



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Office of the Governor

COMMISSION FOR HUMAN RIGHTS

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CONFIDENTIAL

May 22, 2020

Geoff Strommer
Craig A. Johnson
Hobbs, Strauss, Dean & Walker, LLP
215 SW Washington St. Suite 200
Portland, OR 97204

RE: *Bristol Bay Area Health Corporation inquiry regarding Governor Mike Dunleavy, in his official capacity as Governor of Alaska*

Dear Mr. Strommer and Mr. Johnson:

The Alaska State Commission for Human Rights ("Commission") received your client's faxed letter and accompanying draft complaint against Governor Mike Dunleavy. We appreciate the obvious time spent researching and drafting this document.

Typically, our regulation requires that the Commission's staff assist a complainant in drafting and filing a complaint after inquiry. 6 AAC 30.210(b). Further, the staff counsels an inquirer to file a complaint only if the facts and circumstances constitute an apparent violation of AS 18.80. 6 AAC 30.031. However, "if the facts related do not constitute a violation of the human rights law, the staff will accept a complaint only after advising the inquirer that the case will be closed for lack of jurisdiction." *Id.*

This letter constitutes notification advising the Bristol Bay Area Health Corporation ("BBAHC") that if the Commission accepts the complaint as drafted, the case will be closed for lack of jurisdiction.

The Commission only has jurisdiction to investigate discrimination within four primary subject matters areas: employment; credit and financing practices; places of public accommodation; and the sale, lease, or rental of real property. AS 18.80.200. *See also* AS 18.80.220, 18.80.230, 18.80.240, and 18.80.250. The Commission can also investigate a case where the complainant alleges that the state, or a political subdivision thereof, acts to "refuse, withhold from, or deny to any person any local, state, or federal funds, services, goods, facilities,

advantages, or privileges” based upon membership in a protected class. AS 18.80.255(1). Those protected classes include race, religion, sex, color, or national origin. *Id.*

I understand your complaint, in sum, to allege racial and national origin discrimination by the State of Alaska’s denying Alaska Native tribal communities in the Bristol Bay region the privilege or advantage of prohibiting travel to those communities to advance a commercial fishery.

Before we can discuss filing a case for a temporary restraining order, we must first determine that the complaint is jurisdictional and accept it for investigation.

Protected Classes

Your client cites *Johnson v. Alaska State Dept. of Fish & Game*, 836 P.2d 896 (Alaska 1991) to support the position that the State of Alaska previously discriminated against Alaska Natives, based on race, in favoring non-Native commercial fisherman. In *Johnson*, downstream fisherman, consisting solely of Alaska Natives, saw the State of Alaska close their surf fishery while upstream non-Native commercial fisherman continued harvesting salmon. *Id.* at 902-03. While the order closing the surf fishing was itself (presumably) racially neutral, its discriminatory intent and impact were established because the local State regulator’s “racial prejudice against the [N]atives ‘infected the entire process’ of fishery regulation.” *Id.* at 903.

Johnson is distinguishable from the facts at hand because the COVID-19 health mandates apply to the entire state and effectively all forms of fishing. The argument that it creates two classes of Alaska Natives (Bristol Bay area tribes/every other tribe in Alaska) is invalid because the health mandates apply to other small communities and tribal government localities with fishing, including other small, predominantly Alaska Native, villages along the Yukon and Tanana Rivers who also depend on fishing for subsistence and economic activity. Further, the mandates equally apply to small, predominantly non-Native off-highway fishing communities such as Pelican and Craig, the latter of which has no Alaska Marine Highway connection. Analyzing the 2019 census estimates shows that the Lake and Peninsula Borough, the Bristol Bay Borough, and the Dillingham Census Area (collectively representing the communities served by BBAHC) consist of 28.3%, 48.1%, and 18.3%, respectively, of people who are not American Indian/Alaska Native or two or more races. *United States Census, QuickFacts Dillingham Census Area, Alaska; Bristol Bay Borough, Alaska; Lake and Peninsula Borough, Alaska* (July 1, 2019), <https://www.census.gov/quickfacts/dillinghamcensusareaalaska,bristolbayboroughalaska,lakeandpeninsulaboroughalaska>. The health mandates apply to these non-Alaska Natives/American Indians just as equally as they do to the beneficiaries BBAHC serves.¹ The non-Native residents’ health concerns are arguably *greater* than those of the Alaska Native/American Indian residents who are eligible for BBAHC’s relatively expansive regional healthcare system because although BBAHC serves non-beneficiaries in a fee-for-service basis, it has the authority to deny non-Natives services. *See* 49 U.S.C. § 49 (citing Act of Jan 12, 1927, ch. 27, § 1, 44 Stat. 968, for the proposition that the Secretary of the Interior “may” admit non-indigent patients to the Public

¹ BBAHC is not itself a federally recognized tribe. *See* Dep’t of the Interior, Bureau of Indian Affairs, Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200-05 (Feb. 1, 2019).

Health Service hospitals in Alaska upon the payment of reasonable charges). The fact that BBAHC also serves non-beneficiaries further undercuts its argument that the State of Alaska is discriminating solely against Alaska Native tribes. The health mandates' impact, even within the BBAHC region, is not racially disparate.

Taking at face value that Alaska Natives are members of a protected class (race), your client's argument that they are also being discriminated against based on national origin is extremely attenuated. The Commission acknowledges the settled legal precedent that sovereign tribal governments exist in Alaska, and that those governments exist separately and distinctly both from each other and from the State of Alaska as independents. The preference described in *Morton v. Mancari* "as applied, is granted to Indians not as a discrete racial group, but, rather, as members of []sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Enrollment in a tribe is a political classification. *Id.* at 554 n.24 ("[T]he preference is political rather than racial in nature."). See also *Malabed v. North Slope Borough* 70 P.3d 416, 420 (Alaska 2003) (describing the holding in *Morton v. Mancari* as a "kind of political classification"). This does not make these tribes, or their members, subject to national origin discrimination. "Tribal membership, often based on blood quantum and lineage incorporates notions of race and ethnicity that the drafters of Title VII [of the Civil Rights Act of 1964] explicitly understood the term 'national origin' to exclude." *E.E.O.C. v. Peabody Western Coal Co.*, 773 F.3d 977, (9th Cir. 2014). While it is true that national origin discrimination based on tribal enrollment can arise in the employment context, your client is not presenting an employment discrimination complaint under AS 18.80.220. See *Dawavendewa v. Salt River Project Arg. Imp. and Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) ("We therefore conclude that differential employment treatment based on tribal affiliation is actionable as 'national origin' discrimination under Title VII."). All citizens of federally recognized tribes inherently have as their place of national origin, or ancestry, physical locations within the United States of America. See AS 18.80.300(11).

Denial of advantage/privilege

Assuming for purposes of your client's draft complaint that collectively the health mandates deny a community from prohibiting travel for fishing purposes, and that the authority to deny travel constitutes an advantage or privilege, the draft complaint fails to fall within the Commission's jurisdiction because the denial applies equally to every Small Community defined by the Alaska Small Community Emergency Travel Order. The communities served by BBAHC are not the sole Small Community purveyors of subsistence fishing or the fishing industry in Alaska.

Further, your client's complaint, dated May 13, 2020, relies heavily upon a health mandate that Governor Dunleavy subsequently superseded: Health Mandate 12. Health Mandate 12 cited and incorporated the Alaska Essential Services and Critical Workforce Infrastructure Order along with the Alaska Small Community Emergency Travel Order. Superseding Health Mandate 18 cites and incorporates only the Alaska Essential Services and Critical Workforce Infrastructure Order. Therefore, setting aside open legal questions about the authority of a federally recognized tribe dispossessed of its territorial jurisdiction to prohibit travel through an amorphous and

undefined community border, or the authority of that tribe to apply a tribal ordinance to a non-Indian outside of Indian Country; and setting aside constitutional questions about restricting a person's fundamental right to travel (outside of Indian Country) during a pandemic; the Alaska Small Community Emergency Travel Order appears to be rescinded.

The State of Alaska "reopened" as of May 22, 2020, with Phases 3/4 taking effect at 8:00 am. *State of Alaska, Office of Gov. Mike Dunleavy, Open Alaska Responsibly, Phase 3/4 Starts Friday, May 22, 2020* (May 22, 2020), <https://covid19.alaska.gov/reopen/>. The guidance document associated with implementing Phase III/IV reiterates that Health Mandate 18 remains in effect and states that "[l]ocal communities may enact stricter travel restrictions to protect their community, but no one traveling between communities for Critical Needs or Essential Services/Critical Infrastructure can be subjected to any automatic quarantine or isolation on arrival." *State of Alaska, Reopen Alaska Responsibly, Phase III/IV Guidance* 12 (May 21, 2020), <https://covid19.alaska.gov/wp-content/uploads/2020/05/05212020-Phase-III-IV-Guidance.pdf>. This document makes no mention of the Alaska Small Community Emergency Travel Order, nor does it further articulate what restrictions local communities may enact, or what governing authorities may enact them. In fact, at the bottom of Health Mandate 18, the document states "[t]his Health Mandate Supersedes Mandate 012, Attachment B . . ." which is the Alaska Small Community Emergency Travel Order. *Michael J. Dunleavy et al., State of Alaska COVID-19 Mandate 018 3* (May 11, 2020), <https://covid19.alaska.gov/wp-content/uploads/2020/05/05112020-COVID-MANDATE-018-Intrastate-Travel.pdf>. To that extent, your client's allegation was already moot when it was drafted.

Conclusion

The Commission does not have jurisdiction to proceed with your client's discrimination complaint as drafted based on race or national origin. While we understand the public concern with opening travel for subsistence fishing and the fishing industry, the potential risks it poses apply statewide regardless of race or national origin.

The facts outlined in your client's draft complaint do not articulate a violation of the human rights law that we enforce. While your client may disagree with the Dunleavy administration's policy decision(s), the Commission's function is to enforce Alaska's human rights laws rather than investigate and adjudicate policy grievances, and the draft complaint does not articulate a jurisdictional case under AS 18.80. Should you wish to pursue filing, a complaint will be accepted, but be advised under 6 AAC 30.031, the case will be immediately closed for lack of jurisdiction. Because the Commission lacks jurisdiction to proceed with an impartial investigation and has not accepted a jurisdictional complaint, we cannot seek a temporary restraining order under AS 18.80.105 in the Alaska Superior Court enjoining the State from opening the Bristol Bay fishery.

Lastly, I wish to note my disappointment in the email contact I received from a reporter, who provided me with a cleaner copy of your client's draft complaint than I received via fax. Please advise your client of the confidentiality provisions of AS 18.80.115, which the Alaska Supreme Court stated "supports [] an intent that the process be confidential . . . to the public at large" *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 963 (Alaska

2018). Just this morning I received another phone call from a staff person with the Office of Representative Bryce Edgmon inquiring if the Commission intends to expedite this review, indicating to me that your client's draft complaint is already wide-spread and likely has political connotations.

At this time, we are treating your client's draft complaint as an inquiry, as it cannot be accepted as presented or assigned a Commission case number. Should you or BBAHC have any further questions or concerns, please contact the office at (907) 274-4692. If your client wishes to proceed, I encourage it to work with one of the Commission's experienced investigators to discuss whether a jurisdictional case can be outlined.

Sincerely,



Robert W. Corbisier
Executive Director