

**BOARD OF PORT COMMISSIONERS
CITY OF OAKLAND**

5/13/2021
Item No. 5.2
DSC/msr



**RESOLUTION APPROVING AND AUTHORIZING THE RESCISSION
OF PORT OF OAKLAND ("PORT") ADMINISTRATIVE POLICY
AND PROCEDURE ("AP") 16 (INTERNAL REVIEW PROTOCOL)
AND THE AMENDMENT OF PORT AP 18 (WHISTLEBLOWER
PROTECTION POLICY) AND PORT AP 19 (WHISTLEBLOWER
HOTLINE POLICY).**

WHEREAS, the Board of Port Commissioners ("Board") has reviewed and evaluated the Agenda Report for Agenda Item 5.2 dated May 13, 2021 ("Agenda Report") and related agenda materials, has received the expert testimony of Port of Oakland ("Port") staff, and has provided opportunities for and taken public comment; and

WHEREAS, the Office of Audit Services ("OAS") presented initial proposed changes to Port AP 16 (Internal Review Protocol), Port AP 18 (Whistleblower Protection Policy), and Port AP 19 (Whistleblower Hotline Policy) to the Audit Committee of the Board at the Audit Committee's October 15, 2020, meeting to clarify and codify the Port's existing audit practices; and

WHEREAS, the members of the Audit Committee provided comments to Port staff on the initial proposed changes to Port AP 18 and Port AP 19 and directed Port staff to address those comments and changes in revised versions of the subject Port APs; and

WHEREAS, by motion unanimously passed at its October 15, 2020, meeting, the Audit Committee approved the initial proposed changes to Port APs 16, 18, and 19 as well as the anticipated changes that the Committee directed Port staff to make to Port APs 18 and 19 and recommended that the Board approve and authorize all such changes; and

WHEREAS, the OAS, in coordination with the Port Attorney's Office, made additional proposed changes to Port AP 18 and Port AP 19 in response to input received from the Audit Committee in open session at its October 15, 2020, meeting; and

WHEREAS, the proposed changes to Port APs 16, 18, and 19 were presented to the Board at its November 5, 2020, meeting for final adoption and approval, but the Board directed staff to return to the Audit Committee to discuss and resolve two remaining issues for Port APs 18 and 19: first, limiting the Whistleblower Hotline to Port employees only; and second, addressing vexatious complaints and vexatious Whistleblowers; and

WHEREAS, in response to the Board's direction at the November 5, 2020, meeting, Port staff made additional revisions to Port AP 18 and Port AP 19 and presented those changes as well as the original proposed changes to Port APs 16, 18, and 19 to the Audit Committee at its April 15, 2021, meeting; and

WHEREAS, by motion unanimously passed during its April 15, 2021, meeting, the Audit Committee approved the rescission of Port AP 16 as well as all the proposed changes to Port AP 18 and Port AP 19 and recommended that the Board approve and authorize such changes; and

WHEREAS, in acting upon this matter, the Board has exercised its independent judgment based on substantial evidence in the record and adopts and relies upon the facts, data, analysis, and findings set forth in the Agenda Report, and in related agenda materials and in testimony received; now, therefore be it

RESOLVED, that Port AP 16 is hereby rescinded; and be it

FURTHER RESOLVED, that the Board hereby approves the amendments to, and the restatement of, Port AP 18 (Whistleblower Protection Policy), as described in Agenda Report Item No. 5.2 dated May 13, 2021, which final version with all changes accepted is attached as Exhibit A to this resolution; and be it

FURTHER RESOLVED, that the Board hereby approves the amendments to, and the restatement of, Port AP 19 (Whistleblower Hotline Policy), as described in Agenda Report Item No. 5.2 dated May 13, 2021, which final version with all changes accepted is attached as Exhibit B to this resolution; and be it

FURTHER RESOLVED, that the Board hereby repeals all prior versions of Port AP 18 and Port AP 19; and be it

FURTHER RESOLVED, that this resolution is not evidence of and does not create or constitute (a) a contract, or the grant of any right, entitlement, or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Port; and be it

FURTHER RESOLVED, that this resolution shall be effective immediately upon approval and adoption by the Board.

EXHIBIT A

WHISTLEBLOWER PROTECTION POLICY

ADMINISTRATIVE POLICY 18 (AP 18)

DRAFT

WHISTLEBLOWER PROTECTION POLICY

SECTION: Basic Policy

POLICY NUMBER:

AP 18

INITIAL DATE PREPARED: August 27, 2010

LAST DATE REVIEWED: May 13, 2021

I. PURPOSE

To define and affirm the Port of Oakland's ("Port") policy to protect all Port employees who act as whistleblowers from retaliation.

II. POLICY

- A. A "whistleblower" is a Port officer or employee who reports through the Port's Whistleblower Hotline any information (i.e., "complaint") which, if true, would constitute one of the following:
1. a work-related violation by a Port officer or employee (hereinafter, "employee") of any law or regulation;
 2. fraud, waste, or mismanagement of Port assets or resources;
 3. gross abuse of authority;
 4. a specific and substantial danger to public health or safety due to an act or omission of a Port employee;
 5. use of a Port office, position, or resources for personal gain.
- B. A whistleblower must be acting in good faith and have a reasonable basis for believing the information disclosed falls within one or more of the enumerated categories in Subsection II-A. Upon a written finding by the Chief Audit Officer ("CAO") that a Port employee filed a complaint that was knowingly false or was made in reckless disregard of the truth, or that lacks any arguable basis to support its claims, the CAO shall refer the findings to the Port employee's appointing authority as defined in the Board of Port Commissioner's ("Board") By-Laws and Administrative Rules ("By-Laws") for appropriate disciplinary action.
- C. To the extent permitted by law, reports of suspected violations will be kept confidential. A reporter's identity may be shared, however, when necessary to conduct an investigation.

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SECTION: Basic Policy

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INITIAL DATE PREPARED: August 27, 2010

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- D. No Port employee shall use or threaten to use any official authority or influence to restrain or prevent any other person who is acting as a whistleblower in good faith and upon reasonable belief. Further, no Port employee shall use or threaten to use any official authority or influence to cause an adverse employment action as a reprisal against a Port employee who acts as a whistleblower in good faith and with reasonable belief that improper conduct has occurred.
- E. Any Port employee who knowingly engages in conduct prohibited by this policy shall be disciplined, up to and including discharge.

III. PROCEDURES

- A. Any Port employee who believes that he or she has been subjected to an adverse employment action as a result of being a whistleblower may file a written complaint of retaliation within 30 days from the date of the alleged retaliatory action with the CAO or, if the CAO is the subject of the complaint, with the Port Attorney.
- B. The complainant shall at least include:
 - 1. A description of the nature of the alleged retaliatory action taken or threatened in violation of this policy;
 - 2. The date(s), time(s), and location(s) and a detailed description of the alleged violation(s);
 - 3. The name(s) of the alleged offender(s);
 - 4. The name(s) of witnesses, if any;
 - 5. The facts which led the employee to believe that the person or persons initiating or threatening to initiate retaliatory action have knowledge of the employee's having made or filed any complaints which if true would constitute any of the items enumerated in Subsection II-A of this policy; and
 - 6. Any other information that would be of assistance in the investigation.

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- C. Upon receipt of a complaint, the CAO (or the Port Attorney, if the CAO is the subject of the complaint) will refer the complaint to the Port's Office of Equal Opportunity for investigation. In the event that the CAO or the Port Attorney determines that an investigation conducted by Port staff would present a conflict of interest, an independent investigator shall be appointed. The investigation should be completed within 90 days, absent any extraordinary circumstances.
- D. Upon completion of the investigation, the CAO (or the Port Attorney, if the CAO is the subject of the complaint) shall provide the Port Attorney, Executive Director, and the Board with a written investigative report indicating the results. Any reports regarding retaliation shall be confidential and not subject to disclosure.
- E. In the event the investigation sustains a Port employee's violation of this policy, the CAO shall forward the written investigative report to the Port Attorney, Human Resources Director, and the employee's appointing authority, as defined in the Board By-Laws, for appropriate disciplinary action.
- F. The CAO shall provide the Executive Director, Port Attorney, and the Board of Port Commissioners with a quarterly summary of all complaints received during the quarter including the status of each complaint as of the end of each quarter.

EXHIBIT B

WHISTLEBLOWER HOTLINE POLICY

ADMINISTRATIVE POLICY 19 (AP 19)

DRAFT

WHISTLEBLOWER HOTLINE POLICY

SECTION: Basic Policy

POLICY NUMBER:

AP 19

INITIAL DATE PREPARED: August 27, 2010

LAST DATE REVIEWED: May 13, 2021

I. PURPOSE

To provide a confidential process for reporting any fraud, waste, abuse, or potential violations of work-related laws or regulations in a manner that will permit the anonymity of the reporter if so desired; and, to ensure timely identification and resolution of all issues that may adversely affect the Port of Oakland (“Port”) or Port employees.

II. POLICY

- A.** All employees are responsible for reporting any information, which if true, would constitute one of the following:
1. a work-related violation by a Port officer or employee (hereinafter, “employee”) of any law or regulation;
 2. fraud, waste, or mismanagement of Port assets or resources;
 3. gross abuse of authority;
 4. a specific and substantial danger to public health or safety due to an act or omission of a Port employee;
 5. use of a Port office, position, or resources for personal gain.
- B.** As outlined in Port Policy AP 13, an “open-door policy” will be maintained at all levels of management to encourage employees to report problems and concerns. Employees are strongly encouraged to report problems and concerns via the chain-of-command. However, the Whistleblower Hotline (“Hotline”) is always available if special circumstances exist, if issues are not being properly addressed, or if an employee feels more comfortable using this channel of reporting.
- C.** The Port has established and maintains a Hotline that employees may use to report fraud, waste, abuse, or violations of work-related laws or regulations either anonymously or in confidence. The Hotline telephone number and website address are readily available to all employees as conspicuously posted in the Port’s common work areas, on the Port’s intranet, and on the Port’s website.

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- D. Employees who report in good faith and with reasonable grounds any information pursuant to Subsection II-A above via the Hotline will be protected from any form of retaliation or retribution as outlined in Port Policy AP18 – Whistleblower Protection Policy.
- E. All staff employed in the Hotline operation will act with utmost discretion and integrity in assuring that information received through the Hotline is acted upon in a timely, reasonable, and proper manner.
- F. The Chief Audit Officer (“CAO”) or his designee will serve as the Hotline Administrator.
- G. The CAO has the responsibility for directing all investigations. In a case where the allegation is a criminal violation of law, the Hotline Administrator may need to involve the Port Attorney to determine whether there is sufficient evidence to support referral of the case to an appropriate law enforcement agency.
- H. Management must take appropriate measures to ensure support for this policy and encourage the reporting of problems or concerns. At a minimum, actions should be taken to ensure that employees are made aware of this policy and the Whistleblower Protection Policy (“AP18”).

III. PROCEDURES

A. FILING A REPORT

1. Any Port employee with knowledge of information that falls within the enumerated categories set forth in Subsection II-A of this policy has an affirmative duty to report that information and to utilize the Hotline if the individual so chooses to use this channel.
2. The Hotline will be operated by an outside provider and available 24 hours a day, 365 days a year. It will be answered by a live person who will debrief the caller and make a report of all information provided on a sequentially numbered confidential Hotline intake form. All callers will be assigned a confidential report number and will be asked to contact the Hotline in 10 business days for any required follow-up. The Hotline Administrator will ensure that any required follow-up information is provided to the Hotline provider prior to the scheduled call-back date.

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3. When a new Hotline report is submitted, the outside Hotline provider will send a notification simultaneously to the CAO, designated audit staff, and the President of the Board of Port Commissioners to advise that a new report has been received.
4. No attempt will be made to identify a caller who requests anonymity. Whenever callers disclose their identity, it will be held in confidence to the fullest extent allowed by law.

B. INVESTIGATION

1. The Hotline Administrator will ensure that all Hotline reports are addressed in an appropriate and timely manner, as well as in accordance with this policy and all related policies and procedures.
2. Upon receipt of a Hotline report, the Hotline Administrator will review the report to determine the most appropriate course of action to address the allegations. In the event the Hotline Administrator or the Port Attorney determines that an investigation conducted by Port staff would create a conflict of interest or the appearance of a conflict of interest, the CAO or the Port Attorney shall appoint an outside independent investigator to conduct the investigation.
3. The Hotline Administrator can determine, at any time, that a Whistleblower Report is frivolous and dismiss it. A dismissal under these circumstances requires the Hotline Administrator to issue written findings that the Whistleblower Report lacks any arguable basis to support its claims, that it was made in reckless disregard of the truth, or that it was knowingly false. The Hotline Administrator may refer a vexatious Whistleblower for disciplinary action pursuant to Administrative Policy and Procedure 18, Section II(B) and/or may summarily dismiss their Whistleblower Reports without investigation. A vexatious Whistleblower is a Port employee who, based on the written findings of the Hotline Administrator, has filed more than one Whistleblower Report that was knowingly false, that was made in reckless disregard of the truth, or that lacked any arguable basis to support its claims.

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4. Depending upon the report's allegation(s), the Hotline Administrator can refer a Hotline report to the appropriate division director for further action to be completed within 30 days of receipt.
5. For a Hotline report warranting investigation, the Hotline Administrator will conduct an initial inquiry which may include document review, interviews, audit, or other investigative techniques. The investigation should be completed within 90 days, absent any extraordinary circumstances.
6. Those charged with investigation will maintain the confidentiality of the sources of information.
7. At the conclusion of an investigation, the Hotline Administrator will provide the Executive Director, Port Attorney, and the Board of Port Commissioners ("Board") with a written report indicating the results of the investigation.
8. The Port Attorney will review the written report's findings and will advise the Executive Director and the Board about the facts, circumstances, and proper courses of action to address the findings and close the investigation.

C. REPORTS

The Hotline Administrator shall provide the Executive Director, the Board, and the Port Attorney with a quarterly summary of all reports received from the Hotline during the quarter including the status of each report as of the end of each quarter.