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Legislative Reference Office**

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Memorandum

TO: Legislative Operating Committee
FROM: Jo Anne House, Chief Counsel
Candice E. Skenandore, Legislative Analyst
DATE: May 20, 2015
RE: Investigative Leave Policy Amendments: Public Meeting Comment Review

On April 30, 2015, a public meeting was held regarding proposed amendments to the Investigative Leave Policy (Policy). Amendments to the Policy include:

- Remove language that states that investigative leaves do not apply to investigations regarding appeals of disciplinary actions or employee complaint investigations.
- Reduce how long an employee can be placed on investigative leave, this timeframe has been reduced from 30 calendar days to 15 calendar days.
- Reduce how long an employee's investigative leave can be extended, this timeframe has been reduced from 30 calendar days to 15 calendar days.
- Require the employee's supervisor to notify the employee when to return to work and/or the disciplinary action that will be taken.
- Amend the appeal process, only allowing the employee to appeal a disciplinary action that arises from and investigation.

This memorandum is submitted as a review of the oral and written comments received during the public meeting process. The public meeting draft with comments, as well as the comments received, have been attached for your review.

Comment 1. Multiple Investigations when allegations include criminal or licensing issues.

From line 75-82 of the analysis: This Policy says that the employee's supervisor and/or area manager is responsible for completing the investigation [See 7-1]. The Policy then says that if the allegation includes criminal actions or actions that may affect licensing, that the investigation may be completed by an appropriate agency [See 7-2]. This could be interpreted that if allegations involve criminal or licensing issues that two investigations are conducted, one by the supervisor and/or area manager and one by an appropriate agency. The LOC may want to consider clarifying whether or not two investigations will occur when an allegation involves criminal or licensing issues.

Barb Kolitsch: The other thought that I have is in partial agreement with Candace's comment below regarding two investigations going at the same time. In some cases, such as a case HRD had many years ago, and what I say in training is that a supervisor shouldn't put someone on investigative leave waiting for a conviction if they have enough evidence to terminate. If they do need investigative leave to conduct their own investigation, do so, and then follow the sequence of supervisor "completing" the investigation to the best of their ability.

A generic example such as this...employee's purse is stolen at work. Camara's in Skenandoah show clearly that Jim Bob stole the purse. Why would we wait for a conviction of theft before we terminated? When the Police go to Jim Bob's house, they find the stolen purse in his car. So, in this type of situation, no investigative leave would be needed because we have the evidence to terminate, and the theft investigation and case may not go to court until months later.

Response

It is possible that a supervisor may be reviewing actions that affect employment and licensing or criminal activity. However, the employment related investigation does not depend on the licensing or criminal investigation to be concluded. It is possible that a supervisor may find an action to be in violation of employment policies that do not rise to a criminal action and may have no bearing on a license. Further, although this is less likely, an action may be criminal or in violation of a license and have no bearing on the employment environment. In the event the non-work related action which results in a criminal conviction or a license suspension or revocation, then the supervisor may need to take additional employment related action. Recommendations have been made to revise section 7-2 to address this comment.

7-2. If the allegations against the employee include criminal actions, or actions that may affect licensing, the supervisor shall conclude the employment related investigation without waiting for the results of a criminal or licensing investigation ~~investigations may be completed by an appropriate agency, including but not limited to: Police Departments, District Attorneys, Oneida Security, the Oneida Gaming Commission, and Social Services.~~

Comment 2. Comment on HRD Manager's Role.

5-1. This leave, or an extension of this leave, shall only be used when an employee's supervisor receives prior approval from the Human Resources Department Manager or his or her designee and:

- (a) their Division Director; or
- (b) if there is no Division Director, the person at the highest level of the chain of command.

5-2. If the Human Resources Department Manager of his or her designee and the Division Director or his or her equivalent do not agree with placing the employee on investigative leave, then the final decision shall rest with the Human Resources Department Manager or his or her designee.

Mike Debraska: I just want to renew what I had stated earlier at the April 3rd LOC meeting, Brandon, which was, I think, too much power is being vested in the HR Manager to determine a lot of these.

Response

The Human Resources Department Manager is reviewing initial information provided by the supervisor. They are then weighing the needs of the employer to conduct an unimpeded investigation versus the needs of the employee to continue working and earning a paycheck during the investigation process. The needs of the employer are balanced by meeting two criteria – first, limiting investigative leaves to those occasions where the employee could alter or destroy

evidence related to the investigation, and second, by limiting the amount of time in which the investigation must be conducted. The Human Resource Department Manager's opinion is limited and objective – you either meet the criteria or you do not. No amendments to the language are recommended.

Comment 3. Comment on Investigator(s) and Reports

7-1. The employee's supervisor and/or area manager shall be responsible for completing the investigation. If the employee being investigated reports directly to the Oneida Business Committee, the Tribal Equal Employment Opportunity Officer shall conduct the investigation.

7-2. If the allegations against the employee include criminal actions, or actions that may affect licensing or background eligibility, the investigations may be ~~completed~~ conducted by an appropriate agency.

7-3. The person(s) conducting an investigation shall prepare a written report that shall include the findings of the investigation, and provide a copy of the written report to the employee and, if someone other than the employee's supervisor conducts the investigation, a copy of the written report shall be provided to the employee's supervisor.

(a) If the employee's supervisor conducts the investigation, the written report shall inform the employee when to return to work if applicable and/or of what disciplinary action will be taken against the employee based on the report.

(b) If someone other than the employee's supervisor conducts the investigation, within forty-eight (48) hours of receiving the written report, the supervisor shall complete the investigation by determining any corrective actions needed, inform the employee in writing when to return to work if applicable, and/or inform the employee of any applicable ~~what~~ disciplinary action will be taken against the employee based on the report.

Barb Kolitsch: I made recommended edits in the document via strikethrough deletions and red font additions. I think that if an "outside" agency does an investigation, it's not their decision, nor can they take the action, so they can't "complete" the process. I say in training that the investigation isn't closed until the supervisor takes all the required action needed, which can include updating sop's and communication to the "need-to-know's." The supervisor has to take action, so I said that the outside agency conducts the investigation and the supervisor completes the investigation through the actions they take based on the investigation findings.

Response

The recommendations by the Human Resources Department clarify sections 7-1 and 7-3. It is recommended that those amendments be included. It is recommended that the response to Comment 1, above, be utilized instead of the recommendation proposed by the Human Resources Department.

Conclusion

There was a comment received at the public meeting and comments received in writing which the LOC may want to consider incorporating into the Policy as appropriate. After the LOC reviews the comments and provides direction as to any changes necessary based on the comments, the draft and analysis should be updated and may be prepared for OBC consideration.