

DEPARTMENT OF EMPLOYMENT RELATIONS

-- COLLECTIVE BARGAINING BULLETIN --

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* Cross References:
Amending and Clarifying CIB #64

Subject: Limited Circumstances for Suspending
Represented Employees Without Pay While
Pending Investigation and Without a
Loudermill (Pre-Disciplinary) Meeting Preceding
the Suspension

A. Scope of this Bulletin.

This bulletin provides specific standards for an agency to apply in making a decision about whether to “summarily suspend” a represented employe without pay pending an investigation, prior to holding any due process pre-disciplinary meeting, also known as a Loudermill meeting.

The requirements for pre-disciplinary meetings, and many other “due process” requirements mentioned in this bulletin, exist for public employes who are considered by law as possessing a “property interest” in their employment. Most represented employes are held to possess a property interest in their employment as a result of the “just cause” provisions of their collective bargaining agreement. If a represented employe group does not have just cause protection, they are not covered by the pre-disciplinary meeting requirement of this and other bulletins.

Non-represented employe groups may or may not possess a property interest in their jobs, depending upon the applicability of particular statutes. Agency managers and supervisors should consult with their agency legal counsel to determine whether the requirement of a pre-disciplinary meeting, and other “due process” requirements, apply to particular non-represented employes.

B. Directions Prior to this Bulletin.

On July 28, 1997, the Department of Employment Relations in CBB-44 issued directions to agencies to temporarily refrain from changing current procedures regarding the requirement to hold pre-disciplinary meetings prior to suspending an employe without pay. Procedures at that time, and extended until now, required a pre-disciplinary meeting prior to any disciplinary action being applied to a state employe (CIB #64). The reason for the direction to agencies to temporarily continue holding pre-disciplinary meetings under any circumstances was to provide DER with time to fully assess the implications and application of a recent U.S. Supreme Court decision (Gilbert v. Homar, U.S. Sup. Ct. docket no. 96-651, decided June 9, 1997) that approved of a particular action in which a public university suspended without pay and without a pre-disciplinary meeting a university police officer who had been arrested on felony drug charges.

C. Change in Procedures.

Based on an analysis of the Gilbert v. Homar decision that integrates the due process flexibility in that decision with contract and collective bargaining requirements, agencies may now, under certain limited circumstances, suspend without pay some types of represented employes without first providing a pre-disciplinary meeting. (A suspension without pay pending an investigation, prior to a pre-disciplinary meeting, will be referred in this memo as a “summary suspension.”)

Effective March 23, 1998, an agency may immediately suspend (or “summarily suspend”) for a limited amount of time *without pay*, pending investigation to determine work rule violations, only certain represented state employes who have had felony charges filed against them, where the agency believes that such an immediate suspension would serve the interest of maintaining public confidence in the work of the agency in general or at the particular work site. **See the following Section D of this memo for the specific conditions and requirements under which an agency may apply such a summary suspension without pay.**

(Nothing in this bulletin prevents an agency from continuing current procedures for suspending an employe *with pay* pending investigation of other complaints of misconduct not involving felony charges, when the agency believes for good faith, demonstrable security reasons that it is necessary to remove an employe from a work site until the facts of the complaint have been determined.)

D. Conditions and Requirements for Utilizing a Summary Suspension.

The U.S. Supreme Court decision in Gilbert v. Homar has, for the first time, provided some guidance regarding the circumstances under which a public employer may apply an unpaid disciplinary suspension to an employe without first holding a pre-disciplinary meeting. The Gilbert decision, however, does not stand alone, but must be applied consistent with other due process rights, as well as existing contract and collective bargaining requirements.

Accordingly, the following directions have been developed by the Department of Employment Relations to assist agencies in utilizing summary suspensions where appropriate.

A summary suspension cannot be applied to a represented state employe unless all of following conditions exist:

- 1. Type of employe (“covered employe”):** The represented state employe must be (1) a sworn law enforcement officer or (2) an officer of the court (e.g., an attorney), or (3) be an employe *who occupies a position of great public trust and high public visibility*. An agency that applies a summary suspension to an employe in the third descriptive category must be prepared to explain at an arbitration hearing how the employe meets the descriptive criteria.

2. **Nature of the charges:** Felony charges must have been filed against the employe. In the State of Wisconsin, felony charges are normally filed by means of a criminal complaint issued by a District Attorney. Such a criminal complaint may be filed before or after an arrest, depending upon circumstances.
3. **Just cause for the summary suspension:** The felony charge must be of such a nature that continuing to pay the employe while he/she is under investigation would undermine public confidence in the work of the agency in general and/or at the particular work site. An agency must be prepared to explain at an arbitration hearing how the nature of the felony charges could adversely affect the public's confidence and/or the Employer's confidence in the ability of the employe to carry out his/her particular duties (i.e., impact on operations). An adequate explanation will be similar to a "nexus" analysis for discipline for off-duty misconduct, and many of these situations will likely involve felony charges for off-duty activity. The nexus analysis here will require an explanation of a connection between the felony charge and the particular duties of the employe. (This same nexus analysis will also have to be applied again during the summary suspension period while the pending/ensuing investigation into the facts of the felony charges is underway.)
4. **Limited amount of time for the summary suspension:** The summary suspension must not exceed thirty (30) calendar days in duration. If the investigation exceeds that period of time, the employe will be placed in a status of suspension with pay, pending investigation. The agency must still complete its investigation within a reasonable period of time, considering all the circumstances. Any subsequent disciplinary action involving a loss of pay must be preceded by a pre-disciplinary meeting.

In addition, the following requirements must also be observed when utilizing a summary suspension:

5. **Summary suspensions without pay pending investigation of felony charges will likely have to be applied by an agency in a non-discriminatory manner under the *equal treatment test* used by arbitrators in determining *just cause* for represented employes.** *Ad hoc* application of summary suspensions (in other words, sporadic use for some covered employes but not for others) could be subject to challenge by the employe's union. An agency that contemplates using summary suspensions of employes, without pay, pending investigation of felony charges is advised to apply such suspensions to all covered employes charged with felonies that may impact operations. In those instances in which the agency has not applied summary suspensions without pay to some covered employes, the agency should be able to explain why such an action was not in its interest to do so.
6. **Notice to the employe:** The employe will be notified by the agency (1) that he/she is being suspended without pay pending an investigation of the criminal charges filed against him/her, in order to more fully determine the effect of those charges on his/her employment; (2) that the employe will make him/herself available to the agency for any investigatory interviews the agency considers necessary to assist in its determination of this matter; and (3) that the employe may be subject to further disciplinary action depending on the findings of the investigation.

7. **An investigation is promptly commenced:** The purpose of a summary suspension is to remove the employe from the workplace, without pay (because he/she is not performing work while criminal charges are pending), in order that a full investigation may be undertaken by the Employer regarding any effect that the criminal charges may have on the employe's ability to perform his/her job. An investigation by the Employer must be undertaken to determine whether the felony charges constitute a work rule violation or otherwise impact the ability of the employe to carry out the duties of his/her position. At a minimum, the Employer's investigation must determine the circumstances of the arrest as best as possible and the factual allegations of the charges. Further investigation to determine the actual facts of the criminal violation, to the satisfaction of the Employer, may also be necessary. Since most of these situations will likely involve situations of off-duty misconduct, the requirement of a "nexus" or connection between the misconduct and the duties of the position will have to be considered in the investigation and any subsequent additional disciplinary action.
8. **Be prepared to hold an immediate pre-disciplinary meeting or change the summary suspension without pay to a suspension with pay pending investigation if the felony charge is dropped by the law enforcement authority or dismissed by a court during the period of time for which the employe has been summarily suspended.** In the event that the felony charge is dropped by law enforcement authority or dismissed by a court during the period of the summary suspension, the Employer will either have to immediately hold a pre-disciplinary meeting on the underlying conduct by the employe, or the Employer will have to change the summary suspension (which is without pay) to a suspension with pay pending the completion of the Employer's own investigation. If the felony charge is quickly dropped or dismissed, the Employer usually will not yet have had an opportunity to check all the facts of the employe's conduct that led to the filing of the felony charge in the first place, and so Employer will not be in a position to hold a pre-disciplinary meeting; in such a situation, the employe will then have to be placed on a suspension with pay pending completion of the Employer's own investigation.
9. **Any further discipline resulting from the findings of the investigation within the summary suspension period must be for just cause and be preceded by a pre-disciplinary meeting:** If, at the end of the summary suspension period, the Employer concludes that the results of its completed investigation require the application of further disciplinary action for just cause beyond the period of the summary suspension itself (e.g. a longer term suspension, a demotion, termination, or other appropriate disciplinary action), a pre-disciplinary meeting will be accorded the employe prior to finalizing any further discipline that involves a loss of pay.
10. **Make whole for a summary suspension that is determined to be without just cause:** In the event the agency determines that just cause did not exist for the summary suspension (e.g., criminal charges were mistakenly filed against the employe), then the agency will return the employe to work, with back pay and reinstatement of any lost benefits for the period of the summary suspension.
11. **CAUTION: SPECIAL INSTRUCTIONS FOR FLSA-EXEMPT PROFESSIONAL EMPLOYES. If the employe is a professional employe exempt from the Fair Labor**

Standards Act (FLSA), a summary suspension of that employe pending investigation of a felony charge must be applied in a manner consistent with FLSA requirements that such employes can only be suspended *without pay* for periods of *full work weeks*.

Many professional state employes are exempt from the overtime requirements of the federal Fair Labor Standards Act, under what is called the "salary basis test." Among the qualifying factors for the FLSA salary test is the requirement that agency policies or practices cannot subject exempt professional employes to disciplinary suspensions without pay for periods of less than a full work week. Guidance on how to apply disciplinary suspensions for exempt professional, administrator, and executive employes in a manner consistent with the FLSA requirements has previously been issued by the Department of Employment Relations in CBB-7 (July 6, 1995). **As applied specifically to a summary suspension of an FLSA-exempt employe pending investigation of a felony charge, an agency should proceed as follows:** (1) Summary suspension *without pay* should only be made for periods of full work weeks. (2) If the Employer first becomes aware of the cause for the summary suspension *after the commencement of the work week*, then *the employe should be paid for the balance of the week even though he/she is directed not to report to work; the suspension of pay should start only with the beginning of the next work week*. (3) These FLSA requirements, where applicable, should be explained to the employe in the agency's notice of suspension to him/her. (4) The suspension of pay for these employes can only be *continued in units of full work weeks*; the employe should be paid his/her full week salary if the summary suspension is concluded within a work week on a basis other than a termination or additional disciplinary action.

E. Remember the purpose of a pre-disciplinary meeting as distinguished from an investigatory interview.

Pre-disciplinary meetings are conducted after an investigation has been completed but prior to a final and formal disciplinary decision by an agency. The purpose of the pre-disciplinary meeting is to inform an employe of the nature of the evidence supporting a disciplinary action and to give that employe the opportunity to respond to that information, i.e., to "give his/her side of the story."

Pre-disciplinary meetings are different from "investigatory interviews" of an employe. An investigatory interview is part of the investigative process during which the agency is trying to determine the facts of what happened. An employe is generally questioned in an investigatory meeting about the details of an incident before the agency has completed the full investigation and made a determination about what happened. The pre-disciplinary meeting occurs after the investigation has been completed and the agency has reached its conclusions about what happened.

If there are any questions regarding this bulletin, please contact Thomas Kwiatkowski in the Division of Collective Bargaining at (608) 266-6435.

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