

Back Pay Policy

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Article I. Purpose and Policy

1-1. The purpose of this Policy is to set forth standards used in the calculation of back pay for all employees of the Tribe in accordance with Tribal law.

1-2. It is the policy of the Tribe to have consistent and standard procedures for the management of employee back pay.

Article II. Adoption, Amendment, Appeal

2-1. This Policy was adopted by the Oneida Business Committee by resolution BC-5-24-06-PP and amended by resolutions BC-06-23-10-F and BC-08-13-14-C.

2-2. This Policy may be amended or repealed by the Oneida Business Committee or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

2-3. Should a provision of this Policy or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this Policy which are considered to have legal force without the invalid portions.

2-4. In the event of a conflict between a provision of this Policy and a provision of another policy, the provisions of this Policy shall control.

2-5. This Policy is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

Article III. Definitions

3-1. This section shall govern the definitions of words and phrases used within this Policy. All words not defined herein shall be used in their ordinary and everyday sense.

(a) "Advocate" shall mean a non-attorney person as provided by law and other person who is admitted to practice law and is presented to the court as the representative or advisor to a party.

(b) "Back pay" shall mean money damages owed to the employee for a salary or wage that would have been earned in the time taken to litigate the employment dispute, minus amounts that are deducted from salary or income earned from a third-party employer or limited by other law of the Tribe.

(c) "Consequential Damages" shall mean damages that are not a direct and immediately result of an act, but a consequence of the initial act, including but not limited to penalties on early withdrawal of retirement account.

(d) "Consultant" shall mean a professional who is contracted externally whose expertise is provided on a temporary basis for a fee.

(e) "Court" shall mean the trial court of the Tribe's judicial system.

(f) "Earnings" shall include vacation/personal time, shift differential, holiday pay, merit increases, bonuses and incentives, employment benefits and income received during the back pay period.

(g) "Employee" shall mean any individual who is employed by the Tribe and is subject to the direction and control of the Tribe with respect to the material details of the work performed, or who has the status of an employee under the usual common law rules applicable to determining the employer-employee relationship. "Employee" includes, but

is not limited to; an individual employed by any program or enterprise of the Tribe, but does not include elected or appointed officials or individuals employed by a Tribally Chartered Corporation. For purposes of this Policy, individuals employed under an employment contract as a limited term employee are employees of the Tribe, not consultants.

(h) “Involuntarily separated” shall mean an employee removed from employment through whatever means, other than a layoff, by the employer. This shall include, but is not limited to, investigative leave, suspension or termination.

(i) “Tribal” or “Tribe” shall mean the Oneida Tribe of Indians of Wisconsin.

Article IV. Back Pay Calculation

4-1. *Back Pay Limitations.* Back pay shall only include the items identified in this Article as they relate to the employee. Back pay shall include and be subject to the following:

(a) *Vacation/Personal Time Accrual.* Employees shall receive prorated credit for vacation/ personal time which would have accrued during the back pay period.

(1) Reinstated employees shall be credited for vacation/ personal time. If the crediting of vacation/personal time would result in the employee exceeding the accrual cap of two-hundred eighty (280) hours pursuant to the Tribe’s personnel policies and procedures, then any amount over that cap shall be provided as a cash payout. Non-reinstated employees shall be paid out vacation/personal time in lieu of crediting personal/vacation time.

(b) *Shift Differential.* Shift differential shall be included in the back pay amount to the extent it is a part of the employee’s regularly scheduled hours.

(c) *Tips.* If the employee received pooled tips at the time of involuntary separation, tips shall be included in the total back pay amount at the same tip rate that other employees in the same position and on the same shift received on the same dates.

(1) If the employee received individual tips at the time of involuntary separation, the employee shall be ineligible for tips during the back pay period.

(d) *Holiday Pay.* Holiday pay shall be included in the back pay amount to the extent the employee would have received such pay if the employee had not been involuntarily separated.

(e) *Merit Increases.* The hourly rate used to calculate back pay shall be increased according to the merit increase system/standard used by the employee’s supervisor during the back pay period.

(1) The effective date of the employee’s merit increase shall be the same as the effective date for other employees in the same department. Retroactive increases shall be calculated back to the retroactive date used for other employees in the same department.

(2) The most recent performance review issued to the employee prior to being involuntarily separated shall be used to determine the level of merit increase. However, if the employee appealed the performance review to the Human Resource Department Manager prior to involuntary separation, a method under the Tribe’s personnel policies and procedures shall be used to determine the merit increase.

(f) *Bonuses and Incentives.* All bonus and incentive payments for which the employee would have been eligible during the back pay period shall be included in the total back pay amount, except for non-monetary gifts distributed by the Tribe to all employees (e.g.

Winter Gift gift certificates) or other non-monetary benefits, such as clothing allowance.

(g) *Employment Benefits.* Employee benefits shall be subject to the provisions in this section.

(1) *Health Insurance Premiums.* The Tribe shall deduct health insurance premiums from the back pay award. Health insurance coverage by the Tribe shall continue during the involuntary separation, excluding terminations. If the employee's circumstances have changed during the back pay period and such circumstances affect the employee's health insurance needs, the employee shall notify the Tribe of such changes at the time of reinstatement.

(2) *Flexible Benefit Plan Contributions.* If a terminated employee was contributing to the Tribe's flexible benefit plan at the time of termination, the status of the employee's flex benefit plan shall be subject to the provisions of the Internal Revenue Code.

(3) *Retirement Benefit Contributions.* In the event the employee was participating in the Tribe's retirement plan at the time of involuntary separation, the employee shall be responsible for contacting the retirement plan administrator and reactivating contributions.

(A) The employee may choose whether to have the employee's contribution to the retirement plan that would have been made during the back pay period deducted from the total back pay amount and deposited into the employee's retirement account.

(B) If the employee was eligible for employer matching contributions at the time of involuntary separation and the employee chooses to make a contribution through back pay, the Tribe shall contribute the employer match into the employee's retirement account.

(C) If the employee was not participating in the Tribe's retirement plan or chooses not to make contributions through the back pay process, then the Tribe shall not make employer match contributions into the employee's retirement account or otherwise make payments to the employee in lieu of employer match contributions.

(h) *Income Received During the Back Pay Period.*

(1) *Unemployment Benefits.* Any unemployment compensation paid by the Tribe to the State of Wisconsin for an involuntarily separated employee shall be deducted from the employee's back pay award.

(2) *Income Received Through Employment.* Except as provided in 4-1(h)(2)(B), income earned by an employee during the back pay period shall be deducted from the total back pay amount.

(A) The employee shall provide information to verify the amount of or lack of earned income and sign an affidavit attesting to the amount of or lack of earned income.

(B) If the employee worked an additional job prior to being involuntarily separated and continued working in the same capacity, the income earned from that employment shall not be deducted from the total back pay amount to the extent that the income is consistent with pre-involuntary separation earnings. Where the employee worked the additional job, the employee shall provide information from the employer to verify the income earned before and during the back pay period.

4-2. *Payments Not Allowed.* The Tribe shall not include the following in any back pay amount:

- (a) Punitive damages;
- (b) Consequential damages;
- (c) Attorney's or advocate's fees.
- (d) Time when the employee would not have been eligible to work.
- (e) Monies normally paid for additional duties while working where an alternate employee assumed that function while the employee was involuntarily separated, unless the additional duties are a part of such involuntarily separated employee's regular schedule.

4-3. *Back Pay Period.* Calculation of back pay begins on the day the employee is involuntarily separated and ends on the day the employee is reinstated.

- (a) If the employee is reinstated but refuses to return to work, the back pay period ends on the date reinstatement would have taken effect, but was refused by the employee.
- (b) Back pay shall be calculated by taking the employee's earnings during the fifty-two (52) week period immediately preceding the date of the involuntary separation and divide that amount by the number of weeks worked.
 - (1) If the employment prior to the involuntary separation was less than fifty-two (52) weeks, the average weekly wage shall be calculated by taking the employee's earnings and divide that amount by the number of weeks worked.
 - (2) If the involuntary separation period involves a fractional week, the indemnity shall be paid for each day of such week at the rate of one-sixth (1/6) of the weekly indemnity.

Article V. Back Pay Process

5-1. The Oneida Law Office shall develop necessary forms and procedures for the purpose of implementing this Policy.

5-2. The Oneida Law Office shall work with the employee's supervisor, the Human Resource Department and the employee/advocate to assemble information and prepare the back pay agreement. A reasonable effort shall be made to complete the back pay agreement within thirty (30) calendar days, starting the day after the party to the grievance action provides to the Oneida Law Office a judgment ordering back pay or the results of an investigation showing the employee is cleared of any wrongdoing.

5-3. An employee not receiving back pay in accordance with the back pay agreement may seek enforcement by appealing to the court.

End.

Adopted - BC-5-24-06-PP

Amended - BC-06-23-10-F

Amended - BC-08-13-14-C