

State of Wisconsin

**DOA – DIVISION OF PERSONNEL MANAGEMENT**

**- EMPLOYMENT RELATIONS BULLETIN -**

**Date:** September 27, 2019

**Locator No.** DPM-0504-ER

**Subject: REPLACEMENT BULLETIN:** Limited Circumstances for Suspending Employees Without Pay While Pending Investigation and Without a Pre-Disciplinary Meeting Preceding the Suspension

This is a re-issue and replacement of policy bulletin CBB-60 (last released March 13, 1998) on guidelines for limited circumstances for suspending represented employees without pay while pending investigation and without a pre-disciplinary meeting preceding the suspension. This bulletin has been updated to cover all state employees, whether represented or non-represented.

**A. Scope of this Bulletin.**

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

An agency may immediately suspend (or “summarily suspend”) for a limited amount of time *without pay*, pending investigation to determine work rule violations, certain state employees 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 bulletin for the *specific conditions and requirements under which an agency may apply such a summary suspension without pay.***

**B. Relevant Statutes**

Section 230.34, Wis. Stats., provides in relevant part:

**230.34 Demotion, suspension, discharge and layoff. (1)** (a) An employee with permanent status in class or an employee who has served with the state as an assistant district attorney or an assistant state public defender for a continuous period of 12 months or more may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause. . . .

... (b) No suspension without pay shall be effective for more than 30 days. The appointing authority shall, at the time of any action under this section, furnish to the employee in writing the reasons for the action.

(c) The administrator shall establish guidelines for uniform application of this authority among the various agencies.

Section 111.335, Wis. Stats., provides in relevant part:

**111.335 Arrest or conviction record; exceptions and special cases. (2)**

...  
(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

**C. Constitutional Requirements**

In *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), the United States Supreme Court held that due process requires that a public employee dismissible only for cause is entitled to a limited pre-termination hearing, to be followed by a more comprehensive post-termination hearing. This pre-disciplinary or "Loudermill" due process requirement includes oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Supreme Court held that there are *certain limited circumstances* where an employee may be suspended, without pay, without first providing an employee the pre-disciplinary hearing required by *Loudermill*. Applying the balancing test first articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court held that the due process clause is not violated where an employee charged with a felony receives a "sufficiently prompt" post-suspension hearing and the employee holds a position of "great public trust and high public visibility, such as police officers." *Gilbert, supra* at 932-33.

**D. Conditions and Requirements for Utilizing Suspension Without Pay ("Summary Suspension") Pending Further Investigation of Felony Charges In Certain Limited Circumstances**

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

- 1. Type of employee:** The state employee must be (1) a sworn law enforcement officer; (2) an officer of the court (e.g., an attorney); or (3) be an employee *who occupies a position of great public trust and high public visibility*. An agency that applies a summary suspension to an employee in the third descriptive category must be prepared to explain at a civil service hearing how the employee meets the descriptive criteria. In all cases written reasons why the employee must be suspended without pay must be provided to the employee at the time of the suspension.
- 2. Nature of the charges:** Felony charges must have been filed against the employee. 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. The circumstances of the pending charges must be substantially related to the circumstances of the employee's particular job in order to comply with s. 111.335, Wis. Stats.
- 3. Just cause for the summary suspension:** The felony charge must be of such a nature that continuing to pay the employee 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 a civil service 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 employee to carry out his/her particular duties (i.e., impact on operations) if the employee was suspended with pay.

- 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 employee will be placed in a status of paid administrative leave, pending further investigation. The agency must still complete its investigation within a reasonable period of time, considering all the circumstances.

In addition, the employer must observe the following requirements when utilizing a summary suspension:

- 1. Notice to the employee:** The employee must be provided written reasons why it is necessary that they be suspended without pay and additionally (1) that they are being suspended without pay pending an independent investigation of the facts that form the basis for the criminal charges and impact on his/her employment; (2) that the employee will make him or herself available to the agency for any investigatory interviews; and (3) that the employee may be subject to disciplinary action depending on the findings of the investigation.
- 2. An investigation is promptly commenced:** The employer must promptly initiate an investigation into the underlying facts that form the basis for the criminal charges to determine whether a work rule violation has occurred or whether the charges would otherwise impact the employee's ability to perform his/her job. The employer cannot solely rely on the complaint filed by the law enforcement agency bringing the charges. Rather, the employer must independently determine whether the facts alleged in the complaint are accurate. If it does not appear likely that those facts can be quickly ascertained, the employer may want to consider whether suspension without pay is warranted, given that the suspension will have to be converted to paid administrative leave after no more than 30 calendar days.
- 3. Be prepared to hold an immediate pre-disciplinary hearing or change the summary suspension without pay to paid administrative leave 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 employee 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 hearing on the underlying conduct by the employee, or the Employer will have to change the summary suspension (which is without pay) to paid administrative leave 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 employee's conduct that led to the filing of the felony charge in the first place, and so the employer will not be in a position to hold a pre-disciplinary hearing; in such a situation, the employee will then have to be placed on paid administrative leave pending completion of the employer's own investigation.
- 4. Any 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 hearing:** If, at the end of the summary suspension period, the Employer concludes that the results of its completed investigation require the application of disciplinary action for just cause a pre-disciplinary hearing must be afforded the employee.

5. **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 employee or the employer is unable to prove that the employee engaged in the conduct for which he was charged after its independent investigation, etc.), then the agency will return the employee to work, with back pay and reinstatement of any lost benefits for the period of the summary suspension.

Questions regarding this directive may be directed to DPM Enterprise Employment Relations staff.



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