STATE PERSONNEL SYSTEM

SUBJECT: Performance Evaluations for Employees on Extended Leave and the Impact on Employment Actions

POLICY GUIDELINE: HRM #2017-016

EFFECTIVE DATE: April 18, 2017

SUPERSEDES: Rule Interpretation 60L-35-2010-#001: Performance Evaluations for Employees on Extended Leave and the Impact on Employment Actions

STATUTES/RULES/REGULATIONS/LAWS:
Rule 60L-35, Florida Administrative Code (F.A.C.), Performance Evaluation System
Section 110.224, Florida Statutes (F.S.), Public Employee Performance Evaluation System

FORMS: N/A

ADDITIONAL REFERENCE MATERIALS: N/A

SCOPE AND PURPOSE:
The purpose of this policy guideline is to provide a tool to assist State Personnel System (SPS) Human Resource professionals in administering performance evaluations for employees who experience an extended leave of absence during the rating period.

QUESTION AND ANSWER:

Question 1: How should performance evaluations be administered when an employee takes an extended leave of absence?

Answer:

Normally, a rater expects to observe an employee’s performance over the course of the twelve months in the evaluation period. However, an extended leave of absence during any point in an evaluation period could impact the rater’s ability to assess performance. Consequently, raters need to consider the type of leave taken, how long the employee was absent during the rating period, and when (during or after the evaluation period) did the employee return. If the rater is comfortable that these factors did not impact the ability to assess employee performance, then the performance evaluation should be administered the same as outlined in Rule 60L-35, F.A.C.

In no case shall leave protected by state or federal law (USERRA, FMLA, etc.) be used as a negative factor in assessing performance.
When raters are aware that an employee will be taking extended leave, a close-out evaluation should be conducted for the portion of the evaluation period the employee worked prior to the extended absence or, in the case of a probationary employee, assess performance up to the time the employee goes on extended leave. This is critical as it may have an impact on future employment actions including legislatively mandated pay increases and layoffs. As with all evaluations, any and all performance deficiencies or causes for special recognition that the rater has been documenting should be noted on this evaluation. If a close-out evaluation is not conducted prior to the employee’s extended leave of absence, the rater should assign a rating of “N – None Given” to each performance expectation at the end of the designated evaluation period. It should be documented that the “N – None Given” rating is due to the rater’s inability to assess performance because of the employee’s leave of absence. Assigning an “N – None Given” documents that the statutory requirement for annual performance evaluations is being met but does not falsely rate an employee’s performance.

If the supervisor does not have sufficient time to adequately assess the employee’s performance during the period between the employee’s return to work from an extended absence and the end of the evaluation period, the rater should assign a rating of “N – None Given” to each performance expectation when the evaluation is prepared. The supervisor should also include comments that there was insufficient time following the employee’s return to work to provide a numeric performance score.

Note: Because individual circumstances can vary, agencies will need to address employee absences on a case by case basis. Consequently, it is essential that agencies adopt consistent policies and procedures that give raters sufficient guidance to administer performance evaluations fairly, ensure leave protections afforded by state and federal law (particularly the FMLA and USERRA), and provide a uniform basis for determining eligibility for legislatively mandated pay increases.

**Question 2:** May an employee with probationary status have the probationary period extended for a sufficient period of time to assess performance when a leave of absence impacts the ability of the rater to assess performance?

**Answer:**

Yes, except as noted below. An employee with probationary status may have the probationary period extended for a sufficient period of time to assess performance, in accordance with SPS program guidelines (Extension of Probationary Period for Career Service Employees, effective April 17, 2007).

However, court interpretations of federal provisions prohibit employers from extending probationary periods for employees due to the use of FMLA or military leave, because such extensions may interfere with an employee’s FMLA or military leave rights by discouraging the employee from even requesting the use of such leave. (*Schmauch v. Honda of America Manufacturing, Inc.*, 295F. Supp.2d 823[S.D. Ohio 2003]) Therefore, the rater should assign a rating of “N – None Given” to each performance expectation (and document that the leave of absence was the reason).

Because section 110.213(1), F.S. requires employees to complete at least a 1-year probationary period before attaining permanent status, and Rule 60L-35.004(3), F.A.C., provides that failure to evaluate a probationary employee on or before the end of the probationary period will result in the employee successfully completing the probationary period,
employees on federally protected forms of leave will consequently attain permanent status simply because of the passage of time that takes them to the end of the 1-year probationary period. In these cases, there is no correlation to satisfactory performance, since the assigned rating should be an “N-None Given”.

**Question 3:** Does a rating of “N – None Given” have a numeric equivalent for purposes of legislatively mandated pay increases?

**Answer:**

Yes, it has a theoretical numeric “equivalent” only in those situations where the employee has no prior numerical rating. However, a number is never reflected on the actual performance evaluation. Once again, raters should be encouraged to complete a close-out evaluation when they are aware an employee will be on extended leave and are able to assess an employee’s performance. This provides the employee as well as the agency with a numerical rating for performance that could be used when considering future employment actions, such as legislatively mandated pay increases.

Federal provisions, specifically those in USERRA and FMLA, require that employees be held harmless for using federally protected leave and that the employee shall receive “any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.” As stated above, when an employee is on extended leave and receives a rating of “N – None Given,” the employer must look to the most recent performance evaluation for which the employee received a numerical Overall rating. Although rated an “N” due to their extended leave of absence, employees who received an Overall rating of Satisfactory or above on the last completed evaluation should be considered to have “Satisfactory” performance for purposes of legislatively mandated pay increases because there is nothing to suggest such employees would have performed below satisfactory nor is there a certainty that they would have performed above that level.

However, if an employee’s most recent numerical Overall rating was less than Satisfactory (2.99 or below), there is no reasonable certainty that performance would improve to a satisfactory level. Therefore, these employees should not be considered for any employment action that requires satisfactory performance until such time as they return to work and are subsequently evaluated and receive an Overall rating of Satisfactory or above.

Employees who receive an “N – None Given” rating and have no prior numerical rating, (e.g., the probationary employee that attains permanent status while out on military leave) will be presumed to have successfully performed their established job duties, even though they do not have an overall numerical rating. Therefore, these employees should be considered eligible for any legislatively mandated pay increase tied to successful performance of job duties. This is in accordance with Rule 60L-35.004(3), F.A.C., that requires employees to be notified of performance deficiencies that could result in a “Below Expectation” or “Unacceptable” rating prior to the end of the evaluation period. Absent anything in writing indicating such employees were performing below a satisfactory level, it can be presumed these employees were performing at least at a satisfactory level prior to the extended leave of absence.
APPLICABLE STATUTORY AND RULE CITATIONS:

Section 110.224, F.S., Public employee performance evaluation system

(2) Each employee must have a performance evaluation at least annually, and the employee must receive an oral and written assessment of his or her performance evaluation. The performance evaluation may include a plan of action for improvement of the employee’s performance based on the work expectations or performance standards applicable to the position as determined by the agency head.

Rule 60L-35.003, F.A.C., Minimum Requirements

(5) Other than probationary employees addressed in paragraph 60L-35.004(3), F.A.C., employees who do not receive a performance evaluation within sixty (60) calendar days following the agency designated evaluation date shall be considered to have met their performance expectations as documented on their performance plan, and will receive a rating of “Meets Expectation” for each performance expectation and an overall rating of “Satisfactory”.

Rule 60L-35.004, F.A.C., Career Service

(3) Career Service employees in probationary status shall have a performance evaluation completed on or before the end of the probationary period provided that, if the probationary period is extended pursuant to agency policy, the extension shall be noted on the evaluation form and the employee shall have another performance evaluation completed on or before the end of the extended probationary period. Failure to evaluate the probationary employee on or before the end of the probationary period will result in the employee successfully completing the probationary period.