

## BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION )  
FOR HUMAN RIGHTS, PAULA M. )  
HALEY, EXECUTIVE DIRECTOR, )  
*ex rel.*, CONNOR CARLE, SYDNEY )  
PETERSON, BASHKIM HETEMI, )  
ROBIN BURGESS and ANTHONY )  
SHEPPARD )

Complainants,

v.

SULLIVAN'S OF ALASKA, INC. )  
d/b/a SULLIVAN'S STEAKHOUSE, )

Respondent.

ASCHR No. J-12-005, J-12-192,  
J-12-193  
OAH No. 14-2059-HRC

## FINAL ORDER

A Proposed Order was issued by the Commission on March 8, 2018. No objections to the order were filed. In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners hereby ADOPT the proposed order in the entirety.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

RECEIVED  
HUMAN RIGHTS COMMISSION

MAY 8 2018

VIA: 4/12 TIME: 9:35 BY: CRB

## FINAL ORDER – Page 1

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

Hearing Unit

Calendared

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5/8/18

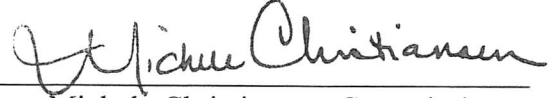
IT IS SO ORDERED.

DATED: May 8, 2018



Christa Bruce-Kotrc, Commissioner

DATED: May 8, 2018



Michele Christiansen, Commissioner

DATED: May 8, 2018



Brandon Nakasato, Commissioner

**FINAL ORDER** – Page 2

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

**CERTIFICATE OF SERVICE**

I certify that on May 8, 2018, a true and correct copy of the foregoing **Proposed Order** was hand delivered to:

Stephen Koteff, Human Rights Advocate  
Alaska State Commission for Human Rights  
800 A Street, Suite 204  
Anchorage, AK 99501

and mailed by first-class U.S. mail, postage prepaid and emailed to:

Respondent or Respondent's Representative  
W. Sherman Ernouf  
Law Offices of Ernouf & Coffey  
P.O. Box 212314  
Anchorage, AK 99508  
Email: [sernouf@eclawfirm.org](mailto:sernouf@eclawfirm.org)

and mailed by first-class U.S. mail, postage prepaid, to:

Kathleen A. Frederick, Chief Administrative Law Judge  
State of Alaska  
Office of Administrative Hearings  
550 W. 7<sup>th</sup> Avenue, Suite 1940  
Anchorage, AK 99501



Shari Ketchum  
Commission Secretary

**FINAL ORDER – Page 3**

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

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Complainants,

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SULLIVAN'S OF ALASKA, INC. )  
d/b/a SULLIVAN'S STEAKHOUSE, )  
Respondent. )

RECEIVED  
HUMAN RIGHTS COMMISSION

MAR 8 2018

VIA: EM TIME: 11:26 BY: [SK] CWO

ASCHR No. J-12-005, J-12-192,  
J-12-193

OAH No. 14-2059-HRC

PROPOSED ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the Administrative Law Judge's Recommended Remedial Order dated June 15, 2017 propose to issue the following order subject to consideration of objections as set forth in 6 AAC 30.480.

The Commission adopts the Recommended Remedial Order in part. The portion of the Recommended Remedial Order by paragraph of that order that is adopted in its entirety is the following:

1. Sullivan's violated AS 18.80.220(a)(1) by terminating the employment of Connor Carle, Sydney Peterson, Robin Burgess, Bashkim Hetemi, and Anthony Sheppard because they were under the age of 18;

PROPOSED ORDER – Page 1

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

Hearing Unit

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2. Sullivan's is permanently ordered not to discriminate in hiring or employment on the basis of an applicant's or employee's status as a minor.

6. Sullivan's shall refrain from penalizing the minor employees in any way regarding future considerations for employment and, if rehired, for transfers, promotions, or upgrading because of the complaints the executive director filed with the Commission on their behalf;

7. Sullivan's shall refrain from advising or informing any other employer or potential employer of the minor employees of the facts or circumstances involved in this case, including the minor employees' involvement in a discrimination case against Sullivan's.

The portion of the Recommended Remedial Order by paragraph adopted except as to change of date is the following:

3. Paragraph 3 of the Remedial Order is adopted except the date for completion is 60 days from the date of this Remedial Order.

4. Paragraph 4 of the Remedial Order is adopted except the date for completion is 90 days from the date of this Remedial Order.

5. Paragraph 5 of the Remedial Order is adopted except the date for completion is 120 days from the date of this Remedial Order.

The portion of the Recommended Remedial Order that is amended is as follows:

1. The quarterly earnings approach should be used to calculate back pay. This is the method of calculating back pay that the Commission has historically followed. *See*

**PROPOSED ORDER – Page 2**

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

1 *eg. Echeverria v. Caribou*, (ASCHR Dec. 30, 2016); *Wheeler v. State, Dep't of Health and*  
2 *Soc. Services* (ASCHR Mar. 7, 2016); *Gonzales v. Duke Investments, LLC* (ASCHR Jan.  
3 30, 2014). This method of calculating back pay has also been commonly applied to back  
4 pay awards for discrimination claims under Title VII and for unfair labor practice claims  
5 under the National Labor Relations Board. *See Darnell v. City of Jasper*, 730 F.2d 653,  
6 657 (11<sup>th</sup> Cir. 1984).

7  
8  
9 2. Based on the above quarterly earnings determination, the back pay awarded  
10 to the following former employees based on the record evidence and as described in the  
11 executive director's objections to the Recommended Remedial Order dated July 20, 2017,  
12 is as follows:

13 Connor Carle: \$3,207.51;

14 Sydney Peterson: \$1,982.05;

15 Bashkim Hetemi: \$3,925.07;

16 Robin Burgess: \$2,050.07.

17  
18 Interest is awarded on the back pay at the rate of \$.23 per day from the June 16, 2017 date  
19 of the Recommended Order to the date of payment as recommended in the Recommended  
20 Remedial Order. No back pay is awarded to former employee Anthony Sheppard for the  
21 reasons set forth in the Administrative Law Judge's Recommended Decision.

22  
23 3. The Commissioners acknowledge that a Revised Recommended Order  
24 dated November 28, 2017 was issued by the Administrative Law Judge. But the  
25 Administrative Law Judge's Recommended Remedial Order was issued on June 15, 2017,  
26

27  
28 **PROPOSED ORDER – Page 3**

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim  
Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse,  
ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*

1 the executive director submitted objections, and pursuant to the Commission's regulations  
2 the objections were deemed denied when there was no ruling on the objections within 20  
3 days. 6 AAC 30.370(d). Thus, the jurisdiction before the Office of Administrative Hearing  
4 had expired before the November 28, 2017 Revised Recommended Order had issued.  
5 However, the Hearing Commissioners have reviewed the record evidence in this matter  
6 pursuant to 6 AAC 30.480.  
7

8 Pursuant to 6 AAC 30.480, objections to this proposed order must be filed within  
9 21 days of this order.  
10

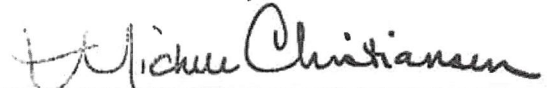
11 IT IS SO ORDERED.

12 DATED: March 8, 2018



Christa Bruce, Commissioner

14 DATED: March 8, 2018



Michele Christiansen, Commissioner

17 DATED: March 8, 2018



Brandon Nakasato, Commissioner

28 **PROPOSED ORDER** – Page 4

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse, ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*



1                   **CERTIFICATE OF SERVICE**

2                   I certify that on March 8, 2018, a true and correct copy of the foregoing **Proposed Order**  
3                   was hand delivered and emailed to:

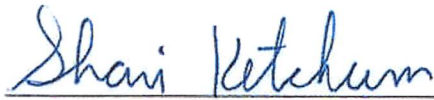
4                               Stephen Koteff, Human Rights Advocate  
5                               Alaska State Commission for Human Rights  
6                               800 A Street, Suite 204  
7                               Anchorage, AK 99501  
8                               Email: [steve.koteff@alaska.gov](mailto:steve.koteff@alaska.gov)

9                   and mailed by first-class U.S. mail, postage prepaid and emailed to:

10                              **Respondent or Respondent's Representative**  
11                              W. Sherman Ernouf  
12                              Law Offices of Ernouf & Coffey  
13                              P.O. Box 212314  
14                              Anchorage, AK 99508  
15                              Email: [sernouf@eclawfirm.net](mailto:sernouf@eclawfirm.net)

16                   and mailed by first-class U.S. mail, postage prepaid, to:

17                              Kathleen A. Frederick, Chief Administrative Law Judge  
18                              State of Alaska  
19                              Office of Administrative Hearings  
20                              550 W. 7<sup>th</sup> Avenue, Suite 1940  
21                              Anchorage, AK 99501

22                                
23                              \_\_\_\_\_  
24                              Shari Ketchum  
25                              Commission Secretary

26  
27  
28                   **PROPOSED ORDER – Page 5**

*ASCHR, Paula M. Haley, Executive Director ex rel. Connor Carle, Sydney Peterson, Bashkim  
                  Hetemi, Robin Burgess and Anthony Sheppard v. Sullivan's of Alaska, d/b/a Sullivan's Steakhouse,  
                  ASCHR No. J-12-005, J-12-192, and J-12-193, OAH No. 14-2059-HRC.*



ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
800 A Street, Suite 204  
Anchorage, Alaska 99501-3669  
(907) 276-7474 FAX (907) 278-8588

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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR )  
HUMAN RIGHTS, PAULA M. HALEY, )  
EXECUTIVE DIRECTOR, *ex rel.*, )  
CONNOR CARLE, SYDNEY F. PETERSON, )  
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ANTHONY SHEPPARD, )

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Respondent.

OAH No. 14-2059-HRC  
ASCHR Nos. J-12-192  
J-12-193  
J-12-005

**REQUEST FOR RULING ON JURISDICTION**

The Executive Director requests that the Hearing Commissioners issue a ruling on the jurisdiction of the Administrative Law Judge (ALJ) to revise a recommended decision and respond to objections after the time to do so has expired. 6 AAC 30.470(d) specifies that an ALJ shall rule on objections to a recommended decision within twenty days. If no ruling on objections is made within that time, the objections are deemed denied, and the hearing record must be sent to the Commissioners for review. *Id.* In this case the ALJ issued a Recommended Remedial Order, the Executive Director filed Objections to the recommendation, and the ALJ did not rule on the Executive Director’s Objections within twenty days; however, the ALJ failed to transmit the record in this matter to the Hearing Commissioners as specified in the regulation.

The record was complete and should have been transmitted to the Hearing Commissioners on August 9 in accordance with 6 AAC 30.470(d). Since then, the

1 Executive Director twice requested that the ALJ forward the record to the Commission so  
2 that a final order could be issued, but the ALJ did not respond to either request. Instead, the  
3 ALJ issued a revised decision and a response to the Executive Director's Objections on  
4 November 29, 2017, 112 days past the deadline for the ALJ to act. The Executive Director  
5 believes that the ALJ was without authority to issue these documents and requests a ruling  
6 from the Commission affirming that jurisdictional limitation. Such a ruling will help avoid  
7 similar delays in future cases.  
8

9  
10 ***Discussion***

11 The Accusations in this case alleged that Respondent, Sullivan's of Alaska, Inc.  
12 (Sullivan's), discriminated against five of its employees on the basis of their ages when they  
13 were called into a meeting and simultaneously fired. A hearing was held on May 4-6, 2015,  
14 and post-hearing briefs were filed on May 22, 2015. Pursuant to 6 AAC 30.470(a), the ALJ  
15 was to then "promptly" issue a recommended decision; however, the ALJ's initial  
16 recommended decision was not issued for over a year thereafter, on June 14, 2016. The  
17 Executive Director was not informed of the reason for the delay.  
18  
19

20 The ALJ's initial recommended decision concluded that Sullivan's discriminated  
21 against the five employees because of their ages when it terminated their employment. The  
22 ALJ concluded, however, that the Human Rights Act does not protect employees under the  
23 age of eighteen from age discrimination and recommended dismissal of the case. The  
24 Executive Director submitted timely objections to the initial recommended decision on June  
25 30, 2016. The ALJ did not respond to or rule on the objections. According to 6 AAC  
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1 30.470(d), if an ALJ does not rule on objections within twenty days, the objections are  
2 deemed denied, and the record should be forwarded to the Hearing Commissioner's for  
3 review and issuance of an order. Thus, the Executive Director's June 30 objections were  
4 deemed denied on July 20, 2016. But the ALJ did not forward the record to the Hearing  
5 Commissioners until November 29, 2016, more than four months after the objections were  
6 deemed denied. Again, there was no explanation for the delay.  
7

8  
9 The Hearing Commissioners reviewed the record and reversed the ALJ's  
10 jurisdictional finding on February 10, 2017. The Hearing Commissioners concluded that  
11 the Human Rights Act does protect employees under the age of eighteen from age  
12 discrimination. The Commissioners remanded the case to the ALJ on February 27, 2017,  
13 for consideration of a remedy. After several more months, the ALJ issued a Recommended  
14 Remedial Order, without briefing by the parties, on June 15, 2017. This recommendation  
15 proposes an award of back pay to only one of the five fired employees and reduces the  
16 award to that employee below the amount originally requested by the Executive Director in  
17 her prehearing brief. The Executive Director filed Objections to the recommended remedy  
18 on July 20, opposing the methodology used by the ALJ and seeking full back pay for all five  
19 employees. Again, the ALJ did not respond to or rule on the Executive Director's  
20 objections within the required twenty days. The Objections were therefore deemed denied  
21 on August 9 when the ALJ did not rule on them. At that point, there was no further action  
22 for the ALJ to take.  
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**REQUEST FOR RULING ON JURISDICTION —Page 3**

*ASCHR, Paula Haley, Executive Director, ex rel. Carle, et al.*, ASCHR No. J-12-005,  
J-12-192, J-12-193; OAH No. 14-2059-HRC

1 But the ALJ did not forward the record to the Hearing Commissioners as required  
2 and after another month had passed, on September 12, the Executive Director filed a request  
3 with the ALJ to transmit the record to the Hearing Commissioners. Exhibit 1. The  
4 Executive Director explained that she was concerned about the four-month delay that  
5 occurred after the ALJ had previously failed to rule on objections, as well as the year-long  
6 delay in the issuance of the recommended decision after the hearing. The ALJ did not  
7 respond to this request or transmit the record. On September 21, however, the ALJ's Law  
8 Office Assistant emailed the parties, saying that "Judge Frederick has asked me to let the  
9 parties know that she is working on a revised remedial order that will be issued in the  
10 near future." Exhibit 2. This communication did not explain why the ALJ thought she  
11 retained the authority to issue a revised order.

12  
13  
14  
15 On November 1, OAH's Deputy Chief ALJ contacted the Executive Director to  
16 explain that OAH had "lost jurisdiction" of the case and that the Hearing Commissioners  
17 could request transmittal of the file. It was unclear to the Executive Director whether those  
18 statements constituted *ex parte* communications that should be disclosed, but it did appear  
19 that OAH believed the hearing record should be transmitted to the Commissioners. The  
20 Executive Director therefore filed a Second Request for Transmittal of Record with the ALJ  
21 on November 8, 2017, disclosing the contact and again asking for the file to be sent to the  
22 Commissioners.

23  
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25  
26 The ALJ did not respond to this second request. Instead, the ALJ issued a revised  
27 recommended remedial order and a response to the Executive Director's Objections on  
28



1 November 29, 2016. For the Hearing Commissioners to consider this revised remedial  
2 order or response to objections as it prepares its final order would sanction a procedure  
3 outside that provided by regulation which injects arbitrary delay into a system designed to  
4 provide for meaningful remedial relief. It has now been more than more than two and a half  
5 years since the hearing was held, and more than three and a half months since the Executive  
6 Director's objections were deemed denied (on August 9) and the record was ripe for review  
7 by the Hearing Commissioners. The Commission has found that Sullivan's discriminated  
8 against the five fired employees, and the Executive Director has argued they are all entitled  
9 to back pay. Yet this case remains unresolved, and the fired employees remain without a  
10 remedy, because of OAH's inexplicable delay in issuing a decision and simply forwarding  
11 the record.  
12

13 Because of this extraordinary situation, the Executive Director asks that the Hearing  
14 Commissioners issue a ruling that confirms that an ALJ loses the authority to issue a revised  
15 decision more than twenty days after objections are filed if the objections are not addressed  
16 within that time. If an ALJ remains free to ignore this time limit, the regulatory timeline  
17 becomes meaningless, and cases can be indefinitely delayed simply because an ALJ has  
18 failed to act.  
19

### 20 ***Conclusion***

21 The Executive Director requests that the Hearing Commissioners consider only the  
22 Recommended Remedial Order issued on June 15, 2017, striking from its consideration the  
23 Revised Recommended Remedial Order and Response to Objections issued November 29,  
24

2017, and issue a ruling affirming that under 6 AAC 30.470(d), an ALJ loses jurisdiction to take any further action in a case once the objections are deemed denied.

Respectfully submitted this 13th day of December 2017 at Anchorage, Alaska.

ALASKA STATE COMMISSION  
FOR HUMAN RIGHTS



Stephen Koteff  
Human Rights Advocate  
Alaska Bar No. 9407070

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of December 2017, the foregoing **Request for Ruling on Jurisdiction** was served via U.S. Postal Service and email on:

W. Sherman Ernouf  
Law Firm of Ernouf & Coffey, P.C.  
P.O. Box 212314  
Anchorage, AK 99508  
Email: [sernouf@eclawfirm.net](mailto:sernouf@eclawfirm.net)

and that a courtesy copy was submitted via U.S. Postal Service to:

Office of Administrative Hearings  
550 W. 7<sup>th</sup> Avenue, Suite 1940  
Anchorage, Alaska 99501

and that the original and 2 copies were filed with the Hearing Commissioners via hand delivery.



Carolyn A. Thomas, Law Office Assistant  
Law Office Assistant

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
ON REFERRAL TO THE OFFICE OF ADMINISTRATIVE HEARINGS

ALASKA STATE COMMISSION FOR )  
HUMAN RIGHTS, PAULA M. HALEY, )  
EXECUTIVE DIRECTOR, *ex rel.*, )  
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SULLIVAN'S STEAKHOUSE, )

Respondent. )

OAH No. 14-2059-HRC  
ASCHR Nos. J-12-192  
J-12-193  
J-12-005

**REQUEST FOR TRANSMITTAL OF RECORD**

The Executive Director requests that the Administrative Law Judge (ALJ) transmit the record to the Hearing Commissioners for their consideration and issuance of a final order. The Executive Director submitted Objections to the ALJ's Recommended Remedial Order on July 20, 2017. The ALJ has not ruled on the Objections. Pursuant to 6 AAC 30.370(d), if the ALJ does not rule on objections within twenty days after the objections are filed, the objections are deemed denied. The Executive Director's Objections were therefore denied on August 9, 2017, and the hearing record was complete and ready to be transmitted to the Commissioners on that date.

The Executive Director makes this request to avoid any further delay in this matter. It has now been two years and four months since the hearing in this case was held, on May 4-6, 2015. Post-hearing briefs were filed on May 22, 2015, and the initial recommended

1 decision was not issued for over a year thereafter, on June 14, 2016. The initial  
2 recommended decision concluded that the Human Rights Act does not protect employees  
3 under the age of eighteen from age discrimination. The Executive Director submitted  
4 timely objections to the initial recommended decision on June 30, 2016. The ALJ did not  
5 rule on the objections, and they were deemed denied on July 20, 2016. But the record was  
6 not forwarded to the Hearing Commissioners until November 29, 2016, more than four  
7 months after the objections were denied.  
8

9  
10 After reviewing the record, the Hearing Commissioners reversed the ALJ's  
11 jurisdictional finding on February 10, 2017, and remanded the case to the ALJ on February  
12 27 for consideration of a remedy. The ALJ issued the Recommended Remedial Order  
13 without briefing by the parties on June 15, 2017. The remedial order proposes an award of  
14 back pay to only one of the complainants and reduces the award to that complainant below  
15 the amount originally requested by the Executive Director in her prehearing brief. As noted  
16 above, the Executive Director filed her Objections to the recommended remedy on July 20,  
17 opposing the methodology used by the ALJ and seeking full back pay for all five  
18 complainants. The Objections were deemed denied on August 9 when the ALJ did not rule  
19 on them. At that point, there was no further action for the ALJ to take.  
20

21  
22 The Executive Director has prevailed on the question of whether Respondent  
23 discriminated against the complainants. The Executive Director has objected to the ALJ's  
24 calculation of the back pay award and seeks make whole relief for all of the complainants.  
25  
26 At this point, more than two years and four months have elapsed since the hearing. The  
27  
28



1 Executive Director requests that this matter be hastened to conclusion so that the  
2 Commission can consider the outstanding issues and the complainants can receive the  
3 awards they are due without further delay.  
4

5 Respectfully submitted this 12th day of September 2017 at Anchorage, Alaska.

6 ALASKA STATE COMMISSION  
7 FOR HUMAN RIGHTS

8 

9  
10 \_\_\_\_\_  
11 Stephen Koteff  
12 Human Rights Advocate  
13 Alaska Bar No. 9407070

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on this 12th day of September 2017, the foregoing Request for  
16 Transmittal of Record was served via U.S. Postal Service and email on:

17 W. Sherman Ernouf  
18 Law Firm of Ernouf & Coffey, P.C.  
19 3606 Rhone Circle, Ste. 100  
20 Anchorage, AK 99508  
21 Email: [sernouf@eclawfirm.net](mailto:sernouf@eclawfirm.net)

22 that the original was submitted via U.S. Postal Service and email to:

23 Office of Administrative Hearings  
24 550 W. 7<sup>th</sup> Avenue, Suite 1940  
25 Anchorage, Alaska 99501  
26 Email: [doa.oah@alaska.gov](mailto:doa.oah@alaska.gov)

27 and that a courtesy copy was filed with the Hearing Commissioners via hand delivery.

28   
Carolyn A. Thomas, Law Office Assistant  
Law Office Assistant

**REQUEST FOR TRANSMITTAL OF RECORD —Page 3**

*ASCHR, Paula Haley, Executive Director, ex rel. Carle, et al.*, ASCHR No. J-12-005,  
J-12-192, J-12-193; OAH No. 14-2059-HRC

**Thomas, Carolyn A (GOV)**

---

**From:** Cozad, Rachel B (DOA)  
**Sent:** 21 September, 2017 3:39 PM  
**To:** Thomas, Carolyn A (GOV); Sherman Ernouf ([sernouf@eclawfirm.org](mailto:sernouf@eclawfirm.org)); Koteff, Steve (GOV)  
**Subject:** RE: Carle, et al. v. Sullivan's of Alaska dba Sullivan's Steakhouse, OAH No. 14-2059-HRC

Good afternoon,

Judge Frederick has asked me to let the parties know that she is working on a revised remedial order that will be issued in the near future.

Thanks,

**Rachel Cozad**  
Law Office Assistant  
Office of Administrative Hearings  
550 W 7<sup>th</sup> AVE STE 1940  
Anchorage, AK 99501  
907-269-8170 (phone)  
907-269-8172 (fax)

---

**From:** Thomas, Carolyn A (GOV)  
**Sent:** Tuesday, September 12, 2017 4:30 PM  
**To:** oah (DOA sponsored) <[doa.oah@alaska.gov](mailto:doa.oah@alaska.gov)>  
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**Subject:** Carle, et al. v. Sullivan's of Alaska dba Sullivan's Steakhouse, OAH No. 14-2059-HRC

Attached please find the Request for Transmittal of Record for filing in the above referenced matter. The original will follow via U.S. Postal Service. Thank you, Carolyn

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**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS**

Alaska State Commission for Human Rights,	)	
Marti Buscaglia, Executive Director, <i>ex rel.</i>	)	
CONNOR CARLE, SYDNEY PETERSON,	)	
BASHKIM HETEMI, ROBIN BURGESS and	)	OAH No. 14-2059-HRC
ANTHONY SHEPPARD,	)	ASCHR Nos. J-12-005
	)	J-12-192
Complainant,	)	J-12-193
	)	
v.	)	
	)	
SULLIVAN’S OF ALASKA, INC. d/b/a	)	
SULLIVAN’S STEAKHOUSE	)	
	)	
Respondent.	)	
	)	

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**REVISED RECOMMENDED REMEDIAL ORDER**

**I. Introduction**

In a Recommended Decision dated June 14, 2016, the Administrative Law Judge determined that the five complainants, all of whom were under 18 years of age, had been dismissed from their employment at Sullivan’s of Alaska, Inc. (Sullivan’s) because of their age and concomitant status as minors. However, the Administrative Law Judge also concluded that AS 18.80.220 did not prohibit discrimination against minors on the basis of age, and recommended dismissal of the Executive Director’s Accusations of age discrimination.

A majority of the Hearing Commissioners rejected the conclusion of law, set forth in the Recommended Decision, that AS 18.80.220 did not prohibit age-based discrimination against minor employees – *i.e.*, employees under the age of 18. Two of the three Hearing Commissioners concluded that the five complainants were dismissed because of their age, and that in dismissing these employees Sullivan’s had violated AS 18.80.220.<sup>1</sup> The Commission then remanded the case to the Administrative Law Judge to prepare a Recommended Remedial Order that provides appropriate relief.

A Recommended Remedial Order dated June 15, 2017 was delivered to the parties. The Executive Director filed objections to the Recommended Remedial Order on July 20, 2017. A

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<sup>1</sup> One Hearing Commissioner filed a dissent, concurring with the Administrative Law Judge’s Recommended Decision that the case should be dismissed because AS 18.80.220 does not prohibit age-based discrimination against minor employees.

ruling on those objections was issued on November 28, 2017, finding that one of the objections had merit. This Revised Recommended Remedial Order addresses certain issues raised in the Objections.

## **II. Back Pay/Front Pay as a Remedy**

### **A. Back Pay**

The Accusations the Commission's Executive Director filed on behalf of the five complainants requested back pay, including any lost benefits or remuneration for Mr. Carle, Ms. Peterson, Ms. Burgess, Mr. Hetemi, and Mr. Sheppard (hereinafter, collectively referred to as the "Minor Employees").<sup>2</sup> Although the Minor Employees' employment with Sullivan's ended on December 29, 2011, they received a final paycheck from Sullivan's at the beginning of 2012.<sup>3</sup> Unless subject to offset, back pay would begin to accrue from January 10, 2012 – the date Sullivan's was served with a complaint of discrimination arising from the Minor Employees' termination on December 29, 2011.<sup>4</sup>

#### **1. Connor Carle, Sydney Peterson, and Robin Burgess**

The evidence presented at the hearing, held on May 4-6, 2015, showed that Mr. Carle, Ms. Peterson, and Ms. Burgess each earned more income in 2012 through 2014 than they had earned while employed at Sullivan's in 2011.<sup>5</sup> Thus, these three Minor Employees mitigated their damages completely and are not eligible for an award of back pay.<sup>6</sup>

#### **2. Bashkim Hetemi**

After he was terminated from Sullivan's, Mr. Hetemi applied to numerous retail jobs at the Dimond Mall, but was not called for any interviews.<sup>7</sup> He very briefly held a job at Denny's, but only worked there a few days.<sup>8</sup> Soon afterwards, Mr. Hetemi was hired by GNC. Despite his

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<sup>2</sup> The Executive Director filed three Accusations on October 27, 2017: one on behalf of Connor Carle, another on behalf of Sydney Peterson, and a third on behalf of Robin Burgess, Bashkim Hetemi, and Anthony Sheppard.

<sup>3</sup> See Exh. 79, p. 3 (Burgess); Exh. 88, p. 4 (Carle); Exh. 95, p. 1 (Hetemi); Exh. 105, p. 4 (Peterson) & Exh. 111, p. 3 (Sheppard).

<sup>4</sup> AS 09.30.070(b); Exh. 16; see also *Tookalook Sales and Service v. McGahan*, 846 P.2d 127, 129 (Alaska 1993), *reh'g den*.

<sup>5</sup> Exhs. 79-83 (Burgess); Exhs. 86-89 (Carle); & Exhs. 102, 104-107 (Peterson).

<sup>6</sup> See AS 18.30.130(a)(1). For the reasons outlined in the Ruling on Objections, the annual loss method was used here to compute damages. There was no evidence in the record – *i.e.*, no testimony and no exhibits – relating to the quarterly loss method espoused by the Executive Director in the Objections.

<sup>7</sup> Testimony of Bashkim Hetemi. Mr. Hetemi attributed his lack of success in finding a job despite diligent efforts to his disclosure on job applications that he had been fired by Sullivan's.

<sup>8</sup> Testimony of Bashkim Hetemi. Sullivan's failed to introduce any evidence at the hearing showing Mr. Hetemi's voluntary departure from Denny's tolled his eligibility for back pay until he secured the position at GNC. *Cf. Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1101 (3<sup>rd</sup> Cir. 1995).



mitigation efforts, Mr. Hetemi earned less in 2012 than he had earned in 2011 when he was employed by Sullivan's. Mr. Hetemi's gross earnings in 2011 from Sullivan's were \$3,795, comprised of \$2,759 in wages and \$1,036 in tips.<sup>9</sup> By contrast, in 2012 Mr. Hetemi only earned \$1881.20 from his new employment.<sup>10</sup> Thus, Mr. Hetemi's earnings in 2012 were \$1,913.80 *less than* the amount he had earned the prior year at Sullivan's.<sup>11</sup> Accordingly, he is eligible for back pay in the amount of \$1,913.80 plus interest as calculated in Part II-C. Mr. Hetemi is not eligible for back pay after 2012: in 2013, Mr. Hetemi's annual earnings exceeded his 2011 income from Sullivan's, and there was no evidence in the record relating to his gross earnings in 2014.<sup>12</sup>

### 3. Anthony Sheppard

Anthony Sheppard earned \$1,782.37 in wages from Sullivan's in 2011.<sup>13</sup> Following his termination from Sullivan's, Mr. Sheppard held a job at Alaska Custom Gutters in 2012 after school ended in late May, and earned \$10 an hour in that job.<sup>14</sup> Mr. Sheppard said he could not give an "accurate estimate" of the number of hours he worked each week but guessed that he had worked "maybe 10 hours a week give or take."<sup>15</sup> There is, however, no evidence in the record indicating exactly how many weeks he held that job in 2012 or his gross earnings from Alaska Custom Gutters.<sup>16</sup> In addition to his summer job at Alaska Custom Gutters, Mr. Sheppard briefly worked at the Alaska Sportsplex "after the football season ended" in 2012 and earned \$99.70 from that employment.<sup>17</sup>

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<sup>9</sup> See Ex. 93. Sullivan's issued Mr. Hetemi's final paycheck in the amount of \$230.56 in 2012, but it was for work Mr. Hetemi had performed prior to his December 29, 2011 termination.

<sup>10</sup> Exh. 95.

<sup>11</sup> It is the Respondent's burden to demonstrate that Mr. Hetemi failed to mitigate his damages by not remaining at Denny's. See *Lathem v. Dept. Of Children and Youth Services*, 172 F. 3d 786, 794 (11<sup>th</sup> Cir. 1999) (courts resolve uncertainties in back pay in favor of the discrimination victim; it is the defendant's burden to prove that the plaintiff did not use reasonable diligence to obtain comparable work); see also *EEOC v. Delight Wholesale Col.*, 973 F.2d 664, 670-71 (8<sup>th</sup> Cir. 1992). Since Respondent never made that argument, it need not be discussed here.

<sup>12</sup> Compare Exh. 93 with Exh. 94.

<sup>13</sup> As a dishwasher, Mr. Sheppard did not receive tips. See Testimony of Anthony Sheppard. His 2011 earnings include the wages (\$1,584.37 set forth in his W-2 from Sullivan's for 2011) plus his final paycheck for 2011 in the amount of \$198, which he received in 2012. See Exh. 111. Although Mr. Sheppard testified that he believed he was paid \$10.00 an hour at Sullivan's, his pay history at Sullivan's shows that he was paid approximately \$9.00 an hour and his W-2 form suggests that he was paid \$9.19 an hour. Compare Testimony of Anthony Sheppard with Exh. 111.

<sup>14</sup> Testimony of Anthony Sheppard. There were no tax returns, W-2 forms, or pay stubs in the record showing that Mr. Sheppard had worked for Alaska Custom Gutters, the duration of that employment, or the gross earnings he had received from that job. See Exhs. 111-115.

<sup>15</sup> Testimony of Anthony Sheppard.

<sup>16</sup> Mr. Sheppard testified that he worked for Alaska Custom Gutters after the end of May until "football season" began. No other dates for this employment were given, either through testimony or in exhibits introduced into evidence. See Exhs. 111-115.

<sup>17</sup> See Exhs. 113 & 115; see also Testimony of Anthony Sheppard.

Before a tribunal can award damages, Mr. Sheppard must first establish that his economic loss was due to Sullivan's discrimination and the amount of that loss.<sup>18</sup> Back pay is subject to an offset for wages Mr. Sheppard earned after his termination from Sullivan's.<sup>19</sup> Here, Mr. Sheppard testified that he was unable to give an accurate estimate of his earnings at Alaska Custom Gutters in 2012, which would be part of that offset. There also were no documents in the record that could have been used to determine his wages at Alaska Custom Gutters. Consequently, Mr. Sheppard has not met his burden of establishing an economic loss or the amount of that loss. Accordingly, he cannot recover back pay for 2012. Moreover, since Mr. Sheppard's earnings in 2013 and 2014 exceeded the income he received from Sullivan's in 2011, he is not eligible to receive back pay for those two years.<sup>20</sup>

### **B. Front Pay**

Under AS 18.80.130, a complainant may receive front pay for a period of not more than one year under the circumstances enumerated in the statute.<sup>21</sup> Like back pay, front pay must be reduced by the amount the employee could have earned by making reasonably diligent efforts to obtain similar employment. Here, no evidence of a potential front pay loss was shown at the hearing for any of the Minor Employees. This was understandable, since by 2013, the Minor Employees had obtained jobs which paid better than the entry-level jobs they previously had held at Sullivan's. Accordingly, no award of front pay is appropriate in this case.

### **C. Interest**

Pursuant to 6 AAC 30.480(b), the Commission may order interest on monetary awards in accordance with AS 09.30.070(a), and such an award is appropriate in this case to compensate the Minor Employees for the long delay in receiving lost wages. Damages are calculated on an annual basis, starting on January 1, 2012.<sup>22</sup> Interest is calculated from January 1, 2013.<sup>23</sup> The interest rate for state judgments rendered in 2017 is 4.25%. Interest assessed in accordance with AS 09.30.070 is simple, not compound, interest.<sup>24</sup>

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<sup>18</sup> See *Taylor v. Philips Indus., Inc.*, 593 F.2d 783, 787 (7<sup>th</sup> Cir. 1979).

<sup>19</sup> See *id.*

<sup>20</sup> Compare Exh. 111 with Exh. 112 & Exh. 113

<sup>21</sup> Front pay, if applicable, would be calculated from the date of this Revised Recommended Remedial Order. See *Zisumbo v. Ogden Regional Medical Center*, 801 F.3d 1185, 1205 (10<sup>th</sup> Cir. 2015) (Front pay is the money awarded for lost compensation during the period between judgement and reinstatement or in lieu of reinstatement to make the plaintiff whole).

<sup>22</sup> For the reasons outlined in the Response to Objections to Recommended Remedial Order, the annual loss method has been used to compute these damages.

<sup>23</sup> See *Paula M. Haley ex rel., Cassandra Webb et al v. Die-Fast, Inc.*, OAH No. 06-0491-0495-HRC.

<sup>24</sup> See *Alyeska Pipeline Serv. Co. v. Anderson*, 669 P.2d 956, 956 (Alaska 1983).

Applying these concepts, interest on the \$1,913.80 in back pay damages owed to Mr. Hetemi in this case has accrued since January 1, 2013 at the rate of 22 cents per day, or \$81.34 per year. Thus, as of November 28, 2017, Mr. Hetemi should receive \$1,913.80 in principle and \$398.40 in interest, for a total of \$2,312.20.

### **III. Other Remedial Steps**

The Commission is required by statute to order the respondent to refrain from engaging in any discriminatory conduct it has been found to be engaged in.<sup>25</sup> Here, the respondent has been found to have discriminated against employees based on their age and concomitant status as minors, which a majority of the Hearing Commissioners have determined to be impermissible. The respondent must be ordered not to engage in such discrimination in the future. The Commission also has discretion to order a wide range of other relief, including imposition of conditions on the respondent's future business conduct.

The only relief, other than damages and interest, that the Executive Director has advocated in the Accusations is that the Commission: (1) issue an order declaring that Sullivan's violated AS 18.80.220(a)(1) by terminating the Minor Employees; (2) order Sullivan's to adopt and disseminate a policy of nondiscrimination under the Alaska Human Rights Law (AHRL); (3) order Sullivan's to obtain in-person training, conducted by a neutral, third-party trainer, of at least six hours in length for its managers and supervisors and three hours in length for its employees, on the provisions of the AHRL that prohibit discrimination in employment, and that such order specify that the trainer and training curriculum be approved by the Executive Director prior to the training being conducted; (4) order Sullivan's to eliminate from the personnel records of the Minor Employees all documents and entries relating to the facts and circumstances that led to this case and any of the related events occurring thereafter; (5) order Sullivan's to refrain from penalizing any of the Minor Employees in any way in future considerations for employment and, if rehired, for transfers, promotions or upgrading because the Minor Employees complained about discrimination or because they filed a Complaint with the Commission; and (6) order Sullivan's to refrain from advising or informing any other employer or potential employer of any of the Minor Employees of the facts or circumstances involved in this case.

Sullivan's has not contested the appropriateness of this relief. All of it should be ordered, except that item (4) requires some further explanation. The Commission, in remanding the case for a Recommended Remedial Order, has requested that an "appropriate" remedy be fashioned.

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<sup>25</sup> AS 18.80.130(a).

Because the Minor Employees are in the early stages of their respective careers, it is appropriate that their future employment options not be restricted due to Sullivan's discriminatory conduct.

The Employee Status Change Form for each of the Minor Employees indicates that their termination was "involuntary."<sup>26</sup> The Form further stated that the reason for termination was "non-compliance with company policy" and "violation of local, state or federal statutes."<sup>27</sup> Not surprisingly, three of the Minor Employees – Connor Carle, Sydney Peterson, and Bashkim Hetemi – testified that they initially had difficulty getting interviews after disclosing that they had been terminated from Sullivan's on job applications for prospective employers.<sup>28</sup> Mr. Sheppard avoided that problem by securing employment with a family friend after his employment at Sullivan's ended.<sup>29</sup> Ms. Burgess was able to get re-employed in the restaurant business shortly after her termination, but only because one of her former supervisors at Sullivan's recruited her for a position at the Glacier Brewhouse, where he was then employed.<sup>30</sup>

Since a termination, especially for those reasons, can affect future employment options, an appropriate remedy in this case is for Sullivan's to change the termination codes for each of the Minor Employees to "T113, Discontinuation of Function/Position."<sup>31</sup> This is the code which best fits the situation here (*i.e.*, an involuntary termination based on a decision not to employ minors under any circumstances) that is non-pejorative in nature.

### **ORDER**

It is hereby **ORDERED** that:

1. Sullivan's violated AS 18.80.220(a)(1) by terminating the employment of Connor Carle, Sydney Peterson, Robin Burgess, Bashkim Hetemi, and Anthony Sheppard on December 29, 2011 because they were under the age of 18.
2. Sullivan's is permanently ordered not to discriminate in hiring or employment on the basis of an applicant's or employee's status as a minor.
3. By **February 1, 2018**, Sullivan's shall adopt and disseminate a policy of non-discrimination under the Alaska Human Rights Act.

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<sup>26</sup> See Exhibit 1, pp. 69-73.

<sup>27</sup> *Id.*

<sup>28</sup> Testimony of Connor Carle; Testimony of Sydney Peterson; Testimony of Bashkim Hetemi. Ms. Peterson testified she was kept "out of the restaurant business for a while" because her termination made potential employers leery of hiring her.

<sup>29</sup> Testimony of Anthony Sheppard.

<sup>30</sup> Testimony of Robin Burgess. Ms. Burgess testified that, had she not been recruited by a former manager at Sullivan's who gave her a recommendation, her termination would "otherwise have been a problem."

<sup>31</sup> See Exhibit 1, pp. 69-73.



4. By **February 1, 2018**, Sullivan's shall pay \$2,312.20 to Bashkim Hetemi, plus interest at \$0.22 per day commencing on November 28, 2017 to the date of payment.
5. By **February 15, 2018**, Sullivan's shall expunge from the personnel records of the Minor Employees any documents that are related to this case which arose after the Minor Employees were terminated from employment at Sullivan's, ensure that the Minor Employees' separation from employment at Sullivan's is no longer designated as an "involuntary termination: Code T104/T110" but rather is deemed an "involuntary termination: Code T113," and provide the Executive Director with documentation showing that it has corrected the personnel records reflecting the reason for the Minor Employees' separation from employment.
6. By **March 1, 2018**, Sullivan's shall provide six hours of in-person training conducted by a neutral, third-party trainer for its managers and supervisors and three hours of training for its employees on the provisions of the Alaska Human Rights Law that prohibit discrimination in employment. In addition, both the trainer selected to provide this training and the training curriculum shall be approved by the Executive Director of the Commission prior to the training being conducted.
7. Sullivan's shall refrain from penalizing the Minor Employees in any way regarding future considerations for employment and, if rehired, for transfers, promotions, or upgrading because of the Complaints the Executive Director filed with the Commission on their behalf.
8. Sullivan's shall refrain from advising or informing any other employer or potential employer of the Minor Employees of the facts or circumstances involved in this case, including the Minor Employees' involvement in a discrimination case against Sullivan's.

DATED: November 28, 2017.

By: Kathleen A. Frederick  
Kathleen A. Frederick  
Chief Administrative Law Judge

THE UNDERSIGNED CERTIFIES THAT ON  
THIS DATE AN EXACT COPY OF THE  
FOREGOING WAS PROVIDED TO THE  
FOLLOWING INDIVIDUALS:

Enouf - by email  
Koteff - by email  
Jessica X. Egan 11/29/17  
SIGNATURE DATE