CHAPTER 227

ADMINISTRATIVE PROCEDURE AND REVIEW

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227.01 Definitions. In this chapter:

(1) "Agency" means any board, commission, committee, department or officer in the state government, except the governor or any military or judicial officer of this state.

(2) "Contested case" means a proceeding before an agency in which, after hearing required by law, substantial interests of any party to such proceeding are determined or adversely affected by a decision or order in such proceeding and in which the assertion by one party of any such substantial interest is denied or controverted by another party to such proceeding. There are 3 classes of contested cases as follows:

(a) A "class 1 proceeding" is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon the agency. Class 1 proceedings include, but are not restricted to: rate making; price setting; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; and the grant or denial of licenses.

(b) A "class 2 proceeding" is a proceeding in which an agency determines whether to impose a sanction or penalty against one or more parties. Class 2 proceedings include, but are not restricted to, suspensions of, revocations of, and refusals to renew licenses because of an alleged violation of law. Any proceeding which could be construed to be both a class 1 and 2 proceeding shall be treated as a class 2 proceeding.

(c) A "class 3 proceeding" is any contested case not included in class 1 or 2.

(2m) "Hearing examiner" means a person designated under s. 227.09 (1) to preside over a contested case.

(3) "License" includes the whole or any part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law, except motor vehicle operator's licenses issued under ch. 343, vehicle registration certificates issued under ch. 341 and licenses required primarily for revenue purposes or for hunting or fishing or other similar licenses where the issuance is merely a ministerial or nondiscretionary act.

(4) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license.

(5) "Official of the agency" means a secretary, commissioner or member of any board of any agency.

(6) "Party" means each person or agency named or admitted as a party. Any person whose substantial interests may be adversely affected

by any proposed agency action in a contested case shall be admitted as a party.

(8) A "person aggrieved" includes any person or agency whose substantial interests are adversely affected by a determination of an agency.

(9) "Rule" means a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the foregoing), of general application and having the effect of law, issued by an agency to implement, interpret or make specific legislation enforced or administered by such agency or to govern the organization or procedure of such agency.

(11) "Rule" as defined in sub. (9) does not include or mean, and the provisions of s. 227.011 do not apply to, action or inaction of an agency, regardless of whether otherwise within sub. (9) or s. 227.011, which:

(a) Concerns the internal management of the agency and does not affect private rights or interests;

(b) Is a decision or order in a contested case;

(c) Is an order which is directed to a specifically named person or to a group of specifically named persons which does not constitute a general class, and the order is served on the person or persons to whom it is directed by the appropriate means applicable thereto. The fact that the named person who is being regulated serves a group of unnamed persons who will be affected does not make such order a "rule";

(d) Relates to the use of the highways and is made known to the public by means of signs or signals;

(e) Relates to the construction or maintenance of highways or bridges, except as provided in s. 85.025;

(f) Relates to the curriculum of, admission to or graduation from, public educational institutions, as determined by each individual institution;

(g) Relates to the use of facilities of public libraries;

(i) Relates to military or naval affairs;

(j) Relates to the form and content of reports, records, or accounts of state, county or municipal officers, institutions or agencies;

(k) Relates to expenditures by state agencies, the purchase of materials, equipment or supplies by or for state agencies, or to printing or duplicating of materials for state agencies;

(l) Establishes personnel standards, job classifications, or salary ranges for state, county or municipal employes who are in the classified civil service;

(m) Determines water levels;

(n) Fixes or approves rates, prices, or charges, except when a statute specifically requires the same to be fixed by rule;

(o) Determines the valuation of securities held by insurers;

(p) Is a statistical plan relating to the administration of rate regulation laws under ch. 625 or 626;

(q) Is a form the content or substantive requirements of which are prescribed by a rule or a statute; or

(r) Is a pamphlet or other explanatory material not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature.

(s) Prescribes or relates to a uniform system of accounts for persons, including municipalities, regulated by the transportation commission or public service commission.

(t) Ascertains and determines prevailing hours of labor, wage rates and truck rental rates pursuant to s. 103.50 and prevailing wage rates and hours of labor pursuant to s. 103.49 but any such action or inaction which so ascertains and determines prevailing hours of labor, wage rates and truck rental rates pursuant to ss. 103.49 and 103.50 shall continue to be subject to judicial review, the same as a rule, as provided in this chapter.

(v) Establishes procedures used for the determination of allocations as charges to state agencies under s. 20.865 (1) (f) or (fm).

(w) Establishes rates for use of personal automobiles under s. 20.916 (4) (a).

(x) Establishes rental policies for state-owned housing approved by the joint committee on finance under ss. 13.101 (12) and 16.004 (8).

(y) Prescribes measures to minimize the adverse environmental impact of bridge and highway construction and maintenance.

(z) Defines or lists nonattainment areas under s. 144.371.

(12) "Working day" means each day except Saturday, Sunday and those holidays designated in s. 230.35 (4) (a).

History: 1973 c. 162; 1973 c. 333 s. 201m; 1975 c. 39, 81, 189, 224; 1975 c. 414 ss. 2 to 5, 28; 1975 c. 422; 1977 c. 26, 130, 272, 306, 418, 447; 1979 c. 28; 1979 c. 34 ss. 1019ua, 1019ub, 2102 (29) (a), (58) (b); 1979 c. 102 ss. 38, 236 (4); 1979 c. 221.

Proceeding for incorporation of village is not a "contested case" under (2). Westring v. James, 71 W (2d) 462, 238 NW (2d) 695.

Flood plain zoning ordinance adopted by DNR under 87.30 (1) was "rule" under 227.01. Citizens for Sensible Zoning, Inc. v. DNR, 90 W (2d) 804, 280 NW (2d) 702 (1979).

Discussion of what constitutes a rule. Terms "rule" and "order" are mutually exclusive. Wis. Elec. Power Co. v. DNR, 93 W (2d) 222, 287 NW (2d) 113 (1980).

See note to 445.03, citing 63 Atty. Gen. 154.

See note to 13.56, citing 63 Atty. Gen. 159.

State does not have jurisdiction to enforce Wisconsin Administrative Code with respect to construction of buildings on Oneida Indian Reservation trust land. 58 OAG 91, (1969) withdrawn. 65 Atty. Gen. 276.

See note to 227.07, citing 67 Atty. Gen. 188

Agencies are subject to rule-making procedures in making discretionary choices even if those choices are based on opinions of attorney general. Rule-making procedure does not apply where opinion describes what law mandates. 68 Atty. Gen. 363.

227.011 Statements of policy and interpretations of law. (1) Each agency shall adopt and file as a rule every statement of general policy and every interpretation of a statute which is specifically adopted by an agency to govern its enforcement or administration of that statute. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts involved does not render it a rule as defined in s. 227.01 (9) or constitute specific adoption thereof by the agency so as to be required to be issued and filed as provided in this subsection.

(2) No agency may adopt a rule which conflicts with state law.

History: 1979 c. 34 ss. 1019ua, 1019uc.

Agency's revised interpretation of statute constituted administrative rule-making under (10) [227.011] and declaratory relief under 227.05 was accordingly proper. Discussion of what constitutes a rule. Schoolway Trans. Co. v. Div. of Motor Vehicles, 72 W (2d) 223, 240 NW (2d) 403.

227.012 Natural resources hearings. In this section "hearing examiner" means any person designated under this section to preside over a hearing. The administrator of the division of natural resources hearings in the department of administration shall:

(1) Serve as the appointing authority of all hearing examiners under s. 230.06.

(2) Assign a hearing examiner to preside over any hearing of a contested case which is required to be conducted by the department of natural resources and which is not conducted by the secretary of natural resources.

(3) Supervise hearing examiners in the conduct of the hearing and the rendering of a decision, if a decision is required.

(4) Promulgate rules relating to the exercise of the administrator's powers and duties under this section.

(5) Set the fees to be charged to the department of natural resources for any services rendered to the department by a hearing examiner under this section. The fee shall cover the total cost of the services less any costs covered by the appropriation under s. 20.505 (8) (a).

History: 1977 c. 418.

227.013 Forms. A form which imposes requirements which are within the definition of a rule shall be treated as a rule for the purpose of this chapter, except that:

(1) Its adoption, amendment or repeal need not be preceded by notice and public hearing; and

(2) It need not be adopted, amended or repealed by the board or officer charged with ultimate rule-making authority but may be adopted, amended or repealed by any employe of the agency to whom such board or officer has delegated the authority; and

(3) It need not be published in the administrative code or register in its entirety, but may be listed by title or similar description together with a statement as to how it may be obtained.

227.014 Extent to which chapter confers rule-making authority. (1) Except as provided in sub. (2) and as otherwise expressly provided in this chapter, nothing in this chapter confers rule-making authority upon or augments the rule-making authority of any agency.

(2) Rule-making authority hereby is expressly conferred as follows:

(a) Each agency is authorized to adopt such rules interpreting the provisions of statutes enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation.

(b) Each agency is authorized to prescribe such forms and procedures in connection with statutes to be enforced or administered by it as it considers to be necessary to effectuate the purpose of the statutes, but nothing in this paragraph authorizes the imposition of substantive requirements in connection with such forms or procedures.

(c) Each agency which is authorized by law to exercise discretion in deciding individual cases is authorized to formalize the general policies which may evolve from such decisions by adopting such policies as rules which the agency will follow until they are amended or repealed. Such rules are valid only to the extent that the agency has discretion to base its individual decisions on the policies expressed in the rules.

History: 1975 c. 414; 1979 c. 89.

Cross Reference: See 101.04, concerning labor and industry review commission.

227.015 Petition for rules. (1) Except where the right to petition for a rule is restricted by statute to a designated group or except where the form of procedure for such petition is otherwise prescribed by statute, any municipality, corporation or any 5 or more persons having an

interest in a rule may petition an agency requesting the adoption, amendment or repeal of such rule.

(2) Such petition shall state clearly and concisely:

(a) The substance or nature of the rule making which is requested; and

(b) The reasons for the request and the petitioners' interest in the request; and

(c) References to the authority of the agency to take the action which is requested.

(3) Within a reasonable period of time after the receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or proceed with the requested rule making. If the agency denies the petition, it shall promptly give notice thereof to the person who filed the petition, including a brief statement of its reasons for the denial. If the agency proceeds with the requested rule making, it shall proceed in the manner prescribed by ss. 227.02 to 227.024.

227.017 Advisory committees and informal consultations. An agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. Each agency also is authorized to appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only.

History: 1973 c. 162; 1977 c. 84, 370; 1979 c. 34 ss. 1019ud, 1019ue.

227.018 Committee review of proposed rules. (1) STATEMENT OF PURPOSE; RULE-MAKING POWERS. (a) Article IV of the constitution vests in the legislature the power to make laws, and thereby to establish agencies and to designate agency functions, budgets and purposes. Article V of the constitution charges the executive with the responsibility to expedite all measures which may be resolved upon by the legislature.

(b) The legislature recognizes the need for efficient administration of public policy. In creating agencies and designating their functions and purposes, the legislature may deem it necessary to delegate rule-making authority to these agencies to facilitate administration of legislative policy. The delegation of such rule-making authority is intended to eliminate the necessity of establishing every administrative aspect of general public policy by legislation. In so doing, however, the legislature reserves unto itself:

1. The right to retract any such delegation of rule-making authority;

2. The right to establish any aspect of general policy by legislation, notwithstanding any delegation of rule-making authority;

3. The right and responsibility to designate methods of rule promulgation and rule review and modification; and

4. The right to delay or suspend the implementation of any rule or proposed rule while under review by the legislature.

(2) NOTIFICATION OF STANDING COMMITTEES. An agency shall notify the presiding officer of each house of the legislature when a proposed rule is in final draft form by submitting a notice to the officer to this effect. The notice shall be submitted in triplicate and shall be accompanied by the report required under sub. (3). A notice received under this subsection on or after November 1 of an even-numbered year shall be considered received on the first day of the next regular session of the legislature. Each presiding officer shall, within 7 working days following the day on which the notice and report is received, refer the notice and report to one standing committee. An agency may withdraw the draft of a proposed rule or a portion thereof by notifying the presiding officer of its intention not to promulgate the rule or portion of the rule. The agency shall cause a statement to appear in the Wisconsin administrative register to the effect that a proposed rule has been submitted to the presiding officer of each house of the legislature. The presiding officers shall each cause a similar statement to appear in the journal of each house.

(3) FORM OF REPORT. The report required under sub. (2) shall include the proposed rule in the form specified in s. 227.024, any recommendations of the legislative council staff and an analysis. The analysis shall include:

(a) Findings of fact;

(b) A statement explaining the need for the proposed rule;

(c) Explanations of modifications made in the proposed rules as a result of testimony received at public hearings;

(d) A list of persons who appeared or registered for or against the proposed rule at any public hearing held by the agency; and

(e) A response to legislative council staff recommendations under s. 227.029 indicating:

1. Acceptance of recommendations in whole;

2. Acceptance of recommendations in part;

3. Rejection of recommendations; and

4. Reasons for not accepting recommendations.

(4) STANDING COMMITTEE REVIEW. (a) *Standing committee meeting.* A committee may

be convened upon the call of its chairperson to review a proposed rule. A committee may meet separately or jointly with the other committee to which the notice is referred, and may direct the agency to send a representative to attend the meeting. A committee may hold a public hearing to review the proposed rule.

(b) *Standing committee review period.* The standing committee review period extends for 30 days after the notice is referred by a presiding officer and if within the 30-day period a standing committee directs the agency to meet with it to review the draft, the standing committee review period is continued for 30 days from the date of that request. If a standing committee and an agency agree to modifications in a proposed rule, then the period for review by both standing committees is extended to the 10th day following receipt by the committees of the modified proposed rule.

(c) *Agency not to promulgate rule pending standing committee review.* An agency may not promulgate a proposed rule during the standing committee review period unless both committees waive their authority to object to the proposed rule prior to the expiration of that period.

(d) *Standing committee action.* Either standing committee may object to the proposed rule or part of the proposed rule by taking action in executive session to object to the rule within the standing committee review period. An agency may promulgate a proposed rule or part of a proposed rule if neither committee objects to the rule or part of the rule.

(5) JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES. (a) *Referral.* If either standing committee objects to a proposed rule or part of a proposed rule, the committee shall refer the proposed rule or the part to which an objection has been made to the joint committee for review of administrative rules.

(b) *Joint committee review period.* The joint committee review period extends for 30 days after a proposed rule is referred to it. The joint committee shall meet and take action in executive session during that period.

(c) *Agency not to promulgate rule pending joint committee review.* An agency may not promulgate a proposed rule or any part thereof which is objected to by a standing committee unless the action of the standing committee is nonconcurred in by the joint committee for the review of administrative rules under par. (d) or until the bill introduced under par. (e) fails enactment. An agency may promulgate any portion of a rule to which no objection is made under this section.

(d) *Joint committee action.* The joint committee for the review of administrative rules may nonconcur in an objection to a proposed rule or portion thereof by a standing committee by taking action to this effect within the joint committee review period. If the joint committee objects to a proposed rule or portion thereof, an agency may not promulgate the proposed rule or portion thereof until the bill introduced under par. (e) fails enactment. A proposed rule or portion thereof may be objected to by the joint committee only for one of the following reasons:

1. An absence of adequate statutory authority.
2. An emergency relating to public health, safety or welfare.
3. Failure to comply with legislative intent.
4. Being contrary to state law.
5. A change of circumstances since the original date of passage of the earliest law upon which the rule is based.
6. Being arbitrary and capricious or imposing an undue hardship.

(e) *Bill to prevent promulgation.* When the joint committee for the review of administrative rules objects to a proposed rule or portion of a proposed rule, the committee shall within 30 days of the date on which objection is made place before each house of the legislature, for consideration at any regular session, a bill to support the objection. If both bills are defeated, or fail enactment in any other manner, the proposed rule or portion thereof which is objected to may be promulgated. If either bill becomes law, the proposed rule or portion thereof objected to may not be promulgated unless a properly enacted law specifically authorizes the adoption of that rule or the portion to which objection is made under this section.

(f) *Late introduction of bills; effect.* If the bills required by this subsection are introduced 60 days or less before a time at which any rule or resolution of the legislature provides that no additional legislation may be introduced, unless either house adversely disposes of either bill, the committee shall reintroduce the bills on the first day of the next regular session of the legislature. In such case, the proposed rule or portion of the rule to which the bills pertain may not be promulgated except as provided in par. (e). If either house adversely disposes of either bill, then the rule or portion of the rule to which objection is made may be promulgated. In this paragraph, "adversely disposes of" means that one house has voted:

1. To indefinitely postpone the bill.
2. To nonconcur in the bill.
3. Against ordering the bill engrossed.
4. Against ordering the bill to a 3rd reading.
5. Against passage.
6. Against concurrence.

(6) PROMULGATION PREVENTION PROCEDURE. (a) No bill required by this section may

be acted upon by the legislature until the joint committee for review of administrative rules submits a written report on the proposed bill. The report shall accompany the introduced bill required by this section and be printed as an appendix to the bill. The report shall contain:

1. An explanation of the issue involving the rule or portion of the rule objected to and the factual situation out of which the issue arose;

2. Arguments presented for and against the rule or portion of a rule at the executive session held under sub. (5);

3. A statement of the action taken by the committee regarding the rule or portion of the rule; and

4. A statement and analysis of the grounds upon which the committee relies for objecting to a rule or portion of a rule.

(b) Upon introduction of the bills by the committee under this section, the presiding officer of each house of the legislature shall refer the bill introduced in that house to the appropriate standing committee, to the calendar scheduling committee or directly to the calendar in each house of the legislature. If a bill is referred to a standing committee and the standing committee makes no report within 30 days after referral, the bill shall be considered reported without recommendation. No later than 40 days after referral, the bills shall be placed on the calendars of the respective houses of the legislature according to the rules of the respective houses governing the placement of proposals on calendars. A bill introduced under this section which is received in the 2nd house shall be referred, reported and placed on the calendar in the same manner as an original bill introduced under this section.

(7) NONAPPLICATION. This section does not apply to emergency rules adopted under s. 227.027.

History: 1979 c. 34, 154, 270.

Legislative committee review of administrative rules in Wisconsin. Bunn and Gallagher. 1977 WLR 935.

227.019 Fiscal estimates. (1) An agency shall prepare a fiscal estimate for each proposed rule-making order.

(2) The fiscal estimate shall include a reliable estimate of the fiscal impact of the changes in the agency's rules proposed in the order, including:

(a) The order's anticipated effect on county, city, village, town, school district, vocational, technical and adult education district and sewerage district fiscal liability and revenues.

(b) A projection of the order's anticipated state fiscal effect during the current biennium and a projection of the full annualized fiscal effect.

(c) A list of major assumptions used in preparing the estimate.

(3) An agency shall prepare the fiscal estimate for a proposed rule-making order prior to the time that each proposed rule contained in the order is submitted to the legislative council staff under s. 227.029.

(4) If the rule of an agency interprets or implements a law, and the rule has no fiscal effect independent of the fiscal effect of the law, the fiscal estimate prepared under this section shall be based on the fiscal effect of the law.

(5) If a rule-making order is substantially revised in such a manner that the fiscal effect of the order is significantly changed prior to issuance of the order by the agency, the agency shall prepare a revised fiscal estimate prior to issuance of the rule-making order. An agency shall give notice of the revised fiscal estimate in the same manner that notice of the original estimate is given.

History: 1979 c. 34, 154.

227.02 When hearings required. (1) An agency shall precede all its rule making with notice and public hearing unless:

(a) The proposed rule is procedural rather than substantive; or

(b) The proposed rule is designed solely to bring the language of an existing rule into conformity with a statute which has been changed or adopted since the adoption of the rule or to bring the language of an existing rule into conformity with a controlling judicial decision; or

(c) The proposed rule is adopted pursuant to s. 227.027 as an emergency rule; or

(d) The joint committee for the review of administrative rules directs the agency to promulgate what it determines to be a rule under s. 13.56 (2); or

(e) The proposed rule and the fiscal estimate required under s. 227.019 are published in the notice section of the administrative register together with a statement to the effect that the agency will adopt the proposed rule without public hearing thereon unless, within 30 days after publication of the notice, it is petitioned for a public hearing on the proposal by 25 persons who will be affected by the rule, a municipality which will be affected by the rule, or an association which is representative of a farm, labor, business or professional group which will be affected by the rule. If the agency receives such a petition it may not proceed with the proposed rule-making until it has given notice and held a hearing as prescribed by ss. 227.021 and 227.022.

(2) The exceptions to the general hearing requirement which are set forth in sub. (1) do not apply if:

(a) Another section of the statutes specifically requires the agency to hold a hearing prior to adoption of the proposed rule under consideration; or

(b) The agency determines that a hearing is desirable, in which event the agency has discretion to determine what kind of hearing it will hold and what kind of notice it will give.

(3) An agency may hold a hearing with respect to the general subject matter of possible or anticipated rule-making before preparation of any rule in draft form for the purpose of soliciting early public input into the rule-drafting process. A hearing held under this subsection does not serve in lieu of any hearing which is required to be held under this section with respect to the adoption of a specific proposed rule.

History: 1975 c. 414 s. 28; 1979 c. 34.

The public service commission must hold a public hearing prior to the adoption of the minimum gas safety standards of the federal department of transportation as rules under 196.745 (1). 63 Atty. Gen. 152.

227.021 Notice of hearing. (1) Whenever an agency is required by law to hold a public hearing as part of its rule-making process, the agency shall:

(a) Transmit written notice of hearing to the revisor of statutes for publication in the notice section of the administrative register, and, if a statute applicable to the specific agency or a specific rule or class of rules under consideration requires publication in a local newspaper, publish notice as required by that statute in addition to publication in the notice section of the administrative register; and

(b) Transmit written notice of such hearing to every member of the legislature who previously has made a request in writing filed with the revisor of statutes to be notified of proposed rule making. The revisor of statutes upon request of any agency shall transmit to such agency a list of all such legislators who have theretofore filed such request, together with their addresses; and

(c) Take such other steps as it deems necessary to convey effective notice to persons who are likely to have an interest in the proposed rule making.

(2) The notice shall be given at least 10 days prior to the date set for the hearing. If notice is given through publication in the administrative register it is deemed to have been given on the first or the 15th day of the month following publication or, in case the publication is delayed beyond the date for which the issue of the register is designated, then on the date prescribed in s. 227.026 (3).

(3) The notice which this section requires an agency to give shall include:

(a) A statement of the time and place at which the hearing is to be held; and

(b) Either the text of the proposed rule in the form specified in s. 227.024 (1) or an informative summary of the effect of the proposed rule; and

(c) A reference to the statutory authority under which the agency proposes to adopt the rule and a reference to any statute that the rule interprets;

(d) An analysis of the proposed rule;

(e) The fiscal estimate required under s. 227.019 or a summary of the fiscal estimate and a statement of the availability of the full fiscal estimate; and

(f) If the text of the proposed rule is not published under par. (b), a description of how copies of the text may be obtained from the agency at no charge; and

(g) Any additional matter which may be prescribed by statute applicable to the specific agency or to the specific rule or class of rules under consideration.

(4) An agency may modify a proposed rule without providing additional notice under this section if the modification is germane to the subject matter of the proposed rule.

(5) Failure of any person to receive notice of a hearing on proposed rule making is not grounds for invalidating the resulting rule if notice of the hearing was published as provided in sub. (1) (a).

History: 1979 c. 34, 221.

227.022 Conduct of hearings. (1) The agency shall hold a public hearing at the time and place designated in the notice of hearing, and shall afford all interested persons or their representatives an opportunity to present facts, views or arguments relative to the proposal under consideration. The presiding officer may limit oral presentations if he feels that the length of the hearing otherwise would be unduly increased by reason of repetition. The agency shall afford each interested person opportunity to present facts, views or arguments in writing whether or not he has had an opportunity to present them orally. At the beginning of each hearing, if the agency has made a proposal, the agency shall present a summary of the factual information on which its proposal is based, including any information obtained through the use of advisory committees or as a result of informal conferences or consultations.

(2) The agency or its duly authorized representative may administer oaths or affirmations

and may continue or postpone the hearing to such time and place as it determines. The agency shall keep minutes or a record of the hearing in such manner as it determines to be desirable and feasible.

(3) If the officer or a quorum of the board or commission charged by law with ultimate responsibility for rule making is not present at the hearing a person who appears at the hearing shall be given an opportunity to present his arguments to such officer or quorum of such board or commission prior to adoption of the proposed rule if, at the hearing, the person makes a request for such opportunity in writing to the person presiding at the hearing. Such officer, board or commission may in its discretion require such arguments to be presented in writing. If a record of the hearing has been made, argument shall be limited to the record. Where oral argument is accorded, such officer, board or commission may impose reasonable limitations on the length and number of appearances in order to conserve time and preclude undue repetition.

(4) The procedures prescribed by this section do not supersede procedures prescribed by any statute relating to the specific agency or to the rule or class of rules under consideration.

227.023 Filing of rules. (1) A certified copy of every rule adopted by an agency shall be filed by the agency in the office of the secretary of state and in the office of the revisor of statutes. No rule is valid until a certified copy thereof has been so filed.

(2) The secretary of state shall indorse on the copy of each rule filed with him the date of filing. He shall keep a permanent file of such rules.

(3) The filing with the secretary of state of a certified copy of a rule raises a presumption that:

(a) The rule was duly adopted by the agency; and

(b) The rule was filed and made available for public inspection at the day and hour indorsed on it; and

(c) All the rule-making procedures prescribed by this chapter were complied with; and

(d) The text of the certified copy of the rule is the text as adopted by the agency.

The invalidity of the ILHR department sex discrimination guidelines for failure to comply with (1) did not deprive the department of the authority to decide contested cases dealing with pregnancy leave under the applicable statute, 111.32 (5) (g). Wisconsin Telephone Co. v. ILHR Dept. 68 W (2d) 345, 228 NW (2d) 649.

227.024 Preparation of rules. (1) PREPARATION. (a) *Form.* An agency shall adhere substantially to the following form in preparing a proposed rule for publication or distribution and in preparing a rule for filing:

(ORDER) (PROPOSED ORDER) OF THE
(Agency)
ADOPTING, AMENDING
OR REPEALING RULES

Relating to rules concerning .....
(Here insert the subject matter of the rules)
Analysis prepared by (name of agency)
(Here insert analysis)

Pursuant to authority vested in (name of agency) by section(s) ...., Wis. Stats., the (agency) (hereby repeals, amends and adopts) (proposes to repeal, amend and adopt) rules interpreting section(s) ...., Wis. Stats., as follows:

Sections .... of the Wisconsin administrative code are repealed.

Sections .... of the Wisconsin administrative code are amended to read:

(Here set forth the amended section, subsection or paragraph)

Sections .... of the Wisconsin administrative code are adopted to read:

(Here set forth the text of the sections created)

The rules, amendments, and repeals contained in this order shall take effect on ..... [as provided in section .....] [pursuant to authority granted by s. 227.026 (1) (b)] [as an emergency rule. Facts constituting the emergency are as follows:]

(Set forth the alternative which fits the particular situation)

Dated: Agency
(Signature and title of officer)
Seal, if any

(b) *Relating clause.* A rule-making order shall have a relating clause which shall state in the fewest words practicable the subject to which the rule-making order relates.

(c) *Sequence.* Repeals, amendments and adoptions of rules need not be grouped together. Preferably, they should be set forth in the sequence in which they appear or will appear in the administrative code.

(d) *Amendments to existing rules.* A rule-making order or a section of a rule-making order which proposes to amend an existing rule shall indicate the material to be deleted typed with a line through the material and material to be inserted typed with underscoring under the material.

(e) *Section titles and numbers.* Each agency shall give each section of its rules an appropriate section title and section number. Sections shall be numbered according to the decimal system. To enable parts of a section to be amended without the necessity of setting forth the whole

section, each section shall be divided into subsections whenever feasible. Subsections may be divided into paragraphs. Subsections shall be designated by Arabic numerals in parentheses and paragraphs by lowercase letters in parentheses. Rules shall be numbered so that rules of an agency or subdivision of an agency are grouped together. An agency shall coordinate rule drafting with the legislative council staff and the revisor of statutes to determine the appropriate numbering.

(f) *Reference to applicable forms.* If a rule requires a new or revised form, the agency shall include a reference to that form in a note to the rule and the revisor of statutes shall insert that reference in the administrative code as a notation to the affected rule.

(g) *Plain language.* An agency shall prepare rules in plain language which can be easily understood to the greatest extent possible.

(h) *No repetition of statutory language.* Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to effectively convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language which is statutory and the portion which is the agency's amplification of that language.

(2) ANALYSIS. An agency shall prepare in plain language an analysis of each proposed rule to be printed with the proposed rule when it is published or distributed. The analysis shall include a reference to any statute that the proposed rule interprets, any related statute and related rule and a brief summary of the proposed rule.

(4) OTHER ATTACHED MATERIALS. (a) *Forms.* If a proposed rule requires a new or revised form, the agency shall attach to the proposed rule a copy of the form or a description of how a copy of the form can be obtained at no charge.

(b) *Other material.* An agency may include with its rules brief notes, illustrations, findings of fact, digests of supreme court cases, court of appeals decisions or attorney general's opinions, or other explanatory material if the materials are labeled or set forth in a manner which clearly distinguishes them from the rules.

(5) CERTIFIED COPIES. Certified copies of rules filed shall be typed or duplicated on 8 1/2 by 11 inch paper. Sufficient room for the secretary of state's stamp shall be left at the top of the first page. Forms which are filed need not comply with the specifications of this subsection.

(6) COPIES AVAILABLE TO THE PUBLIC AT NO COST. An agency shall make available to the public on request at no cost a copy of any proposed rule of the agency, including the analysis and related forms, if any.

History: 1977 c. 187; 1979 c. 34.

227.025 Publication of rules. All rules and other materials which agencies are directed or authorized by this chapter to file with the revisor of statutes shall be published in the Wisconsin administrative code or register in the manner prescribed by s. 35.93. For the purpose of avoiding unwarranted expense, an agency may, with the consent of the revisor and attorney general, utilize standards established by technical societies and organizations of recognized national standing by incorporation of such standards in its rules by reference to the specific issue or issues of books or pamphlets in which they are set forth, without reproduction of the standards in full. The revisor and attorney general shall consent to such incorporation by reference only in rules that are of limited public interest and where the incorporated standards are readily available in published form. Each rule containing such incorporation by reference shall state how the material so incorporated may be obtained and that the books and pamphlets containing the standards are on file at the offices of the agency, the secretary of state and the revisor of statutes. Rules adopted jointly by 2 or more agencies need not be published in more than one place in the code. Agency materials which are exempted by s. 227.01 from complying with the requirements of this chapter may be published, either verbatim or in summary form, if the adopting agency and the revisor of statutes determine that the public interest would thereby be served.

Cross Reference: See 902.03 for provision for judicial notice of administrative rules.

Consent may not be given to incorporate by reference the United States Code or federal regulations. Future standards may not be incorporated by reference. 59 Atty. Gen. 31. But see note to Art. IV, s. 17, citing 63 Atty. Gen. 229.

Incorporation by reference discussed. 68 Atty. Gen. 9.

227.026 Effective date of rules. (1) A rule is effective on the first day of the month following its publication in the Wisconsin administrative register unless:

(a) The statute pursuant to which the rule was adopted, amended or repealed provides for an effective date subsequent to legislative review of the proposed action or otherwise prescribes a different effective date; or

(b) A later date is prescribed by the agency in a statement filed with the rule; or

(c) The rule is adopted pursuant to s. 227.027 as an emergency rule, in which event it becomes effective at the time prescribed in that section; or

(d) The date of publication of the issue of the register of which the rule is a part was delayed beyond the date for which the register is designated for publication under s. 35.93 (3), in which event the rule becomes effective as provided in sub. (3).

(2) The revisor of statutes may prescribe by rule the monthly date prior to which rules must be filed in order to be included in that month's issue of the register. The revisor shall compute the effective date of all rules submitted for publication in the administrative register and shall cause such information to be published in brief notes at the end of each section. For the purpose of computing such effective date, the revisor of statutes may presume that any particular issue of the register will be published during the month in which it is designated for publication.

(3) If, because of some contingency, an issue of the register or the notice section of the register is not published before the first or 15th day of the month for which the issue is designated in compliance with s. 35.93 (3), the department of administration shall stamp the date of publication on the title page of each copy of that issue. Rules and notices contained in that issue of the register are not effective earlier than the day following the date stamped on the title page.

(4) In this section, "date of publication" refers to the date when copies of the register first are mailed to persons entitled by law to receive them.

History: 1977 c. 84, 274, 277, 353, 370, 426, 427; 1979 c. 221.

227.027 Emergency rules excepted from certain procedures. (1) If preservation of the public peace, health, safety or welfare necessitates putting a rule into effect prior to the time it could be put into effect if the agency were to comply with the notice, hearing and publication requirements of this chapter, the agency may adopt such rule as an emergency rule. An emergency rule takes effect upon publication in the official state paper or on such later date as is specified in a statement published with the rule, but remains in effect only for a period of 120 days.

(2) An agency shall file an emergency rule as provided in s. 227.023, shall mail copies to each member of the legislature, and shall take such other steps as it considers to be feasible to make the rule known to persons who will be affected by it. The revisor of statutes shall insert in the notice section of each issue of the administrative register a brief description of emergency rules currently in effect.

The legislature intended that emergency rules would only have effect for 120 days. Therefore, an emergency rule may not be perpetuated by simply refiling it under (2) before or after the 120 days in (1) lapse. 62 Atty. Gen. 305.

The Wisconsin emergency rule provision: Increased use in response to a slow rulemaking process. Larsen, 1978 WLR 485.

227.028 Revisor of statutes. (1) The revisor of statutes may promulgate rules governing the form, style and placement of rules in the administrative code.

(2) The revisor of statutes may, in order to preserve uniformity in the administrative code, change the title or numbering of any rules. If an agency desires to secure an advance commitment as to the title or numbering of proposed rules, it shall, for that purpose, submit a copy of such rules to the revisor of statutes prior to filing. Such copy shall indicate the titles and numbering desired by the agency. As soon as possible, thereafter, the revisor of statutes shall either approve the titles and numbering suggested by the agency or indicate the changes which he considers necessary in order to preserve uniformity in the code. If the title or numbering of a rule is so revised, the revisor of statutes shall make certain that the revised version is filed with the secretary of state.

(3) The revisor of statutes may delete from the administrative code obsolete rules promulgated by any agency which no longer exists.

(4) The revisor of statutes may edit the analysis and other materials before publishing them in the administrative code and register, may merely refer to the fact that they are on file, or may eliminate them or any reference to them in the administrative code and register if he or she feels that they would not, to any appreciable extent, add to an understanding of the rules. If the revisor of statutes edits such materials preparatory to publication, he or she shall submit the edited version to the agency for its comments prior to publication.

(5) The revisor of statutes shall furnish advice and assistance with respect to the form and mechanics of rule drafting whenever requested to do so by an agency.

History: 1979 c. 34 ss. 1019ve, 1019vf.

It is within the discretionary power of the revisor of statutes whether to purchase and utilize the federal standards found in the federal register and attach state printed covers thereto in lieu of completely reprinting them in the standard format of the Wisconsin administrative code as authorized by (7) [(2)] and 35.93 (1). 63 Atty. Gen. 78.

227.029 Legislative council. (1) SUBMISSION TO LEGISLATIVE COUNCIL STAFF. Prior to any public hearing on a proposed rule or if no public hearing is required, prior to notification under s. 227.018, an agency shall submit the

proposed rule to the legislative council staff for review. The proposed rule shall be in the form specified in s. 227.024. This subsection does not apply to emergency rules adopted under s. 227.027.

(2) ROLE OF LEGISLATIVE COUNCIL STAFF. The legislative council staff shall, within 20 working days following receipt of a proposed rule, review the proposed rule in accordance with this subsection. With the consent of the executive secretary of the legislative council, the review period may be extended for an additional 20 working days. The legislative council staff shall act as a clearinghouse for rule drafting and cooperate with the agency and the revisor to:

(a) Review the statutory authority under which the agency intends to adopt the rule.

(b) Ensure that the procedures for the promulgation of a rule required by this chapter are followed.

(c) Review proposed rules for form, style and placement in the administrative code.

(d) Review proposed rules to avoid conflict with or duplication of existing rules.

(e) Review proposed rules to provide adequate references to related statutes, related rules and forms.

(f) Review proposed rules for clarity, grammar and punctuation and to ensure plain language.

(g) Review proposed rules to determine potential conflicts and to make comparisons with related federal regulations.

(h) Streamline and simplify the rule-making process.

(3) ASSISTANCE TO STANDING COMMITTEES. The legislative council staff shall work with and assist the appropriate standing committees throughout the rule-making process. The legislative council staff may issue recommendations concerning proposed rules which the agency shall submit with the notice required under s. 227.018 (2).

(4) NOTICE OF CHANGES IN RULE-MAKING AUTHORITY. Whenever the rule-making authority of an agency is eliminated or significantly changed by the repeal, amendment or creation of a statute, by the interpretive decision of a court of competent jurisdiction or for any other reason, the legislative council staff shall notify the joint committee for the review of administrative rules and the appropriate standing committees of each house of the legislature as determined by the presiding officer thereof. This subsection applies whether or not the rules of the agency are under review by the council staff at the time of the change in rule-making authority.

(5) ANNUAL REPORT. The legislative council staff shall submit an annual report to the legislature and governor summarizing any action taken and making recommendations to streamline the rule-making process and eliminate obsolete, duplicative and conflicting rules.

(6) PUBLIC LIAISON. The legislative council staff shall assist the public in resolving problems related to administrative rules. Such assistance shall include but not be limited to providing information, identifying agency personnel who may be contacted in relation to rule-making functions, describing the locations where copies of rules, proposed rules and forms are available and encouraging and assisting participation in the rule-making process.

History: 1979 c. 34, 154

227.03 Construction of administrative rules. The following rules apply when construing rules of administrative agencies:

(1) The repeal of a rule does not revive a rule which previously had been repealed.

(2) The repeal of a rule does not defeat or impair any right which had accrued or affect any penalty which had been incurred under the rule which was repealed.

(3) Whenever a rule of an agency authorizes or requires the use of registered mail, and does not require a return receipt of the addressee only, certified mail may be used if a sender's receipt is obtained from the postal authorities and a return receipt is requested. If a return receipt signed by the addressee only is required, registered mail must be used.

227.031 Effect of chapter on procedures prescribed by other statutes. Compliance with the procedures prescribed by this chapter does not obviate the necessity of complying with procedures prescribed by other provisions of the statutes.

History: 1979 c. 89.

227.033 Discrimination by rule prohibited. (1) No rule, either in its terms or in its application, shall discriminate for or against any person by reason of sex, race, creed, color, national origin or ancestry. A rule which discriminates for or against any person by reason of physical condition or developmental disability as defined in s. 51.01 (5) shall be permitted only if that rule is strictly necessary to a function of the agency and is supported by data demonstrating that necessity. Every person affected by a rule shall be entitled to the same benefits and subject to the same obligations as any other person under the same or similar circumstances.

(2) No rule may use any term removed from the statutes by chapter 83, laws of 1977.

History: 1975 c. 94, 275, 422; 1977 c. 83; 1977 c. 418 s. 929 (55).

See note to 230.08, citing State v. DILHR, 77 W. (2d) 126, 252 NW (2d) 353.

227.05 Declaratory judgment proceedings. (1) Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of such rule brought in the circuit court for Dane county. The officer, board, commission or other agency whose rule is involved shall be the party defendant. The summons in such action shall be served as provided in s. 801.11 (3) and by delivering a copy to such officer or to the secretary or clerk of the agency where composed of more than one person or to any member of such agency. The court shall render a declaratory judgment in such action only when it appears from the complaint and the supporting evidence that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff. A declaratory judgment may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the rule in question.

(2) The validity of a rule may be determined in any of the following judicial proceedings when material therein:

(a) Any civil proceeding by the state or any officer or agency thereof to enforce a statute or to recover thereunder, provided such proceeding is not based upon a matter as to which the opposing party is accorded an administrative review or a judicial review by other provisions of the statutes and such opposing party has failed to exercise such right to review so accorded;

(b) Criminal prosecutions;

(c) Proceedings or prosecutions for violations of county or municipal ordinances;

(d) Habeas corpus proceedings relating to criminal prosecution;

(e) Proceedings under s. 56.07 (7), 56.21, 66.191 or 101.22 or ss. 227.15 to 227.21 or under ch. 102, 108 or 949 for review of decisions and orders of administrative agencies if the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

(3) In any judicial proceeding other than one set out above, in which the invalidity of a rule is material to the cause of action or any defense thereto, the assertion of such invalidity shall be set forth in the pleading of the party so maintaining the invalidity of such rule in that proceeding. The party so asserting the invalidity of such rule shall, within 30 days after the service of the pleading in which he sets forth such invalidity, apply to the court in which such proceedings are had for an order suspending the trial of said proceeding until after a determination of the validity of said rule in an action for declaratory judgment under sub. (1) hereof.

(a) Upon the hearing of such application if the court is satisfied that the validity of such rule is material to the issues of the case, an order shall be entered staying the trial of said proceeding until the rendition of a final declaratory judgment in proceedings to be instituted forthwith by the party asserting the invalidity of such rule. If the court shall find that the asserted invalidity of a rule is not material to the case, an order shall be entered denying the application for stay.

(b) Upon the entry of a final order in said declaratory judgment action, it shall be the duty of the party who asserts the invalidity of the rule to formally advise the court of the outcome of the declaratory judgment action so brought as ordered by the court. After the final disposition of the declaratory judgment action the court shall be bound by and apply the judgment so entered in the trial of the proceeding in which the invalidity of the rule is asserted.

(c) Failure to set forth invalidity of a rule in a pleading or to commence a declaratory judgment proceeding within a reasonable time pursuant to such order of the court or to prosecute such declaratory judgment action without undue delay shall preclude such party from asserting or maintaining such rule is invalid.

(4) In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(5) The joint committee for review of administrative rules shall be served with a copy of the petition in any action under this section and, with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard.

History: Sup. Ct. Order, 67 W. (2d) 775; 1977 c. 29, 449.

See note to 227.16, citing Dane County v. H&SS Dept. 79 W. (2d) 323, 255 NW (2d) 539.

227.06 Declaratory rulings. (1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall

bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court. A ruling shall be subject to review in the circuit court in the manner provided for the review of administrative decisions.

(2) Petitions for declaratory rulings shall conform to the following requirements:

(a) The petition shall be in writing and its caption shall include the name of the agency and a reference to the nature of the petition.

(b) The petition shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, the reasons for the requested ruling, and the names and addresses of persons other than the petitioner, if any, upon whom it is sought to make the declaratory ruling binding.

(c) The petition shall be signed by one or more persons, with each signer's address set forth opposite his name, and shall be verified by at least one of the signers. If a person signs on behalf of a corporation or association, that fact also shall be indicated opposite his name.

(3) The petition shall be filed with the administrative head of the agency or with a member of the agency's policy board.

(4) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing. If the agency denies the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefor.

The doctrine of res judicata applies solely to courts and has no application to proceedings of an administrative body or agency, and hence does not preclude such a body from reconsidering its own findings or orders. Fond du Lac v. Dept. of Natural Resources, 45 W (2d) 620, 173 NW (2d) 605

227.064 Right to hearing. (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

(a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;

(b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

(2) Any denial of a request for a hearing shall be in writing, shall state the reasons for denial, and is an order reviewable under this chapter. If the agency does not enter an order disposing of the request for hearing within 20 days from the date of filing, the request shall be deemed denied as of the end of the 20-day period.

(3) This section does not apply to rule-making proceedings or rehearings, or to actions where hearings at the discretion of the agency are expressly authorized by law.

(4) This section does not apply if a hearing on the matter was conducted as a part of a hearing under s. 144.836.

History: 1975 c. 414; 1977 c. 418; 1979 c. 221

227.065 Notice of hearing to division of natural resources hearings. The department of natural resources shall notify the division of natural resources hearings in the department of administration of every pending hearing to which the administrator of the division is required to assign a hearing examiner under s. 227.012 after the department of natural resources is notified that a hearing on the matter is required.

History: 1977 c. 418.

227.066 Payment for natural resources hearing examiner services. The department of natural resources shall pay all costs of the services of a hearing examiner assigned to the department under s. 227.012 according to the fee schedule set by the administrator of the division of natural resources hearings in the department of administration under s. 227.012 (5).

History: 1977 c. 418.

227.07 Contested cases; notice; hearing; records. (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Except in the case of an emergency, reasonable notice shall consist of mailing notice to known interested parties at least 10 days prior to the hearing.

(2) The notice shall include:

(a) A statement of the time, place, and nature of the hearing, including whether the case is a class 1, 2 or 3 proceeding.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held, and, in the case of a class 2 proceeding, a reference to the particular statutes and rules involved.

(c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.

(3) Opportunity shall be afforded all parties to present evidence and to rebut or offer countervailing evidence.

(4) (a) In any action to be set for hearing, the agency or hearing examiner may direct the parties to appear before it for a conference to consider:

1. The clarification of issues.

2. The necessity or desirability of amendments to the pleadings.

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

4. The limitation of the number of witnesses.

5. Such other matters as may aid in the disposition of the action.

(b) The agency or hearing examiner presiding at a conference under this subsection shall make a memorandum for the record which summarizes the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of the parties. Such memorandum shall control the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(5) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. In any proceeding in which a hearing is required by law, if there is no such hearing, the agency or hearing examiner shall record in writing the reason why no such hearing was held, and shall make copies available to interested persons.

(6) The record in a contested case shall include:

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

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

(c) A 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 agency or hearing examiner.

(7) All staff memoranda and staff data, not admitted as evidence in a contested case, which are submitted to the hearing examiner or officials of the agency in connection with their consideration of the case, are not part of the official record but shall be made a part of the file and shall be served on all parties. Any party may, within 10 days of service of such memoranda or data, submit comments thereon to the examiner or officials and such comments shall also be served on all parties and placed in the file.

(8) A stenographic, electronic or other record of oral proceedings shall be made in any class 2 or class 3 proceeding and in any class 1 proceeding when requested by a party. Each agency may establish rules relating to the transcription of the record into a written transcript and the providing of free copies of the written transcript. Rules may require a purpose for transcription which is deemed by the agency to be reasonable, such as appeal, and if this test is met to the satisfaction of the agency, the record shall be transcribed at the agency's expense. Rules may require a showing of impecuniousness or financial need as a basis for providing a free copy of the transcript, otherwise a reasonable compensatory fee may be charged. If any agency does not adopt such rules, then it must transcribe the record and provide free copies of written transcripts upon request. In any event, an agency shall not refuse to provide a written transcript if the person making the request pays a reasonable compensatory fee for the transcription and for the copy. This subsection does not apply where a transcript fee is specifically provided by law.

(9) The factual basis of the decision shall be solely the evidence and matters officially noticed.

History: 1975 c. 414; 1977 c. 26, 418

Hearing examiner did not abuse discretion in failing to use interpreter. Kropiwka v. DILHR, 87 W (2d) 709, 275 NW (2d) 881 (1979).

Reprimand may be imposed only after affording opportunity for hearing as provided for in a class 2 contested case. 67 Atty. Gen. 188.

227.08 Evidence and official notice. In contested cases:

(1) Except as provided in s. 19.52 (3), an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

(2) All evidence, including records and documents in the possession of the agency or hearing examiner of which the agency or hearing examiner desires to avail himself or herself, shall be duly offered and made a part of the record in the case. Every party shall be afforded adequate

opportunity to rebut or offer countervailing evidence.

(3) An agency or hearing examiner may take official notice of any generally recognized fact or any established technical or scientific fact; but parties shall be notified either before or during the hearing or by full reference in preliminary reports or otherwise, of the facts so noticed, and they shall be afforded an opportunity to contest the validity of the official notice.

(4) An agency or hearing examiner shall take official notice of all rules which have been published in the Wisconsin administrative code or register.

(5) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(6) A party may conduct cross-examinations reasonably required for a full and true disclosure of the facts.

(7) In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon motion by a party or by the person from whom discovery is sought in any class 2 proceeding, and for good cause shown, the hearing examiner may make any order in accordance with s. 804.01 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. In any class 1 or class 3 proceeding, an agency may by rule permit the taking and preservation of evidence, but in every such proceeding the taking and preservation of evidence shall be permitted with respect to a witness:

(a) Who is beyond 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 same or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

History: 1975 c. 94 s. 3; 1975 c. 414 ss. 9, 10, 12; 1977 c. 277, 418, 447; 1979 c. 162, 208.

Where there is evidence that a rule promulgated by an administrative agency is founded on a particular source, it is reasonable to resort to such source to interpret the rule, but ultimately, it is the course of reliance on the source, the uniform administrative interpretation of the rule, that gives the interpretation validity and not the source itself. Employers Mut. Liability Ins. Co. v. ILHR Dept. 62 W (2d) 327, 214 NW (2d) 587.

227.09 Hearing examiners; examination of evidence by agency. (1) Except as provided under s. 227.012, an agency may designate an official of the agency or an employe on its staff or borrowed from another agency under s. 20.901 or 230.047 as a hearing examiner to preside over any contested case. In hearings under s. 19.52, another qualified person may be appointed. Subject to rules of the agency, examiners presiding at hearings may:

(a) Administer oaths and affirmations.

(b) Issue subpoenas authorized by law and enforce subpoenas under s. 885.12.

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

(d) Take depositions or have depositions taken when permitted by law.

(e) Regulate the course of the hearing.

(f) Hold conferences for the settlement or simplification of the issues by consent of the parties.

(g) Dispose of procedural requests or similar matters.

(h) Make or recommend findings of fact, conclusions of law and decisions to the extent permitted by law.

(i) Take other action authorized by agency rule consistent with this chapter.

(2) In any contested case which is a class 2 or class 3 proceeding, where a majority of the officials of the agency who are to render the final decision are not present for the hearing, the hearing examiner presiding at the hearing shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case. The proposed decision shall be a part of the record and shall be served by the agency on all parties. Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral. If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance.

(3) With respect to contested cases, an agency may by rule or in a particular case may by order:

(a) Direct that the hearing examiner's decision be the final decision of the agency;

(b) Except as provided in sub. (2) or (4), direct that the record be certified to it without an intervening proposed decision; or

(c) Direct that the procedure in sub. (2) be followed, except that in a class 1 proceeding both written and oral argument may be limited.

(4) Notwithstanding any other provision of this section, in any contested case, if a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposed decision is served upon the parties and an opportunity is afforded to each party adversely affected to file objections and present briefs or oral argument to the officials who are to render the decision. The proposed decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the hearing examiner or a person who has read the record. The parties by written stipulation may waive compliance with this subsection.

(5) In any class 2 proceeding, if the decision to file a complaint or otherwise commence a proceeding to impose a sanction or penalty is made by one or more of the officials of the agency, the hearing examiner shall not be an official of the agency and the procedure described in sub. (2) shall be followed.

(6) The functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner. A hearing examiner or agency official may at any time disqualify himself or herself. In class 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a hearing examiner or official, the agency or hearing examiner shall determine the matter as part of the record and decision in the case.

(7) (a) Notwithstanding any other provision of law, the hearing examiner presiding at a hearing may order such protective measures as are necessary to protect the trade secrets of parties to the hearing.

(b) In this subsection, "trade secret" has the meaning given under s. 943.205 (2) (a).

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 196 s. 131; 1977 c. 277, 418, 447; 1979 c. 208.

Agency findings should reflect that majority of officials under (4) either heard case or read record. Wis. Elec. Power Co. v. DNR, 93 W (2d) 222, 287 NW (2d) 113 (1980).

See note to 194.14, citing Hansen Storage Co. v. Wis. Transp. Comm. 96 W (2d) 249, 291 NW (2d) 534 (1980).

Sub. (5) requires use of a hearing examiner if an examining board member participates in the decision to commence a proceeding against a licensee, but does not require such use if a board member is involved only in the investigation. 66 Atty. Gen. 52.

Discussion of circumstances under which hearing examiner has power to entertain motion to dismiss proceedings. 68 Atty. Gen. 30.

Witness subpoenaed under (1) must attend continued or postponed hearing and remain in attendance until excused. 68 Atty. Gen. 251.

227.10 Decisions. Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.16. The agency shall by rule establish a procedure for determination of parties.

History: 1975 c. 414 ss. 12, 15; 1977 c. 418; 1979 c. 208.

Although its procedures are not subject to ch. 227, the finding of the city of Milwaukee Board of Fire and Police Commissioners was insufficient in failing to specify what particular wrongful acts the officers performed or why those acts constituted conduct unbecoming an officer under the circumstances, and in failing to make separate findings as to each officer, because in making its determination the board is required to state specific findings of fact and conclusions of law in the manner required of state agencies under this section. State ex rel. Heffernan v. Board, 247 W 77, overruled. Edmonds v. Board of Fire & Police Commrs. 66 W (2d) 337, 224 NW (2d) 575.

227.11 Service of decision. Every decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings or to the party's attorney of record.

History: 1975 c. 94 s. 3; 1975 c. 414 ss. 13, 17.

Service of a decision is complete on the date of its mailing regardless of its receipt by the addressee. In re Proposed Incorporation of Pewaukee, 72 W (2d) 593, 241 NW (2d) 603.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and

which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 139; 1979 c. 208.

227.13 Ex parte communications in contested cases. (1) (a) In a contested case, no ex parte communication relative to the merits or a threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employe of the agency who is involved in the decision-making process, by:

1. An official of the agency or any other public employe or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter; or

2. A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or an authorized representative or counsel.

(b) Paragraph (a) 1 does not apply to an advisory staff which does not participate in the proceeding.

(c) This subsection does not apply to an ex parte communication which is authorized or required by statute.

(d) This subsection does not apply to an ex parte communication by an official or employe of an agency which is conducting a class 1 proceeding.

(e) This subsection does not apply to any communication made to an agency in response to a request by the agency for information required in the ordinary course of its regulatory functions by rule of the agency.

(2) A hearing examiner or other agency official or employe involved in the decision-making process who receives an ex parte communication in violation of sub. (1) shall place on the record of the pending matter the communication, if written, a memorandum stating the substance of the communication, if oral, all written responses to the communication and a memorandum stating the substance of all oral responses made, and also shall advise all parties that the material has been placed on the record; however, any writing or memorandum which would not be admissible into the record if presented at the hearing shall not be placed in the record, but notice of the substance or nature of the communication shall be given to all parties. Any party desiring to rebut the communication shall be allowed to do so, if the party requests the opportunity for rebuttal within 10 days after notice of the communication. The hearing examiner or agency official or employe may, if deeming it necessary to eliminate the effect of an ex parte communication received, withdraw from the proceeding, in which case a successor shall be assigned.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 418.

227.14 Licenses. (1) When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(2) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally acted upon by the agency, and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

(3) Except as otherwise specifically provided by law, no revocation, suspension, annulment or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If an agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other

action. Such proceedings shall be promptly instituted and determined.

History: 1975 c. 414

227.15 Judicial review; orders reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, except the decisions of the department of revenue, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, and the state board of vocational, technical and adult education acting under s. 38.29, and as otherwise provided by law, shall be subject to judicial review as provided in this chapter.

History: 1975 c. 414; 1977 c. 187, 418.

Cross Reference: See 50.03 (11) for review under subchapter I of chapter 50.

An order of the tax appeals commission refusing to dismiss proceedings for lack of jurisdiction is not appealable because the merits of the case are still pending. Pasch v. Dept. of Revenue, 58 W (2d) 346, 206 NW (2d) 157.

The requirements of 227.15 and 227.16 (1), for standing to seek review of an administrative decision, do not create separate and independent criteria, but both sections essentially require that to be a person aggrieved for standing purposes, one must have an interest recognized by law in the subject matter which is injuriously affected by the decision. Wisconsin's Environmental Decade, Inc. v. PSC, 69 W (2d) 1, 230 NW (2d) 243.

An order of the employment relations commission directing an election and determining the bargaining unit under 111.70 (4) (d) is not reviewable. West Allis v. WERC, 72 W (2d) 268, 240 NW (2d) 416.

See note to 111.07, citing WERC v. Teamsters Local No. 563, 75 W (2d) 602, 250 NW (2d) 696.

Unconditional interim order by Public Service Commission fixing utility rates pending final determination is reviewable where no provision was made for refund of excess interim rates. Friends of Earth v. Public Service Commission, 78 W (2d) 388, 254 NW (2d) 299.

Decision of PSC not to investigate under 196.28 and 196.29 was a nonreviewable, discretionary determination. Reviewable decisions defined. Wis. Environmental Decade v. Public Service Comm. 93 W (2d) 650, 287 NW (2d) 737 (1980).

Administrative decisions eligible for judicial review in Wisconsin. Klitzke, 61 MLR 405.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

History: 1971 c. 243; 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 26 s. 75; 1977 c. 187; 1979 c. 90, 208, 355.

The circuit court has no jurisdiction of an appeal from the tax appeals commission where the petition for review was served only on the department of revenue and not on the commission within the allowed 30 days. Brachtl v. Dept. of Revenue, 48 W (2d) 184, 179 NW (2d) 921.

Service on the department of a notice of appeal by ordinary mail, when received in time and not promptly objected to is good service. Service on a staff member of the department is sufficient if in the past that individual has represented himself as agent and as attorney for the department. Hamilton v. ILHR Dept. 56 W (2d) 673, 203 NW (2d) 7.

An appeal will not lie from an order denying a petition to reopen an earlier PSC order where no appeal was taken from the order or the order denying rehearing within 30 days. Town of Caledonia v. Public Service Comm. 56 W (2d) 720, 202 NW (2d) 912.

Failure to strictly comply with the caption requirements of (1) does not divest a court of jurisdiction if all other jurisdictional requirements are met. Evans v. Dept. of Local Affairs & Development, 62 W (2d) 622, 215 NW (2d) 408.

Where the taxpayer failed to serve a copy of his petition for review of a decision and order of the tax appeals commission upon the department of revenue within 30 days, the circuit court had no jurisdiction. Cudahy v. Dept. of Revenue, 66 W (2d) 253, 224 NW (2d) 570.

The implied authority of the PSC under various provisions of ch. 196, to insure that future supplies of natural gas will remain as reasonably adequate and sufficient as practicable indicates a legally recognized interest of the environmental group members living in the area affected by the commission order in the future adequacy of their service which is sufficient to provide standing if the facts alleged in the petition are true to challenge the commission's failure to consider conservation alternatives to the proposed priority system. Wisconsin's Environmental Decade, Inc. v. PSC, 69 W (2d) 1, 230 NW (2d) 243.

County has standing to challenge validity of rule not adopted in conformity with 227.02 through 227.025. Dane County v. H&SS Dept. 79 W (2d) 323, 255 NW (2d) 539.

"Parties" under (1) (c), 1975 stats., are those persons affirmatively demonstrating active interest in the proceedings; PSC must identify parties. Wis. Environmental Decade v. Public Service Comm. 84 W (2d) 504, 267 NW (2d) 609 (1978).

Ch. 801 is inapplicable to judicial review proceedings. Omernick v. DNR, 94 W (2d) 309, 287 NW (2d) 841 (Ct. App. 1979).

227.17 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision; but the reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43 and 551.62.

227.18 Record on review. Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein; but by stipulation of all parties to the review proceedings the record may be shortened by eliminating any portion thereof. Any party, other than the agency, refusing to stipulate to limit the record may be taxed by the court for the additional costs. The record may be typewritten or printed. The exhibits may be typewritten, photostated or otherwise reproduced, or, upon motion of any party, or by order of the court, the original exhibits shall accompany the record. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

227.19 Additional evidence; trial; motion to dismiss; amending petition. (1) If before the date set for trial, application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon such terms as the court may deem proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court the additional evidence together with any modified or new findings or decision.

(2) Proceedings for review of administrative agency decisions as provided in this chapter may be brought on for trial or hearing at any time

upon not less than 10 days' notice given after the expiration of the time for service of the notices provided in s. 227.16 (2).

(3) Within 20 days after the time specified in s. 227.16 for filing notices of appearance in any proceeding for review, any respondent who has served such notice may move to dismiss the petition as filed upon the ground that such petition, upon its face, does not state facts sufficient to show that the petitioner named therein is a person aggrieved by the decision sought to be reviewed. Upon the hearing of such motion the court may grant the petitioner leave to amend the petition if the amendment as proposed shall have been served upon all respondents prior to such hearing. If so amended the court may consider and pass upon the validity of the amended petition without further or other motion to dismiss the same by any respondent.

History: 1975 c. 414.

See note to 111.36, citing Chicago & N W R R v. Labor & Ind. Rev. Comm. 91 W (2d) 462, 283 NW (2d) 603 (Ct. App. 1979).

227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

History: 1975 c. 94 s. 3; 1975 c. 414; 1979 c. 208.

Finding of fact is supported under (6) if reasonable minds could arrive at the same conclusion. Westring v. James, 71 W (2d) 462, 238 NW (2d) 695.

Reviewing court, in dealing with determination or judgment which administrative agency is alone authorized to make, must judge propriety of action solely by grounds invoked by agency with sufficient clarity. Stas v. Milw. County Civil Service Comm. 75 W (2d) 465, 249 NW (2d) 764.

See note to 30.12, citing Kosmatka v. DNR, 77 W (2d) 558, 253 NW (2d) 887.

Summary judgment procedure is not authorized in proceedings for judicial review under this chapter. Wis. Environmental Decade v. Public Service Comm. 79 W (2d) 161, 255 NW (2d) 917.

"Discretion" means process of reasoning, not decision-making, based on facts in record or reasonably inferred from record, and conclusion based on logical rationale founded on proper legal standards. Reidinger v. Optometry Examining Board, 81 W (2d) 292, 260 NW (2d) 270.

See note to 220.035, citing State ex rel. 1st Nat. Bank v. M & I Peoples Bk. 82 W (2d) 529, 263 NW (2d) 196.

See note to Art. I, sec. 1, citing Hortonville Dist. v. Hortonville Ed. Asso. 426 US 482.

The scope of judicial review in Wisconsin Hewitt, 1973 WLR 554.

227.21 Appeals. Any party, including the agency, may secure a review of the final judgment of the circuit court by appeal to the court of appeals. Such appeal shall be taken in the manner provided by law for appeals from the circuit court in other civil cases, except that the time for appeal shall be limited to 30 days from the notice of entry of the judgment.

History: 1977 c. 187 s. 134.

Court of appeals had no power to remand case under 806.07 (1) (b) or (h); ch. 227 cannot be supplemented by statutory remedies pertaining to civil procedure. Chicago & N.W.R.R. v. Labor & Ind. Rev. Comm. 91 W (2d) 462, 283 NW (2d) 603 (Ct. App. 1979).

227.22 Application of chapter 227. (1) This chapter applies to cases arising under ss. 76.38, 76.39 and 76.48.

(2) Only the provisions of ss. 227.01 to 227.21 relative to rules are applicable to matters arising out of s. 56.07 (7), 56.21, 66.191 or 101.22, ch. 102, subch. II of ch. 107 or ch. 108 or 949.

(3) Any provision of ss. 227.07, 227.064 and 227.12 which is inconsistent with the requirements of title 45 of the code of federal regulations shall not apply to hearings held pursuant to ch. 49.

(4) The provisions of this chapter relating to contested cases do not apply to proceedings involving revocation of parole or probation, grant of probation, prison discipline or good time or other proceedings involving the care and treatment of particular inmates of correctional institutions.

(5) This chapter does not apply to proceedings of the claims board, except as provided in ss. 775.05 (5), 775.06 (7) and 775.11 (2).

History: 1975 c. 147 s. 54; 1975 c. 414; 1977 c. 29; 1977 c. 418 s. 929 (55); 1979 c. 208, 221, 353.

Legislative Council Note, 1979: Sub. (2) is amended to clarify that a claim against the mining damage appropriation under subch. II of ch. 107, as created by the bill, will not be conducted as a contested case under ch. 227, but rather according to procedures developed by the department of industry, labor and human relations by rule. [Bill 570-S]

227.24 Short title. This chapter may be cited as the Administrative Procedure Act.

227.25 Certification of certain cases from the circuit court of Dane county to other circuits. Any action or proceeding for the review of any order of an administrative officer, commission, department or other administrative tribunal of the state required by law to be instituted in or taken to the circuit court of Dane county except an action or appeal for the review of any order of the department of industry, labor and human relations or findings and orders of the labor and industry review commission which is instituted or taken and is not called for trial or hearing within 6 months after such proceeding or action is instituted, and the trial or hearing of which is not continued by stipulation of the parties or by order of the court for cause shown, shall on the application of either party on 5 days' written notice to the other be certified and transmitted for trial to the circuit court of the county of the residence or principal place of business of the plaintiff or petitioner, where such action or proceeding shall have precedence over all ordinary civil actions. Unless written objection is filed within such 5-day period, the order certifying and transmitting such proceeding shall be entered without hearing. The plaintiff or petitioner shall pay to the clerk of the circuit court of Dane county a fee of $2 for transmitting the record.

History: 1977 c. 29.

227.26 Jurisdiction of state courts to determine validity of laws when attacked in federal court and to stay enforcement. Whenever a suit praying for an interlocutory injunction shall have been begun in a federal district court to restrain any department, board, commission or officer from enforcing or administering any statute or administrative order of this state, or to set aside or enjoin the suit or administrative order, the department, board, commission or officer, or the attorney general, may bring a suit to enforce the statute or order in the circuit court of Dane county at any time before the hearing on the application for an interlocutory injunction in the suit in the federal court. Jurisdiction is hereby conferred upon the circuit court of Dane county and on the court of appeals, on appeal, to entertain the suit with the powers granted in this section. The circuit court shall, when the suit is brought, grant a stay of proceedings by any state department, board, commission or officer under the statute or order pending the determination of the suit in the courts of the state. The circuit court of Dane county upon the bringing of the suit therein shall at once cause a notice thereof, together with a copy of the stay order by it granted, to be sent to the federal district court in which the action was originally begun. An appeal may be taken within 10 days after the termination of the suit in the circuit court to the court of appeals, and the appeal shall be in every way expedited and set for an early hearing.

History: 1977 c. 187.