

State of Wisconsin

DOA – DIVISION OF PERSONNEL MANAGEMENT

- MERIT RECRUITMENT AND SELECTION BULLETIN -

Date: November 06, 2018

Locator No. DPM-0484-MRS

Subject: REPLACEMENT BULLETIN:

Guidelines for Restoration from the
Unclassified Service, Pursuant to Sec.
230.33, Wis. Stats.

This is a re-issue of policy bulletin MRS-211 (last released March 26, 2001) on guidelines for restoration from the unclassified service, pursuant to s. 230.33, Wis. Stats. Recently, BMRS has received inquiries from both employees and appointing authorities regarding application of the right of restoration for employees on leave to the unclassified service who seek return to the classified service. This bulletin provides guidance regarding restoration under s. 230.33, Wis. Stats. The bulletin has been updated to reflect the changes to reinstatement and restoration following modifications made to Chapter 230, Wis. Stats. in 2015 WI Act 150.

I. SEC. 230.33 LEAVE OF ABSENCE

An employee appointed to serve in an unclassified position does not have restoration rights to the classified service unless the employee has a leave of absence from the classified service under s. 230.33, Wis. Stats. This provision is the authority for leave of absence and return to classified service for those appointed to unclassified service and should not be confused with the provisions under s. ER18.14(2)(a), Wis. Adm. Code which are not applicable.

Prior to administering a leave of absence for appointments under s. 230.33(1), Wis. Stats., by a judicial body or legislative body or committee, the appointing authority must provide notice to the BMRS director for confirmation of leave eligibility due to the uniqueness of defining judicial bodies, legislative bodies, or committees.

An approved leave of absence to serve in the unclassified service is limited in duration to the term of the elected official from which appointment authority is derived or, when applicable, the end of a fixed-term appointment. There is no indefinite leave of absence under s. 230.33, Wis. Stats., and each leave of absence form must include an end date which is the end of the applicable term plus the three months granted under s.230.33. See part IV below for information regarding successive appointments to the unclassified service.

II. SEC. 230.33 REINSTATEMENT ELIGIBILITY

Reinstatement eligibility is provided regardless of whether the employee was granted a leave of absence under s. 230.33, Wis. Stats. Reinstatement eligibility is to any agency for five (5) years from the date of the unclassified appointment or one (1) year following separation, whichever is longer. Refer to *Wisconsin Human Resource Handbook* Chapters 104 and 156 for additional information on reinstatement.

III. **SEC. 230.33 RESTORATIONS ARE UNIOUE**

While rights of restoration exist for several personnel transactions (see s. ER-MRS 16.03, Wis. Adm. Code), restoration rights pursuant to s. 230.33, Wis. Stats., are unique. A s. 230.33, Wis. Stats., restoration has a different period of eligibility than exists for other types of restorations. (s. ER-MRS 16.025(3), Wis. Adm. Code.) Additionally, a s. 230.33, Wis. Stats., restoration is the only type of restoration that provides: "...this section shall supersede any provision of law in conflict therewith...." (s. 230.33(4), Wis. Stats.) Under that provision, the rights under s. 230.33, Wis. Stats., take precedence over other statutes and administrative rules, like Ch. ER-MRS 22, Wis. Adm. Code, when there is a conflict. The Personnel Commission (now the Wisconsin Employment Relations Commission) has upheld the predominance of s. 230.33, Wis. Stats., restoration rights over seniority considerations when it held that restoration rights to a position in the classified service are not controlled by seniority.¹ Further, under s. 230.33, Wis. Stats., an employee's restoration rights are to his/her former or equivalent position, not the other types of positions listed in s. ER-MRS 1.02(30), Wis. Adm. Code.

Restoration rights are specifically authorized for the same or equivalent position; not preferred alternatives such as a lower level than the position of restoration right, a position in a different agency, a position at the same level but of a different authority or scope, etc. The employee must restore under these provisions or those rights are forfeited. Preferred alternatives would require reinstatement

IV. **RIGHTS ASSOCIATED WITH SEC. 230.33**

In order to be eligible for s. 230.33, Wis. Stats., restoration rights, an employee must first meet the following requirements:

- completion of an original appointment probationary period in the classified service;
- appointment to the unclassified from the classified service; and
- be on an approved leave of absence to the unclassified service, with a fully completed state form on file with the appropriate agencies.²

An employee who meets these requirements is eligible for leave to the unclassified service and restoration to the classified service as follows:

A. **Appointment to an Unclassified Position in His/Her Department**³

- an absolute right to a leave of absence without pay for the duration of the appointment plus three (3) months;
- restoration rights⁴ to his/her former position or equivalent position in the department;

¹ Kelley v. DILHR, 93-0208-PC, 3/16/95.

² Appropriate documentation of any approved leave of absence for each appointment to the unclassified service is the responsibility of the Human Resources office of the agency granting the leave, even in situations where there is a restoration between different appointments to the unclassified service.

³ Sec. 230.33(1), Wis. Stats., governs appointments to the unclassified by the governor, elected officer, judicial body or a legislative body or committee; appointments under that subsection are treated in the same manner as unclassified appointments by an appointing authority within the same department, pursuant to sec. 230.33(1)(m), Wis. Stats.

⁴ Restoration is a mandatory reappointment. (s. ER 1.02(42), Wis. Adm. Code)

- accrual of seniority while in the unclassified service;
- reinstatement privileges for five (5) years from the date of appointment or for one (1) year after the termination of the appointment, whichever is longer. (s. 230.33(1m), Wis. Stats.)

B. Appointment to an Unclassified Position in Another Department

- if the employee's former appointing authority approves, a leave of absence without pay for the duration of the appointment plus three (3) months, as well as the restoration rights, reinstatement privileges and accrual of seniority noted in A. above;
- if the employee's former appointing authority does not approve a leave of absence, the employee only has the reinstatement privileges noted in A. above. (s. 230.33(2), Wis. Stats.)

NOTE: The right of restoration and reinstatement privilege are forfeited if the reason for termination of the unclassified appointment would also constitute the basis for discharge from his/her former position in the classified service. (ss. 230.33(1) and (1m), Wis. Stats.)

Additionally, restoration rights are to "the former position or equivalent position." "The former position" is the same position (same position number) or another position assigned the same duties and responsibilities. An "equivalent position" is not equivalent merely because it has the same salary, hours and benefits. In adopting a standard used by the Wisconsin Supreme Court, the Commission has held that not only must the salary,⁵ hours and benefits be the same, but the responsibilities, authority and status must be equivalent.⁶

NOTE: Human Resources staff are reminded that any restoration, even a restoration between different appointments to the unclassified service, must result in a reappointment to a "real" authorized position. This may include reappointment to a pool coded (surplus) position as approved by the Department of Administration, Division of Executive Budget and Finance.

A further consideration is that s. 230.33, Wis. Stats., restoration rights do not protect the employee indefinitely after he/she is restored to the classified service. Once restored⁷ to the former or equivalent position, the employee is subject to subsequent personnel actions by the appointing authority in the same manner as classified employees who do not have restoration rights. Thus, should a reorganization or lay-off situation arise after the employee has been restored, that employee's right to his former position or equivalent position no longer protects him/her from the consequences of lay-off or other movements pursuant to applicable laws or rules.

⁵ The method used to calculate the compensation for an employee restoring pursuant to sec. 230.33, Wis. Stats., is set forth at V.B. of this bulletin.

⁶ Kelley v. DILHR, supra.

⁷ "Restored" refers to the act of mandatory reappointment to his/her former or equivalent position and the movement (layoff, transfer, displacement) of other employees to accommodate the restoration. Sec. 230.33, Wis. Stats., and Kelley v. DILHR, supra.

V. RECOMMENDED ANALYSIS WHEN RESTORING UNDER SEC. 230.33

The following analysis should be used to facilitate a s. 230.33, Wis. Stats., restoration in a lawful manner:

A. Restoring the Employee to a Position

- Determine if there is a vacancy in the employee's former position:
 - If there is a vacancy, restore him/her to the former position.
 - If there is no vacancy, look to equivalent positions.
- Determine if there is a vacancy in an equivalent position:
 - If there is a vacancy, restore him/her to an equivalent position.
 - If there is no vacancy, then he/she must be restored to the former or equivalent position without regard to seniority.
- If the same or equivalent positions are filled, the movement of another employee is necessary to accomplish the restoration. In executing this movement, the provisions of Ch. ER-MRS 22 (Layoff), Wis. Adm. Code are most likely applied. However, an appointing authority may identify a vacancy for involuntary transfer under Ch. ER-MRS 15 (Transfer), Wis. Adm. Code, unless the action affects a career executive. In that instance, follow the provisions of Career Executive re-employment (s. ER-MRS 30.11(2), Wis. Adm Code) and career executive reassignment (s. ER-MRS 30.07, Wis. Adm. Code) **prior to restoring the unclassified employee from leave of absence**, or layoff (s. ER-MRS 30.105, Wis. Adm. Code). If layoff must be administered, the appointing authority will establish a layoff group which **does not** include the restored employee and then determine the appropriate employee movements of those in the layoff group.⁸

B. Determining the Appropriate Pay Upon Restoration

Pay upon restoration from a leave to serve in an unclassified position is determined under s. ER 29.03(7), Wis. Adm. Code, or any applicable provisions of the Compensation Plan. The employee being restored shall receive the last base pay rate received in the position from which restoration rights are derived, plus intervening adjustments. These adjustments shall be those of the appropriate collective bargaining agreement or the Compensation Plan, based on the pay schedule for the class from which the restoration rights are derived. Discretionary Merit Compensation awards or predecessor Discretionary Compensation

⁸ Employees who have to move as a result of a restoration may have rights to vacant positions in a bargaining unit, depending on which collective bargaining agreement governs.

Adjustments received by the employee while in the unclassified position may be included in the calculation of pay on restoration, limited to two within pay range steps per fiscal year for each year the employee received a discretionary increase. (See Section J, 2.00(8) of the Compensation Plan.)

When an employee is to be restored to a broadband position, the Compensation Plan provides that if the appointment maximum corresponding to that position is greater than the last rate received plus intervening adjustments, the appointing authority may set the employee's pay at a rate not to exceed the appointment maximum. The maximum adjustment that can be given is the total amount that would have been generated for each adjustment during the employee's leave had the employee been in the classified position on the effective date of each adjustment. The discretionary adjustments that would have been permitted to the employee had he/she remained in the classified service will thus create a range from which the appointing authority may choose to pay the individual who is being restored. This follows since agencies have discretion in how much of generated salary increase is distributed. If the adjustments that the employee would have been eligible for had he/she remained in the classified service result in a base pay rate upon restoration that is above the appropriate pay range maximum, the rate shall be red circled.

VI. SUCCESSIVE UNCLASSIFIED APPOINTMENTS

If an employee serving an unclassified appointment is appointed to a different unclassified position, or appointed for another term to the same unclassified position, a restoration to classified service is required to execute the successive appointment. The restoration to classified service and new appointment to unclassified service can occur on the same day, in that order.

A new leave of absence shall be granted if appointed under provisions of ss. 230.33(1) or (1m), Wis. Stats. If appointed under provisions of s. 230.33(2), Wis. Stats., a new leave of absence may be granted by the agency appointing authority of the classified position. If a new leave of absence under s. 230.33(2), Wis. Stats., is not granted and the employee accepts the new unclassified appointment, the employee must either resign from the classified service or be terminated for failure to return from leave.

These transactions must be entered in HCM. An appointment letter must be generated for the new unclassified appointment.

VII. HYPOTHETICALS TO ILLUSTRATE RESTORATION TO A POSITION

(For purposes of the following examples, assume that "Employee A" seeks restoration to the classified service from the unclassified service.)

Example 1:**Facts**

Employee A's former position is vacant.

Action

Restore Employee A to his/her former position.

Example 2:**Facts**

Employee A's former position is not vacant. However, a position with the same salary, hours, benefits, responsibility, authority and status is vacant.

Action

Restore Employee A to the equivalent position.

Example 3:**Facts**

Neither Employee A's former position nor an equivalent position are vacant.

Employee B who has less seniority than Employee A occupies his/her former position.

Action

Restore Employee A to his/her former position and provide Employee B with his/her lay off rights under Ch. ER-MRS 22, Wis. Adm. Code and rights to move to a vacant represented position. [NOTE: If the action affects Career Executives, s. ER-MRS 30.11, s. ER-MRS 30.105, and s. ER-MRS 30.07, Wis. Adm. Code, should be followed.]

Example 4:**Facts**

Same facts as in Example 3, except Employee B has more seniority than Employee A.

Action

Same Action as in Example 3.

Example 5:

Facts

Employee A's former position was eliminated. Employee B and C occupy equivalent positions.

Employee A has more seniority than Employee B, but less seniority than Employee C.

Action

Employee A is restored to one of the two equivalent positions. The appointing authority establishes a layoff group that consists of Employees B and C and follows the rules of Ch. ER-MRS 22, Wis. Adm. Code, as well as any rights an employee may have to move to a vacant represented position. [NOTE: If the action affects Career Executives, s. ER-MRS 30.11, s. ER-MRS 30.105 and s. ER-MRS 30.07, Wis. Adm. Code, should be followed.]

Example 6:

Facts

The duties of Employee A's former position have been changed and the position has been moved to another division.

Two equivalent positions remain-one occupied by Employee B and one by Employee C.

Employee A has less seniority than both Employee B and C.

Action

Same Action as in Example 5.

Inquiries regarding s. 230.33, Wis. Stats., restorations, whether rights of restoration, layoff or classification issues, should be directed to the BMRS Director. Compensation questions should be directed to the Bureau of Classification and Compensation.



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