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4040 OMBUDSMAN STANDARDS

The investigatory standards are established in AS 24.55.150. Additional explanation and definitions are provided in this policy.

(1) *Contrary to Law* [revised 7/93, 12/01, 4/23]

“Contrary to law” means:

- (A) failure to comply with statutory or regulatory requirements;
- (B) misinterpretation or misapplication of a statute, regulation, or comparable requirement;
- (C) failure to follow common law doctrines;
- (D) failure to comply with valid court or administrative orders; or
- (E) individual misconduct in which a state employee:
 - (1) acted for an illegal or improper purpose, or
 - (2) acted in an illegal manner, such as violation of the Executive or Legislative Ethics Acts (*see* AS 11.56, AS 39.52, AS 24.60, etc.).

The investigation of a complaint alleging an act was “contrary to law” should specify the law the administrative act violated.

(2) *Unreasonable* [revised 6/6/86, 12/01, 4/23]

“Unreasonable” means:

- (A) the agency adopted and followed a procedure in managing a program that was inconsistent with, or failed to achieve, the purposes of the program;
- (B) the agency adopted and followed a procedure that denied the complainant’s valid application for a program benefit; or
- (C) the agency’s action was inconsistent with agency policy and thereby placed the complainant at a disadvantage relative to all others.

We apply this standard based on the customary understanding of “unreasonable:” beyond the average person’s “common sense” or the limits of acceptability or fairness.

(3) *Unfair* [revised 4/23]

“Unfair” means an administrative act violated some principle of equity or justice. Investigation of a complaint that an administrative act was “unfair” should consider both the agency’s process and the impact to the complainant.

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A complaint that an administrative act was “unfair” usually will involve investigation as to whether the agency:

- (A) provided adequate and reasonable notice of the matter to the complainant;
- (B) provided adequate opportunity to be heard and present information/evidence to a person having an interest in the decision;
- (C) decisionmaker acted without bias or other disqualification;
- (D) made a decision on the record considering all pertinent facts and circumstances, testimony, evidence, or information from people with a legitimate interest in the decision;
- (E) made a decision supported by reasons or by a statement of evidence relied on; and
- (F) applied standards or principles consistently in making a decision.

(4) *Oppressive* [rev 4/23]

“Oppressive” means:

- (A) unreasonable or unjust preconditions were imposed on the complainant;
- (B) the burden placed on the complainant far exceeds the benefit received; or
- (C) the agency placed the complainant at an unreasonable disadvantage relative to other people seeking the same service or benefit.

(5) *Arbitrary* [rev 4/23]

“Arbitrary” means:

- (A) the agency’s action or decision was not based upon any rule, reason, logic or facts;
- (B) the agency’s basis for an action or decision is not intelligible or understandable;
- (C) the agency’s action or decision was based on a delegation of authority to the agency under inadequate standards (standards are “inadequate” if they are unrelated to the fundamental purposes of the program or statute under which the action or decision is taken);
- (D) the agency’s action or decision treated the complainant differently than others and the difference in treatment:
 - (a) was not based on a difference recognized in law or

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(b) was not based on a difference having a fair and substantial relationship to the objective or purpose of the legislation under which the action or decision was taken; or

(E) the agency’s action or decision was not based on a meaningful consideration of all relevant factors.

Review of the administrative record is essential to the application of this standard. Lack of a robust (or any) administrative record to support an agency’s action or decision can be considered evidence of arbitrariness.

(6) *Capricious*

“Capricious” means: an act or decision was made at the whim or pleasure of an agency official or employee without regard to any law or controlling principle.

(7) *Abuse of Discretion* [revised 12/01, 4/23]

In the context of administrative law, this standard has been the subject of countless judicial decisions and journal articles. It can mean something similar to “arbitrary or capricious,” which is why courts offer administrative agencies wide deference:

- (A) *Chevron* deference (*Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)) generally applies to an agency’s legally binding, reasonable interpretation of a statute it administers;
- (B) *Auer/Seminole Rock* deference (named for *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)) generally applies to an agency’s reasonable interpretation of its own regulations; and
- (C) *Skidmore* deference (named for *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) applies to an agency’s informal interpretation of a statute, which has the “power to persuade” a reviewing court.

However, in 2022, the U.S. Supreme Court issued decisions declining to extend deference to the U.S. Department of Health and Human Services (*American Hospital Association v. Becerra* (June 15, 2022) and *Becerra v. Empire Health Foundation* (June 24, 2022)). These decisions appear to dilute the courts’ longstanding deference to administrative agencies.

The Ombudsman is not a judge, and we are not bound to defer to agencies the way courts do. However, investigation of whether an agency has abused their discretion will require a comprehensive examination of the action or decision of the agency.

The Alaska Administrative Procedures Act defines “abuse of discretion” for the purposes of administrative appeals to superior court in AS 44.62.570(b):

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Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

An investigation of a complaint alleging “abuse of discretion” requires:

- (A) a determination that the agency had authority to exercise discretion in the matter that was before it, and
- (B) a determination that, in the exercise of its judgment, the agency:
 - (1) did not proceed according to law;
 - (2) based its decision on an erroneous choice of standards or principles;
 - (3) based its decision on considerations not supported by evidence;
 - (4) based its decision on considerations that were not relevant; or
 - (5) made a decision that was clearly contrary to the reasonable inferences or deductions to be made from the evidence.

Given the foregoing, it is preferable to apply the standards of contrary to law, unreasonable, based on improper/irrelevant grounds or no grounds, etc.

(8) *Unnecessarily discriminatory* [rev 4/23]

“Unnecessarily discriminatory” means:

- (A) There is evidence of discrimination or discriminatory treatment in an agency’s administrative action or decision and the evidence shows the agency’s action or decision:
 - (1) was based on considerations that the legislature or a similar body could not have intended to make relevant; or
 - (2) was not reasonably required to achieve the purpose that the action or decision was intended to serve; or
- (B) There is evidence that an agency’s administrative action or decision creates a disparate impact to a group based on their characteristics without a legitimate need for the policy.

Some administrative policies are clearly discriminatory, while others may be facially neutral but adversely affect some people and not others. Disparate impact from administrative policies is usually unintentional.

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(9) Based on a Mistake of Fact

“Based on a mistake of fact” means: a significant part of the agency’s decision was based on a misperception or misunderstanding as to the existence of relevant facts.

(10) Based on Improper Grounds

“Based on improper grounds” means: the agency failed to consider all relevant information or factors in making a decision.

(11) Based on Irrelevant Grounds:

“Based on irrelevant grounds” means: the agency made a decision based on information or factors that had no reasonable relationship to or bearing on the matter under consideration.

(12) No Grounds for Agency Action

“No grounds for agency action” means: the agency made a decision without reference to any law and entirely lacking a legal basis.

(13) Unsupported by an Adequate Statement of Reasons [rev 4/23]

“Unsupported by an adequate statement of reasons” means:

- (A) the agency did not address or explain the complainant’s concerns directly and completely in the decision;
- (B) the agency did not plainly state the rule of law on which its decision was based;
- (C) the agency’s factual assertions and legal conclusions lacked sufficient support;
- (D) the agency provided reasons for its decision that were not comprehensible; or
- (E) the agency did not provide documentation relevant to the decision.

(14) Performed Inefficiently [rev 4/23]

“Performed inefficiently” generally covers instances of unreasonable agency delay and ineffectual performance. The timeliness of an administrative act is sometimes an issue.

“Performed inefficiently” means:

- (A) An administrative act exceeded:
 - (1) a time limit established by law; or

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(2) a time limit established by custom, good judgment, sound administrative practice, or decent regard for the rights or interests of the person complaining or of the general public; or

(B) An agency mishandled the decision-making process or the process of implementing an act or service by:

(1) proceeding with too much caution or excessive deliberation that delayed action; or

(b) required an unreasonable amount of clarification from the complainant when it could have made a decision or implemented an action or service without such clarification.

(15) *Performed Discourteously* [rev 4/23]

An agency employee “performed discourteously” if they engaged in unprofessional conduct or individual rudeness or discourtesy.

(16) *Otherwise Erroneous* [rev 4/23]

“Otherwise erroneous” is the residual standard and should be used in extremely limited circumstances. If an allegation does not fit within any of the other 15 standards, the investigator should consider reframing the allegation and/or consulting with their colleagues about whether the matter is appropriate for ombudsman investigation.