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CLEARINGHOUSE RULE 96–127

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 October 1994.]

2. Form, Style and Placement in Administrative Code

a. The first sentence in the Analysis refers to "restoration of benefits, and/or back wages." This slashed alternative should not be used. [See s. 1.01 (9) (a), Manual.] In this case, the "and/or" should be changed to "or."

b. The Analysis indicates that "prior to May 15, 1996, if the order or settlement directed that salary be paid for a specific period of time, the salary was considered . . . ." However, the general effective date for 1995 Wisconsin Act 302 was May 16, 1996. Therefore, the reference to "May 15, 1996" should be changed to "May 16, 1996."

c. In the titles to each of the sections created in the proposed order, the period following each section number should be deleted. For example, "ETF 20.12." should be "ETF 20.12."

d. In the title of s. ETF 20.12, the acronym "WRS" is used but is not defined. Unless defined, this should be written out as "WISCONSIN RETIREMENT SYSTEMS." [See s. 1.01 (8), Manual.]

e. In s. ETF 20.12 (4), "Personnel Commission" should not be capitalized. [See s. 1.01 (4), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. ETF 20.12 (3) (a) 3., it appears that the reference to "para. (c)" should be changed to "subd. 2." inasmuch as there is no par. (c).

b. In ss. ETF 40.12, 50.12 and 60.40, the reference to "S. ETF 20.14 (9)" should be changed to "Section ETF 20.12 (9)" because: (1) there is no s. ETF 20.14; and (2) at the beginning of a sentence, the word "Section" should be written out instead of abbreviated.

c. In s. ETF 50.44 (2) (b) Note, the reference to "s. ETF 20.14 (3) (a)" should be changed to "s. ETF 20.12 (3) (a)."

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

a. To be consistent with the rest of the rule and s. 40.02 (22) (b) 9., Stats., the term "settlement" should be changed to "compromise settlement" in both s. ETF 20.12 (2) and (9).

b. In s. ETF 20.12 (3) (a) 2., the term "***ss.*** 40.23, 40.25, or 40.63, Stats." (emphasis added) should be "***s.*** 40.23, 40.25, or 40.63, Stats." (emphasis added), since the final conjunction is "or." This comment also applies to s. ETF 20.12 (9).

c. A Note follows s. ETF 20.12 (3) (a) 4. explaining that the term "annual earnings period" is defined in s. 40.02 (3), Stats., and paraphrasing the statutory meaning. The Note provides that ". . . effective July 1, 1997, education support personnel, the term means . . . ." If this sentence is retained, and if the period from July 1 through June 30 is intended to apply only to educational support personnel, the word "for" should be inserted prior to the phrase "educational support personnel" and the word "and" should be inserted before the word "circuit." [If the period from July 1 through June 30 is meant to apply to teachers, see s. 40.02 (3) (a), Stats.]

However, under 1995 Wisconsin Act 381, this definition applies to education support personnel ***who terminate participating employment on or after July 1, 1997***. Thus, the Note is not entirely accurate. Suggested alternatives are: (1) expanding the Note to accurately reflect the statute; (2) simply indicating in the Note that "annual earnings period" is defined in s. 40.02 (3), Stats.; or (3) deleting the Note inasmuch as s. ETF 10.01 (intro.) provides that words, phrases and terms not defined in s. ETF 10.01 have the meaning set forth in s. 40.02, Stats.

d. In s. ETF 20.12 (3) (b), as currently structured, the phrase "and not previously reported to the department by the employer" modifies the term "hours." Read literally, this would mean that s. ETF 20.12 (3) (b) applies only if the hours have not previously been reported to the Department of Employe Trust Funds.

In some cases, it may be that the dispute between a continuously participating employe and the employer concerned only the wage per hour and not the number of hours; that is, the number of hours may have been previously reported to the department, but at the wrong wage rate. In such a case, s. ETF 20.12 (3) (b) does ***not*** apply; thus, a court order or compromise settlement providing for additional back wages at an increased rate would not be considered earnings for Wisconsin Retirement System purposes. Unless this result was intended, s. ETF 20.12 (3) (b) should be changed to make clear that it also applies to a situation in which hours were previously reported but at the wrong wage rate.

e. Section ETF 20.12 (4) provides that a Personnel Commission order or an order through arbitration under a collective bargaining agreement "may" be treated as a compromise

settlement for purposes of s. ETF 20.12. This implies that the department has discretion to determine that such an order will not be treated as a compromise settlement. Unless this result was intended, this provision should be amended by changing "may" to "shall."

Also, arbitrators typically issue arbitration awards rather than orders. Therefore, it seems more appropriate to replace the phrase "through arbitration" with the phrase "an arbitration award issued."

f. In Example 1 following s. ETF 20.12 (6) (b), the phrase "worked 1,000 per year" should be changed to "worked 1,000 hours per year." Also, can the department explain why, in Example 1, the entire payment, and not the excess, is disregarded as earnings?

g. Section ETF 20.12 (8) (a) provides that "[r]egardless of the terms of a court order or compromise settlement ***to which the department is not a party***, under no circumstances may the department ***knowingly*** accept any contributions to the Wisconsin retirement system which would exceed the limits on contributions to qualified pension plans . . . ." [Emphasis added.]

The inclusion of the first emphasized phrase suggests that a different result may obtain if the department is a party. However, the statement that there are no circumstances under which the department may knowingly accept any contributions which are over the limit overrides this suggestion. If the intended result is that, even when the department is a party, the department cannot accept over-the-limit contributions, then it would be preferable to delete the phrase "to which the department is not a party" as it is meaningless and may add confusion. If this is not the intended result, then the rule should explain what happens if the department is a party.

Also, use of the word "knowingly" to modify "accept" leaves unanswered the question of what happens if the department unknowingly accepts over-the-limit contributions. Can such contributions be retained once the problem is discovered? This should be clarified.

h. Section ETF 20.12 (9) provides that if an employe is reinstated and if the employe's group health, income continuation or group life coverages lapsed in the interim, the employe may enroll "only for the insurance plans and coverage in which the employe participated on the date of the disputed termination and for any plan or coverage for which the employe is otherwise eligible and which was first offered by the employer during the period of the disputed termination."

Consider the following example: four health maintenance organizations (HMOs) (ABC HMO; DEF HMO; UVW HMO; and XYZ HMO) were available when the employe was terminated, and the employe had been enrolled in XYZ HMO. During the interim when the employe was not working, XYZ HMO ceased to exist (or was discontinued as an option by the employer). Also, in the interim, RST HMO was first offered by the employer. Because XYZ HMO is no longer an option when the employe is reinstated, s. ETF 20.12 (9) would provide that the only insurance plan or coverage in which the employe may enroll is RST HMO because it was the only insurance plan or coverage now available which was ***first offered*** during the interim. If this is not the intended result, s. ETF 20.12 (9) should be amended.

i. In the second sentence of s. ETF 20.12 (9), the second "as" should be deleted in the phrase "as if the employe were as rehired."

j. The general effective date for 1995 Wisconsin Act 302 was May 16, 1996. The proposed effective date for the rule is the first day of the month following publication in the Wisconsin Administrative Register. This leaves unanswered the question as to the limits on contributions based on court orders or compromise settlements entered into on or after May 16, 1996 but before the effective date of the rule. This could be addressed by including an initial applicability clause, for example, indicating that the rule first applies to court orders or compromise settlements entered into on or after May 16, 1996.