Chapter DWD 223

PUBLIC EMPLOYEE SAFETY AND HEALTH

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DWD 223.01 Purpose. The purpose of this chapter is to implement the law prohibiting employers from discharging or discriminating against public employees because they have exercised their rights under the public employee safety and health law, s. 101.055 (8), Stats.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.02 Definitions. When used in this chapter:

(1) "Act" means the public employee safety and health provisions contained in s. 101.055 (8), Stats.

(2) "Administrative law judge" means the examiner appointed to conduct hearings under the act.

(3) "Complainant" means the person who files a complaint alleging that an action prohibited by the act has been committed.

(4) "Day," when used in time computations in this chapter, means a calendar day, except that if the last day of the time period is a Saturday, Sunday, or legal holiday, the last day shall be the next business day.

(5) "Division" means the equal rights division of the department of workforce development.

(6) "Filing" means the physical receipt of a document.

(7) "Person" includes, but is not limited to, one or more individuals, partnerships, associations, corporations, joint stock companies, trusts, unincorporated organizations, trustees, or trustees or receivers in bankruptcy.

(8) "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of the act probably has been or is being committed.

(9) "Respondent" means the person or agency alleged to have committed an action prohibited by the act.

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DWD 223.03 Complaints. (1) WHO MAY FILE COMPLAINTS. A complaint may be filed by any person or by the person's authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(2) WHERE TO FILE COMPLAINTS. (a) A complaint may be filed in person with any division office, or it may be mailed or sent by facsimile transmission to one of the following division offices:

1. Equal Rights Division, 201 East Washington Avenue, Madison, WI 53702. Facsimile number: 608−267−4592.

2. Equal Rights Division, 819 North Sixth Street, Milwaukee, WI 53203. Facsimile number: 414−227−4084.

(b) A complaint filed by facsimile transmission shall conform with the requirements of s. DWD 223.22 (1).

(3) FORM AND CONTENT OF COMPLAINT. A complaint shall be written on a form that is available at any division office or on any form that contains all of the information set forth in this subsection. Each complaint shall be signed by the person filing the complaint or by the person's authorized representative. The signature constitutes an acknowledgment that the person or the representative has read the complaint; that to the best of that person's knowledge, information, and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

(a) The name and address of the complainant.

(b) The name and address of the respondent.

(c) A concise statement of the facts, including pertinent dates, constituting the alleged violation of the act.

(4) ASSISTANCE BY THE DIVISION. The division shall, upon request, provide appropriate assistance in completing and filing complaints.

(5) DATE OF FILING OF COMPLAINT DEFERRED BY ANOTHER AGENCY. A complaint which is deferred to the division by a federal or local agency with which the division has a work sharing agreement complies with the requirements of sub. (3) and is considered filed when received by the federal or local agency.

(6) AMENDMENT OF COMPLAINT. (a) A complaint may be amended, subject to the approval of the division.

(b) A complaint may be amended during the investigation if the proposed amendment alleges a basis that is covered under the act. If the complaint is amended prior to the issuance of an initial determination, the division shall investigate the allegations of the amended complaint.

(c) If the complainant requests to amend the complaint after the case has been certified to hearing, the chief of the hearing section or the administrative law judge shall consider whether the proposed amendment meets the requirements of s. DWD 223.05 (1) and may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated the act as alleged in the amended complaint.

(7) WITHDRAWAL OF COMPLAINT. A complaint may be withdrawn at any time. A request for withdrawal shall be in writing and shall be signed by the complainant or by the complainant's authorized representative. Upon the filing of a request for withdrawal, the division shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

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DWD 223.04 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT. The division shall serve by first class mail

a copy of a complaint that meets the requirements of s. DWD 223.03 upon each respondent prior to the commencement of any investigation.

(2) CONTENT OF NOTICE. The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the division. The notice shall further state that, if the respondent fails to answer the complaint in writing, the division may make an initial determination as to whether a violation of s. 101.055 (8) (ar), Stats., has occurred based only on the division's investigation and the information supplied by the complainant.

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DWD 223.05 Preliminary review of complaints. (1) REVIEW OF COMPLAINT. The division shall review every complaint filed to determine all of the following:

(a) Whether the complainant is protected by the act.

(b) Whether the respondent is subject to the act.

(c) Whether the complaint states a claim for relief under the act.

(d) Whether the complaint was filed within the time period set forth in the act.

(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The division shall issue a preliminary determination dismissing any complaint, or any portion of a complaint, that fails to meet the requirements of sub. (1). The division shall send the order of dismissal by first class mail to the last−known address of each party and to their attorneys of record.

(3) APPEAL OF PRELIMINARY DETERMINATION. The complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the division. The appeal shall be filed within 10 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the division shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, or set aside the preliminary determination. The division shall serve the decision on the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it may be appealed to circuit court if it is a final decision and order as defined in s. DWD 223.20 (2).

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.06 Investigations. (1) CONDUCT OF INVESTIGATION. The division shall investigate all complaints that satisfy the review under s. DWD 223.05 (1). In conducting investigations under this chapter, the division may seek the cooperation of all persons to provide requested materials to the division; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. The division may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) ADVISING COMPLAINANT TO AMEND COMPLAINT. If, during an investigation, it appears that the respondent has discharged or otherwise discriminated against the complainant in a manner that is not alleged in the complaint, the division may advise the complainant that the complaint should be amended.

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DWD 223.07 Initial determination. (1) GENERAL. At the conclusion of the investigation, the division shall issue a written initial determination which shall state whether or not there is probable cause to believe that the complainant has been discharged or otherwise discriminated against in violation of the act as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) INITIAL DETERMINATION OF PROBABLE CAUSE. If the division initially determines that there is probable cause, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions in ss. DWD 223.11 to 223.19.

(3) INITIAL DETERMINATION OF NO PROBABLE CAUSE. If the division initially determines that there is no probable cause, it shall dismiss those allegations. The division shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 223.08.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.08 Appeal of initial determination of no probable cause. (1) WHEN FILED. Within 10 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The division shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) DISMISSAL FINAL IF NO APPEAL FILED. If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the division.

(3) CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS. If a timely appeal is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. DWD 223.11 and 223.13 to 223.19, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues the division may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.09 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the division. The division may assist the parties to reach a settlement agreement. The parties shall notify the division immediately upon reaching a settlement. Upon receiving notification that the parties have reached a settlement, the division shall issue an order dismissing the complaint.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.10 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed based upon the conditions set forth in s. DWD 223.05 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 223.07 (2) or 223.08 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts that may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.11 Notice of hearing. (1) CONTENT. In any matter that has been certified to hearing following an initial deter-

mination of probable cause under s. DWD 223.07 (2) or an appeal of an initial determination of no probable cause under s. DWD 223.08 (3), the division shall advise the parties and their representatives and attorneys of record in writing by first−class mail, of the specific time, date, and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 20 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the violation of s. 101.055 (8) (ar), Stats., that is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

(2) PLACE OF HEARING. The hearing shall be held in either the county where the alleged violation of the law occurred or the county where the respondent resides, or at another location with the consent of the parties.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.12 Answer. (1) WHEN REQUIRED. Within 14 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a signed document indicating that a copy of the answer has been mailed to all other parties.

(2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial, or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise an affirmative defense in the answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.13 Pre−hearing conference. In any case which has been certified to hearing, a pre−hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

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DWD 223.14 Pre−hearing discovery. (1) WHEN DISCOVERY MAY BEGIN. Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery shall, not less than 10 days prior to conducting the discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the division at the time they are served upon the unrepresented party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the division by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

(3) SCOPE, METHOD, AND USE OF DISCOVERY. The scope of discovery, the methods of discovery, and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge may compel discovery, issue protective orders, and impose sanctions in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

(5) FILING WITH DIVISION. Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.15 Subpoenas and motions. (1) SUBPOENAS. The division or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness, and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) MOTIONS. Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.16 Disqualification of the administrative law judge. Upon the administrative law judge's own motion, or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.17 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with the act and the provisions of ch. 227, Stats.

(2) POSTPONEMENTS AND CONTINUANCES. All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

(3) APPEARANCE OF PARTIES. Parties may appear at the hearing in person and by counsel or other representative.

(4) FAILURE TO APPEAR AT HEARING. If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall proceed as scheduled. If, within 10 days after the date of hearing, any party who failed to

appear shows good cause in writing for the failure to appear, the administrative law judge shall reopen the hearing.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.18 Record of hearing. (1) METHOD OF RECORDING HEARINGS. A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under the act. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is recorded on tape or digitally, the original recording shall remain in the division for 5 years following the hearing, after which it may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim, transcript of the proceedings.

(3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the division shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the division shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.19 Decision and order. (1) GENERAL. After the close of the hearing, including review of any briefs that may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision that shall include findings of fact, conclusions of law, and an order, and which may be accompanied by an opinion. If the administrative law judge allows briefs to be filed after the close of the hearing, the requirement in s. 101.055 (8) (c), Stats., that the division shall issue its decision and order within 30 days of the hearing is waived.

(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE. After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order that dismisses the allegations of the complaint or that orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to circuit court if it is a final decision and order as defined in s. DWD 223.20 (2).

(3) DECISION AND ORDER AFTER HEARING ON THE MERITS. After a hearing on the merits, the administrative law judge shall issue a decision and an order which shall either dismiss the allegations of the complaint or shall order such action by the respondent as shall effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint. A certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

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DWD 223.20 Appeal rights. (1) NOTICE OF APPEAL RIGHTS. Every decision and order of an administrative law judge under s. DWD 223.19 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review under ch. 227, Stats.

(2) JUDICIAL REVIEW. Any party may seek judicial review of a final decision and order of the administrative law judge as provided in s. 101.055 (8) (d), Stats. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.21 Pay status and witness fees for state employee parties and state employee witnesses. (1) PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre−hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(2) PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES. State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.

DWD 223.22 Filing of documents by facsimile transmission or electronic mail. (1) FILING OF DOCUMENTS BY FACSIMILE TRANSMISSION. (a) Except where otherwise directed by the division, documents may be filed by facsimile transmission. Documents filed by facsimile transmission shall include a cover sheet setting forth all of the following information:

1. The name of the sender.

2. The individual to whom the transmission is directed, if that individual is known.

3. The number of pages being transmitted, including the cover sheet.

(b) The date of transmission recorded by the division's facsimile machine shall constitute the date of filing of a document under this section, except that documents filed by facsimile after the regular business hours of the division as established by s. 230.35 (4) (f), Stats., or on a day when the offices of the division are closed pursuant to s. 230.35 (4) (a), Stats., shall be considered filed on the next business day of the division.

(2) FILING OF DOCUMENTS BY ELECTRONIC MAIL. Documents may be filed by electronic mail only if expressly authorized by the equal rights officer or the administrative law judge assigned to the case.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.