

Stockbridge-Munsee Community
Chapter 65
Elder/Youth License Ordinance

Section 65.1 Purpose, Findings, and Scope

(A) Purpose: In general, the Tribe must adhere to federal law and state law by conducting criminal background checks on employees and volunteers who work with youth.¹ The purpose of this Ordinance is to meet the specific needs of the Community and adhere to the applicable state and federal laws.

(B) Tribal Council Findings:

(1) Tribal Council recognizes that elders and youth are vulnerable members of the Community who should not be placed at risk by being placed in the care of persons who may have a propensity to harm elders/youth. Tribal Council finds that in the interest of ensuring that elders/youth utilizing tribal services are not exposed to individuals who have a propensity to harm elders/youth, an individual desiring a position with elders/youth is subject to a background investigation and must obtain an elder/youth license.

(2) Tribal Council also recognizes the importance of optimal employment opportunities to the Community. Tribal Council finds that if an applicant is unable to obtain an elder/youth license, the applicant should not automatically be denied other employment within the same facility, or for other positions within the Tribe. Tribal Council recognizes that specific employment duties for one position may require an elder/youth license while another position within the same facility may not require a license.

(C) Scope: This Ordinance applies to all Tribal employment positions, service contracts, and volunteer positions that have regular contact or control over elders/youth, and to boards and committees whose responsibilities and duties provide access to elders/youth. In general, the Ella Besaw Center, the Health Center, the Day Care Center, Head Start, and the Family Center are within the scope of licensing. However, this Ordinance is intended to include other Tribal departments, agencies, entities, or persons if they have regular contact or control over elders/youth, or if other Tribal/federal/state laws are applicable.

¹ 25 U.S.C. §§3201-3211 and the implementing regulations 25 C.F.R. §63. The federal law applies when the Tribe receives funding through a 638 contract, 25 U.S.C. §450. To date, Indian Health Service has not implemented regulations. However, on March 25, 1999 Indian Health Service published Proposed Regulations that closely parallel 25 C.F.R. §63, at 64 FR 14560. State law applies to entities or persons that obtain licensing from the state. The licensees must comply with the Wisconsin Caregiver law at Wis. Stat. §§48.685, 50.065, Wis. Admin. Code §§ Ch. HFS 12, 13. This Ordinance extends beyond the federal law to include elders, not just youth. This Ordinance extends beyond state law to include non-licensed departments, volunteers, volunteer organizations, and other programs that serve elders/youth.

Section 65.2 Definitions

(A) “Abuse” means abuse as defined in Wis. Stat. § 48.02(1), Wis. Stat. §46.90(1), and Wis. Admin. Code § Ch. HFS 13.03(1).

(B) “Applicant” means a potential employee, volunteer, volunteer organization, or service contractor who is seeking a Tribal elder/youth license or an elder/youth licensee whose license is under review.

(C) “Category I” or “Category II” means the designation of crimes from the Crimes list.

(D) “CIB” means the Criminal Information Bureau administered through the Wisconsin Department of Justice.

(E) “Clear and convincing evidence” means more than ‘more likely than not’, but less than ‘reasonable doubt.’

(F) “Compliance” means the Tribal Compliance Department.

(G) “Conviction” means an adjudication where the applicant has been convicted of a crime, or pleaded guilty or no contest to a crime in a court of competent jurisdiction.

(H) “Crimes list” means the list of statutory crimes contained in the Elder/Youth Tribal Procedures.

(I) “Degree of risk review” means the applicant has a conviction for a crime, the conviction is not a permanent bar crime from the crimes list, and the applicant’s degree of risk to elders/youth is resolved through a Preliminary Determination and a Final Determination conducted by Human Resources.

(J) “Elder” means a person over fifty-five (55) years old, or a person eligible for elder tribal services.

(K) “Elders/Youth” means elders or youth.

(L) “Employment” as used in this Ordinance means the applicant, volunteer, or service contractor is performing work or services for the Tribe.

(M) “Finding” means the Tribal Social Worker, Indian Child Welfare Agency, county Social Services, or similar agency has determined by the preponderance of the evidence that neglect, abuse, or misappropriation of property has occurred against the applicant.

(N) “Human Resources” means the Human Resources Department of the Stockbridge-Munsee Community.

(O) “Indirect or irregular contact or control” means applicants who primarily perform clerical, administrative, maintenance or other support functions and are not expected to have regular contact or control with elders/youth or their personal property. Indirect or irregular contact or control also means occasional contact with elders/youth.

(P) “License” means a revocable permit issued by the Human Resources department to an applicant who successfully completes a criminal background check.

(Q) “Neglect” means failure, refusal, or inability to provide necessary care, food, clothing, medical, dental care, or shelter to an individual, for reasons other than poverty, so as to seriously endanger the physical health of an individual.

(R) “Pending charge” means the applicant has been charged with a crime and there has been no adjudication.

(S) “Permanent bar crime” means a crime on the Crimes List that makes the applicant ineligible from obtaining an elder/youth license.

(T) “Position”, as used in this Ordinance, means employment, volunteer or service contracts with the Tribe and whose duties have direct and regular contact with elders/youth.

(U) “Preponderance of the evidence” means ‘more likely than not.’

(V) “Record” means the employment application, license application, investigation summary, preliminary and final determination documentation, and correspondence between the applicant and Human Resources, and other relevant information obtained in the licensing process.

(W) “Regular contact or control” means in the course of performing the applicant’s expected duties, the person will have direct, frequent, or singular contact (unsupervised one-on-one contact) over one or more elders/youth, or their property. Applicants having any overnight duties shall be considered regular contact or control. Occasional contact with elders/youth shall not be considered regular contact or control.

(X) “Sexual Registry” means the Wisconsin Department of Corrections Sexual Offender Registry Information System, a similar state or federal registry.

(Y) “Volunteer”, as used in this Ordinance, means a person not employed by the Tribe, but performs functions or services for the Tribe. Volunteer also includes a person who accompanies elder/youth on any overnight activities, or a person not directly supervised by an Elder/Youth licensee.

(Z) “Volunteer Organizations”, as used in this Ordinance, means programs that are administered or funded by the Tribe, but does not include organizations that receive Tribal donations and are not administered by the Tribe.

(AA) “Youth” means a person under the age of eighteen (18) years old.

Section 65.3 Licensed Positions

(A) Human Resources shall compile and regularly update an accurate list of employment and service contract positions that require an Elder/Youth license.

(1) Positions that require a license shall be positions where the applicant has regular contact or control with or over elders/youth.

(2) Positions excluded in most situations, should be positions that have irregular contact or control with or over elders/youth.

(3) Job postings, applicable contracts, and applicable volunteer postings shall state the applicant must obtain an elder/youth license to be eligible for employment.

(4) All records involved in the licensing process shall be confidential, stored, and preserved in Human Resources, except records that are required to be disclosed for lawful regulatory purposes.

(5) All current applicants who have regular contact or control with and over elders/youth must obtain an Elder/Youth license.

(B) Department Managers/Directors shall compile and regularly update an accurate list of volunteer positions and volunteer organizations that require licensing, utilizing the criteria in (A)(1), (2) and submit the list to Human Resources.

(C) At the end of each Tribal fiscal year, Human Resources shall report to the state Department of Health and Family Services the total number of licenses applied for, the number of denials, and the number of licenses approved in order that the DHFS may submit the statistical information to the Wisconsin legislature.

Section 65.4 License Application

(A) Applications that require licensing must have a separate elder/youth license application, in addition to the regular employment application.

(1) License application asks applicant if they have ever been arrested, detained, charged, convicted or pleaded nolo contendere.

(2) License application clearly states that a thorough background check will be conducted.

(3) License application shall state that an omission or misleading information on the license application shall be grounds for a revoking the license and/or denial of license.

(4) License application shall state that the license only makes the applicant eligible for the position, and a successful background investigation does not entitle or guarantee the applicant a position with the Tribe.

(5) Application shall state that if the applicant is licensed and hired for the position, the applicant shall be subject to subsequent background investigations, as a condition of the applicant's employment.

(6) From completed license application, Human Resources determines if any information on the application might permanently bar the applicant from obtaining a license.

(a) Human Resources consults with the Legal Department regarding any legal issues from the license application that might permanently bar an applicant from obtaining an elder/youth license.

(b) If the license application permanently bars the applicant from obtaining a license, the applicant is informed in writing that a determination has been made that the applicant is unable to obtain an elder/youth license.

(i) The notification specifically states that the crime listed on the application is a permanent bar crime and a license cannot be issued.

(ii) The notification states that the applicant has a right to appeal the determination to Tribal Court.

(iii) The notification states that the applicant is not barred from applying for other positions that do not require elder/youth license.

(B) Chapter 54, the Employee Preference Policy Ordinance is not applicable to this Ordinance.

Section 65.5 Background Check

(A) If the applicant's license application does not prevent the applicant from obtaining a license, Human Resources, by written notification, requests Compliance to conduct criminal background check of applicant.

(1) Compliance conducts CIB, fingerprint background investigation, and investigates (but is not limited to) the following:

(a) Applicable state and tribal courts shall be contacted if the applicant has resided in other states and/or on Indian reservations.

(b) Other technology may be supplemented with the CIB and fingerprint background investigation if the other technology is more efficient and as reliable as the CIB and fingerprint investigation.

(c) Sexual Registries where the applicant has resided shall be contacted.

(d) Information maintained by the Wisconsin department of regulation and licensing regarding the status of the person's credentials, if applicable.

(2) Compliance requests information from applicable county and/or Indian Child Welfare regarding findings of abuse, neglect, or misappropriation of property of a client/elder/youth against the applicant.

(3) Compliance submits written report of background investigation to Human Resources.

(B) Human Resources shall contact the Tribal Legal Department for clarification of crimes.

Section 65.6 Provisional License

(A) The technology that exists in 1999 prevents a fingerprint investigation from being completed before 6-7 weeks. It is very difficult for the Tribe to provide adequate service to the elders/youth if positions are held open 6-7 weeks awaiting results of the fingerprint background check. Therefore, in the following situation a provisional Elder/Youth license may be issued by Human Resources to the applicant:

(1) Category I Crimes:

(a) The license application and the CIB do not have any convictions that are Category I crimes, and,

(b) There have been no findings from an applicable agency, and,

(c) The applicant's name does not appear in the sexual registry, or,

(2) Category II Crimes:

(a) There has been a finding, or conviction from the application or CIB that is a Category II crime, and,

(b) The applicant's name does not appear in the sexual registry, and,

(c) Human Resources has made a Preliminary Determination that the risk of harm to elders/youth does not prevent the applicant from receiving a provisional elders/youth license.

(B) The provisional license shall be issued for no longer than 120 calendar days.

(1) The provisional license is a temporary license pending, at a minimum, a completed finger print investigation.

(2) If the background investigation cannot be completed within 120 calendar days, Human Resources may extend the provisional license in 30-day increments until the background investigation is completed.

(3) If further investigation reveals that the applicant has a Category I conviction, the applicant's provisional license shall be suspended by Human Resources and the license application shall proceed through Preliminary and Final Determinations.

(4) If further investigation reveals that the applicant has a Category II conviction, or that the applicant might not be eligible for licensing the provisional license may be suspended by Human Resources, and the license application shall proceed through the Preliminary and Final Determination process.

(5) If the provisional license is suspended, the applicant is not eligible to work with elders/youth in any capacity.

Section 65.7 Preliminary Determination

(A) Human Resources shall make a Preliminary Determination by utilizing Risk Review Procedures whether an applicant is eligible for licensing after reviewing the application, CIB, findings, Sexual Registry results, and fingerprint (if available) reports from Compliance.

(1) Two individuals must be involved to make the Preliminary Determination. In most case, the two individuals should be from Human Resources. If Human Resources has only one individual available to make the Preliminary Determination, the Tribal Administrator shall be substituted.

(2) The intent of the Preliminary Determination is twofold:

(a) If it appears that the applicant might not be eligible for licensing, Human Resources must reduce to writing the specific reasons why an applicant might not be eligible for licensing, and,

(b) Provide the applicant an opportunity to clarify, refute, or dispute information contained in the background investigation.

(3) If the background investigation leads to a Preliminary Determination that a license will be not be issued, the applicant receives written notification from Human Resources by U.S. mail that a Preliminary Determination has been made that the applicant is not eligible for licensing.

(4) The notification must contain:

(a) A statement that a Preliminary Determination indicates that the applicant is not eligible for licensing.

- (b) A specific statement regarding the information or factors that led to the preliminary decision.
- (c) A statement that a Final Determination will be made 10 business days from the date the notification was sent, and the applicant must respond in writing to Human Resources.
 - (i) The notification must state that if the applicant does not respond to Human Resources with 10 business days, the applicant waives their right to appeal to Tribal Court.
 - (ii) If the applicant does not respond within 10 business days to explain, deny, or refute unfavorable and incorrect information from the background investigation, Human Resources will make a Final Determination denying the Elder/Youth license to the applicant.
- (d) A statement that the applicant has the opportunity and responsibility to explain, deny, or refute unfavorable and incorrect information gathered in the investigation before the Final Determination is made.
- (e) A written summary of the background investigation and explanation of the process Human Resources utilized in making its decision.
 - (i) The applicant is not entitled to view the actual reports (from federal, state, tribal, or county courts or agencies) utilized in the investigation, but may view summaries compiled by Compliance or Human Resources.
 - (ii) The applicant may contact the originating federal, state, tribal, or county court or agency to receive a copy of the actual reports that Compliance and/or Human Resources utilized in order to challenge the accuracy and completeness of the report.

Section 65.8 Final Determination

(A) Human Resources shall make a Final Determination whether a license shall be issued after the applicant has had an opportunity to respond to the Preliminary Determination.

(1) Two individuals must be involved to make the Final Determination. In most cases, the two individuals should be from Human Resources. If Human Resources has only individual available to make the Final Determination, the Tribal Administrator shall be substituted.

(B) If the applicant has not responded to the Preliminary Determination to deny a license, Human Resources shall make a Final Determination.

(1) Human Resources may review the Preliminary Determination to make the Final Determination, but is not obligated to.

(2) Human Resources, via U.S. mail must notify the applicant that a Final Determination has been made

(a) The notification shall contain the applicable portions from the Preliminary Determination.

(b) The notification shall state that because the applicant did not respond to the Preliminary Determination, the applicant has waived their right to appeal, unless good cause can be shown to the Tribal Court.

(C) If the applicant has responded to the Preliminary Determination, Human Resources shall make a Final Determination utilizing the Risk Review Procedures and shall consider the following:

(1) Despite the potential risk of harm to elders/youth, has the applicant has demonstrated by clear and convincing evidence that the applicant should not pose a foreseeable threat to elders/youth and is eligible for licensing.

(D) If the applicant has responded to the Preliminary Determination and is not eligible for licensing, the applicant receives written notification via U.S. mail that a Final Determination has been made that the applicant is not eligible for licensing.

(1) The final notification must contain:

(a) Relevant information from the Preliminary Determination.

(b) Notice of right to appeal to Tribal Court, if the applicant has not waived their right to appeal.

(c) A statement that the Final Determination affects licensing at this time only.

(d) A statement that the applicant may reapply for licensing 24 months from the date of this application being initiated by the applicant.

(E) If a license is issued to the applicant, the license shall be valid for no longer than four years, and shall be subject to subsequent background investigations.

Section 65.9 License Review

(A) Every four years, from the date of licensing, the licensee shall be subject to review of their license including a complete background investigation.

(1) Human Resources notifies the licensee, and the licensee's immediate supervisor, that the license will expire in 120 days and the licensee must reapply to Human Resources within 14 calendar days to have their license renewed.

(2) Compliance shall conduct a complete background investigation, as in Section 65.5(A).

(3) If the license review indicates that the license may not be reissued, the procedures from the preliminary and Final Determinations shall be utilized.

(B) If Human Resources or Compliance has reason to believe that a license review is necessary before the expiration of the license, and Human Resources requests additional information, Compliance shall conduct additional background investigation and Human Resources shall review the employee's license.

(1) If reasonable cause exists, Human Resources has the authority to immediately suspend a license. Reasonable cause is to be determined on a case by case basis, but may include knowledge of new facts, pending charge(s), or other significant factors that would otherwise affect license eligibility.

(a) Two individuals must be involved to make the decision to suspend a license. In most cases, the two individuals should be from Human Resources. If Human Resources has only one individual available to make the decision, the Tribal Administrator shall be substituted.

(b) If the license is suspended, the person must be notified via U.S. mail. The notification must contain a written summary of Human Resources' findings and conclusions. If the person's license is suspended, the person is not eligible to work or volunteer with elders/youth in any capacity that requires a license, while the license is suspended. If the license is suspended, the person has the right to appeal the decision pursuant to Section 65.10.

(2) Revocation of license: Human Resources has the authority to revoke a license provided that Human Resources utilizes the procedures contained in Section 65.7 Preliminary Determination and Section 65.8 Final Determination.

(C) All licensees have an ongoing obligation to inform Human Resources if there are any arrests, charges, convictions, no contest pleas, or findings against the licensees.

Section 65.10 Appeal Rights and Limited Waiver of Sovereign Immunity

(A) Notwithstanding Chapter 5 of the Tribal Ordinances, the Tribal Court has jurisdiction to review Human Resources Final Determination if an applicant has been denied an elder/youth license, if the applicant has not waived their right to appeal by failing to respond after the Preliminary Determination.

(1) The Tribal Court may grant jurisdiction to an applicant who has waived their right to appeal only if good cause can be shown.

(B) The Tribal Court hearing shall be closed to the public, except for the relevant parties to the case.

(C) The Tribal Court's review shall be from the record of the license application process, unless good cause can be shown.

(D) The Tribal Court's standard of review is abuse of discretion.

(1) Because the licensing determination is very fact specific, is performed by a Tribal department that regularly makes Human Resource/employment decisions, and Tribal Council has determined that elders/youth are in need of protection, the Tribal Court's review of the license determination will be restricted to the following:

(a) The Court will not remand a Human Resource's Final Determination unless,

(i) Human Resources made a plain error in the process of making of making its Final Determination, or,

(ii) The determination to deny a license was so unreasonable that a reasonable person could not have made a similar determination.

(2) The applicant's sole remedy is to remand the Final Determination to Human Resources for reconsideration of the Final Determination.

(E) Standing: Only the applicant (or their attorney) has standing to request that the Tribal Court review the Final Determination.

(F) The waiver provided in this Ordinance is granted only for suits in the Stockbridge-Munsee Tribal Court. The Stockbridge-Munsee Community does not waive its immunity from suit to any suits brought in any court other than the Stockbridge-Munsee Community Tribal Court.

(G) Notwithstanding the Administrative Appeals Ordinance (Chapter 5 Stockbridge-Munsee Ordinances), and notwithstanding waivers contained in some Tribal Ordinances and procedures, the terms of this appeal Ordinance control all aspects of the appeal process for this Ordinance.

(H) Applicant shall pay a filing fee of twenty-five dollars to the Tribal Court, unless the Tribal Court waives the fee upon a showing of financial hardship.

Section 65.11 Date of Applicability

(A) This Ordinance shall take effect 30 calendar days after approval from the Bureau of Indian Affairs.

(B) All current applicants, employees, volunteers, volunteer organizations that are within the scope of this Ordinance must apply for an Elder/Youth license within 60 calendar days after this Ordinance takes effect.

Legislative History

Adopted by Tribal Council on September 7, 1999, Resolution Number 057-99.

Approved by BIA November 1, 1999.

Technical changes made in footnote 1, §65.2(A), and 65.5(1). §65.3(C) added and Appendix A moves the crime reckless driving – cause great bodily harm, felony 346.63(4) from a Category I – Permanent Bar to a Category II – Risk Review Crime on December 6, 1999, Resolution Number 082-99.

Approved by BIA December 17, 1999.

Technical changes made in §§65.2(A), 65.3(A)(4), 65.9(A), and 65.9(A)(2) adding to “Abuse” definition, allowing for otherwise confidential records to be available for lawful regulatory purposes, and changing a two-year limited background check to a four-year complete background check on March 21, 2000, Resolution Number 09-2000.

Technical changes approved by BIA March 29, 2000.

Wisconsin Department of Health and Family Services approves Tribal Elder/Youth License and Tribe as a Tribal Designated Rehabilitative Review Agency, May 8, 2000.

On November 19, 2002, Tribal Council, by Resolution No. 071-02, amended sections 65.6(B) [90 days to 120 days], 65.6(B)(2) [90 days to 120 days], 65.8(E) [2 years to 4 years], 65.9(A)(1) [90 days to 120 days], and section 65.9(B) clarifying Compliance and Human Resources responsibilities. Approved by BIA December 31, 2002. Wisconsin Department of Health and Family Services notified on January 14, 2003.

On December 16, 2003, Tribal Council, by Resolution No. 056-03, amended Section 65.9 by creating Sections 65.9(B)(1), 65.9(B)(1)(a), 65.9(B)(1)(b) and 65.9(B)(2). Approved by BIA on January 22, 2004.