STATE OF WISCONSIN
Department of Employee Trust Funds
David A. Stella
SECRETARY

801 W Badger Road
PO Box 7931
Madison WI 53707-7931

1-877-533-5020 (toll free)
Fax (608) 267-4549
http://etf.wi.gov

CORRESPONDENCE MEMORANDUM

DATE: October 19, 2011

TO: Group Insurance Board

FROM: David H. Nispel, General Counsel

SUBJECT: Clearinghouse Rule #11-044
Proposed Administrative Rule updating ETF 11

Staff recommends the Board approve the final version of this proposed rule.

The Department of Employee Trust Funds (ETF) proposes an update to the Department's appeal procedures in order to improve and clarify the process for members, the administrative law judge, the boards that decide appeals, the department, and others who are involved in the process. Sections 5, 10, 12, 13, and 24 of the proposed rule may be of particular interest to the Group Insurance Board.

Board approval of the final version of the proposed rule is the next step in the administrative rule promulgation process. The Deferred Compensation Board, the ETF Board, Wisconsin Retirement Board, and Teachers Retirement Board also will need to approve the rule at their meetings in November and December. If approved by all boards, the rule will be submitted to the Governor's office and the State Legislature for consideration. Prior to this date, ETF has taken the following action:

- Scope statement approved by ETF Secretary (January 28, 2011)
- Scope statement published in the Wisconsin Administrative Register (February 15, 2011)
- Submitted the proposed rule and a report to the Legislative Council Administrative Rules Clearinghouse (September 8, 2011)
- Submitted the proposed rule and Legislative Council report to the Department of Administration and Legislative Reference Bureau along with a notice of the scheduled public hearing (September 8, 2011)
- Submitted the proposed rule and economic impact analysis to the Governor's Office, Senate Chief Clerk and Assembly Chief Clerk (September 8, 2011)

Reviewed and approved by Robert J. Conlin, Deputy Secretary.

Signature

10/21/11
Date

Board	Mtg Date	Item #
GIB	11.8.11	4A

- Published the notice of hearing in the Wisconsin Administrative Register (October 1, 2011)
- Received Clearinghouse Report from Legislative Council (October 6, 2011)
- Public hearing scheduled for October 21, 2011

The final draft report on the proposed administrative rule is attached to this memorandum. Changes to the rule were made in response to comments received in the Legislative Council Staff Clearinghouse Report. The rule now conforms to recommended form and style.

If anyone appears at the October 21, 2011, public hearing or if any comments are received from the public, ETF will revise page 19 of the Final Draft Report on Clearinghouse Rule #11-044. If any comments are received which require revisions to the rule, ETF will inform the board.

Department staff will be available at the meeting to discuss this memorandum and answer any questions you may have regarding the proposed revisions.

Attachment: Final Draft Report on Clearinghouse Rule #11-044

STATE OF WISCONSIN
DEPARTMENT OF EMPLOYEE TRUST FUNDS
EMPLOYEE TRUST FUND BOARD
WISCONSIN RETIREMENT BOARD
TEACHERS RETIREMENT BOARD
GROUP INSURANCE BOARD
DEFERRED COMPENSATION BOARD

FINAL DRAFT REPORT ON CLEARINGHOUSE RULE #11-044

FINAL RULE to amend ETF 11.02 (3) and (8), 11.03 (2) (b), (bm), (3m), (4) (b), (8), and (11), 11.04 (2), (4) (f), and (8), 11.05 (4) and (7), 11.06 (1), 11.07 (1), 11.08 (2) (b) 1., 11.09 (1) and (3) (intro.), 11.12 (1) (a), 11.13 (3), 11.14 (2) (c) and (4) (intro.) and 11.16 (4); and to create ETF 11.02 (3m), 11.03 (9) Note, (14), (15), and (16), 11.04 (4) (i), (j), and (k), 11.08 (2) (f) and (g), and (5m), 11.09 (3) (c), 11.12 (8), 11.13 (1) (h) relating to the ETF appeals process.

Agency Person to be Contacted for Questions

Please direct any questions about the proposed rule to David Nispel, General Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 264-6936. E-mail address: david.nispel@etf.state.wi.us.

Statement Explaining Need for Rule

This rule-making is needed to revise and update the department's existing appeals rule in order to improve and clarify the appeals process for members, the administrative law judge, the boards, the department and others who participate in the appeals process.

Analysis Prepared by the Department of Employee Trust Funds

1. Statutes interpreted:

Sections 40.03 (1) (j), (2) (m), (3), (6) (i), (7) (f), (8) (f), and (9), 40.06 (1) (e), 40.80 (2), and (2m), and 227.44 to 227.48, 227.485, 227.49, and 227.50, Stats.

2. Statutory authority:

Sections 40.03 (2) (i), (ig), and (ir), and s. 227.11 (2) (a), Stats.

3. Explanation of agency authority:

By statute, the DETF Secretary is expressly authorized, with appropriate board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin statutes. Also, each state agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency if the agency considers it necessary to effectuate the purpose of the statute.

4. Related statute or rule:

There are no other related statutes or administrative rules directly related to this rule.

5. Plain language analysis:

The purpose of this rule is to update the department's appeal procedures, to improve and clarify the process for members, the administrative law judge, the boards that decide appeals, the department, and others who are involved in the process.

6. Summary of, and comparison with, existing or proposed federal regulations:

There are no existing or proposed federal regulations that directly pertain to this proposed rule.

7. Comparison with rules in adjacent states:

Many other retirement systems in adjacent states promulgate rules to provide an appeals process for their members. The appeals process established by the department of employee trust funds is consistent with those of other retirement systems in Illinois, Iowa, Michigan, and Minnesota.

8. Summary of factual data and analytical methodologies:

The department is proposing this rule to clarify and improve the existing appeals process established by this department.

9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

This rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the Wisconsin Retirement System.

10. Anticipated costs incurred by private sector

None.

11. Statement of effect on small business:

The rule has no effect on small businesses.

Regulatory Flexibility Analysis:

The proposed rule has no significant effect on small businesses because only governmental employers and their employees may participate in the benefit programs under ch. 40 of the statutes administered by the Department of Employee Trust Funds.

Fiscal Estimate:

The proposed rule has no direct fiscal impact. The proposed rule generates no revenues for any employer. The proposed rule itself has no effect on the fiscal liabilities of any county, city, village, town, school district, technical college district or sewerage district. The rule has no state fiscal effect during the current biennium and no fiscal impact on state funds.

Text of Rule

SECTION 1. ETF 11.02 (3) is amended to read:

ETF 11.02 (3) "Appeal" means the review of a written finding, notification or decision specifically set forth in a determination made by the department conducted by a board under s. 40.03 (1) (j), (6) (i), (7) (f), or (8) (f), Stats.

SECTION 2. ETF 11.02 (3m) is created to read:

ETF 11.02 (3m) "Appeals coordinator" means the department staff responsible for receiving appeals, forwarding appeals to the hearing examiner, and working directly with the hearing examiner and board on administrative matters regarding an appeal.

SECTION 3. ETF 11.02 (8) is amended to read:

ETF 11.02 (8) "Determination made by the department" means a written finding, notification or decision of the department~~, applying~~ which includes a notice of appeal rights and applies law or contract terms to actual facts to determine a benefit, right, obligation or interest under ch. 40, Stats., including contracts authorized by ch. 40, Stats., of a person who is, or claims the status of, a participant, annuitant, beneficiary, employer, insured, insurer or deferrer.

SECTION 4. ETF 11.03 (2) (b) is amended to read:

ETF 11.03 (2) (b) ~~A right or benefit under~~ In accordance with the limitations on board remedies established by ch. 40, Stats., a right or benefit may not be granted by the board as the result of an appeal unless under the facts proven and the provisions of ch. 40, Stats., and other applicable law, the appellant is eligible for the right or benefit, and meets all qualifications established by statute, administrative rule and any applicable contract authorized by ch. 40, Stats., as of the commencement of the appeal. ~~This paragraph applies regardless of any allegation that an employee or agent of the department or member or agent of the board gave erroneous or mistaken advice or was negligent in the performance of any alleged duty to the aggrieved person.~~ Erroneous or mistaken advice or negligence in performance of a duty may not be the basis for granting a right or benefit to an appellant under ch. 40, Stats.

SECTION 5. ETF 11.03 (2) (bm) is amended to read:

ETF 11.03 (2) (bm) ~~There is no remedy in an appeal before a board based on a theory of undue influence.~~ Regardless of proof offered by an appellant, the board may not change or void any choice, designation, application or other action of a participant, annuitant, beneficiary, insured, or deferrer on the grounds that person was acting under

the undue influence of another. The board does not have authority to hear appeals involving allegations of retaliation or discrimination or to issue any decision based on such allegations. Nothing in this paragraph shall be construed to prevent an aggrieved party from bringing an action against the beneficiary of the alleged undue influence or the person responsible for the alleged retaliation or discrimination in a court of competent jurisdiction and seeking any remedy available under the law.

SECTION 6. ETF 11.03 (3m) is amended to read:

ETF 11.03 (3m) NEW DETERMINATION; NEW TIME LIMITS. The department may internally review a previous determination made by the department. If the department then issues a new determination that revises the original determination, reaches a different result from the original determination, or relies upon different material facts or law from those stated in the original determination, any person aggrieved by the new determination shall have 90 days from its issuance to request an appeal.

SECTION 7. ETF 11.03 (4) (b) is amended to read:

ETF 11.03 (4) (b) The request identifies the particular ~~departmental~~ department determination being challenged and the factual and legal basis for the appeal, including specifically identifying the particular material facts and legal interpretations underlying the ~~departmental~~ department determination which the appellant believes are erroneous. Any question about the sufficiency of the pleading under this paragraph shall be resolved by the hearing examiner at the pre-hearing conference.

SECTION 8. ETF 11.03 (8) is amended to read:

ETF 11.03 (8) BURDEN OF PROOF. The appellant shall have the burden of proceeding and the burden of proving each element necessary to establish that the appellant is entitled to, and has fully qualified for, the claimed right or benefit provided by ch. 40, Stats.

SECTION 9. ETF 11.03 (9) Note is created to read:

Note: The "Limited Power-Of-Attorney For Appeal" form, ET-4944, "Authorization To Disclose Non-Medical Individual Personal Information" form, ET-7406, and "Authorization To Disclose Medical Information" form, ET-7414, required by ch. ETF 11 may be obtained at no charge by writing to: department of employee trust funds, P. O. Box 7931, Madison, WI 53707-7931, or by calling: (608) 266-3285 or toll free at (877) 533-5020. The forms also are available on the department's website: etf.wi.gov.

SECTION 10. ETF 11.03 (11) is amended to read:

ETF 11.03 (11) PRE-HEARING CONFERENCE. The hearing examiner shall hold a pre-hearing conference for the purpose of: determining the proper parties, defining the issues to be resolved, ~~and~~ identifying the material factual and legal disputes between the

parties. ~~If the parties have not reached a stipulation on material facts not in dispute, the hearing examiner shall set~~ setting a deadline for the parties to reach agreement on a ~~factual~~ stipulation of facts or ~~advise~~ advising the examiner that they are unable to do so. ~~The hearing examiner may set~~ and setting the date for the evidentiary hearing ~~at the pre-hearing conference~~. The pre-hearing conference may be held by telephone with the call initiated by the hearing examiner. Following the pre-hearing conference, the hearing examiner shall prepare a memorandum to the parties summarizing the actions taken, amendments allowed to the pleading, recording agreements of the parties, specifying the issues to which the hearing is limited and making appropriate orders to the parties. This memorandum shall control the subsequent course of the appeal, unless modified at the hearing to prevent manifest injustice.

SECTION 11. ETF 11.03 (14) is created to read:

ETF 11.03 (14) HEARING LOCATION. The evidentiary hearing shall be held at the offices of the hearing examiner except as may otherwise be necessary for the convenience of all parties to the appeal.

SECTION 12. ETF 11.03 (15) is created to read:

ETF 11.03 (15) EXPEDITED APPEAL PROCESS. Requests for an expedited appeal process shall be considered by the hearing examiner upon receipt of a written request from a party to the appeal. The hearing examiner shall allow for written objections to be filed within ten days of the date that notice is sent to the parties that such a request has been received. Upon receipt of such a request, the hearing examiner shall schedule a pre-hearing conference for the specific purpose of discussing with the parties the reasons for the request, any objections, and a possible procedure for expediting the time period for issuing a final decision in the appeal. The hearing examiner may grant a request for an expedited appeal process based on financial hardship or other extraordinary circumstances demonstrated by a party. Following the pre-hearing conference, the hearing examiner shall prepare a memorandum to the parties summarizing the expedited process to which the parties have agreed and the hearing examiner has approved. If the parties did not reach an agreement during the pre-hearing conference, the hearing examiner may issue an order either approving or denying the request for an expedited appeal.

SECTION 13. ETF 11.03 (16) is created to read:

ETF 11.03 (16) DECISION WITHOUT HOLDING A HEARING. The parties may agree to have the appeal decided without holding an evidentiary hearing and on the basis of filing legal briefs with the hearing examiner. If there is such an agreement, the parties shall inform the hearing examiner in writing. Upon submission of the legal briefs by the parties, the hearing examiner shall prepare a proposed decision in the manner set forth in s. ETF 11.09.

SECTION 14. ETF 11.04 (2) is amended to read:

ETF 11.04 (2) QUALIFICATIONS. ~~Board staff~~ The department shall contract with a person to serve as a hearing examiner. The person shall be an attorney or administrative law judge knowledgeable in administrative law practice and ch. 40, Stats., or similar statutory benefit programs, or a person deemed otherwise qualified by the board. No person who directly participated in making the determination appealed from may be designated or serve as hearing examiner.

SECTION 15. ETF 11.04 (4) (f) is amended to read:

ETF 11.04 (4) (f) Limit testimony to only those matters which are disputed and which can be resolved by the board pursuant to ch. ETF 11 and ch. 40, Stats.

SECTION 16. ETF 11.04 (4) (i), (j), and (k) are created to read:

ETF 11.04 (4) (i) Encourage the parties to submit a stipulation of facts and if the parties cannot reach agreement on a stipulation, then the hearing examiner shall issue a statement of facts based on submissions from the individual parties.

(j) Limit testimony and exhibits at the evidentiary hearing to only those matters which are relevant to the findings, notifications, and decisions set forth in the determination made by the department.

(k) Rule on any request by a party for an expedited appeal process as provided in s. ETF 11.03 (15).

SECTION 17. ETF 11.04 (8) is amended to read:

ETF 11.04 (8) EXAMINER'S FILE. In the course of presiding over the appeal, the hearing examiner shall maintain the official record of the appeal, as well as filing correspondence to the examiner relating directly to the appeal but not part of the record. The hearing examiner may delegate some or all of this responsibility to board staff. After preparing the final or proposed decision, the hearing examiner shall forward the record and hearing examiner's file to the appeals coordinator for the department. The examiner's personal notes shall not be forwarded to the department and are not part of the official record. Disposition of the examiner's personal notes is at his or her discretion.

SECTION 18. ETF 11.05 (4) is amended to read:

ETF 11.05 (4) A party to the appeal may request that the hearing examiner review individual personal information in the records of the department in camera. If the hearing examiner determines that the information is relevant to the appeal and disclosure is required to assure proper administration of a benefit program under ch. 40, Stats., the examiner may order the department to disclose the information as provided in sub. (3).

SECTION 19. ETF 11.05 (7) is amended to read:

ETF 11.05 (7) ~~For the convenience of a party or witness, but only by~~ By advance written agreement between all parties, the oral or written deposition of a witness, as described by ss. 804.05 and 804.06, Stats., may be taken and used at the hearing in its entirety, so far as it is admissible under this chapter, as if the witness were then present and testifying.

SECTION 20. ETF 11.06 (1) is amended to read:

ETF 11.06 Evidence at hearing. (1) PRIVILEGES; RULES OF EVIDENCE. Rules of privilege recognized by law shall be given effect. However, common law or statutory rules of evidence do not apply except as provided in s. ETF 11.12 (2) (b) concerning hearsay. The hearing examiner shall admit all testimony having a reasonable probative value to the issue that was established at the pre-hearing conference and that is to be resolved by the evidentiary hearing. The hearing examiner shall exclude from the record irrelevant, immaterial, or unduly repetitious testimony.

SECTION 21. ETF 11.07 (1) is amended to read:

ETF 11.07 Informal disposition. (1) Disposition of an appeal under this section requires no further action by the hearing examiner or board. After the parties have informed the hearing examiner in writing that the appeal has been disposed of informally pursuant to this section, the hearing examiner shall forward the record to the appeals coordinator.

SECTION 22. ETF 11.08 (2) (b) 1. is amended to read:

ETF 11.08 (2) (b) 1. The appeal was not filed within 90 days after the ~~departmental~~ department determination appealed from was ~~mailed~~ sent by mail or e-mail to the person aggrieved by the determination. The entire appeal shall be dismissed.

SECTION 23. ETF 11.08 (2) (f) and (g) are created to read:

ETF 11.08 (2) (f) No issue has been identified which can be resolved by the hearing examiner or board under ch. ETF 11 or ch. 40, Stats.

(g) There is no remaining issue to be decided from the issues that are set forth in the department determination letter.

SECTION 24. ETF 11.08 (5m) is created to read:

ETF 11.08 (5m) The hearing examiner shall issue the final decision of an appeal if each of the parties informs the hearing examiner in writing that they agree to have the

appeal decided pursuant to a motion for summary judgment. The motion must be filed with the hearing examiner and include the signatures of the parties.

SECTION 25. ETF 11.09 (1) is amended to read:

ETF 11.09 Proposed decision. (1) CONTENTS. The proposed decision shall be in the same form and comply with the same standards as is required for a final decision. If the hearing examiner concludes that the decision may depend upon the interpretation of an ambiguous statute, the proposed decision shall include the hearing examiner's basis for concluding that the statute is ambiguous as a matter of law and a recommended interpretation giving the same weight to the interpretations of the department, attorney general and administrative rules as is required for a final decision. If the proposed decision does not dispose of an issue raised by a party, the hearing examiner shall state in the proposed decision why ch. 40, Stats., or ch. ETF 11 does not permit such a disposition.

SECTION 26. ETF 11.09 (3) (intro.) is amended to read:

ETF 11.09 (3) (intro.) OBJECTIONS. Any party ~~aggrieved by the proposed decision~~ may file a written objection to the proposed decision with the hearing examiner within 20 days of the date of the notice of the proposed decision. The ~~aggrieved~~ party shall specify, in detail, the following:

SECTION 27. ETF 11.09 (3) (c) is created to read:

ETF 11.09 (3) (c) Any written objections to the proposed decision shall be included in the record of the appeal that is forwarded to the board.

SECTION 28. ETF 11.12 (1) (a) is amended to read:

ETF 11.12 (1) (a) Findings of fact, consisting of a concise and separate statement of the ultimate conclusion upon each material issue of fact, without recital of evidence. If the findings of fact do not include an ultimate conclusion on an issue raised by a party, a statement shall be made indicating why ch. 40, Stats., or ch. ETF 11 do not authorize the hearing examiner to make such a ruling.

SECTION 29. ETF 11.12 (8) is created to read:

ETF 11.12 (8) BOARD CONTACT WITH PARTIES. Unless the board specifically requests information from the parties, no party to an appeal of a determination made by the department may contact any member of the board about that appeal prior to the issuance of a final decision by the board.

SECTION 30. ETF 11.13 (1) (h) is created to read:

ETF 11.13 (1) (h) Letters and e-mails sent to the hearing examiner or the board by a party.

SECTION 31. ETF 11.13 (3) is amended to read:

ETF 11.13 (3) The board staff shall arrange for a stenographic, electronic or other record of the hearing proceedings to be made. A written transcript of the hearing shall be prepared ~~only if deemed necessary by~~ upon request of a party, the hearing examiner, the board or the department. ~~Unless otherwise prepared for the hearing examiner's, board's or department's own use, a written transcript shall not be prepared at the specific request of any person, unless needed by that person for judicial review purposes or other valid reason.~~ If a written transcript is prepared, the stenographic, electronic or other record need not be retained.

SECTION 32. ETF 11.14 (2) (c) is amended to read:

ETF 11.14 (2) (c) The discovery of new evidence no later than 20 days after notice of the final decision is mailed that is sufficiently strong to reverse or modify the original decision, which could not have been previously discovered by due diligence.

SECTION 33. ETF 11.14 (4) (intro.) is amended to read:

ETF 11.14 (4) (intro.) DECISION ON ~~MOTION~~ PETITION. The board chair shall determine whether the petition shall be added to the agenda of the next board meeting or whether to delegate final authority to decide the ~~motion~~ petition to the hearing examiner who presided over the appeal. The parties to the appeal shall immediately be notified of the decision to grant or deny the petition. If the board itself considers and grants the petition, the appeal will be referred to a hearing examiner and proceedings conducted under sub. (6). If the decision is delegated to the hearing examiner:

SECTION 34. ETF 11.16 (4) is amended to read:

ETF 11.16 (4) DEPARTMENT AND BOARD MAILING ADDRESS. Mail to a board shall be addressed to the board, in care of the ~~department~~ appeals coordinator and mailed or delivered to the department.

Note: The ~~present~~ mailing address of the department is: ~~Department of Employee Trust Funds~~ department of employee trust funds, Post Office Box 7931, Madison, Wisconsin 53707−7931.

(end of rule text)

Economic Impact Analysis for ETF rule relating to the ETF appeals process.

This rule does not have an economic effect on specific businesses, business sectors, public utility ratepayers, local governmental units, and the state's economy as a whole. Because this rule does not have an economic impact, ETF has not solicited information and advice from businesses, associations representing businesses, local governmental units, and individuals that may be affected by the proposed rule.

The policy problem that the proposed rule is intended to address is to improve and clarify the ETF appeals process for members, the administrative law judge, the boards that decide appeals, the department, and others involved in the process. The federal government and the various retirement systems in the states of Illinois, Iowa, Michigan, and Minnesota have administrative rules concerning an appeals process.

There is no economic impact of this proposed rule and therefore no implementation and compliance costs reasonably expected to be incurred by or passed along to businesses, local governmental units, and individuals that may be affected by the proposed rule.

The alternative of not promulgating the proposed rule would result in the policy problem being ineffectively addressed with a lower level of customer service.

Since the proposed rule does not adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of the state, the department did not consult with businesses, local governmental units, and individuals that may be affected by the proposed rule when preparing this economic impact analysis.

LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Pam Shannon
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Scott Grosz and Jessica Karls-Ruplinger
Clearinghouse Assistant Directors

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **11-044**

AN ORDER to renumber ETF 11.08 (6); to amend ETF 11.01 (1), 11.02 (3) and (8), 11.03 (2) (b) and (bm), (3m), (4) (b), (8) and (11), 11.04 (2), (4) (intro.), (f) and (h), and (8), 11.05 (4) and (7), 11.06 (1), 11.07 (1), 11.08 (2) (b) 1., 11.09 (1) and (3), 11.12 (1) (a), 11.13 (3), 11.14 (2) (c) and (4) (intro.), and 11.16 (4); and to create ETF 11.02 (3m), 11.03 (9) (Note), (14), (15), and (16), 11.04 (4) (i), (j), and (k), 11.08 (2) (f) and (g), 11.09 (3) (c), 11.12 (8), and 11.13 (1) (h), relating to the ETF appeals process.

Submitted by **DEPARTMENT OF EMPLOYEE TRUST FUNDS**

09-09-2011 RECEIVED BY LEGISLATIVE COUNCIL.

10-06-2011 REPORT SENT TO AGENCY.

SG/JKR:DWS

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☐ NO ☑

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☑ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Pam Shannon
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Clearinghouse Assistant Directors

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Legislative Council Deputy Director

CLEARINGHOUSE RULE 11-044

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

2. Form, Style and Placement in Administrative Code

a. The introductory clause should be rewritten as follows:

> An order to amend ETF 11.01 (1), 11.02 (3) and (8), 11.03 (2) (b) and (bm), (3m), (4) (b), (8) and (11), 11.04 (2), (4) (intro.), (f) and (h), and (8), 11.05 (4) and (7), 11.06 (1), 11.07 (1), 11.08 (2) (b) 1., 11.09 (1) and (3) (intro.), 11.12 (1) (a), 11.13 (3), 11.14 (2) (c) and (4) (intro.), and 11.16 (4); and to create ETF 11.02 (3m), 11.03 (9) Note, (14), (15) and (16), 11.04 (4) (i), (j) and (k), 11.08 (2) (f) and (g) and (5m), 11.09 (3) (c), 11.12 (8), and 11.13 (1) (h), relating to the ETF appeals process.

Note that the above introductory clause incorporates the changes to SECTIONS 25, 26, and 28, discussed below.

b. In the summary of the rule, the department should review the statutes interpreted section; it appears the department may have intended to refer to s. 40.03 (6) (i), Stats., rather than s. 40.03 (6) (j), Stats. Also in this section, an "and" should be inserted after "(8) (f)" and after "40.80 (2)." In general, "and" should be inserted prior to the last reference to a statutory subunit when two or more such subunits are referenced in a sequence. Likewise, in the statutory authority section, the statutes should be cited as: "Sections 40.03 (2) (i), (ig) *and* (ir), and 227.11 (2), Stats.". (Emphasis added.) [The ch. 227 citation could be stated more explicitly as s. 227.11 (2) (a), "Stats."]

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

c. In the fiscal estimate for the rule, the department should insert "district" after "sewerage."

d. Throughout the rule, the department inserts the phrase "of employee trust funds" after "department." However, s. ETF 11.02 provides that words used in ch. ETF 11 have the same meaning as in s. 40.02, Stats. Since the term "department" is defined as the Department of Employee Trust Funds in s. 40.02 (19), Stats., "department" may be used in this rule chapter without adding the phrase "of employee trust funds."

e. The subsections of s. ETF 11.02 amended in SECTIONS 3 and 4 are out of order. Section ETF 11.02 (3m) should precede s. ETF 11.02 (8).

f. In s. ETF 11.02 (3m), "coordinator" should not be capitalized.

g. In s. ETF 11.02 (8), the underscored material appears to constitute a substantive provision that should not be incorporated in a definition. [s. 1.01 (7) (b), Manual.]

h. Throughout the rule, periods should not be included in stricken material when the period should be retained. Rather, the department should place underscored material before an existing period. [s. 1.06 (4), Manual.]

i. Throughout the rule, the phrase "shall not" should be replaced by "may not." [s. 1.01 (2), Manual.]

j. The word "Stats." should be capitalized throughout the rule. [s. 1.07 (2), Manual.]

k. In the text of s. ETF 11.03 (2) (bm), the "(bm)" should be preceded by "ETF 11.03 (2)."

l. In ss. ETF 11.03 (9) (Note) and 11.16 (4) (Note), it is not necessary to use the lower case for "department of employee trust funds" as capitalization is the norm for postal address titles.

m. In s. ETF 11.03 (9) (Note), "Individual" should be inserted before "Personal" in the reference to form ET-7406.

n. Section ETF 11.03 (16) should have a title, for consistency with the other subsections in this section. [s. 1.05 (1), Manual.]

o. The treatment clause to SECTION 16 should be rewritten to read: "ETF 11.04 (4) (intro.), (f), and (h) are amended to read:". In s. ETF 11.04 (4) (intro.), the department substitutes "shall" for "may." Is it appropriate to create a mandatory obligation for each paragraph in subsection (4)? For example, par. (b) reads "Issue, quash and enforce subpoenas." Is it the department's intent that each of these activities must take place in every hearing? If not, it may be more appropriate to retain the use of "may" or otherwise bifurcate the paragraphs of sub. (4) into mandatory and permissive acts.

p. Throughout the rule, the department should replace references to "this rule" with internal references, consistent with s. 1.07 (2), Manual.

q. In s. ETF 11.04 (4) (i), a "(4)" should be inserted before the "(i)".

r. To avoid unnecessary renumbering of current rule provisions, it is suggested that the language in SECTION 25 be deleted, so that s. ETF 11.08 (6) remains sub. (6), and the language in SECTION 26 be created as s. ETF 11.08 (5m) and placed in SECTION 25 with the following treatment clause: "ETF 11.08 (5m) is created to read:". If this change is made, SECTION 27 would be renumbered SECTION 26, and so forth. [s. 1.03 (g) and Note, Manual.]

s. Throughout the rule, statutory references should conform to s. 1.07 (2), Manual. For example, in s. ETF 11.09 (1), the department should refer to "ch. 40, Stats.," rather than "Wis. Stat. ch. 40."

t. In SECTION 28, the treatment clause should refer to s. ETF 11.09 (3) (intro.).

u. Section ETF 11.12 (8) should have a title, for consistency with the other subsections of this section. [s. 1.05 (1), Manual.]

v. In s. 11.16 (4), it is not necessary to insert a par. (a) unless two or more paragraphs exist. In the Note following this provision, the word "present" should be deleted. If the department's address changes, the Note should be updated to keep that information current.

w. The effective date of the rule should be included in a numbered SECTION. [s. 1.02 (4), Manual.]

x. The department should review the economic impact analysis to determine whether the element of the analysis regarding contact with various entities has been satisfied. Also, note that the Department of Administration has developed a combined template for fiscal estimates and economic impact analyses. It is available at: http://legis.wisconsin.gov/lc/adminrules/files/AR_FiscalEstimate-DOA-2049.doc.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the last sentence of s. ETF 11.03 (2) (b), the department may wish to substitute a more specific noun for "someone."

b. In s. ETF 11.03 (11), the word "advise" on line 6 should be "advising."

c. In s. ETF 11.03 (14), "will" should be changed to "shall." Also, how will the department determine when it is "necessary for the convenience" of parties to an appeal to meet in an alternative location?

d. In s. ETF 11.03 (15), a hearing examiner "shall grant" a request for expedited appeal on account of financial hardship. How will the department define the level of hardship that will trigger a mandatory approval of a request for an expedited appeal? Should the hearing examiner instead have permissive authority ("may grant") to grant requests for expedited appeals? If no agreement to an expedited appeal is reached, and a hearing examiner issues an order approving a request, is it necessary to indicate that the order approving the request will also specify the terms of the expedited process?

e. In s. ETF 11.04 (4) (h), on the second-to-last line, "hearing" should be followed by a comma.

f. In s. ETF 11.04 (4) (k), should the word "appeal" replace "hearing"?

g. In s. ETF 11.07 (1), "informally disposed of" should read "disposed of informally."

Response to Legislative Council Staff Recommendations

The DETF implemented the Legislative Council Staff recommendations contained in the Clearinghouse Report. Changes were made in form, style and placement in the administrative code as well as clarity, grammar, punctuation and use of plain language.

List of Persons Appearing or Registering For or Against the Rules.

No persons registered either for or against the rule at the public hearing on October 21, 2011.

Summary of Comments Received at Public Hearing.

No person wished to testify concerning the rule. The record was held open for written comments until 4:30 p.m. on October 21, 2011, but no comments were received.

Modifications to Rule as Originally Proposed as a Result of Public Comments

None.

Modifications to the Analysis Accompanying the Proposed Rule.

None.

Modifications to the Initial Fiscal Estimate

None.

Board Authorization for Promulgation

This final draft report on Clearinghouse Rule #11-044 has been duly approved for submission to the Governor and Legislature, and for promulgation, by the Department of Employee Trust Funds, by the Group Insurance Board at its meeting on November 8, 2011, by the Deferred Compensation Board at its meeting on November 15, 2011, and by the Employee Trust Funds Board, Wisconsin Retirement Board and Teachers Retirement Board at their meetings on December 1, 2011.

Effective Date

This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), Stats.

Respectfully submitted,

DEPARTMENT OF EMPLOYEE TRUST FUNDS

_____ Date: _____

David A. Stella
Secretary