



## Suspension Pending Investigation or Criminal Proceeding ESMT Guide

The DOP's *Administrative Rule, W. VA. CODE R. §143-1-1 et seq.* was revised effective July 1, 2016, to permit employees to use annual leave (AL) while on non-disciplinary suspension pending investigation or outcome of criminal proceedings. Specifically, the Rule provides, in pertinent part:

12.3.b. Non-disciplinary Suspension. An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Upon completion of the investigation or criminal proceeding, the appointing authority shall:

12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and,

12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension.

### Initiating a Non-disciplinary Suspension

When it is determined an investigation will be performed or the agency becomes aware the employee is the subject of an indictment or other criminal proceeding, the employee should be orally notified of the allegations and placed on a non-disciplinary suspension without pay pending the outcome of an investigation or criminal proceeding. The employee may elect to use accrued AL during the period of suspension.

Written notice containing the specific reason(s) for the suspension must be issued to the employee within three (3) working days of the oral notice of suspension. The written notice should document if the employee has chosen to use accrued AL during any period of the non-disciplinary suspension.

Upon suspending the employee, the agency must enter an Employee Status Maintenance Transaction (ESMT) implementing the Personnel Action (PACT) for an unpaid non-disciplinary suspension (SUSPD INV). The written suspension notice issued to the employee must be attached to the ESMT by the agency entering the transaction.



### **During the Period of Suspension**

The following guidelines shall apply when processing ESMT transactions:

1. At the employee's discretion, accrued AL may be used during the period of investigation or criminal proceeding.
2. If an employee chooses not to use AL or has insufficient AL to cover the period of the suspension, the agency must process a suspension pending investigation or criminal proceeding ESMT for unpaid non-disciplinary suspension (SUSPD INV).
3. If a holiday occurs during the period of non-disciplinary suspension, the employee must use AL for that day. If AL is restored, the employee will have AL restored for that day.

Further, an employee otherwise eligible for the holiday who was scheduled to work on the holiday prior to suspension, will not only receive pay for the holiday without charge to leave but is also entitled to observe the holiday on an alternate date as provided in the DOP *Administrative Rule*.

4. If the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, he or she does not receive tenure credit for any AL that was taken. When processing the TRSN (transition) ESMT, date and time of separation is the last day the employee physically worked or participated in interim work to participate in the investigation or predetermination conference for more than a de minimis period of time (i.e., 12 minutes). Please note an edit may need to be processed in KRONOS if the employee works less than 12 minutes.
5. If the employee was required to participate in the investigative process or predetermination conference for more than a de minimis period of time (i.e., 12 minutes), the interim work shall be documented on the progression dates calculator and attached to the leave return transaction (LVRTN). Only one LVRTN transaction is necessary to return an employee to work.

### **Upon Completion of the Investigation or Criminal Proceeding**

Immediately upon completion of the investigation, the agency must notify the employee of further action regarding their employment (i.e. dismissal, further suspension, return to work). If the agency determines the employee shall return to work, they must notify the employee to return to work on the next scheduled shift or workday. When notifying an employee, best practice would include notification by phone call, with a follow-up confirmation letter sent both certified and regular mail.

Absences beyond the period necessary to conduct the investigation or criminal proceeding are not eligible for retroactive wages or leave restoration. If for some reason the employee is unable or unwilling to return to work upon notification, and the agency desires to retain the employee, the agency may approve AL or a personal leave of absence without pay for the time between the date the employee was instructed to return and the employee's actual return to work.



Employees who fail to return after more than three (3) days of notification to return, may be dismissed for job abandonment as provided in 12.2.c. of DOP's *Administrative Rule*.

If the allegations are unsubstantiated, the employee will be returned to work and compensated for the period of suspension through restoration of AL and/or awarded back wages plus benefits, as applicable.

In the event the employee resigns upon notification that the investigation was unsubstantiated, the employee's pro-rated annual increment and terminal AL should be included in the settlement agreement authorizing retroactive wages and/or restoration of leave.

However, if the allegations are substantiated, in whole or in part, appropriate disciplinary action, up to and including dismissal, should be implemented. If it is determined disciplinary suspension without pay will be imposed, the employee may agree that all or part of the period of unpaid non-disciplinary suspension may be considered as fulfilling all or part of the imposed disciplinary suspension.

A settlement agreement is required to pay any retroactive wages. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid non-disciplinary suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.

The DOP's *Administrative Rule* 12.2.d. requires that when providing employment verification or reference for a dismissed employee, or an employee who resigns in lieu of dismissal, to another state agency or appointing authority the Agency must disclose that the employee's separation was due to dismissal, or resignation in lieu of dismissal, and that the employee did not leave employment in good standing and must comply with the disclosure requirements of W. Va. Code § 55-7-18a.

### **Resignation in Lieu of Dismissal**

When an employee resigns in lieu of dismissal, the DOP shall be notified so a determination may be made regarding the employee's eligibility for reemployment, consistent with 12.1.b. of the DOP's *Administrative Rule*, W. VA. CODE R. §143-1-1 *et seq.* The back-up documentation submitted with a TRSN should describe the circumstances under which the employee's dismissal was being considered and the reason provided by the employee for the resignation.

The following guidelines shall apply when processing ESMT transactions following the outcome of an investigation and non-disciplinary suspension.



## Processing ESMT Transactions

### 1) Suspension Pending Investigation– Unsubstantiated

- a. LVRTN – NSB: Comments on the Leave Return ESMT. (The Progression Date Calculator (PDC) should not include time spent on leave.)
- b. If the allegations are unsubstantiated, the employee will be returned to work and compensated for the period of suspension through restoration of AL and/or awarded back wages plus benefits, as applicable. AL will be restored, subject to the restrictions on maximum carry forward of AL as provided in the DOP *Administrative Rule*.
- c. In the event the employee does not return to work upon notification that the investigation was unsubstantiated, the agency needs to provide a letter to the employee notifying them of the results of the investigation. The letter must be attached to the pending TRSN document. Employee will receive tenure credit and leave accrual from the effective date of the suspension pending investigation through the date of determination.
  - i. Any time between the date the employee was notified of the investigation outcome through the date the employee resigns will require an ESMT to place the employee on an unpaid leave of absence. No tenure credit or leave accrual will be given during the unpaid leave of absence.

### 2) Suspension Pending Investigation – Substantiated/No loss in tenure

- a. LVRTN – (no part code): Enter for day of return. (The PDC should not include time spent on leave.)
- b. Letter to the employee detailing the outcome of the investigation and subsequent disciplinary action must be attached to the LVRTN transaction.
- c. Any AL paid during the suspension pending investigation must be paid back to the agency. Upon final payment, the employee’s AL will be restored, subject to the restrictions on maximum carry forward of AL as provided in the DOP *Administrative Rule*. Information regarding repayment of AL must be included in the letter to the employee regarding the outcome of the investigation.

### 3) Suspension Pending Investigation – Substantiated/Suspension Time Served

- a. PDC: Must enter an “Event” and comment.
- b. A new disciplinary suspension must be entered with the same effective date as the non-disciplinary suspension pending investigation.



- c. Any AL paid during the suspension pending investigation must be paid back to the agency. Upon final payment, the employee's AL will be restored. Information regarding repayment of AL must be included in the suspension for cause letter.
- d. LVRTN – (no part code): Enter for day of return.

**4) Suspension Pending Investigation – Substantiated/Partial Suspension Time Served**

- a. PDC: must enter an “Event” and comment. (Manual Entry should be used on the PDC to show the number of hours and scheduled days off the employee is to be docked.)
- b. A new disciplinary suspension must be entered with the same effective date as the non-disciplinary suspension pending investigation.
- c. Any AL paid during the suspension pending investigation must be paid back to the agency. Upon final payment, the employee's AL will be restored. Information regarding repayment of AL must be included in the suspension for cause letter.
- d. LVRTN – (no part code): enter for day of return.

**5) Suspension Pending Investigation – Substantiated/Three-day notice period**

- a. LVRTN – (no part code): Enter for day of return with comment.
- b. PDC: No entry for suspension pending investigation, must include notes.
- c. SUSPD – (relevant part code): Enter date listed on employee's suspension letter that provides required notice period.
- d. LVRTN – (no part code): Enter for day of return from disciplinary suspension.

**6) Separation while on Suspension Pending Investigation – Voluntary Resignation Accepted – Predetermination meeting occurred**

- a. Suspension pending investigation will be on PDC. Comment on both TRSN and final separation that employee resigned while under investigation.
- b. TRSN - ATE: Will be date of last predetermination meeting. (All predetermination meetings and suspensions must be indicated on PDC.)
- c. RESGN – (relevant part code): Day after TRSN date.
- d. Employee does not get tenure credit or leave accrual after last day of work.



**7) Separation while on Suspension Pending Investigation– Voluntary Resignation Accepted – No Predetermination meeting**

- a. Suspension pending investigation will not be on PDC. Comment on both TRSN and final separation that employee resigned while under investigation.
- b. TRSN - ATE: Will be for last day physically worked.
- c. RESGN – (relevant part code): Day after TRSN date.
- d. Employee does not get tenure credit or leave accrual after last day of work.

**8) Separation while on Suspension Pending Investigation– Dismissal**

- a. Suspension pending investigation on PDC.
- b. All time spent for predetermination/investigative meetings shown on PDC with Comments.
- c. TRSN - ATW: Last day physically worked or date of last predetermination/investigative meeting (whichever was last). Employee does NOT get tenure credit for suspension pending investigation.
- d. DISMS – (relevant part code): Effective fifteen (15) days from notification unless for Gross Misconduct (gross misconduct can be immediate or provide a notice period at agency discretion).
  - i. In the event the dismissal date is amended, agencies should comment on the ESMT as follows: “Amended effective date of dismissal/termination is MM/DD/YY”
- e. Employee does not get tenure credit or leave accrual after last day of work.

**9) Separation while on Suspension Pending Investigation– Resign in Lieu of Dismissal**

- a. Suspension pending investigation on PDC.
- b. All time spent in predetermination / investigative meetings shown on PDC with comment.
- c. TRSN – ATE: Dated for last day physically worked or date of last predetermination/investigative meeting (whichever was last). Employee does NOT get tenure credit for Suspension Pending Investigation.
- d. RESGN – LOD: Effective for day after TRSN.
- e. Employee does not get tenure credit or leave accrual after last day of work.