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CORRESPONDENCE MEMORANDUM

DATE: February 28, 2005
TO: ETF Board Members
FROM: Dave Stella
Deputy Secretary
SUBJECT: ETF Secretary's Settlement and Correction of Error Authority

At the December 2004 Board meeting, the Board requested historical and statistical information on Department settlement agreements as well as information on the Department's policies and practices regarding recovery of overpayments. In response to this request, the Department has prepared the following information on the Secretary's settlement and correction of error authority, which will be discussed at the March 18, 2005, meeting.

For your reference, copies of the ETF guidelines regarding settlement proposals and correction of error authority are attached to this memo. All Division Administrators received this guidance in July of 2002.

SETTLEMENT

In 2001, s. 40.03(2)(v), was created by 2001 Wisconsin Act 16. This statute states that the Department Secretary:

May settle any dispute in an appeal of a determination made by the department that is subject to review under sub. (1)(j), (6)(i), (7)(f), or (8)(f), or s. 40.80(2g), but only with the approval of the board having the authority to accept the appeal. In deciding whether to settle such a dispute, the secretary shall consider the cost of litigation, the likelihood of success on the merits, the cost of delay in resolving the dispute, the actuarial impact on the trust fund, and any other relevant factor the secretary considers appropriate. Any moneys paid by the department to settle a dispute under this paragraph shall be paid from the appropriation account under s. 20.515(1)(r).

The intention of the state statute granting the Department Secretary the authority to attempt to reach a proposed settlement of an appeal to a Board is to:

- 1) ensure that appeals are managed in a cost effective manner, and
- 2) resolve disputes closer to the time at which the disagreement arose and in a manner that is in the best interest of the Trust Fund.

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This statute requires the Department to receive approval of the proposed settlement from the board having the authority to accept the appeal.

CORRECTION OF ERROR AUTHORITY

In 2001, s. 40.03(2)(w), WI Stats., was created by 2001 Wisconsin Act 16. Effective August 31, 2001, it reads:

If the secretary determines that an otherwise eligible participant has unintentionally forfeited or otherwise involuntarily ceased to be eligible for any benefit provided under this chapter principally because of an error in administration by the department, may order the correction of the error to prevent inequity. A decision under this paragraph is not subject to review. The secretary shall submit a quarterly report to the employee trust funds board on decisions made under this paragraph.

The intention of the state statutes granting correction of error authority to the Department Secretary is to correct errors made by the Department and prevent inequities that result from these errors. These errors include unintentional results of actions made by a participant as a result of inaccurate and/or incomplete information provided by the Department.

Under the statute, the Department must submit a quarterly report to the ETF Board. The Department *is not* required to receive approval of the correction from the board having the authority to accept the appeal.

The following chart includes statistics on settlements and correction of error authority usage for calendar years 2001 through 2004.

SETTLEMENT AND CORRECTION OF ERROR USAGE

Type	2001	2002	2003	2004	TOTAL
Settlement	0	0	1	2	3
Error Correction	0	2	3	0	5

Under the Secretary's settlement authority, the Department has recovered \$8,459.12 of \$15,231.67 and all three appeals were withdrawn. As a result of the application of the Secretary's correction of error authority, the Department has reviewed and revised several procedures in an effort to ensure that similar mistakes are not made in the future.

DEPARTMENT OVERPAYMENT RECOVERY PROCESSES

The Department collection process begins with a direct request for repayment. In general, ETF does not report overpayment debts to any credit agencies or use a collection agency to collect overpayments. Staff handle this process, however, in certain circumstances, an overpayment case may be referred to the Wisconsin Attorney General's office.

As permitted by s. 40.08(7) b, WI Stats., any lump sum benefit overpayment exceeding certain statutory limits to a person who cannot be located or which proves to be uncollectable may be written off two years after the overpayment is discovered. The last time this was done was December of 1997, when the Board approved the Department's recommendation to write off lump sum benefit overpayments to 62 accounts worth approximately \$430,000.

In addition to requesting direct repayment by the participant, the Department may use the following processes when attempting to collect an overpayment from a participant:

- Overpayments to Annuitants That Have Died. ETF's single largest cause of overpayment occurs with the death of an annuitant. If an annuitant dies too late in the month for the Department to stop their next monthly check or if the Department isn't promptly notified of a death, an overpayment occurs. If direct recoveries are not successful (stop payment on check or repayment), the Department attempts to recover the funds from the estate or heirs if there is no estate. Recovery from an estate is fairly reliable if there is an estate and if the Department files a claim before the estate is closed. If there is no estate or if the estate is closed, recovery from heirs becomes very difficult.

The Department maintains the receivables for two years beyond the year in which they are established. By the end of two years an estate is almost certainly closed and efforts with heirs are exhausted. The only remaining option for overpayment collection would be through the courts and this typically isn't justified by the amount of the receivable. Uncollected accounts after two years are written off. Over the last ten years, overpayment write-offs to annuitants that have died have totaled approximately \$700,000.

- In 2002, the Department established about \$5.7 million in receivables for annuity payments after the death of the annuitant. ETF collected all but \$51,913 (less than one percent) of these receivables and at the end of 2004, after two full years, wrote off the \$51,913 as uncollectable.
- In 2004, the Department established 3,235 receivables for overpayments to annuitants that died for a total of \$5.13 million. Any portion of the \$5.13 million that is not collected will be considered for write-off at the end of 2006.
- Annuity Overpayments: Present Value Offset. If an overpayment amount is 30% or more of an annuitant's gross monthly amount, the Department completes a present value offset calculation of the overpayment amount. This results in a small monthly reduction for the lifetime of the annuity as the Department recovers the overpayment. If the overpayment is less than 30%, the total overpayment amount is applied against the next monthly check.
- Annuity Overpayments: Account Receivables Lump Sum Overpayment Account. The Department will establish lump sum overpayment accounts (account receivables) for benefit overpayments. The Department notifies the participant of the overpayment via a letter explaining the reason for the overpayment. This letter also explains that they will have any unpaid debt deducted from any future WRS benefit if not repaid.

The files for participants with outstanding overpayments are tagged so if the participant applies for a future benefit under WRS and owes any debt, the Department knows to deduct it from the benefit. If there is any debt unpaid at the end of each year, ETF also sends an annual statement/invoice to the debtor.

ETF Settlement Authority

Revised February 23, 2005

Statutory Authority

s. 40.03(2)(v), created by 2001 Wisconsin Act 16, effective August 31, 2001 states that the Department Secretary:

May settle any dispute in an appeal of a determination made by the department that is subject to review under sub. (1)(j), (6)(i), (7)(f), or (8)(f), or s. 40.80(2g), but only with the approval of the board having the authority to accept the appeal. In deciding whether to settle such a dispute, the secretary shall consider the cost of litigation, the likelihood of success on the merits, the cost of delay in resolving the dispute, the actuarial impact on the trust fund, and any other relevant factor the secretary considers appropriate. Any moneys paid by the department to settle a dispute under this paragraph shall be paid from the appropriation account under s. 20.515(1)(r).

Guidelines

The intention of the state statute granting the Department Secretary the authority to attempt to reach a proposed settlement of an appeal to a Board is to:

- 1) ensure that appeals are managed in a cost effective manner, and
- 2) resolve disputes closer to the time at which the disagreement arose and in a manner that is in the best interest of the Trust Fund.

The appeal must meet the requirements of the ETF administrative rule governing the appeal process (Wis. Admin. Code Ch. ETF 11) and must be formally pending before one of the boards governing the administration of the WRS (ETF Board, Teachers Retirement Board, Wisconsin Retirement Board, Group Insurance Board or Deferred Compensation Board).

The appeal must be of a determination made by the Department, or a contractor acting on its behalf, and subject to review under s. 40.03(1)(j), (6)(i), (7)(f) or (8)(f) or s. 40.80(2g), WI Stats.

A statement of the issues to be resolved by the appeal must have been established by agreement between the parties or by a pre-hearing conference. When more than one claim is involved in an appeal, the nature and amount of each claim must be identified in sufficient detail, through agreement of the parties, to satisfy the Secretary that the full extent of the claim is understood.

The Secretary will consider proposing a settlement in appeals when:

- The cost of litigation (including the time associated with preparing for, discussing, arguing, and conducting the appeal itself) is likely to be significant in relation to the cost of the settlement.
- Based on past Board decisions deemed by the Secretary to involve similar issues and facts, success on the merits is in significant doubt.
- The likely delay in resolving the appeal is deemed by the Secretary to create a result that can no longer effectively provide the relief sought by the participant.

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- The actuarial cost to the WRS or other trust is determined not to be significant by the Secretary.
- The settlement would not create an undesirable precedent for future cases with similar but not identical facts.

The Secretary will not normally intervene in appeals involving situations where the appeal is high profile or high volume (e.g., Benson cases, SIPD), or the decision to settle may have a major impact on the trust fund or administration or processes.

Settlement Principles

- The settlement proposal should totally resolve the particular dispute, or aspect of dispute, being settled.
- A settlement may resolve only one of several issues of an appeal, if that issue is completely resolved and if the costs to the Department of continued litigation on the remaining issue(s) will be lessened substantially enough that the settlement of one issue is nevertheless deemed by the Secretary to be both reasonable and efficient.
- Where there are multiple parties with an interest in the benefit, such as multiple beneficiaries disputing the distribution of a death benefit, the settlement will normally encompass all parties.
- When the question to be settled involves primarily a legal interpretation, rather than a factual dispute, scope statements should be proposed and administrative rules promulgated extending the same legal interpretation incorporated into the settlement to other similarly situated participants and beneficiaries.

Documentation

ETF staff will prepare background material that will include documentation necessary for the Secretary to determine whether or not the Department will propose a settlement. At a minimum this will include a summary of the issues, facts of the case (citing applicable administrative rules or state statutes), and the proposed resolution. It should also contain copies of correspondence, information on why a particular resolution is proposed and a list of the alternative solutions that were proposed to the Division Administrator.

Internal Department Process

After consulting with appropriate Department staff, the Secretary will make the decision on whether or not to propose settlement of an appeal. Once this decision has been made, the Secretary will request approval from the appropriate governing board. The Board will receive this information in the form of a standardized quarterly report. Data to be normally included in a report are as follows:

- Appeal number. Personal information such as participant's name and social security number should not be included.
- Facts of the case.
- Proposed settlement.
- A clear and complete analysis of the issues in sufficient detail so that the Board can understand the essential facts and how the law was applied.
- Summary of why decision was made to offer a settlement.
- Cost of settlement.
- Other information such as additional areas where this decision may apply or have an impact, and if the Department will be preparing a scope statement to promulgate an administrative rule.

Board Approval Process

1. The WRS participant, the Department, and other parties must agree in writing on the facts of the case.
2. The Secretary should request approval for the settlement from the appropriate Board. The information used to make this request will consist primarily of the documentation developed by ETF staff that the Secretary used to make the initial decision to settle.
3. After consultation with the Secretary and ETF staff, as appropriate, the Board will either approve or disapprove the settlement.
4. Once a settlement has been approved and prior to the release of any funds or other settlement actions, the WRS participant must write a letter withdrawing his/her appeal.

ETF Correction of Error Authority

Revised February 23, 2005

Statutory Authority. *s. 40.03(2)(w), WI Stats., created by 2001 Wisconsin Act 16, effective August 31, 2001 was created to read:*

If the secretary determines that an otherwise eligible participant has unintentionally forfeited or otherwise involuntarily ceased to be eligible for any benefit provided under this chapter principally because of an error in administration by the department, may order the correction of the error to prevent inequity. A decision under this paragraph is not subject to review. The secretary shall submit a quarterly report to the employee trust funds board on decisions made under this paragraph.

Guidelines for use of s. 40.03(2)(w), WI Stats., Correction of Error Authority

The intention of the state statutes granting correction of error authority to the Department Secretary is to correct and prevent inequities that result from errors made by Department staff or are the unintentional results of actions made by a participant as a result of inaccurate information and/or incomplete information provided by the Department.

In general, when there is evidence that Department staff made an error in its processing or in providing inaccurate or incomplete information, the Department Secretary will consider use of this correction authority to grant the participant that to which they had a right. The authority will be used when it is determined, based on available facts, that the participant would not likely have otherwise forfeited the benefit **but for** the action or inaction by the Department. Note: the Department is not authorized under this statute to assume liability for errors made by participating employers.

What is eligible?

The Secretary will consider using this authority for a participant in cases where an ETF error is documented or can otherwise be corroborated such that the Secretary is able to determine the relevant facts to his satisfaction. The list below provides examples of the types of situations when the Secretary's authority might be used:

- ETF staff provided inaccurate information about a deadline for an application.
- ETF staff didn't provide information that was crucial to a member protecting or exercising a right.
- ETF staff lost an application or other document that was in its possession.

What is not eligible?

The list below provides examples of when the Secretary would not invoke this authority:

- When it is clear that the state statutes prohibit an action and it is unclear whether the failure to meet the requirements of the statutes was principally the result of an action or inaction by Department staff.
- When a participant made a good faith effort but did not meet a statutory requirement, and there is no conclusive factual information demonstrating that Department action or inaction principally caused the failure to comply with the statute. For example, a participant may have to meet an application deadline, but missed the deadline due to

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factors out of the Department's and/or the participant's control, such as the post office delaying or losing mail.

Documentation

ETF staff will prepare background material that will include documentation necessary for the Secretary's Office to review the decision. At a minimum this will include a summary of the issues, facts of the case, and the proposed decision of the Division Administrator. It should also contain copies of correspondence, information on why the current situation is inequitable or otherwise a problem (citing applicable administrative rules or state statutes) and a list of the alternative solutions that were proposed to the Division Administrator.

Process

The discovery of an error that falls within guidelines listed above begins the process to use the Secretary's correction of error authority as authorized in s. 40.03(2)(w), WI. Stats. When this happens, ETF staff or the Division Administrator should develop documentation of all relevant information. If the Division Administrator recommends that the Secretary apply this correction authority, the Division Administrator will forward the proposed recommendation along with the supporting documentation to the Secretary's Office.

After consulting with appropriate Department staff, the Secretary will make the final decision. Once a decision is made, the Secretary's Office will inform the participant(s) and the ETF Board of the decision. The ETF Board will receive this information in the form of a standardized quarterly report. Department staff will also publish a summary of the outcome for use by ETF staff on FRED, under a new heading such as, "Summary of Correction of Error Authority Applications," located under the "Legal/Legislation" link.

Example of elements to include in a potential report to the ETF Board

- A unique identifying number (e.g., "correction of error authority application 05-01"); personal information such as participant's name and social security number should not be included.
- Facts of the case
- Decision
- Summary of why decision was made