

BOARD OF REGENTS BRIEFING PAPER

AGENDA ITEM TITLE: Amendments to NSHE Code to Authorize Furloughs in Response to COVID-19 Emergency Budget Shortfall

MEETING DATE: May 29, 2020

2. BACKGROUND & POLICY CONTEXT OF ISSUE:

On April 3, 2020, the Governor's Office of Finance made an emergency request that the Board of Regents, along with other State entities, submit alternative plan to achieve up to six (6) percent, ten (10) percent, and fourteen (14) percent budget cuts for fiscal year 2021, which begins on July 1, 2020. The requested cuts were directly related to significant anticipated budget shortfalls caused by the COVID-19 pandemic.¹

On April 10, 2020, and in response to the request from the Governor's Office of Finance, the Board of Regents held an emergency Special Meeting, where the Board approved the submittal of plans that, among other budget cuts, included the possibility of either a one-half (½) furlough day per month or a one (1) furlough day per month for non-classified academic and administrative faculty, as an across-the-board emergency salary savings measure. Implementation of furloughs was discussed as a means to avoid the possibility of future faculty layoffs or other salary reductions.

The current provisions of the NSHE Code that govern furloughs were drafted over a decade ago and were tailored to respond to the Great Recession. More specifically, they were premised upon action by the Nevada Legislature, not the Office of the Governor. Moreover, they included options involving faculty layoffs and salary reductions, in addition to furloughs, and were largely contingent upon the Board declaring a 'fiscal emergency.'

Unlike the Great Recession, the fiscal emergency that the Board of Regents, along with all other State entities, currently confronts due to the COVID-19 pandemic, has emerged rapidly and with little advanced warning. Contracts for academic and administrative faculty renew and become effective for fiscal year 2021 on July 1, 2020. The NSHE Code is incorporated into every employee contract. Accordingly, a need for immediate action by the Board to comply with gubernatorial directives, and to mitigate a possible greater budget shortfall in the future, has emerged which requires amendment to current Code provisions to allow the possibility of furloughs being required of faculty during the 2021 fiscal year.

¹ It is relevant that on May 11, 2020, Governor Sisolak declared that the State of Nevada was experiencing a fiscal emergency due a negative disruption in commerce and projected revenue shortfalls due to the COVID-19 pandemic.

3. SPECIFIC ACTIONS BEING RECOMMENDED OR REQUESTED:

The following three combined emergency amendments are being recommended in this agenda item:

- Amend Title 2, Chapter 1, Section 1.1.(i) to remove the requirement of "financial exigency" to the definition of the term furlough.
- Amend Title 2, Chapter 5, Section 5.4.4 to include action by the Office of the Governor or the Board of Regents, along with action by the Nevada Legislature, as being sufficient to authorize the implementation of furloughs and incorporate them into all faculty contracts by July 1, 2020.
- Adopt a new subsection in Title 2, Chapter 5, Section 5.4.12 that will allow the Board to authorize NSHE institutions and/or System Administration to implement furloughs, as directed by the Board, during fiscal year 2021. This new subsection also sets forth protocols governing notice to faculty members of a decision to implement furloughs and a limited process for faculty members to request reconsideration of the decision.

4. IMPETUS (WHY NOW?):

Employee contracts for fiscal year 2021 will become effective on July 1, 2020, and the Board of Regents is currently awaiting a response the Governor’s Office of Finance on its April 10 budget-savings proposal. Making this Code amendment now provides all faculty members with 30 days of advanced constructive notice that changes to the Code are being made that may affect the underlying terms of their contracts for fiscal year 2021. Making this Code amendment now will also allow the Board of Regents flexibility and the ability to focus conversations regarding the possibility of furloughs and other budget cuts at a future meeting.

Moreover, amendments to the Code typically require 30 days, pursuant to Title 2, Chapter 1, Section 1.3.3.(a), between the time the amendments are first proposed and time they are adopted by the Board. However, due to the emergency nature of the budget crisis and the impending date of July 1, 2020, this matter is being brought before the Board as an emergency Code amendment pursuant to Title 2, Chapter 1, Section 1.3.3.(b). Accordingly, this proposed Code amendment, if approved by the Board, will become effective immediately for 120 days. To become permanent, the amendment will need to be subsequently re-approved by the Board after 30 days has passed.

5. CHECK THE NSHE STRATEGIC PLAN GOAL THAT IS SUPPORTED BY THIS REQUEST:

X Not Applicable to NSHE Strategic Plan Goals

INDICATE HOW THE PROPOSAL SUPPORTS THE SPECIFIC STRATEGIC PLAN GOAL

N/A

6. BULLET POINTS TO SUPPORT REQUEST/RECOMMENDATION:

▪The Code amendments allow the Board of Regents to be responsive to gubernatorial directives and mitigate budget shortfalls created by the COVID-19 pandemic without declaring a fiscal exigency or awaiting further direction from the Nevada Legislature.

▪Furloughs authorized pursuant to these amendments are intended to be temporary and are emergency actions in response to the COVID-19 pandemic. These Code amendments are limited and only authorize the implementation of furloughs during fiscal year 2021. Procedures for layoffs outside of current Code provisions are not impacted. While it is possible the need for furloughs will extend beyond fiscal year 2021, extending the furloughs beyond fiscal year 2021 would require subsequent Board action.

▪Other than authorizing the possibility of furloughs for academic and administrative faculty in fiscal year 2021, no other Code provisions are impacted. It does not disturb existing procedures governing other matters, such as notices of non-reappointment and grievance processes.

▪The new amendments were drafted and modeled after existing Code provisions. Faculty members retain rights to notice and the opportunity for limited reconsideration procedures, if they are aggrieved by a furlough decision based on a mistake of fact or without a reasonable basis.

▪Code amendments allow policy flexibility for the Board on how to implement furloughs, and what direction it may give to NSHE institutions and/or System Administration.

7. POTENTIAL ARGUMENTS AGAINST THE REQUEST/RECOMMENDATION:

While there may be debate on what furlough policy should ultimately be enacted by the Board, no reasonable arguments have been identified as to why these Code amendments should not be approved.

8. ALTERNATIVE(S) TO WHAT IS BEING REQUESTED/RECOMMENDED:

N/A

9. RECOMMENDATION FROM THE CHANCELLOR’S OFFICE:

The Chancellor’s Office recommends that the Board approve the amendments as drafted.

10. COMPLIANCE WITH BOARD POLICY:

Consistent With Current Board Policy: Title 2, Chapter 1, Section 1.3.3.(a), (b)
 Amends Current Board Policy: Title 2, Chapter 1, Section 1.1.(i) (Amends)
Title 2, Chapter 5, Section 5.4.4 (Amends)
Title 2, Chapter 5, Section 5.4.12 (New Section)
 Amends Current Procedures & Guidelines Manual: N/A
 Other: These Code amendments are being brought as an emergency enactment that is valid for 120 days pursuant to Title 2, Chapter 1, Section 1.3.3.(a). To become permanent, pursuant to Title 2, Chapter 1, Section 1.3.3.(b), the Board will need to re-approve the Code amendments after 30 days has passed from May 29, 2020—the Board’s Special Meeting—and within 120 days.
 Fiscal Impact: Yes ___ No
Explain: _____

HANDBOOK REVISIONS: Title 2 of the NSHE Code

Amendment Title 2, Chapter 1, Section 1.1.(i)

Amendment Title 2, Chapter 5, Section 5.4.4

New Section Title 2, Chapter 5, Section 5.4.12

Additions appear in ***boldface italics***; deletions are [~~stricken~~ and bracketed]

1.1 Definitions

...

(i) "Furlough" means a leave of absence without pay mandated by the employer [~~because of financial exigency~~].

...

5.4.4 Employment Contracts and Interpretation. An initial employment contract shall not be binding until executed, ***either*** electronically or by any process that demonstrates the acceptance of its terms and conditions by both the appointee and the appointing authority, and approved as may be provided in this NSHE Code. Except as otherwise provided in Code Section 5.4.2, and if the employment contract has not been terminated or expired as provided in the terms of the contract and notice of non-reappointment or termination has not been issued, subsequent employment contracts shall renew, without any action required of the appointing authority or the appointee, on July 1 and end on the following June 30th. The renewed employment contract, if any, shall include any merit increases awarded to the employee, cost of living or other compensation adjustments funded by the Nevada Legislature, as well as any ***furloughs***, unpaid leave or salary reductions imposed by the Nevada Legislature, ***Office of the Governor, Board of Regents, or any combination thereof***. Any other amendments of the terms and conditions in an employment contract shall be accepted by the employee, who shall be deemed to have accepted the amended terms and conditions by any of the following means: (i) an electronic or other process which demonstrates acceptance of the amended

and renewed contract; (ii) the cashing of a payroll check during the term of the renewed contract; or (iii) the failure to refund within seven calendar days the entirety of any payroll check electronically deposited into the employee's account during the term of the renewed contract. All employment contracts are subject to and interpreted in accordance with Nevada law and Board of Regents' Code.

.....

5.4.12 Emergency Furloughs Due to COVID-19 Budget Shortfalls

Notwithstanding any other provision in Title 2 of the NSHE Code or the Board of Regents Handbook, and to comply with emergency directives from the Office of the Governor or the Nevada Legislature to reduce budgetary expenditures and costs during any fiscal quarter, year or biennium due to the COVID-19 pandemic, the Board of Regents may authorize any NSHE institution and/or System Administration and its units to implement one or more monthly furlough days and/or half days for academic and administrative faculty and to reduce a faculty member's salary to reflect the furlough day(s) for all or any portion of fiscal year 2021, without the declaration of a financial exigency, the issuance of a notice of non-reappointment, or any other procedural requirement or review as set forth in this Chapter or any other provision of the Code or Handbook.

(a) Notice

1. A notice of furloughs shall be given under this Section to faculty members, either individually or collectively, and no less than ten (10) calendar days before the notice becomes effective. The time frame for notice pursuant to this Section may be shortened if funding is not reasonably available to continue making payments during this ten (10)-day notice period. Notice may be properly delivered via electronic means to the faculty member's work email account, hand delivered, and/or mailed through the US Postal Service to the faculty member's home address. If notice is mailed through the US Postal Service, the ten (10)-day notice period begins to run the day after mailing.

2. The notice shall provide the faculty member with a reasonable statement of the basis for the decision to furlough and a description of the manner in which the decision was arrived, including the date it was made and the information relied upon. The notice shall also inform the faculty member of the right to reconsideration of the decision, the procedures governing reconsideration, and the contact information for whom a request for reconsideration should be made.

(b) Process for Reconsideration

1. A faculty member may request reconsideration of the decision to impose one or more furlough days on the faculty member within five (5) calendar days of receiving notice of the furlough. Timely requests for reconsideration shall be limited to the issue of whether there is a reasonable basis to support the decision or a mistake of material fact was relied upon as it relates to the individual faculty member. There shall be no reconsideration of the Board's policy decision to authorize or implement furlough day(s) pursuant to this Section or due to a personal financial hardship. A request for reconsideration will not stay implementation of a decision to implement one or more furlough day(s) for a faculty member, and the faculty member must comply with the furlough decision while the request is pending.

2. In the event decisions are made to impose furloughs under this Section, the President of each NSHE institution, as applicable, shall establish one or more reconsideration committees to review an individual faculty member's request for reconsideration. The President shall determine the number of persons to serve on each committee and their terms of service, designate one person of each committee to serve as the chair, and choose one half of the remaining membership of each committee. The Faculty Senate of the institution shall determine the remaining one half of the committee membership.

3. A request for reconsideration of a decision to furlough an individual faculty member must be timely submitted to the President, together with the reasons,

arguments, and documentation supporting the request for reconsideration. The President shall send a request for reconsideration, together with a copy of the notice of furlough, to the review committee. The institution may respond to the request for reconsideration through an administrator designated by the President. A response must be submitted to the review committee and the faculty member no later than three (3) calendar days before the reconsideration hearing.

4. The review committee shall hold a hearing on the request for reconsideration within fifteen (15) calendar days of its receipt of the request or, given the number of requests that may be received, as soon thereafter as reasonably feasible. The hearing shall be informal and non-adversarial in nature. The committee shall have the discretion to consolidate multiple hearings. The hearing shall be recorded by audio and a copy of the audio recording must be provided to the faculty member upon request.

5. A faculty member requesting reconsideration may have an advisor present at the hearing. Evidence presented at the hearing must possess reasonably probative and material value and be relevant to the employment decision. The faculty member requesting reconsideration has the burden of showing that the decision to implement a furlough on the faculty member cannot be sustained.

6. The institution shall have an opportunity at the hearing through its representatives to respond to the contentions of the faculty member requesting reconsideration or to otherwise correct any erroneous or misleading information presented to the review committee.

7. The review committee shall forward its written recommendation to the President on the issue(s) presented by the request for reconsideration within ten (10) calendar days after the conclusion of the hearing. The President shall make a final decision within five (5) calendar days after receipt of the recommendation.

The President's decision shall be final and shall be sent to the faculty member requesting reconsideration.

8. The reconsideration provided to faculty members by this Section for the imposition of one or more furlough day(s) shall be the exclusive process of review. It is not applicable to the issuance of notices of non-reappointment of employment or termination set forth in other provisions of the Code or Handbook. All notices or other documents served pursuant to this Section may be done so via email, hand delivered, and/or by US Postal Service mail.