State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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April 22, 1999

The Honorable Fred Risser, President
Wisconsin State Senate
1 East Main, Suite 402
Madison, WI 53702

The Honorable Scott Jensen, Speaker
Wisconsin State Assembly
1 East Main, Suite 402
Madison, WI 53702

Re: Clearinghouse Rule 98-119
HA 3, relating to the procedure and practice for fair hearings regarding the food stamp and medicaid programs.

Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rules are in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rules were submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about these rules, please contact Louis Dunlap at 267-7376.

Sincerely,

Louis H. Dunlap
Assistant Administrator

Cc: Gary Poulson, Deputy Revisor of Statutes
Senator Judy Robson, JCRAR
Representative Glenn Grothman, JCRAR
Mark Bugher, Secretary, DOA

Proposed Administrative Rules – HA 3
Analysis for Legislative Standing Committees
Pursuant to s. 227.19(3), Stats.

Need for Rules

These proposed rules describe the requirements and process for the appeal by individuals of adverse actions which affect their benefits in the Medicaid, food stamps, public assistance and social services programs administered by the departments of health and family services, workforce development, and administration.

Before government reorganization in 1996, "fair hearings" required by law for the various public assistance and social service programs were conducted pursuant to HSS 225 by the office of administrative hearings located in the department of health and social services.In the course of reorganization, that office merged with the division of hearings and appeals and the administration of the food stamp program was moved to the department of workforce development. These changes, as well as the fact that HSS 225 was generally outdated, create the need for a new rule governing the hearing process. The new departmental review process conducted by the division on W-2 is also addressed.

The proposed rule :

- Defines the actions appealable in the medical assistance, food stamp, public assistance and social services programs administered by the three departments.
- Describes the process, requirements and time limits for requesting a hearing and the circumstances under which program benefits will be ordered continued pending a hearing decision.
- Describes the rights of a person requesting a hearing before and during the proceeding.
- Defines the powers of the administrative law judge who conducts the hearing.
- Indicates the required content and form of a hearing decision, the circumstances under which a decision will be issued as proposed rather than final and the time requirements for issuance.
- Describes the process for rehearing of or amendment to a hearing.
- Provides the requirements and time frames for the prevailing party to request payments of costs.
- Describes the process for review of agency decisions under the Wisconsin Works program.

Related Statutes and Rules

Ss 49.45(5), 48.64(4) and 49.152,Stats.
HFS 225

Responses to Clearinghouse Recommendations

The Clearinghouse comments and the Division's responses are attached.

Public Hearing

The Division held one public hearing on the proposed rules, in Madison on January 14, 1999. Mitchell Hagopian, of the Coalition of Wisconsin Aging Groups, testified. Written comments were submitted by four persons during the public review period that ended on January 21, 1999. List of the commenters, their remarks, and the Division's responses are attached.

Final Regulatory Flexibility Analysis

These rules apply to the Division, to individuals appealing actions in public assistance programs and to the departments and agencies making those decisions. The proposed rules are not anticipated to have a significant economic impact on a substantial number of small businesses as defined under s. 227.114(a), Stats.

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC FORM 2

RULES CLEARINGHOUSE

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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 **98–119**

AN ORDER to create chapter HA 3, relating to the procedure and practice for fair hearings regarding the food stamp and medicaid programs.

Submitted by **DIVISION OF HEARINGS AND APPEALS**

08–21–98 RECEIVED BY LEGISLATIVE COUNCIL.
09–21–98 REPORT SENT TO AGENCY.

RS:LR:jal;rv

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CLEARINGHOUSE RULE 98–119

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

Section HA 3.01 (1) cites in part ss. 46.016 and 49.45 (5) and (10), Stats., as statutory authority for the promulgation of ch. HA 3 by the Division of Hearings and Appeals. These statutes appear to relate to responsibilities and functions of the Department of Health and Family Services and not directly to the authority of the division to undertake the hearings described in ch. HA 3. An additional citation to s. 227.43, Stats., as affected by 1997 Wisconsin Acts 3 and 27, would make the statement of statutory authority more accurate. The statement of authority also should support the division's activities with respect to hearing appeals of decisions made by the Department of Administration. Finally, s. HA 3.12 provides for a division review of a Wisconsin Works agency fact-finding decision. However, both s. 49.152, Stats., as affected by 1997 Wisconsin Act 27, and s. DWD 12.22 (2) and (3) appear to provide for review of Wisconsin Works agency decisions by the Department of Workforce Development (DWD), rather than by the Division of Hearings and Appeals. Since the review by DWD is not a hearing of a contested case, and since the authority of the division under s. 227.43 (1) (by), Stats., is to preside over a hearing of a contested case, what statutory authority exists for the division to review decisions of a Wisconsin Works agency?

2. Form, Style and Placement in Administrative Code

a. The rule-making order does not contain an introductory clause, a plain language analysis or a fiscal estimate. These should be inserted into the rule. [s. 1.02 (1), (2) and (7), Manual.]

b. In s. HA 3.02 (2), the word "service" on the last line should be "services."

c. In s. HA 3.02 (4), (8) and (13), the second word of that definition should not be capitalized.

d. Section HA 3.02 (11) defines Medicaid waiver services as home and community-based services under s. 46.27, Stats. There are many other Medical Assistance (MA) waiver programs in other parts of the statutes. Is the appeals procedure only to cover the Medicaid Waiver Program under the Community Options Program? If so, this definition is correct; if not, these statutory references need to be expanded to include the other MA waiver programs.

e. Section HA 3.02 (16) would read more clearly if commas were placed before and after the phrase "other than under local county-funded programs."

f. In s. HA 3.03 (intro.), the word "action" should be made plural.

g. In s. HA 3.03 (1), the words "determination" in the first line and "in writing" in the second line should be deleted and, instead, the term "written statement" should be inserted after the word "the" on the first line.

h. The mailing address of the Division of Hearings and Appeals set forth in s. HA 3.05 (2) (b) should be placed in a note to the rule.

i. In s. HA 3.06 (7), it should be clarified that the hearing should be tape-recorded, rather than simply "recorded." Tape-recordings are referred to in s. HA 3.09 (1) and (7).

j. Section HA 3.11 (4) states that the "department or agency has 15 days from receipt of a complete costs motion to respond in writing to the administrative law judge." This sentence should be rewritten to state that the "department or agency shall respond in writing to the administrative law judge within 15 days of receipt of a complete costs motion." Further, if the department or agency fails to respond, what is the consequence of that failure?

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

42 C.F.R. s. 431.220 (a) (3) provides for an appeal of an erroneous nursing home transfer or discharge. This is not included in the list of appealable items in s. HA 3.03. The division should consider adding this to the list, in conformity with the federal regulation.

Response to Clearinghouse Report

Clearinghouse Rule 98-119

1. Statutory Authority

With regard to the citation of ss.46.016 and 49.45(5) and (10), these statutes do relate to the responsibilities and functions of the Department of Health and Family Services, and not directly to the authority of the division to do hearings; they describe what must be in the rules and this is taken largely from federal requirements. Federal law requires, for Medicaid, for example, that the program be administered "by a single state agency". The statutes highlight the fact that, in a very meaningful sense, these rules, although promulgated by the agency holding the hearings by delegation, must be seen to be approved by DHFS, since they "are" DHFS rules from the federal vantage point.

Second, a citation to s. 227.43, Stats., has been added.

DWD has expressly acknowledged that the process for the Wisconsin Works agency review of decisions is "subject to the requirements of s. 227, Stats." See Public Hearing Comment & Agency Response, Rule Number DWD 12, p. 14.By definition, that means they are contested case proceedings, clearly appealable to circuit court after a DHA decision and subject to s. 227 requirements. See also, s. 227.42(1).

2. Form, Style and Placement in Administrative Code

a) An introductory clause, plain language analysis and fiscal estimate have been added.

b) "This chapter" has replaced "these rules".

c) HA 3.03(9) which is now sub.(n): "par (am)" has been deleted appropriately.

d) HA 3.03(6), now sub.(f): change made.

e) HA 3. 05(2) and 3.06(6)(b): for the former, the language has been considerably changed after the public hearing. Change made in the latter.

f) HA 3. 05(3): Change made.

g) HA 3.08: Change made.

h) HA 3.11 (2): Change made.

i) HA 3.12: Change made.

4. Adequacy of References to Statutes, etc.

a) HA 3.02(9): Correction made.

b) HA 3.02(13) (now 15): Change made.

c) HA 3.02(17) (now 19): Correction made.

d) HA 3.04: Corrections made.

5). Clarity, Grammar, Punctuation

a) HA 3.01(2): Change made.

b) HA 3.02(2): Correction made.

c) HA 3.02(4), (8) and (13): Change made.

d) HA 3.02(11). (Now 13): References expanded to include all waiver programs.

e) HA 3.02(16) (Now 18): Commas added.

f) HA 3.03(intro): "action" has been pluralized.

g) HA 3.03(1): The language has been changed; the reference is now gone.

h) HA 3.05(2)(b): A note with the address has been added.

i) HA 3.06(7): Change made.

j) HA 3.11(4): The sentence has been rewritten, but "may" is used rather than "shall". The statute, at s. 227.485(5), Stats., states that the agency "has" 15 days to respond. The statute does not specify consequences and case law has not dealt with the issue. We believe that there are no consequences; the agency simply has provided nothing for the examiner to consider.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

The right to appeal nursing home transfer or discharge has been added, at HA 3.03(h).

Clearinghouse Rule 98-119
Public Hearing on January 14, 1999, at Madison

Persons Appearing or Registering at Public Hearing

Mitchell Hagopian -- Coalition of Wisconsin Aging Groups - Madison

Kathleen McKinstra -- Coalition of Wisconsin Aging Groups - Madison

Patricia DeLessio -- Legal Action of Wisconsin - Milwaukee

Carol Medaris – Wisconsin Council on Children and Families - Madison

Shirin Cabrall – Legal Action of Wiscosin - Milwaukee

Jeffrey Spitzer-Resnick – Wisconsin Coalition for Advocacy - Madison

PUBLIC HEARING COMMENT & AGENCY RESPONSE
CLEARINGHOUSE RULE 98-119
DIVISION OF HEARINGS AND APPEALS

RULE NUMBER: HA3

RELATED TO: Hearing Procedure

HEARING LOCATION: 5005 University Avenue, Suite 201, Madison

HEARING DATE: January 14, 1999

Commenting in Sup.	Commenting in Opp.	For Info.	Exh. No.	Presenter, Group Represented, City & State	Comments/Recommendations	Agency Response
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	1. HA 3.02: the definition section should be amended to include appeals concerning the denial or reduction of licenses or the imposition of penalties for child welfare agencies, shelter facilities, group homes, day cares, and foster homes as specified in §48.72 and 48.75(2).	Disagree. DHA does have jurisdiction for such appeals, but will consider them when existing HA2 is amended. HA 3 is intended to apply only to the non-licensure appeals by individuals of public assistance/social service matters, not the more formal litigation for licensure cases.
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	2. HA 3.02: the definition section should be amended to include appeals concerning the denial or termination of child care authorization to the parent, guardian or relative requesting assistance (as opposed to the facility). [In Milwaukee County it is the county who oversees child care for kinship care relatives, foster parents and working individuals. In addition it is the county that completes the authorization and provides payments for W-2 participants. These issues cannot be addressed in the fact-finding process because the county is not part of that process.]	Disagree. DWD considers child care disputes to be subject to the fact finding, not fair hearing process, as the statute under which child care decisions are made is §49.155, thus drawing in the review process of §49.152 (Fact-finding with Departmental review).
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	3. HA 3.02: the definition section should be amended to include appeals concerning any action taken by a managed care entity which denies services to medical assistance recipients or limit services to them in any way.	Agree. The section has been amended accordingly.

		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	4. HA 3.03: right to appeal this section should be amended to include the types of appeals noted above. In addition: a) subsection (12) should be clarified, or a new section added, that allows individuals to appeal continuing recovery efforts where he or she believes the amount has been repaid or discharged in bankruptcy, and b) subsection (13) should be terminations as well.	As to (12), agree. S. 12 has been amended. As to (13), agree. "Termination" has been added.
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	5. HA 3.05(2): Subsection (2) implies that an applicant or recipient must authorize something in writing to allow a representative to request a hearing on his or her behalf. It should read – a request for hearing should be made in writing by the applicant or recipient or his or her representative.	Disagree. This office has never required authorization from attorneys, those holding power of attorney, spouses or parents of a minor child, but has required authorization in specific cases or for those who less obviously stand in the shoes of the petitioner. The language has been modified to reflect this.
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	6. HA 3.05: Subsection (3) provides that, except in food stamp cases and those cases where a different time limit is specified, the petitioner has 45 days to file an appeal. This section should be amended to provide that where notice of appeal rights is not provided the time limit for requesting hearings does not apply. Similarly, subsection (4) should be amended. Hearing requests should not be denied or dismissed for failing to file within the time required unless it is established, through the taking of testimony and evidence, that the petitioner received adequate and timely notice of her appeals rights.	Disagree. This language is identical to, e.g., the language in the federal regulations for food stamps. It is not necessary to spell out all the legal defenses available to denial of jurisdiction.

					7. HA 3.05(5): Subsection (5) should be amended to include continuing benefits in those cases where a managed care entity proposes to discontinue a service (i.e. mental health counseling); and in those cases where timely notice has not been provided.	Agree that medicaid benefits discontinued by a managed care entity are subject to continuation on timely appeal, but disagree that it needs to be specified. Continuation of medicaid benefits is already covered by the existing language of s. (5). As to continued benefits and timely notice, s. (5) refers to actions taken prior to hearing, not to post hearing relief provided by an examiner. This DOES NOT preclude this relief when it is established at hearing that timely notice was not provided.
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	8. HA 3.08: In general, §227.45 should be incorporated as the applicable evidentiary standard. Specifically, subsection (5) should be amended to conform with §227.45(3). As proposed, it allows an administrative law judge to take official notice of information which is in the departments' official computer systems, such as CARES. This section should be limited to items the parties agree on. CARES contains a great deal of information that simply cannot be noticed. For example, county and W-2 workers put case comments into CARES which are their description of events and not established facts. In addition, even where a notice is listed in CARES as being sent it may not have been sent to the correct address or may have been suppressed. Allowing notice of all matters contained in the computer system may result in notice being taken of facts that are actually in dispute. Section 227.45(3) sets forth a fairer, more equitable standard.	Disagree as to incorporation of §227.45. "Official notice" was used as a rubric, but was inappropriate in terms of what was meant. This was not meant to apply to derivation of substantive fact from, e.g., CARES. In many of these hearings, where both sides are unrepresented, one of the key issues is determining exactly what happened. Sometimes this is the only issue. The language has been changed to indicate that computer information as to case history, notice issuance, what actions were taken, etc. may be accessed and used.
		X		Written comments from Patricia DeLessio on behalf of Legal Action of Wisconsin.	9. HA 3.09: Subsection (12) should be amended to require all decisions to specify a time limit for implementation.	Disagree. There are many types of decisions where specification of a time limit will not work or does not apply (MA disability, prior authorizations, etc.). Although all decisions requiring an agency to take a discrete action such as issuing benefits specify a time limit, it cannot be done in every instance.

		X		Written comments from Shirin Cabraal on behalf of Legal Action of Wisconsin.	1. Rule should be amended to include: Medicaid recipients enrolled in Medicaid HMOs or other MCOs have the right to a fair hearing to appeal any action by the HMO or other MCO which: a) denies, reduces, terminates or otherwise limits services; b) improperly denies access to emergency room or specialist care; c) improperly denies an out-of-plan referral for medically necessary care, if the plan cannot provide equivalent care within the plan; d) Unreasonably delays medically necessary care; e) denies access to interpreter or transportation services for medically necessary care; or any other action by an MCO that adversely affects a Medicaid managed care recipient.	Agree. Actions taken by managed care entities have been added, the term defined, etc. We do not feel it is necessary, however, to spell out every particular action which is appealable.
		X		Written comments from Shirin Cabraal on behalf of Legal Action of Wisconsin.	2. Fair hearing rights must be available to Medicaid managed care enrollees who are adversely affected by the action of the state agency which denies an enrollee's request for disenrollment or exemption from an HMO.	Agree. This is one of the types of decisions included in the managed care – action language added to HA 3.03.
		X		Written comments from Shirin Cabraal on behalf of Legal Action of Wisconsin.	3. The internal grievance procedures of the HMO or MCO need not be exhausted before a fair hearing is requested by a Medicaid recipient; DHSS/HMO Contract Art. VIII B and C (1)(e); Goldberg v. Kelly, 397 U.S. 254 (1970).	We agree that this is so but do not believe it is necessary to this rule.
		X		Written comments from Shirin Cabraal on behalf of Legal Action of Wisconsin.	4. If a Medicaid recipient requests a fair hearing before the Division of Hearings and Appeals within 10 days of the termination reduction, suspension, or limitation of services by an HMO or MCO, those services shall be continued pending issuance of a fair hearing decision; DHSS/HMO Contract Art. VIII C (2) a; 42 C.F.R. §431.230 and §431.231.	See response to DeLessio comments at No. 7 above.

		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families	1. HA 3.01(3)(a): The description of permissible challenges brought by applicants should be expanded so that it is consistent with later language. This might include, after "social services," the phrase "or to challenge the level or timing of benefits or the form of payments."	Agree in part. The right to challenge the timing (i.e., onset date of eligibility) will be spelled out, but "level" and "form" of benefits are covered by HA 3.01(3)(b) for a recipient.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	2. HA 3.03(4): A new subsection should be added here to provide for appeals of "The determination of the date when eligibility or benefits begin." These issues do not appear to be clearly covered under language in other subsections.	Agree. Although it was felt that this is covered by "sufficiency" of benefits, the language "or initial eligibility date" has been added to HA 3.03 (4).
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	3. HA 3.03(5): Language should be added making it clear that applicants may challenge the form of payments as well as recipients. This may be done by changing this subsection to read, "The form of payment of benefits or a change in the form of payment."	Agree. The section has been changed.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	4. HA 3.03(12): This should be expanded to include appeals of "continuing recovery efforts after overpayments are alleged to have been repaid."	This change was made in response to DeLessio's comments, No. 4.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	5. HA 3.03(13): In addition to "denial of an application for kinship payment," this subsection should include the "termination of payments," as well.	Already changed in response to DeLessio's comments, No. 4.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	6. HA 3.03: It might be helpful to finish this section with a catchall phrase, similar to language in the federal food stamp rules which covers "any action which affects the participation of the household in the Program." 7 CFR 273.15(a).	Agree. HA 3.03 (15) has been added.

		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	7. HA 3.05(2): This would seem to require that a representative have written authorization prior to filing a hearing request. In my experience that has never been the practice, and such a change would severely burden persons requesting the assistance of, for example, legal services attorneys by telephone near the deadline for requesting hearings, or during the very short time limit for continuing benefits. Many clients of legal services offices live a good distance away and/or lack reliable transportation. They may also lack the reading and writing skills necessary to prepare an authorization in order to submit one quickly themselves.	See No. 5 of DeLessio's comments above. It has never been the practice to require authorizations from attorneys, and this will not change. We have always required authorization for some sorts of representatives or in particular cases.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	8. HA 3.05(3): It would be helpful to add a section here to clarify that time limits do not begin to run until adequate and timely notice is received by the petitioner.	See No. 6 of DeLessio's comments above.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	9. HA 3.05(4)(e): Similarly, this section should clarify that a hearing request may not be denied for untimeliness unless the agency shows that petitioner received adequate and timely notice.	Disagree. It is not the agency's burden to show the receipt of notice by a petitioner.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	10. HA 3.05(5): In the first line, to be consistent with earlier language and federal law, the word "suspension" should be added to the kinds of actions that may be stayed pending the hearing decision.	Agree. Change has been made.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	11. HA 3.06(6): In the first line, "or petitioner's representative" should be added to clarify that a representative is also authorized to take the actions in (a) through (e) on petitioner's behalf.	Agree. Language has been added.
		X		Written comments from Carol Medaris on behalf o the Wisconsin Council on Children and Families.	12. HA 3.08(5): This section appears to go much too far in authorizing judicial notice for anything appearing in CARES. For example, workers' comments may be in CARES, but their presence there would not provide any	See No. 8 of DeLessio's comments above.

					assurance of reliability or materiality or lack of prejudice.	
		X		Written comments from Jeffrey Spitzer-Resnick on behalf of the Wisconsin Coalition of Advocacy.	1. To avoid ambiguity and to insure that the individual who receives notification of his or her right to appeal fully understands that right, we believe that the phrase, "as set forth in HA 3.05" should be added to the end of HA 3.04.	Agree. The addition has been made.
		X		Written comments from Jeffrey Spitzer-Resnick on behalf of the Wisconsin Coalition of Advocacy.	2. HA 3.05(3)(b): In order to make sure that the deadline for filing a request for hearing is clear to the applicant or recipient in, we believe that the phrase, "and shall be stated in the Notification of Right to Appeal" should be added to the end of HA 3.05(3)(b).	Agree. Change has been made.
		X		Written comments from Jeffrey Spitzer-Resnick on behalf of the Wisconsin Coalition of Advocacy.	3. HA 3.09(9): So that all parties are fully informed of comments that are filed regarding proposed decisions, we suggest that the phrase, "a copy of which shall be served on the other party" should be added to the end of the first sentence of HA 3.09(9).	Disagree. Although this is a good practice and we so indicate in our letter, this is not in the statute.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	1. HA 3.02(15): Request that "paralegal" and "benefit specialist" be added to the definition of "representative."	Agree. The terms have been added.
					2. Does this rule govern only hearings involving welfare matters?	Yes.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	3. HA 3.03(4) and (6): Are these subsections meant to limit appeals in the COP program by excluding some matters?	Yes. The statute at x. 46.27(7m), provides for a right to hearing for those who "are denied eligibility for services or whose services are reduced or terminated...." It also excludes a hearing right for those denied for lack of adequate funding or because they are eligible for comparable services funded under another program.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	4. HA 3.03(1): The hearing right should be extended to those "dissuaded" by an agency from filing a written application.	Partially agree. This is a difficult area to spell out. Cases can easily draw in equitable issues, where we lack legal authority. On further review, we have deleted the latter part of the subsection, which was drawn from another state's rule, and which did not reflect our historical practice, and modified the language to

						state our practice, where we will consider overt denial of the right to apply.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	5. HA 3.05(2): Is this intended as a change from the current practice of not requiring authorization if an appeal is requested by an attorney? Also, we request that "benefit specialists" should not be required to be authorized in writing.	No change was intended. The provision has been changed to clarify an appeal may be by the applicant/recipient, that person's attorney, or by a representative authorized in writing. We disagree that benefit specialists should be excepted from the requirement for written authorization. They are third party representatives like other sorts, outside the attorney-client situation.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	6. HA 3.05(3c): Does the provision on FAXing appeals in effect extend the appeal period?	Yes. When an appeal is received by FAX the period within which an appeal is timely files is extended by one day if the FAX is received after office hours on the period's last day for timely filing.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	7. HA 3.05(4)(d): Is this a change in policy/procedure? OAH used to send out a letter after a nonappearance, asking if the petitioner really meant to abandon the hearing request. Also, could the "abandoned" decisions reference more than the statutory rehearing language?	This is a change from HFS 225, which provided for dismissal for abandonment if the petitioner, after failing to appear at hearing, failed to respond to an inquiry in writing. Because the response rate to such letters was so low, it was extremely inefficient. Dismissals for abandonment now ask if the person really wishes to abandon their appeal and advises them to inform us if they still want a hearing. As to "abandoned" decisions, this is a comment on our practice, not on the rule.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	8. HA 3.05(5): Rather than referring to the federal regulations, we would like the rule to quote the actual language on appeal times from the Medicaid and food stamp federal regulations.	Disagree. The regulation language is lengthy, cumbersome, and contains cross-references to other regulation provisions which presumably would also have to be incorporated. We believe this is unnecessary.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	9. HA 3.05 or 3.06: The rule does not refer to the current practice of the Division in requesting the department or agency to provide a summary of the action, or decision resulting in the appeal.	Language has been added stating that the Division shall request such a summary upon receipt of an appeal.
		X		Oral comments from Mitchell	10. HA 3.07: Is this meant to preclude the	Not in general, that is statutory, but it is intended

				Hagopian on behalf of the Elder Law Center.	issuance of subpoenas by attorneys?	to preclude use of subpoenas for discovery purposes. These hearings were never intended to be full-blown examples of litigation.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	11. HA 3.08: This subsection refers to contemptuous conduct at the hearing. This should be extended to conduct such as not preparing a summary letter or not following orders that have been issued.	Disagree. The administrative law judges lack contempt powers. In order to enforce an order or sanction, they must turn to the courts or request of the departments that agencies be sanctioned, etc., all avenues that need not be specified by rule.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	12. HA 3.08(5): The official notice is overbroad, there are many things in CARES that are facts to be proven, not taken as dispositive because they are there.	See response to DeLessio's comment at No. 8 above.
		X		Oral comments from Mitchell Hagopian on behalf of the Elder Law Center.	13. HA 3.10: a) There should be a limit on how long an ALJ has to make sua sponte changes to the decision. b) HA 3.10(3): This should cross-reference the earlier section on abandonment.	a) Agree. It has been specified that changes may be made within 30 days. This has also been added to sub. (3). b) Agree. The change has been made.
		X		Oral comments from DHA hearing examiners.	1. HA 3.03: The right of former recipients to appeal determinations that they have been overpaid should be added.	Agree. This is now in HA 3.03(3), including tax intercepts.
		X		Oral comments from DHA hearing examiners.	2. HA 3.03: There should be a generic "catch-all" jurisdictional provision.	Agree. This has been added at HA 3.03(4).
		X		Oral comments from DHA hearing examiners.	3. HA 3.03: Matters appealable under §48.64(4) which provides for fair hearings on foster care issues aside from licensure should be added.	Agree. This is added at HA 3.03(1)(o).
		X		Oral comments from DHA hearing examiners.	4. HA 3.03: It would be desirable to have a "catch-all" jurisdictional provision for medicaid-related issues not specifically mentioned.	Agree. This is now HA 3.03(1)(k).
		X		Oral comments from DHA hearing examiners.	5. HA 3.09: The standard of proof (i.e., "preponderance") should be added.	Agree. This is now HA 3.09(4).

PROPOSED ORDER OF THE

DIVISION OF HEARINGS AND APPEALS

CREATING RULES

To create chapter HA 3, relating to appeal procedure for medicaid, food stamp, public assistance and social service Programs.

Analysis Prepared by the Division of Hearings and Appeals

These rules describe the requirements and process for the appeal by individuals of adverse actions which affect their benefits in the medicaid, food stamp, social services and public assistance programs administered by the departments of health and family services, workforce development, and administration.

Prior to government reorganization, "fair hearings" required by law were conducted by the Office of Administrative Hearings in the Department of Health and Family Services pursuant to HFS 225. In the course of reorganization, the Office of Administrative Hearings merged with the Division of Hearings and Appeals and the administration of the food stamp program was moved to the Department of Workforce Development. Subsequently, the Aid to Families with Dependent Children program was abolished. These changes, as well as the fact that HSS 225 was generally outdated, create the need for a new rule on the hearing process. The new departmental review process for W-2 is also addressed.

The Division's authority to create these rules is found in s. 15.03, Stats.

SECTION 1. Chapter HA 3 is created to read:

Chapter HA 3

Procedure and Practice for Fair Hearings

HA 3.01 AUTHORITY AND PURPOSE. (1) This chapter is adopted pursuant to ss. 15.03, 46.016, 49.45 (5) and (10) and 227.11 (2)(a), and 43, Stats. and to conform with the requirements of 42 U.S.C. s. 8624(b)(13), Titles IV and XIX of the U.S. Social Security Act as amended and the Food Stamp Act of 1977, as amended, 7 U.S.C.2011 to 2029.

(2) This chapter governs the fair hearing process for considering the appeal by affected individuals of decisions made by the departments of health and family services, workforce development and administration and decisions by county social and human service departments and tribal agencies concerning medicaid, food stamps, public assistance and social service programs administered by these departments. This chapter also governs the departmental level review process for Wisconsin works.

(3) The purpose of hearings on department and agency decisions is the following:

(a) To provide an opportunity for an applicant to challenge a department or agency finding that he or she is ineligible for medicaid, food stamps, public assistance or social services or to challenge the date of initial eligibility by establishing that the department's or agency's decision on the application was incorrect.

(b) To provide an opportunity for a recipient of medicaid, food stamps, public assistance or social services to assert continuing eligibility for aid when the department or agency has decided to discontinue aid, or to object to

aid reduction, sufficiency or form of payment.

HA 3.02 DEFINITIONS. In this chapter:

(1) "Administrative law judge" means an administrative hearing examiner employed by the division of hearings and appeals.

(2) "Agency" means a county department of social services under s. 46.215 or 46.22, Stats., a county department of human services under s. 46.23, Stats., or a tribal agency which administers medicaid, food stamps, social services or public assistance programs.

(3) "COP" means the long term support community options program under s. 46.27, Stats.

(4) "Costs motion" means a request by a prevailing party under s. 227.485, Stats., for a department to pay the costs incurred in connection with a contested case.

(5) "Department" means the Wisconsin department of health and family services, the Wisconsin department of workforce development or the Wisconsin department of administration.

(6) "Division" means the division of hearings and appeals.

(7) "Food stamps" means an assistance program under the Food Stamp Act of 1977, as amended, 7 USC 2011 to 2029.

(8) "Fair hearing" or "hearing" means a de novo proceeding before an impartial administrative law judge in which the petitioner or the petitioner's representative presents the reasons why the agency or department action or inaction in the petitioner's case should be corrected.

(9) "Katie Beckett waiver program" means the medicaid eligibility program authorized by 42 U.S.C. s.1396a s. 1902(e)(3).

(10) "Low Income Home Energy Assistance Program" or "LIHEAP" means the federally designated program under 42 U.S.C. s. 8621 as amended, and s. 16.385, Stats. which provides benefits and services to assist low-income households with the costs of energy used for home heating.

(11) "Managed care entity" means an organization which makes available to an enrolled participant health care services provided by providers selected by the organization and which has a contractual arrangement with the Department of Health and Family Services for the provision of services to medicaid enrollees.

(12) "Medicaid" means the medical assistance program under ss. 49.43 to 49.47 and 49.49 to 49.497, Stats., and chs. HFS 101 to 108.

(13) "Medicaid waiver services" means home and community-based services provided under ss. 46.27, 275, 277,and 278, Stats.

(14) "Petitioner" means a person on whose behalf a request for a hearing has been filed.

(15) "Public assistance" means a program, such as, but not limited to, LIHEAP, kinship care under s. 48.57(3m)and(3p),stats., caretaker supplement under s. 49.775, stats., or state supplements under s. 49.77, stats., which provides cash benefits to needy individuals and which is administered by a department or by an agency for a department. "Public assistance" does not mean the Wisconsin works program under s. 49.141 to 49.161, stats.

(16)"Representative" means an attorney, guardian, spouse, relative, friend, paralegal, benefit specialist or other authorized spokesperson representing a petitioner for fair hearing purposes.

(177 "Secretary" means the secretary of the department of work force development, the secretary of the department of health and family services or the secretary of the department of administration or their designees.

(18) "Social services" means services, other than under local county-funded programs, which are provided by agencies or the departments to individuals, or paid for by agencies or the departments on behalf of individuals, such as, but not limited to, the Alzheimer's family and caregiver support program under s. 46.87, or the family support program under s. 46.985.

(19) "Wisconsin works" or "W-2" means the assistance program for families with dependent children, administered under ss. 49.141 to 49.161,

Stats.

HA 3.03 RIGHT TO APPEAL. (1) Any person applying for or receiving medicaid, food stamps, social services or public assistance may appeal any of the following administrative actions of the department or an agency:

(a) Denial of an application for benefits or the overt denial of the right to apply.

(b) Failure to act on an application with reasonable promptness.

(c) Reduction, suspension or termination of program benefits.

(d) The determination of the amount, sufficiency, initial eligibility date of program benefits excluding COP program benefits.

(e) A change in the form of payment of benefits.

(f) For the COP program and medicaid waiver services, the denial of eligibility for services or reduction or termination of services as provided in s. 46.27(7m), Stats.

(g) A determination with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Social Security Act of 1935, as amended.

(h) A decision to transfer or discharge a resident from a facility subject to the requirements of 42 CFR. s. 483.12.

(i) A denial or termination of eligibility for medicaid under the Katie Beckett waiver program under section 1902(e)(3) of the Social Security Act.

(j) A decision to impose a Medicaid lien or to deny a hardship waiver under s. 49.496, Stats.

(k) Any other decision or action affecting a medicaid applicant or enrollee where a hearing is required by law.

(l) A decision to deny a hardship waiver under s. 49.682(5), Stats. with regard to the recovery of benefits under a chronic disease program.

(m) The determination under s. 49.85, Stats., to recover an overpayment of benefits by means of certification to the Wisconsin department of revenue

and the determination of the amount of such an overpayment as including an amount they believe has already been repaid or discharged in bankruptcy.

(n) A denial of an application for kinship care payment on the grounds specified in ss. 48.57(3m)(am)1., 2., 4., 4m. and 5., Stats or the termination of kinship care payments.

(o) Removal of a child or any other decision or order by an agency or department that affects the head of a foster, treatment foster or group home or the children involved, per s. 48.64(4), Stats.

(2) An applicant for or recipient of medicaid may appeal a decision or order of a managed care entity which denies, reduces, terminates or otherwise limits services, which denies an enrollee's request for disenrollment or exemption from the entity or which otherwise adversely affects the individual.

(3) A former recipient of medicaid, food stamps, Aid to Families with Dependent Children or W-2 may appeal the determination that he or she has been overpaid benefits, the amount of such an overpayment still owing or whether it has been discharged in bankruptcy or the determination under s. 49.85, Stats., to recover such an overpayment by means of certification to the Wisconsin department of revenue.

(4) An applicant, recipient or former recipient may appeal any other adverse action or decision by an agency or department which affects their public assistance or social services benefits where a hearing is required by state or federal law or department policy.

HA 3.04 NOTIFICATION OF RIGHT TO APPEAL. An agency or department shall in writing inform a person at the time the person applies for medicaid, food stamps, public assistance or social services, and at the time an agency takes an action listed under s. HA 3.03, of the person's right to a hearing under this chapter and of procedures for requesting a hearing as set forth in HA3.05.

HA 3.05 REQUEST FOR A HEARING. (1) An applicant or recipient who wishes to contest an action specified under s. HA 3.03 may request a hearing.

(2) A request for a hearing may be made by the applicant, recipient or former recipient, by an Immediate family member, or someone with legal authority to act on their behalf. The division in its discretion may require written authorization of such representation in an individual case or a type of case.

(a) A request for a hearing may be made in writing or orally and may be made to the agency or the division. An oral request to the agency shall be reduced to writing by the agency and signed by the petitioner, except that a request involving only food stamps need not be signed. An agency receiving a hearing request shall immediately date-stamp the request and forward it to the division.

(b) The hearing request shall include a short statement of the matter to be reviewed. If it is unclear from the request what action the person seeks to appeal or whether the petitioner has standing to obtain a hearing, the division may request clarification before taking action on the request.

Note: A hearing request should be addressed to the Division of Hearings and Appeals, P.O. Box 7875, Madison, Wisconsin 53707. Appeals may be delivered in person to that office at 5005 University Avenue, Room 201, Madison, Wisconsin.

(3) Except as provided in par. (a) or (b), the petitioner shall have 45 days from the effective date of the adverse action specified under s. HA 3.03 in which to file a hearing request.

(a) For a hearing request relating to food stamps, the petitioner has 90 days from the date of the action specified under s. HA 3.03 in which to file the hearing request.

(b) If a different time limit for a hearing request is specified by state statute, administrative rule or federal regulation, that limit shall apply and shall be stated in the notification of Right to Appeal in the

decision.

(c) A hearing request shall be considered filed on the date of actual receipt by the division or agency, or the date of the postmark, whichever is earlier. A request filed by facsimile is complete upon transmission. If the request is filed by facsimile transmission and such transmission is completed between 5 p. m. and midnight, 1 day shall be added to the prescribed period.

(4) The division shall deny or dismiss a hearing request under any of the following circumstances:

(a) The division does not have jurisdiction to conduct a hearing on the matter appealed.

(b) The petitioner or the petitioner's representative withdraws the request in writing.

(c) The sole issue is one of state or federal law requiring automatic grant adjustments for classes of recipients, unless the issue being contested is that eligibility or benefits were improperly computed or that federal law or regulation is being misapplied or misinterpreted by the department.

(d) The petitioner has abandoned the hearing request. The division shall determine that abandonment has occurred when the petitioner, without good cause, fails to appear personally or by representative at the time and place set for the hearing. Abandonment may also be deemed to have occurred when the petitioner or the authorized representative fails to respond within a reasonable time to correspondence from the division regarding the hearing.

(e) The hearing request is not received within the time period specified in sub. (3).

(5) In cases involving discontinuance, reduction, suspension of assistance or benefits or change in the form of payment of assistance, the division shall order that the adverse action be stayed and benefits continued unchanged pending the hearing decision if the hearing request was filed within the time limits specified in 42 CFR 431.230 and 431.231 for medicaid or within the time limits specified in 7 CFR 273.13 and subject to the exceptions

therein for food stamps or, for social services and public assistance, if the hearing request was filed prior to the effective date of the adverse action.

(6) The division shall acknowledge the receipt of a hearing request to the petitioner and the agency or department which took the action or made the decision under appeal, and shall request that the agency or department promptly provide a summary statement concerning the action or decision, including the reason for the action or decision.

HA 3.06 HEARING ARRANGEMENTS. (1) A hearing shall be held at a time reasonably convenient to the petitioner, department or agency staff and the administrative law judge, shall be easily accessible to the petitioner and, whenever possible, shall be held on department or agency premises, subject to the judgment of the administrative law judge.

(2) A petitioner in need of special arrangements for the hearing, such as an interpreter or a hearing site other than the county agency, shall notify the division of this need no later than 5 days prior to the hearing.

(3) At least 10 days before the hearing, the division shall provide written notice to the petitioner and the petitioner's representative, if any, of the time, date and place of the hearing.

(4) The division may postpone a hearing for good cause. In food stamp cases, a petitioner may request and is entitled to receive a postponement of the scheduled hearing of up to 30 days.

(5) The parties may be directed by the administrative law judge to appear at a conference or to participate in a telephone conference to consider how issues might be clarified or simplified, whether facts or documents which may be admitted which will avoid unnecessary proof, or any other matter that may aid in the disposition of the appeal.

(6) The petitioner or petitioner's representative shall have an opportunity to do all of the following:

(a) Examine at a reasonable time before the date of the hearing and

during the hearing all documents and records to be used or that are used at the hearing, and the content of the applicant's or recipient's case file, in accordance with 7 CFR 273.15(p) or 42 CFR 431.242.

(b) Present the case or have it presented by a representative.

(c) Bring witnesses.

(d) Question or refute any testimony or evidence, and confront and cross-examine adverse witnesses.

(e) Submit relevant evidence to establish all pertinent facts and circumstances in the case.

(f) Advance relevant arguments without undue interference.

(7) A hearing shall be tape-recorded.

(8) If individual issues of fact are not in material dispute and related issues of state or federal law are the sole issues being raised, the division may respond to a series of individual requests for a hearing by conducting one group hearing.

HA 3.07 WITNESSES AND SUBPOENAS. The division or the administrative law judge may issue a subpoena, under the same procedure and in the same form as provided by s. 805.07 (1) Stats., at a party's request if it appears that the testimony will be relevant and reasonably necessary for a full and fair hearing. The administrative law judge may require the party to provide written justification for the subpoena requested. A subpoena requiring the production of material may be issued if the person requesting the subpoena specifies the documents to be presented by the subpoenaed witness and if the request is found reasonable by the administrative law judge. The party requesting the subpoena is responsible for service and for fees.

HA 3.08 ADMINISTRATIVE LAW JUDGE. (1) An administrative law judge may do all of the following:

(a) Administer oaths and affirmations.

(b) Rule on offers of proof, accept relevant evidence and exclude from the record evidence that is irrelevant or repetitious.

(c) Dispose of procedural requests or similar matters.

(d) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing.

(e) Exclude individuals from the hearing, adjourn the hearing or otherwise reasonably respond to contemptuous conduct.

(f) Admit into evidence a deposition as a substitute for testimony, but only when the witness is unavailable as defined in s. 908.04, Stats. Depositions sought by the parties for the purpose of discovery are not authorized by this provision.

(g) Exclude individuals from the hearing to preserve the applicant's or recipient's confidentiality or where an individual's presence is not considered essential, depending on the circumstances of the case including space limitations.

(h) Exercise discretion in excluding cameras from the hearing room.

(2) An administrative law judge may at any time disqualify himself or herself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of an administrative law judge, the division or administrative law judge shall determine the matter as part of the record and decision in the case.

(3) The administrative law judge may grant a continuance or additional time to present evidence once a hearing has started when the administrative law judge finds it necessary to the proceeding or to ensure that the petitioner is given a complete and fair hearing.

(4) If the hearing in a medicaid case involves medical issues such as those concerning a diagnosis or an examining physician's report and if the administrative law judge considers it necessary to have a medical assessment other than the one considered in making the original decision, the administrative law judge may order a new assessment to be obtained at

department or agency expense and made a part of the record.

(5) The administrative law judge may access and use information concerning the petitioner's case history, benefit issuance history, calculations and notice history which is in the departments' official computer systems, such as, but not limited to, the Client Assistance for Reemployment and Economic Support (CARES) system except that such information may not be used for the determination of substantive fact as to any issue in dispute.

HA 3.09 HEARING DECISION. (1) The tape recording of the hearing, the exhibits, papers and requests filed in the proceeding and matters of which the administrative law judge has taken official notice shall constitute the exclusive record for decision.

(2) The decision shall be in writing in the name of the department by the department secretary or a designee such as an administrative law judge in the division.

(3) The decision shall set forth the names and addresses of all persons who appeared before the division in the proceeding who are considered parties for purposes of judicial review, the issue or issues, the principal relevant facts elicited at the hearing, the reasoning that led to the decision, citation of legal authority, the action taken and the parties' appeal rights. These elements shall be grouped under appropriate headings such as preliminary recitals, findings of fact, discussion, conclusions of law and the order.

(4) Unless a different standard is provided by law, the standard for decision shall be by a preponderance of the credible evidence.

(5) Where necessary and appropriate, an interim decision may be issued, where a final decision dispositive of the merits of the case is not possible.

(6) A copy of the decision shall be mailed to the petitioner, the petitioner's representative, if any, and the agency or the department organizational unit charged with the administration of the assistance or services involved. The petitioner's mailing address shall be the address

given for the petitioner on the hearing request, unless the petitioner has notified the division of another address in writing or placed it on the hearing record.

(7) The decision shall include the names and addresses of the petitioner and the department or agency. The division shall serve a copy of the decision on each party. The decision is served on a party as of the date it is mailed by the division.

(8) The petitioner may request a copy of the cassette tape recording of the hearing. The division shall furnish the requested recording upon receipt of payment for the cost of duplication and mailing. A written transcript of the hearing shall be prepared only if an appeal is filed with a circuit court pursuant to s. 227.53, Stats. If the petitioner requests a written copy of that transcript following the filing of that appeal, the division may impose a reasonable charge per transcript page.

(9) (a) Except for a proposed decision under par. (b), or by order in a specific case, the decision of the administrative law judge shall be the final decision of the department in proceedings under this chapter.

(b) The administrative law judge shall submit a proposed decision to the secretary or designee for decision in any of the following circumstances:

1. The decision holds that a manual or handbook provision, contract provision, state plan provision, numbered memo administrative directive or other official document is invalid or limited under a statute, administrative rule or federal regulation.

2. The department has not delegated final decision making authority to the division.

(10) When a proposed decision rather than a final decision is issued, the petitioner and the agency or department may file written comments with the division within 15 days from the date of service of the decision. This period may be extended for 10 days upon request of either party. At the close of the comment period, the proposed decision and comments shall be forwarded by the division to the secretary for issuance of a final decision.

(11) The division shall ensure that decisions for medicaid are issued

in a timely manner so that final administrative action may be taken within 90 days from the date of filing of the hearing request, and that decisions for food stamps are issued within 60 days from the date of filing of the hearing request.

(12) When a petition for review is dismissed in its entirety, final administrative action is taken on the date the division mails the decision to the petitioner.

(13) A final decision is binding upon the department and agency involved and may be enforced by appropriate legal and fiscal sanctions. The agency involved shall implement any food stamp decision within 10 days after the date of the decision.

HA 3.10 REHEARING AND AMENDMENT OF DECISION. (1) When requested by the petitioner or that person's representative, the department or an agency or, upon its own motion, the division, may, within 30 days of the date of the decision, amend or vacate a decision for the purpose of correcting either plain or administrative errors, or as altered conditions may require.

(2) A petitioner or that person's representative, an agency or the department may request a rehearing pursuant to s. 227.49, Stats. Such a request shall state what error of law or fact is asserted as the basis for the rehearing or what newly discovered evidence has been found which could not have been found earlier with due diligence. Upon granting a rehearing, the division shall determine whether or not a proceeding to consider additional evidence is required.

(3) After a decision has been issued dismissing a hearing request as abandoned by the petitioner as provided in s.HA 3.05(4)(d), the division may vacate that decision upon the assertion by petitioner in writing within 30 days of the date of the decision that the matter has not been abandoned.

HA 3.11 COSTS MOTION. (1) A petitioner may file a motion for costs under s. 227.485, Stats., with the division and the department or agency within 30 days of service of the final decision if the petitioner was the

prevailing party. The petitioner need not be represented by an attorney to file a costs motion.

(2) Although no specific form or format is required, a complete costs motion shall contain an explanation of why the state agency which was the losing party was not substantially justified in taking its position, and an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the petitioner stating the actual time expended and the rate at which fees and other expenses were computed. A complete motion shall also contain an affidavit or other proof that the petitioner has federal adjusted gross income of less than $150,000 in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case.

(3) The petitioner's costs may include attorney's fees and any of the following items if the item provided evidence relevant to the hearing issue on which the party prevailed:

(a) Expert witness fees.

(b) Any study, analysis, engineering report, test or project determined by the administrative law judge to be necessary for preparation of the case.

(c) Service of process on relevant witnesses.

(d) Certified copies of papers and records in any public office.

(e) Postage.

(f) Telephone, telegraph or FAX expense.

(g) Depositions of unavailable witnesses, including necessary photocopies.

(h) Plats and photographs.

(4) The department or agency may respond in writing to the administrative law judge within 15 days of its receipt of a complete costs motion. If the petitioner's costs motion contains a request for expert witness fees, the response shall indicate the highest rate of compensation paid by the agency or department to an expert witness in the case.

(5) The administrative law judge may deny a costs motion that is not complete.

(6) The administrative law judge shall prepare a written proposed decision which denies or awards some or all of the requested costs. That proposed decision shall be forwarded by the division to the department for issuance of a final decision.

HA 3.12 WISCONSIN WORKS (1)Upon receipt of a timely petition under s. DWD 12.22(2)(b),(2)(c) or (3), the division shall review the fact-finding decision of the Wisconsin works agency.

(2) The division shall deny a petition or refuse to grant relief if the Wisconsin works applicant or recipient withdraws the petition in writing.

(3) Upon receipt of a petition, the division may make any additional investigation it considers necessary.

(4) The Wisconsin works agency shall forward the fact-finding file to the division within 5 days of notification of the request for review.

(5) If the division or administrative law judge determines that the record provided for review is inadequate or incomplete, the division may conduct a hearing, issue an interim decision directing the Wisconsin works agency to supplement the record, or take further action considered necessary to provide for a meaningful review.

The rules included in this order 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.

Wisconsin Division of Hearings and Appeals

By _____

David H. Schwarz

Administrator

Dated: