

CITY of ALBUQUERQUE

TWENTY SEVENTH COUNCIL

COUNCIL BILL NO. O-26-41 ENACTMENT NO. _____

SPONSORED BY: Brook Bassan

1 **ORDINANCE**

2 **AMENDING THE WHISTLEBLOWER ORDINANCE, ROA 1994, CHAPTER 3,**
3 **ARTICLE 7.**

4 **BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF**
5 **ALBUQUERQUE:**

6 **SECTION 1. The Whistleblower Ordinance, ROA 1994, Chapter 3, Article 7 is**
7 **amended as follows:**

8 **§ 3-7-1 SHORT TITLE. This article may be known and cited as the**
9 **"Whistleblower Ordinance."**

10 **§ 3-7-2 FINDINGS AND INTENT. The public health, safety and welfare are**
11 **better protected by instituting a procedure for reporting improper**
12 **governmental action [by city employees], encouraging such reporting and**
13 **protecting those [employees] who properly report such action from retaliation.**
14 **Proper reporting will provide the opportunity to minimize any adverse impacts**
15 **of improper governmental actions.**

16 **§ 3-7-3 DEFINITIONS. For the purpose of this article, the following**
17 **definitions shall apply unless the context clearly indicates or requires a**
18 **different meaning.**

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

25 **COMPLAINANT'S DEPARTMENT. The director of the department in which**
26 **the city employee filing a complaint is assigned. If the complainant works for**

1 an agency of the city that is not designated as a department, then
2 **COMPLAINANT'S DEPARTMENT** shall mean the highest[-]ranking official of
3 such agency.

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

10 ~~[DIRECTOR. The Inspector General created by the Inspector General~~
11 ~~Ordinance, or its successor agency, and any investigators designated by the~~
12 ~~Director.]~~

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

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

20 **GRIEVABLE and GRIEVANCE.** These terms shall have the same meaning
21 as provided in [ROA 1994,] § 3-1-24 ~~[ROA 1994]~~.

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

26 **IMPROPER GOVERNMENTAL ACTION.** Any action by a city employee, an
27 appointed member of a board, commission or committee or an elected official
28 of the city that is undertaken in the performance of such person's duties with
29 the city that is in violation of a federal, state or local government law or rule,
30 an abuse of authority, of substantial and specific danger to the public health
31 or safety, or a gross waste of public funds that is in violation of city policy or
32 rules. The action need not be within the scope of the employee's, elected
33 official's or board, commission or committee member's official duties to be

1 subject to a claim of improper governmental action. IMPROPER
2 GOVERNMENTAL ACTION does not include city personnel actions, including
3 but not limited to employee grievances, complaints, appointments,
4 promotions, transfers, assignments, reassignments, reinstatements,
5 restorations, reemployments, performance evaluations, reductions in pay,
6 dismissals, suspensions, demotions, reprimands, violations of collective
7 bargaining agreements or the merit system ordinance, [ROA 1994,] §§ 3-1-1 et
8 seq. ~~[ROA 1994]~~.

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

13 INSPECTOR GENERAL [WHISTLEBLOWER] INVESTIGATION. A special
14 ~~[audit]~~ [investigation] conducted by the Office of the Inspector General based
15 on a complaint filed pursuant to this article~~[, the Whistleblower Ordinance]~~.

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

25 § 3-7-4 PROCEDURES FOR REPORTING [IMPROPER GOVERNMENT
26 ACTION].

27 (A) *Complaints filed with the department.*

28 [(1)] The complainant shall submit a written report to the complainant's
29 department stating in detail the factual basis for the complainant's
30 reasonable belief that an improper governmental action has occurred.

31 [(2)] Upon receipt of a complaint, the complainant's department shall
32 take prompt action to investigate the report of improper governmental
33 action.

1 **[(3)]** Upon completion of the investigation, the complainant's
2 department shall provide to the complainant a summary of the results of
3 the investigation.

4 **[(a)]** Summaries of investigations shall not include personnel
5 disciplinary actions taken as a result of the investigation.

6 **[(b)]** Summaries shall be provided to the complainant within 15 [city]
7 business days of the receipt of the written complaint by the
8 complainant's department[. If additional time is needed, the
9 complainant's department may extend the investigation] [or at such
10 additional time] beyond 15 days, but only [when the complainant's
11 department has] [for] good cause [for extending the investigation] and
12 [only if it] notifies the complainant [of the reason for the extension and]
13 when the summary of results will be provided [and the reason for the
14 extension of time]. No extension shall be longer than an additional 15
15 [city] business days.

16 **(B) *Alternative filing.*** If the complainant's department director or the
17 highest[-]ranking official of a city agency is the subject of the complaint, then
18 the complaint shall be filed with the Chief Administrative Officer or a member
19 of [his] [their] staff designated to receive such complaints. If the office of the
20 [~~e~~][C]hief [~~a~~][A]dministrative [~~e~~][O]ffice is the subject of the complaint, the
21 complaint shall be filed with the Mayor or [his] [the Mayor's] designee.

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

28 **(D) *Complaints to be accepted by the Inspector General.*** The Inspector
29 General shall proceed with an investigation when[:]

30 (1) a complaint has been filed pursuant to subsections (A) or (B) of this
31 section and the summary of the investigation is not provided to the
32 complainant within 15 business days or the extension thereof,

1 (2) after receipt of the summary of the investigation the complainant
2 alleges that there is a reasonable basis for believing that insufficient action
3 has been taken by the city to address the improper governmental action,

4 (3) for other specified reasons, the improper governmental action is
5 likely to recur[,] or

6 (4) a complaint alleges immediate harm [pursuant to the provisions of
7 subsection (E) below].

8 [The complaint must include sufficient facts that, if true, would establish that
9 improper government action occurred.] When applicable, a complaint filed
10 with the Inspector General shall have attached to it the written complaint
11 submitted to the complainant's department [and] ~~[- The complaint filed with~~
12 ~~the Inspector General shall contain a statement explaining at least one of the~~
13 ~~following:~~

14 ~~(1) that the complainant's department did not provide a summary of the~~
15 ~~investigation,~~

16 ~~(2) the basis for the complainant's belief that the action taken by the city~~
17 ~~in response to the complaint is insufficient or~~

18 ~~(3) the basis for the complainant's belief that the improper governmental~~
19 ~~action is likely to recur or~~

20 ~~(4) the nature of the immediate harm and the basis for the complainant's~~
21 ~~belief that immediate and substantial harm may occur.]~~

22 ~~[When applicable, the complaint shall include]~~ a copy of all summaries of
23 investigation provided to the complainant by the complainant's department.

24 The ~~[Director]~~ [Inspector General] shall not accept complaints ~~[related to]~~ [(1)
25 that the complainant was subject to] discrimination [or retaliation based on
26 their status in a protected class or a protected activity,] or [(2) that the City has
27 violated] labor law[s, collective bargaining agreement] matters, [or the Merit
28 System Ordinance,] or [(3) related to] ~~[other]~~ matters that are the subject of
29 pending litigation [or investigation by any state or federal agency].

30 (E) *Immediate harm.* Complainants shall file a complaint of improper
31 governmental action with the Inspector General if the complainant believes
32 that immediate and substantial harm to people or property will occur if
33 immediate action is not taken. The complainant shall notify the Inspector

1 General in the complaint as to whether the complainant has filed the same
2 complaint with the complainant's department and, if applicable, attach a copy
3 of such complaint. If the complaint has not been filed with complainant's
4 department, the Inspector General shall determine if the complaint shall first
5 be investigated by the complainant's department, pursuant to the procedures
6 required in subsection (A) of this section, or the Inspector General. The
7 ~~[Director]~~ [Inspector General] shall immediately notify the complainant's
8 department if the Inspector General determines that a threat of immediate
9 harm may exist.

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

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

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

25 § 3-7-5 DISCLOSURE OF INFORMATION.

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

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

1 § 3-7-6 INVESTIGATIONS.

2 (A) Investigations shall be conducted in a timely manner by an
3 independent and qualified fact finder, including but not limited to the Office of
4 Inspector General, Internal Audit, or other designated authority.

5 (B) The Inspector General shall conduct a preliminary investigation based
6 on complaints filed pursuant to this article. Such preliminary investigation
7 shall begin within 30 days of the receipt of the complaint by the Inspector
8 General. The preliminary investigation shall determine if the complaint merits
9 further investigation.

10 [(1)] If the Inspector General finds that the complaint has no merit or
11 that proper corrective measures have been taken by the city, the Inspector
12 General shall notify the complainant and the complainant's department of
13 the decision[,] and such decision shall be a final report.

14 [(2) Following the preliminary investigation,] [H] [if] the Inspector
15 General finds that a further investigation is required, the Inspector General
16 shall notify the complainant and the complainant's department of that
17 decision.

18 Decisions made pursuant to this subsection shall be public record only upon
19 delivery of the decision to the complainant and the complainant's department.

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

31 [(C)] [(D)] If the Inspector General determines that the complaint
32 (1) was made in bad faith,
33 (2) is frivolous,

1 (3) was made for purposes of harassment or in retaliation,
2 (4) contains information that the complainant knows to be false or the
3 complainant disclosed information with disregard for the truth or falsity
4 thereof,
5 (5) contains information that is confidential by any provision of law[,] or
6 (6) contains information from records which are closed to public
7 inspection pursuant to law,
8 such determination shall be included in a report to the complainant, the
9 complainant's department and the Chief Administrative Officer. The report
10 shall be a public record, state the basis for such determination and be filed in
11 complainant's personnel file. The Chief Administrative Officer shall determine
12 if disciplinary action concerning the complainant is appropriate based on the
13 Inspector General's report and notify the complainant's department.
14 ~~[(D)]~~ [(E)] The Inspector General may decline to investigate a complaint or
15 portions of a complaint alleging improper governmental action if the same
16 allegations have previously been investigated or have been adjudicated [by
17 the Human Resources Department or any state or federal agency, or have
18 been adjudicated by any state or federal agency,] in any court[, or in any
19 arbitration]. The Inspector General may consolidate investigations when
20 complaints allege the same or similar improper governmental action.
21 ~~[(E)]~~ [(F)] Upon completion of a full investigation, a final written report
22 containing the findings and conclusions of the investigation shall be delivered
23 to the complainant and complainant's department. The report shall be public
24 record upon delivery to the complainant and complainant's department. If the
25 report concludes that improper governmental action occurred and that
26 corrective measures have not taken place or are insufficient to prevent
27 reoccurrence of the improper governmental action the report shall also be
28 delivered to the Mayor[,] ~~[and]~~ the City Council ~~[president]~~ [President, and the
29 City Attorney].
30 [(G)] The City shall maintain a secure case management and tracking
31 system for all complaints investigated pursuant to this Article.]
32 § 3-7-7 CONFIDENTIALITY.

1 **[(A)]** The complainant's identity shall be kept confidential when a complaint
2 is filed with the complainant's department until such time that the summary of
3 the investigation is provided to the complainant. If a complaint is filed with the
4 Inspector General, the complainant's identity shall be kept confidential until
5 such time that the Inspector General delivers a final report as provided in this
6 article. Nothing in this article shall preclude the Inspector General from
7 disclosing the identity of a complainant or witness or other information to the
8 extent necessary to conduct the Inspector General's investigation or from
9 disclosing all information related to the complaint, including the identity of the
10 complainant, to law enforcement agencies of proper jurisdiction.

11 **[(B) Disclosure of a complainant's identity shall not occur without the**
12 **consent of the complainant unless required by law. Where disclosure is**
13 **necessary, reasonable advance notice shall be provided when practicable.**
14 **Personally identifiable information shall be protected to the maximum extent**
15 **permitted by law.]**

16 **§ 3-7-8 RETALIATION.**

17 (A) *Retaliation prohibited.* Elected city officials and city employees are
18 prohibited from taking retaliatory action against an employee because the
19 employee ~~[participated]~~ **[engaged in protected activity by filing an allowable**
20 **complaint or participated participating]** in an **[investigation conducted**
21 **pursuant to]** ~~[action protected under]~~ this article.

22 (B) *Discipline.* It shall be a defense to any discipline that the disciplinary
23 action was initiated in retaliation **[for engaging in protected activity]** ~~[of the~~
24 ~~employee having filed an allowable complaint or participated in an action~~
25 ~~protected]~~ pursuant to this article.

26 (C) **[Complaint.]** ~~[Grievances. Complaints]~~ **[Classified employees may**
27 **submit complaints]** of retaliation ~~[not involving discipline shall be submitted~~
28 ~~pursuant to the grievance resolution procedure]~~ **[in accordance with the**
29 **Grievance Resolution Procedure]** provided in **[ROA 1994.]** § 3-1-24 ~~[ROA 1994].~~
30 **[Unclassified employees may submit complaints to their Department Director**
31 **or the Human Resources Department.]**

32 (D) *Proof of retaliation.* In order to establish retaliation as a defense to a
33 disciplinary action, the complainant must demonstrate that the ~~[complainant's~~

1 activity] [complainant engaged in activity protected] under this article[, the city
2 took adverse action against the employee, and the employee's] [was]
3 protected activity [and] was the primary reason for the action [taken against]
4 the employee [is grieving or appealing]. The city may rebut this defense if it
5 demonstrates that it would have taken the same action regardless of the
6 complainant's participation in the activity protected under this article, and that
7 the disciplinary action was taken for legitimate business reasons.

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

15 (F) *Remedies*. When retaliation is found to have occurred, ~~[either the~~
16 ~~remedies allowed pursuant to §§ 3-1-24 and 3-1-25 ROA 1994 of the Merit~~
17 ~~System Ordinance may apply or]~~ [any disciplinary action shall be reversed and
18 any] adverse materials relating to the retaliatory action in the employee's
19 personnel file [shall] be expunged~~[, or both may apply]~~. [In addition, the
20 Department Director, Human Resources Director, or the Chief Administrative
21 Officer shall determine and document whether additional actions are needed
22 to address any retaliatory actions taken. Any such additional actions taken
23 shall also be documented.]

24 (G) *Retaliation*. If a supervisor is found to have retaliated against an
25 employee in violation of this article, one or more of the following remedies
26 may be ordered by the supervisor's department:

- 27 (1) placement of information describing the violation of this article in the
28 supervisor's personnel file,
29 (2) reprimand,
30 (3) suspension without pay,
31 (4) demotion[,] or
32 (5) termination of employment.

1 [Retaliation includes, but is not limited to, termination, demotion, or discipline;
2 harassment or intimidation; retaliatory investigations; withholding of benefits
3 or opportunities; or adverse employment actions.]

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

8 (I) Retaliation shall not be a defense to a disciplinary action or grounds for
9 a grievance if the complainant's complaint is found

10 (1) to have been made in bad faith,

11 (2) frivolous,

12 (3) to have been made for purposes of harassment or in retaliation,

13 (4) to have contained information that the complainant knew to be false,

14 (5) to have disclosed information without regard for the truth or falsity

15 thereof, [or]

16 (6) to have contained confidential records.

17 § 3-7-9 RESERVATION OF AUTHORITY.

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

21 § 3-7-10 NOTICE OF WHISTLEBLOWER PROTECTIONS.

22 The Inspector General shall prepare and each city department shall post a
23 notice of allowable activities under this article. [The City shall ensure
24 awareness of whistleblower protections through training, onboarding, public
25 accessibility, and contractor/vendor notification.]

26 § 3-7-11 [ANNUAL WHISTLEBLOWER] REPORT[S] TO THE CITY COUNCIL.

27 [Within 60 days of the end of each fiscal year,] ~~[T]~~[t]he Inspector General
28 shall provide an annual [Whistleblower R]eport to the City Council which shall
29 include~~[:]~~

30 (1) the number of complaints received,

31 (2) the nature of each complaint,

32 (3) the number of full investigations conducted,

1 (4) findings or recommendations on policies or practices resulting from
2 investigations,

3 (5) the number of complaints found as valid claims[,] and

4 (6) the number of complaints found to be frivolous or without merit.

5 SECTION 2. SEVERABILITY. If any section, paragraph, sentence, clause,
6 word or phrase of this Ordinance is for any reason held to be invalid or
7 unenforceable by any court of competent jurisdiction, such decision shall not
8 affect the validity of the remaining provisions of this Ordinance. The Council
9 hereby declares that it would have passed this Ordinance and each section,
10 paragraph, sentence, clause, word or phrase thereof irrespective of any
11 provision being declared unconstitutional or otherwise invalid.

12 SECTION 3. COMPILATION. SECTION 1 of this Ordinance amends, is
13 incorporated in, and is to be compiled as part of the Revised Ordinances of
14 Albuquerque, New Mexico, 1994.

15 SECTION 4. EFFECTIVE DATE. This Ordinance takes effect five days after
16 publication by title and general summary.

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