State of Wisconsin

OFFICE OF STATE EMPLOYMENT RELATIONS

- COMPENSATION & LABOR RELATIONS BULLETIN -

- MERIT RECRUITMENT & SELECTION BULLETIN -

Date: October 11, 2013	**Subject:** Guidance on Eligibility for Certain Benefits Following Termination for Misconduct or Delinquency
Locator No: OSER-0343-CLR-MRS	

I. INTRODUCTION

Pursuant to Administrative Code, continuous service, sick leave, and reinstatement are affected by termination for misconduct or delinquency. The purpose of this bulletin is to clarify the consequences of termination for misconduct or delinquency and describe when those consequences must be applied.

II. APPLICABLE ADMINISTRATIVE CODE

Sick Leave: Section ER 18.02(2)(b), 2m., b., Wis. Adm. Code, states "Any return to service following termination for misconduct or delinquency is deemed to not be a qualifying reemployment under this provision, even though the return is within the 5 year period." This means that if an employee is terminated for misconduct or delinquency, ***no*** continuous service accumulated prior to the termination will be credited to any subsequent employment in state service.

Section ER 18.03(5)(a), Wis. Adm. Code, states in part "Termination from the service for misconduct or delinquency shall cancel all unused accumulated sick leave." The phrase "shall cancel" means that any sick leave an employee had accumulated prior to termination for misconduct or delinquency ***cannot*** be:

A) Restored upon subsequent employment; ***or***
B) Converted for payment of health insurance premiums.

Consequently, any accumulated sick leave credits ***must be zeroed out*** upon the termination of an employee for misconduct or delinquency.

Reinstatement: Any permanent or probationary employee who is separated for misconduct or delinquency is ***not eligible*** for reinstatement. This restriction is set forth in Section ER-MRS 16.035(1), Wis. Adm. Code, which states that "An employee who has separated from a position in the classified service without misconduct or delinquency or who has accepted a voluntary demotion for personal reasons shall be eligible for reinstatement in any agency for 5 years from the date of such separation or demotion." Section ER-MRS 16.04(2), Wis. Adm. Code, sets forth this rule for probationary employees, stating that "A person who separates from a position without misconduct or delinquency while serving a probationary period may be reinstated to a position in a class in the same pay range or counterpart pay range or in a lower class than the position from which the employee separated at any time during a 5 year period from the date of separation providing the person is qualified to perform the work after the customary orientation provided to a newly hired worker in the position."

III. APPLICATION OF "MISCONDUCT OR DELINQUENCY"

A. Application of Consequences

The terms *"misconduct"* and *"delinquency"* are not easily defined in a way that will be all inclusive when one considers the many reasons for, and situations under which, employees are terminated. For that reason, definitions are not included in this bulletin, however, the following guidance is provided.

1. **An employee is terminated for misconduct or delinquency when s/he is discharged for violating an agency work rule(s) related to on duty conduct or for engaging in off duty behavior that is deemed to be misconduct.** The degree of the violation is not a consideration (i.e., the action does not necessarily have to be egregious). Employees who are discharged for such violations:

    a. ***Must*** have any accumulated sick leave credits ***zeroed out*** as of the effective date of the termination (i.e., the sick leave credits are not kept on the books and they are not certified to the Department of Employee Trust Funds);
    b. ***Will not*** have prior state service counted towards their continuous service date upon subsequent state employment;
    c. ***Do not*** have reinstatement eligibility.

2. An employee is **not** considered to have been terminated for misconduct or delinquency when s/he is terminated for medical reasons (including fitness for duty), or for poor performance when the discharge is based on the employee's inability to satisfactorily perform the duties of the position (see exception under b., below). An employee who resigns in lieu of termination, or whose discharge is changed to a resignation pursuant to a settlement agreement, is also **not** considered to have been terminated for misconduct or delinquency.

    a. Under the above circumstances, and pursuant to applicable administrative code provisions, the employee is:
        i. Eligible for restoration of sick leave credits (if any) accumulated prior to the date of termination, upon subsequent employment in state service;
        ii. Eligible to have prior service counted towards her/his continuous service date upon subsequent employment in state service;
        iii. Eligible for reinstatement.

    b. Exception related to termination for unsatisfactory performance:
        i. Employees who *refuse* to perform the functions of the position, in violation of an agency work rule(s) (or in some other performance-related fashion violate an agency work rule(s)), *are* considered to have been terminated for misconduct or delinquency and the consequences outlined under 1., above, will apply. For example, poor work performance that may equate to misconduct or delinquency could involve willful neglect, insubordination, negligence, or other similar types of conduct.

3. If a former employee is an applicant for reemployment in the classified service, it is the responsibility of the hiring agency to research the former employee's work history and reason for termination. A former employee who is not eligible for reinstatement for reasons under 1. or 2., above, must be certified from an exam register in order to be eligible for appointment. If hired, the appointment is an original appointment.

The above guidance is not intended to address every possible scenario. It is likely that situations will occur where agencies will need to use their judgment as to whether an employee's termination is for misconduct or delinquency. The question as to whether an employee's behavior rises to the level of misconduct or delinquency must be evaluated on a case by case basis. In those situations where an agency requires assistance is making this determination, the appropriate individual listed under Referral of Questions, below, should be contacted for guidance, as needed. Further, each agency human resources office should work closely with their agency payroll staff to ensure that the consequences for terminations for misconduct or delinquency are properly applied.

IV. REFERRAL OF QUESTIONS

Employees: Questions regarding the contents of this bulletin should be directed to the agency human resources or payroll office.

Employers: Questions regarding the contents of this bulletin should be directed to the appropriate individual as follows:

Adjusted continuous service or sick leave:	Paul Ostrowski at (608) 267-0343 or paul.ostrowski@wisconsin.gov
Misconduct/Delinquency – Application:	Jim Underhill at (608) 266-9564 or jim.underhill@wisconsin.gov
Reinstatement:	Chelsea Daley at (608) 267-5165 or cheslea.daley@wisconsin.gov

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