

BOARD OF REGENTS
BRIEFING PAPER

Agenda Item Title: Handbook Revision, Title 4, Chapter 3, new Section 49--Fitness for Service
Meeting Date: September 4-5, 2014

2. BACKGROUND & POLICY CONTEXT OF ISSUE:

In 2011, Vice Chancellor of Administrative and Legal Affairs Bart Patterson constituted the Code Review Task Force, naming representatives from each of the NSHE institutions to the Task Force. The Task Force's work was to review Code provisions and make recommendations for amendments and new sections. As part of this review, it was noted by Task Force members that there are instances when a professional employee appears to be unable to perform the essential functions of the position or poses a threat to health and safety. In these instances, the employee should be placed on leave pending a medical examination and a return to work certification. There is currently no NSHE policy or procedure applicable to professional employees in such situations. The employer shall pay for the cost of the initial medical examination(s). If the medical examination determines that the employee is unable to perform the essential functions of the position or poses a significant threat to health and safety, then the employee shall remain on leave until he or she obtains a return to work certification from a health service provider. The employee is responsible for the cost of the return to work certification.

3. SPECIFIC ACTIONS BEING RECOMMENDED OR REQUESTED:

Vice Chancellor for Legal Affairs, Brooke Nielsen requests approval of new Board of Regents Policy, Title 4, Ch. 3-Professional Staff, new Section 49—Fitness for Service, which allows the appointing authority (or designee) of a professional employee to place an employee on leave when the employee poses an safety threat, or due to illness or injury, is not able to perform the essential functions of his or her position.

4. IMPETUS (WHY NOW?):

The Task Force has completed its work on this proposed addition to the Board of Regents Policies. The proposed policy has been reviewed by institution Presidents, General Counsels, Human Resources Advisory Council and Faculty Senate Chairs, and has been revised based upon input received.

5. BULLET POINTS TO SUPPORT REQUEST/RECOMMENDATION:

- There have been instances where a professional employee is not able to perform the essential functions of the position or poses an imminent threat to the health and safety of others.
- In these instances, the employee either is not aware of the condition or is unwilling voluntarily to acknowledge it and to seek medical care.
- In the absence of a specific policy or procedure, supervisors are uncertain as to the proper course of action.
- The proposed policy will help the employee obtain appropriate medical care and encourages return to work.
- The adoption of this policy will provide a reasonable process for handling these unusual and infrequent situations where there is a threat to health and safety of employees in the work place, and/or where an employee is not able to perform the

essential functions of the position.

- The proposed policy protects the employee's rights while recognizing that there may be situations where the employee should be placed on leave pending a return to work certification.
- The proposed policy provides the following:
 - An employee may be placed on leave by the appointing authority, if the employee:
 - poses a significant risk of substantial harm to health and safety that cannot be reduced or eliminated with or without reasonable accommodation; and/or
 - due to known or suspected illness or injury, is unable to perform the essential functions of the position, with or without reasonable accommodation.
 - Consultation with Human Resources, institution counsel and meeting with the employee required before employee is placed on leave.
 - Employer may withdrawal consent to be on premises or use equipment or resources pending return to work.
 - Medical examination, paid for by the employer, to determine whether the employee is fit for service, must take place.
 - If the employee is found to be fit for service, all leave is restored and the employee paid for any unpaid leave taken, unless the employee caused an unreasonable delay.
 - Process for return to work certification; employee pays for initial return to work certification.
 - Confidentiality of records.
 - If the employee is found to be unfit for service, the appointing authority may take appropriate action which may include disciplinary action in accordance with NSHE policy and applicable law.
 - Determination of whether an employee is fit for service must be made within a reasonable time after placing the employee on leave.

6. POTENTIAL ARGUMENTS AGAINST THE REQUEST/RECOMMENDATION:

None known.

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

Do not add this new section to the Policies.

8. COMPLIANCE WITH BOARD POLICY:

- Consistent With Current Board Policy: Title # _____ Chapter # _____ Section # _____
- Amends Current Board Policy: Title # 4 Chapter # 3 new Section # 49
- Amends Current Procedures & Guidelines Manual: Chapter # _____ Section # _____

Other:

Fiscal Impact: Yes _____ No X

Explain: The fiscal impact is anticipated to be minimal—less than \$25,000.

**PROPOSED REVISIONS – Board of Regents HANDBOOK
TITLE 4, CHAPTER 3, new SECTION 49
Fitness for Service**

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

Section 49. Fitness for Service.

1. Policy Statement.

a. NSHE is committed to providing a safe workplace. In order to provide a safe work environment, employees must be able to perform their job duties in a safe, secure, productive, and effective manner, and remain able to do so throughout the entire time they are working. Employees who are not fit for service may present a safety hazard to themselves, to other employees, to students, or to the public. All employees are required to report to work fit for service and able to perform their job duties in a safe, appropriate and effective manner. This policy applies to all full-time and part-time professional employees. This policy will be interpreted and applied so as to conform to applicable law, including the Americans with Disabilities Act, the Rehabilitation Act, HIPPA and the Family and Medical Leave Act.

b. Definitions.

- i. “Fit for service” means able to perform the duties of the job in a safe, secure, productive, and effective manner, with or without reasonable accommodation.*
- ii. “Health service provider” is a doctor of medicine or osteopathy, dentist, podiatrist, psychiatrist, clinical psychologist, optometrist, nurse practitioner, physician assistant, nurse-midwife, or a licensed clinical social worker or other health care practitioner who is authorized to practice in the state of Nevada or licensed in the state in which the health service provider resides or works.*
- iii. “Essential Functions of the Position” generally includes the required major duties and responsibilities of the position, specific tasks associated with the position, and physical, mental and environmental demands of the position, which may be set forth in writing such as a role statement, position description or similar document.*

2. Placing an Employee on Leave and Requiring Medical Examination and Return to Work Certification.

a. Placing an Employee on Leave. An appointing authority or designee, after consultation with the institution Human Resources department and institution or unit counsel, may require an employee to take paid sick leave, annual leave or unpaid leave and require the employee to undergo a medical examination

and return to work certification if, based upon a written recommendation from the employee's supervisor, the employee:

- i. Poses a significant risk of substantial harm to the health and safety of the employee or others that cannot be eliminated or reduced with or without reasonable accommodation; and/or*
- ii. Due to a known or suspected illness or injury is not able to perform the essential functions of his or her position with or without reasonable accommodation.*

The employer will consider whether the mandatory leave also qualifies as Family and Medical Leave which may only be granted if the employee is otherwise eligible for such leave.

- b. Meeting with Employee and Documentation. The employer shall document the reason for placing an employee on leave and shall provide the employee with a copy of such documentation including a copy of this policy. The employer shall meet with the employee before placing him or her on leave to explain the reasons for the action, unless such a meeting poses a significant threat of substantial harm to the health or safety of the employee, his or her fellow employees, students or the public or unless the employee refuses to attend the meeting. If the meeting is not held as provided under this subsection, the employer shall inform the employee in writing of the reasons the meeting was not held.*
- c. Access to Premises, Equipment and Resources. Whenever there is reasonable cause to believe that life, limb, property or the maintenance of order are at risk, the appointing authority or designee may withdraw consent for the employee to enter or remain on the institution premises and to use institution equipment or resources until the employee is returned to work following the initial medical examination or following a return to work certification. The reasons for the withdrawal of such consent must be given to the employee in writing at the time of the meeting required in subsection b. above.*

3. Initial Medical Examination and Return to Work Certification.

- a. Initial Medical Examination. If the appointing authority places the employee on leave pursuant to subsection 2 above, the appointing authority or designee shall require the employee to undergo an initial medical examination performed by a health service provider selected by the employer to determine whether the employee:*

- i. poses a significant risk of substantial harm to the health and safety of the employee or others that cannot be reduced or eliminated with or without reasonable accommodation; and/or*
- ii. due to a known or suspected illness or injury is not able to perform the essential functions of his or her position with or without reasonable accommodation.*

Employees are required to cooperate fully with the selected health service provider and must sign consent forms for both the medical examination and the communication of the results to the employer. The health service provider shall report the results of the medical examination in writing to the employer and employee on a form provided by the employer. The employer shall provide the health service provider with a written description of the essential functions of the employee's job, as defined in subsection 1(b)(iii) above. The final decision on whether a provider's medical examination determination will be accepted lies with the appointing authority or designee after consultation with Human Resources and institution or unit counsel. A second independent health service provider medical examination may be required by the employer for reasonable cause documented in writing. The employer shall pay the costs of the medical examination(s). The determination of whether an employee is fit for service should be completed within a reasonable time of the employee being placed on leave in consideration of all of the relevant facts and circumstances.

- b. Return to Work Certification. If the medical examination(s) determines that the employee: i. poses a significant risk of substantial harm to the health or safety of the employee or others that cannot be reduced or eliminated with or without reasonable accommodation; and/or ii. due to a known or suspected illness or injury is not able to perform the essential functions of his position with or without reasonable accommodation, then the employee shall not return to work, unless and until he or she obtains a written return to work certification from a health service provider on a form provided by the employer. The employee must provide the health service provider the essential functions of his or her position as defined in subsection 1(b)(iii) above and a copy of the written determination(s) from the initial medical examination(s). The final decision on whether a health service provider's return to work certification will be accepted lies with the appointing authority or designee after consultation with Human Resources and institution or unit counsel. The employee is responsible for the cost of the return to work certification.*

The employer may, for reasonable cause documented in writing, require a second return to work certification¹ by a health service provider, chosen and paid for by the employer. The employee is required to cooperate fully with the selected health service provider and must sign consent forms for both the return to work medical examination and the communication of the results to the employer. If the second return to work certification concurs with the first certification and has delayed the employee's return, the additional leave taken will be restored and/or the employee will be reimbursed for any unpaid leave.

- 4. Fitness for Service Records. Records created pursuant to this policy will be treated as confidential medical records and be kept separate from existing department and*

¹ Note: A second return to work certification may not be required if the employee is certified to return to work while in FMLA status.

personnel files; this information can be disclosed in accordance with the provisions of the Code, Title 2, Ch. 5, Sec. 5.6.

- 5. Restoration/Payment for Leave. If, as a result of the medical examination(s) provided for in subsection 3.a above, the appointing authority or designee concludes that the employee is fit for service, any paid leave required to be taken by the employee shall be restored, except as provided herein. If unpaid leave was required, the employer shall pay the employee for those days of unpaid leave, unless the employee caused an unreasonable delay in obtaining the medical examination. If the employee caused an unreasonable delay, as determined by the employer and documented in writing, the employee shall not be paid nor have paid leave restored for the period of the delay.*

- 6. Finding that the Employee is not Fit for Service. If the appointing authority or designee determines that the employee is not fit for service in accordance with subsection 3.a above, the employer shall take appropriate action, which may include but is not limited to disciplinary action, in light of the particular circumstances, and consistent with NSHE policy and applicable law.*