



Employment Law: Corrective Actions and the Grievance Process

By the Legislative Operating Committee

The Legislative Operating Committee and the Oneida Business Committee have made the development and adoption of a new Employment Law one of their top priorities. The Legislative Operating Committee has identified the importance of understanding the Employment Law and the Oneida Employee Handbook before presenting to the General Tribal Council for a vote. The Legislative Reference Office has been directed to present informational articles regarding the Employment Law and Handbook. In the last Kalihwisaks, we presented an overview of the Employment Law's limited use of at-will employees. This article focuses on the updated corrective action and grievance process.

The Oneida Employee Handbook (the "Handbook") provides which corrective actions are available and the progressive order for issuing corrective actions. Serious misconduct may justify deviating from the expected progressive order. The available corrective actions are written warnings, suspensions

and termination with progression recommended in that order; this is the same as the current practice under the Personnel Policies and Procedures. The Handbook also includes alternative dispute resolution and employee assistance programs as other non-corrective action tools available to supervisors that may be included as a requirement in a corrective action.

Some changes have been made to suspension and termination requirements, but written warnings remain unchanged. The changes to suspensions include a cap providing that suspensions may not exceed forty (40) hours and, based on legal payment requirements for salaried employees, require that suspensions of salaried employees must be in full workday increments and be limited to serious misconduct. As for terminations, the current policy allows for termination for three (3) accumulated corrective actions within a twelve (12) month period and interprets the actual termination to be the fourth infraction. The new Handbook clarifies that termination itself is the third corrective action within a twelve (12) month period and requires, instead of allows, termination so that this provision is applied fairly to all employees. Lastly, as discussed in

depth in our last article on employment at-will, the Employment Law and Handbook allow the limited group of at-will employees to be terminated at any time and for any reason.

The current practice requires HRD's Equal Employment Officers to review all suspensions and terminations before they are issued to an employee. The Handbook strengthens this process by requiring supervisors to have a written certificate of procedural compliance from an Equal Employment Officer prior to issuing a suspension and termination. Without the certificate, the suspension may not be issued. Further, the revised employee protection plan included in the Handbook allows an Equal Employment Officer to deny a certificate of procedural compliance if he or she deems the corrective action to be retaliation.

The grievance process for contesting a corrective action or any other supervisor action that an employee considers to be an adverse employment action or deprivation of an equal employment opportunity has remained largely the same. We summarize it below.

The first step required to contest a supervisor's action is for the employee to request reconsideration of the supervisor's action to the review-

ing supervisor, which is the person responsible for overseeing the employee's supervisor. A request for reconsideration may be made for any corrective action or other action the employee considers being an adverse employment action or deprivation of an equal employment opportunity. The reviewing supervisor must issue a decision to uphold, modify or reverse the supervisor's action. If the action is modified or reversed, the supervisor may receive a corrective action or be required to complete updated supervisor training. This is the same level of review that the Personnel Commission identifies as the first level of review currently available: appeal to the area manager. The only difference is improved accountability holding management responsible for inappropriate disciplinary actions and the change in title from "appeal" to "request for reconsideration." We chose to rename this step in the grievance process because reviewing supervisors are not conducting formal appeals as there is no hearing process involved at this level. For that reason, "request for reconsideration" is a more accurate reflection of what is occurring at the first level internal to Tribal management.

An employee may file a formal appeal to the

Administrative Hearing Court (AHC), which is in the process of being developed, if he or she disagrees with a reviewing supervisor's decision regarding an alleged adverse employment action, deprivation of an equal employment opportunity or a suspension or termination. We chose to limit appeals to only suspensions and termination because they are the only corrective actions that result in a loss of income for an employee. This largely mirrors the second level of appeal currently available: appeal to the Personnel Commission.

The largest change at this level is replacing the Personnel Commission with the AHC. Moving employee appeals to the AHC is in the best interest of both the Tribe and the employee because it will resolve appeals much faster and provide a legally experienced and impartial hearing body. Further, the AHC will also hear most matters currently heard by Tribal boards, committees and commission, so the transfer to the AHC will promote a consistent hearing process Tribe-wide.

In an opinion presented in a previous edition of the Kalihwisaks by the Personnel Commission, they were correct in stating that our earlier draft of the Employment Law did not allow appeal of

adverse employment actions. This was not intentional and the Employment Law has since been revised. Further, while it may seem to limit appeal rights by only allowing appeal of corrective actions that result in a loss of earnings (suspensions and terminations only), the Handbook specifically allows the AHC to consider whether any previous corrective action that led to the termination or suspension under appeal so long as the Employee requested reconsideration of it from his or her reviewing supervisor. The change in policy does not prevent employees from appealing written warnings, it just requires the employee to wait to appeal until he or she has been financially harmed by the supervisor's unjustified action. This policy change minimizes conflict in the employment environment while saving the Tribe and the employee the time and money spent disputing corrective actions that have no financial harm on employees.

If an employee asserted that the supervisor's action amounted to a deprivation of an equal employment opportunity in his or her appeal to the AHC, the Employee may appeal the AHC's decision to the appellate court of the Judiciary. This is a

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Judiciary. This is a policy change which only allows supervisor actions that are discriminatory the second level of appeal in the courts because these are the most serious allegation an employee can make against a supervisor. In all other circumstances, the decision of the AHC is final.

The AHC will be held to the standards set by the General Tribal Council in

the Judicial Cannons so the transfer to the AHC will promote consistent and fair decision making by judges held to higher standards than the Personnel Commission. By providing a more skilled and trained hearing body, we are able to reinstate confidence in appeal decisions and eliminate the need for so many levels of appeal that take from the Tribe's limited re-

sources.

Lastly, in response to the Personnel Commission's concern that the Oneida Judiciary's filing fees may be too burdensome on employees, we revised the Employment Law to allow those fees to be waived for Tribal employees appealing employment related matters.

Please keep in mind that the Employment Law is still in draft form,

so it remains subject to change as the drafting team continues to receive valuable input from the Tribe's employment base and membership. A current draft of the Employment Law and additional information is available on the Oneida

Register's homepage at <https://oneida-nsn.gov/Register/>. Please watch for upcoming meetings to be scheduled discussing the proposed Employment Law and the Oneida Employee Handbook and for our next article on the Employment Law, which

will discuss the hiring process. If you have any questions or comments regarding the Employment Law, please contact the Legislative Reference Office by e-mail at LOC@oneidanation.org or by telephone at 920-869-4375.



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