource Officer 
Human Resource Management Services

Kim Wassim, PHR, Human Resource Officer 
Human Resource Management Services

SUBJ: Workplace Investigation Report
To be attached to the Department of Health Risk Management Incident Report.
This investigation was conducted at the request of the Department of Health
and Risk Management.

DATE: January 2, 2015

We have completed our workplace investigation into allegations of age discrimination, sexual harassment, hostile work environment, and retaliation/reprisal at the Department of Health, Microbiology Lab.

Scope of Investigation

Arvy Smith contacted Human Resource Management Services to conduct a workplace investigation. Laurie Sterioti Hammeren, Director, Human Resource Management Services, assigned Travis Engelhardt and Kim Wassim to conduct the investigation.

We conducted the interviews, which consisted of pre-established questions, in Kim Wassim's office on the 14th floor of the Capitol. Opening and closing statements were read to each individual interviewed.

Those interviewed from the Department of Health included:

- Sandy Young, Microbiologist II
- Tim Brosz, Microbiologist III
- Kristie Schwarzkopf, Microbiologist II
- Margaret (Maggie) Kuklok, Microbiologist II
- Dawn Wilhelmi, Medical Lab Tech II
- Heather Sease, Microbiologist II
- Tracy Hoke, Microbiologist II
- Laura Mastel, Microbiologist II
- Lisa Wingerter, Microbiologist II
- Lori Carter, Medical Lab Tech I
- Karla Reinhardt, Administrative Assistant II
- Jan Trythall, Microbiologist III
- Lisa Well, Microbiologist III
- Stacy Hoffman, HR Officer I
- Dirk Wilke, Human Resource Director
- Michelle Feist, ELC Program Manager
- Myra Kosse, Director of Lab Division
- L. David Glatt, Chief – Environmental Health Section
- Christie (Chris) Massen, QA & CLIA Coordinator
- Eric Hieb, Assistant Director, Division of Lab Services - Microbiology

Second interviews were conducted with Sandy Young and Tim Brosz. Third interviews were requested by Sandy Young and Tim Brosz. The persons interviewed were provided an opportunity to review the interviewer's notes for accuracy at the conclusion of each interview. Each person was afforded an opportunity to make changes, amendments, and additions to the notes. Each person then signed and dated the notes. The investigators also reviewed the personnel files, disciplinary files, and training records of staff, and the Department of Health's Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution policies.

Investigative Findings of Complaints/Allegations

Ms. Young's and Mr. Brosz's complaints included allegations of retaliation/reprisal, age discrimination, sexual harassment, and hostile work environment. During the course of the investigation, we attempted to verify statements made by Ms. Young, Mr. Brosz and others to arrive at conclusions and recommendations regarding the allegations. There were hundreds of individual allegations; we investigated each allegation. For the purpose of this report, however, we have summarized our findings and only addressed the major allegations. We provided our conclusions and recommendations after each

section. We attempted to categorize the allegations into retaliation/reprisal, sexual harassment, age discrimination, and hostile work environment. The following includes our summary of findings regarding the allegations. Details of the allegations and responses are listed on the investigation notes. Wherever and whenever possible, the words of interviewees are reflected in these sections.

Standard of Proof: As a basis for our determination, we considered whether there was a reasonable basis to conclude that inappropriate behavior occurred.

April 10, 2014 Incident

We talked to Ms. Wilhelmi, Ms. Schwarzkopf, and Ms. Young who were present in the lab at the time of the incident. Ms. Young was alleged to have said, "And these are real", while pointing to her breasts in reference to Ms. Massen getting the Quality Assurance Coordinator position. Ms. Young was reluctant to admit her involvement in the April 10, 2014 incident. Although Ms. Young and Mr. Brosz allege that others were engaging in inappropriate behaviors and topics of conversation this does not excuse Ms. Young's behavior and language on April 10, 2014. The two Chemistry employees who originated the complaint of misconduct on April 10, 2014 were not interviewed in the course of our investigation. Our intent was not to re-investigate the allegation of misconduct that occurred on April 10, 2014 since an investigation of that incident and follow-up actions have been completed by the Department of Health. For the purposes of our investigation, we asked about the incident that occurred on April 10, 2014, because that incident and the subsequent investigation appear to be a catalyst for what followed.

Conclusions/Recommendations - April 10, 2014 Incident

We believe Mr. Wilke should have interviewed Ms. Wilhelmi when he conducted the investigation into the April 10, 2014 incident. Mr. Wilke told us Ms. Wilhelmi was not in the lab the day the interviews were conducted. Mr. Wilke stated he decided not to interview Ms. Wilhelmi as he already had multiple witnesses who verified what Ms. Young said on April 10, 2014. The decision not to interview Ms. Wilhelmi may have given Ms. Young the impression that not all important witnesses were interviewed and that only a select group were chosen. Clearly, Mr. Wilke was in charge of the investigation and decided who was on the interview team and who was to be interviewed. Mr. Wilke included supervisors on the investigation team because he wanted them to hear what was going on in their areas. In the future, we recommend that Mr. Wilke not include supervisors on the interview team. The investigation team must be neutral and objective and not have a vested interest in the outcome of the investigation; the investigation team should not contain either a subordinate or supervisor of any of the participants. The decision to include supervisors on the investigation team may have given Ms. Young the impression that what she stated in the interview was used against her by her supervisors. This likely contributed to the

charge of retaliation. Ms. Young believes that since other people have also made sexually related comments in the workplace, she should have not been taken to task for what she said on April 10, 2014 – she felt she was being held to a different standard. However, to our knowledge, no Microbiology Lab staff have reported being offended or harassed prior to the April 10, 2014 incident. The Chemistry employees that complained about the April 10, 2014 incident with Ms. Young apparently knew who Ms. Young was referring to with her comment, were offended, and reported this to their manager who had an obligation to act.

Retaliation/Reprisal

Ms. Young and Mr. Brosz alleged that the statements they made on April 24, 2014 during the interview to investigate allegations of sexual harassment caused Mr. Hieb to give them a poor evaluation for the 2014 annual performance period. Ms. Young stated she was previously unaware of the issues brought up in her performance evaluation and felt that the evaluation only reflected recent events. On her evaluation, a reference was made to Mr. Brosz which Mr. Hieb explained was an error. Mr. Hieb also told us that he had conversations with Ms. Young regarding her performance issues throughout the year. For example, Mr. Hieb stated that Ms. Young missed some turnaround times on influenza and he discussed it with her. In addition, Ms. Young did not always accept help when offered and this gave the perception that she was controlling of her workload. In her performance evaluation, it stated Ms. Young followed/watched/manipulated people. Under the Basic Work Expectations of Ms. Young's performance review, it stated incidents involving criticism of other's work abilities, workloads, and personal life issues should be discontinued. Mr. Hieb explained that Ms. Young creates friction and tension in the organization and although Ms. Young claims that others in the office were also critical of coworkers, Mr. Hieb has not really experienced this critical behavior from others. Ms. Young's criticisms stand out as they were said in front of Ms. Kosse, Mr. Glatt, and Mr. Wilke. No one else in the office has a pattern of criticizing others like Ms. Young. Mr. Hieb stated, for example, that Ms. Young criticized Ms. Hoke for not having enough work to do, and stated that Ms. Schwarzkopf should not be a Microbiologist II. What Ms. Young believes to be casual observations on her part actually create a great deal of tension in the office. Mr. Hieb told us that Ms. Young has told him that she has no respect for Ms. Kosse as Lab Director, that she didn't accept the hiring process for the QA Coordinator position, and a hiring algorithm that she provided should have been used. Ms. Young told Ms. Kosse that Ms. Kosse doesn't care and said Mr. Hieb is not responsive. Mr. Hieb said Ms. Young has made similar comments many times throughout the last year to such an extent that he questioned whether her level of criticism for her supervisor amounted to insubordination.

Mr. Hieb stated that he sent Ms. Young's and Mr. Brosz's 2014 evaluations to Mr. Wilke, Ms. Kosse, and Mr. Glatt for review. Mr. Wilke told Mr. Hieb that Mr. Brosz's was a solid review and on Mr. Wilke's advice, Mr. Hieb incorporated the April 10, 2014 incident on Mr. Brosz's review.

Mr. Hieb stated that Ms. Young received a "2" (signifying the employee's performance is fully acceptable and that the employee has a competent and dependable level of performance) on her primary job for 2014 because she didn't do anything outstanding over the past year that would merit a higher rating; additionally, Ms. Young missed turnaround times due to attempts to achieve cost efficiency. Ms. Young did meet expectations for the year – a "2" means "meets expectations." On her performance evaluation, Mr. Hieb said Ms. Young needs to use other trained staff when needed in order to complete testing more efficiently and effectively.

Ms. Young stated Mr. Hieb told her on May 28, 2014 she would have received a "3" instead of a "2" for HIV and hepatitis if not for recent events. Mr. Hieb stated he doesn't remember saying that. Mr. Hieb said he didn't put everything in Ms. Young's performance evaluation, such as Ms. Young's not getting all her procedures done, but also said that in the last few months she has gotten almost all of them done. Mr. Hieb said he had a conversation with the whole staff about getting procedures done and he gave the task to the QA Committee. Mr. Hieb said he expected Mr. Brosz and Ms. Young to lead this charge.

Ms. Young stated she did not follow, watch, or manipulate people. Mr. Hieb stated Ms. Young was taking "following or watching" too literally; he meant it metaphorically and tried to explain it to her as more monitoring – particularly of Ms. Kuklok, as Ms. Young felt Ms. Kuklok was young, new, and didn't want her to make mistakes. Mr. Hieb stated that he tried to tell Ms. Young that her trying to keep Ms. Kuklok from making mistakes looks like following or monitoring to Ms. Kuklok. Mr. Hieb stated he tried to share examples with Ms. Young after the QA Coordinator position was filled and prior to her performance evaluation. Mr. Hieb stated that Ms. Kuklok is trying to do her best and he has no doubts in Ms. Kuklok's abilities.

Both Ms. Young and Mr. Brosz were surprised at the short notice they were given for their performance evaluation meeting; they felt they had little time to prepare and a comment Mr. Hieb made in an email before the evaluation meetings intimidated them and caused them to not fully participate in the meeting. In his email, Mr. Hieb stated, "From a place of personal concern for you, please reconsider any thoughts of defensiveness or other counter-productive approaches on your behalf or in defense of others." Mr. Hieb stated he was under a strict deadline to complete all his staff's performance evaluations and he also gave other staff short notices of their evaluation meetings. This was confirmed by other staff. Mr. Hieb also stated that they had to work around multiple people's schedules including Mr. Glatt and Mr. Wilke to find time for Ms. Young's and Mr. Brosz's evaluation meetings. Both Ms. Young and Mr. Brosz indicated they felt intimidated by a statement Mr. Hieb made in his email to them. When asked about this statement, Mr. Hieb said he wanted them both to come to the meeting in a constructive manner. He typed and deleted this statement and typed it again. He had a strange feeling its meaning would be misunderstood in this manner. Mr. Hieb thought this situation could be overcome and they could get to a better place.

Ms. Young alleged she was the only Microbiologist and oldest in a non-management position to not receive a legislated performance based raise in 2013 when her scores were equal to those who received increases. For several reasons, 2013 was a transitional year and not all staff had actual performance reviews or evaluation documents including Mr. Brosz and Ms. Young. Because of time constraints, Mr. Hieb only did evaluations for those who would be getting the additional 1% outstanding performance increase. Mr. Hieb stated only 40% of staff could get the additional 1% and he concluded that there were others performing above Ms. Young, but she was not a poor performer. Mr. Hieb said it was a difficult decision deciding who would get the additional 1%; he felt many deserved it and would have preferred everyone got it. However, most of the lab staff could not receive it.

Ms. Young received competent performance ratings ("2") or above on all of her technical skill areas of her 2014 performance evaluation. She received deficient performance ratings ("1") on several of her soft skills areas such as communication, team work/cooperation, and attitude, and unacceptable ratings on positive attitude, working relationships, courtesy and respect. Ms. Young received a 1% performance increase and a 2% equity increase for 2014.

On his 2014 performance evaluation, Mr. Brosz received a deficient performance rating ("1") on lead analyst – virology/immunology and competent performance ratings ("2") or above on all other critical job duties; he received a deficient performance rating ("1") on team work/cooperation, and an unacceptable rating on working relationships. Mr. Brosz received a 3% performance increase and a 2% equity increase for 2014. Mr. Hieb stated that both Ms. Young's and Mr. Brosz's performance reviews were based on the entire previous year. Mr. Hieb wondered how Mr. Brosz could claim retaliation based on his performance review since he received a 3% performance increase along with the 2% equity increase.

Mr. Hieb said his goal with performance reviews is not to destroy people but to improve people and point out improvement opportunities; he wasn't trying to point out every little incident or example or criticize everything, just general principles.

Conclusions/Recommendations - Retaliation/Reprisal

Ms. Young alleged a high correlation between age and performance. Ms. Young did receive a 4% legislated performance based raise in 2013. The additional 1% is not guaranteed to anyone and only awarded to staff whose performance is rated as outstanding. In Microbiology, two staff over 40 and five staff under 40 received the additional 1% in 2013. For 2014, the overall average performance score of those over 40 is 2.11; those under 40 is 2.33. There are 13 lab staff included in our analysis which showed that of the seven over the age of 40, three received an outstanding performance increase (additional 1%) in 2014; of the six under the age of 40, four received an outstanding performance increase in 2014. For 2014, one of the seven

over the age of 40 received a performance bonus; three of the six under the age of 40 received a performance bonus. Ms. Young and Mr. Brosz provided their own performance scoring analyses which we reviewed and found to be misleading. For example, Ms. Young's analysis compares the total number of "3" ratings on the annual reviews of all employees supervised by Mr. Hieb and claims there is a correlation between the number of "3" ratings an employee receives on their annual reviews and salary increases. We found there to be no relationship between the number of "3" ratings on an employee's annual review and salary increases. Based on our analysis, it is difficult to see how salary administration correlates to scores on the evaluation. For example, Tracy Hoke who is under 40, received the 2nd highest overall average rating of 2.38; she did not receive the outstanding performance increase. Kristie Schwarzkopf, who is over the age of 40, received the 3rd lowest overall average rating of 2.10 and received the outstanding performance increase. This is further evidenced by Laboratory Services using a seven point questionnaire to determine outstanding pay increases, which is separate from the performance review document. We reviewed and analyzed the 2013 and 2014 performance documents in the personnel files. Our review indicated that there is a slight difference between age and performance; however, we do not believe this is due to age discrimination. (See attachments.) Mr. Hieb stated that he did not know the age of his staff until these allegations came up and that he has not used age as a factor in determining performance increases or in any other personnel action. Additionally, performance reviews are signed by Ms. Kosse and Mr. Hieb, which makes it more difficult for any bias of either employee to be reflected in the final annual performance review. We find that there are not reasonable grounds to believe that Mr. Hieb discriminated against Ms. Young on the basis of her age in either her 2013 or 2014 annual performance reviews and decisions regarding the rate of performance based increase Ms. Young received in 2013 and 2014. Further, all outstanding performance increase and bonus documents are signed by Ms. Kosse, Mr. Glatt, and Ms. Arvy Smith. We find it unreasonable that with all the higher levels of review and approval, Mr. Hieb could discriminate based on age.

We reviewed Mr. Brosz's and Ms. Young's 2014 performance reviews and find that overall, the performance review documents and content for Mr. Brosz and Ms. Young are reasonable. Ms. Young did receive performance and equity increases in 2014. Due to deficiencies in several soft skill areas of her performance, there could have been no increase for Ms. Young. However, we are not going to second guess the supervisor in how he rated Ms. Young's or Mr. Brosz's performance during the entire year. Mr. Hieb needs to correct the reference to "Tim" in Ms. Young's 2014 performance review document.

Upon initial review of Ms. Young's and Mr. Brosz's 2014 performance reviews, it seemed like the April 10, 2014 incident and their interviews could have had a negative impact on their performance reviews and their performance reviews did not seem to reflect the entire year. It appeared to us the language used in their reviews primarily related to the April 10, 2014 incident. However, in discussions with Mr. Hieb, it became

apparent to us that the performance reviews reflected the entire year based on a number of incidents and a pattern of behavior that occurred throughout the past year. We do believe that Mr. Hieb could have provided more specific examples that occurred during the year in the performance reviews so Ms. Young and Mr. Brosz would have clearly understood the evaluation reflected the entire year.

We too wonder how Mr. Brosz could claim retaliation based on his performance review since he received a 3% performance increase along with the equity increase – considered a “full increase” for lab staff and the same amount received by many others. Mr. Brosz did not receive the additional 1% outstanding performance increase, however, this is not guaranteed to anyone. We believe Mr. Brosz is fortunate to have received the full performance increase given the fact that his performance was deficient in several areas. We do not believe that any low ratings in the 2014 employee evaluations were based on the interviews to investigate the April 10, 2014 incident but were instead based on work performance over the entire year; therefore we can find no evidence of retaliation by Mr. Hieb against Ms. Young and Mr. Brosz.

Mr. Hieb was under a tight deadline to complete all performance evaluations. The staff we interviewed indicated they too received short notice for their performance review meetings. Mr. Hieb was trying to coordinate the schedules of Mr. Glatt, Ms. Kosse, and Mr. Wilke in conducting the performance review meetings for Mr. Brosz and Ms. Young. Both Ms. Young and Mr. Brosz indicated they felt intimidated by a statement Mr. Hieb made in his email to them. Mr. Hieb, Ms. Kosse, Mr. Wilke, and Mr. Glatt indicated that Mr. Brosz and Ms. Young participated in the meetings and did not appear to be intimidated. The meeting with Mr. Brosz was reported as productive and focused on ways he could improve. It was reported that Ms. Young didn't seem intimidated and went on and on during her review. We understand Mr. Hieb's intent (productive performance evaluation meeting) with sending the cover letter; however, it was poorly worded. We understand Mr. Hieb had a tight deadline in completing performance evaluations and that other staff actually had less time to prepare for their meetings than Mr. Brosz and Ms. Young, however, it is reasonable that based on the nature of these reviews (covering some deficient ratings), more time should have been provided to Ms. Young and Mr. Brosz to reflect on the information in their reviews and prepare for their performance review meetings. We understand why Mr. Hieb invited Mr. Glatt, Ms. Kosse, and Mr. Wilke to the performance evaluation meeting (he wanted everyone in the room to answer questions since they were the next level of review), however, that many people and senior managers involved in a performance review can be intimidating to an employee.

We did not sense that management was angry at Mr. Brosz or Ms. Young; they were more confused and overwhelmed by the amount of allegations Mr. Brosz and Ms. Young discussed at the April interviews.

To our knowledge, Ms. Young has not reported being offended or harassed by what coworkers said in the workplace. After she was accused of sexual harassment, Ms. Young discussed numerous incidents that occurred prior to April 2014. Ms. Young reported these incidents to us and others as examples of everybody else's inappropriate behavior, which we believe in her mind excused her inappropriate behavior on April 10, 2014. We do not agree with Ms. Young and find it unreasonable to ignore any instance of sexual harassment even if there are other alleged incidents of misconduct. Alleged inappropriate behavior by others does not excuse Ms. Young's behavior on April 10, 2014.

Sexual Harassment/Hostile Work Environment

Ms. Young alleged that other staff in the lab besides her made sexually related comments, these types of comments were known to management, and she was held to a different standard than other staff when she was accused of sexual harassment in April 2014.

Mr. Brosz stated that he has heard sexually related comments from a number of staff in the workplace and when he does he tries to block that stuff away. Mr. Brosz stated Mr. Hieb handles all personnel issues and he was not aware that he had personnel related duties as lead analyst. When asked how he feels regarding the allegation that lab management knew of the sexually offensive culture in the lab, Mr. Brosz responded that Mr. Hieb has ears, Ms. Kosse sees these people socially, and they never said anything about stopping this kind of talk. Mr. Hieb stated that bringing personnel issues regarding staff to management is in Mr. Brosz's job description and he needs to keep Mr. Hieb apprised of issues. Mr. Hieb stated his assumption is that if Mr. Brosz needs help, he would come ask for assistance. Mr. Hieb stated that if there's a problem with personnel, Mr. Brosz needs to communicate with Mr. Hieb about that, just like if there's a problem with equipment.

Mr. Hieb has worked in the lab for many years. Mr. Hieb stated that inappropriate topics of conversation in room 305 have been known for years by some people to some extent. Mr. Hieb stated that in room 305, conversations were inappropriate at different times and he's aware that this has been going on for years. Mr. Hieb stated he didn't think sexually related conversations in room 305 stopped when he became Assistant Director. Mr. Hieb stated he had not had any conversations with staff in room 305 about stopping sexually related conversations once he became Assistant Director; he was focusing on his new role and the reorganization per Mr. Glatt's expectations.

Several lab staff admitted to us they made sexually related comments in the workplace.

Ms. Young alleged that a vendor made an inappropriate comment towards her in the fall of 2011 and she told Mr. Brosz and Mike Trythall the day it happened. Mr. Brosz stated he also reported this the same day to Mr. Trythall. Mr. Brosz stated he brought this up

at various times to Mr. Trythall, Mr. Hieb, and Ms. Kosse and nothing was done about it. Mr. Brosz stated he brought it up again to Mr. Hieb and Ms. Kosse in 2013 and they acted like it was the first time they heard about it. Mr. Hieb and Ms. Kosse stated they were unaware of the incident until 2013 and they immediately contacted HR when they became aware of the alleged incident. It was determined there wasn't enough time to get a new vendor for 2013 so Ms. Young was provided several options, including paid administrative leave when the vendor was there. Ms. Young chose to stay at the workplace and stay away from the vendor. Ms. Kosse and Mr. Hieb stated they are currently in the process of an RFP to procure a new vendor for this service.

Conclusions/Recommendations - Sexual Harassment/Hostile Work Environment

The employees we interviewed are aware of the Department of Health's Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution Policies. For 2014, the Department of Health required all employees to review certain policies as part of the performance evaluation including Equal Employment Opportunity, Hostile Environment/Sexual Harassment, and Problem Resolution. There were a variety of responses when we asked if and when they had attended any training related to these policies; however, in general, it is our belief that lab staff have not had any recent training in these areas.

We confirmed that a number of staff in the Microbiology Lab made sexually related comments - mostly sharing information about their own personal lives. Some of these comments were made in the lab, some during breaks in the break room. To our knowledge, other than the complaint regarding the April 10, 2014 incident, no one reported sexual harassment by coworkers in the Microbiology Lab. Even though no one complained to management or HR, these types of sexually related conversations in the workplace are clearly inappropriate. It appears sexually related conversations became somewhat common in the workplace, which led to the sexual harassment complaint against Ms. Young on April 10, 2014. Even though others made sexually related comments in the workplace, this does not excuse Ms. Young's behavior on April 10, 2014. We do not find a reasonable basis to believe that Ms. Young was being held to a different standard than other employees, because although other inappropriate comments may have been made in the workplace by other employees, no report of sexual harassment was made, and when management received a sexual harassment complaint, they investigated and followed up.

We reviewed the job posting for the lead analyst position Mr. Brosz currently has and it contains a bullet including personnel related duties as part of his job description; Mr. Brosz stated he read the job posting when he applied for the lead analyst position and he did not recall that's what it said. We believe that both Mr. Brosz and Mr. Hieb were aware of these types of sexually related comments and conversations and should have addressed them immediately and appropriately. It is everyone's obligation to keep the workplace free of any type of inappropriate comments or behavior, especially anyone in

a management, supervisory, or lead position. We found a basic lack of understanding of the difference between appropriate work related discussions and inappropriate sexually related conversations. We strongly recommend that the entire lab, including management, receive in-person Harassment Prevention education and training. Human Resource Management Services offers such training.

Since we did not talk with Mr. Trythall, we were not able to verify the incident involving the vendor and when it was reported to management. However, it appears that management addressed this issue with Ms. Young in 2013 and are in the process of selecting a new vendor. It appears management addressed this issue when they became aware of it.

Age Discrimination/Hostile Work Environment

In her grievance, Ms. Young stated that Mr. Hieb's management and leadership style creates a hostile work environment. Ms. Young stated that Mr. Hieb has divided staff age wise; those over 40 feel they are not important to Mr. Hieb and that the group under 40 is his everything. Ms. Young stated she feels that Mr. Hieb won't call on the group of employees over 40 for projects and committees, and that Mr. Hieb doesn't engage or spend time with the group of employees over 40.

Mr. Hieb stated he doesn't know how his management and leadership style can create a hostile work environment and doesn't know what he'd be doing to create a hostile work environment. Mr. Hieb described his management and leadership style as fairly hands off, provides resources and tools to staff, expects staff to achieve job goals or ask for help, has an open door, wants success for the whole organization, aspires greatly not to be a micro-manager, tries to be a mentor and develop people professionally, and has the big picture in mind, including who can replace him in 8-10 years when he decides to retire (it takes someone 3-5 years to comprehend everything that's going on at that level).

We asked staff we interviewed to describe Mr. Hieb's management and leadership style and most staff generally described his style in positive terms.

Ms. Young alleged that others are very afraid of what Mr. Hieb will do to them if they say anything. Ms. Young said Ms. Schwarzkopf and Ms. Wilhelmi have said similar things since April 24, 2014 and especially since May 20, 2014 in the lab in response to Ms. Young's performance evaluation. Mr. Hieb stated he completely disagrees with that and that people were interviewed multiple times so they could say whatever they wanted. Ms. Wilhelmi stated she is not afraid of what's happened here with Ms. Young. Ms. Wilhelmi also stated that she and Ms. Schwarzkopf have talked about financially needing their jobs and Ms. Young may have been present during those conversations. Ms. Schwarzkopf stated she is not afraid of Mr. Hieb; she thinks one needs to be cautious and have tact with management and not be accusatory. Ms. Schwarzkopf

stated she needs her job but if she felt strongly about something, she would take it to management.

Ms. Young alleged that Mr. Hieb gives preferential treatment regarding placement of younger, less-tenured employees on "limited term" strategic committees and special projects and that older staff members have not been afforded the same opportunities to serve on special committees not part of their job description and complete special projects. Ms. Young also stated that Mr. Hieb does not collaborate with all members of the lab team because he effectively divides the lab by including primarily younger team members on the committees.

Mr. Hieb stated that participation on committees is voluntary and committee members are given appropriate tasks. Mr. Hieb stated he gave the QA Committee the procedures manual project. Mr. Hieb stated that special projects are voluntary, role-based, or a combination of the two. Mr. Hieb stated that everyone is very busy and people work at different paces – if someone has the time and ambition to work on a special project or a committee, he does not remember turning anyone away.

Mr. Brosz stated committees are made up of only those under 40. Mr. Brosz stated there is not a mix of new and experienced staff on the Building, QA, and Biosafety Committees, and that it seems critical to have experienced and younger staff on committees. Mr. Brosz said there should be a balance of young and old staff on committees.

There are a number of committees in the Lab: Building Safety (includes Chemistry and Microbiology staff), Lab Improvement (includes Chemistry and Microbiology staff), Biosafety (includes Microbiology staff), Log In (Microbiology staff), QA (Quality Assurance – Microbiology staff), and CQI (Continuous Quality Improvement – Dr. Linz, Lead Analysts, QA Coordinator, Ms. Young, Mr. Hieb, and Ms. Kosse). All of the committees, with the exception of QA, have staff over and under 40.

Several staff over the age of 40 told us they were not interested in serving on committees and did not volunteer for the Lab Improvement or the Quality Assurance Committees. Four people under the age of 40 volunteered for the Lab Improvement & QA Committees; two over the age of 40 volunteered for these Committees; all six volunteers were placed on one of the two committees, including Ms. Young.

On July 28, 2014, Ms. Massen emailed to Microbiology staff a check list of training documents not yet completed arranged by testing area. Ms. Young and Mr. Brosz alleged that all Microbiologists II under the age of 40 had prior knowledge of the training documents and were able to complete them by the time of Ms. Massen's email. Ms. Massen stated she wanted each bench to have training guidelines and asked a few individuals to do it. Ms. Massen stated she presented it to the CQI group and they liked the idea.

Ms. Young alleged that the promotion of Ms. Massen to the QA/QC Coordinator role was due to her being a young, attractive female and Ms. Young felt Ms. Massen's looks played a role in her being hired for the QA position. Mr. Hieb was one of four people on the interview panel for the QA position; the other three were women that included Ms. Hoffman from HR, Ms. Feist from Disease Control, and Ms. Kosse. Mr. Hieb and Ms. Kosse felt all four candidates that applied for the QA position could do the job. Only internal candidates were interviewed for the position: Ms. Young, Ms. Hoke, Ms. Schwarzkopf, and Ms. Massen. Each interviewer scored the candidates individually and Ms. Massen was the top scorer for three of the four interviewers; Ms. Young was the top scorer for one interviewer with Ms. Massen one point behind. After a group discussion, the interview panel agreed to offer Ms. Massen the position.

Ms. Young's allegation of Mr. Hieb creating a hostile work environment was not corroborated by any other staff; no one indicated that Mr. Hieb created a hostile work environment. Many staff made positive comments about Mr. Hieb's management and leadership style.

Conclusions/Recommendations - Age Discrimination/Hostile Work Environment

We did not find it reasonable to believe that staff in the Microbiology Lab are afraid of Mr. Hieb. This investigation was carried out independently of Mr. Hieb and anyone else in the Department of Health. We did sense that some people we interviewed were holding back information, not because they were afraid of Mr. Hieb, but because they were trying to protect co-workers or didn't want to get involved.

There is a difference in the performance scores and number of outstanding performance increases and bonuses between the groups of employees over 40 and under 40; however, we do not find it reasonable to conclude that age was a determining factor. (See our analysis under Conclusions/Recommendations - Retaliation/Reprisal.)

We made a comprehensive review of the creation and assignment of committee members. Mr. Hieb created the QA Committee in late 2012/early 2013. Mr. Glatt directed the creation of the Lab Improvement Committee about this same time. These Committees were discussed at a staff meeting on November 8, 2012. A total of six people volunteered and three people were put on each committee. Ms. Young was already on the CQI Committee and she was placed on the Lab Improvement Committee. Ms. Young stated this Committee has not been active other than developing a lab call schedule which was initially assigned by management. Since Mr. Glatt directed the creation of the Lab Improvement Committee, this appears to be a high-level assignment. However, it does not appear that committee members initiated any further projects beyond creating the call schedule. This is unfortunate since we believe this is an important committee with opportunities to impact the entire Lab Services Division. We do not find that it is Mr. Hieb's or Ms. Kosse's fault that the Lab Improvement Committee has not been active. The fact is Ms. Young is on two high-

level committees, one of which (CQI) is for lead analysts, management, and the QA Coordinator; Ms. Young is not in any of those roles, but still on the committee. Mr. Hieb has told us Ms. Young can remain on this committee if she wants to. Further, Mr. Hieb has stated Ms. Young can be on the QA Committee and this invitation has been open since the QA Coordinator position was filled by Ms. Massen. However, both Mr. Hieb and Ms. Massen told us that Ms. Young was noncommittal about being on the QA Committee. There may have been some miscommunication about Ms. Young's involvement with QA since there are two committees that both have a quality focus and Ms. Young was doing some QA duties in assisting Mr. Brosz in that role prior to Ms. Massen being promoted to the position. We do not believe that age was a factor in any committee assignments. **There does appear to be confusion regarding the QA and CQI Committees and Building Safety and Biosafety Committees; initially, we were confused ourselves.** We recommend management clarify the purpose of these Committees to all lab staff.

Ms. Young and Mr. Brosz alleged that all Microbiologists II under the age of 40 had prior knowledge of the training documents referenced in Ms. Massen's email on July 28, 2014. Ms. Massen provided information to the CQI Committee in March and June, 2014 regarding the new employee training documents and completed areas. This information was documented on the agendas as well as in the meeting minutes. Mr. Brosz and Ms. Young were not at these meetings. Ms. Massen brought up the training documents to the QA Committee as well (the QA Committee members are currently under the age of 40). Ms. Kuklok heard about Ms. Massen working on this and gave her training documents to Ms. Massen. This explains how the Microbiologists II under the age of 40 were aware of the training documents. It appears this information was readily available and we believe it was the responsibility of both Mr. Brosz and Ms. Young that as CQI Committee members, they should have reviewed this information or at the very least, asked about it if they were absent. **To claim that Mr. Brosz and Ms. Young were not made aware of these documents because of their age is disingenuous, as Mr. Brosz and Ms. Young did not take the initiative or make any minimal effort to become aware of information that was readily available and provided to all CQI members.** Both Mr. Hieb and Ms. Kosse do not believe Ms. Massen's email on July 28, 2014 reflects poorly on any lab employee whose primary areas were not completed. There does not appear to be any effort by Ms. Massen to make the training documents a secret or to exclude anyone. Further, we find it unreasonable to conclude that lab staff over the age of 40 were purposely excluded from knowing about and completing the training documents and checklist.

In reviewing the assignment of special projects, it appears that projects are generally tied to either committee work (the procedures manual was given to the QA Committee) or phase training (such as the Directory of Services which has been given to several staff over the years). **If Ms. Young is interested in being more active with committees and special projects, we recommend she allow others who are cross trained and have**

the time to do her bench work to free up more of her time. We suggest Ms. Young volunteer like others and not expect special projects to be assigned or given to her.

There seems to be a lot of pride and ownership amongst the staff with the testing they perform. With more experience in a particular type of testing comes a certain level of expertise, efficiency, and comfort. We believe there are lingering effects from Mr. Trythall where cross training and allowing others outside of room 305 to help with testing was discouraged. In addition, cost efficiency appears to have been very important to Mr. Trythall and this may be why testing is delayed or not run until more samples are available to be tested. We recommend management discuss with staff the importance of balancing patient/customer needs with cost efficiency and ensuring expectations regarding turnaround times are clear.

Mr. Brosz and Ms. Young contend that older staff should be working on projects along with younger staff in order for the workplace to be fair and to ensure no mistakes are made. That would be making a management decision based on age which is inappropriate. Less tenured or younger staff may not have as much experience at the Department of Health but may be experienced Microbiologists with work experience outside of the Department. Mr. Brosz and Ms. Young seem to believe that if someone has less tenure at the Department of Health, they should not be assigned certain projects, or only be assigned projects when working with a more tenured staff member. However, just because staff are younger or less tenured does not mean they are less qualified. Again, we found no evidence and believe it to be unreasonable to conclude that age was a factor in determining who would work on projects.

We thoroughly investigated Ms. Young's claim that age and attractiveness played a part in Ms. Massen's promotion to the QA position. We reviewed all interviewer notes, talked with each interviewer and each candidate, evaluated and discussed the process for this promotion with Mr. Wilke and Ms. Hoffman, and reviewed the applications. Ms. Young admitted to us that she could have prepared more for the interview and was not expecting the level of questions asked of her, and she felt she did not do well in the interview. During an interview, candidates must be able to communicate their experience and skills; they cannot assume everyone on the interview panel knows about their past experience and skills. It does not appear Ms. Young is taking responsibility for her own actions during the interview and instead has presumed that the only reason someone other than her received the QA position must have been due to age or attractiveness. In our opinion, we find it demeaning to Ms. Massen and her credentials for Ms. Young to suggest that Ms. Massen's promotion was based on age and attractiveness. Ms. Massen is highly educated – she has her master's degree in Clinical Lab Science and has run an MLT degree program at a college and got it accredited – all valuable to the QA role. We could find nothing to suggest that age, attractiveness, favoritism, or anything other than the candidates' qualifications and interviews had any bearing on the hiring decision.

We asked Ms. Trythall for clarification on her response to the allegation Mr. Hieb discriminates against older workers and whether there is a belief or perception by older staff members that he favors younger staff members. Ms. Trythall stated that, "it's based on who he wants to communicate with and who he doesn't." Ms. Trythall said Mr. Hieb is not communicating with her. Ms. Trythall stated that Mr. Hieb needs to be a little more careful he's not favoring certain employees over others because sometimes it looks that way. Ms. Trythall also stated she thinks Mr. Hieb would rather promote younger people into positions or put them forward for committees. While we do not believe Mr. Hieb is favoring or promoting younger staff, Ms. Young, Mr. Brosz, and Ms. Trythall have that perception. We recommend Mr. Hieb be more mindful of the perception of his decisions and communicate the reasons for his decisions more clearly, frequently, and consistently with all staff. For example, Mr. Hieb may want to concisely communicate information directly with the Lead Analysts with the expectation information is passed along to all other staff.

Other Allegations

Both Ms. Young and Mr. Brosz made a number of allegations against Ms. Kuklok. Ms. Kuklok stated that she cares about results going out; that's what drives her – customers. Mr. Hieb stated Mr. Brosz and Ms. Young have brought complaints to him about Ms. Kuklok in the last 6 months; he doesn't remember any complaints prior to April 2014.

Ms. Young reported to us that she feels ostracized in the workplace since this investigation has begun. Some allegations provided to us include: some people won't say hi or good morning to her, some people ignore her at the break table or won't sit next to her, minimal conversation, some people communicate only through email, someone moved her coffee cup in the break room, and some people turn their heads when passing her in the hallway.

Ms. Young feels her performance evaluation reflects negative comments she has made, but that negative comments others have made are not in their evaluations. Both Ms. Young and Mr. Brosz stated they have made negative comments in the workplace. Other staff have also reported making negative comments.

Ms. Young alleged that Mr. Hieb told her she would get a salary increase with roll-up dollars after she was informed she would not get the additional 1% outstanding performance increase in 2013. Mr. Hieb stated that is not what he said; he talked about the opportunity for roll-up dollars in 2013 when positions were all filled. Ms. Kosse stated that after filling the positions, there were only a few hundred dollars left over. Mr. Glatt stated that roll up dollars are used for an investment in staff. Mr. Glatt stated that looking at funding cuts from the CDC last year and the year before, money available can change month to month, and the goal is to get through the biennium; the majority of staff have no clue about this.

Conclusions and Recommendations - Other Allegations

Ms. Young and Mr. Brosz accused Ms. Kuklok of being an instigator, a "pot-stirrer." Only one other person also said this about Ms. Kuklok. Nine people we interviewed, including Ms. Kuklok, told us that Ms. Young is the instigator and "pot-stirrer" in the workplace. Ms. Kuklok stated that she does tell people to go to HR; she believes HR is there to help. We do not believe Ms. Kuklok encouraged others to go to HR to share negative information about Ms. Young. Ms. Young felt that Ms. Kuklok was after Ms. Young's job and would perform some of Ms. Young's work without asking. Ms. Kuklok told us that she got tired of asking Ms. Young if she wanted help and being told no, and subsequently seeing the samples setting there untested for a week or a week and one-half. Ms. Kuklok previously worked in a hospital lab where you get results out quickly. Ms. Kuklok didn't want patients waiting for results unnecessarily when she had the time and training to process the samples. Mr. Hieb stated that Mr. Brosz voiced concern about Ms. Kuklok processing samples without asking for permission; Ms. Kuklok sees things that need to be done and just does them. Mr. Hieb told Mr. Brosz that he can't slow Ms. Kuklok down – Mr. Brosz has to find ways for Ms. Kuklok to be satisfied and successful. It seemed that Ms. Young and Mr. Brosz were concerned about cost control which may be due to influences from Mr. Trythall. We recommend that Mr. Hieb and Ms. Kosse communicate lab priorities in regards to cost control and timeliness of patient results. We do not believe Ms. Kuklok is after Ms. Young's job or harassing Ms. Young. We do not believe that Ms. Kuklok has malicious intent to mess with Ms. Young's work, but rather just to get the testing done. Clearly, Ms. Young, Ms. Kuklok, and Mr. Brosz have very different working styles; we believe they should make an effort to understand each other's working styles to ensure a successful and respectful workplace while meeting all customer needs.

In response to the allegation that Ms. Kuklok has a continuous disregard for following protocol, Ms. Kuklok responded, "it depends on the protocol; for example, I follow CDC through the line." Ms. Kuklok also stated that certain protocols are dumb and we can serve customers better. Ms. Kuklok gave an example where chlamydia equipment was contaminated and a service had to come in to sterilize the equipment. The service recommended cleaning with a solution of bleach. Ms. Kuklok told us she disagreed with using bleach because it was corrosive to the metal and she has used NucleoClean to sterilize the instrument a few times since the rep was there. Ms. Kuklok doesn't think she is doing anything wrong with using NucleoClean as they've used it for the same thing the last 10 years. We recommend Ms. Kuklok follow all protocols as directed, unless told otherwise by Mr. Hieb or Mr. Brosz.

In regard to ostracizing, Ms. Young reported these alleged incidents to a number of management staff and HR at the Department of Health. Mr. Hieb told us he asked Ms. Young what she wanted him to do; he couldn't tell people to talk to her and say good-morning. Ms. Young contacted us several times about these incidents. Up until the last time we met, Ms. Young did not feel this behavior was impacting her work. During the

last time we met, which was at Ms. Young's request, she implied that it was impacting her work but she didn't want to say it was impacting her work because she didn't want to be removed from the workplace. This statement was an example of Ms. Young's pattern of inconsistent responses. The examples and responses Ms. Young gave us previously about ostracizing did not demonstrate to us that it impacted her work. We believe it reasonable to conclude the reason staff may not be interacting with Ms. Young as they had previously may be due to the nature of the personal, sensitive, and negative information Ms. Young shared with us, which we were bound to investigate and ask others about. Management cannot force co-workers to have personal conversations with Ms. Young or any other coworker. However, employees can and must be expected to interact in a professional manner in the workplace so as not to negatively impact the agency's mission. Management can expect professional behavior in the work place at all times. We also find it reasonable to conclude that Ms. Young and Mr. Brosz chose to share their various allegations of misconduct and personal, sensitive, and negative information in an attempt to take the focus off Ms. Young's actions and behavior specifically related to the April 10, 2014, incident. At no time did Ms. Young refer to the personal, sensitive, and negative comments made by others as offensive to her or as harassment.

In regard to negative workplace comments, there appears to be a basic misunderstanding of what is appropriate and what is not appropriate conversation in the workplace. Employees in the Microbiology Lab need to be taught that negative comments, gossip, rumors, etc. are detrimental in the workplace and employees should be encouraged to constructively address any concerns they have with each other directly and with their direct supervisors in private if attempts to resolve their concerns personally are not successful.

In regard to roll-up dollars, Mr. Glatt, Ms. Kosse, and Mr. Hieb all had the same story – roll up dollars *may* be available after filling all positions. Further, Ms. Wilhelmi recalled Mr. Hieb mentioning the *possibility* of roll-up dollars. The availability of roll-up dollars is not a guarantee of salary increases. Management must make difficult decisions in the administration of limited salary dollars.

Additional Conclusions and Recommendations

An important consideration of a workplace investigation is the assessment of the credibility of witnesses. As for the people we interviewed for this investigation:

- **Sandy Young – we found Ms. Young largely not credible.** We found it interesting and suspect that Ms. Young brought forward many of her allegations after she was accused of sexual harassment in April 2014. We could not corroborate many of the allegations and claims made by Ms. Young. She was reluctant to admit her involvement in the incident on April 10, 2014. We believe her

allegations were initiated to deflect and defuse her behavior on April 10, 2014. This diminishes the credibility of her allegations.

- **Tim Brosz** – we found Mr. Brosz largely not credible - his allegations and examples were very similar to Ms. Young's. We found it interesting and suspect that Mr. Brosz brought forward many of his allegations only after Ms. Young was accused of sexual harassment in April 2014. We believe his allegations were initiated in support of his co-worker and friend, Ms. Young.
- **Kristie Schwarzkopf** – we believe Ms. Schwarzkopf was not entirely forthcoming in her interview and withheld information likely due to her friendship with Ms. Young and because she did not want to involve herself in the investigation.
- **Dawn Wilhelmi** - we believe Ms. Wilhelmi was not entirely forthcoming in her interview and withheld information likely due to her friendship with Ms. Young.
- **Jan Trythall** – we believe Ms. Trythall was not entirely forthcoming in her interview and withheld information.
- **Eric Hieb** – we found Mr. Hieb largely credible, but there were certain areas where he was not entirely forthcoming.

As for the rest of the people interviewed for this investigation, we found them to be largely credible.

Clearly the Microbiology Lab needs to work on trust and communication issues going forward; this will take time. We recommend the following training either by HRMS or an EAP provider:

- Harassment Prevention – available through HRMS
- Generations in the Workplace – available through HRMS
- Conflict Management – available through HRMS
- Communication
- Trust/Team Building – EAP

We recommend reviewing applicable policies to determine if any policies need updating or creating. During the course of our investigation, we discovered there appears to be some confusion regarding the policies for annual leave, sick leave, flextime, and overtime/compensatory time. We recommend the Department of Health discuss and clarify these and any other relevant policies with Microbiology staff.

It appears that a number of staff are confused about the chain of command or line of supervision. Some staff mentioned Mr. Hieb as their supervisor; others mentioned their lead analyst. Mr. Hieb changed the lead analyst role; previously the lead analysts had more supervisory responsibility. We recommend that these roles again be clarified to all staff.

It is interesting to us that Ms. Young and Mr. Brosz have followed similar paths in the course of this investigation. Both brought forth a barrage of allegations during the April

investigation into charges of sexual harassment even though Mr. Brosz was not present, both filed grievances at about the same time with very similar allegations, both filed a similar complaint regarding training documents around the same time, and both requested a third interview with us.

We believe that sexually related comments were made in the Microbiology Lab, including the break room. It appears that many of these comments were in regard to one's own personal sex life. However, these comments are still inappropriate in any workplace.

Ms. Young was dissatisfied with a number of things during the past year – Ms. Massen's promotion to QA Coordinator, Ms. Young not getting the additional 1% salary increase in 2013, committees, special projects, etc. Ms. Young sought out explanations for these decisions from several people, several times over the course of many hours. Ms. Young does not seem willing to accept the decisions of management. For example, Mr. Hieb stated Ms. Young was in his office for 8-10 hours after she did not get the QA Coordinator position and Ms. Young told Mr. Hieb what he should have graded her and how he should have graded others for the salary increase in 2013. It appears Ms. Young continues to ask questions (often the same questions) until she gets the answer or outcome she wants. In our opinion, this type of behavior borders on insubordination. It's reasonable and encouraged for management to obtain input from staff; however, ultimately management must make decisions that may differ from employees' input and employees must respect those decisions. Displaying a pattern of frequent and continual asking of the same questions in hopes of getting a different answer or outcome can become a waste of staff time and taxpayer resources.

Mr. Brosz appears to be a technical expert; however, he needs to be given tools and support by management to be a stronger leader. Mr. Hieb is currently meeting with Mr. Brosz on a weekly basis and we recommend this continue to ensure further clarity in regards to Mr. Brosz's job expectations. In addition, the Department of Health may want to consider sending Mr. Brosz to Supervisory/Management training offered by HRMS.

Mr. Hieb stated Ms. Young and Mr. Brosz did a great job in QA with the amount of time they had to perform this work in addition to their bench work over the past few years. However, Mr. Hieb recognized a need for a dedicated full-time position to take QA to the next level of quality management. A full time QA Coordinator will be able to build upon the good work Ms. Young and Mr. Brosz have done and take even bigger strides toward an effective quality management program for the Microbiology Lab.

We strongly recommend a consistent performance evaluation process be utilized going forward, where all employees receive a performance evaluation at least once annually. We recommend utilizing the actual performance evaluation scores to justify any performance increases, including the outstanding performance increase, to ensure a

direct link between the performance score and salary increase, and to streamline the process.

In a workplace where the level of discord is high, hypersensitivity can occur. In our opinion, a number of staff seem to be assuming the worst of other's behavior, communications, and intentions. We would encourage staff to ask questions and speak to each other if something is bothering them and encourage management to clearly communicate important issues to all staff. This will lead to greater transparency and increased trust in the workplace.

The Microbiology Lab has been reorganized within the last two years and Mr. Hieb supervises most of the lab staff directly, including approving annual and sick leave. As an Assistant Director, Mr. Hieb's time may be better spent focusing on high level strategic issues and allowing the lead analysts to supervise the day to day activities of the lab, including approving leave, scheduling, and performance evaluations. The Department of Health may want to follow up and review the organizational structure in the Microbiology Lab in six months to a year to ensure the appropriate organizational structure exists in the lab now and in the future.

Based on our investigation and review of all allegations, we have concluded that Ms. Young and Mr. Brosz were not subject to sexual harassment, retaliation/reprisal, age discrimination, or a hostile work environment.

Whenever employees have personal issues that impact work productivity, management should remember to recommend the employee assistance program to help employees address and work through these issues.

All employees must be reassured that retaliation will not occur for reporting these or any future incidents. Employees must also understand that management directs them to report incidents.

We are available to assist you with any further questions.

2014

	Sandy Young	Tim Brosz	Kristie Schwarzkopf	Lisa Wingerter	Dawn Wilhelmi	Lisa Well	Jan Trythall	Chris Massen	Tracy Hoke	Heather Sease	Maggie Kuklok	Laura Mastel	Lori Carter	Overall
Critical Job Duty 1	2	1	2	3	2	2	2	3	3	3	3	2	2	2.3
Critical Job Duty 2	2	2	3	2	2	2	2	2	2	2	2	3	2	2.2
Critical Job Duty 3	2	2	2	2	3	2	3	3	2	2	3	2	2	2.3
Critical Job Duty 4	2	2	2	2	2	2	2	2		2	2	2	2	2.0
Critical Job Duty 5	3	2	2	2			3				2	3	2	2.4
Critical Job Duty 6	2	3												2.5
Knowledge and innovation demonstrated	2	2	2	3	3	2	2	3	2	2	2	2	2	2.2
Communication	1	2	2	2	2	2	2	2	2	2	2	2	2	1.9
Teamwork/ Cooperation	1	1	2	2	2	3	2	2	3	2	2	2	3	2.1
Self Management	2	2	2	2	2	2	3	3	3	3	3	3	2	2.5
Attitude	1	2	2	2	2	3	2	2	2	3	2	2	3	2.2
Outstanding Performance			X		X		X	X		X	X	X		
Performance Bonus					\$500			\$500	\$500	\$500				
Basic Work Expectations - # Unacceptable	3**	1*	0	0	0	0	0	0	0	0	0	0	0	
Average Ratings	1.82	1.91	2.10	2.20	2.22	2.22	2.30	2.44	2.38	2.33	2.30	2.30	2.20	2.2
Age Group Overall Average	2.11							2.33						

*Develop and maintain positive and effective working relationships with other employees, agencies, departments, stakeholders and the public

**Maintain a positive attitude; Develop and maintain positive and effective working relationships with other employees, agencies, departments, stakeholders and the public; Use courtesy and respect in all interactions

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HB 1246

3/7/17

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North Dakota Department of Health

INTRADEPARTMENTAL MEMORANDUM

TO: Investigation File

FROM: Dirk Wilke, Human Resources Director

DATE: May 2, 2014

RE: Harassment complaint filed by John Gabriel

I. Identification of Problems

Jim Quarnstrom, Assistant Director of Chemistry, received the report from John Gabriel and reported to Myra Kosse, Lab Manager, who reported to Stacy Hoffman, HR Officer. Reported statement involved Kristie Schwartzkopf and Sandy Young. The reported statement indicated a possible violation of the Department of Health sexual harassment policy. Due to the nature of the complaint, Human Resources determined an investigation was needed.

II. Investigation Process

The interview team was comprised of four individuals: Lab Director Myra Kosse, Human Resources Director Dirk Wilke, Eric Hieb, Assistant Director of Microbiology, and Stacy Hoffman, Human Resources Officer. The scope was determined to be those who might have witnessed or experienced the harassment in question and could be expanded depending on findings. Prior to beginning the interviews with staff members, Dirk asked Eric and Myra for background regarding the situation.

During the interviews, Dirk informed the staff members that they were responding to a harassment complaint. Dirk also stressed that following the previous year's investigation into the workplace environment that it was important the lab continue to move forward in a positive way. The investigation had a goal of ensuring that. The interview team asked two primary questions to each employee: What happened in regards to the specific complaint and "Are you aware of any harassment that has taken place in the lab?" As the employee provided specific information and offered first-hand experiences, the team asked more detailed follow-up questions to provide clarity. The interview team did not limit employees from discussing anything they wished, nor did they require the employees to provide an answer if they preferred not to answer. Employees were also given the opportunity to talk directly with anyone on the interview team if they had additional comments after their interview.

After the employee interviews were concluded, the interview team discussed their findings and recommendations. Follow-up interviews were taken into account and discussed with Dirk, Eric, Myra, and Dave Glatt, Environmental Health Chief, when determining the final course of action.

III. Interviews

On April 24th, 2014, the interview team met with eight staff members from Chemistry and Microbiology. The process began with a background discussion of what the general report was before the individual interviews took place.

General Lab Report

Eric informed everyone that Jim Quarnstrom, Assistant Director of Chemistry, received the report and reported to Myra who reported to Stacy Hoffman. When describing the situation in Room 305 of micro, John Gabriel called it a "vortex of negativity." Eric stated that Tom Nemeth and John Gabriel were the chemists involved.

The reported statement involved Kristie Schwartzkopf and Sandy Young. The comments were "How would you feel if Annalise O'Toole (a newly hired Chemist I out of college) was promoted over you? Well that is what happened to us." Then Sandy grabbed her boobs and stated, "and these are real" in front of the chemists.

Eric informed the team that he had heard rumblings of Chrissie Massen bashing since she was hired for the QA/QC position over Sandy and Krissie but never got reported. Sandy did have a 4 ½ hour discussion with him regarding the hiring. She felt it was her job to get. Eric indicated after the conversation that he told her she needed to come to terms with the situation.

Dirk asked for his reference why was she not chosen. Eric stated that interview team for QA/QC position was Myra, Stacy, Eric and Michelle Feist from Disease Control. Chrissie was hired because she came into the interview very prepared, had a binder full of QA/QC examples and ideas of how to move lab forward. Myra also stated that Chrissie had good experience while working at school. Sandy gave an OK interview but didn't provide ideas to grow and improve. Eric indicated that he had told all applicants that he and Myra wanted examples of how to improve.

Jim Quarnstrom

Jim was asked as first receiver of the report what was reported to him. Jim said that John Gabriel was doing IT work. John had described the room with Sandy and Kristy as a negativity vortex. And comments were made by Sandy which John felt were not appropriate. He reported she said "How would you feel if Annalise O'Toole was promoted over you? Well that is what happened to us." Then Sandy grabbed her boobs and stated, "And these are real." This was said to John and Tom Nemeth. Jim followed up with Tom who verified the claim. He then reported the claim to Myra.

John Gabriel

John stated that he was fixing computers when Sandy Young randomly asked "How would you feel if Annalise O'Toole was promoted over you?" John thought comment was weird and tried to ignore it but

**NORTH DAKOTA**
DEPARTMENT of HEALTH

Intrdepartmental Memorandum

B1

DIVISION of LABORATORY SERVICE

2635 EAST MAIN AVE
P O BOX 1
BISMARCK ND 58506-1
(701) 328-4**To:** Eric Heib**From:** Dave Glatt, Section Chief of Environmental Health Section**Cc:** Myra Kosse, Director of Laboratory Services
Dirk Wilke, Director of Human Resources**Date:** January 12, 2015**Re:** Action Plan

As I stated in the laboratory meeting on January 6, 2015, we have received the final report from the workforce investigation conducted independently by Human Resource Management Services (HRMS). In reviewing the report recommendations and conclusions, several areas of improvement and clarification involving you were identified. I believe, in order to successfully move forward, improve your overall performance, and improve the working atmosphere in the lab, we need to implement these suggestions.

With that in mind, we have created an action plan to provide specific guidance and clarification of our expectations moving forward. This memorandum and action plan are not disciplinary in nature, but serve to address issues raised in the investigation and answer questions you have raised. Please note that these expectations are also designed to address not only the HRMS recommendations, but additional Department of Health concerns.

Effective immediately, you will be expected to follow the following action plan:

Provide clear examples of issues on future performance evaluations

Although the HRMS report verified that Sandy and Tim's performance evaluations reflected the entire year, it also suggested that you could have provided more specific examples to better emphasize that the review looked at the entire year. It is very important as a supervisor to discuss performance issues with staff so that they are aware of your expectations and where they need to improve. In order to do this effectively, clear and concise communications are best and should take place throughout the year. This allows employees an opportunity to improve and address areas of concern.

Clarify the purposes of the lab committees to all staff

One area of confusion noted by HRMS was the lab committees. Staff and HRMS both are confused by the responsibilities and purpose of the existing committees. As Assistant Director, you are in an appropriate position to clarify the purpose of the committees to all lab staff. The best way to do this might be with a face to face meeting so that staff can ask questions followed by an email to summarize your discussion.

Ensure staff have been appropriately trained in multiple analytical areas and laboratory competencies and clarify customer service focus

One of the goals of the lab is to provide high quality, cost effective, accurate and timely specimen results to our customers. This can be accomplished through effective teamwork and ensuring staff have been appropriately trained in multiple analytical areas and laboratory competencies. One of the areas of concerns noted by HRMS is the pride and ownership staff feels with the testing they perform. They also mentioned that there may be lingering effects from Mike Trythall where cross training and help with testing was discouraged. HRMS also indicated that Mike's practice in regards to cost efficiency may be a reason testing has been delayed in some circumstances. We want to be a customer driven lab and cross training will allow the lab to meet one of its goals of providing timely, accurate and, more efficient service. Clarify that customer service is our focus and discuss with staff our expectations in regards to turnaround times and cost efficiency. It is important to note that although we are evaluated as individuals for the work that we accomplish we are also evaluated collectively as a laboratory. How we function to serve and interact with customers collectively as a laboratory is as equally important as our individual accomplishments. We know that examples of exemplary work effort and customer service do reflect positively on the lab but also know that missed specimen holding times or inaccurate analyses can have the opposite or negative public opinion regarding lab effectiveness as a whole.

Be mindful of the perceptions of your decisions and communicate the reasons for your decisions more clearly, frequently, and consistently with all staff.

While HRMS confirmed that they do not believe you are favoring or promoting younger staff, they did recommend that you are mindful of that perception. A solution for addressing this perception is more clear, frequent, and consistent communication of decisions with staff. A suggestion provided by HRMS is that you communicate concisely to the lead analysts with the expectation that the information is passed on. Following this process will allow all areas of the lab to receive the information without taking too much of your individual time.

Improve your verbal and written communication

In reviewing the report with HRMS, one area of concern was the method in which you communicate. During the investigation, they noticed that you responded to a lot of questions by providing a lot of background and analysis prior to directly answer a question. While knowledge of background and analysis are good to determining an appropriate response, statements should be made in clear and concise language. By focusing so much on background, the message can get lost or skewed. A good example of this was the email you sent Sandy and Tim in preparation

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for their evaluation. Your goal was to have a constructive discussion during the evaluation, however because you wanted to provide additional information to explain your goal it hurt your message. Instead of a simple, "I hope to have a constructive discussion during the evaluation" you wrote a five sentence paragraph which included "From a place of personal concern for you, please reconsider thoughts of defensiveness or other counter-productive approaches on your behalf or in defense of others." While we understand the intent, this was an inappropriate comment which could have been avoided by concisely and clearly stating what you mean. As a supervisor, it is important to be able to communicate your ideas and expectations with staff. The best way to do this is by providing clear and concise language. This makes the message the main focus. It is our expectations that you work to improve your communication in this way moving forward.

Move Forward

The HRMS investigation was independent and very thorough. It has provided us with some recommendations on how to move forward in our efforts to maintain a professional microbiological laboratory while establishing a constructive work environment. We believe that although you might not have agreed with all the outcomes of the investigation, it is important that you accept the results and move forward with the rest of the lab employees.

We also expect that you will follow the action plan that was sent to the entire lab. Eric, please understand that we are trying to work with you to ensure that you are aware of our expectations. Thank you for your help as we strive together to better serve the public and make the microbiological laboratory a great place to work.

I have been given a copy of this document have had an opportunity to read it. I understand that my signature does not indicate that I agree with the content, only that I have had an opportunity to read this document.

Eric Stiel

Name

2-23-2015

Date

**NORTH DAKOTA**
DEPARTMENT of HEALTH

Intradepartmental Memorandum

DIVISION of LABORATORY SERV

2835 EAST MAIN AVI
P O BOX
BISMARCK ND 58506
(701) 328**To:** Maggie Kuklok**From:** Dave Glatt, Section Chief of Environmental Health Section**Cc:** Myra Kosse, Director of Laboratory Services
Dirk Wilke, Director of Human Resources
Eric Heib, Assistant Director of Microbiology**Date:** January 12, 2015**Re:** Action Plan

As I stated in the laboratory meeting on January 6, 2015, we have received the final report from the workforce investigation conducted independently by Human Resource Management Services (HRMS). In reviewing the report recommendations and conclusions, several areas of improvement and clarification involving you were identified. I believe, in order to successfully move forward, improve your overall performance, and improve the working atmosphere in the lab, we need to implement these suggestions.

With that in mind, we have created an action plan to provide specific guidance and clarification of our expectations moving forward. This memorandum and action plan are not disciplinary in nature, but serve to address issues raised in the investigation and answer questions you have raised. Please note that these expectations are also designed to address not only the HRMS recommendations, but additional Department of Health concerns.

Effective immediately, you will be expected to follow the following action plan:

Follow all protocols as directed

In the HRMS report is stated that in response to the allegation that you have a continuous disregard for following protocol you responded, "it depends on the protocol; I follow the CDC protocol through the line." It is important, especially in a laboratory setting, that all protocols are followed as directed. While you may not agree with all protocols in place, they are in place to protect you, the lab and others. If you feel that you have a better solution or protocol, we encourage that you pass that suggestion through Tim, Eric and Myra. This allows for management review and ensures all aspects of the protocol have been reviewed before implementation.

Move Forward

The HRMS investigation was independent and very thorough. It has also provided us with some recommendations on how to move forward in our efforts to maintain a professional microbiological laboratory while establishing a constructive work environment. We believe that although you might not have agreed with the outcomes of the investigation, it is important that you accept the results and move forward with the rest of the lab employees.

We also expect that you will follow the action plan that was sent to the entire lab. Maggie, please understand that we are trying to work with you to ensure that you are aware of our expectations. Thank you for your help as we strive together to better serve the public and make the microbiological laboratory a great place to work.

I have been given a copy of this document have had an opportunity to read it. I understand that my signature does not indicate that I agree with the content, only that I have had an opportunity to read this document.

Maggie K. Kullback
Name

2.23.15
Date

Testimony on HB 1246
Tag Anderson, Director
OMB Risk Management Division
March 7, 2017

Chairman Klein, and members of the Senate Industry, Business and Labor Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today in opposition to HB 1246.

Simply put, HB 1246 will increase the cost of government by allowing for, if not encouraging, increased employment litigation against the State, instead of having issues of discrimination resolved at the lowest level possible. Employment litigation is expensive to defend and is a significant part of the costs the State pays through the Risk Management Fund. As litigation and litigation costs increase, agency costs increase through increased Risk Management premiums that agencies will be required to pay.

In addition, HB 1246 creates a special exception to the general rule of exhausting administrative remedies for a very limited group of employees only, namely classified state workers. The requirement that a party exhaust administrative remedies is a firmly established legal principle in North Dakota. The North Dakota Supreme Court has repeatedly required exhaustion of administrative remedies as a prerequisite to the ability to bring an action in court, both for parties challenging the actions of a governmental entity as well as private entities that have established remedies. This principle is further frequently reinforced in statute, including NDCC 14-02.4-19, part of the North Dakota Human Rights Act, and NDCC 34-01-20, North Dakota's general Whistleblower statute. Non-classified state employees, including those within the ND University System, county and city employees that are under a civil service system, employees of private employers that have established internal processes through collective bargaining or otherwise all remain subject to the requirement that administrative remedies must be exhausted. But under HB 1246, classified state workers could avoid administrative remedies and simply bring an action in state district court, thereby hampering the administrative agency's ability to investigate and resolve the matter and increase the cost of State government.

In addition, under federal law addressing most forms of discrimination, conciliation/settlement is the primary intended means of resolving disputes, with parties required to first file a charge of discrimination with the EEOC or a deferral agency under a work sharing agreement. An employee may ultimately be able to bring an action in court, but not until there has been an administrative process that investigates the charges and attempts to resolve the matter through voluntary conciliation.

NDCC 54-44.3-12.2 establishes the state-wide appeals mechanism for classified employees, providing an administrative process for employees to appeal and challenge certain enumerated employer actions. The state-wide appeals mechanism also provides an administrative remedy for non-classified employees asserting retaliation under the Public Employees Relations Act.

The state-wide appeals mechanism provides a timely, cost effective and efficient means of resolving these claims. An administrative law judge can provide the same equitable remedies that a court can provide including reinstatement of an employee with back pay and benefits. A successful employee claiming discrimination can also apply to the district court and receive an award of attorney's fees incurred in successfully pursuing a discrimination claim through the state-wide appeals mechanism.

Employment litigation brought against the State is very expensive to defend and often takes many years to resolve. HB 1246 would allow state employees that are classified to avoid exhaustion of administrative remedies and bring an action immediately in state district court. Because this will increase costs to the State in defending these claims and could interfere with an agency's ability to properly investigate and take appropriate action as required under state and federal law, Risk Management opposes HB 1246.

This concludes my prepared remarks and I would be happy to answer any questions you may have.

Thank you.

14-02.4-19. Actions - Limitations.

1. Any person claiming to be aggrieved by a discriminatory practice with regard to public services or public accommodations in violation of this chapter may file a complaint of discriminatory practices with the department or may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed or in the district in which the person would have obtained public accommodations or services were it not for the alleged discriminatory act within one hundred eighty days of the alleged act of wrongdoing.
2. Any person claiming to be aggrieved by any discriminatory practice other than public services or public accommodations in violation of this chapter may file a complaint of discriminatory practice with the department or, except as limited by this section, may bring an action in the district court in the judicial district in which the unlawful practice is alleged to have been committed, in the district in which the records relevant to the practice are maintained and administered, or in the district in which the person would have worked or obtained credit were it not for the alleged discriminatory act within three hundred days of the alleged act of wrongdoing.
3. Except as otherwise limited by this section, if a complaint of a discriminatory practice is first filed with the department, the period of limitation for bringing an action in the district court is ninety days from the date the department dismisses the complaint or issues a written probable cause determination.
4. If a person elects to bring an action in the district court under this chapter, any administrative action pending before the department based upon the same discriminatory acts must be dismissed immediately.
5. A person whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for discriminatory acts is available must exercise that process to completion before commencing an action under this section, and if that process provides for judicial review by statutory appeal or through special proceedings, then that process must be followed to completion. The period of limitation for bringing an action in the district court if there is no statutory appeal is ninety days from the date the available process is completed or if a complaint is filed with the department, ninety days from the date the department dismisses a complaint or issues a written probable cause determination, whichever is greater. In those cases when there is no statutory appeal, a request for an administrative hearing under section 14-02.4-23 must be made within twenty days from the date the department dismisses a complaint or issues a probable cause determination, but no administrative hearing may be held until any available internal process is completed. A person found to have been subjected to a discriminatory act through an administrative process may apply to the district court for an award of reasonable attorney's fees and costs. Nothing in this subsection limits the ability of the department to receive and investigate complaints of discrimination and engage in informal conciliation.

Testimony on HB 1246
Becky Sicble, Interim Director
OMB Human Resource Management Services
March 7, 2017

Good afternoon, Chairman Klein and members of the Senate Industry, Business and Labor Committee. I am Becky Sicble, Interim Director of Human Resource Management Services (HRMS), a division of the Office of Management and Budget. I am here to testify in opposition to HB 1246.

Generally stated, a grievance is a disagreement between an employee and the employer over some term or condition of employment or over the interpretation or application of policy, rule, or law. Under our current law, an employee may file a grievance regarding demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, reprisal or discrimination. Each state agency is required to have an internal grievance procedure with the steps of the process and appeal options defined. When a grievance is submitted by an employee, it is either processed through the agency's grievance procedure or forwarded to our office for review by the Office of Administrative Hearings (OAH) if the internal process is waived.

HB 1246 proposes classified employees be singled-out and allowed to take discrimination-type grievances only directly to district court without first completing the agency's grievance procedure. This bill seeks to complicate agency grievance procedures by providing a completely different process dependent upon who is filing the grievance and what the specific type of grievance is.

Though I empathize with the bill's supporters, the reality is this bill does not resolve their ongoing concern with one state agency. Instead, it proposes a dramatic and costly change to our statewide process. I do not believe our statewide process should change because of this one situation.

I do believe our state's current grievance process works and provides the most cost-effective, time efficient, and resolution-focused outcome to both the employee and the employer.

I request this committee assign a "Do Not Pass" recommendation to this bill. This concludes my remarks. I would be happy to answer any questions at this time.

HOUSE BILL 1246
SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE
March 7, 2017

TO: Jerry Klein, Chairman of the Senate Industry, Business and Labor Committee, and Members of the Senate Industry, Business and Labor Committee.

I, Travis Engelhardt, Director of Human Resources, submit this testimony in opposition of House Bill 1246 on behalf of the North Dakota Department of Corrections and Rehabilitation ("ND DOCR").

A diverse and large employer such as the DOCR respects, values and needs workplace complaints brought to the attention of the Department, along with an opportunity to investigate and resolve workplace employment discrimination claims as quickly as possible.

The current process already allows for the Department and employee to waive the internal grievance process. And if the agency finding is unfavorable to the employee, the employee still has the right to ultimately file a charge with ND Department of Labor and Human Rights, the EEOC, and district court. This is all possible right now.

The DOCR believes HB 1246 will increase costs for employment discrimination claims by increasing litigation. Litigation not only costs the State and the employee money, but generally takes the longest to resolve. Current NDCC 54-44.3-12.2 states it best:

"It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees by requiring affected agencies to adopt grievance procedures and through the creation of a statewide appeals mechanism with primary jurisdiction to entertain and resolve classified employee appeals. It is the policy of this state to resolve bona fide employee complaints as quickly as possible." HB 1246 will add time and costs to employment discrimination claims.

Lastly, the Department feels it important to note that a records request related to an employment discrimination claim can cost the State \$100's and even \$1,000's of dollars in staff time, extracting, reviewing and redacting exempt or confidential information from records. This bill requires the agency to provide records at no cost to the employee or employee's representative. Without ability to recoup a portion of the costs, HB 1246 will again cost the State more money. Currently, NDCC (44-04-18) provides the agency the ability to recoup costs related to extracting, reviewing and redacting exempt or confidential information from public records.

In closing, this bill removes the opportunity an agency has to address employment discrimination claims at the lowest level and fastest way possible. The DOCR takes the responsibility to investigate and rectify any discrimination claim very seriously and finds it crucial to continue to allow the Department an opportunity to fix what may be wrong inside its own workplace. This bill will increase costs to state agencies and employees. We ask that you do not let one or two former employees' perceived bad experience with the internal State appeal process to affect change to the entire classified system that will increase costs and time for resolution for all involved.

Therefore, the ND DOCR respectfully requests a do not pass vote for House Bill 1246.