

pt 2

98-050-ETF-52-DUTY DISABILITY
BENEFIT PROG.



STATE OF WISCONSIN

Department of Employee Trust Funds

Eric Stanchfield
Secretary
801 West Badger Road
P.O. Box 7931
Madison, Wisconsin 53707-7931

June 19, 1998

HONORABLE ROBERT WELCH
SENATE CO-CHAIRPERSON
JOINT COMM FOR REVIEW OF ADMINISTRATIVE RULES
1 EAST MAIN STREET ROOM 201
MADISON WI 53702

Re: Clearinghouse Rule #CR-98-050, creating sections ETF 52.01, 52.02, 52.04, 52.06, 52.07, 52.08, 52.10, 52.12, 52.14, 52.16, 52.18, 52.20, 52.22, 52.24, 52.26 and 52.28 of the Wisconsin administrative code, relating to the administration of the duty disability benefit program under Wis. Stats. § 40.65.

Dear Senator Welch:

I am enclosing a copy of this proposed rule, which has been submitted to the presiding officers of the legislative houses in accordance with s. 227.19 (2), Stats. A copy of the report required by s. 227.19 (3), Stats., is also enclosed.

Please contact Audrey Koehn at 261-8173 if you would like to discuss this rule.

Sincerely,

Dave Mills, Deputy Secretary
(608) 266-3641
FAX#(608) 267-0633
TTY#(608) 267 0676

Attachment

STATE OF WISCONSIN
DEPARTMENT OF EMPLOYE TRUST FUNDS,
EMPLOYE TRUST FUNDS BOARD, and
WISCONSIN RETIREMENT BOARD

**FINAL DRAFT REPORT
CLEARINGHOUSE RULE #98-050**

A RULE creating sections ETF 52.01, 52.02, 52.04, 52.06, 52.07, 52.08, 52.10, 52.12, 52.14, 52.16, 52.18, 52.20, 52.22, 52.24, 52.26 and 52.28 of the Wisconsin administrative code, relating to the administration of the duty disability benefit program under Wis. Stat. § 40.65.

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Submitted this 19th day of June, 1998.

WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS

By: Audrey Koehn
Audrey Koehn
Director, Disability Programs Bureau

**ANALYSIS OF THIS RULE
PREPARED BY THE DEPARTMENT OF EMPLOYE TRUST FUNDS**

Authority for rule: Wis. Stat. §§ 40.03 (1)(L), (2)(i) and 227.11 (2).

Statutes interpreted: Wis. Stat. §§ 40.03 (1)(i) and 40.65

This rule codifies policies and procedures of the Department of Employee Trust Funds in administering the duty disability benefit program established by Wis. Stat. § 40.65. The rule codifies the ruling of the Wisconsin Supreme Court in *Coutts v. Wisconsin Retirement Bd.*, 209 Wis. 2d 655; 562 N.W.2d 917 (1997) reviewing a decision of the Wisconsin Court of Appeals reported at 201 Wis. 2d 178, 547 N.W.2d 821 (Ct. App. 1996). See § ETF 52.16. The Supreme Court determined that "payable" as used in Wis. Stat. § 40.65 (5)(b)3, and (by implication) throughout Wis. Stat. § 40.65 (5)(b), refers to sums presently owing or to be remitted in the future. The DETF had previously reduced duty disability benefits by worker's compensation benefits received, regardless of when received.

The rule also changes DETF's previous method of determining the effective date of duty disability benefits retroactive to the first date on which the individual met all the qualifications under Wis. Stat. § 40.65 (4). This sometime resulted in retroactive payments covering months or years prior to the application for benefits. The Court of Appeals and Supreme Court ruled in the *Coutts* decision that duty disability benefits are not retroactive and that a person who waits to apply gives up the opportunity to receive those benefits in the interim. In § ETF 52.10, this rule newly sets the effective date at (1) the date on which the individual becomes disabled within the meaning of Wis. Stat. § 40.65 (4) or (2) the date on which the individual's application for duty disability benefits is received, whichever is later.

The *Coutts* decision also ruled that another DETF practice must be changed. DETF had previously carried over worker's compensation payments until the entire worker's compensation benefit had been used to reduce duty disability benefits. The Supreme Court affirmed the Court of Appeals decision, which said:

... if the combined amount of other earnings or benefits exceeds the monthly duty disability benefit payment, that participant will not receive a monthly duty disability payment and the WRB may not carry forward or "bank" the excess amount and deduct it from the participant's next month's duty disability benefit payment. That would be contrary to the statute because the statute only permits reductions for amounts payable when the monthly duty disability benefit payment is due and not amounts paid.

See *Coutts*, 201 Wis.2d 178, 547 N.W.2d 821, at 826 (Ct. App. 1996)

Accordingly, in § ETF 52.16 the rule adopts the interpretation that as benefits listed in Wis. Stat. § 40.65 (5)(b) are paid to the duty disability recipient, they will be offset against the duty disability benefit for that month. The date of the payment to the participant will control, without regard for the period intended to be covered by the payment in question. Exceptions are provided in Wis. Stat. § 40.65 (5)(b)3 and 4 for lump sum worker's compensation benefits and lump sum retirement system benefits. This rule defines DETF's interpretation of what is meant by "lump sum" in those contexts. See §§ ETF 52.02 (3), 52.16 (1)(c) and (4)(b).

Under this rule, all worker's compensation benefits received by a person also entitled to duty disability benefits would be offset, regardless of the nature or date of the injury. See § ETF 52.16 (4). Previously, DETF had not reduced duty disability benefits for worker's compensation benefits received which were clearly unrelated to the disability which was the basis for benefits under Wis. Stat. § 40.65. The Court of Appeals rejected the practice, stating:

... While the WRB reads § 40.65(5)(b)3, STATS., as limiting the reduction for worker's compensation paid to a participant which relates to the same disability, that limitation cannot be found in the statutory language. Section 40.65(5)(b)3 provides a reduction for "[a]ny worker's compensation benefit payable to the participant, including payments made pursuant to a compromise settlement...." There is no language in this statute which indicates that the worker's compensation must be for a related disability.

Coutts, 547 N.W.2d at 826 (Ct. App. 1996). The Supreme Court affirmed the Court of Appeals decision, without further comment on this issue.

Under this rule, DETF would continue its practice of not reducing duty disability benefits for worker's compensation benefits paid as attorney fees or reimbursement of expenses. DETF does not regard these as benefits payable to the participant. See § ETF 52.16 (4)(c).

The rule codifies DETF's present interpretation of the indexing of benefits in § ETF 52.12 (3). Because duty disability benefits are intended to operate as an income guarantee, based on the "monthly salary" at the time the individual first becomes disabled as defined by Wis. Stat. § 40.65 (4), the DETF believes the annual indexing of the monthly salary is also intended to begin after the disability date, which is defined in this rule as the "qualifying date." See §§ ETF 52.02 (6) and 52.08. If indexing began after the effective date, then an individual with a gap of years between the qualifying date and the effective date would begin receiving duty disability benefits based upon a monthly salary amount set years before and not indexed during the interim.

This rule also codifies general policies and interpretations of Wis. Stat. § 40.65 which the department has adopted during its administration of the duty disability benefit program. In §§ ETF 52.04 (1) and 52.26 (1), the rule clearly delegates authority of Wisconsin Retirement Board to DETF to administer the duty disability program on behalf of the Board, including the termination of benefits. Any determination made by the DETF may be appealed to the Board by

the aggrieved employer or participant, except that initial eligibility denials are appealed to the Department of Workforce Development, under Wis. Stat. § 40.65 (2)(b)3. See § ETF 52.28 regarding appeals.

Although Wis. Stat. 40.65 (4)(intro.) describes those eligible for benefits as “protective occupation participants,” the DETF has (since 1991) focused on the applicant's status at the time the disability arose, not at the time of application. This interpretation is based on a 1991 unpublished Court of Appeals decision. The rule codifies that interpretation in § ETF 52.02 (5) and requires that the applicant have been a protective occupation participant and participating employe both on the date when injured and when the resulting disability met the criteria in Wis. Stat. § 40.65 (4).

This rule defines the terms “light duty,” in § ETF 52.02 (2), and interprets what is meant by “reduction in pay or position,” in § ETF 52.07 (3)(c). These terms are used in the eligibility criteria for duty disability benefits in Wis. Stat. 40.65 (4) but have not previously been defined. The rule also prescribes how to compute “monthly salary” and particularly what overtime pay may be included. See § ETF 52.12.

Section ETF 52.16 relates to the reductions of duty disability benefits due to income received from other sources. In particular, § ETF 52.16 (2) concerns benefits received under the federal Old Age, Survivors, Disability and Health Insurance (“OASDHI”) provisions of the Social Security Act and Long-Term Disability Insurance. This rule codifies the current administrative practice of waiting until April to adjust the monthly reduction based on receipt of Social Security benefits. Increases in Social Security benefits are actually received beginning in January. For several months, until the DETF can catch up and adjust duty disability benefits being paid, duty disability recipients who also receive Social Security benefits are therefore receiving benefits in excess of their entitlement under Wis. Stat. § 40.65 (5). Under this rule, DETF would treat those excess benefits as money paid in error and collect the overpayments.

In § ETF 52.16 (5)(b), this rule also codifies DETF's current treatment of benefits received under the long-term disability insurance program under Wis. Admin. Code § ETF 50.40, *et seq.* This program was created by the Employe Trust Funds Board under authority of Wis. Stat. § 40.03 (1)(i) to replace disability annuity benefits under Wis. Stat. § 40.63. The rule provides that the LTDI benefits operate to reduce duty disability benefits as did the disability annuity benefits under Wis. Stat. § 40.63, which they replaced.

This rule includes a provision to establish estimated monthly reductions. See § ETF 52.18. This is intended to result in consistent monthly income for a duty disability recipient. Any necessary adjustments between the amounts due and the amounts paid can be handled in annual reconciliation. This section of the rule also includes a provision for the participant to request adjustment of the estimate to more closely conform to actual income from sources listed in Wis. Stat. § 40.65 (5)(b).

The rule also clarifies that the present statutory provisions of Wis. Stat. § 40.65 (5)(a) and (b)(intro) and (7)(a)(intro.) and (am) of the statutes do not apply to state employees, in accord with the initial applicability provision found in 1987 Wis. Act 363, § 11 (2) and (3). See §§ ETF 52.14 and 52.22 (2).

In § ETF 52.26, the rule includes a provision that if duty disability benefits are terminated, the person may not reapply for duty disability benefits based upon the same disability.

Final Fiscal Estimate:

The duty disability benefits program is funded by premiums paid by the state, municipal and local government employers which employ protective occupation participants. See Wis. Stat. § 40.05 (2)(ar). These premiums are primarily risk-based, depending on the number of duty disability recipients for the particular employer, plus the adjusted monthly benefit being paid. Under the rule (and the *Coutts* decision) an individual's duty disability benefits will no longer be reduced based on worker's compensation benefits paid before applying for duty disability benefits, even if both are based on the same injury. This will tend to increase the amount of duty disability benefits being paid and therefore potentially increase an employer's premiums for duty disability coverage. However, payment of duty disability benefits retroactive to dates prior to application will also end, tending to reduce the initial amounts of duty disability benefits paid. These competing factors make it impossible to determine at this time the costs associated with this rule. The only employers potentially affected, however, are those which participate in the Wisconsin Retirement System and which employ "protective occupation participants" as defined by Wis. Stat. § 40.02 (48)

Administrative costs associated with the changes to program administration necessitated by the *Coutts* decision and under this rule equate to one full-time equivalent permanent position (1.0 FTE). The costs are projected to be \$25,000 for the SFY97-99 biennium (position to start approximately January 1, 1999) and \$40,000 per year thereafter adjusted for applicable increases in salary/fringe and operational support.

Final Regulatory Flexibility Analysis:

This rule affects only a benefit program open exclusively to governmental employees classified as "protective occupation participants" under Wis. Stat. § 40.02 (48) and the state, municipal or local units of government which employ them and which also participate in the Wisconsin Retirement System. The Department therefore anticipates that the provisions of this rule will have no direct adverse impact on small businesses.

Statement Explaining Need For The Rule:

This rule is required by Wis. Stat. § 227.10 (1), which directs that each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. In the approximately 10 years that the Department of Employee Trust Funds (DETF) has administered the current duty disability program, it has become clear that some interpretation of statutory terms is necessary, particularly concerning eligibility criteria, in order to promote uniform and fair entitlement to, and administration of, duty disability benefits. Finally, the DETF believes it to be good policy to fully inform participants in the benefit programs it administers of the terms and conditions of those benefits.

(BEGINNING OF RULE TEXT)

SECTION 1. Chapter ETF 52 (title) is created to read:

Chapter 52

Duty Disability Benefits

SECTION 2. ETF 52.01 to 52.28 are created to read:

ETF 52.01 PURPOSE & SCOPE. (1) SCOPE. This chapter applies to the administration of the duty disability program under s. 40.65, Stats.

(2) PURPOSE. The purpose of this chapter is to codify the interpretations of s. 40.65, Stats., and general policies adopted by the department with respect to its administration of the duty disability benefit program under s. 40.65 (2)(a) and (2)(b), Stats.

ETF 52.02 DEFINITIONS. Unless the context clearly requires otherwise, words, phrases and terms shall have the meanings set forth in s. 40.02, Stats., and s. ETF 10.01. In this chapter: (1) "Effective date" means the date determined under s. ETF 52.10.

(2) "Light duty" means the employer's limiting of the participant's job duties because of medically imposed restrictions associated with an apparent disability, or the employer's assignment of the participant to another position, the duties of which the participant is capable of performing notwithstanding the apparent disability, and which does not cause the participant to be reclassified to a category other than protective occupation participant.

(3) "Lump sum payment" means a payment, or that portion of a payment, which covers a period other than the current benefit payment period established for those benefits.

EXAMPLE: Worker's compensation benefits are payable in weekly payments. If a worker's compensation payment covered this week and the previous two weeks, the portion covering the previous two weeks would be a lump sum payment. Wisconsin retirement system annuities are payable monthly. A payment covering the previous 12 months, but not the current month, would be a lump sum payment.

(4) "Medical report" means a written certification on the form prescribed by the department by a physician, as defined in s. 448.01(5), Stats., who practices in this state, concerning the medical evaluation, diagnosis, prognosis and causal factors of the condition of an applicant for duty disability benefits.

NOTE: "Duty Disability Medical Report," form ET-5312.

(4m) "Municipal fire fighter" means:

(a) An employe of the fire department of a participating employer other than the state or a state agency, who was classified for that employment as a protective occupation participant and whose employment by the fire department was not subject to title II of the federal social security act. The term does not include a fire department employe who spends more than 49% of his or her working hours engaged in duties other than active fire suppression or prevention. Telephone operator, clerk, stenographer, machinist or mechanic duties, for example, are not active fire suppression or prevention.

(b) For purposes of s. 891.455, Stats., the term does not include a person who did not meet the qualifications of par. (a) for a period of at least 10 years and who spent at least two-

thirds of his or her working hours for that period engaged in active fire suppression or prevention

(5) "Protective occupation participant" as used in s. 40.65 (4)(intro.), Stats., means a person who was a protective occupation participant within the meaning of s. 40.02 (48), Stats., on the date the injury occurs, or the disease is contracted, which leads to the disability under s. 40.65 (4), Stats.

(6) "Qualifying date" means the date on which a participant became disabled under s. 40.65 (4), Stats., as determined under s. ETF 52.08.

(7) "Qualifying medical report" means a medical report, consistent with attached medical records, which certifies that an applicant for duty disability benefits is disabled as described by s. 40.65 (4), Stats.

(8) "Receiving duty disability benefits" as used in this chapter, or "receiving a benefit under this section" as used in s. 40.65 (6), Stats., refers to a person who has applied for and been found eligible to receive duty disability benefits under s. 40.65, Stats., regardless of the effect of any monthly reductions on the net duty disability benefit payable.

ETF 52.04 DEPARTMENT AUTHORITY AND DUTIES. (1) ADMINISTER. The department shall administer the duty disability benefit program on behalf of the Wisconsin retirement board under s. 40.65, Stats., and this chapter.

(2) REQUEST INFORMATION. The department may request any income or benefit information, or any information concerning a person's marital status, which it considers to be necessary to determine the amount of each monthly benefit payable under s. 40.65, Stats.,

and its effective date. The department shall require a participant receiving duty disability benefits to submit a certified copy of his or her most recent state or federal income tax return annually.

(3) DETERMINE BENEFITS. The department shall determine the amount of each monthly benefit payable under this chapter and its effective date. The department shall periodically review the dollar amount of each monthly benefit and adjust it to conform with the provisions of this chapter. The department shall notify the participant of a determination under this subsection.

(4) PAY BENEFITS. The department shall pay the net duty disability benefits payable to a participant. Payment shall be made on the first day of each month for the previous month.

ETF 52.06 APPLICATION FOR DUTY DISABILITY BENEFITS. (1) IN GENERAL.

An application for duty disability benefits made on or after May 3, 1988, shall be filed with the department, regardless of whether the person filed an application for duty disability benefits with the former department of labor, industry and human relations prior to May 3, 1988.

(2) RECEIPT DATE. (a) An application for duty disability benefits is initiated on the date the completed form, currently prescribed by the department for that purpose, is received by the department in accord with s. ETF 10.82.

(b) The receipt date for applications filed with the department prior to January 1, 1995, and for application materials filed prior to May 3, 1988, with the former department of

industry, labor and human relations, is the date of the receipt stamp affixed to the document by the respective department, absent clear and convincing proof to the contrary.

(3) CRITERIA TO BE SPECIFIED. An applicant shall specify which of the following eligibility criteria under s. 40.65 (4)(c), Stats., are satisfied:

- (a) Terminated employment due to disability.
- (b) Assigned to light duty due to disability, on other than a merely temporary basis.
- (c) Pay reduced due to disability, on other than a merely temporary basis.
- (d) Position reduced due to disability, on other than a merely temporary basis.
- (e) Promotion specifically prohibited due to disability by employer rules, ordinances, policies or written agreements, on other than a merely temporary basis. The rule, ordinance, policy or written agreement shall be expressly identified or a copy attached to the application.

(4) EMPLOYMENT STATUS. A person who was not both a participating employe and a protective occupation participant both at the time he or she became injured or contracted an occupational disease and when he or she became disabled as described by s. 40.65 (4), Stats., is not eligible for duty disability benefits. For purposes of this subsection only, aggravation of an existing injury or disease is deemed the same as being injured or contracting a disease.

(5) APPLICATION MATERIALS; MEDICAL REPORTS (a) Upon request, the department shall provide a blank copy of the currently approved application form and a blank copy of the currently approved medical report form to a participant. Upon receipt of an application form and a medical report from a physician chosen by the applicant, the department shall provide the applicant with the name of at least one physician approved by the department to complete a second medical report at the applicant's expense. If the medical

report from the physician chosen by the applicant is not a qualifying medical report, the department shall advise the applicant that it will be required to deny the application but that the applicant may nevertheless wish to obtain the second medical report from a physician approved by the department. The department may, by written notice to the applicant, establish a time limit of at least 60 days for submission of the second report.

(b) The department may request and consider any information from the physician who completed a medical report which the department deems necessary to supplement or clarify the physician's opinion, evaluation, diagnosis and prognosis concerning the participant's condition and qualification for duty disability benefits.

NOTE: The "Duty Disability Application," form ET-5311, and an initial "Duty Disability Medical Report," form ET-5312, are available free upon request from the Department of Employee Trust Fund, Division of Insurance Services, Disability Programs Bureau, P.O. Box 7931, Madison WI 53707. Outdated versions should not be used and may be rejected.

(6) WITHDRAWAL OF APPLICATION. (a) Voluntary withdrawal. A participant may withdraw his or her application and, upon withdrawal, the application is void.

(b) Failure to submit medical reports. If the applicant fails to submit two qualifying medical reports within one year after the date on which the application was filed, and the department has not already denied the application, the application shall be deemed to have been withdrawn with the same effect as under par. (a).

(7) REQUIRED EMPLOYER CERTIFICATION. (a) For each application for duty disability benefits, the department shall obtain from the employer one of the following:

1. A certification that the applicant is disabled as described in s. 40.65 (4), Stats., indicating the specific criterion under s. 40.65 (4)(c), Stats., which has been satisfied, and an admission that the injury or disease leading to the disability was duty-related.

2. A statement that the employer believes the applicant does not qualify for duty disability benefits and the general basis for that belief.

(b) In addition to the requirements of par. (a), for each application for duty disability benefits by a municipal fire fighter, the department shall obtain from the employer a certification including the following:

1. Whether the participant had served a total of 5 years or more for that employer as a municipal fire fighter within the meaning of s. ETF 52.02 (4m)(a).

2. Whether the participant had served at least 10 years for that employer as a municipal fire fighter within the meaning of s. ETF 52.02 (4m)(b).

3. An attached copy of the qualifying medical examination given prior to the time the participant became a fire fighter for that employer or a certification that there is no record of a medical examination.

(c) The department shall determine whether s. 891.45 or 891.455, Stats., applies. If either presumption applies the department may grant an application for duty disability benefits despite an employer assertion that the cancer or heart or respiratory impairment or disease underlying the disability is not due to the participant's occupation. The presumptions under ss. 891.45 and 891.455, Stats., are rebuttable.

NOTE: "Employer Certification – Duty Disability," form ET-5326, will be sent to the employer by the department following receipt of the employee's application for benefits. Outdated versions of the form should not be used and may be rejected.

(8) DENIAL AND APPEAL OPTION ABSENT EMPLOYER RESPONSE. If the employer fails, upon request of the department, to provide either the certification or the statement required by sub. (7), the department shall deny the application. The department shall allow the employer at least 30 days to respond to its request and may grant reasonable extensions of time to the employer.

(9) FALSE INFORMATION. The department may deny the application of any person who submits false information material to an application for duty disability benefits.

ETF 52.07 DISABILITY. A participant is disabled within the meaning of s. 40.65 (4), Stats., if all of the following apply:

(1) Work-related. The participant was injured while performing his or her duty as a protective occupation participant of a participating employer or contracted a disease due to that occupation.

(2) Permanency. The disability is likely, to a reasonable degree of medical certainty, to be permanent.

(3) Severity. The disability is so severe that it causes one or more of the following:

(a) The applicant is medically required to terminate the participating employment.

(b) The employer assigns the applicant to light duty.

(c) The employer reduces the applicant's pay. Only a reduction in base pay meets the criterion of this subdivision. Loss of shift differential payments, uniform allowances, or

other collateral payments is not a reduction of pay within the meaning of s. 40.65 (4)(c) 2., Stats. Receipt of temporary disability compensation under s. 102.43, Stats., in lieu of regular pay may be a reduction of pay for purposes of duty disability benefit eligibility when the employer does not make up the difference and if the participant terminates employment while still receiving temporary disability compensation.

(d) The employer reduces the applicant's position. Assigning a formerly full-time employe to a part-time position is a reduction of position. Assigning the applicant to a position which does not satisfy the criteria under s. 40.02 (48), Stats., defining a protective occupation participant is a reduction of position.

NOTE: See Wis. Stat. § 40.02 (48)(b) 1. to 3., Stats., defining "police officer," "fire fighter," "deputy sheriff" and "county traffic police officer," concerning their continuing protective occupation status even if temporarily assigned to other duties.

(e) The employer prohibits the applicant from promotion for which the applicant is otherwise fully qualified, solely on the basis of the applicant's disability and under the express terms of a valid state or local employer rule, ordinance, policy, or written agreement which is not superseded by state or federal law.

(4) Temporary actions non-qualifying. Assignments to light duty, or reductions in pay or position or promotional opportunities, which are merely temporary in nature, such as actions taken to allow recovery, are not consistent with a permanent disability and do not qualify a participant for duty disability benefits.

ETF 52.08 QUALIFYING DATE. (1) IN GENERAL. A participant's qualifying date is the date on which he or she becomes disabled within the meaning of s. 40.65 (4), Stats., and s. ETF 52.07, as determined under this section.

(2) RETIREMENT. If eligibility for duty disability benefits is based upon a disability which requires the employe to retire from his or her job, the termination date is the qualifying date.

(3) REDUCTION OF PAY OR POSITION; ASSIGNMENT TO LIGHT DUTY. If eligibility for duty disability benefits is based upon a reduction of pay or position or assignment to light duty, then the qualifying date is the date on which the employe began the permanent reduction or assignment. For purposes of this subsection, a reduction or assignment is permanent even if initially characterized as temporary by the employer, if the reduction or assignment remains continuously in effect while the participant is recovering or his or her permanent condition is being assessed and the employer then determines that it is necessary, because of the participant's disability, to make the reduction or assignment permanent, or that employment be terminated. If the participant is restored to the unreduced pay or position then a previous reduction in pay or position was not permanent. If the participant is assigned to full duty then a previous assignment to light duty was not permanent.

(4) PROMOTION PROHIBITED. If eligibility for duty disability benefits is based upon a prohibition against promotion due to a disability, the qualifying date is the date on which the employe became continuously subject to the prohibition.

ETF 52.10 EFFECTIVE DATE OF DUTY DISABILITY BENEFITS. (1)

DEPARTMENT TO ESTABLISH. The department shall establish an effective date for duty disability benefits for each participant whose application for duty disability benefits is granted. Duty disability benefits are not retroactive. The effective date for duty disability benefits is the later of:

(a) The date the participant's application form was received, as determined under s. ETF 52.06 (2), ignoring any previous applications.

(b) The participant's qualifying date.

(2) If an applicant filed a document with the former department of industry, labor and human relations prior to May 3, 1988, seeking a determination of eligibility for duty disability benefits the department will treat the earliest document filed with respect to each claim as the application form regardless of the document title, including without limitation a request for a hearing or a stipulation between the employer and participant agreeing to the participant's receipt of duty disability benefits.

ETF 52.12 MONTHLY SALARY AND SUBSEQUENT ADJUSTMENTS. (1)

INITIALLY DETERMINED BY EMPLOYER. A participant's monthly salary shall be initially determined by the employer in whose service the disability occurred by adding together the regular monthly earnings, prorated cash payments, and regular and dependable overtime pay as determined pursuant to the following paragraphs:

(a) Regular monthly earnings. The participant's monthly earnings, as defined by s. 40.02 (22), Stats., as of the qualifying date, except as provided in subd. 1 and 2.

1. 'Exclusions.' All overtime pay, any payments excluded from earnings by s. 40.02 (22)(b), Stats., or any periodic payments made during that month which covered other periods of time, such as a lump sum longevity award, shall be subtracted from the earnings under this paragraph. Additions to pay which the participant was not eligible to receive on the qualifying date and amounts which are not earnings reportable to the Wisconsin retirement system may not be included in the amount under this paragraph.

2. 'Temporary disability compensation; effect'. If the participant is receiving temporary disability compensation under s. 102.43 as of the qualifying date, and the qualifying date is prior to the termination of employment with the participating employer in whose employment the disabling injury occurred or the occupational disease was contracted, then the participant's regular monthly earnings are the amount of earnings the employe would have received under s. 40.29 (1)(b), Stats., if the disability had not occurred, subject to the exclusions in subd. 1.

(b) Prorated cash payments. A prorated amount reflecting the monthly equivalent of periodic cash payments which are includable in the participant's annual Wisconsin retirement system earnings, except that any category or type of payment for which the participant did not qualify as of the qualifying date may not be included in this proration, regardless of the participant's previous receipt of, or entitlement to, the payments.

(c) Regular and dependable overtime pay. A monthly prorated amount for overtime pay which was regularly and dependably received. Subject to subds. 1 and 2, this amount shall be calculated by taking the number of overtime hours for which the participant was paid in the 5 calendar years preceding the calendar year of the qualifying date, dividing by 60, and

multiplying the result by the hourly overtime rate to which the participant was entitled as of the qualifying date. If the participant has been employed by the employer for less than the preceding 5 years, the monthly average of all overtime hours paid shall be multiplied by the hourly overtime rate as of the qualifying date.

1. If the participant received no overtime from the employer in whose service the disability occurred during one of the 5 years preceding the calendar year of the qualifying date, then no overtime was regularly and dependably received.

2. If the participant was in a position not eligible for overtime pay on the qualifying date then no overtime pay may be included in the calculation of monthly salary. Eligibility for compensatory time off is not eligibility for overtime. No form of compensatory time off is overtime pay under this paragraph.

(2) REVIEW BY DEPARTMENT. The employer's calculation of a participant's monthly salary will be reviewed by the department. The department shall notify the participant of the department's determination of the monthly salary amount and shall also notify the employer if the determination made by the department differs from the amount provided by the employer.

(3) SALARY INDEX ADJUSTMENT. The monthly salary of a participant receiving duty disability benefits shall be adjusted as of each January 1 after the participant's qualifying date, using the salary index for the previous calendar year, in the manner provided by s. 40.65 (6), Stats.

ETF 52.14 DUTY DISABILITY BENEFITS FOR STATE EMPLOYEES. (1) Except as provided in sub. (2) or (3), the maximum monthly duty disability benefit payable to a participant who is a state employe is 80% of the participant's monthly salary adjusted as provided in s. 40.65 (5) (b) and (6), Stats., and ss. ETF 52.12. Except as provided in sub. (2) or (3), the department shall withhold an amount equal to 5% of the monthly benefits under this section until the amount payable under s. 40.65 (5)(b)3., Stats., is determined.

(2) The treatment of s. 40.65 (5) (a) and (b) (intro.), 1985-86 Stats., by 1987 Wis. Act 363, concerning duty disability benefit amounts and withholding 5% pending resolution of worker's compensation benefits, does not apply to a state employe covered by a collective bargaining agreement under subchapter V of chapter 111, Stats., until the department of employment relations notifies the department that the treatment was approved by the collective bargaining representative and by the joint committee on employment relations.

NOTE. See 1987 Wis. Act 363, section 11 (2), concerning initial applicability.

(3) The treatment of s. 40.65 (5) (a) and (b) (intro.), 1985-86 Stats., by 1987 Wis. Act 363, concerning duty disability benefit amounts and withholding 5% pending resolution of worker's compensation benefits, does not apply to a state employe not covered by a collective bargaining agreement under subchapter V of chapter 111, Stats., until the department of employment relations notifies the department that the treatment was recommended by the secretary of the department of employment relations and approved by the joint committee on employment relations.

NOTE. See 1987 Wis. Act 363, section 11 (3), concerning initial applicability.

ETF 52.16 REDUCTIONS IN MONTHLY DUTY DISABILITY BENEFITS. (1) IN

GENERAL. (a) Income guarantee. The duty disability benefit for eligible protective occupation participants shall be administered as an income guarantee program. The amount equal to the percentage of monthly salary guaranteed under s. 40.65 (5)(a), Stats., or under s. ETF 52.14 for state employes to whom s. 40.65 (5)(a), Stats., does not apply, and adjusted under s. ETF 52.12 (3), is both the guaranteed monthly income amount and the maximum amount payable as monthly duty disability benefits. If the combined income from all sources listed in s. 40.65 (5)(b) 1. to 6., Stats., does not equal or exceed the guaranteed amount, then the difference will be made up by duty disability benefits. To determine the monthly amount of duty disability benefits payable to an eligible person, the department shall determine the dollar amount of the guaranteed percentage of monthly salary then subtract all earnings and OASDHI, unemployment compensation, worker's compensation, disability and retirement benefits as provided in s. 40.65 (5)(b)1 to 6, Stats., and this section.

(b) Receipt assumed. The department may assume that any benefit or amount listed s. 40.65 (5)(b)1. to 6., Stats., is payable to a participant until it is determined to the department's satisfaction that the participant is ineligible to receive the benefit or amount.

(c) No carryover. All amounts described in s. 40.65 (5)(b) 1. to 6., Stats., received by a person entitled to duty disability benefits after that person's effective date shall apply to reduce the person's maximum monthly duty disability benefit in the month in which received without any carryover to other months, except that lump sum payments of worker's compensation benefits shall reduce duty disability benefits as provided in s. 40.65 (5)(b)3.,

Stats., and sub. (4) and lump sum payments of disability or retirement benefits under 40.65 (5)(b) 4. shall reduce duty disability benefits as provided in that subdivision.

(d) Limit on reductions. Duty disability benefits for a particular month may not be reduced below zero.

(2) OASDHI BENEFITS. The reduction of monthly duty disability benefits for OASDHI benefits received shall be affected by annual increases in monthly OASDHI benefits. If OASDHI benefits are increased for a month during which the recipient is also entitled to duty disability benefits and the department is administratively unable to immediately adjust the person's monthly duty disability benefits, then any excess duty disability benefits paid for that month as a result shall be treated as an overpayment of duty disability benefits as provided in s. ETF 52.20.

(3) UNEMPLOYMENT COMPENSATION. Maximum duty disability benefits shall be reduced by the amount of unemployment compensation benefit paid to the participant for that month regardless of who employed the participant or the nature or period of employment which is the basis for the benefit.

(4) WORKER'S COMPENSATION. (a) Withholding requirement. Until the worker's compensation benefits payable to the participant are determined, the department shall withhold from each monthly payment of duty disability benefits an amount equal to 5% of the maximum monthly duty disability benefits, except as otherwise provided by s. ETF 52.14. For purposes of this subsection, worker's compensation benefits become determined on the following date:

1. For a case resolved by a compromise agreement, on the date one year after the later of the date the compromise was filed with the department of workforce development or its predecessor or the date an award was entered based on the compromise, provided no application is then pending to review, set aside, or modify the agreement.

2. In all other cases, on the date an award decision becomes final and is not subject to further review.

(b) If a person subject to 5 % withholding under par. (a) subsequently receives a lump sum payment of worker's compensation benefits, including a lump sum payment made pursuant to a compromise settlement under s. 102.16 (1), Stats., the department shall do one of the following:

1. If the participant receives a lump sum worker's compensation payment or compromise settlement, only the portion of the lump sum which exceeds the accumulated total of the amounts then withheld under this subsection shall be treated as a lump sum under s. 40.65 (5)(b)3., Stats., for purposes of reducing the participant's monthly duty disability benefits.

2. If the accumulated total of the amounts withheld under this subsection exceeds the participant's lump sum worker's compensation payment or compromise settlement, then the difference shall be refunded to the participant when the participant's worker's compensation benefits have been determined and the lump sum payment shall not otherwise reduce monthly duty disability benefits.

(c) Payable to the participant. Worker's compensation benefits payable to the participant, within the meaning of s. 40.65 (5)(b)3, Stats., are all worker's compensation benefits other than amounts expressly identified in the worker's compensation order, or order

approving a compromise settlement, as being paid to an attorney fees, as medical expenses or reimbursement for other costs.

(d) All worker's compensation benefits apply; no carryover except for lump sum payments. Worker's compensation benefits paid to a participant receiving duty disability benefits after the effective date shall reduce the participant's maximum monthly duty disability benefits for the month in which paid, without regard for the nature or date of the injury or the time period covered by the benefits. Any lump sum worker's compensation benefit shall reduce the participant's maximum monthly duty disability benefits as provided in s. 40.65 (5)(b)3., Stats.

(5) DISABILITY AND RETIREMENT BENEFITS. (a) Lump sum payments. The treatment under s. 40.65 (5)(b)4., Stats., of the full amount received as a lump sum benefit applies only to lump sum benefits received under s. 40.25, Stats. Lump sum payments received from any other retirement system shall reduce duty disability benefits for the month in which received only.

(b) Disability annuity alternatives. Monthly duty disability benefits shall be reduced by benefits received under s. ETF 50.52 (1). Notwithstanding s. 40.65 (5)(c), Stats., if the employe trust funds board determines that some or all of a disability annuity benefit provided from the Wisconsin retirement system shall instead be provided through group insurance plans established by the group insurance board, then benefits received under the insurance plan shall reduce monthly duty disability benefits as did the disability annuity benefits.

(6) EARNINGS; INCOME FROM THERAPY OR REHABILITATION. The department may elect not to reduce a participant's benefit because of income related to therapy or rehabilitation, following written request by the participant.

ETF 52.18 ESTABLISHING ESTIMATED MONTHLY REDUCTIONS. (1) The department may reduce monthly duty disability benefits consistently during a year by estimating applicable reductions and correcting any resulting over- or under-payments in an annual reconciliation.

(2) The department shall provide each participant receiving duty disability benefits with a written statement showing the monthly salary amount, effective date, maximum amount of duty disability benefits and reductions to monthly benefits.

NOTE: "Monthly Payment and Offsets," Form ET-5507.

(3) A participant eligible to receive duty disability benefits may request that his or her estimated reductions be adjusted to more accurately conform to anticipated income from sources specified in s. 40.65 (5)(b), Stats.

ETF 52.20 COLLECTION OF EXCESS BENEFITS PAID IN ERROR. (1) The department shall inform the participant of any overpayment of duty disability benefits as identified and determined by the department. If not immediately repaid by the participant, the department shall utilize its authority under s. 40.08 (4), Stats., to collect the amount overpaid and the interest it determines to be due.

ETF 52.22 DEATH BENEFITS. (1) FATALITIES. For purposes of paying a death benefit under s. 40.65 (7)(am), Stats., and sub. (2), a protective occupation participant who suffers fatal injury while performing the participant's duty, or who dies due to a disease contracted due to the participant's occupation, is deemed to have died as the result of an injury for which a benefit would be payable under s. 40.65 (4), Stats., even if there was no inability to perform the job immediately prior to death.

(2) STATE EMPLOYEE DEATH BENEFITS. Except as provided in par. (a) or (b), death benefits with respect to deceased state employe participants receiving duty disability benefits are determined under s. 40.65 (7), Stats.

(a) The treatment of s. 40.65 (7) (a) (intro.) and (am), 1985-86 Stats., by 1987 Wis. Act 363, affecting death benefits, does not apply to a state employe covered by a collective bargaining agreement under subchapter V of chapter 111, Stats., until the department of employment relations notifies the department that the treatment was approved by the collective bargaining representative and by the joint committee on employment relations.

NOTE. See 1987 Wis. Act 363, section 11 (2), concerning initial applicability.

(b) The treatment of s. 40.65 (7) (a) (intro.) and (am), 1985-86 Stats., by 1987 Wis. Act 363, affecting death benefits, does not apply to a state employe not covered by a collective bargaining agreement under subchapter V of chapter 111, Stats., until the department of employment relations notifies the department that the treatment was recommended by the secretary of the department of employment relations and approved by the joint committee on employment relations.

NOTE. See 1987 Wis. Act 363, section 11 (3), concerning initial applicability.

ETF 52.24 REQUIRED REPORTING BY DUTY DISABILITY RECIPIENTS:

FAILURE TO SUBMIT. (1) MONTHLY EARNINGS FROM EMPLOYMENT. A person receiving duty disability benefits shall keep records of all earnings received, including profits from self-employment, during each month beginning with the effective date, whether paid by the employer under whom the duty disability occurred or from any other employer. The department shall request the records at least annually and, upon request, the person shall supply the records to the department. As used in this subsection and in s. 40.65 (5)(b) 6., Stats., the terms "earnings" and "employer" have their broad, plain meaning and are not limited to the definitions in s. 40.02 (22) and (28).

(2) DUTY TO REPORT RECEIPT. A person receiving duty disability benefits shall respond within 30 days to any request for income information from the department and, regardless of any requests, shall disclose in writing, within 30 days after receipt, any retroactive or other lump sum payment of any Social Security, worker's compensation, unemployment compensation, disability or retirement benefit or employment earnings, including sums received in lieu of earnings, such as an award for lost earnings, which is received on any date after the participant's duty disability benefit effective date.

(3) DUTY TO REPORT KNOWN ERRORS. A person receiving duty disability benefits shall disclose in writing to the department any error known to the person with regard to the amounts by which the department is reducing the participant's monthly duty disability benefits due to the participant's receipt of Social Security, worker's compensation,

unemployment compensation, disability or retirement benefit or earnings, including sums received in lieu of earnings.

ETF 52.26 TERMINATION OF DUTY DISABILITY BENEFITS. (1) The department may terminate duty disability benefits for any person who refuses to submit or fails to timely submit information requested by the department, including but not limited to income or benefit information, or information concerning a person's marital status, or who submits false information.

(2) A person whose duty disability benefits are terminated may not reapply for duty disability benefits based upon the same disability.

ETF 52.28 APPEALS. (1) Except as provided in sub. (2) all determinations made by the department under this chapter, including, but not limited to the calculation of the applicant's monthly salary, are subject to appeal to the Wisconsin retirement board as provided in ch. ETF 11. Both the applicant and the employer may request an appeal.

(2) Determinations made by the department under this chapter as to an applicant's eligibility for duty disability benefits may be appealed to the department of workforce development under s. 40.65 (2)(b)3, Stats. The department is a necessary party.

(a) The employer may appeal a determination granting an application for duty disability benefits, including determinations based upon ss. 891.45 and 891.455, Stats.

(b) If an application is denied based upon receipt of a qualifying medical report and a medical report which was not a qualifying medical report, and the participant appeals the

denial as provided in s. 40.65 (2)(b)3., Stats., then the administrative law judge determining eligibility may decide between the two conflicting medical reports to determine eligibility.

(END OF RULE TEXT)

Effective Date: This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Wis.Stats.

Approved for publication: This rule, in final draft form, has been approved for submission to the presiding officers of the Legislature for review as provided in s. 227.19 (2), Stats., and for promulgation, by the Department of Employee Trust Funds and by the Wisconsin Retirement Board at its regular meeting on June 18, 1998, and by the Employee Trust Funds Board at its regular meeting on June 19, 1998.

Signed at Madison, Wisconsin this 19th day of June, 1998.

WISCONSIN DEPARTMENT OF EMPLOYEE TRUST FUNDS

Eric O. Stanchfield

Eric O. Stanchfield, Secretary

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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APR 27 1998
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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 98-050

AN ORDER to create chapter ETF 52, relating to the duty disability benefit program.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

03-30-98 RECEIVED BY LEGISLATIVE COUNCIL.

04-27-98 REPORT SENT TO AGENCY.

RNS:DD:kjf;jt

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

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CLEARINGHOUSE RULE 98-050

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Depending upon how "practice in this state," as it appears in s. 40.65 (2) (b) 2., Stats., is interpreted, s. ETF 52.06 (5) (b) may arguably conflict with s. 40.65 (2) (b) 2., Stats.

b. Does the department have authority to deny, under s. ETF 52.06 (8), an application for duty disability benefits based on failure of the *employer* to submit the required information? Section ETF 52.06 (8) penalizes the employe for a failure on the part of the employer.

c. In light of the specificity of the last sentence of s. 40.65 (3), Stats., one could argue that s. ETF 52.06 (10), to the extent that it allows denial of an application for simply submitting false information, regardless of whether eligibility requirements are otherwise met based on accurate information submitted, exceeds the scope of the department's authority. On the other hand, the department can argue that sub. (10) is merely a reasonable extension to the application process of the authority granted under s. 40.65 (3) that applies when a person is already receiving monthly benefits.

d. Is the second sentence of s. ETF 52.16 (2) consistent with the use of "payable" in s. 40.65 (5) (b) 1., Stats.? [*cf. Couits v. Wisconsin Retirement Board*, cited in the department's analysis.]

2. Form, Style and Placement in Administrative Code

a. An introductory clause that follows the format in s. 1.02 (1), Manual, should be included. Further, if the secretary is promulgating the rule under s. 40.03 (2) (i), Stats., there is no indication that the rule has received the required approval of the board.

- b. In s. ETF 52.01 (1), "This chapter applies" should replace "These rules apply." In sub. (2), "chapter" should replace "rule."
- c. In s. ETF 52.02 (1), "under" should replace "as provided in" and the material beginning with the comma may be deleted from the definition.
- d. In s. ETF 52.02 (4), the second "concerning" could be replaced by "of."
- e. In s. ETF 52.02 (6), "under" should replace "in accord with."
- f. The title of s. ETF 52.04 would be more descriptive if it were revised to read: **"Department authority and duties."**
- g. The title to s. ETF 52.04 (1), given the nature of the other subsection titles, should be revised to **"ADMINISTER."**
- h. Consideration should be given to relocating s. ETF 52.04 (4). Arguably, it deserves separate section status and might most appropriately be located at or near the end of the chapter.
- i. In s. ETF 52.04 (5), "any" should be "a." Also, "day" should be inserted after "first."
- j. Section ETF 52.06 (1) should begin as follows: "An application for duty disability benefits made on or after May 3, 1988 shall be filed with . . ." Further, "any," as it appears in the subsection, should be replaced by "an." For consistency with other provisions, "former" should precede "department of."
- k. In s. ETF 52.06 (2) (b), "deemed to be" should be deleted. It is suggested that the Note following par. (b) be placed after sub. (5).
- l. In s. ETF 52.06 (3) (e), "to the application" should be added to the end of the sentence.
- m. In s. ETF 52.06 (5), third sentence, the reference to a "non-qualifying" report fails to use a defined term. [See s. ETF 52.02 (7); the proper reference would be to a report that is not a qualifying medical report.]
- n. The Note following s. ETF 52.06 (5) (a) is substantive. [See s. 1.09 (1), Manual.]
- o. Section ETF 52.06 (6) (a) should read: "A participant may withdraw his or her application and, upon withdrawal, the application is void."
- p. In s. ETF 52.06 (7) (a) (intro.), "one of the following" should replace "either."
- q. Is there a form for the certification, admission and statement referenced in s. ETF 52.06 (7) (a)? If so, see s. 1.09 (2), Manual.
- r. In s. ETF 52.06 (7), is the omission of a par. (b) intentional? In par. (c), "to the requirement of par. (a)" should be added following "addition" in the first sentence.

- s. Consideration should be given to relocating s. ETF 52.06 (9) or giving it separate section status.
- t. In s. ETF 52.08 (1), "determined under" should be substituted for "provided in."
- u. In s. ETF 52.08 (2), "for duty disability benefits" should be added after "eligibility." In this regard, see also subs. (3) and (4).
- v. In s. ETF 52.08 (3) "is" should be substituted for "shall be"; and "the" should be substituted for "such" (all in the first sentence). In the second sentence, the first "the" can be eliminated.
- w. In ss. ETF 52.08 (4) and 52.10 (1) (intro.), "is" should be substituted for "shall be."
- x. In s. ETF 52.10 (2), can "effective date is" be substituted for "department shall deem the application to be"?
- y. In s. ETF 52.12 (1) (a) 2., the comma after "occurred" should be deleted and "deemed to be" should be deleted.
- z. In s. ETF 52.12 (1) (b), "the" should be substituted for "such." This change should be made in several provisions of the rule.
- aa. In s. ETF 52.12 (1) (c) (intro.), last sentence, "then instead multiply" should be deleted and "shall be multiplied" should be inserted after "paid."
- ab. In s. ETF 52.12 (1) (c) 1., a reference to "this employer" is awkward.
- ac. In s. ETF 52.12 (2), "also" should be deleted.
- ad. In s. ETF 52.14 (1), "in" should replace "by" in all three instances. In the first sentence, "is" should replace "shall be."
- ae. In s. ETF 52.14 (2) and (3), "does" should replace "shall."
- af. As drafted, the first sentence of s. ETF 52.16 (1) (a) is more appropriately placed in a note than in the text of the rule.
- ag. In s. ETF 52.16 (1) (c), "apply to" should be eliminated.
- ah. In s. ETF 52.16 (4) (a) 2., the first "then" should be eliminated.
- ai. In s. ETF 52.16, "(3) UNEMPLOYMENT COMPENSATION. [Reserved.]" should be deleted.
- aj. The title to s. ETF 52.16 (4) (a) should be underscored, not contained in single quotation marks.
- ak. The acronym "OASDHI" is used in s. ETF 52.16 (2). It should be spelled out or defined.

al. In s. ETF 52.16 (4) (c), "Any and all" should be eliminated from the first sentence.

am. Section ETF 52.16 (5) (b) contains only one subdivision and sub. (6) contains only one paragraph. [See s. 1.03 (intro.), Manual.] It is suggested that par. (b) 1. be combined with par. (b) (intro.) and that sub. (6) (a) simply be sub. (6).

an. In s. ETF 52.18 (1), it appears that "consistently" may be substituted for "on a regular and steady basis."

ao. In s. ETF 52.22 (1), "the participant's" should be substituted for "his" in two locations.

ap. In s. ETF 52.22 (2) (intro.), "are" should be substituted for "will be"; in pars. (a) and (b), "does" should be substituted for "shall."

aq. The second s. ETF 52.24 should be numbered s. ETF 52.26.

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

a. Pertinent citations may be missing from the listing of statutes providing authority for the rule and of statutes being interpreted. For example, see ss. 40.02 (22) (b) 14., 40.03 (1) (L) and 40.08 (4), Stats. A review of statutes utilized in this regard is in order.

b. In s. ETF 52.02 (7), "Stats." should follow the statutory reference. [See s. 1.07 (2), Manual.] This comment applies in a number of instances throughout the rule.

c. In s. ETF 52.04 (3), it appears that both references to "section" should instead be to "chapter."

d. In s. ETF 52.06 (7) (c), "to the requirement of par. (a)," should precede the first comma. The definition section should indicate that "municipal fire fighter" has the meaning given in s. 891.45, Stats. In the second sentence of the paragraph, ", if it applies," should replace "in such cases."

e. In s. ETF 52.10 (1) (a), it is suggested that "as determined under s. ETF 52.06 (2)" be inserted after "received."

f. In the Note following s. ETF 52.14 (2), "act" should be deleted. For similar treatment, see the Notes to sub. (3) and to s. ETF 52.22 (2) (a) and (b).

g. In s. ETF 52.16 (1) (c), the clause "Except as otherwise expressly provided for receipt of lump sum worker's compensation benefits or disability and retirement benefits" is inadequate. Specific reference should be given to the provisions that provide otherwise.

h. In s. ETF 52.16 (2), second sentence, it appears that "payments made in error" should be deleted and replaced by "an overpayment of duty disability benefits as provided in s. ETF 52.20."

i. In s. ETF 52.16 (4) (a) (intro.), it appears that the reference to s. ETF 52.14 (1) should be to the entire section, not solely to sub. (1).

j. In s. ETF 52.22 (2) (intro.), it appears that “, 1985-86 Stats.” should be deleted.

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

a. The usefulness of the department’s analysis would be enhanced if the provisions of the rule being described were cited.

b. In the first sentence of the first full paragraph on page 4 of the department’s analysis, the first comma should be deleted and “and” should be placed between the two terms within quotes. In the following paragraph, “concerns” in the first sentence should be in the singular.

c. In s. ETF 52.02 (3), it appears that “one” and the comma that follows should be deleted. Note that the examples following the definition of the term “lump sum payment” do not seem to reflect the term as defined. The definition says nothing about excluding the current benefit payment period from the term.

d. The necessity to define some of the terms for purposes of the entire chapter is unclear. In other words, if a term is only used in one provision of the rule, consideration should be given to defining the term only for purposes of that provision or incorporating the definition into the text.

e. Should the qualification “on other than a merely temporary basis” also apply to s. ETF 52.06 (3) (e)?

f. In s. ETF 52.06 (7) (c), it appears that the second sentence is intended to imply that the department may grant the application if the presumption under s. 891.45, Stats., is not overcome. See, generally, ch. 903, Stats., for the legal effect of a statutory presumption. Note, also, 1997 Enrolled Senate Bill 329.

g. In s. ETF 52.06 (9) (c) 3., second sentence, “criteria” should be “criterion.”

h. Is it possible under s. ETF 52.08 to have more than one qualifying date? For example, if a temporary but continuous reduction in position continues until the employer terminates the employe because of the disability, is there a qualifying date based on reduction in position and on termination of employment? See, in particular, the second sentence of s. ETF 52.08 (3). This appears to be addressed to some degree by s. ETF 52.12 (1) (a) 2. The relationship of the latter provision with s. ETF 52.08 should be reviewed.

i. Is the first sentence of s. ETF 50.12 (2) intended to mean that an employer’s calculation of a participant’s monthly salary will in all cases be reviewed by the department? If so, the provision should state this.

j. Is s. ETF 52.12 (3) necessary given s. ETF 52.04 (4)?

k. In s. ETF 52.14 (1), second sentence, is the inclusion of “not” correct?

l. Section ETF 52.16 (4) (b) is awkwardly drafted and its relationship to par. (c) is not clear. Perhaps more consistent use of terms such as "payable," "paid" and "received" would help clarify the two paragraphs. In addition, is the last sentence of par. (c) redundant given the first sentence of par. (c)?

m. Is s. ETF 52.16 (5) (b) 1. redundant, given the general provision of par. (b) (intro.)?

n. In s. ETF 52.24 (1), should the second sentence read as follows: "The department shall request the records at least annually and, upon request, the person shall supply the records to the department"?

Responses to Legislative Counsel Staff Recommendations:

The Legislative Counsel Staff had no comments concerning any conflict with or duplication of existing rules, potential conflicts and compatibility with federal regulations or compliance with permit action deadline requirements.

Statutory Authority.

With respect to the Legislative Counsel Staff comments concerning statutory authority, the Department of Employee Trust Funds adopted the recommendation of the Legislative Counsel Staff 1.a. regarding a potential conflict between the proposed § ETF 50.06 (5)(b) and Wis. Stat. § 40.65 (2)(b)2. As a result, the proposed rule provision allowing DETF to accept medical reports from Minnesota and Michigan physicians, if the participant resided in northern Wisconsin, has been removed. The paragraphs that followed have been renumbered accordingly.

Notwithstanding the Legislative Counsel staff comment 1.b. that § ETF 52.06 (8) appears to penalize the employee for a failure on the part of the employer, no changes were made. A favorable employer certification is a required factor for granting a duty disability benefit application. See Wis. Stat. § 40.65 (2)(b)2. Absent an employer certification the application cannot be granted. The rule, in particular § ETF 50.06 (8) is intended to prevent an employer from unreasonably delaying the processing of an application by refusing to provide a certification. Although the immediate consequence of the employer's continued refusal is denial of the application, the applicant may then appeal the denial and force the employer to defend its refusal. The alternative of granting applications when the employer refuses to certify is unacceptable. This could result in benefits being improperly paid to applicants who are (unknown to the DETF) not eligible because their employment was terminated for reasons other than disability or their disability is not work related or not severe enough to meet the standards established by Wis. Stat. § 40.65 (4)(c). Employers, by standing mute, would be able to shift potential worker's compensation liabilities to the duty disability program. The requirement that an employer must certify that the duty disability applicant has a work-related disability serves also as an admission of liability for worker's compensation benefits

In light of the Legislative Counsel staff comment 1.c., the DETF amended the former proposed § ETF 52.06 (10), now renumbered § ETF 52.06 (9), to permit DETF to deny the application if the person supplied false information, provided the false information was material to the application. DETF believes authority to do so is implicit in the express authority to terminate duty disability benefits if fraud is discovered after granting the benefits. See Wis. Stat. § 40.65 (3). The alternative, of first granting an application based on false information, then terminating it, appears absurd.

The Legislative Counsel staff comment 1.d. concerning the second sentence of § ETF 52.16 (2) appears to be based upon a misunderstanding of the subsection. The DETF has edited the subsection in an effort to clarify the treatment of Social Security benefit payments and adjustments to those payments. Social Security disability benefits

may be increased each year, effective in January, by a percentage established each year at the federal level. The DETF has experienced difficulty in the past in increasing the offset appropriate for Social Security disability benefits simultaneously, and in the same amount as, the federal increases. This subsection is intended to enable the DETF to recover any temporary overpayment of duty disability benefits that might result but does not permit the so-called "banking" of offsetting income which was prohibited by the courts in *Coutts v. Wisconsin Retirement Board*.

Form, Style and Placement in the Administrative Code.

The DETF has amended the rule to incorporate all the suggestions of the Legislative Counsel staff with respect to form, style and placement in the Administrative Code, except as follows:

The text of the proposed note originally following § ETF 52.06 (5)(a), which the Legislative Counsel staff suggested in comment 2.n. was substantive, was moved to the new section on appeals, § ETF 52.28, and incorporated into the substantive provisions.

The DETF did not implement suggestion 2.x. concerning revising § ETF 52.10 (2) to substitute "effective date is" for "department shall deem the application to be." The DETF did revise the subsection to make its purpose more clear. This subsection is intended to identify what pre-1988 documentation will be treated as the application for duty disability benefits. The former Department of Industry, Labor and Human Relations did not prescribe a separate or distinct application form for duty disability benefits during the period before May 3, 1988, when applications were made to the former DILHR. At least some of these applications were denied and there would be no "effective date" in those cases.

The DETF did not implement suggestion 2.af. to make the first sentence of § ETF 52.16 (1)(a) into a note. The paragraph has been rephrased to make it a clearly substantive requirement to treat duty disability benefits as an income guarantee program.

The DETF did not implement suggestion 2.ai. to delete § ETF 52.16 (3) which formerly consisted only of the subsection title "UNEMPLOYMENT COMPENSATION" and the notation "[Reserved]." Instead, a substantive provision was added stating that any unemployment compensation benefit received may be offset against duty disability benefits regardless of the employment giving rise to the compensation.

The DETF did not implement the suggestion 2.ak. to spell out or define the acronym OASDHI. This acronym is already expressly defined by s. 40.02 (43), Stats.

Adequacy of References to Related Statutes, Rules and Forms.

The DETF has amended the rule to incorporate all the suggestions of the Legislative Counsel staff with respect to the adequacy of references to related statutes, rules and forms, except as follows:

The DETF has adopted the suggestion in paragraph d. to define “municipal fire fighter.” However, the suggested source, Wis. Stat. § 891.45, does not actually define the term. DETF added a definition of “municipal fire fighter” at § ETF 52.02 (4m) which includes elements of the definition of “protective occupation participant” and “fire fighter” found in § 40.02 (48)(a) (intro.) and 2. The definition also incorporates the elements of the “municipal fire fighter” partial definition found in the new Wis. Stat. § 891.455, which became effective on May 12, 1998. This part of the definition applies only with respect to duty disability benefit determinations involving that presumption.

Clarity, Grammar, Punctuation and Use of Plain language.

The DETF has amended the rule to incorporate all the suggestions of the Legislative Counsel staff with respect to clarity, grammar, punctuation and use of plain language, except as follows:

The DETF made no changes in response to paragraph 5.d. The definitions in § ETF 52.02 are either of terms used throughout the rule or terms used in Wis. Stat. § 40.65 requiring interpretation.

The DETF made no changes in response to paragraph 5.f. The provision in question, § ETF 52.06 (7)(c) states that DETF may apply the presumption to overcome a negative employer certification that the applicant does not meet the criteria for duty disability benefits. In all other cases, a negative employer certification results in denial of the application. The rule states that the presumption may be overcome. Ordinarily, the DETF would probably not have information at hand in the application process sufficient to overcome the presumption. But if sufficient evidence is offered either during the application process or in an appeal of the DETF’s determination to grant the application, the presumption may be rebutted. This has two effects. First, benefits based upon a conclusive, irrebuttable presumption do not enjoy the same favorable federal income tax treatment, as do worker’s compensation benefits. Second, the rule restates the holding in *Sperbeck v. ILHR Department*, 46 Wis.2d 282, 174 N.W.2d 546 (1970), that the presumption in Wis. Stat. §891.45 is rebuttable. Section ETF 52.06 (7)(c) is also intended to clarify for all parties that the DETF is responsible for applying the presumptions of Wis. Stat. §§ 891.45 and 891.455 to applications. In the past, some physicians and employers had declined to give their required opinions as to an applicant’s qualifications for duty disability benefits, instead asserting that the applicant was entitled under the presumption. Proper administration of the duty disability program requires that the certifying physicians and employers share the factual grounds for their opinion on whether the applicant meets the qualifying criteria. DETF must then make the initial determination of whether the applicant meets the legal qualifications. DETF’s determinations are subject to appeal.

The DETF made editorial changes to § ETF 52.08 (3) to enhance the clarity of the subsection, but did not adopt any other changes suggested by comment 5.h. The DETF

did not adopt the suggest cross-reference between §§ ETF 52.08 and 52.12 (1)(a)2. There is no intended relationship between § ETF 52.08, which establishes the qualifying date for duty disability benefits and 52.12 (1)(a)2 which concerns the computation of the monthly salary amount on which duty disability benefits are based.

The question of the redundancy of §§ ETF 52.04 (4) and ETF 52.12 (3), which was the subject of comment 5.j., was resolved by removing both subsections and combining the concepts in a new section concerning appeals, numbered § ETF 52.28. The original language of § ETF 52.04 (4) was also amended, after the public hearing, to clarify that appeals of eligibility determinations are to the Department of Workforce Development, under s. 40.65 (2)(b)3, while the Wisconsin Retirement Board has jurisdiction to hear appeals of all other DETF determinations concerning duty disability benefits.

List of Persons who Appeared or Registered For or Against at The Public Hearing.

The public hearing was held on May 11, 1998, in Madison, Wisconsin. The only person who appeared at the public hearing was Mr. Steve Urso, representing the Wisconsin Professional Police Association. Mr. Urso registered and spoke in favor of the rule. The record was held open until May 15, 1998, to accept written comments from persons unable to attend in person. The only written comment received was from Mr. Mark Zeier, President of Professional Fire Fighters of Wisconsin, Inc. Mr. Zeier favored retroactive payment of duty disability benefits and recommended that § ETF 52.10 in the proposed rule be altered to establish the effective date without regard for the date the individual applied for benefits.

The Department did not revise the proposed rule in response to Mr. Zeier's comments. Mr. Zeier and the DETF read the language of the *Coutts* decision differently. Contrary to Mr. Zeier's assertions, the DETF believes its rule will not discourage disabled employes from seeking light duty assignments or other employment from their employers. An employe eligible to receive duty disability benefits is clearly permitted to work for the same employer, or any other. Employers may be required by the federal Americans with Disabilities Act to accommodate an employe who is still able and willing to work. Instead, the rule will tend to encourage qualifying employes to file their applications promptly after becoming disabled, when the medical evidence on causation is freshest. Even if an employe chooses to wait to apply, this does not affect the calculation of benefits, contrary to Mr. Zeier's assertion. The calculation of benefits is based upon the participant's monthly salary as of the date he or she first met the disability standards under Wis. Stat. § 40.65 (4), regardless of when the person files the application. The indexing of the monthly salary amount is retroactive to that qualifying date, too. The only thing the participant does not receive is retroactive monthly duty disability benefits for the months that he or she waited before applying. Finally, if the rule were changed as requested by Mr. Zeier, it would mean that a participant could collect worker's compensation benefits for months after being disabled, then apply for duty disability benefits and receive retroactive payments for exactly the same months, without any reduction for the worker's compensation benefits already received during those months

for the same disability. This result would appear to compensate a disabled employee beyond the intention of Wis. Stat. § 40.65 (5), at the expense of their employers.

Modifications Made To The Proposed Rule Following The Public Hearing.

In addition to the changes made in response to the Legislative Counsel Staff report and those noted above, the DETF changed its reference to the term “gross” duty disability benefits to refer to “maximum” benefits throughout the rule. This change was intended to make the rule clearer.