

# ALASKA STATE LEGISLATURE

## LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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October 10, 2011

Members of the Legislative Budget  
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

OFFICE OF THE GOVERNOR  
ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
SELECTED OPERATIONAL ISSUES

September 23, 2011

Audit Control Number

01-30056-11

The purpose of this audit was to determine if qualified, Alaska State Commission for Human Rights (ASCHR) staff are investigating discrimination complaints timely and the reasons for delays. We also analyzed if ASCHR is performing its statutory obligations as intended by the legislature.

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

A handwritten signature in black ink, appearing to read "Pat Davidson".

Pat Davidson, CPA  
Legislative Auditor

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# OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Alaska State Commission for Human Rights (ASCHR).

## Objectives

The objectives of this audit were to determine:

1. If ASCHR is investigating received complaints.
2. If ASCHR is investigating complaints timely.
3. How many and what types of complaints are investigated; how many days it takes to resolve a complaint; and the reasons for delayed resolutions.
4. If complaint investigations take longer for different races.
5. The remedies or protections available for retaliated complaints and if they are effective.
6. If ASCHR investigators are qualified and trained to perform complaint investigations.
7. If ASCHR is meeting its statutory obligations and legislative purposes.

## Scope

The audit covers ASCHR activities relating to complaint investigations that occurred from January 2008 through December 2010 and other activities through June 30, 2011.

## Methodology

To understand ASCHR as well as the investigation process, we reviewed:

- Title 18 of the Alaska Statutes;
- Title 6 of the Alaska Administrative Code;
- Alaska Statute 44.64 – Hearing Officers and Office of Administrative Hearings;
- ASCHR’s 2008 through 2010 annual reports;
- ASCHR board minutes for calendar year (CY) 06 through CY 10;
- The Division of Legislative Audit’s 2000 audit report of ASCHR;
- The Office of the Governor’s *Performance Review of Selected Topics of ASCHR* for CY 08; and
- Statutes and regulations of various human rights organization in other states.

Additionally, we interviewed ASCHR management and staff regarding investigating discrimination complaints. Prior and current investigators were also interviewed regarding the investigation process, training, caseload, and work environment at ASCHR.

To determine the extent to which ASCHR is meeting its statutory obligations by investigating complaints; analyzing and performing studies on discrimination problems; and conducting outreach and education, we interviewed Office of the Governor staff, ASCHR commissioners, ASCHR management, the National Association for the Advancement of Colored People, and other human rights organizations.

To confirm the qualifications, training, and job performance of ASCHR investigators, we examined employee personnel files.

To determine the nature of complaints filed with the Office of the Ombudsman regarding ASCHR, we interviewed ombudsman management and reviewed the complaints against ASCHR.

To assess the timeliness of the investigations, we reviewed complaints that exceeded 180 days. Using ASCHR's database case management system, we obtained the data of complaints that were open or closed as of December 31, 2010. We categorized the complaints by discrimination types. We selected a random statistical sample of employment discrimination complaints and one complaint from each of the other discrimination types. A random sample of complaints was selected for the retaliation and administrative dismissal categories. We examined all of the three mediation and four reopened/remanded complaints. We also analyzed the complaint files to determine if ASCHR is investigating complaints received; reasons for the delays in investigation; and if race was a factor in the timeliness of investigations.

Complaints with the basis of retaliation for filing a complaint were further examined to identify the recommended remedies and its effectiveness.

We also performed an analysis and presented ASCHR's discrimination data in various tables.

## ORGANIZATION AND FUNCTION

The Alaska State Commission for Human Rights (ASCHR) was created in 1963 under AS 18.80 – State Commission for Human Rights and is organized under the Office of the Governor. ASCHR was created to eliminate and prevent discrimination in employment; credit and financing practices; places of public accommodation; practices by the State or its political subdivisions; and in the sale, lease, or rental of real property. Under state law, it is illegal to discriminate against an inhabitant of Alaska in these areas because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, or practices of the State or its political subdivisions.

ASCHR’s mission states:

*Discrimination not only threatens the rights and privileges of the inhabitants of the state, but also menaces the institutions of the state and threatens peace, order, health, safety, and general welfare of the state and its inhabitants. Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination. It is also the policy of the state to encourage and enable physically and mentally disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment.*

The commission consists of seven public commissioners, appointed by the governor and confirmed by the legislature, for staggered terms of five years. Statutes require the commission to hire and exercise general supervision over an executive director and other administrative staff necessary to carry out its mission. The commission’s staff includes an executive director, chief of enforcement, two investigation directors, seven investigators, two in-house attorneys, and administrative support staff. The commission’s staff helps aggrieved members of the public to file complaints of discrimination. ASCHR investigates these complaints; conciliates complaints when substantial evidence is found; and presents cases in a public hearing if conciliation efforts fail.

Exhibit 1

<b>ASCHR Commissioners</b>
Lester Lunceford, Chair
Christa Bruce-Kotrc
Mark S. Fish
JoAnn Holmes
Grace Merkes
Faith Marie Peters
Karen Rhoades

Source: Office of the Governor, Boards and Commissions

ASCHR’s FY 12 operating budget is \$2.2 million dollars.

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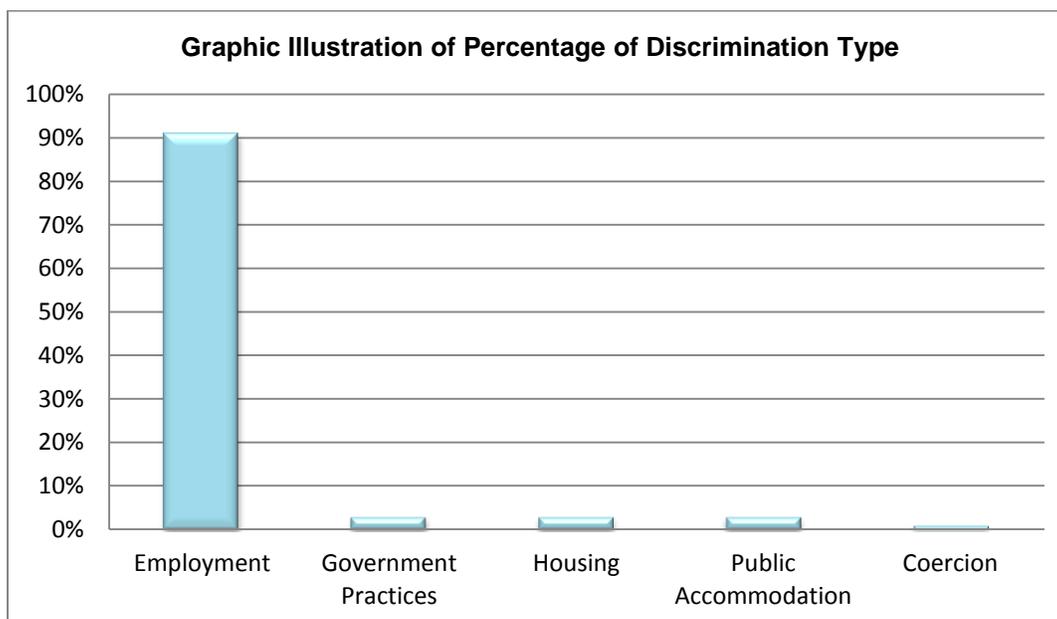
## BACKGROUND INFORMATION

The Alaska State Commission for Human Rights (ASCHR) was created to eliminate and prevent discrimination in employment, public accommodations, housing, finance and credit, and practices by the state or its political subdivisions.

As demonstrated in Exhibit 2, the majority of received ASCHR discrimination complaints were employment type discrimination complaints. Appendix B provides a detailed breakdown of the number of complaints by types of discrimination, sex, race/ethnicity, and basis of complaint.

**Exhibit 2**

<b>Complaints Received by Discrimination Type<sup>^</sup> by Calendar Year</b>					
<b>Type of Discrimination</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>% of Complaint (2010)</b>	<b>% Increase/Decrease CY 08 to CY 10</b>
Employment	256	264	318	91%	24%
Government Practices	10	18	12	3%	20%
Housing	10	12	10	3%	0%
Public Accommodation	15	7	10	3%	-33%
Finance	2	0	0	0	*
Coercion	0	0	1	<1%	*
<b>Total</b>	<b>293</b>	<b>301</b>	<b>351</b>		<b>20%</b>



Source: ASCHR CaTS database

<sup>^</sup>Excludes the co-filed Equal Employment Opportunity Commission (EEOC) complaints not investigated by ASCHR and ASCHR remand/reopened complaints.

\*Complaints for these discrimination types are not received consistently every year; therefore, percent increase/decrease

## Discrimination Types Defined by Statute

### 1. Alaska Statute 18.80.220 – Employment

*It is unlawful for an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction of the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood.*

### 2. Alaska Statute 18.80.255 – Government Practices

*It is unlawful for the state or any of its political subdivisions to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of religion, sex, color, or national origin.*

### 3. Alaska Statute 18.80.240 - Housing

*It is unlawful in the sale or rental of real property for the owner, lessee, manager, or other person having the right to sell, lease or rent real property to refuse to sell, lease, rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin.*

### 4. Alaska Statute 18.80.230 – Public Accommodation

*It is unlawful for the owner, lessee, manager, or employee of a public accommodation to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin.*

### 5. Alaska Statute 18.80.250 – Finance

*It is unlawful for a financial institution or other commercial institution extending secured or unsecured credit, upon receiving an application for financial assistance or credit for the acquisition, construction, rehabilitation, repair, or maintenance of a housing accommodation or other property or service, or the acquisition or improvement of unimproved property, or upon receiving an application for any sort of loan of money, to permit one of its officials or employees during the execution of the official's or the employee's*

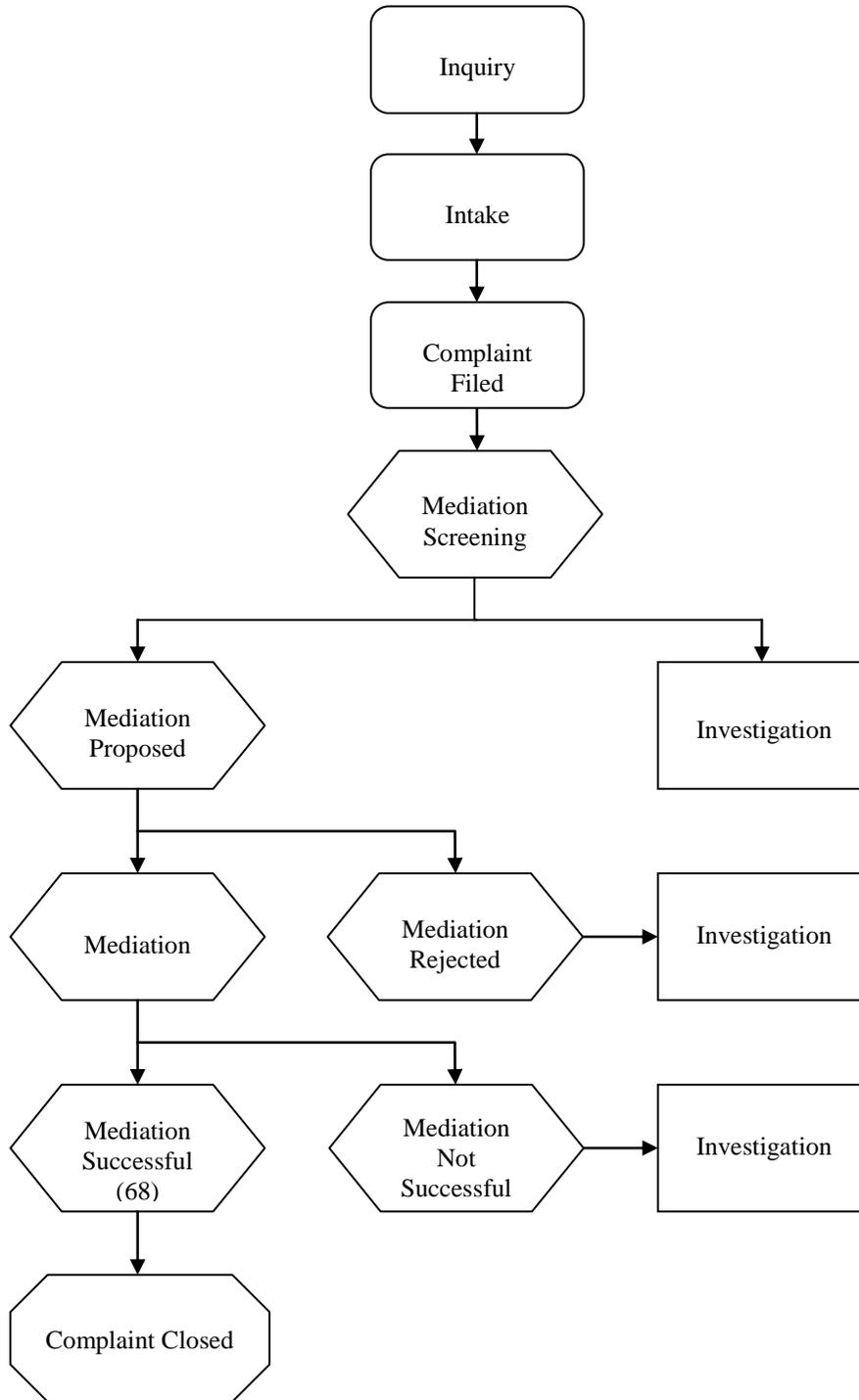
*duties to discrimination against an applicant because of sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin of a person.*

6. Alaska Statute 18.80.260 – Coercion

*It is unlawful for a person to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.*

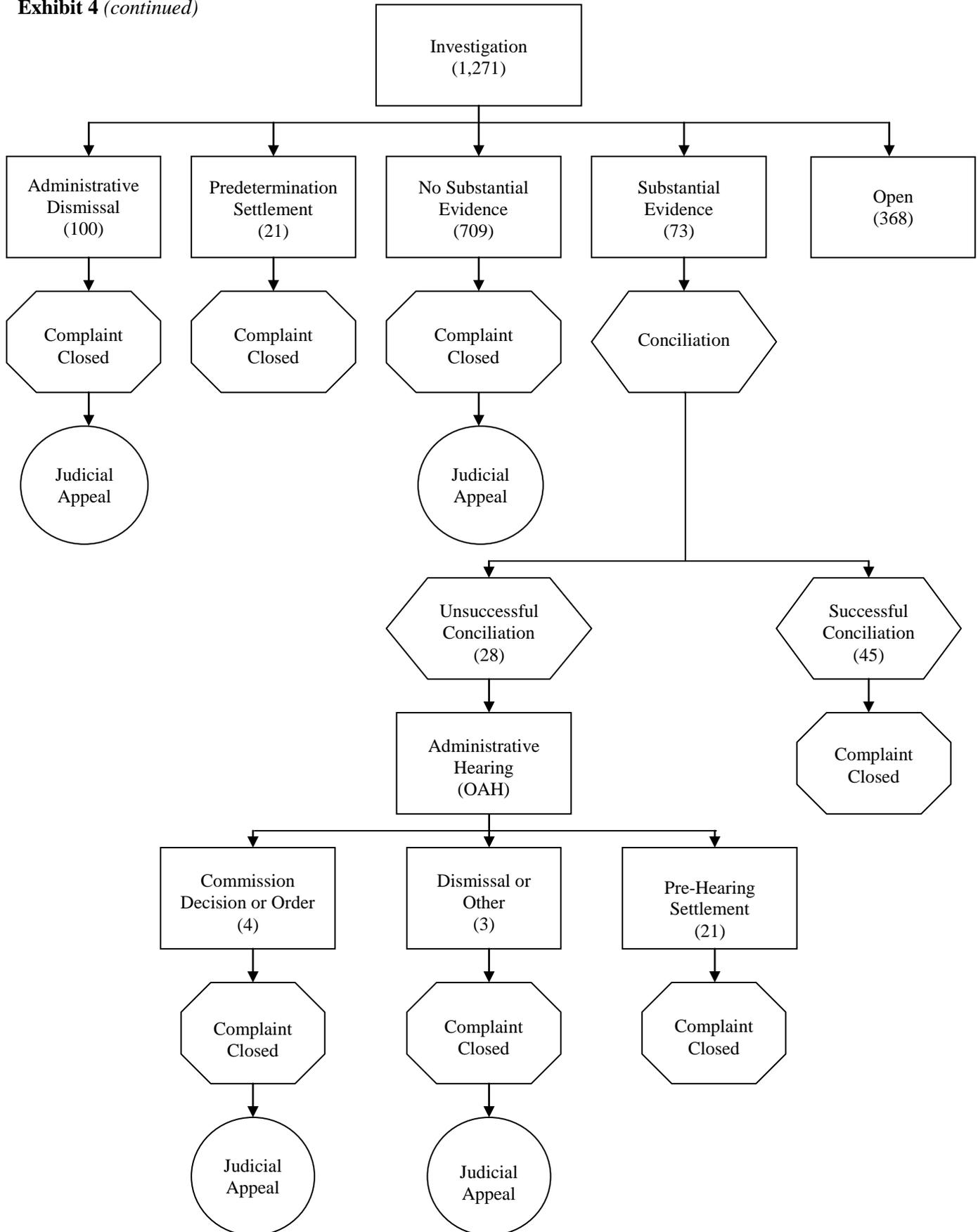
**Exhibit 4**

**ASCHR Complaint Flowchart<sup>1</sup>**



<sup>1</sup>Numbers represent the number of complaints in each phase from CY 08 through CY 10.

Exhibit 4 (continued)



## ASCHR's Complaint Resolution Process

The complaint resolution process varies by complaint based on the willingness of the parties to settle and the investigator's determination of whether there is enough evidence of discrimination to substantiate the complaint. The flowchart presented in Exhibit 7 (pages 8 and 9) provides an overview of the process.

**Intake (Inquiry/Complaint):** The process begins when a person contacts ASCHR. Most inquiries do not result in filing a discrimination complaint. People contact ASCHR for various reasons including: clarification of what constitutes discrimination, information about services it provides, direction on how to file a complaint, and to learn of other available options to address a situation.

The duty of fielding public inquiries is rotated among ASCHR investigators weekly. When an investigator receives an inquiry that alleges discrimination, the investigator works with the complainant to determine if the alleged act is prohibited under state discrimination law or whether the alleged act falls under the protection of federal discrimination law. If the alleged act qualifies as discrimination under state law, ASCHR assists the individual in filing a complaint with the commission.

A person alleging discrimination may contact ASCHR by telephone, mail, or by visiting ASCHR's office regarding filing a complaint. Filing of a complaint must occur within 180 days of the alleged act of discrimination. The person signs the complaint, swearing to the accuracy of the information. Once the complaint is received and found to be complete, notice of the complaint is promptly served on the party (referred to as the *respondent*) alleged to have committed the discriminatory action.

**Mediation:** The mediation program is a free and voluntary process offered by ASCHR to help parties resolve their differences and reach a mutually acceptable agreement. During mediation, parties exchange information and work together with the neutral mediator to try to resolve the complaint. The neutral mediator has a contractual timeline to complete the mediation process 60 days after mediation occurred. If the parties reach a settlement, the commission will dismiss the complaint. If no settlement is reached, the case will be transferred for a full and impartial investigation.

**Investigation:** Complaints transferred to investigation are assigned monthly to investigators who are instructed to work the complaints on a first-come-first-served basis which is based on the date the complaint was filed. Investigators are required by statute and regulation to remain impartial.

ASCHR employs nine investigators.<sup>2</sup> An investigator is typically responsible for 40 to 50 active complaints at any point in time.<sup>3</sup> An investigator may work on other complaints while

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<sup>2</sup>The nine investigators include two investigation directors, one of which does not maintain a caseload.

<sup>3</sup>Information is based on investigator interviews and complaints assigned as of December 31, 2010.

waiting for information from a respondent. It also means that an investigation rarely begins immediately once a complaint is assigned to an investigator. According to ASCHR’s training outline, an investigator should issue a determination for five discrimination complaint investigations per month (or 60 a year).<sup>4</sup> Annual merit increases are primarily based on the investigator meeting this expectation.

The investigation process begins once a complaint is filed and stops once a determination regarding the merits of the complaint has been made. State law requires that ASCHR “*informally investigate the matters set out in a filed complaint, promptly and impartially.*”

The term *promptly* can be interpreted by many individuals differently. ASCHR is not aware of any Alaska case where a court has interpreted the term *promptly* in AS 18.80.110. According to ASCHR’s executive director, “*Every case is unique and workloads and resources vary. Thus ‘promptly’ is going to depend on what is reasonable under the circumstances.*” ASCHR management provided the protocols listed in Exhibit 3 to assist with prompt investigations.

There is no established timeframe for investigating a complaint. The availability of evidence, the nature of a complaint, and the parties’ willingness to cooperate are all factors that have an impact on the amount of time it takes to complete an investigation and to what extent investigative methods are used.

Typically, investigators obtain and analyze facts relevant to a complaint to determine if the allegations are supported by substantial evidence. Statutes and regulations mandate that investigations are conducted as informally as possible. Settlements that occur before investigators make a determination regarding evidence are classified as predetermination settlements.

At the end of an investigation, a determination is made as to whether adequate evidence exists to substantiate a complaint. If there is not substantial evidence, the parties are notified and the complaint is considered resolved by ASCHR.

**Exhibit 3**

<b>Protocols for “Prompt” Investigations</b>
<ul style="list-style-type: none"> <li>• Investigators work discrimination complaints in date order (oldest first).</li> <li>• No extensions of time over 30 days to respond to requests for information are granted to parties unless approved by a supervisor.</li> <li>• Investigators have target production goals.</li> <li>• Investigators are evaluated annually and merit increases are contingent on them meeting their target goals.</li> <li>• Investigators meet regularly with supervisors to discuss complaint investigations.</li> <li>• Investigators regularly provide caseload completion projections to supervisors.</li> <li>• Supervisors review the status of cases with investigators monthly.</li> <li>• Supervisors conduct periodic reviews of randomly selected cases.</li> <li>• Weekly meetings are held with investigators who need assistance.</li> </ul>

Source: ASCHR Management

<sup>4</sup>For the first year an investigator works at ASCHR, the requirement is 45 determinations and 60 determinations per year after that.

All substantial evidence (SE) determinations go through an “*in-house*” attorney<sup>5</sup> review. During an initial meeting, attended by the investigator, investigative director, chief of enforcement, in-house attorney, and executive director, complaint facts as well as the evidence are presented and discussed. After an SE determination is agreed upon in the meeting, the investigator drafts a preliminary SE determination and conciliation agreement. The preliminary SE determination and conciliation agreement are forwarded to ASCHR’s in-house attorney who performs a comprehensive analysis of the facts and evidence.

The parties to the complaint receive the proposed terms of the conciliations agreement along with the SE determination. The conciliation agreement may include that the respondent will cease the discriminating act or practice; obtain training in the laws prohibiting discrimination; adopt an anti-discrimination policy; take other actions necessary to remedy the discrimination; and provide “*make whole*” relief to the complainant for losses incurred as a result of the unlawful discriminatory conduct.

When conciliation agreements are successful, the complaint is considered resolved. ASCHR monitors compliance with conciliation agreements. If a respondent does not agree to a conciliation agreement, the complaint proceeds to hearing.

**Hearing:** ASCHR does not continue in the role of impartial investigator once conciliation fails. ASCHR now acts on behalf of the complainant and presents the case at hearing. The hearing is conducted by an administrative law judge or hearing examiner from the Office of Administrative Hearings (OAH).

A pre-hearing settlement occurs prior to the hearing decision. A pre-hearing settlement provides *make whole* relief to the complainant and may also require training for the respondent or respondent’s employees. If settled, ASCHR monitors compliance with the terms.

Although OAH has a statutory deadline,<sup>6</sup> ASCHR is exempt. Once the hearing has been completed and both parties have had an opportunity to present their case, OAH prepares the proposed findings of fact and conclusions of law. OAH’s decision is forwarded to ASCHR commissioners<sup>7</sup> who review the case file as well as the proposed findings and conclusions, and make the final decision.

**Judicial Review:** Any person adversely affected by a decision of the commission may obtain judicial review of the decision. Judicial review is conducted by the superior court without a jury. When reviewing an administrative decision, the superior court considers the following

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<sup>5</sup>ASCHR has two in-house attorneys.

<sup>6</sup>Alaska Statute 44.64.060(d) states, “*The office shall within 120 days after the date the agency received the request for a hearing, prepare a proposed decision.*”

<sup>7</sup>The ASCHR chairperson appoints at least three commissioners and one alternate to hear and decide the case.

questions. (1) Did the agency proceed without or in excess of jurisdiction; (2) was there a fair hearing; and (3) was there prejudicial abuse of discretion.<sup>8</sup>

### Office of Administrative Hearing

In 2004, legislation was passed to create OAH, an independent office within the Department of Administration, charged with providing administrative adjudication services, regulatory review and training. OAH's mission is *"To provide for the delivery of high-quality adjudication services that ensure fair hearings conducted in a timely, efficient and cost effective manner."*

OAH's statute 44.64.030(a) identifies the various state agencies subject to OAH's adjudicative administrative hearings. Additionally, AS 44.64.030(b) allows for other agencies to utilize the services of OAH based on written agreements. ASCHR utilizes the services of OAH under AS 44.64.030(b) and ASCHR's statute 18.80.120. ASCHR's statute provides:

*The commission shall request the chief administrative law judge to appoint, under AS 44.64.020 , an administrative law judge employed or retained by the office of administrative hearings to preside over a hearing conducted under this section. AS 44.64.040 - 44.64.055, 44.64.070 - 44.64.200, and the procedures in AS 44.62.330 - 44.62.630 (Administrative Procedure Act) apply to the hearing except as otherwise provided in this chapter.*

ASCHR's statute specifically excludes the portion of OAH's statute<sup>9</sup> which establishes the timeline of 120 days under which OAH must prepare a proposed decision. Although ASCHR's cases are not subject to OAH's statutory timelines, ASCHR's regulation 6 AAC 30.470 requires OAH's decision to be prompt.

### Other Human Rights Organizations

Depending on the circumstances surrounding a discrimination grievance, a person who feels they have been discriminated against may file a complaint with other human rights organizations other than the ASCHR. The organizations are as follows.

#### **The Anchorage Equal Rights Commission (AERC)**

The AERC is the municipal law enforcement agency charged to eliminate and prevent unlawful discrimination under Title 5 of the Municipal Code within the geographic boundaries of the municipality. The enforcement provisions cover employment, housing, public accommodations, education and financial practices, and unlawful practices of the

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<sup>8</sup>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.

<sup>9</sup>Alaska Statute 44.64.060.

municipality. Complaints can be filed in regards to race, color, sex, religion, national origin, marital status, age, or physical or mental disability.

### **State of Alaska, Division of Personnel, Equal Employment Opportunity Program (EEOP)**

The State of Alaska is an equal opportunity employer and does not discriminate in employment on the basis of race, color, religion, sex, national origin, age, disability, marital status, changes in marital status, pregnancy, and parenthood. EEOP staff receive, investigate, and resolve employment discrimination complaints from current or former state employees and applicants for state employment.

### **The Equal Employment Opportunity Commission (EEOC)**

The federal EEOC was established by Title VII of the Civil Rights Act of 1964. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, pregnancy, national origin, age, disability, or genetic information.

The EEOC has the authority to investigate discrimination complaints against employers who are covered by the law. The EEOC's role in an investigation is to fairly and accurately assess the allegations in the complaint and then make a finding. If a finding of discrimination has occurred, the EEOC will try to settle the complaint. If a settlement is not successful, it has the authority to file a lawsuit to protect individuals' rights and the public's interest.

The EEOC also works to prevent discrimination before it occurs through outreach, education, and technical assistance programs.

The EEOC's headquarters offices are in Washington, D.C. Complaints may be filed at the closest EEOC office or at any one of the 53 field offices. The nearest field office for Alaska is in Seattle, Washington. The EEOC website includes an on-line assessment tool that individuals can complete in order to determine if the EEOC is the correct agency with which to file a discrimination complaint. The EEOC website also includes an intake questionnaire for individuals to complete regarding their employment discrimination. The questionnaire can be mailed or delivered in person. The EEOC also receives discrimination complaints by phone.

### **ASCHR and EEOC Work-sharing Agreement**

ASCHR has a work-sharing agreement with the federal EEOC. This agreement allows a person alleging discrimination to file a claim only once, either with the EEOC or ASCHR. The agency that receives the complaint will co-file with the other human rights agency if the complaint alleges discrimination within the respective agency's jurisdiction. The intake agency, the EEOC or ASCHR, conducts one investigation. Such an approach is designed to avoid duplicate investigations. ASCHR receives \$550 for up to 294 complaints for each

complaint it investigates under the EEOC work-sharing agreement. From calendar year (CY) 08 through CY 10, there were 1,074 co-filed complaints with the EEOC in which ASCHR was the investigator.

From CY 08 through CY 10, there were an additional 213 complaints that were co-filed with ASCHR that EEOC investigated.

### ASCHR's Annual Report

The annual report includes a letter from the commission chair regarding highlights of ASCHR activities; a synopsis of complaint investigations that proceeded to OAH during the year; a summary of appealed ASCHR decisions that are in superior or supreme courts; abstracts from various complaint investigations regarding different types of discrimination; and case data for the year.

### Prior Audit Status

In 2000, the Division of Legislative Audit conducted an audit<sup>10</sup> of ASCHR and made two recommendations. (1) Establish procedures to ensure cases are assigned for investigation in a fair and consistent manner, and (2) institute investigation timelines to prevent periods of inactivity in the investigative process.

The first recommendation from the prior audit stemmed from a backlog of unassigned complaints. According to management, there is currently no backlog of unassigned complaints as cases are assigned monthly.<sup>11</sup> As of December 31, 2010, there were 20 unassigned complaints.<sup>12</sup> It took an average of 38 days for a complaint to be assigned to an investigator after it was filed. Although this prior recommendation has been implemented, once complaints are assigned they are not actively worked for many months. On average, it takes 170 days for an investigator to document the nature and scope of the investigation in an investigation plan after a complaint was assigned.

The second recommendation pertains to ASCHR not completing investigations in a timely manner when it has a statutory mandate to promptly and impartially investigate complaints. The prior audit recommended a timeline of 180 days to complete an investigation, absent extenuating circumstances.

#### **Exhibit 5**

##### **Length of Investigations Complaints Filed to Determination CY 08 – CY 10**

	Closed
Greater than 1 year	46%
Between 180 days and 1 year	30%
Less than 180 days	24%

Source: ASCHR CaTS database

<sup>10</sup> *Office of the Governor, Alaska State Commission for Human Rights, Selected Operational Issues, May 19, 2000, Audit Control No. 01-4580-00.*

<sup>11</sup> ASCHR received an average of 29 employment complaints a month for CY 10.

<sup>12</sup> A majority of the unassigned complaints were filed in November and December. Two were filed in October and one in September. One unassigned complaint was filed in September 2009 and is currently being investigated by the EEOC.

This recommendation was not implemented by ASCHR. After ten years, ASCHR still does not complete investigations in a timely manner. Based on a review of the complaints that were closed from CY 08 through CY 10, approximately 75% of the determinations were issued 180 days after the complaint was filed. (See Exhibit 5.)

(See Recommendations No. 1 and No. 2.)

## REPORT CONCLUSIONS

Based on our audit, we determined:

- The Alaska State Commission for Human Rights (ASCHR) is investigating complaints received, but not timely.
- Complainants' race/ethnicity is not a factor in the timeliness of investigations.
- It is inconclusive if remedies are effective against eradicating or preventing discrimination.
- ASCHR investigators are qualified and receive on-the-job training.
- ASCHR is not meeting all of its statutory obligations and legislative purposes.

Detailed report conclusions are as follows.

ASCHR investigates all discrimination complaints filed with the agency, but does not investigate them timely.

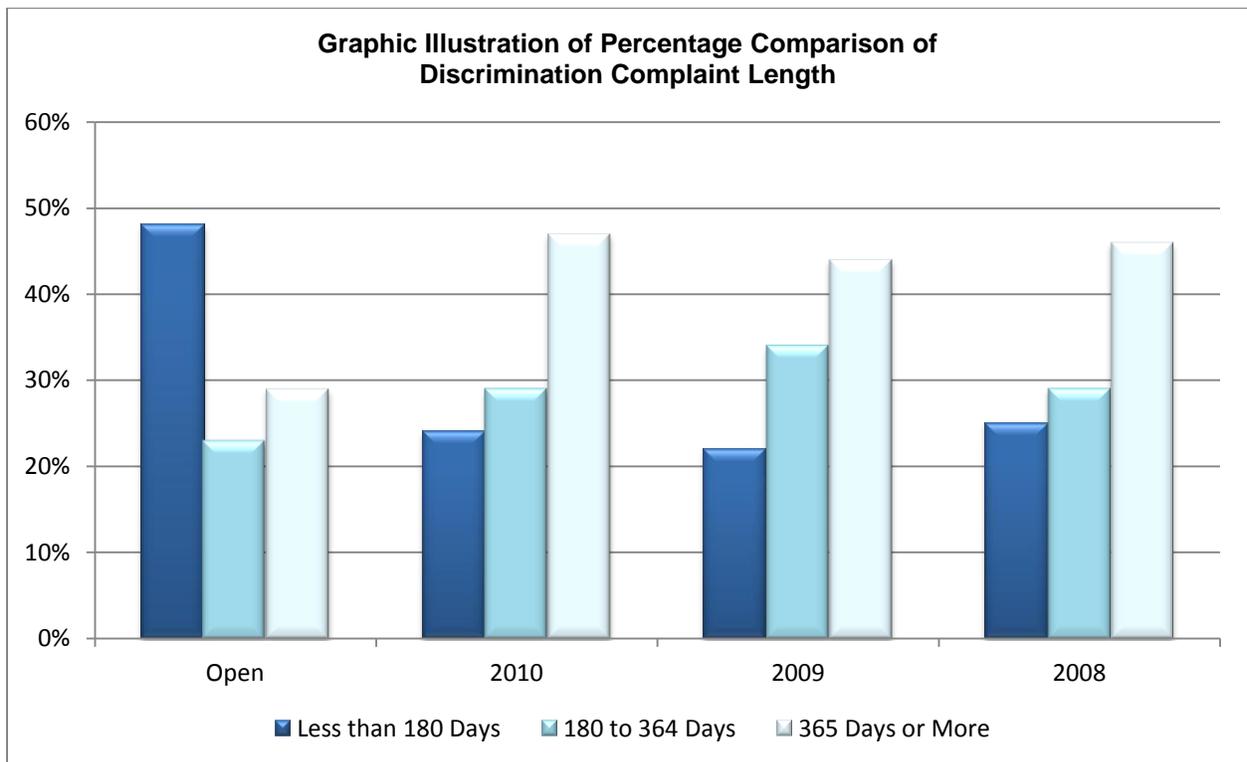
As discussed in the Background Information section, ASCHR receives inquiries from the public regarding potential acts of discrimination. During inquiries, ASCHR investigators assist individuals with filing complaints if the facts and circumstances constitute a violation of a human rights law. ASCHR accepts discrimination complaints even if the facts are not clear. As noted in Exhibit 6 (following page), from calendar year (CY) 08 through CY 10, there were over 1,300 discrimination complaints filed with ASCHR.

Once ASCHR establishes that it has jurisdiction over a discrimination complaint, AS 18.80.110 requires investigators to conduct an investigation "*promptly and impartially.*"

As illustrated in Exhibit 6 (following page), approximately 75% of each year's discrimination complaints took over 180 days to issue a determination after the complaint was filed. Additionally, over 500 discrimination complaints (almost 50% of the determinations for each year) took over a year. Appendix A provides a more detailed breakdown of the timeline of a complaint investigation.

**Exhibit 6**

<b>Length of Discrimination Complaints^ CY 08 - CY 10</b>									
<b>Number of Cases and Percentages</b>									
<b>Open or Year</b>	<b>Less than 180 days</b>		<b>180 – 364 days</b>		<b>365 days or more</b>		<b>Total</b>	<b>Total over 180 days by year</b>	
<b>Closed</b>	<b>Count</b>	<b>Percent</b>	<b>Count</b>	<b>Percent</b>	<b>Count</b>	<b>Percent</b>	<b>Count</b>	<b>Count</b>	<b>Percent</b>
<b>Open*</b>	177	48%	84	23%	107	29%	368	191	52%
<b>2010</b>	84	24%	99	29%	162	47%	345	261	76%
<b>2009</b>	70	22%	109	34%	144	44%	323	253	78%
<b>2008</b>	76	25%	87	29%	140	46%	303	227	75%
<b>Total</b>	<b>407</b>		<b>379</b>		<b>553</b>		<b>1,339</b>	<b>932</b>	



Source: ASCHR CaTS database

^Discrimination complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by the ASCHR and ASCHR remand/reopened complaints.

\*Open investigations as of December 31, 2010.

Exhibit 7 details the various closure types for discrimination complaints. Administrative dismissals accounted for 10% of the total closures from CY 08 through CY 10 and took on average 668 days. Reasons for administrative dismissals are the complainant withdrew complaint; the complaint was not timely; the complainant was not available; the complainant was not cooperative; the complainant filed with the courts; or the complaint was filed against a tribal sovereign entity. Further breakdown by the administrative dismissal complaints is illustrated on Appendix C.

**Exhibit 7**

<b>Average Number of Days Complaints Filed to Determination for Discrimination Complaints^ CY 08 – CY 10</b>			
<b>Closure Type*</b>	<b>Count</b>	<b>Percent</b>	<b>Average Days</b>
Administrative Dismissals	100	10%	668
Mediation	68	7%	96
Settlements	21	2%	266
NSE Determinations	709	73%	411
SE Determinations	45	5%	829
Pre-Hearing Settlements	21	2%	917
Administrative Hearings - Dismissals	3	<1%	1089
Administrative Hearings	4	<1%	1350
<b>All Closures</b>	<b>971</b>		<b>448</b>

Source: ASCHR CaTS database.

^Discrimination complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by the ASCHR and ASCHR remand/reopened complaints.

\*Information presented is from ASCHR’s database by “closure type” field.

Exhibit 7 also shows that from CY 08 through CY 10, it took investigators an overall average of 448 days from the complaint-filing date to issue a determination for 971 closed investigations. The majority (73%) of the investigated closed complaints resulted in no substantial evidence (NSE) determinations; it took investigators an average of 411 days to issue a determination. Five percent of discrimination complaint investigations that resulted in a substantial evidence (SE) determination took an average of 829 days.

The following factors contributed to untimely investigations:

- **Turnover** – During the past 3 years, ASCHR had a 100% investigator turnover.<sup>13</sup> When an investigator leaves ASCHR employment, his or her caseload of discrimination complaints is redistributed to the other investigators. Over 45% of complaints were

<sup>13</sup>The analysis of the 100% turnover excludes the promotion of an investigator to the investigation director position.

reassigned to a second or third investigator during the investigation stage. Based on investigation activities after reassignment, it took an average of over 135 days for a new investigator to take action on inherited cases.

- **Techniques and tools are not available to investigators** – Investigators do not have access to external email in order to schedule meetings or request and receive documents. Investigators also do not have internet access at their work station in order to perform research. Requesting and receiving documents from complainants and respondents adds a significant amount of time to the investigative process.

Investigators do not have current, comprehensive policies and procedures to use during intake and investigations. Management has expectations regarding its investigative procedures and documentation; however, investigators are expected to follow and be held accountable to policies and procedures that are not kept current or comprehensive.

ASCHR's intake process does not identify all exempt organizations such as not-for-profits and organizations with tribal immunity without starting an investigation. Based on the data, there were 23 complaints filed against not-for-profit organizations and ten against village councils that proceeded to investigations. Investigations against these types of organizations could have been avoided if their exempt status had been addressed during the intake process. Several of these organizations were not on ASCHR's intake exempt organization list.

Investigators are not required to periodically keep in contact with the complainants during the investigation. As a result, in some cases ASCHR has invested significant time into an investigation, and when the complainant is contacted, they are either unavailable or uncooperative. ASCHR files show that 16 complaints were closed an average of 415 days after the complaint was filed due to the complainant not cooperating with the investigation. Another 27 complaints were closed an average of 1,292 days after the complaint was filed because complainant was not available. See Appendix C for a breakdown of the length of time for administrative dismissals.

Investigators are not encouraged to work in teams or consult with one another on complaint investigations. The lack of sharing like information or issues does not allow for efficiencies or ensuring investigations are prompt.

- **SE Determination Reviews** – Investigators are not allowed to issue SE determinations without review by an in-house attorney. Results from examining 13 complaint investigation case files indicate that the average time for in-house attorney reviews of SE determinations is 348 days. Although the investigators have a productivity standard to meet, there is no expectation by management for the in-house attorneys to complete a specified number of SE determination reviews or within a specified timeframe.

- **Investigator workload** – Investigators are to investigate complaints on a first-come-first-served basis. As of December 31, 2010, investigators’ workload had an average of 44 investigations. Due to factors such as investigator turnover; older, complicated complaints in their workload; Equal Employment Opportunity Commission (EEOC) cases; and intake responsibilities, investigators typically do not begin working on new complaints until many months after assignment. On average, it took 170 days for the investigator after assignment to determine the nature and scope of the investigation as documented in an investigation plan.

Due to ASCHR’s untimely investigations, complainants and respondents are filing complaints with the Office of the Ombudsman. Since January 1, 2005, there have been 18 complaints filed with the ombudsman regarding ASCHR’s complaint investigation process. Over half of the complaints<sup>14</sup> were about ASCHR’s untimely investigations. The ombudsman’s internal procedure is to not investigate complaints until the respondents have completed their investigation process; therefore, the 18 complaints were closed.

Investigations that are delayed for long periods of time impact both the complainant and the respondent as evidence is more difficult to obtain. When investigations are not timely, complainants’ issues remain unresolved, respondents are not held accountable, and, importantly, discrimination is not being prevented or eradicated in a timely fashion or if at all.

(See Recommendations Nos. 1 and 2.)

Complainants’ race/ethnicity is not a factor in the timeliness of investigations.

During the complaint intake process, the race/ethnicity of the complainant is noted on an intake and data entry form. ASCHR uses this information for presentation purposes in their annual report. There was no evidence in the investigation files that race/ethnicity was a factor in the timeliness of the investigator performing the investigation and processing of the complaint.

Exhibit 8 on the following page details the various races/ethnicities by the timeframes. For complaints over one year or more, the percentages of investigation closures are relatively comparable among the races/ethnicities. See Appendix A for a detailed breakdown of the number of complaints by types of discrimination, sex, race/ethnicity, and basis of complaint.

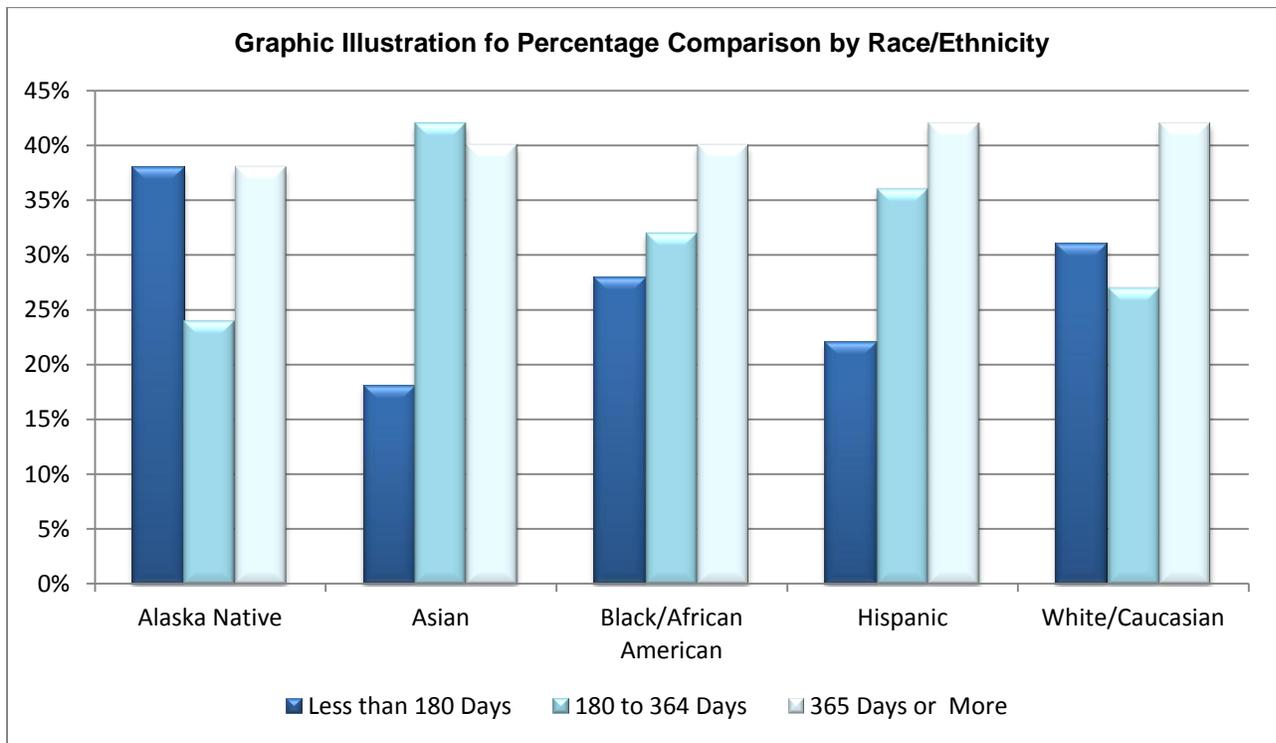
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<sup>14</sup>The other complaints were about ASCHR’s decision was incorrect; ASCHR pursuing the spouse since the respondent was deceased; and ASCHR’s investigation was flawed.

**Exhibit 8**

**Timeframes Complainants' Race/Ethnicity  
Open\* and Complaints Filed to Determination  
CY 08 – CY 10^**

Race/Ethnicity**	Number of Cases and Percentages					
	Less than 180 days		180 days to less than 364 days		365 days or more	
	Count	Percent	Count	Percent	Count	Percent
Alaskan Native	69	38%	44	24%	69	38%
Asian	15	18%	35	42%	34	40%
Black/African American	58	28%	66	32%	82	40%
Hispanic	18	22%	29	36%	34	42%
White/Caucasian	227	31%	191	27%	303	42%



Source: ASCHR CaTS database

\*Open investigations as of December 31, 2010.

^Discrimination complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by ASCHR and ASCHR remand/reopened complaints.

\*\*Excludes American Indian, other and unknown race/ethnicity categories as each was less than 4% of the total complaints.

It is inconclusive if discrimination determination remedies are effective in eradicating and preventing discrimination.

Alaska Statute 18.80.130(1) outlines the remedies available for discrimination, recommending:

*Training of an employer, labor organization, or employment agency and its employees concerning discriminatory practices; an accommodation for a person with a disability; removal of or changes to a personnel record; posting of signs; back pay; the hiring, reinstatement, or upgrading of an employee with or without back pay.*

From CY 08 through CY 10, there were 85 “retaliation for filing a complaint” investigations. Of the 85 complaints, the commission found substantial evidence in eight. Six complaints were conciliated successfully, and two were not successfully conciliated and went through the administrative hearing process. The remedies in the conciliation agreements reviewed were those identified in AS 18.80.130(1).

Based on review of the eight retaliation SE determinations, four of the eight respondents had additional complaints filed after the SE determination date. Most complaints were for different issues and resulted in NSE determinations, or the investigation is still active. One respondent had a complaint filed against them for the same issue, “retaliation for filing a complaint,” and this complaint is still being investigated.

It is inconclusive whether remedies are effectively working to eradicate and prevent discrimination given respondents continue to receive discrimination complaints for dissimilar issues.

ASCHR is not meeting all of its statutory obligations and legislative purposes.

At the creation of ASCHR, it was the legislature’s intent that:

*The commission to be more than a simple complaint-taking bureau; the statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in employment, in credit and financing practices, in places of public accommodations and in the sale, lease or rental of real property.*

Notes to the statute state:

*The commission’s responsibility may be viewed as twofold: (1) to study and report on the problems of discrimination, and (2) to take affirmative steps to eliminate any discrimination discovered.*

In addition to not investigating complaints promptly, ASCHR does not perform any assessments or studies about discrimination problems in our communities and our state as required by statute. (See Exhibit 9.) ASCHR reported in its 2005 and 2008 annual report a section regarding “EEO Progress in State Government” which is to meet its statutory requirement of AS 18.80.060(a)(6).

ASCHR’s annual report includes data about the complaint processes, but no analysis and assessments are made about the data it captures. Additionally, it does not include any timeline assessments or identifies recommendations that could prevent and reduce discrimination. Based on interviews ASCHR commissioners believe ASCHR annual reports suffice as studies on discrimination.<sup>15</sup>

As shown in Exhibit 10 (following page), analysis of respondents indicates that, excluding government, the top four respondents by industry are food and beverage establishments, health care and social assistance, construction, and accommodations (hotels, inns, etc.). Appendix D lists the number of complaints by respondents’ industry. These are potential industries for ASCHR to seek out and conduct outreach and trainings to help prevent discrimination complaints.

The 307 complaints filed against government took an average of 445 days. Over half of the complaints filed against government resulted in an NSE determination. Thirteen percent of government complaints were mediated, settled, or had an SE determination issued.

## Exhibit 9

### Duties of the Commission (Excerpts)

AS 18.80.060(a)(5)

*Study the problems of discrimination in all or specific fields of human relationships, foster through community effort or goodwill, cooperation and conciliation among the groups and elements of the population of the state, and public the results of investigation and research as in its judgment will tend to eliminate discrimination.*

AS 18.80.060(a)(6)

*Make an overall assessment, at least every three years, of the progress made toward equal employment opportunity by every department of state government; results of the assessment shall be included in the annual report.*

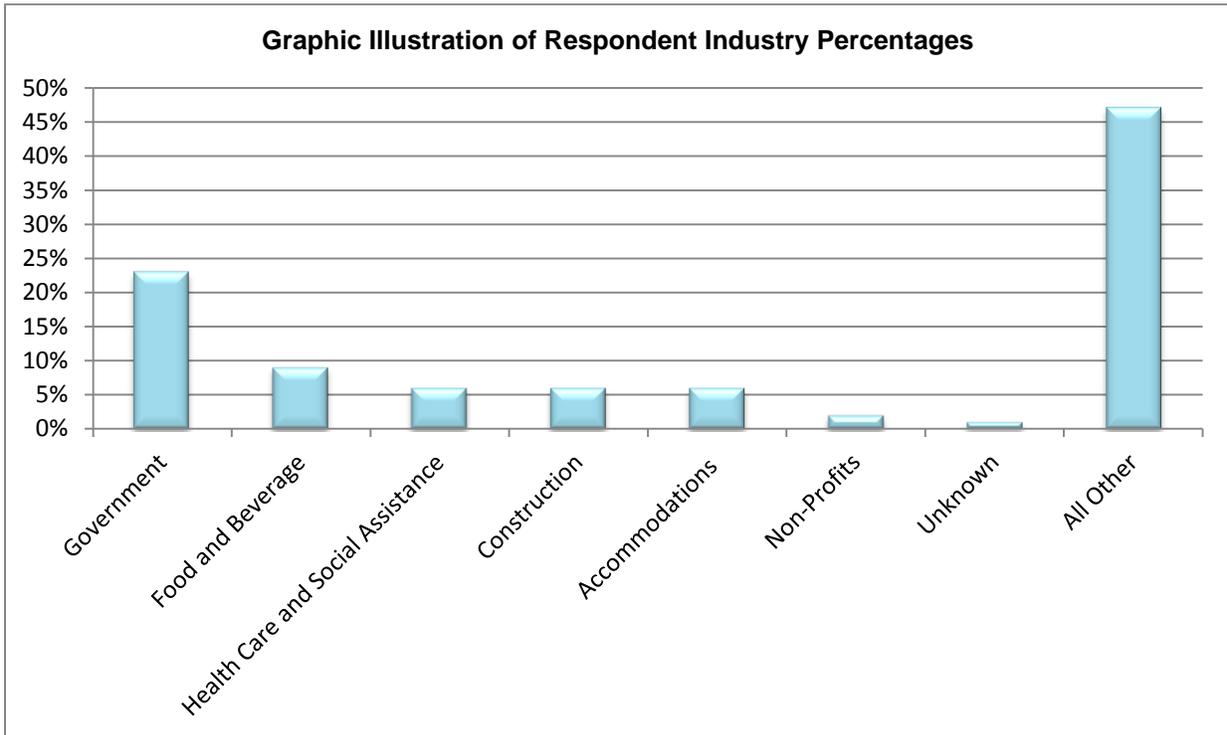
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<sup>15</sup>As discussed in the Background Information section, the annual report consists of summaries of investigations and case processing statistics.

**Exhibit 10**

**Discrimination Complaints^ by Respondent Industry  
CY 08 – CY 10**

<b>Industry Respondent by Count and Percent</b>		
<b>Respondent Industry</b>	<b>Count</b>	<b>Percent</b>
<b>Government</b>	307	23%
<b>Non-Government Respondent Industries (Top 4)</b>		
Food and Beverage Establishments	125	9%
Health Care and Social Assistance	80	6%
Construction	78	6%
Accommodations (hotels, inns, etc...)	74	6%
<b>Other Respondent Industries</b>		
Non-profits	23	2%
Unknown	17	1%
All other private employers	635	47%
<b>Total</b>	<b>1,339</b>	



Source: ASCHR CaTS database

^Discrimination complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by ASCHR and ASCHR remand/reopened complaints.

ASCHR consists of seven commissioners whose statutory powers and duties are to exercise general supervision and direct the activities of the executive director and other administrative staff.<sup>16</sup> According to interviews conducted with the commission, there is no general supervision by the commissioners of the activities of the executive director and other administrative staff. Except for the duties and powers of hearings and orders, the commission has delegated all of its powers and duties to the executive director. From CY 08 through CY 10, ASCHR commissioners issued decisions on four hearings.

According to ASCHR management, commissioners' primary directive has been on investigating complaints and not on conducting and analyzing discrimination problems and the effectiveness of remedies. However, identifying areas and focusing efforts through education and public outreach where discrimination can be prevented and eradicated is also its statutory mandate. According to ASCHR commissioners, performing more public outreach will lead to ASCHR receiving more discrimination complaints.

The EEOC and other human rights organizations have a different perspective toward public outreach and education. Many, including the EEOC, believe that discrimination can be prevented if companies, agencies, and individuals know their legal rights and responsibilities.

When further questioned about preventing and providing education about discrimination, ASCHR commissioners and management stated that they lack the resources in performing studies and providing training and outreach. Essentially, ASCHR has become a "*simple complaint-taking bureau*" which was not the legislative intent.

(See Recommendation No. 3.)

#### ASCHR investigators are qualified and receive on-the-job training.

All ASCHR investigators, not including the investigation directors, are classified as Human Rights Field Representative (HRFR) IIIs. The minimum qualification for an ASCHR investigator is one year of experience as an HRFR II with the State of Alaska or the equivalent elsewhere. The HRFR II position requires satisfactory completion of a training program at the entry professional level of HRFR I. Alternatively a person can be employed as an HRFR III who has three years of experience with a governmental agency, private firm, or voluntary service in which knowledge of civil rights law, legal theory, principles, and techniques of investigation as well as interviewing techniques have been demonstrated. Additionally, the three years of experience includes specific abilities<sup>17</sup> to perform the job duties required of an investigator.

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<sup>16</sup>Alaska Statute 18.80.060(a)(3).

<sup>17</sup>Abilities include gather and analyze data; reason logically and accurately, and draw valid conclusions; read, comprehend and apply written material such as statutes, legal opinions, court decisions; write clear and concise reports, letters, or other forms of communication; communicate effectively both orally and writing; and deal effectively with individuals in stressful situations.

None of ASCHR's investigators were HRFR I's or II's. Instead, most have a law degree, another type of degree, or related experience.

All investigators receive two to three weeks of orientation training covering legal, investigative, and administrative topics. Afterwards, on-the-job training is provided. Based on current and past employee interviews conducted, investigators feel that the training they received was adequate.

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# FINDINGS AND RECOMMENDATIONS

## Recommendation No. 1

The legislature should consider establishing statutory timelines for the Alaska State Commission for Human Rights (ASCHR).

As documented in Exhibit 6 (page 18), approximately 75% of ASCHR discrimination complaints took over 180 days from complaint filed to a determination. Alaska Statute does not require the commission to investigate discrimination complaints within a specific timeframe. Alaska Statute 18.80.110 only mandates ASCHR investigate complaints “promptly.” According to ASCHR’s executive director, “Every case is unique and workloads and resources vary. Thus ‘promptly’ is going to depend on what is reasonable under the circumstances.”

As illustrated in Exhibit 11, ASCHR is not investigating complaints promptly as some complaints are older than five years.

An untimely complaint investigation is not only poor customer service, but it may also alter the outcome of a case as evidence is more difficult to obtain. Documents may be lost or destroyed; complainants, respondents, or witnesses may lose contact, move, or become deceased; and recollections of events and issues may become no longer current and clear. Timeliness is one of the most important factors in evaluating if a case has received equitable treatment. Untimely investigations may also result in a change of the final determination.

Time limits for issuing a determination on discrimination complaint cases are necessary to ensure ASCHR investigations are completed promptly. Although 73% of ASCHR-investigated complaints result in no substantial evidence (NSE) determinations, investigations still took an average of 411 days from the date a complaint was filed to the date a determination was issued. A six-month (180 days) time limit to complete investigations appears to be a reasonable time limit based on both a review of complaint investigation files and compared to the federal, municipal, and other state human rights organizations. (See Exhibit 12 on the following page.)

### **Exhibit 11**

<b>Timeframe for Open* and Complaints Filed to Determination^ CY 08 – CY 10</b>	
5 years or older	17
4 years	13
3 years	43
2 years	105
1 year	375
Between 180 days and 1 year	379
Less than 180 days	407
<b>Total</b>	<b>1,339</b>

Source: ASCHR CaTS database

\*Open investigations as of December 31, 2010.

^Discrimination complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by the ASCHR and ASCHR remand/reopened complaints.

## Exhibit 12

### Timeline of other Human Rights Organizations

<b>Federal</b> (applicable to federal employees)	<i>The agency shall complete its investigation within <b>180 days</b> of the date of filing...unless the EEO Officer or designee and the complainant agree in writing to an extension of not more than ninety (90) days.</i> (Code of Federal Regulations 1614.108(e))
<b>Municipality of Anchorage</b>	<i>The commission shall investigate promptly and impartially the matters set out in the filed complaint. The commission shall ... issue its determination within <b>240 days</b> after the filing of the complaint.</i> (Municipal Code 5.50.010 Investigative Overview)
<b>Arizona</b>	<i>The division shall make its determination on reasonable cause as promptly as possible and as far as practicable not later than <b>60 days</b> from the filing of the charge.</i> (Arizona Code 41-1481(B)).
<b>Hawaii</b>	<i>The executive director shall issue a determination of whether or not there is reasonable cause to believe that an unlawful discriminatory practice has occurred within <b>one-hundred and eighty days</b> from the date of filing a complaint unless the commission grants an extension of time to issue a determination.</i> (Hawaii Revised Statute Title 20 Section 368-13(b)).
<b>Idaho</b>	<i>After <b>365 Calendar days</b>, if the complaint has not been dismissed pursuant to subsection (3) of this section or the parties have not entered into a settlement or conciliation agreement pursuant to subsection (2) or (4) of the section or other administrative dismissal has not occurred, the commission shall, upon request of the complainant, dismiss the complaint and notify the parties.</i> (Idaho Statute 67-5907(6)).
<b>Minnesota</b>	<i>The commissioner shall give priority to investigating and processing those charges, in the order below, which the commissioner determines have the following characteristics: ... On other charges the commissioner shall make a determination within <b>12 months</b> after the charge was filed as to whether or not there is probable cause to credit the allegation of unfair discriminatory practices.</i> (Minnesota Statute 363A.28 (subd 6)(b)(6)).
<b>Montana</b>	<i>The finding must be issued within <b>180 days</b> after a complaint is filed.</i> (Montana Code 49-2-504(7)(a)).

Since timelines are affected by the actions and activities of the parties to a complaint, exceptions to the statute should also be established. Examples include allowing for extensions to the timeline under specific circumstances and financial sanctions against respondents when information is not submitted timely.

In addition to the investigation timeframe, complaints were also delayed in the hearing process. Based on the complaints that went through the administrative hearing process, it took over 400 days to issue a final decision after the investigator made their determination. ASCHR is exempt from the Office of Administrative Hearings' (OAH) statutory timeline, which allows 120 days to issue a decision. After ASCHR's investigative process, including the administrative hearings, complainants or respondents may continue through the judicial process by filing an appeal with the court system<sup>18</sup> if they were adversely affected by ASCHR decisions.

Since the judicial process remains available to parties, complaints should not be delayed in the ASCHR process. Even though exceptions could be allowed, setting a specific time frame will help ensure discrimination complaints are addressed and resolved more timely.

We recommend the legislature establish a statutory timeline of 180 days for ASCHR to complete a complaint investigation and for OAH to issue a decision within 120 days.

## Recommendation No. 2

ASCHR's executive director should improve and develop comprehensive policies, procedures and regulations to ensure complaint investigations are performed timely, and submit them to the commission for adoption.

As noted in Exhibit 7 (page 19), it took an overall average of 448 days for ASCHR to issue a determination after the complaint was filed. As discussed in the Report Conclusions section, many factors contributed to ASCHR not promptly processing complaints. The following are areas ASCHR should consider improving in the complaint investigation process.

### **1. Update Regulations.**

ASCHR should review its regulations to identify areas in which timelines or limitations can be implemented. Regulations should be updated to provide formal written guidance to investigators concerning any procedural changes to ensure complaints are processed timely. The following are examples of regulation areas to consider updating or implementing.

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<sup>18</sup>From CY 08 through CY 10, there were 22 complaints that proceeded with the formal process - appealed to the Superior Court. Of those appealed ASCHR decisions, the Superior Court affirmed six decisions; nine were dismissed; five are still open; and two were remanded back to ASCHR. One case was appealed to the Supreme Court and affirmed.

**Complainant Administrative Dismissals.** As noted in Exhibit 13 (on the following page), there are several administrative dismissal categories related to a complainant that resulted in the complaint being closed. The complainant-not-cooperative category is addressed in regulations;<sup>19</sup> nevertheless, there is no associated timeframe. There were 16 complaints that closed an average of 415 days after the complaint was filed due to the complainant not cooperating with the investigation. Also, ASCHR management stated that they have an internal policy that if the complainant cannot be located for 60 days the complaint will be closed. However 27 complaints were closed an average of 1,292 days after the complaint was filed because complainant not available. Requiring periodic contact with the complainant and establishing timeframes in regulations would ensure these complaints were addressed timely. Appendix C provides a further breakdown of the administrative dismissal-type and associated timelines.

**Exhibit 13**

Average Days to Determination Administratively Dismissed Complaints CY 08 – CY 10		
Administrative Dismissal	Count	Average Days
Administrative Dismissal - Other	8	822
Complainant Not Available	27	1292
Complainant Not Cooperative	16	415
Complaint Not Timely	1	250
Complainant to Court	4	494
Complaint Withdrawn	27	413
Lack of Jurisdiction	9	160
Respondent has Tribal Immunity	8	487
<b>Total</b>	<b>100</b>	<b>668</b>

Source: ASCHR CaTS database

However 27 complaints were closed an average of 1,292 days after the complaint was filed because complainant not available. Requiring periodic contact with the complainant and establishing timeframes in regulations would ensure these complaints were addressed timely. Appendix C provides a further breakdown of the administrative dismissal-type and associated timelines.

**SE Determination Reviews.** Based on our review of complaint investigation files, the in-house attorney review of substantial evidence (SE) determinations took an average of 348 days. SE determination closure types, including hearings, account for less than 10% of the investigation determinations from calendar year (CY) 08 through CY 10. It is unclear from staff interviews and file reviews why the in-house attorney review takes an inordinate amount of time given ASCHR’s initial meeting efforts. Additionally, management has chosen not to impose time-frame or productivity standards on in-house attorneys for SE determination reviews.

**Use of Technology.** Investigators waiting for information from complainants or respondents resulted in delays in a majority of the investigations. ASCHR should update its regulations (6 AAC 30.320(b)) to allow for the submission of answers to interrogatories and responses using email or other technological means.

**2. Establish Written Policies and Procedures.**

ASCHR does not have current, comprehensive policies and procedures for complaint investigations. Investigators are provided an outdated procedures manual which is

<sup>19</sup>6 AAC 30.320(b)(2) states, “If a complainant fails to answer, appear, or produce information necessary to reach a determination on the merits of the complaint, the commission’s staff shall close the case.”

supplemented by a training manual. Some investigators stated that they have created their own procedures based on initial training materials provided and periodic memorandums received.

Management is responsible to provide official guidance through current, comprehensive policies and procedures to investigators regarding expectations for complaint investigations. Without comprehensive guidance on how ASCHR investigators are to investigate complaints of discrimination, there is uncertainty concerning what is required or necessary.

ASCHR regulations require them to determine the nature and scope of the investigation; therefore, ASCHR official written policies and procedures should detail how the investigators are to document this requirement (i.e. investigation plan). Thirty-five percent of examined complaint investigation files did not include an investigation plan. Other areas to include in the written policies and procedures are: respondent's failure to reply to requests; position statements; the investigator's case analysis memo; ASCHR's determination letter; and information/documents required for the investigation file.

ASCHR should make improvements in managing its discrimination complaints by establishing and maintaining comprehensive current written policies and procedures to guide investigators on management's expectations on the processing of complaints. The policies and procedures should also provide detailed guidance in order to meet the regulatory requirements.

### **3. Provide and Allow Access to External Email, Internet, and Collaboration Among Co-workers.**

Management does not allow investigators to have external email due to confidentiality concerns. Also, investigators do not have access to the internet on their individual work computers. Instead investigators typically schedule meetings and request documents by phone or mail. Furthermore, receipt of documents must be in person or by mail. Access to email and the internet should be considered for the investigators while performing their responsibilities to ensure investigations are effective and prompt. Additionally, investigators are not encouraged to collaborate or share ideas with their co-workers regarding investigations. Again, not sharing information and processes further inhibits the efficiency of performing investigations.

Other human rights organizations, including the federal Equal Employment Opportunity Commission (EEOC), allow their investigators to collaborate as well as use email and the internet to perform their investigation responsibilities.

ASCHR should review its current investigative techniques and technological tools to improve its timelines. If confidentiality is still a concern, ASCHR should include a section in its policies and procedures regarding the use of email and internet that goes beyond those already included in state guidelines.

#### 4. Reevaluate the Intake Process.

ASCHR should reevaluate its intake process to identify ways to streamline the process so that investigators can focus on investigating discrimination complaints. As noted in Exhibit 13 (page 32), from CY 08 through CY 10, there were nine complaints filed that took an average of 160 days for ASCHR to determine that they lacked jurisdiction to perform an informal investigation. Another eight complaints took an average of 487 days to make the determination that the respondent has tribal sovereign immunity, which resulted in an administrative dismissal. ASCHR can improve some of its timeliness issues by eliminating the exempt organizations during the intake phase. Additionally, ASCHR should consider other screening methods to reduce the number of complaints that would be dismissed during the investigative stage.

#### 5. Establish Performance Measures.

ASCHR should establish performance measures with the Office of the Governor's Office of Management and Budget for the full scope of its statutory responsibilities. ASCHR lacks accountability in how they are performing and what they are doing to prevent and eradicate discrimination. Establishing performance measures is a requirement of many state agencies as well as boards and commissions. Currently, ASCHR is not required to establish performance measures in their annual operating budget.

In summary, ASCHR should ensure their investigations are operating efficiently and effectively by analyzing and improving processes; updating regulations; adopting and maintaining official comprehensive policies and procedures; and using current technologies.

#### Recommendation No. 3

##### The legislature should consider realigning ASCHR's mission.

ASCHR is not completing investigations of discrimination complaints in a timely manner. It is also not fulfilling its legislative mandate to "*seek out and eradicate discrimination in employment, in credit and financing practices, in places of public accommodations and in the sale, lease or rental of real property.*" Preventing employment discrimination from occurring in the workplace in the first place is preferable to remedying the consequences of discrimination. However, due to workload and resource issues, ASCHR does not believe it can perform any assessments and studies to seek out and eradicate discrimination.

Due to the length of investigations, ASCHR is not able to operate as the legislature intended as "*more than a simple complaint taking bureau.*" Alaska Statute 18.80.110 requires ASCHR to informally investigate complaints promptly and impartially. The statute does not provide any guidance as to the definition of *promptly*. ASCHR management also does not define *promptly* in terms of timelines. Furthermore, ASCHR management does not perform any analysis of its data to determine the investigation effectiveness in terms of timeliness.

ASCHR management believes *promptly* will depend on their workload, resources, and uniqueness of cases. They believe they should not be held accountable to timelines in making a discrimination determination because quality of decisions may be affected. However, ASCHR took an average of 411 days to issue NSE determinations and over 800 days to issue SE determinations. Although there may be exceptions, taking over a year or years to make an ASCHR determination is not reasonable or prompt.

If ASCHR is unable to be more than “*a simple complaint taking bureau*” and is unable to find ways to improve timeliness of investigations to fulfill the mandate “*to seek out and eradicate discrimination,*” the legislature should consider reevaluating ASCHR’s mission to improve ASCHR workload and resource issues.

Rather than ASCHR taking all complaints, better alignment of its workload with its resources would be to limit the number of complaints. One method for reducing the number of complaints filed with ASCHR would be to require complainants to have exhausted the complaint resolution processes with their respective employer or other human rights organizations prior to filing a complaint with ASCHR. The following organizations investigate employment discrimination complaints.

- The Municipality of Anchorage, Office of Equal Opportunity investigates employment discrimination complaints filed against the municipality.
- The State of Alaska, Department of Administrations, Division of Personnel, Equal Employment Opportunity Program investigates employment discrimination complaints filed against the state.
- The federal EEOC handles employment type discrimination complaints.

Additionally, discrimination complaints occurring within the geographic boundaries of the Municipality of Anchorage regarding employment, housing and public accommodations, education, financial practices, and unlawful practices of the municipality can be filed, investigated and resolved by the Anchorage Equal Rights Commission.

ASCHR’s statutes could also be modified to improve its annual report by using it to provide ongoing and public monitoring of the timeliness of investigations and the level of activity performed by ASCHR to specifically seek out and eradicate discrimination. ASCHR is already required to provide an annual report and has a sufficiently reliable data system that could be used to provide summary statistics on the length of time it takes in the complaint investigation and resolution processes.

Overall, the legislature, through a realignment of ASCHR’s responsibilities and required improvements in its annual report, could assist both ASCHR and the public in the State’s mission “*to eliminate and prevent discrimination.*” This would also change ASCHR’s current operating status from being a simple complaint taking bureau.

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## Appendix A

<b>Timeframe for Open Complaints and Complaints Filed to Determination^ CY 08 – CY 10</b>																
	Open*		Administrative Dismissal		Mediation		Settlement		NSE Determination		SE Determination		Administrative Hearings**		Total	
	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent	Count	Percent
5 years or more	3	<1%	11	11%	0	0%	0	0%	2	<1%	1	2%	0	0%	17	1%
4 years	1	<1%	2	2%	0	0%	0	0%	6	1%	1	2%	3	11%	13	1%
3 years	12	3%	2	2%	0	0%	0	0%	18	3%	5	11%	6	21%	43	3%
2 years	21	6%	8	8%	0	0%	0	0%	40	6%	21	47%	15	54%	105	8%
1.5 years	30	8%	13	13%	0	0%	3	14%	104	15%	6	13%	2	7%	158	12%
1 year	40	11%	13	13%	1	1%	2	10%	158	22%	3	7%	0	0%	217	16%
270-364 days	38	10%	10	10%	1	1%	3	14%	120	17%	3	7%	0	0%	175	13%
180-269 days	46	13%	13	13%	1	1%	6	29%	131	18%	5	11%	2	7%	204	15%
1-179 days	177	48%	28	28%	65	96%	7	33%	130	18%	0	0%	0	0%	407	30%
<b>Total</b>	<b>368</b>		<b>100</b>		<b>68</b>		<b>21</b>		<b>709</b>		<b>45</b>		<b>28</b>		<b>1,339</b>	

Source: ASCHR CaTS database

^Discrimination Complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by ASCHR and ASCHR remand/reopened complaints.

\*Open investigations as of December 31, 2010

\*\*Administrative Hearings includes pre-hearing settlements, administrative hearing decisions, and administrative hearing dismissals.

**Appendix B**

<b>Open Complaints and Complaints Filed to Determination Type by Basis of Complaint by Race/Ethnicity/Sex CY 08 – CY 10</b>														
<b>Type by Basis</b>	<b>Alaskan Native</b>		<b>Asian</b>		<b>Black/ African American</b>		<b>Hispanic</b>		<b>White/ Caucasian</b>		<b>Other</b>		<b>Total</b>	
	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>	<i>Female</i>	<i>Male</i>		
	<b>Employment</b>	<b>93</b>	<b>56</b>	<b>42</b>	<b>39</b>	<b>73</b>	<b>102</b>	<b>31</b>	<b>47</b>	<b>394</b>	<b>260</b>	<b>31</b>		<b>23</b>
Age	10	9	14	8	4	11	3	5	72	78	6	5		
Change in Marital Status									1					
Marital Status	1								3	1				
Mental Disability	1	2	1			1			12	6	1	1		
National Origin	6	3	9	13	1	7	10	15	4	5	3	4		
Parenthood	1	1							7	2	1			
Physical Disability	6	4	2	5	3	8	3	2	74	51	4	2		
Pregnancy	8		1		3				31		3			
Race/Ethnicity	25	24	5	6	36	59	5	12	10	23	6	4		
Religion	2				1	3		3	12	16		1		
Retaliation	10	11	4	1	9	7	4	3	44	31	2	2		
Retaliation for Filing	8	2	4	5	11	6		2	27	15	2	3		
Sex	15		2	1	5		6	5	97	32	3	1		
<b>Government Practices</b>	<b>4</b>	<b>7</b>			<b>3</b>	<b>10</b>	<b>2</b>		<b>4</b>	<b>23</b>	<b>2</b>	<b>1</b>	<b>56</b>	
Mental Disability	2								2	3	1			
Physical Disability		4							2	9		1		
Race/Ethnicity	2	3			3	8	2				1			
Religion						2				11				
<b>Housing</b>	<b>5</b>		<b>1</b>	<b>1</b>	<b>5</b>	<b>4</b>	<b>1</b>		<b>20</b>	<b>4</b>	<b>2</b>	<b>2</b>	<b>45</b>	
Mental Disability	1								5		1	2		
National Origin				1										
Parenthood										1				
Physical Disability						1			9	2				

Type by Basis	Alaskan Native		Asian		Black/ African American		Hispanic		White/ Caucasian		Other		Total
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	
Pregnancy									1				
Race/Ethnicity	3		1		5	3	1		3	1	1		
Retaliation									1				
Sex	1								1				
<b>Public Accommodation</b>	<b>8</b>	<b>7</b>		<b>1</b>	<b>2</b>	<b>6</b>			<b>6</b>	<b>10</b>	<b>1</b>	<b>3</b>	<b>44</b>
Mental Disability	1	1							5				1
National Origin										1	1	1	
Physical Disability	1									8		1	
Race/Ethnicity	6	6		1	2	6				1			
Sex									1				
<b>Finance</b>	<b>1</b>	<b>1</b>											<b>2</b>
Physical Disability	1												
Race/Ethnicity			1										
<b>Coercion</b>						<b>1</b>							<b>1</b>
Race/Ethnicity						1							
<b>Total Complaints</b>													<b>1,339</b>

Source: ASCHR CaTS database

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## Appendix C

<b>Timeframe for Administrative Dismissal Discrimination Complaints<sup>^</sup> Complaints Filed to Determination CY 08 – CY 10</b>									
	<b>Administrative Dismissal-Other</b>	<b>Complainant Not Available</b>	<b>Complainant Not Cooperative</b>	<b>Complaint Not Timely</b>	<b>Complainant to Court</b>	<b>Complaint Withdrawn</b>	<b>Lack of Jurisdiction</b>	<b>Tribal Sovereign Immunity</b>	<b>Total</b>
5 years or more	1	8				1		1	11
4 years		2							2
3 years	1	1							2
2 years	1	1	2		1	2		1	8
1.5 years	1	5	2		1	3	1		13
1 year	2	3	3		1	4			13
270-364 days		2	4			2		2	10
180-269 days		3	3	1		4	2		13
1-179 days	2	2	2		1	11	6	4	28
<b>Total</b>	<b>8</b>	<b>27</b>	<b>16</b>	<b>1</b>	<b>4</b>	<b>27</b>	<b>9</b>	<b>8</b>	<b>100</b>

Source: ASCHR CaTS database

<sup>^</sup>Discrimination Complaints include all discrimination types, but exclude the co-filed EEOC complaints not investigated by ASCHR and ASCHR remand/reopened complaints.

## Appendix D

### Number of Complaints Against Respondent Industry

Industry	Number of Complaints	Industry	Number of Complaints
Government	307	Truck Transportation	12
Food and Beverage Establishments	125	Couriers and Messengers	11
Health Care and Social Assistance	80	Investigation and Security Services	11
Construction	78	Other Manufacturing	11
Accommodations (hotels, inns, other)	74	Gasoline Stations with Convenience Stores	10
Real Estate and Rental and Leasing	38	Mining	10
Seafood Product Preparation and Packaging	34	Department Stores	9
Air Transportation Including Freight	30	Miscellaneous Store Retailers	8
General Merchandise and Supercenters	28	Telecommunications	8
Alaska Native and Village Corporations	24	Transit and Ground Passenger Transportation	8
Amusement and Recreation	23	Automotive Repair and Maintenance	7
Food Service Contractors	23	Commercial Banking	7
Nonprofits and Civic Organizations	23	Janitorial Services	7
Oil, Gas, and Mining Support Activities	22	Rental and Leasing Services	7
Grocery Stores	20	Employment Services	6
Architectural, Engineering, and Related Services	18	Finance and Insurance and Related Activities	6
Facilities Support Services	17	Management, Scientific, and Technical Consulting Services	6
Unknown	17	Utilities	6
Building Materials and Garden Supplies Stores	15	Administration of Housing Programs	5
Personal Services	15	Pharmacies and Drug Stores	5
Automobile Dealers	14	Automotive Parts, Accessories, and Tire Stores	4
Labor Unions	14	Clothing Stores	4
Grocery and Related Product Merchant Wholesalers	12	Credit Unions	4
Other Professional, Scientific, and Technical Services	12	Educational Services	4
		Oil and Gas Extraction	4

Industry	Number of Complaints	Industry	Number of Complaints
Petroleum and Petroleum Products Merchant Wholesalers	4	Travel Arrangement and Reservation Services	2
Publishing, Periodical, Book, and Directory Publishers	4	Warehousing and Storage	2
Specialty Food Stores	4	Waste Management and Remediation Service	2
Support Activities for Transportation	4	Apparel Manufacturing	1
Warehouse Club	4	Aquaculture	1
Beer, Wine, and Liquor Stores	3	Business Support Services	1
Broadcasting	3	Child Day Care Services	1
Hardware, Plumbing, and Heating Equipment & Supplies Merchant Wholesalers	3	Data Processing, Hosting, and Related Services	1
Sporting Goods Stores	3	Electrical Equipment, Appliance, and Component Manufacturing	1
Water Transportation Including Freight	3	Electronic and Appliance Stores	1
Accounting, Tax Preparation, Bookkeeping, and Payroll Services	2	Fabricated Metal Product Manufacturing	1
Administrative and Support and Waste Management and Remediation Services	2	Hobby, Toy, and Game Stores	1
Advertising, Public Relations, and Related Services	2	Jewelry, Luggage, and Leather Goods Stores	1
Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers	2	Landscaping Services	1
Dry-cleaning and Laundry Services	2	Nonscheduled Chartered Transportation	1
Furniture Stores	2	Other Food Manufacturing	1
Insurance Carriers and Related Activities	2	Other Information Services	1
Logging	2	Personal and Household Goods Repair and Maintenance	1
Miscellaneous Durable Goods Merchant Wholesalers	2	Petroleum Refineries	1
Miscellaneous Nondurable Goods Merchant Wholesalers	2	Pipeline Transportation	1
Other Personal Services	2	Plumbing, Heating, and Air-Conditioning Contractors	1
Other Support Services	2	Religious Organizations	1
Printing	2	Support Activities for Road Transportation	1
Repair and Maintenance	2	Wholesale Trade Agents and Brokers	1
Scenic and Sightseeing Transportation	2		
Sewing, Needlework, and Piece Goods Stores	2		
Ship and Boat Building and Repair	2		
		<b>Grand Total</b>	<b>1,339</b>

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# STATE OF ALASKA

**Department of Administration**  
**Becky Hultberg, Commissioner**

*Sean Parnell, GOVERNOR*

P.O. Box 110200  
Juneau, AK 99811-0200  
Phone: (907) 465-2200  
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November 7, 2011

RECEIVED

NOV 07 2011

LEGISLATIVE AUDIT

Pat Davidson, CPA  
Legislative Auditor  
Division of Legislative Audit  
Legislative Budget and Audit Committee  
Alaska State Legislature

Re: September 23, 2011, Preliminary Audit Report on the Office of the Governor, Alaska State Commission for Human Rights (ASCHR), Selected Operational Issues Audit Report, Audit Control Number 01-30056-11;

Dear Ms. Davidson:

This response to your October 17, 2011 letter and the preliminary audit report concerning ASCHR operational issues is limited to the portion of Recommendation No. 1 that pertains to setting a 120-day timeframe for the Office of Administrative Hearings to issue decisions in the human rights cases it hears. It expresses no opinion on other aspects of Recommendation No. 1 or on the other recommendations.

**Recommendation No. 1:**

The legislature should consider establishing statutory timelines for the Alaska State Commission for Human Rights (ASCHR).

**Agency Response:**

The Office of Administrative Hearings (OAH) concurs with the recommendation insofar as the recommendation contemplates subjecting the ASCHR cases OAH hears to the timeline prescribed by AS 44.64.060. OAH anticipates implementing the recommendation by applying the timelines and procedures in AS 44.64.060 to the cases filed after the effective date of legislation making the ASCHR cases subject to that section, unless the legislation itself provides otherwise.

As explained in my September 13, 2011 response to Management Letter No. 1 (OAH timelines for ASCHR Cases), OAH is not aware of any reason why the ASCHR cases cannot be subjected to the AS 44.64.060 timeline. The ASCHR cases are quite similar to other cases OAH hears that result from investigations and are commenced with an accusation or complaint, and for which the hearing proceeds like a trial rather than an appeal. AS 44.64.060 and OAH's regulations provide sufficient tools to put a specific case on a longer timeline, if necessary, as long as the parties and the chief administrative law judge consent. The tools also facilitate diverting appropriate cases to alternative dispute resolution notwithstanding the timeline.

OAH anticipates that making the ASCHR cases subject to AS 44.64.060 would result in or require changes to existing ASCHR procedures. Some changes would necessitate amendment of statutes or regulations. Below are the changes that come immediately to mind.

The proposed decision and proposal for action process in AS 44.64.060 would replace the ASCHR recommended decision and written objections process provided for in 6 AAC 30.470. As a result, absent a change in AS 44.64.060, there would no longer be an opportunity for the administrative law judge to consider the objections and issue a revised recommended decision before the case went to the panel of commissioners for final action.

The panel of commissioners making the final decision in a case would need to act in accordance with AS 44.64.060(e), exercising one of the five options authorized by that subsection. Because ASCHR assigns a panel of three commissioners to take final action, without a statutory amendment, it would be unclear how soon they have to act. Subsection (e) presently contemplates a 45-day period running from issuance of the proposed decision by the end of which action must be taken. When the decisionmaker is a board or commission, the timeline allows for the possibility that the board or commission will not have a regularly scheduled meeting within that time period. When a commission panel of three members who do not hold regularly scheduled meetings would need to act is unclear. Under the present ASCHR procedures, no deadline applies for panel action. Many months can pass between the time OAH transmits the recommended decision and file, and the panel takes final action.

OAH applies a self-imposed management prescription to the ASCHR cases in lieu of having a statutory timeline. The management prescription calls for a recommended decision to be issued within 180 days after receipt of the case, unless the parties and the assigned administrative law judge agree to put the case on a longer timeline due to complexity or other good cause. The period was set at 60 days longer than the 120-days-to-proposed-decision prescribed by AS 44.64.060 primarily because ASCHR's procedures allow for the steps of answering the accusation and engaging in prehearing discovery to consume at least 60 days.

The 120-day timeline begins running when a hearing is requested. In a case commenced by an accusation, the notice of defense or answer to the accusation usually constitutes the hearing request that triggers the agency's obligation to deny the request for reasons allowed by law or refer the matter to OAH. Under 6 AAC 30.410(i), ASCHR procedures run the 20-day period for a party to answer the accusation from OAH's assignment of an administrative law judge. The regulation would need to be changed to require the answer to be filed with ASCHR before the case is referred to OAH.

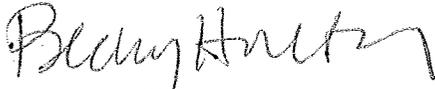
ASCHR's procedures contemplate that the parties will engage in discovery using the rules applied in civil proceedings in the courts. Formal, rule-bound discovery necessarily adds time to the process. If the ASCHR cases are made subject to AS 44.64.060's timeline, it will be necessary for 6 AAC 30.510(a) to be amended or repealed, so that discovery can be handled in the less time-consuming manner usually used in administrative adjudications and provided for in OAH's regulations and the Administrative Procedures Act (which is applicable to ASCHR cases).

Ms. Pat Davidson  
November 7, 2011  
Page 3

These are the most obvious changes that would be required or result from the proposal to subject the ASCHR cases to the AS 44.64.060 timeline. Others may appear, but OAH does not anticipate that any insurmountable obstacles would arise.

If you need additional information on this subject, please do not hesitate to contact me, or to contact Chief Administrative Law Judge Thurbon at OAH. Her telephone number is 465-1886.

Sincerely,



Becky Hultberg  
Commissioner

cc: Terry L. Thurbon  
Chief Administrative Law Judge  
Office of Administrative Hearings

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# STATE OF ALASKA

## HUMAN RIGHTS COMMISSION

SEAN PARNELL, GOVERNOR

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November 16, 2011

*Via U.S. Mail and  
Hand-delivered*

Pat Davidson, Legislative Auditor  
Division of Legislative Audit  
Legislative Budget and Audit Committee  
Alaska State Legislature  
P.O. Box 113300  
Juneau, AK 99811-3300

RECEIVED

NOV 16 2011

LEGISLATIVE AUDIT

**Re: Response to Preliminary Audit Report, Office of the Governor, Alaska State Commission for Human Rights, Selected Operational Issues**

Dear Ms. Davidson and Members of the Committee:

Thank you for the opportunity to respond to the Preliminary Audit Report on select operational issues of the Alaska State Commission for Human Rights (ASCHR). The Preliminary Report was discussed with the full Commission on November 3<sup>rd</sup>. The Commissioners provided input and approved this response. The Commissioners asked that we include a brief summary of our response at the beginning. We will then comment on one point addressed in the Preliminary Report's Background Information. Next we address the Preliminary Report's recommendations and ASCHR's proposals in response to those recommendations. Finally, we address several aspects of the Report Conclusions that we believe should be corrected or otherwise modified to more accurately reflect ASCHR's operations and role in enforcing the Alaska Human Rights Law. We hope these comments will assist the Division of Legislative Audit (Division) and the Committee in preparing a final report that is as accurate and fair as possible.

### Summary

Both the Commissioners and ASCHR staff were taken aback at the Preliminary Report's Recommendation No. 3, which would essentially strip ASCHR of its authority to enforce Alaska's Human Rights Law. Because the Division concluded that ASCHR fails to conduct studies and takes too long to process cases, the Division recommends that ASCHR's statutory mandate be "realigned" so that the vast majority of Alaskans would

be required to take their discrimination complaints to other federal and local agencies. The proposed realignment would create a system of unequal rights that would almost certainly violate the Equal Protection Clause of the Alaska Constitution.

The realignment is purported to allow for more timely investigations (of the few complaints that would remain) and for ASCHR to conduct studies. However, the Preliminary Report fails to note that ASCHR has significantly improved its case processing time since the Division last audited ASCHR in 2000. While the Preliminary Report finds ASCHR staff are well qualified and well trained, and there is no evidence that they are not also hard working, the Division makes no recommendation for additional resources. Instead, the Division recommends a major change in public policy to prioritize studies rather than enforcement of Alaska's antidiscrimination laws. The Commissioners disagree with this proposed change of policy and urge the Committee to reject it. (See discussion at pp.11-15)

The Division also recommends external timelines for complaints to be processed but makes the recommendation based on data that is faulty and without evidence that timelines alone improve timeliness. ASCHR agrees to implement timelines, as detailed below, but believes they should be set by the agency and be reasonable so as to allow effective as well as efficient complaint processing. (See discussion at pp.5-8)

The Division recommends that comprehensive policies and procedures be developed based on the conclusion that ASCHR does not currently have such policies. ASCHR disagrees with this conclusion. Division staff reviewed only some materials and never looked at ASCHR's 360-page Procedures Manual, though it was offered for review. ASCHR does believe the Procedures Manual should be updated and merged with current training materials into one comprehensive guide. ASCHR also is in the process of updating computers so all staff will have internet access at their desks and external email. (See discussion at pp.9-11)

The Division concludes there is no general supervision by Commissioners of the Executive Director and staff. The Commissioners take special exception to this conclusion. The Division's own review of minutes would demonstrate detailed reporting by staff to Commissioners at regular Commission meetings. The Division never reviewed the comprehensive written staff reports and meeting notebooks provided to Commissioners for each meeting. Further, as with most Boards, supervision of the Director between meetings is conducted by the Chair who the Director regularly consults with. (See discussion at pp. 16-17)

Finally, ASCHR cares greatly about education and outreach as well as enforcement. For the Division to state otherwise is incorrect. The ASCHR believes with proper resources preventing and eliminating discrimination is best accomplished through strong enforcement and education. (See discussion at p.17)

Response to Background Information

The ASCHR takes very seriously the statutory mandate to enforce Alaska's Human Rights Law, and to do so in a fair, impartial and prompt manner. The Preliminary Report references a 2000 audit of ASCHR by the Division and states: "After ten years, ASCHR still does not complete investigations in a timely manner. Based on a review of the complaints that were closed from CY08 through CY10, approximately 75% of the determinations were issued 180 days after the complaint was filed." We believe this statement is misleading and omits factual background necessary to fairly and objectively address this issue.

First, the premise that 180 days is an appropriate yardstick has no basis. A survey of other states' civil rights enforcement agencies shows that such a short timeline simply does not work for the investigation of discrimination cases. In only five states is the human rights agency allotted less than one year to complete investigations of civil rights cases, and the deadline is often not met. This issue is discussed in more detail below in our response to Recommendation No. 1.

Second, the Preliminary Report fails to note that ASCHR has significantly improved its case processing time as a result of changes made since the Division's 2000 audit. The 2000 audit found that many of ASCHR's investigations were not completed in a timely manner and that there was a backlog of cases waiting to be assigned to an investigator. The ASCHR responded by taking steps to improve productivity. It reviewed and revised some procedures, amended its regulations, proposed legislation to allow for cost saving measures, and the Commissioners directed staff to allocate its limited resources to investigations rather than outreach. As a result, ASCHR has reduced average case processing time since the 2000 audit period by 90 days. It has done so without additional resources and despite a 20 percent increase in the number of complaints filed from calendar years 2008 to 2010 (see Preliminary Report, Exhibit 2). The ASCHR currently has no backlog of cases waiting for assignment. And since 1999, when the prior audit was conducted, the percentage of cases ASCHR closes in less than 365 days has nearly doubled.

The 2000 audit also reviewed six cases that went through the hearing process and found it took an average of 15.5 months for the hearing to start after the case failed conciliation. It now takes less than half that time. During the 2008-2010 period of this audit it took an average of only 6.5 months for seven cases to go to hearing after conciliation failure.<sup>1</sup>

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<sup>1</sup> One other case went to hearing during this period, but the hearing had to be rescheduled after the attorney handling the case left the agency. Even counting the re-scheduled hearing, the average time to hearing was only 8 months.

By all of these measures, ASCHR has significantly improved its case processing time since the 2000 audit. Nonetheless, ASCHR acknowledges that some cases still take longer than the agency or the parties would like. The ASCHR agrees that some changes should be implemented, as discussed in our response to the Findings and Recommendations. Processing cases more quickly has been a challenge for ASCHR since its inception. Over the years, the number of Alaskans seeking services has fluctuated, as has the agency's resources. At one point ASCHR had only 15 staff in a year when 621 complaints were filed. The inequity between complaints filed and available staff to investigate culminated in one of ASCHR's worst backlogs in 1997 – when Alaskans had to wait over a year before their cases could even be assigned to an investigator. At another point when only 234 complaints were filed, ASCHR had 26 staff.

During the exit interview for this audit, Division staff asked why ASCHR had not requested additional funding. The Legislative Auditor suggested that ASCHR might be underfunded due to its position in the Office of the Governor. She compared ASCHR's challenge with resources to that of another recently audited legislative agency that struggled to secure adequate funding. The ASCHR assumed this to be a reference to the Office of the Ombudsman. In making these remarks, the Auditor appeared to recognize the need for additional resources in order to increase investigation timeliness. Nonetheless, when ASCHR staff asked if the Division planned to recommend additional resources the Auditor said no, that there would be no such recommendation, because "something had to give" so we're looking at cutbacks.

The Auditor's statement appears illogical and ill-supported. The Preliminary Report finds that ASCHR staff are qualified and well-trained. There is no suggestion that staff are not also hard working. Investigators frequently work extra hours when ASCHR has funds available to pay overtime as required for FLSA staff. And virtually all the FLSA-exempt staff work extra (uncompensated) hours, sometimes as many as 60 a week. Since staff are qualified, well-trained, and hard working, it follows that additional resources would be appropriate in order to help improve case processing time.

We note that the Division has recommended staffing increases in audits of other agencies where similar problems were reported. For example, the Division's 2011 Management Review of the Office of the Ombudsman recommended an additional position after the review found problems with untimely investigations, including cases that took over five years to investigate.<sup>2</sup>

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<sup>2</sup> A 1998 Division audit of the Public Defender Agency found inefficiencies in the agency's operations, but also found a need for more attorney positions because current staff worked, on average, 21 hours of uncompensated overtime per week.

A 2005 Division audit of the Department of Health and Social Services, Division of Juvenile Justice, found probation officers were not complying with division policies and that case files showed high error rates, including many required tasks that were either not completed at all or not timely completed. The audit found excessive

Response to Preliminary Report's Findings and Recommendations

**Recommendation No. 1:** The legislature should consider establishing statutory timelines for ASCHR.

Response: The ASCHR disagrees with this recommendation. The ASCHR acknowledges that the current average complaint processing time is frustrating to both those who file complaints and the businesses about whom they complain. The ASCHR believes that it is in the best position to determine what type of internal timelines would be both realistic and of benefit to the process. For example, ASCHR believes that adopting an internal policy requiring completion of investigations within 365 days, with extensions for extraordinary circumstances, is appropriate.

The ASCHR also will develop a timeline for completion of substantial evidence (SE) reviews within two months after a case is submitted for review. We acknowledge there have been delays in the SE review process, especially when other matters including hearings were given priority. Implementing a timeline for conducting SE reviews will help insure that cases do not encounter delay after the investigation is completed.

However, it must be noted that adopting timelines alone is no guarantee of faster complaint processing. The ASCHR does not have control over the number of Alaskans who need and seek out ASCHR's services, or the number of cases where staff will find substantial evidence of discrimination, and the numbers have fluctuated over the years. As noted in the Preliminary Report, ASCHR staff are well-qualified and well-trained. Staff are hard working. Instituting timelines will not change the number of hours in a week that staff have available to impartially and fairly investigate the complaints of discrimination ASCHR receives.

The ASCHR strongly disagrees with the Preliminary Report's recommendation of a 180-day timeline for case investigations. The report states that a "six-month (180 days) time limit to complete investigations appears to be a reasonable time limit based on both review of complaint investigation files and compared to the federal, municipal, and other state human rights organizations. . . [although] exceptions to the statute should also be established." Preliminary Report, pp. 29, 31.

This recommendation lacks any basis. First, the Preliminary Report does not identify any facts from the investigation files that might support a mandatory 180-day timeline. Time lapses between party contacts is the one fact that the report could

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caseloads was a major issue and recommended the division develop an updated workload measurement model and that additional positions approved by the legislature be distributed based on need.

potentially contemplate, but a 180-day deadline cannot correct the underlying reasons for time lapses. Lapses typically occur because of staffing shortages, and because ASCHR, like many state agencies, has staff turnover. A deadline will not correct either problem.

Second, the Preliminary Report contends that other agencies' deadlines support a 180-day deadline for ASCHR. The chart on page 30 of the report provides a list of seven agencies and their purported deadlines. However, an examination of the chart and of each agency's statutes, and a follow-up telephone call to the agencies, revealed several significant and, if uncorrected, misleading discrepancies:

- **Federal:** The report cites a statute allowing a federal agency 180 days to complete an investigation. This statute, however, only applies to *internal investigations by federal agencies*. It does not apply to the Equal Employment Opportunity Commission (EEOC). Currently, the EEOC's average processing time to investigate its civil rights cases is 311 days.
- **Municipality of Anchorage:** The report cites the municipal code that mandates a 240-day limit to complete investigations. The Anchorage Equal Rights Commission (AERC), however, consistently exceeds this deadline. In 2008, 14% of their caseload took longer than 240 days to investigate. In 2007, 51% of cases exceeded the deadline. The Acting Executive Director of the AERC indicated that while it would like to, it currently still does not meet this target and continues to process cases after 240 days.
- **Arizona:** The report cites a state statute that lists a 60-day deadline. *This deadline, however, does not apply to investigations*, but only to initial determinations of whether the case meets initial jurisdictional criteria and thus should be referred for investigation. In fact, Arizona does not have a statutory time limit for completing investigations.
- **Hawaii:** The report lists the statute that allows 180 days to investigate cases and permits extensions of this period upon petition to the Hawaii Civil Rights Commission. According to the Commission Director, this agency, which is comparable to ASCHR in size and number of complaints processed, *always* requires timeline extensions to complete its investigations. On average, the Director reported, this agency takes 320 to 365 days to investigate a case, and as of last year, 95% of its cases were completed within 18 months.
- **Idaho:** The statute cited in the report does not establish an investigative timeline.
- **Minnesota:** The report cites a statute allowing 12 months to complete investigations. The agency, however, takes an average of 420-440 days to make its determinations, according to its Director of Communications.
- **Montana:** Montana does have a 180-day timeline, and, according to the Montana Human Rights Commission's Director, they do consistently meet that deadline. However, in Montana, civil rights violations are the exclusive

purview of this agency, and because complainants cannot file lawsuits in Montana courts until their Montana Human Rights Commission complaints are resolved, the timeline serves a different function than one in Alaska would. And because the timeline is so short, the agency makes its determinations based on evidence collected on the determination date. Per the Director, this means a respondent who has not provided a sufficient rebuttal by the determination date will still receive a “substantial evidence” determination and then be forced to pursue acquittal at trial, or public hearing, even in weak cases.

Even after examining all other states’ statutes, 180 days still does not emerge as a potentially reasonable deadline. In fact, nearly two-thirds of the states (31) have no investigative deadlines at all. In those that do, the majority (11) allow one year, or have deadlines than can be extended to one year. Three states have deadlines of two years. Only in five states is the human rights agency allotted less than one year to complete its investigations of civil rights cases.

ASCHR’s experience as well as information from other agencies further demonstrates the need for a longer deadline than 180 days. As discussions with the Montana Human Rights Commission’s Executive Director revealed, short deadlines increase the chance that an ultimately incorrect determination will be made. In Alaska, once cases fail conciliation, they become public, and taking this approach a short deadline would likely increase the percentage of ultimately unsupported cases that would be publicly announced and scheduled for hearing.

Further, respondents who learn of these deadlines could just refuse to comply or delay responses, or take other actions to avoid supplying ASCHR with evidence. A short deadline would force ASCHR to decide whether it is fair to draw inferences, as the New Hampshire Human Rights Commission does, that the respondent is hiding evidence based on the respondent’s failure to timely comply.

These examples from other states all show that 180 days is not a reasonable timeframe for case investigations. The ASCHR agrees to adopt reasonable timelines (one year to complete investigations, with a mechanism for extension in extraordinary cases) and will commit to complete cases within those timelines.<sup>3</sup>

The ASCHR also disagrees with the Preliminary Report’s suggestion that Office of Administrative Hearings (OAH) timelines be set at 120 days. This suggestion reveals a misunderstanding of the process and fails to acknowledge that the Legislature already considered and rejected this approach. During its consideration of the bill that created

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<sup>3</sup> The ASCHR’s Procedures Manual, first written in 1988, currently has an internal timeline of 180 days which has not been possible to meet.

OAH in 2004, the Legislature originally proposed to require Commission hearings to be subject to the 120 day time limit the Preliminary Report now resurrects. The Legislature, however, dropped this requirement after considering the impact that such a shortened time would have on the due process rights of the parties. As ASCHR then noted about the bill:

Serious due process concerns are also raised by the requirement in proposed AS 44.21.560(d) that the hearing be held within 120 days after it is requested. Respondent businesses that are defending discrimination claims are entitled to engage in full discovery to adequately prepare for an adjudicative hearing. The same holds true for the executive director representing the complainant at the hearing. One party could easily cut off the other party's right to prepare by refusing to agree to extend the 120 day time limit. The goal of accelerating the process is worthy; however, most respondents before the Commission continually seek more time to prepare for hearings than the proposed legislation would allow.

The vast majority of ASCHR cases that go to hearing involve disputed fact situations that require the application and analysis of sometimes complex law. Parties, especially respondent businesses, must have an opportunity to conduct discovery and prepare the case to be presented at the hearing. Requiring this entire process to be completed in substantially *less than* four months would in most cases eliminate any meaningful opportunity for such preparation, and reveals a misunderstanding of the discovery and preparation processes leading to public hearing.

Furthermore, the length of time it takes to resolve hearing cases is already being addressed. A significant amount of the time taken for the hearing process noted in the Preliminary Report had been the time it took after the hearing for the administrative law judge to issue a proposed decision. As a result of concerns ASCHR raised about this delay, OAH has instituted a target deadline for issuing the decision within 180 days of the case being referred to it. In most cases this approach has been working well, with hearings scheduled far enough in advance of the 180-day deadline to allow the ALJ to issue a timely decision.

Such an approach compares extremely favorably with the amount of time it takes to bring an employment discrimination case to trial in the Alaska Superior Courts. A review of recent superior court cases that are known to ASCHR shows that in no case has a trial been scheduled to occur in less than one year from the date of the case filing.<sup>4</sup> And in many cases the trial dates are delayed significantly beyond a year because of

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<sup>4</sup> Pursuant to AS 18.80.145, plaintiffs are required to notify ASCHR when they file discrimination complaints in superior court. Other cases become known to ASCHR because they are reported by the Alaska Supreme Court on appeal. A review of these cases and an analysis of the timelines set in each case can be reviewed on the court system's website.

pretrial filings and summary judgment motions. These cases show that given the timelines adopted by OAH, the ASCHR's hearing process, as an alternative to costly court litigation, proceeds at a comparatively fast pace and is an efficient administrative means to resolving employment discrimination disputes.

**Recommendation No. 2:** ASCHR's executive director should improve and develop comprehensive policies, procedures and regulations to ensure complaint investigations are performed timely, and submit them to the commission for adoption.

Response: The ASCHR does not disagree that having comprehensive policies and procedures is important to timely resolution of complaints. The ASCHR strongly disagrees, however, with the conclusion that "ASCHR does not have current, comprehensive policies and procedures for complaint investigations." This conclusion ignores what was presented to the Division staff. ASCHR has a statute, regulations, extensive training materials that are continually updated, a Procedures Manual that, while not regularly updated, includes much useful material, and case law to guide staff in complaint investigation.

When investigative staff are trained they are provided a training notebook that includes many written policies and instructions, which are continually updated and supplemented. They also receive a copy of ASCHR's Procedures Manual to use as a reference since it contains much useful guidance. ASCHR staff on several occasions told Division staff about the Procedures Manual, which is 360 pages in length, and offered to provide a copy for review. Division staff never looked at it, so they could not have considered whether the manual, supplemented by the training materials investigators receive, satisfies the need for "current, comprehensive policies and procedures for complaint investigations." The 2000 Legislative Audit referred to this Procedures Manual.

The ASCHR does agree—as discussed below and in the response to Recommendation No. 1—that some changes can be made. The Executive Director is prepared to update the Procedures Manual, merging the old manual with new training materials into one comprehensive guide, although ASCHR questions this prioritization of resources over the investigation of complaints. The agency has already started the process of updating computers to allow all staff to have internet access at their desks.

We note, however, that several statements in the Preliminary Report regarding ASCHR's process and how it could further be changed are incorrect and indicate a misunderstanding of the legal standards applicable to jurisdiction, investigations, and closure of cases. For example, in the section entitled "Reevaluate the Intake Process," the recommendation reflects a misunderstanding of ASCHR's jurisdictional authority. The Preliminary Report suggests ASCHR should eliminate all exempt not-for-profit employers and tribal entities with sovereign immunity at the intake stage, without starting

an investigation. ASCHR cannot do so. It has a responsibility to determine whether it has jurisdiction over a respondent, which requires some investigation. In order to qualify for the exemption in AS 18.80.300(5), an employer must be (1) not organized for profit and (2) a fraternal, charitable, educational, or religious association or corporation. It is necessary to send interrogatories to obtain information to determine if an employer is exempt. Regarding tribal immunity, it is likewise necessary to send interrogatories to obtain information to determine whether a respondent is an Indian tribe with sovereign immunity and whether it has waived such immunity. ASCHR does maintain a list of entities *previously* determined to be exempt employers or to have sovereign immunity, and does not take complaints against them.

In the section entitled "Update Regulations," the Preliminary Report provides "examples of regulation areas to consider updating and implementing." As noted above, ASCHR believes that some changes can be made by adopting new procedures. Regarding SE determination reviews, ASCHR agrees with the recommendation to adopt an internal timeline for completing reviews. However, the Preliminary Report incorrectly states, on page 20, that currently "there is no expectation by management for the in-house attorneys to complete a specified number of SE determination reviews or within a specified timeframe." There is a clear expectation that staff will complete as many SE reviews as workloads permit, recognizing that cases that are scheduled for hearings with discovery and motion deadlines must take priority. During the past two years staff focused on addressing a backlog of SE reviews. ASCHR issued 43 SE determinations in 2010 and 45 in 2009, compared to 13, 18, and 16 during the three prior years when the agency encountered turnover in the legal staff. The timeliness of SE reviews, like complaint investigations, is largely a resource issue.

In the section entitled "Provide and Allow Access to External Email, Internet, and Collaboration Among Co-Workers," the Preliminary Report contains several statements that are incorrect. First, the statement that "investigators are not encouraged to collaborate or share ideas with co-workers regarding investigations" is simply untrue. Division staff did not ask ASCHR management about this, and it is baffling how they reached this conclusion. If someone told the Division this, it is not correct. In fact, investigators frequently consult with one another and management encourages the discussion of common issues and challenges because it can promote efficiency.

The Preliminary Report also states, on pages 20 and 33, that investigators' individual computers do not have internet access needed "in order to perform research" and "to ensure investigations are effective and prompt." These statements reflect a misunderstanding. No internet research is required or appropriate during an investigation. Investigators do use the internet to locate witnesses or check a respondent's address or form of organization. For such tasks, investigators have access to two internet computers located in common areas. For this reason, the lack of internet access at each investigator's computer has had no impact on either the timeliness or

effectiveness of investigations. In any event, this is a moot issue. ASCHR is in the process of updating agency computers so that all staff will have internet access in their offices.

We also disagree with the Preliminary Report's conclusion that investigators' lack of external email has delayed investigations. The report states on page 20: "Requesting and receiving documents from complainants and respondents adds a significant amount of time to the investigative process." This conclusion is completely unfounded. Not a single case is cited, nor are we aware of one, in which the inability to request or receive documents by email was shown to add "significant" time—or *any* time, for that matter—to the investigative process. Parties can send documents to ASCHR by facsimile or mail, at their preference. In any event, as noted above, agency computers are being updated and investigators will soon have internet access and external email, rather than just internal email which has been in place for many years. ASCHR has previously avoided external email due to confidentiality concerns. This concern remains and ASCHR will need to limit what can be discussed in external emails in order to safeguard confidentiality and fully comply with AS 18.80.115.

**Recommendation No. 3:** The legislature should consider realigning ASCHR's mission.

Response: The ASCHR strenuously disagrees with this recommendation and the underlying premise. The suggested "realignment" would be tantamount to a complete evisceration of the agency's jurisdiction and enforcement powers. Parsing out the complaints to other organizations as proposed in the recommendation would eliminate almost 90% of the complaints that ASCHR could investigate for Alaska citizens. If the proposed "realignment" had been in effect in 2010, all but 37 of the 351 Alaskans who filed complaints with ASCHR would have been forced to file elsewhere. Besides severely curtailing ASCHR's jurisdiction and enforcement authority, the proposal would create a system of unequal rights that would be ripe for constitutional challenge.

Despite being informed of the impact during the exit interview the Division conducted with ASCHR staff on August 22, 2011, the Division has proposed this recommendation as the only solution for its finding that complaints take too long to process and that ASCHR does not conduct studies of discrimination. The Division staff stated at the exit that EEOC should take all of the complaints with federal claims so ASCHR could have more time to do studies. While ASCHR does not disagree that complaint resolution at times takes too long, it absolutely disagrees with this proposed "solution." It makes no sense to eliminate a vital function of State government and civil rights enforcement solely because of concerns over timeliness and lack of studies.

Further, the Preliminary Report's finding that ASCHR is not fulfilling its legislative mandate to "seek out and eradicate discrimination" because it does not

perform studies of discrimination misapprehends the Alaska Human Rights Law. The Alaska Supreme Court has repeatedly recognized the statute's primary mandate is *enforcement* of the laws prohibiting discrimination. Through enforcement—investigating complaints and prosecuting complaints at hearing to obtain remedies that compel the elimination of discriminatory practices—the goal of eradicating and preventing discrimination is served. As the Court has noted, “The Commission has been given broad powers to enjoin and compel affirmative action to eliminate discriminatory practices and may construct an appropriate remedy without resort to damages.”<sup>5</sup> Enforcement is effective both to halt discriminatory practices and prevent them in the future.

The Preliminary Report takes issue with ASCHR's decision to focus its limited resources on enforcement. The report's suggestion that studies are as important as enforcement lacks any basis. It also disregards three decades of court decisions interpreting the Human Rights Law to mandate that ASCHR not just accept complaints, but reach a determination on the merits. “Alaska's anti-discrimination statutory scheme is a mandate to seek out and eradicate discrimination in employment, and *did not simply create a complaint-taking agency. A human rights complainant in Alaska has the statutory right to expect that his or her claim will be decided on the merits, not pre-determined by budgetary constraints.*”<sup>6</sup>

Furthermore, ASCHR does in fact conduct a study—every three years—which satisfies the statute's only mandatory requirement. The Human Rights Law provides no numerical requirement or frequency for the direction to “study the problems of discrimination in all or specific fields of human relationships...as in [the Commission's] judgment will tend to eliminate discrimination. . . .” AS 18.80.060(a)(5). The statute does offer specifics for studying the State of Alaska's EEO progress, which is to “make an overall assessment, at least once every three years, of the progress made toward equal employment opportunity by every department of state government; results of the assessment shall be included in the annual report made under AS 18.80.150.” ASCHR makes this assessment every three years and publishes it in ASCHR's Annual Reports. The Alaska Supreme Court has recognized that the EEO assessment qualifies as a study on the problems of discrimination.<sup>7</sup>

If the proposed “realignment” took effect, the vast majority of Alaska complainants no longer would have their claims decided on the merits by an agency empowered to enforce state law. Further, the Equal Employment Opportunity

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<sup>5</sup> *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981).

<sup>6</sup> *State, Dept. of Fish and Game v. Meyer*, 906 P.2d 1365, 1374 (Alaska 1995) (internal citation omitted; emphasis added).

<sup>7</sup> *Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union v. Thomas*, 551 P.2d 942, 945 & n. 6 (Alaska 1976).

Commission (EEOC) would sever its work-sharing agreement with ASCHR, ending a contractual relationship under which ASCHR co-files cases it investigates, avoiding Alaskan businesses needing to respond to two different complaints. See attached letter from Michael Dougherty, Director of State and Local Programs for EEOC. Alaska citizens would no longer be able to co-file their complaints with the EEOC when filing with ASCHR. Alaska, which was one of the first state agencies to have a work-sharing contract with the EEOC, would now join Mississippi, Alabama, and Arkansas, the only three states in the country without Fair Employment Practice Agencies. Also, EEOC has no office in Alaska, so Alaska citizens would be relegated to using EEOC's toll-free number which goes to a call center.

Aside from eviscerating ASCHR's jurisdictional and enforcement authority, limiting the number of complaints by forcing some Alaskans, but not others, to first file their cases elsewhere would establish a system of unequal rights for similarly situated employees.

First, requiring some employees to file with the EEOC instead of ASCHR would deny such employees the substantive protections of state law. There are many differences between state and federal law, and the Alaska Human Rights Act is more broadly construed than federal law.<sup>8</sup> Some of the more explicit differences include: 1) protections against discrimination on the basis of age, where the federal law only protects workers over forty, and state law protects all employees; 2) protection on the basis of disability, where state law specifically includes protections for persons who use prostheses and service animals but the federal law does not; and 3) protection against discrimination on the basis of marital status and parenthood, where such protections are completely lacking under federal law.

The procedural differences are also striking. For example, the EEOC does not hold hearings on private sector employees' complaints. Any enforcement under the federal law must be accomplished by EEOC's filing of a lawsuit in federal court, something that is done in a minute fraction of the cases in which EEOC finds substantial evidence. In the past 40 years EEOC has filed only 15 lawsuits in Alaska. ASCHR forwarded that number of substantial evidence cases to public hearing in 2010 alone. Thus, the vast majority of complainants who have their cases resolved in their favor by the EEOC must file their own lawsuit.

Furthermore, for those complainants whose cases are found to lack substantial evidence by EEOC there is no recourse—the federal law contains no right to judicial review of the agency's decisions. On the other hand, Alaskans who believe that ASCHR erred in resolving their complaints may seek review of the decisions in superior court. Finally, under the Human Rights Act, each complainant is entitled to a full impartial

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<sup>8</sup> *Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004).

investigation of their allegations. EEOC, however, rarely conducts a full investigation before closing a case. In fact, EEOC *never* concludes that substantial evidence is lacking in any case—it simply states that, given the information it has assembled, it cannot conclude that the law has been violated, underscoring the fact that it may not have gathered enough information to reach a conclusion on the merits.

Also, it should be noted that EEOC's current average processing time is 311 days. As the Division's proposal was recommended in part to improve timeliness, ASCHR does not see how moving complaints to EEOC would accomplish this. EEOC is currently struggling with its own backlog. If EEOC were to receive hundreds more complaints from Alaska to process during a time when federal resources are dwindling, its case processing time would likely increase.

Second, requiring State of Alaska employees to file complaints with the State EEO office would also result in a denial of rights and put State employees in an inferior class of persons protected by the law. The State EEO office has no authority to make persons whole—that is, it cannot *enforce* the law. In other words, while it may have the power to correct wrongs, it cannot place a person in the position they would have been absent the discrimination by awarding back pay. What's more, this is an *internal* process wherein the State is determining whether it violated the law. Unlike ASCHR, the State's EEO Department is not an independent, impartial enforcement agency. In fact, the State's EEO Department performs sometimes conflicting roles – as the investigator of internal complaints brought by employees and as the defender of management when external complaints are brought. ASCHR investigations, on the other hand, are conducted by a separate, independent agency in a completely impartial manner.

Requiring that this be the course of action for some employees—State workers—and not others is fundamentally unfair. The recommendation does suggest that non-State employees also be required to exhaust the “complaint resolution process with their respective employer,” but this suggestion is similarly flawed. Many employers do not have internal processes, and those that do have processes that vary widely. Making an employee resort to such varying processes (depending on who the employee happens to work for) as a prerequisite to having the employee's rights independently investigated and resolved would be fundamentally unfair.

Third, forcing those employees within the boundaries of the Municipality of Anchorage to file complaints with the Anchorage Equal Rights Commission (AERC) would not only deny those persons protection of State law, it would *not* result in faster case processing. The most recent data published by AERC show that the agency averages 75 determinations and case closures per year. The agency employs four investigators, for a per-investigator total of less than nineteen cases per year. The data also show that many of these cases took longer than 240 days to process. Shunting a large number of new cases to AERC would not, therefore, result in faster processing

time. Instead, it would merely shift the workload to a different agency where State rights are not protected and exacerbate AERC's problem meeting its 240-day deadline.

Finally, these facts all show that giving employees greater or fewer rights depending on their luck of the draw—e.g., where they happen to live, who they happen to work for—would result in grossly disparate treatment of Alaskans in furthering their civil rights. Such disparate treatment would be unconstitutional. The Alaska Supreme Court has consistently stated that assigning dissimilar rights to similarly situated persons violates the Equal Protection Clause of the Alaska Constitution, which states that “all persons are equal and entitled to equal rights, opportunities, and protection under the law.”

The Supreme Court has found, for example, that legislation designed to give preferential treatment to workers within certain defined “economically distressed zones” was unconstitutional because it curtailed the rights of those workers who lived in areas that were not in such zones.<sup>9</sup> The Court has also struck down legislation that reduced disability benefits to workers when the benefits were calculated using an individual's prior work history where the benefit was intended to reflect actual losses.<sup>10</sup> The Court reasoned in that instance that even though the Legislature intended the law to “ensure the quick, efficient, fair, and predictable delivery” of benefits, the basis for calculating the benefit levels had barely “more than a coincidental relationship to the goal of compensating injured workers based on their actual losses.”<sup>11</sup> Throughout its equal protection jurisprudence, the Alaska Supreme Court has emphasized that “the equal protection clause was designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that is often characterized in the most praiseworthy legislation.”<sup>12</sup>

There is no doubt that legislation that would implement the Preliminary Report's recommendation would similarly run afoul of the Equal Protection Clause. It is a fundamental right to be free from discrimination, and the Supreme Court has always required that any legislation that restricts such rights be important and have a close nexus to the interest it serves.<sup>13</sup> Even where the protected rights are not deemed so important, the Court has required the legislation to “bear a fair and substantial relationship” to the

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<sup>9</sup> *State, By & Through Departments of Transp. & Labor v. Enserch Alaska Const., Inc.*, 787 P.2d 624 (Alaska 1989).

<sup>10</sup> *Gilmore v. Alaska Workers' Comp. Bd.*, 882 P.2d 922 (Alaska 1994).

<sup>11</sup> *Id.* at 927-28.

<sup>12</sup> *Isakson v. Rickey*, 550 P.2d 359, 365 (Alaska 1976).

<sup>13</sup> *Enserch Alaska Const., Inc.*, 787 P.2d at 633.

purpose of the underlying Act.<sup>14</sup> A law that treats some Alaskans differently by denying them the same state law rights that others have based simply on where they live, or who they work for, could not pass muster even under the more relaxed standard of review employed by the Court, especially when such a law is adopted simply to provide ASCHR more opportunity to conduct studies and complete investigations more rapidly.

### Response to Report Conclusions

The Preliminary Report questions whether investigations that result in substantial evidence findings and enforcement remedies in employment cases are effective to prevent future discrimination. The Preliminary Report states on page 23 that “It is inconclusive whether remedies are effectively working to eradicate and prevent discrimination given respondents continue to receive discrimination complaints for dissimilar issues.” The correct measure is not whether a subsequent complaint is filed against the employer. What matters is whether a subsequent complaint resulted in a finding of substantial evidence of discrimination. During the three-year period of this audit there was not a single case in which substantial evidence was found a second time against an employer. We believe this shows that ASCHR’s investigation and enforcement is effective at preventing discrimination. In any event, to suggest that just because a company might be found to violate the Alaska Human Rights Law more than once might mean that ASCHR is inefficient is akin to suggesting law enforcement is inefficient when an individual commits more than one crime. In the employment context the suggestion makes especially little sense as the violation by a company may have been committed by a different employee, or even at a different location.

The Preliminary Report states on page 26 that “According to interviews conducted with the commission, there is no general supervision by the commissioners of the activities of the executive director and other administrative staff.” The report does not define “general supervision.” The Commissioners, who serve as volunteers without compensation, do not provide direct, day-to-day supervision. It is clear, however, that the Commissioners exercise supervision over the agency’s Executive Director. Their supervision is like that of any Board of Directors in the public or private sector. The Executive Director provides the Commissioners with regular, detailed written staff reports on the activities of the agency. Commissioners also receive comprehensive meeting packets which include information and activities related to ASHCR. These are discussed during Commission meetings, at which time the Commissioners ask questions and provide direction. Between meetings, the Commission Chairperson is in frequent contact with and provides direction and guidance to the Executive Director on problems and challenges facing the agency. The Chairperson is consulted with and informed when serious personnel matters and/or other issues of significant concern arise. The Chairperson approves the Executive Director’s requests for leave and prepares a draft

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<sup>14</sup> *Gilmore*, 882 P.2d at 927.

Performance Review for presentation to the Commissioners who provide input and revise and approve a final Performance Review of the Executive Director.

It is also clear that the Commissioners provide direction to the Executive Director and staff on policy matters. For example, the Commissioners adopted a policy that merit increases may be granted to staff only if they are rated “high acceptable” on their annual performance evaluation, a higher standard than required for most state employees; directed staff to allocate resources to investigations and not outreach in order to address a backlog of cases; and adopted a policy that staff will hold open cases to monitor compliance with conciliation and settlement agreements to insure that all conditions are met before a case is closed.

The Preliminary Report mischaracterizes ASCHR’s position on public outreach and education. On page 26, the report states that ASCHR commissioners and management “when further questioned” stated that ASCHR lacks resources to perform studies and provide training and outreach, implying that this was a new position. It was not. The ASCHR told Division staff from the start of the audit that ASCHR has necessarily focused its limited resources on enforcing the Human Rights Law. ASCHR staff pointed out that for the past decade ASCHR’s Annual Reports, which are transmitted to the Governor and Legislature as required by law, have stated that limited resources required ASCHR to focus on investigating complaints from Alaskans who allege that the law has been violated.

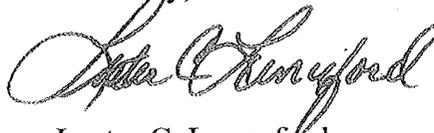
The Preliminary Report also misstates that “EEOC and other human rights organizations have a different perspective toward public outreach and education.” First, the EEOC rarely conducts outreach and education in Alaska, and on the few occasions when it has ASCHR staff participated along with the EEOC. Second, the report implies that ASCHR does not believe public outreach and education are important. This is absolutely wrong. ASCHR has always supported outreach and wishes it could do more. While ASCHR has necessarily focused its resources on enforcement in recent years, staff nevertheless provided education and outreach on 60 occasions to businesses and the public during the three-year period of this audit. ASCHR also redesigned and expanded its website to provide information about the Human Rights Law, how to file a complaint, the investigation process, and recent Commissioner decisions. The website now receives an average of 3500 hits per month. During the recent Alaska Federation of Natives Convention ASCHR staff provided 3 full days of outreach.

Conclusion

Thank you again for the opportunity to respond to the Preliminary Report. We hope these comments are helpful in the creation of the Division’s final report. As stated above, although we have raised specific concerns about certain information in the

Preliminary Report, ASCHR intends to address some of the recommendations and, as always, continue to explore ways to increase the value of its service to Alaskans.

Sincerely,



Lester C. Lunceford  
Chairperson



Paula M. Haley  
Executive Director

LL/PMH/ak

Attachment: Nov. 2, 2011 letter from Michael Dougherty  
Equal Employment Opportunity Commission



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Office of  
Field Programs

November 2, 2011

RECEIVED  
HUMAN RIGHTS COMMISSION  
NOV - 7 2011  
COMMISSION SECRETARY

Paula M. Haley, Executive Director  
Alaska State Commission for Human Rights  
800 A Street, Suite 204  
Anchorage, Alaska 99501

Dear Ms. Haley,

You have asked us to provide our opinion as to what effect proposed changes to the Alaska State Civil Rights Act would have on the Alaska State Commission for Human Rights' (ASCHR) relationship with the U.S. Equal Employment Opportunity Commission (EEOC). Rather than ASCHR taking all complaints, the proposal is intended to limit the number of complaints. The proposal would require potential complainants to use internal complaint resolution processes with their employer or file with other human rights enforcement agencies such as EEOC and the Anchorage Equal Rights Commission (AERC).

As you are aware, EEOC's relationship with the Fair Employment Practices Agencies is grounded in Title VII of the Civil Rights Act of 1964. Title VII requires that we afford State or local authorities that meet certain standards the opportunity to resolve matters which fall within their jurisdiction. Over time, EEOC has developed processes that enable it to assess, first, whether those authorities meet the threshold requirements and thereupon become designated Fair Employment Practices Agencies (FEPAs) and, next, having been designated as such, whether EEOC will execute a Worksharing Agreement with that agency and enter into a contractual relationship for the resolution of charges which are dual-filed with both EEOC and the FEPA. Generally speaking, by so doing, EEOC is able to meet its statutory requirement set out in Title VII for the deferral of charges, and to avoid the duplication of work that could otherwise result if two agencies were processing the same charge against the same business.

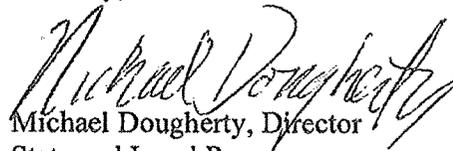
The opinion I am providing as the Director of State and Local Programs is based on my understanding of what the proposal would be. Most significantly, it is my understanding that under the proposal ASCHR would be required to send potential complainants to EEOC for all charges over which our federal agency had jurisdiction. If this were the case, obviously EEOC would be unable to contract with ASCHR for the resolution of charges. In addition, I do not believe the designation of ASCHR as a designated FEPA would continue. A FEPA is expected to have the authority to grant or seek relief from alleged unlawful employment practices. If a State were to institute a process wherein it would have a prohibition against discrimination, but which required that charges filed under that provision would be sent to EEOC or another FEPA to process, it is likely that the State agency would no longer be considered a FEPA. As I understand it, even if the newly-constituted ASCHR were to retain real, substantive and meaningful jurisdiction over matters with which EEOC did not deal---marital status or employers

without the requisite number of employees for our coverage, etc.,---I do not believe that would change the result.

The relationship we have enjoyed with ASCHR for many years exists because of the common jurisdiction we share over unlawful employment practices. The proposal as I understand it would eliminate the relationship, as ASCHR would require citizens of Alaska with concerns about employment discrimination that are jurisdictional with us or another FEPA, to seek services from EEOC or the FEPA, rather than ASCHR processing the complaint.

To reiterate, I am offering the foregoing in response to what I believe the result would be if the above change were put into place with ASCHR's enabling legislation. If you desire a more formal response from EEOC, I welcome you to submit a specific proposal to amend the Alaska Human Rights Law to me at a later date for our consideration. Finally, in response to your question, the states that do not have FEPAs are Alabama, Arkansas and Mississippi.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael Dougherty".

Michael Dougherty, Director  
State and Local Programs  
Office of Field Programs

# ALASKA STATE LEGISLATURE

## LEGISLATIVE BUDGET AND AUDIT COMMITTEE



Division of Legislative Audit

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Juneau, AK 99811-3300  
(907) 465-3830  
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November 23, 2011

Members of the Legislative Budget  
and Audit Committee:

We have reviewed the Alaska State Commission for Human Rights' (ASCHR) response to this audit, and nothing contained in the response causes us to revise or reconsider the report's conclusions and recommendations. However, there are several points that we wish to clarify.

In ASCHR's response, ASCHR management disagrees with the recommendation for the legislature to establish statutory timelines. Management acknowledges a need for a timeline and states that it plans to "*adopt reasonable timelines (one year to complete investigations, with a mechanism for extension in extraordinary cases) and will commit to complete cases within those timelines.*" The previous audit, performed in 2000, recommended ASCHR implement its own internal procedure to complete investigations within 180 days. However, ASCHR did not implement this procedure. Currently, ASCHR is still not investigating complaints timely; approximately 50% of its determinations took over a year, and 75% took over 180 days. Additionally, some complaints took 2, 3, 4, and over 5 years for a resolution. There are also complaints still open with similar time frames as demonstrated in Appendix A of the audit report. We reaffirm our recommendation for the legislature to establish statutory timelines.

ASCHR's response states that the other municipal, state, and federal human rights organization deadlines incorporated in this report include "*misleading discrepancies.*" The data presented in the audit provides examples of human rights organizations that have various timelines. The fact that other organizations may not always adhere to their timelines does not mean they are not held accountable for processing complaints timely. We recognize that not all complaints will meet timeline requirements and, consequently, recommend that exceptions should be considered. Establishing timelines through the legislative process allows for the agency and the public to have input on the required number of days for a timeline. Once a timeline has been established in law, the agency can then develop regulatory response timelines for complainants and respondents to help the agency meet its statutory timeline.

ASCHR's response states that the analysis to determine if remedies are effectively working should be based on the fact that "*there was not a single case in which substantial evidence was found a second time against an employer*" in the three-year period under review. As the audit states, it is inconclusive if remedies are effective because respondents are receiving additional complaints for different issues. Additionally, there are respondents with multiple complaints having different issues with varying resolutions such as mediation, settlement, and substantial evidence determinations. We affirm our conclusion that it is inconclusive if remedies are effective in eradicating and preventing discrimination when an industry, local or state government, or a specific entity continually receive discrimination complaints on a regular basis.

ASCHR's response states that ASCHR staff has provided education and outreach on 60 occasions to businesses and the public during the three-year prior. Based on an examination of those occasions, not all of those efforts were for education and outreach efforts to the public, industry, or respondents. A majority of these were meetings or networking with the Equal Employment Opportunity Commission, International Association of Human Rights Agencies, Office of Civil Rights, and congressional legislators and staff. Based on ASCHR's data, the audit identified potential industries for ASCHR to seek out and conduct outreach and education to help prevent discrimination complaints. Currently, ASCHR is not conducting outreach or education to specific industries or respondents.

Lastly, ASCHR's response identifies a statutory study that it performs in which it makes "*an overall assessment, at least once every three years, of the progress made toward equal employment opportunity.*" Yes, ASCHR does provide an equal employment opportunity progress report issued every three years; however, this progress report and its annual reports do not provide information on the problems of discrimination in our communities or provide any assessment on eliminating discrimination. As stated in the audit report, ASCHR reports do not include any analysis and assessments about the data it captures. We reaffirm our conclusion that ASCHR is not studying the problems of discrimination as required by statute.

In summary, we affirm the report conclusions and recommendations.



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