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Chapter ETF 11

APPEALS

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Note: Corrections made under s. 13.93 (2m) (b) 6., Stats., Register, January 2004 No. 577.

ETF 11.01 Purpose and scope. (1) The purpose of this chapter is to establish a regular and uniform system of procedures and rules governing the review of appealable department determinations by the board responsible for the subject matter. This chapter interprets the provisions of ss. 227.44 to 227.48, 227.485, 227.49 and 227.50, Stats., concerning the conduct of proceedings, as those provisions apply to the deferred compensation board, group insurance board, teachers retirement board and Wisconsin retirement board and establishes rules for appeals to the employee trust funds board and its designees. Any appeal to a board of a determination made by the department shall be conducted in accordance with this chapter.

(2) The deferred compensation board shall hear the timely appeal of a determination made by the department with respect to a right or benefit under the deferred compensation plan provided by ss. 40.80 to 40.82, Stats. This authority is delegated from the employee trust funds board under s. 40.03 (1) (L), Stats.

(3) The group insurance board shall hear the timely appeal of a determination made by the department affecting any right or benefit under any group insurance plan provided under ch. 40, Stats.

(4) The teachers retirement board shall hear the timely appeal of a determination made by the department regarding a disability annuity for a teachers participant, pursuant to s. 40.63 (5) and (9) (d), Stats.

(5) The Wisconsin retirement board shall hear the timely appeal of a determination made by the department regarding a disability annuity for a participant other than a teacher, in accordance with s. 40.63 (5) and (9) (d), Stats. In addition, the department shall make the initial determination of the amount of a duty disability benefit and whether to terminate or reduce a benefit under s. 40.65 (3) or (5), Stats., and the Wisconsin retirement board shall hear the timely appeal of these determinations.

(6) The employee trust funds board shall hear the timely appeal of any other determination made by the department.

(7) Nothing in this section shall prevent the board responsible for hearing the subject matter of an appeal from delegating that responsibility to a hearing examiner.

Note: See ss. 40.03 (1) (j), (6) (i), (7) (f) and (8) (f), and 40.65 (3) and (5), Stats.
History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.02 Definitions. Words, phrases and terms used in this chapter have the same meanings as set forth in s. 40.02, Stats., and s. ETF 10.01, except as defined in this chapter or where the context clearly indicates a different meaning. In this chapter:

(2) "Administrative agent" means a person who has entered a contract with a board or the department to provide administrative services to a program administered by that board or the department under ch. 40, Stats. The term includes the administrative agent of the group insurance board or department who assists in the administration of a group insurance plan under ch. 40, Stats., for which the public employee trust fund is the insurer.

(3) "Appeal" means the review of a determination made by the department conducted by a board under s. 40.03 (1) (j), (6) (i), (7) (f), or (8) (f), Stats.

(4) "Appellant" means the person, including a participant, annuitant, beneficiary, employer, insured, insurer or deferrer who initiates an appeal to the board. "Appellant" also includes a person appealing an adverse determination of participating employee status.

(5) "Board" means the employee trust funds board, deferred compensation board, group insurance board, teachers retirement board or Wisconsin retirement board according to the context of its application.

(6) "Board staff" means the department employees assigned by the secretary to perform tasks in support of the board.

(7) "Deferrer" means an employee who participates in the deferred compensation program under ch. 40, Stats.

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

(9) "Insured" means a person covered under a group insurance plan provided under ch. 40, Stats.

(10) "Insurer" means the person bearing the financial risk and liability for payment of claims under a group insurance plan provided under ch. 40, Stats., including where applicable the public employee trust fund.

(11) "Mail" means to send via the U.S. mails as at least first class mail, and includes sending by express mail, special or overnight delivery, certified or registered mail.

(12) "Respondent" with respect to an appeal means the department of employee trust funds. In addition:

(a) The employer is a respondent in the appeal of a department determination which was based on the employer's determination that a person is not a participating employee or protective occupation participant or based on the employer's certification, or failure to certify, under s. 40.63 (1) (c), Stats.

(b) The insurer and administrative agent are respondents in the appeal of a department determination affecting any right or benefit under any group insurance plan provided under ch. 40, Stats., except that the department shall represent the interests of the public employee trust fund as insurer.

(13) "Substantial interest" means, with respect to an appeal under this chapter, a direct and material interest in the particular determination made by the department, which interest is specially and adversely affected, either by the particular determination itself or by the result sought by the appellant of that determination,

beyond the effect common to other similarly situated persons. The term does not include a derivative, indirect or mere nominal interest.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; renum. (1) to be ETF 10.01 (1h), Register, July, 1999, No. 523, eff. 8−1−99.

ETF 11.03 Process and proceedings. (1) LIMITATIONS ON APPEALS. In addition to the requirements under sub. (3), the following time limitations apply to appeals:

(a) An appeal seeking correction of an alleged error with respect to service credits or contribution, premium or benefit payments is barred unless commenced within 7 years after the date of the alleged error, except as some other limitation is specifically provided by statute or this chapter. Where an alleged error has been incorporated in department records and relied upon in subsequent administration of ch. 40, Stats., benefits, the date of the alleged error for the purposes of this section and s. 40.08 (10), Stats., is the earliest date on which the aggrieved person discovered, or should reasonably have discovered, the alleged error.

Example: If an alleged error involves creditable service for a given year, and the amount of service credited was first reported to the participant on an annual statement the following year, the date of the alleged error is the date of the report to the participant, not a subsequent date on which the alleged error in creditable service is used to calculate retirement benefits or repurchase of forfeited service

(b) Notwithstanding par. (a), an appeal seeking correction of an alleged error with respect to service credits or contribution, premium or benefit payments, based on a claim of fraud, is barred unless commenced within 6 years from the date of the discovery by the aggrieved person of the facts constituting the fraud.

Note: See ss. 40.08 (10) and 893.93 (1) (b), Stats.

(c) All other appeals are barred unless commenced within the appropriate statutory limitation period, including but not limited to those provided by ss. 893.43 and 893.93 (1) (a), Stats.

(d) An appeal barred by operation of s. 41.04 (2) (c), 1979 Stats., or similar predecessor statute, is barred regardless of longer time limits set by s. 40.08 (10), Stats., or this section.

(1m) LIMITATION ON REQUESTING DEPARTMENT DETERMINATION. An employee's appeal to the department under s. 40.06 (1) (e) 1., Stats., of an employer's classification, or denial of classification, as a teacher, protective occupation participant, or other classification specified by the department must be made within 90 days after the employer notifies the employee of the classification action, the right to appeal and this time limit. An appeal of a protective occupation participant classification reviewed by the office of state employment relations under s. 40.06 (1) (dm), Stats., must be made to the department within 90 days after the employee is notified by the office of state employment relations of its determination, the right to appeal and this time limit.

(2) LIMITATIONS ON BOARD REMEDIES. Limitations on the boards' powers include the following:

(a) The deferred compensation board, group insurance board, teachers retirement board and Wisconsin retirement board have no equity powers. The employee trust funds board has no equity powers, except as provided under s. 40.03 (1) (a), Stats., to correct inequity in the computation of the amount of an annuity or death benefit resulting from a participant's combination of full−time and part−time service, a change in annual earnings period during the high years of earnings or the previous receipt and termination of an annuity.

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

(bm) There is no remedy in an appeal before a board based on a theory of undue influence. Regardless of proof offered by an appellant, the board may not change or void any choice, designation, application or other action of a participant, annuitant, beneficiary, insured, or deferrer on the grounds that person was acting under the undue influence of another. Nothing in this paragraph shall be construed to prevent an aggrieved party from bringing an action against the beneficiary of the alleged undue influence in a court of competent jurisdiction and seeking any remedy available under the law.

(c) In an appeal involving a right or benefit under a group insurance plan provided under ch. 40, Stats., the group insurance board may grant the right or benefit claimed, including payment of a claim at issue, only if the public employee trust fund is the insurer. With respect to other insurers, the group insurance board may treat a continued failure of the insurer to grant a right or benefit awarded in the board's final decision as a breach of the insurer's contract with the board.

(d) The group insurance board may not hear an appeal of a group health insurance issue involving a group health plan other than the standard plan unless the appeal involves a provision of the contract between the group insurance board and the insurer or a provision of the board's guidelines for comprehensive medical plans seeking group insurance board approval to participate under the state of Wisconsin group health benefit program. Otherwise, the dispute is directly between the insured and the insurer and does not involve the department or the board.

(e) When the group insurance board has contracted with an insurer other than the public employee trust fund, the board may not hear the appeal of a group insurance issue which the contract reserves to the insurer for determination.

(3) DETERMINATION; TIMELY APPEAL. An appeal is not timely unless the request is received within 90 days of the date a written determination was mailed to the person aggrieved by the department determination. A request which fails to meet this requirement is untimely. An appeal may not be commenced on an untimely request. The department shall notify a person making an untimely appeal request.

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

(4) COMMENCEMENT OF APPEAL. An appeal is commenced upon receipt of a request for review of the department determination provided the request meets the following requirements:

(a) The request is in writing. No appeal may be commenced on an oral request.

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

(c) The request for an appeal is mailed or delivered to the appropriate board in care of the appeals coordinator at the department of employee trust funds by the person requesting the appeal. Appeal requests received which erroneously name a board with respect to a subject matter reviewed by another board shall be redirected to the appropriate board by board staff.

(d) The request for an appeal is a timely appeal.

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(e) The person requesting the appeal has a substantial interest in the determination made by the department. Any question about the appellant's interest shall be resolved by the hearing examiner at the earliest opportunity.

(5) CASE FILE. Upon commencement of an appeal, the department shall open a case file for the hearing examiner, consisting of copies of the determination made by the department and the appeal request by the appellant, including any attachments and referenced documents.

(6) CONTESTED CASE. An appeal to the board shall be treated as a class 3 contested case.

(7) PARTIES. Only a person with a substantial interest in the particular issue to be decided, as it affects the specific participant, annuitant, beneficiary, employer, insured, insurer or deferrer may be an appellant or a party to the appeal. No person without a substantial interest may be admitted as a party. When an appeal is filed, the department shall notify any respondent or other person known to have a substantial interest directly affected by an issue raised in the appeal, including the following persons:

(a) The department shall be a party to each appeal of a determination made by the department.

(b) In an appeal concerning a participant's or annuitant's death benefits, the interested parties include any beneficiary with a direct interest in the death benefits not yet paid by the department or insurer as they may be calculated or distributed as a result of either the department determination or the board's final decision on the issues raised by the appeal.

(c) In an appeal concerning disability benefits under s. 40.63, Stats., or the determination of participating employee or protective occupation participant status, the interested parties include the participant, or the appellant claiming the status of participating employee, and the employer. The office of state employment relations is deemed to be the employer if the appeal involves a state employee claiming the status of a protective occupation participant.

Note: See s. 40.06 (1) (dm), Stats.

(d) In an appeal concerning a program in which an administrative agent is involved, the administrative agent may participate as a party.

(e) In an appeal of a group health insurance determination, the insurer is an interested party.

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

(9) AGENT FOR A PARTY. Any party may appear in person or by an attorney or agent provided the following requirements are met:

(a) Any person who appears as an agent for a party, other than the registered agent of a participating employer or an attorney, shall obtain and file with the department an original power−of−attorney signed by the party authorizing the agent, as attorney−in−fact, to act in all matters involving the appeal with the same authority and effect as the party personally. The person officially designated by a participating employer as its registered agent to represent the employer to the Wisconsin retirement system is deemed to have full authority to act for the participating employer regarding the appeal.

(b) Any party represented by an attorney or agent, other than the department or the participating employer, shall file a written authorization in the form prescribed by the department for the disclosure of confidential personal information to the agent or attorney, to the same extent as is authorized to the party under s. 40.07, Stats., and s. ETF 10.70. The authorization shall be part of the appropriate participant file.

(10) NOTICE. Notice of any hearing or pre−hearing conference shall be mailed to each party, or the party's attorney of record, at least 10 days prior to the hearing or conference, respectively. The notice shall include:

(a) The time, place and nature of the hearing or conference, including a statement that the case is class 3 contested case proceeding.

(b) A statement of the legal authority and jurisdiction for the hearing.

(c) A short and plain statement of the matters asserted. If specificity is not possible when notice is served, the notice may state issues involved.

(11) PRE−HEARING CONFERENCE. The hearing examiner shall hold a pre−hearing conference for the purpose of determining the proper parties, defining the issues to be resolved and identifying the material factual and legal disputes between the parties. If the parties have not reached a stipulation on material facts not in dispute, the hearing examiner shall set a deadline for the parties to reach a factual stipulation or advise the examiner that they are unable to do so. The hearing examiner may set the date for the hearing at the pre−hearing conference. Following the pre−hearing conference, the hearing examiner shall prepare a memorandum to the parties summarizing the actions taken, amendments allowed to the pleading, recording agreements of the parties, specifying the issues to which the hearing is limited and making appropriate orders to the parties. This memorandum shall control the subsequent course of the appeal, unless modified at the hearing to prevent manifest injustice.

(12) WITNESS ATTENDANCE; SUBPOENA. Upon receipt of the notice of hearing, it is the responsibility of each party to contact any witnesses necessary for that party's case and to make arrangements to have them attend the hearing. The hearing examiner or a party's attorney of record may issue a subpoena to compel attendance of witness or production of evidence at hearing or at a deposition authorized under this chapter. Where a party is represented by an agent, rather than an attorney at law, the party shall request the hearing examiner to issue the subpoena. Witness fees shall be paid in advance as provided under s. 885.06, Stats., except witnesses for a state agency shall be paid in the manner provided by s. 885.07, Stats.

(13) EXTENSION OF TIME AND POSTPONEMENT. Requests for postponements and continuances shall be considered by the hearing examiner only if received within a reasonable time before the date of the hearing. Postponements and continuances may be granted by the hearing examiner due to extraordinary circumstances and a postponement, continuance or extension of time may be granted upon the mutual agreement of all the parties.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.04 Hearing examiner. (1) EXAMINER TO HEAR APPEAL. A hearing examiner shall preside over each appeal to the board.

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

(3) IMPARTIALITY. The hearing examiner shall perform all functions in an impartial manner. An examiner shall disqualify himself or herself with respect to a particular appeal if by reason of personal interest in, or knowledge of the determination appealed from, he or she is unable to act fairly or impartially. If bias of the hearing examiner is raised as an issue, the hearing examiner shall determine that issue as part of the appeal. The board shall appoint or contract with another hearing examiner if the original hearing examiner is disqualified.

(4) POWERS. In addition to other powers expressly granted or delegated to the hearing examiner by this chapter, the hearing examiner may:

(a) Administer oaths.

(b) Issue, quash and enforce subpoenas.

(c) Rule on offers of proof and receive relevant evidence at hearing.

(d) Take a deposition authorized by this chapter.

(e) Dispose of procedural requests or similar matters.

(f) Limit testimony to only those matters which are disputed.

(g) Rule on all objections and motions made prior to issuance of the proposed decision.

(h) Require briefs.

(5) DUTIES. The hearing examiner shall have the following duties:

(a) The hearing examiner shall conduct the hearing, and any pre−hearing conference.

(b) For purposes of proceeding to a hearing, the hearing examiner shall determine the parties having a substantial interest in the appeal. The hearing examiner shall exclude as a party any person not having a substantial interest in the issues raised.

(c) When authorized by this chapter or by motion of the board, the hearing examiner shall prepare the final decision in the form required by this chapter.

(d) Except when authorized to make the final decision of an appeal, the hearing examiner shall prepare a proposed decision for the consideration of the board.

(e) A hearing examiner who receives an ex parte communication, other than a communication described in s. 227.50 (1) (b) through (e), Stats., shall make a record of the violation, and notify all parties.

(6) MAILING ADDRESS. (a) The hearing examiner's mailing address, unless otherwise specified by the hearing examiner is:

c/o Appeals Coordinator
Department of Employee Trust Funds
P.O. Box 7931
Madison, Wisconsin 53707

(b) A party mailing any communication or document to the hearing examiner shall also mail a copy to each party, including the department. This requirement does not pertain to the appeals coordinator or other board staff when submitting documents for the hearing examiner's signature for subsequent mailing to all parties.

(7) FINAL DECISION−MAKING AUTHORITY. The hearing examiner shall make the final decision of the board only if authority to make the final decision is expressly delegated to the examiner in this chapter or if final decision making authority in a particular appeal is granted in a motion adopted by the board.

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

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.05 Discovery. There is no right to take and preserve evidence prior to the hearing, except as provided in this section.

(1) No party to an appeal shall have access to individual personal information in the records of the department except as expressly authorized under s. 40.07, Stats., and this section.

(2) In an appeal of the denial of an application for a disability annuity or duty disability benefits under s. 40.63 (5) or (9) (d) or 40.65 (2) (b) 3., Stats., the department may provide the hearing examiner, employer and participant with copies of any physician certifications under s. 40.63 (1) (d) or 40.65 (2) (b) 2., Stats., received in connection with the application.

(3) The department may disclose to the board's hearing examiner individual personal information it deems both relevant to the appeal and required to be disclosed for the proper administration of a benefit program under ch. 40, Stats. Any information disclosed by the department under this subsection shall also be provided to the parties to the appeal. A person receiving information under this subsection shall maintain the confidentiality of the information.

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

(5) Testimony may be taken and preserved of a witness:

(a) Who is beyond the reach of the subpoena of the agency or hearing examiner;

(b) Who is about to go out of the state, not intending to return in time for the hearing;

(c) Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or,

(d) Who is a member of the legislature, if any committee of the legislature or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

Note: See s. 227.45 (7), Stats.

(6) A party may make a request for admissions as provided in s. 804.11, Stats.

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

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

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

(2) OBJECTIONS. Failure of a party to object on the record to admission of any evidence shall be deemed a waiver of that objection.

(3) WITNESS. Section 885.16, Stats., concerning competency of witnesses, applies to appeals under this chapter.

(4) PRESUMPTIONS. In addition to any other presumptions under applicable law:

(a) A signature purporting to be that of a participant, annuitant or beneficiary on a document previously accepted and filed by the department is presumed to be that of the participant, annuitant or beneficiary absent clear and convincing proof to the contrary.

(b) A participant, annuitant, beneficiary, insured or deferrer is presumed mentally competent at the time of making any application, election, designation or taking any other action affecting rights or benefits under ch. 40, Stats., accepted and acted upon by the department, whether affecting only the person or others. This presumption may be rebutted only by proof in the form of a certified copy of the judgment showing that, at the time of the event

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at issue, the person was adjudged incompetent with respect to management of his or her property.

(c) For the purpose of determining timeliness of an appeal request, notice of the department determination is conclusively presumed to have been given to the addressee and all listed recipients of copies on the date of mailing of the determination. Absent clear and convincing proof to the contrary, the date of mailing is presumed to be the day the determination is dated. Absent clear and convincing proof to the contrary, a request for an appeal is presumed received on the day stated by the date stamp affixed to incoming department correspondence.

(5) OFFICIAL NOTICE. The hearing examiner shall take notice of all rules published in the Wisconsin administrative code or register and the written opinions of the attorney general. The hearing examiner may take official notice of any generally recognized fact or established technical or scientific fact, provided the parties are notified of the facts to be noticed and given opportunity to contest their validity.

(6) DEPARTMENT RECORDS. No additional identification or evidence of authenticity, beyond a statement or certification from a custodian or deputy custodian, is required as a pre−requisite for admitting into evidence documents or photocopies of documents from the department record of a particular participating employer, participant or annuitant, including beneficiary claim documents. When a photocopy of a departmental record is offered under this subsection, any party shall be permitted, upon request, to compare the photocopy and the original.

(7) CLOSE OF HEARING AND EVIDENCE. Evidence in any appeal shall be closed when due opportunity to furnish relevant evidence, including proper examination of witnesses and rebuttal, has been afforded to all parties. If by stipulation of the parties or direction of the examiner, documentary evidence is introduced after close of testimony, the evidence is closed when the document is received or when the specified time for furnishing it has expired without it being submitted. The examiner may extend the original time limit for filing documentary evidence. Before the examiner makes a proposed or final decision, the examiner may reopen the hearing for the taking of further evidence.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; CR 07−066: am. (1), Register March 2008 No. 627, eff. 4−1−08.

ETF 11.07 Informal disposition. (1) Disposition of an appeal under this section requires no further action by the hearing examiner or board.

(2) An appeal may be resolved informally by an agreement between all parties to dismiss the appeal with or without prejudice. The department shall then make an order dismissing the appeal as agreed, attach it to the agreement and file it with the record.

(3) If the appellant withdraws the appeal, in writing, the appeal shall be immediately dismissed by the department. This dismissal shall be with prejudice if more than 90 days have elapsed from notice of the determination appealed from, or if an applicable time limit or statute of limitations expired while the dismissed appeal was pending.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.08 Final disposition by hearing examiner. (1) The hearing examiner's findings, conclusions and order dismissing an appeal as provided in this section shall be the final decision of the board.

(2) The hearing examiner shall prepare and issue a dismissal, in the form and manner required by this chapter for a final decision, under the following circumstances:

(a) If the examiner determines that a party has defaulted, resolving the issues on appeal, or that the appellant has failed to appear or pursue the appeal.

(b) If the examiner determines that the appeal is wholly or partially time−barred for one or more of the following reasons:

1. The appeal was not filed within 90 days after the departmental determination appealed from was mailed to the person aggrieved by the determination. The entire appeal shall be dismissed.

2. The issue is the classification of an employee as a protective occupation participant or participating employee and with respect to service rendered more than 7 years prior to the date the appeal is received by the department. Any portion of the appeal not time−barred may proceed. In s. 40.06 (1) (e) 1., Stats., and this subdivision only, "appeal ... received by the department" means the request by the employee to review the employer's determination, not the challenge to the department's resulting determination.

3. The appeal concerns a request to correct an alleged error with respect to service credits or contribution, premium or benefit payments and the request was made more than 7 full calendar years after the date of the alleged error or beyond another applicable limitation specifically provided by statute. If the alleged error is the result of fraud the applicable limitation is instead 6 years from the date the aggrieved person discovered the facts constituting the fraud. Any portion of the appeal not time−barred may proceed.

4. The appeal involves a claim barred by s. 41.04 (2) (c), 1979 Stats., or an applicable statute of limitation, including but not limited to ss. 893.43 and 893.93 (1) (a), Stats. Any portion of the appeal not time−barred may proceed.

(c) The appeal is moot. When an appeal seeks correction of an administrative error, and the department has acknowledged and corrected the error, the appeal, or the appropriate portion of the appeal, is moot. Any portion of the appeal not moot may proceed.

(d) The appellant does not have a substantial interest affected by the determination made by the department.

(e) There is no material issue of fact or law and under the undisputed material facts and law, the appellant is ineligible for the claimed right or benefit or fails to meet all the qualifications for the claimed right or benefit established by statute, administrative rule and applicable contract.

(3) In addition to final decision−making authority granted by sub. (2), the hearing examiner shall also make the final decision of the board if the issues on appeal are limited to one or more of the following:

(a) The numeric result of a mathematical calculation by the department, not involving any challenge to the application of law in choosing the appropriate values or formulas used to make the calculation.

(b) The amount of a reduction in duty disability benefits under s. 40.65, Stats., resulting from receipt of other benefits.

(c) The appeal of denial of a disability annuity under s. 40.63, Stats., where the sole reason for the department's denial was that the employer did not certify as provided in s. 40.63 (1) (c), Stats., that the employee's leave of absence or termination was the result of the disability.

(4) The hearing examiner shall issue the final decision of an appeal if the board has adopted a motion delegating final decision making authority to the hearing examiner for that specific appeal.

(5) The hearing examiner shall not exercise final decision−making authority under sub. (2) (c), (d) or (e), (3) or (4), if the decision necessarily involves the interpretation of a statute, rule or clause of a contract authorized under ch. 40, Stats., which the examiner finds to be ambiguous. The hearing examiner shall prepare a proposed decision and allow the board to make the necessary interpretation.

(6) The hearing examiner may issue a proposed decision if the grant of final authority under this section is not, in the examiner's

opinion, clearly applicable to the particular appeal before the examiner.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.09 Proposed decision. (1) CONTENTS. The proposed decision shall be in the same form and comply with the same standards as is required for a final decision. If the hearing examiner concludes that the decision may depend upon the interpretation of an ambiguous statute, the proposed decision shall include the hearing examiner's basis for concluding that the statute is ambiguous as a matter of law and a recommended interpretation giving the same weight to the interpretations of the department, attorney general and administrative rules as is required for a final decision.

(2) COPY TO EACH PARTY. A copy of the proposed decision shall be mailed to each party or the party's attorney of record, with notice of the opportunity to file an objection and the manner and time limit for doing so.

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

(a) Each provision of the proposed decision to which the party objects and the basis for each objection.

(b) Each change the party requests the board to make in the proposed decision and the legal grounds for the change. If minor, the requested change may be described as a specific edit to the proposed decision. If extensive or major changes are requested, the party may attach a draft proposed decision, clearly marked as that party's draft, to that party's objections.

(4) ARGUMENT. A party filing objections to a proposed decision shall attach to the objections a written copy of any argument by the party in support of the objections. The board shall consider only written arguments, timely filed with the objection. The board shall not entertain oral argument.

(5) AGENDA. Board staff shall place the appeal on the agenda for the regular board meeting next following the expiration of the time limit for filing objections. Board staff shall provide each board member with a copy of the record, including the proposed decision and the timely filed objections to the proposed decision. If board members would have less than 7 calendar days to review the record, proposed decision and timely objections, or the board's agenda is already full, the appeal may instead be added to the agenda of the subsequent regular board meeting. Nothing in this subsection shall prevent the board from electing to hear an appeal case at a special meeting of the board.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.10 Ex parte communications. (1) The secretary and department employees may respond to any request made by the board or a board member for information required in the ordinary course of exercising the board's regulatory and supervisory functions, even if the information requested may pertain to the subject matter of an appeal currently pending before the board or a hearing examiner.

(2) Except as provided in sub. (1), no person involved in an appeal proceeding or factually related matter as a party, an advocate for any party or as a witness may make any ex parte communication relative to the merits of the appeal to the hearing examiner or a board member prior to the final decision of the case.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.105 Board member conflict of interest. (1) No board member or employee of the department may participate in any appeal directly related to a specific benefit, credit, claim or application of the person.

(2) No board member may participate in deciding an appeal to which the board member is a party. No board member who is the director of the office of state employment relations, or the director's designee, may participate in deciding an appeal to which the office of state employment relations is a party. No board member who is the chief executive, chairperson or member of the governing body of a participating employer may participate in deciding an appeal in which that particular participating employer is a party. A board member barred under this subsection from participating in the board's decision of an appeal shall not make any ex parte communications to the board or another board member concerning that appeal and shall not participate in any way in the board's quasi−judicial deliberations.

Note: See s. 40.01 (3), Stats.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.11 Counsel for the board. (1) In accordance with s. 40.03 (3), Stats., board staff shall arrange for legal counsel to advise the board during its consideration of a final decision.

(2) Any legal counsel asked to represent the board under sub. (1) shall fully disclose any real or apparent conflict of interest to the board chair and state whether counsel is able to render objective advice to the board. The board chair may waive the conflict on behalf of the board.

(3) Counsel appointed under sub. (1) shall provide legal representation to the board including all of the following:

(a) Advising the board during its deliberations and making specific recommendations for action by the board.

(b) Drafting findings of fact and conclusions of law.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; **CR 09−047: am. (1) and (2), r. and recr. (3) Register May 2010 No. 653, eff. 6−1−10.**

ETF 11.12 Final decision. (1) FORM. Final decisions, and proposed decisions to be considered by the board, shall be in writing and include:

(a) Findings of fact, consisting of a concise and separate statement of the ultimate conclusion upon each material issue of fact, without recital of evidence.

(b) Conclusions of law based on the factual findings.

(c) A list of names and addresses of all persons who are considered parties for purposes of judicial review.

(d) An order stating either that the department determination is affirmed or, where the department determination is not affirmed, remanding the matter to the department with instructions to take necessary action on the matter, consistent with the final decision. In the following cases, the decision shall include the specified additional orders and findings:

1. 'Disability; employer certification.' Where the appeal is of a determination denying a disability annuity under s. 40.63, Stats., and the sole basis of the denial was the absence of an employer certification that the employee's leave of absence or termination is the result of the disability, the decision shall include a finding whether the employer's negative certification or failure to certify was reasonable and correct. If the employer's action was unreasonable or incorrect, the decision shall include an order to the employer to make the certification and an order to the department to process the disability application when the certification is received.

2. 'Participating employee; protective occupation.' Where the issue of the appeal is whether a person is a participating employee or protective occupation participant, an affirmative decision shall include an order to the participating employer to make the necessary report on that person as required by s. 40.06 (1) (e), Stats.

3. 'Overpayment refund.' If the final decision concludes that the appellant has overpaid the Wisconsin retirement system and a refund is due, the final decision shall include an order to the board staff to compute the amount of the refund, as provided in this chapter. That computation shall be incorporated by reference

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http://docs.legis.wisconsin.gov/code/admin_code

into the final decision and order to the department to pay the refund.

4. 'Group insurance.' If the appeal involves a right or benefit under a group insurance plan provided under ch. 40, Stats., and the insurer is not the public employee trust fund, a final decision favorable to the insured shall include the group insurance board decision of whether the insurer's continued failure to grant the right or benefit to the insured shall be regarded as a breach of the contract between the insurer and the board.

(e) The final decision shall be signed by the board chair or designee.

(2) STANDARDS. Final decisions of the board shall be drafted to meet the following standards:

(a) *Findings.* Each finding of the final decision shall be based on evidence in the record which proves the findings to a reasonable certainty by the greater weight of the credible evidence, or to a higher standard of proof expressly required by this chapter or other law.

(b) *Factual basis.* The factual basis of the final decision shall be solely the evidence and matters officially noticed. Hearsay evidence may be relied upon as the basis for factual findings to the same extent permitted in a Wisconsin court of law.

(c) *Specific statutory authorization.* The final decision may not order or authorize any action solely to further a purpose of the public employee trust fund unless the action is specifically authorized by a provision of ch. 40, Stats., other than s. 40.01 (2), Stats.

(d) *Consistent with law.* The final decision may not be contrary to law. Where the final decision concerns a benefit program qualifying for tax exempt or tax deferred treatment under federal law, the final decision shall be consistent with the applicable federal code and regulations to the extent necessary to preserve the qualified status of the program.

(3) INTERPRETATION OF AMBIGUOUS STATUTE. If the final decision necessarily depends on the interpretation of a statute which is ambiguous as a matter of law, the board shall interpret the statute. As soon as possible after a statute is found ambiguous under this subsection, the department shall propose an administrative rule interpreting the ambiguous statute.

(4) DUE DEFERENCE TO RULE, ATTORNEY GENERAL OPINION. In interpreting a provision of ch. 40, Stats., the board shall give great weight to a written opinion of the attorney general and to the interpretation of the department. The board shall give controlling weight to an administrative rule of the department interpreting the statute.

(5) CLOSED SESSION DELIBERATIONS. The board shall meet in closed session, in its quasi−judicial capacity to review the proposed decision of an appeal and take action on the appeal, as follows:

(a) Parties to the appeal and their attorneys of record may not be present during the closed session, except that board staff and advisory staff of the department who were not involved in the proceedings or in making the underlying departmental determination may be present at the discretion of the board.

(b) Following the closed session on the appeal, the board shall reconvene in open session to briefly summarize the board's action on the appeal for the minutes. The summary shall, so far as possible, respect the confidentiality of individual personal information.

(c) As an alternative to agreeing upon a final decision to be reduced to writing, the board may order an appeal to be returned to a hearing examiner for additional fact finding.

(6) VARIANCE FROM PROPOSED DECISION. The board's final decision may vary from the proposed decision but, if so, the board's final decision shall include an explanation of the basis for each variance.

(7) NOTICE. Board staff shall mail a copy of the final decision to each party or that party's attorney of record by first class mail. Each party, or that party's attorney of record shall also be mailed notice of the right to petition the board for a rehearing, the right to judicial review of an adverse decision, the time limits for filing a petition for rehearing or judicial review and the name of the board to be named as respondent.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; CR 07−066: am. (2) (b), Register March 2008 No. 627, eff. 4−1−08.

ETF 11.13 Record. (1) The hearing examiner and board staff shall create a record of each appeal which shall include:

(a) All applications, pleading, motions, intermediate rulings and exhibits and appendices.

(b) Evidence received or considered, stipulations and admissions.

(c) Statement of matters officially noticed.

(d) Questions and offers of proof, objections and rulings thereon.

(e) Any proposed findings or decisions and exceptions.

(f) Any decision, opinion or report by the board or hearing examiner.

(g) A record of oral proceedings, whether a stenographic, electronic or other record.

(2) The written record shall be maintained as an adjunct to the appropriate participant file, as determined by the department, until a final decision has been rendered and the time limit for all further judicial review has expired without an appeal being filed. Thereafter, only the portions of the record as deemed necessary for the administration of the department shall be retained.

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

(4) When no written transcript is prepared, any party to the appeal and, subject to s. 40.07, Stats., any other person may request a copy of the stenographic, electronic or other record of oral proceedings. The department shall provide a copy to authorized recipients and may charge fees as provided in s. ETF 10.71.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.14 Petition for rehearing. (1) TIME LIMITS; ADDRESS. A party aggrieved by the final decision may file a petition for rehearing within 20 days after notice of the final decision is mailed. The petition for rehearing is subject to the following requirements:

(a) The petition shall be mailed to the appropriate board in care of the appeals coordinator, department of employee trust funds. Alternatively, the petition may be personally served on a person designated by the board as its agent to accept personal service.

(b) The petition is deemed filed on the date it is received.

(c) The petition shall be disposed of within 30 days of its filing. The petition is deemed denied if not otherwise disposed of within 30 days of its filing.

(2) GROUNDS. The board or, when delegated under sub. (4), the hearing examiner may grant a rehearing but only on the basis of one or more of the following:

(a) A material error of law.

(b) A material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the original decision, which could not have been previously discovered by due diligence.

(3) CONTENTS. The petition for rehearing shall specify, in detail, the grounds for the relief requested, including the specific,

material error of fact or law or the newly discovered evidence and cite supporting legal authorities for granting the petition.

Note: The board requests that, whenever possible, a party limit the petition for rehearing to no more than 6 pages. Another party responding for or against the petition is requested, whenever possible, to limit the response to no more than 4 pages.

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

(a) The board staff shall immediately forward the petition for rehearing and the record to the hearing examiner, who shall consider and grant or deny the petition within 20 days.

(b) No hearing on the petition is required.

(c) If the hearing examiner grants the rehearing, the examiner shall proceed to rehear the case under sub. (6).

(d) The examiner's decision to deny the petition is the final decision of the board.

(5) BOARD MOTION. The board may order a rehearing on its own motion within 20 days of service of the final order.

(6) CONDUCT OF REHEARING. A rehearing, if granted, shall be conducted as soon as practicable.

(a) The proceedings shall conform to those for the original hearing, except as the board or hearing examiner may otherwise direct.

(b) If, after the rehearing, the original decision appears unreasonable or unlawful, the hearing examiner shall prepare for the consideration of the board a proposed decision reversing, changing or modifying the original final decision. The board shall consider the examiner's proposed decision at a subsequent board meeting and issue a final decision as provided in s. ETF 11.12.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92.

ETF 11.15 Judicial review. (1) INTERESTED PARTIES. Each person included as a party by the hearing examiner who appeared before the hearing examiner in the proceedings, including the department, may seek judicial review of the final board decision. If, in the opinion of the secretary, the final decision of an appeal results in violation of a fiduciary duty owed to the public employee trust fund, the secretary shall seek judicial review of the board decision.

(2) RESPONDENT FOR REVIEW OF WISCONSIN RETIREMENT BOARD, TEACHERS RETIREMENT BOARD, GROUP INSURANCE BOARD OR DEFERRED COMPENSATION BOARD DECISION. Unless otherwise expressly provided by statute, final decisions of the Wisconsin retirement board, teachers retirement board, group insurance board and deferred compensation board are subject to judicial review as provided in s. 227.53, Stats., and as follows:

(a) *Board is respondent.* The petition for review shall name the board as the sole respondent and shall be mailed by certified mail to the respective board or personally served on a person designated by the board to serve as its agent to accept personal service. The petitioner shall also serve copies of the petition for review upon each party to the appeal before the board, or that party's attorney of record.

(b) *Deadlines.* The following time limits shall be observed:

1. The petition for review is timely only if filed with the court and served upon the board within 30 days. The 30 day period commences on the day after the earlier of personal service upon the party or mailing of the board's final decision to all parties. However, if the party has requested a rehearing, the deadline for filing and serving the petition for review is 30 days after the application for rehearing is finally disposed of whether by action of the hearing examiner, board action or operation of law.

2. Within 30 days of instituting review proceedings, the petitioner shall serve a copy of the petition for review upon each party to the appeal before the board, or that party's attorney of record. The court may dismiss the petition for failure to serve each party listed as a party for purposes of review in the board's final decision. Service shall be by certified mail or, when service is admitted in writing, by first class mail.

3. Parties to the appeal before the board may participate in the review as provided in s. 227.53, Stats. Within 20 days of being served with the petition for review, a party may serve upon the petitioner, the board and the attorney general a notice of appearance. This notice shall clearly state the person's position with reference to each material allegation in the petition for review and to the affirmance, vacation or modification of the board decision under review. Proof of service of the notice shall be filed with the clerk of the reviewing court within 10 days after the service.

Note: See s. 227.53, Stats., for details of judicial review proceedings and pleading.

(3) RESPONDENT FOR REVIEW OF ETF BOARD DECISION. Final decisions of the employee trust fund board are subject to judicial review only by certiorari. The certiorari petition or complaint shall name the employee trust funds board as the respondent and shall be filed in Dane county, where the board is deemed to reside.

Note: In the absence of a statutory deadline for filing the certiorari petition, see *State ex rel Casper v. Board of Trustees, 30 Wis. 2d 170, 140 N.W. 2d 301 (1966)* which sets a 6 month deadline.

(4) AGENT FOR SERVICE UPON BOARD. Except as provided in this subsection, no person or employee of the department is authorized to accept service for the board. From time to time the board may by motion designate a person, either by name or position, as agent to accept personal service for the board. Persons holding the following positions, whose names shall be disclosed by the department upon request, are designated as agents to accept personal service on behalf of the board:

(a) The general counsel of the department.

(b) The division administrator or program director administering the particular program which is the subject matter of the underlying appeal to the board.

(c) The deputy secretary of the department.

(d) The secretary of the department or his or her designees.

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; **CR 09−048: am. (4) (a), cr. (4) (c), (d) Register May 2010 No. 653.**

ETF 11.16 Miscellaneous provisions. (1) COMPUTING TIME. For the purposes of this chapter, unless otherwise specified, the time in which an action shall be taken when expressed in days shall be computed by excluding the first day and including the last, except that if the last day falls on a day the department offices are closed to the public, the action may be taken on the next day the offices are open.

(2) COMPUTING REFUND OF OVERPAYMENT. If the final decision of an appeal determines that a participant overpaid the department and is entitled to a refund, the board shall direct board staff to calculate the refund due under s. 40.08 (6), Stats. No interest shall be paid upon a refund except as expressly authorized in ch. 40, Stats. A refund from a Wisconsin retirement system account shall not include interest but shall include investment earnings as provided in s. 40.08 (6), Stats. The board staff's calculation shall be appended to and become part of the board's final decision. Board staff shall:

(a) Treat the overpayment as a separate account, participating in the variable and core rate trusts to the same extent as the participant, unless another treatment is expressly provided by ch. 40, Stats.

(b) Make all calculations consistent with the board's final decision and based on the actual amounts and dates of payments made to the department.

(3) COSTS TO CERTAIN PREVAILING PARTIES; SPECIAL CIRCUMSTANCES. If the hearing examiner entertains a motion for costs, as provided in s. 227.485, Stats. the examiner shall find that special

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circumstances exist that make the award of costs against the department unjust in the following cases:

(a) An appeal of the denial of a disability annuity application when the department determination was based on the employer's negative certification, or failure to certify, under s. 40.63 (1) (c), Stats. This paragraph does not prohibit the award of costs against an employer which is a state agency.

(b) An appeal of a determination that a person was not a participating employee or protective occupation participant if the department determination was in accord with the employer's determination and the factual information furnished to the department by the employer. This paragraph does not prohibit the award of costs against an employer which is a state agency, or against the office of state employment relations in an appeal of its determination under s. 40.06 (1) (dm), Stats.

(c) An appeal of a determination involving a group health insurance plan other than the standard plan when the department determination was in accord with the insurer's determination and the information furnished to the department by the insurer.

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

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

History: Cr. Register, June, 1992, No. 438, eff. 7−1−92; CR 07−062: r. (2) (c) Register June 2008 No. 630, eff. 7−1−08; **CR 09−057: am. (2) (a) Register May 2010 No. 653, eff. 6−1−10.**