

Clearinghouse Rule 07-066

R05-002

**State of Wisconsin
Department of Employee Trust Funds,
Employee Trust Funds Board, Deferred Compensation Board,
Group Insurance Board, Teachers Retirement Board
and
Wisconsin Retirement Board**

PROPOSED RULE to amend ETF 11.06 (1) and 11.12 (2) (b) regarding hearsay evidence in administrative appeal hearings.

Notice of Public Hearing

A public hearing on this proposed rule will be held on Wednesday, August 1, 2007, at 9:30 AM in Conference Room GB at the offices of the Department of Employee Trust Funds, 801 West Badger Road, Madison, Wisconsin. Persons attending should come to the reception desk up the stairs (or elevator) from the main entrance.

Analysis Prepared by the Department of Employee Trust Funds

1. Statute interpreted:

Sections 40.03 (1) (j), (6) (l), (7) (f), (8) (f) and 40.80 (2g), Stats., concerning the hearing authority of the Employee Trust Funds, Group Insurance, Teachers Retirement, Wisconsin Retirement and Deferred Compensation Boards, respectively.

2. Statutory authority:

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

3. Explanation of agency authority:

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

4. Related statute or rule:

None.

5. Plain language analysis:

The purpose of this rule is to allow the five Boards hearing appeals of determinations made by the Department of Employee Trust Funds (DETF) to rely upon hearsay evidence to make factual findings in administrative hearings to the same extent permitted in state court.

The present s. ETF 11.12 (2) (b) prohibits a Board from basing any finding of fact on hearsay. The proposed rule eliminates that absolute prohibition. This change permits the Board hearing the appeal to base its findings of fact upon hearsay when that hearsay is corroborated by other non-hearsay evidence, or in any other circumstances in which Wisconsin courts may determine that reliance upon hearsay evidence is permissible in administrative proceedings. The proposed rule expressly allows the Boards to rely upon hearsay evidence as the basis for their factual findings to the same extent permitted in hearings in Wisconsin courts.

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

No existing or proposed federal regulations apply to the evidentiary standards that may be applied by the Boards in hearing administrative appeals of determinations made by the Department of Employee Trust Funds.

7. Comparison with rules in adjacent states:

Although there are a number of governmental retirement plans in Illinois, Iowa, Minnesota and Michigan, their administrative rules are not directly relevant to interpreting the Wisconsin statutes governing the Wisconsin Retirement System. Governmental plans differ in the degree to which the terms of the plan are established by enabling legislation or left to subsequent administrative rulemaking or other means.

Illinois

The various governmental retirement systems in Illinois have not adopted administrative rules specifically concerning hearsay evidence in their administrative proceedings. Other state administrative rules deal with hearsay in different ways. For example:

- The Department of Children and Family Services mandates that previous statements by the child relating to abuse or neglect must be admitted as hearsay exceptions. Ill. Admin. Code tit. 89, §§ 336.120 b) 10) and 412.60 g) 1) B).
- The Illinois Gaming Board permits hearsay to support a finding of the Administrative Law Judge if it is the best evidence available, has sufficient indicia of trustworthiness and reliability and is of the type

reasonably and customarily relied on in the gaming industry. See Ill. Admin. Code tit. 86, § 3000.430 a).

- The Department of Central Management Services appeal rules provide that the technical rules of evidence do not apply. Any material evidence, including hearsay, may be accepted, but the finder-of-fact must weigh the hearsay nature of such evidence. See Ill. Admin. Code tit. 14, § 105.60 l) 6).
- In consumer protection hearings by the Attorney General any relevant evidence which is not privileged is admissible, whether or not the evidence is hearsay or would be inadmissible in a court of law. See Ill. Admin. Code tit. 14, § 450.20 b) 3).
- The State Board of Elections permits hearsay evidence to be admitted into evidence if the hearing examiner deems it reliable and trustworthy. See Ill. Admin. Code tit. 26, § 150.115 a).

On the other hand, some administrative rules appear to discourage hearsay evidence with general statements that the common rule against hearsay will be deemed substantive, not merely technical, for hearing purposes. For examples, see Ill. Admin. Code tit. 41, § 123.180 b) [*Office of the State Fire Marshall*], Ill. Admin. Code tit. 56, § 2605.360 b) [*Department of Commerce and Economic Opportunity*] and Ill. Admin. Code tit. 68, § 1110.180 b) [*Department of Financial and Professional Regulation*]. In many cases, however, the agency's rules then go on to recognize exceptions to this exclusion of hearsay evidence. For instance:

- The State Fire Marshal's rules for contested cases involving boiler and other pressure vessels state that hearsay is not admissible — unless the statement is subject to a hearsay exception under Illinois law or has circumstantial guarantees of trustworthiness. The probative value of the hearsay statement must also outweigh any prejudice resulting from an inability to cross-examine the maker of the statement. See Ill. Admin. Code tit. 41, § 123.220 b). The rules also identify the kinds of statements which will not be viewed as hearsay, including certain kinds of prior statements made by the witness and admissions made by the other party. See Ill. Admin. Code tit. 41, § 123.220 c).
- The Department of Commerce and Economic Opportunity, the Department of Financial and Professional Regulation and the Illinois Comptroller have taken similar approaches virtually identical to the State Fire Marshall's. See Ill. Admin. Code tit. 56, § 2605.340 d) and e), Ill. Admin. Code tit. 68, § 1110.220 b) and c) and Ill. Admin. Code tit. 74, § 310.220 b) and c), respectively.

- Language recognizing the hearsay exceptions in Illinois law or circumstantial guarantees of trustworthiness (and of probative value outweighing the prejudice of the inability to cross-examine) is also found in the Department of Children and Family Services rules, although those rules do not contain the list of statements not considered hearsay. See Ill. Admin. Code tit. 89, § 412.60 g) 1) C).
- Under Ill. Admin. Code tit. 56 § 2830.335 c), the Department of Employment Security provides that, in actions pertaining to the re-issuance of benefit checks, hearsay which was not objected to may nevertheless not form the sole basis for a decision, if the claimant testified under oath to the contrary. The sole exception is if the Department's special agent finds that the claimant's testimony is incredible, inconsistent or inherently improbable.
- The Illinois Department of Revenue, in Ill. Admin. Code tit. 86, § 200.155 a), provides that hearsay may not be admitted, except to the extent that it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Iowa

The only Iowa administrative rules expressly concerning hearsay evidence in administrative proceedings allow findings to be based on hearsay, regardless of whether the evidence would be admissible in a jury trial, if the evidence is of a kind that reasonably prudent persons are accustomed to rely upon for the conduct of their serious affairs. See Iowa Admin. Code r. 193-7.26(7) [*contested cases concerning professional licensing and regulation*], Iowa Admin. Code r. 263-9.10(4)(intro.) [*City Development Board involuntary development actions*], and Iowa Admin. Code r. 721-25.24(7) [*Secretary of State administrative complaints regarding elections*].

Michigan

The State Employee Retirement System does not yet have administrative rules. The Michigan Administrative Code contains no rules relating specifically to hearsay.

Minnesota

The Minnesota governmental retirement systems have not adopted administrative rules specifically concerning hearsay evidence. Other state administrative rules deal with hearsay in a fairly uniform way.

Under Minnesota's Office of Administrative Hearings, the rules governing a variety of different kinds of hearings, including contested cases, allow hearsay evidence with probative value to be admitted into evidence. See Minn. R. 1400.7300 subp. 1., Minn. R. 1400.8601 subp. 1., and Minn. R. 1405.1700 subp. 3. The rules on hearings by other state agencies also permit receiving any evidence, expressly including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs. See Minn. R. 3310.2922 [*unemployment compensation procedure*], Minn. R. 3525.4320 [*Dept. of Education disabled children hearings*], Minn. R. 5510.1910 subp. 9 [*Public employment labor relations*], Minn. R. 7897.0170 subp. 3 [*Racing Commission*], Minn. R. 9200.4800 subp. 19 A. [*Environmental quality board*].

The rules of two boards specify that hearsay evidence may be used to supplement or explain direct evidence, but is insufficient to support a finding in itself, unless the hearsay would be admissible over objection in a civil action. See Minn. R. 5601.3145 [*Board of Physical Therapy*] and Minn. R. 5615.0900 subp. 3 [*Board of Medical Practice*].

8. Summary of factual data and analytical methodologies:

The proposed rule is based on logical analysis of the evidentiary issues that can arise under the administrative appeal process as well as many years of experience with evidence offered in such hearings.

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

This rule-making affects only administrative hearings before the Employee Trust Funds Board and four other Boards attached to the DETF. The parties to such hearings are governmental employees affected by determinations made by the DETF in administering the pension, insurance and other fringe benefit plans under ch. 40, Stats. their beneficiaries and sometimes the governmental agencies that employ them. Third party administrators contracted by the DETF or Boards to assist in the administration of particular benefit plans may sometimes participate as parties, if they wish. However, such third-party administrators do not now, and have not in the past, met the definition of a "small business" in s. 227.114 (1), Stats.

10. Anticipated costs incurred by private sector:

None.

11. Effect on small business:

No effect.

12. Agency contact person:

Please direct any questions about the proposed rule to Robert Weber, Chief Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 266-5804. E-mail address: rob.weber@etf.state.wi.us.

13. Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rule may be submitted to Robert Weber, Department of Employee Trust Funds, 801 W. Badger Road, P.O. Box 7931, Madison, WI 53707-7931. Written comments must be received at the Department of Employee Trust Funds no later than 4:30 PM on Friday, August 10, 2007.

Initial Regulatory Flexibility Analysis:

The proposed rule has no effect on small businesses.

Fiscal Estimate:

The proposed rule is expected to have no fiscal effect on any county, city, village, town, school district, technical college district or sewerage district. Although such governmental entities may appear as parties in the administrative appeals affected by this rule, they remain free to present their evidence in those administrative appeals in exactly the same manner as at present. It is possible that the rule will enable some limited savings if evidence can be presented in the form of corroborated, or otherwise reliable, hearsay rather than through, for example, expert testimony.

Free Copies of Proposed Rule:

Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707-7931, telephone (608) 266-1071.

Text of Proposed Rule

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

ETF 11.06 (1) Rules of privilege recognized by law shall be given effect. However, common law or statutory rules of evidence do not apply, except as provided in s. ETF 11.12 (2) (b) concerning hearsay. The hearing examiner shall admit all testimony having a reasonable probative value. The hearing examiner shall exclude from the record irrelevant, immaterial,

or unduly repetitious testimony.

SECTION 2. ETF 11.12 (2) (b) is amended to read:

ETF 11.12 (2) (b) *Factual basis.* The factual basis of the final decision shall be solely the evidence and matters officially noticed. ~~No finding of fact may be based upon hearsay.~~ Hearsay evidence may be relied upon as the basis for factual findings to the same extent permitted in a Wisconsin court of law.

(end of rule text)

Proposed Effective Date:

This rule shall take effect on the first day of the month commencing after the date of publication as provided by s. 227.22 (2) (intro), Stats.

Approved for Publication:

This proposed rule is approved for publication in the *Administrative Register*.

Dated this _____ day of June, 2007.

David Stella, Deputy Secretary
Department of Employee Trust Funds