1997-98 SESSION COMMITTEE HEARING RECORDS

Committee Name:

Joint Committee for Review of Administrative Rules (JCR-AR)

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- *Appointments ... Appt*
-
- *Clearinghouse Rules ... CRule*
-
- *Committee Hearings ... CH*
-
- *Committee Reports ... CR*
-
- *Executive Sessions ... ES*
-
- *Hearing Records ... HR*
-
- *Miscellaneous ... Misc*
- *97hr_JCR-AR_Misc_pt29c_SofC*
- *Record of Comm. Proceedings ... RCP*
-

1997 Service of complaints —

RICHARD J. CALLAWAY
CIRCUIT COURT, BR. 6

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
CIVIL DIVISION

ANDREA CHIROFF,
7148 Woodbury Drive, Franklin, WI 53132

Plaintiff

v.

Case No: 97CV1993

State of Wisconsin
County of Dane
I hereby certify this is a true
copy of the original Summons
and Complaint, filed in my office
Attest: _____
Clerk of Courts
by Deputy Clerk

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
(Formerly known as the Department of Health and Social Services or HSS)
1 West Wilson Street, Madison, WI 53707

Defendant

Case Code: 30701
Declaratory Judgement (no dollar amount claimed)

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Dane County Circuit Court, 210 Martin Luther King Jr. Blvd., Madison, WI, 53709-0001, and to David Mirhoseini, Attorney at Law, plaintiff's attorney, whose address is P.O. Box 275, Waukesha, WI, 53187-0275. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated: July 18, 1997

By: _____

David Mirhoseini, Attorney for Plaintiff
State Bar No.: 1023785
Mail: P.O. Box 275, Waukesha, WI 53187-0275
Phone: (414) 521-2257 / Fax: (414) 521-2527

STATE OF WISCONSIN CIRCUIT COURT CIVIL DIVISION DANE COUNTY

Case No: 97CV1993

ANDREA CHIROFF,
7148 Woodbury Drive, Franklin, WI 53132

Plaintiff

v.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,
(Formerly known as the Department of Health and Social Services or HSS)
1 West Wilson Street, Madison, WI 53707

Defendant

Case Code: 30701
Declaratory Judgement (no dollar amount claimed)

COMPLAINT

The plaintiff, by her attorneys, complains against the defendant as follows.

1. The plaintiff, Andrea Chiroff, resides at 7148 Woodbury Drive, Franklin, Wisconsin and is the plaintiff in an action pending in the Milwaukee County Circuit Court entitled: CHIROFF v. MILWAUKEE COUNTY, et al; Case No.: 97-CV-003572.

2. The Milwaukee County Circuit Court, the Honorable Victor Manian presiding, ruled that the validity of HSS 135.08 of the Wisconsin Administrative Code was material to the issues of Case No. 97-CV-003572, and granted plaintiff's motion for an order staying the trial proceedings pursuant to § 227.40(3) Wis. Stats.. Judge Manian's order was entered on July 14, 1997 (please see attached photocopy of signed order).

3. HSS 135.08 of the Wisconsin Administrative Code is invalid because: (a) The rule, on its face, manifests a trespass by the Department of Health and Family Services (formerly Health and Social Services or HSS and hereinafter: "the Department") into a constitutional province which is soley that of our state legislature under Article IV, section I of the Wisconsin Constitution, by delegating rule-making authority outside the legislature where such authority is constitutionally vested, and the rule further offends our constitution as it gives each county corner and medical examiner complete and total discretion as to what the law of the legal pronouncement of deaths occurring outside of hospitals and nursing homes shall be, and the rule makes such a delegation of rule-

making authority without any guidance from the Department whatsoever, and the delegation is made without providing constitutionally sufficient procedural safeguards such as judicial review or even Departmental oversight or approval of such established county procedures; (b) Even if the rule is not an unconstitutional delegation of rule-making authority, the rule goes far beyond the Department's enabling legislation as the Department does not have the statutory authority to, itself, establish procedures for the legal pronouncement of deaths occurring outside of hospitals or nursing homes, and the Department cannot thus, delegate or re-delegate this authority to others; (c) Even if the Department has the statutory authority to itself establish procedures for the legal pronouncement of deaths occurring outside hospitals or nursing homes, HSS 135.08 goes far beyond the department's enabling legislation as it commands such county offices to action in gross excess of the Department's statutorily grounded supervisory or regulatory control over such county offices; and, (d) The rule is directly contrary to Chapter 69 of the Wisconsin Statutes as it commands each county coroner and medical examiner in our state to establish their own county-by-county procedures for making legal pronouncements of death for deaths that occur outside of hospitals or nursing homes, and thus, the rule ensures that there cannot be a uniform procedure for such death pronouncements state wide in direct opposition to the legislative intent of Chapter 69 that there be a state-wide uniform system of collecting information for vital records (i.e. death certificates).

Request for Relief

WHEREFORE, the plaintiff requests that the court declare that HSS 135.08 of the Wisconsin Administrative Code is invalid and enter an order of such a declaration, and the plaintiff further requests that she be awarded her costs and fees of this action, and any other relief the court deems just.

Dated: July 18, 1997 By: 

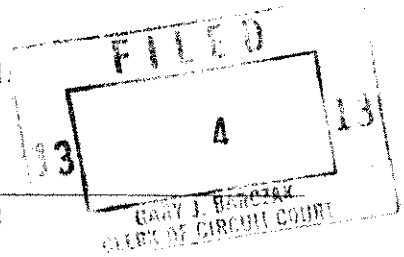
David Mirhoseini, Attorney for Plaintiff
State Bar No.: 1023785

David Mirhoseini, Attorney at Law
P.O. Box 275
Waukesha, WI 53187-0275
Phone: (414) 521-2257
Fax: (414) 521-2527

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

Case No.: 97-CV-003572
CHIROFF v. MILWAUKEE COUNTY, et al.

Branch 13, The Honorable Victor Manian



ORDER STAYING TRIAL PROCEEDINGS

On June 30, 1997, at 9:15 a.m., the court, The Honorable Victor Manian presiding, heard oral argument on plaintiff's motion to stay the trial proceedings in the above-captioned action. The defendants, the City of Franklin, Gaylord Hahn, and Eric E. Balow did not oppose the motion and did not appear in person or by counsel. The defendant, General Star National Company appeared by counsel. The defendants, Milwaukee County, Jeffrey M. Jentzen, Genevieve Penn-Alexander, and Patricia R. Martin appeared by Milwaukee County Deputy Corporation Council Robert E. Andrews. The plaintiff appeared by her attorneys, David Mirhoseini and Koltz Law Offices, S.C. -- Joseph C. Koltz.

The plaintiff's motion was made pursuant to § 227.40(3) Wis. Stats. on the grounds that the validity of HSS 135.08 of the Wisconsin Administrative Code was material to the issues of the above- captioned case.

Based upon the papers of record, oral argument, and the applicable law, the court ruled that the validity of HSS 135.08 of the Wisconsin Administrative Code was material to the issues of the above-captioned case and plaintiff's motion for an order staying the trial proceedings was GRANTED.

IT IS ORDERED:

1. That the validity of HSS 135.08 of the Wisconsin Administrative Code is material to the issues of the above-captioned case; and,

2. That the trial of the above-captioned case be stayed pending the Dane County Circuit Court's determination of the validity of HSS 135.08 of the Wisconsin Administrative Code pursuant to § 227.40 Wis. Stats.; and,

3. That the parties appear before the court again on October 06, 1997 at 9:15 a.m. to update the court as to the status of the Dane County Circuit Court's determination of the validity of HSS 135.08 of the Wisconsin Administrative Code.

By the Court:

Dated: July 14, 1997 By: Victor Manian
Victor Manian, Milwaukee County Circuit Court Judge

Date 8-1-97 Time 1:25pm

place 100 N. Hamilton #404 Madison WI

manner In Person

upon Georgia Schneider

By Robert Essel

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
CIVIL DIVISION

Branch 06, The Honorable Richard J. Callaway

Case No: 97-CV- 1993
CHIROFF v. WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR DECLARATORY JUDGMENT

To: Assistant Attorney General Maryann Sumi, Wisconsin Department of Justice
123 West Washington Avenue, Madison, WI 53707-7857
Via certified mail: Article # P 072 312 268;

State Senator Chvala, P.O. Box 7882, Madison, WI 53707-7882
Via Certified Mail: Article # P 072 312 269;

State Senator Grobschmidt, P.O. Box 7882, Madison, WI 53707-7882
Via Certified Mail: Article # P 072 312 270;

State Assemblyman Grothman, P.O. Box 8953, Madison, WI 53708
Via Certified Mail: Article # P 072 312 271;

State Assemblyman Brancal, P.O. Box 8953, Madison, WI 53708
Via Certified Mail: Article # P 072 312 272

PLEASE TAKE NOTICE: that, pursuant to §§227.40 and 806.04 Wis. Stats., and Local Court Rule 307, the plaintiff, by her attorneys and with the support of the accompanying Principle Brief, hereby moves the court for an order declaring that HHS §135.08 of the Wisconsin Administrative Code is invalid. The grounds for this motion are that: (1) the regulation is unconstitutional; (2) the regulation exceeds the defendant's statutory authority; and, (3) the regulation is contrary to public policy as expressed by statute.

PLEASE TAKE FURTHER NOTICE: that, as a declaratory judgment is a judgment as a matter of law, the plaintiff has moved the court and submitted her principle brief pursuant to Local Court Rule 307 which directs the parties to follow this standard briefing schedule:

1. The defendant's reply brief shall be served and filed within 30 days after service of this notice, motion and plaintiff's principle brief;
2. The plaintiff shall have 15 days after service of the defendant's response brief to serve and file a reply brief or a letter stating that no reply brief shall be filed.
3. The motion will be decided without oral argument unless otherwise ordered.

Dated: October 3, 1997. By: _____

David Mirhoseini, Attorney for Plaintiff
State Bar No.: 1023785

David Mirhoseini, Attorney at Law, P.O. Box 275, Waukesha, WI 53187-0275, (414) 521-2257

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
CIVIL DIVISION

Branch 06, The Honorable Richard J. Callaway

Case No: 97-CV- 1993
CHIROFF v. WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES

PLAINTIFF'S PRINCIPLE BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

The plaintiff, by her attorneys, with these five (5) numbered pages including this page, herein supports her Motion for Declaratory Judgment in the above-captioned case as follows.

CITED AUTHORITIES

Administrative Rules:
HHS §§135.01 and 135.08

Wisconsin Statutes:
Chapters 69 and 979 generally; Sections 59.34, 157.01, 227.40, 250.04, and 806.04.

Wisconsin Constitution:
Article IV, section I

Wisconsin Cases:
Milwaukee v. Sewerage Comm., 268 Wis. 342, 350 (1954), 67 N.W.2d 624.

BACKGROUND

The plaintiff in the above-captioned case is also the plaintiff in Case No: 97-CV-003572, which is currently pending before The Honorable Victor Manion of the Milwaukee County Circuit Court. By order of Judge Manion pursuant to,§227.40(3) Wis. Stats., Judge Manion found that the validity of HSS §135.08 of the Wisconsin Administrative Code was material to the issues of the pending Milwaukee County case. Pursuant to §§227.40(5) and 806.04(11) Wis. Stats., the defendant (hereinafter: "The Department"); the Wisconsin Attorney General; and the chair and co-chairs (a State Senator and an Assemblyman) of the Joint Committee on Legislative Organization and of the Joint Committee for the Review of Administrative Rules, were each duly served with an authenticated copy of the Summons and Complaint in the above-captioned case. Affidavits of Service are filed herewith.

ARGUMENTS

It is clear that HSS 135.08 of the Wisconsin Administrative Code (hereinafter: "The Rule"), is invalid for the following reasons.

1. The Rule is an unconstitutional.

Under Article IV, section I of the Wisconsin Constitution, the power to declare that there shall be a law is vested *solely* in the State Legislature. Thus, only the State Legislature may delegate the authority to make law. The legislature cannot delegate the authority to either: (1) declare whether there shall be a law; (2) determine the general purpose or policy to be achieved by the law; or, (3) fix the limits within which the law shall operate. Milwaukee v. Sewerage Comm., 268 Wis. 342, 350, 67 N.W.2d 624. (1954). However, "[w]hen the legislature *has* laid down the fundamentals of a law, it may delegate to administrative agencies authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. (emphasis added)" Id. (citations omitted). "The true test and distinction whether a power is strictly legislative, or whether it is administrative and merely relates to the execution of the statutory law, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. (citing omitted cases)." Id.

On it's face, The Rule purports to delegate (or perhaps re-delegate) legislative authority and give county coroners and medical examiners the power to say, *carte blanch*, what the law relevant to the legal pronouncement of deaths occurring outside of hospital and nursing homes, shall be. In fact, The Rule *commands* each county, via these offices, to make this law and establish such procedures themselves. Under sub (1) of the Milwaukee v. Sewerage Comm. test, above, The Rule is an unconstitutional delegation of legislative authority. Furthermore, The Department places no limits whatsoever on this law that The Rule commands coroners or medical examiners to make. This is *not* a case where The Department has codified such procedures pursuant to a statute regarding legal procedures for the pronouncement of deaths and then commands counties to follow these procedures. The Rule, on it's face, gives counties total and complete discretion to say what the law shall be and commands *them* to come up with such laws from scratch. Thus, The Rule is also unconstitutional under sub (3) of the Milwaukee v. Sewerage Comm. test.

Even if the delegation of legislative authority effected by The Rule had been made directly to county coroners and medical examiners by our State Legislature, it would be unconstitutional. But, The Rule is even more blatantly unconstitutional. The Department is *not* the Legislature, and The Rule is neither a statute enacted by the Legislature nor even an administrative codification of a state statute. Our Legislature has yet to lay down *any* fundamentals regarding any law relating to the legal pronouncements of deaths. The Rule, on its face, is actually an unconstitutional is two senses -- as a *delegation* of legislative authority, and as an *exercise* of legislative authority. Implicit in The Rule, in the first instance, is The

Department's unconstitutional determination and declaration that there shall be a law regarding procedures for legal pronouncements of certain deaths. Then, secondarily by The Rule, The Department attempts to unconstitutionally delegate this authority without restriction.

Any constitutional exercise or any delegation of legislative authority *must* come from our State Legislature --representatives duly elected by the people of our state. The Rule, on its face, obviously fails to pass muster under subs (1) and (3) of the Milwaukee v. Sewerage Comm. test noted above. Section 135.01 of the Wisconsin Administrative Code, is invalid under Article IV, section I of the Wisconsin Constitution.

2. The Rule is invalid as it is exceeds The Department's statutory authority.

Even if our Legislature had, in the first instance, laid down fundamentals and constitutionally delegated the legislative authority to fill up the details of a law regarding the procedures to be used in making the legal pronouncement of deaths occurring outside of hospitals and nursing homes, to The Department (i.e. The Rule merely administers enacted legislation), The Department would have absolutely no *statutory* authority to re-delegate this administrative authority to county coroners or medical examiners, or anyone else outside of The Department. As found in HHS §135.01, the chapter of the regulations within which The Rule is found (HHS Chapter 135), The Rule was promulgated by The Department "to regulate the preparation, transportation and disposition of human corpses and stillbirths for purposes of protecting the health of the public and properly registering deaths . . . under the authority of ss. 69.02(2), 250.04(7) and 157.01, Stats., to interpret and contribute to the implementation of ss. 69.01 to 69.12, 69.18, 250.04(1), 157.01 and 979.10, Stats." HHS §135.01. The Department is clearly authorized by its enabling legislation to determine the proper form for death certificates, including the blanks appearing thereon for the time of the legal pronouncement of death and for the medical certification of deaths. Arguably, if The Department did have the administrative authority, pursuant to statute, to establish procedures for the legal pronouncements of deaths occurring outside hospitals or nursing homes, The Department could then force anyone responsible for completing death certificates, including county coroners and medical examiners, to follow such established procedures for the completion and submission for filing of death certificates to The Department. But, The Department has not, by The Rule, established anything. The Rule completely passes the buck to county coroners and medical examiners and commands *them* to establish such procedures. County coroners and medical examiners are not "local health officers". Wis. Stats. §250.04(7). The laboratories of county coroners and medical examiners are not established by The Department. Id. at sub (9). They are also not hospitals, nursing homes, prisons, or funeral homes, etc.. Id. at subs (10),(11); Wis. Stats. §157.01. The Department has no statutory authority whatsoever empowering it to make the command made by The Rule. The Rule, on its face, clearly evidences an exercise of authority which exceeds that given The Department by its enabling legislation.

3. The Rule is contrary to public policy as expressed by Wisconsin Statutes.

Section 979.01 of the Wisconsin Statutes, clearly expresses the intent of our Legislature that a county coroner or medical examiner may only take jurisdiction over a death occurring in a private residence, if certain factual determinations can be made regarding the death (i.e. suspicious death, crime, etc.). Wis. Stats. §979.01(1). In fact, should the coroner or medical examiner not have jurisdiction under §979.01(1) but investigate and take samples from the corpse under (3) anyway, the coroner or medical examiner would not only be civilly liable, but would have committed a crime. Wis. Stats. §979.01(2). Coroners and medical examiners are government officers with police powers. *See generally,* Chapter 979 Wis Stats; Wis. Stats. §59.34, They investigate crime, hold inquests, and testify witnesses for the state. They even may be an acting sheriff in their county. To give coroners and medical examiners the authority to establish their own procedures for the legal pronouncement of deaths occurring in a private residence, which is "outside" a hospital or nursing home, is to give coroners and medical examiners jurisdiction over deaths where our legislature intended that they *not* have jurisdiction (i.e. deaths due to natural causes). The Rule is contrary to the important public policy of protecting the constitutional rights of privacy and right against unreasonable search and seizure of our citizens which underlies the restrictions of coroner and medical examiner power under §979.01 Wis. Stats.. Unfortunately for the plaintiff, she hd to experience just such a scenario first hand.

The Rule is also contrary to the public policy expressed in Chapter 69 of the Wisconsin Statutes. Though only §69.03(7) expressly states the legislative intent of "uniformity" vis-a-vis the collection of vital statistics, it is beyond reasoned argument that the whole of Chapter 69 expresses our Legislature's intent that the system of collection and transmission of vital statistics and the creation and maintenance of vital records, be one that is uniform statewide. As The Rule ensures that each county will have their own distinct procedures for the legal pronouncements of deaths occurring outside hospitals and nursing homes, it ensures that the time of the legal pronouncement of a particular death of this type in a particular county would not be uniform with the time of the legal pronouncement of that death had that county followed a different procedure. It may not even be uniform with that same county's own procedures in the past or in the future. As The Rule gives county coroners and medical examiners total discretion as to what these procedures shall be. Nothing would legally prevent counties from adopting or changing such procedures on a death-by-death basis. Thus, The Rule ensures that death certificates and records will not be uniform statewide. The Rule is clearly contrary to the public policy expressed by Chapter 69 of the Wisconsin Statutes, and may also violate the equal protection clauses of our state and federal constitutions.

REQUEST FOR RELIEF

WHEREFORE, the plaintiff request that the court enter an order declaring HHS §135.08 of the Wisconsin Administrative Code invalid, and that the plaintiff be award her costs and disbursements of this action and this motion, including her reasonable actual attorneys fees.

October 3, 1997.

By: _____

David Mirhoseini, Attorney for Plaintiff
State Bar No.: 1023785

David Mirhoseini, Attorney at Law
P.O. Box 275 Waukesha, WI 53187-0275
Phone: (414) 521-2257
Fax: (414) 521-2527

cc: State Senators Grobschmidt and Chvala; State Assemblymen Grothman and Brancal; Wisconsin Attorney General Doyle -- Assistant Attorney General Sumi.

AUG 25 1997

Louie E. Aiello #177826
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

August 21, 1997

Joint Committe for Review of Admin. Rules
Senator Weeden Rm 37 South
P.O. Box 7882
Madison, WI 53707-7882

Re: Open Comment on Purposed Rules Relating to Inmate Mail and Inmate Access to Legal Materials

Dear Senator Weeden:

Greetings. After receiving a copy of the puposed rules relating to inmate mail and access to legal material I feel it necessary to comment on these unnecessary and purely politically motivated rule changes.

First, I have reviewed the Wis. Admin. Register from May of 1997 through July 15, 1997 and I have yet to see the publication of the purposed inmate rule changes on mail. I have seen the other rules. It also appears that the GBCI Library is purposely withholding access to the Wis. Admin. Register until it is too late to comment. For example, all the changes that are in the works for DOC 303 changes. The Wis. Admin. Register with that information was not posted in the GBCI Library until August 18, 1997. Days late for the open comment period. And, my experience has taught me that this "open comment" period is just a fraudulent procedure.

The proposed rules that relate to inmate mail are simply politically motivated by Gov. Tommy Thompson. It seems that he is now directing the activities of the DOC. He's bringing in outside work forces (at a considerable controvery) and now his headline grabbing quote, as quoted in the Aug. 16, 1997 Green Bay Press-Gazzett, clearly show his true motive behind these specific rule changes. It serves no legitimate penological need to change theses rule and apply the restrictions therein, other than to punish prisoners so some bully pretending to be Governor can grab the headlines and win another term.

Also, these proposed rules are vauge and undefinable, i.e., the analysis of the Department for Draft #L-Mail, Phones lists No. 8. "Creates a provison that incoming and outgoing mail may not be delivered if it is determined to be injurious." This is very undefined and so is No. 10.

DOC 309.02(9)(a)(b)(c) (13) & (15) are violations of our First Amendment Rights. I think the department will look more foolish when these rules are ruled unconstitutional by a Federal Court.

These rules should not be implimented, a Federal court has ruled that the "Ensign Act" is unconstitutional. The DOC Codes relating to inmate mail are virtually identical to that act and will be unconstitutional.

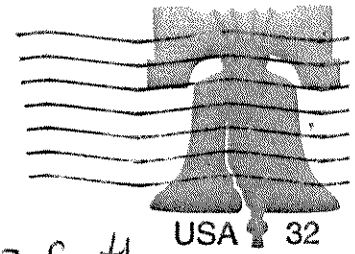
Sincerely,

Louie E. Aiello
#177826

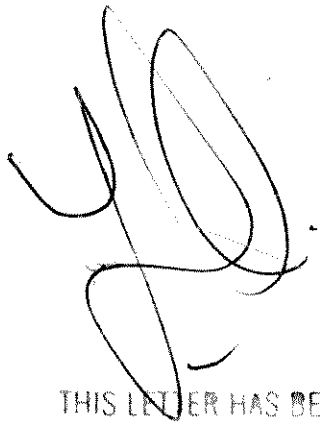
Lea/lea

L. Aiello
Box 19033
Green Bay WI
54307

GREEN BAY WI 543
PM
21 AUG
1997



Senator Weeden, Rm 37 South
Joint Committee for Review Adm. Rules
PO Box 7882
Madison WI 53707-7882



THIS LETTER HAS BEEN MAILED
FROM THE WISCONSIN PRISON SYSTEM

RECYCLED

Joint Committee for Review of
Administrative Rules
P.O. Box 7882
Madison, Wis 53707

SEP 15 1997

9-10-97

I am writing to complain about an Administrative Code Rule used by the Department of Corrections. The DOC Administratively extends Maximum Discharge dates of sentences by the use of DOC 302.25. I have several problems with this. The DOC feels this rule is interpreted as, "The only days that count towards the satisfaction of a sentence are days spent in prison."

That is a condition that is not listed on my Judgment of Conviction. My understanding of the issue is this. A court imposed a "Commitment Term" against me giving the State a period to control and supervise for Correctional purposes. When that period has expired the States Legal Authority ends. How does the Dept of Corrections feel it has the Authority to Administratively extend the Commitment Term beyond the expiration of the Court order?

The DOC Adm Code has 72 chapters, and the term of "Discharge" is clearly dealt with at DOC 328.17. This rule clearly states that the term ends as noted on the Courts Order. The only way it can be extended is by Modification by the sentencing court. This rule also states that the secretary of the DOC shall issue a Discharge certificate. Secretary Sullivan refuses to issue such in the matter of Case 85CR148 that expired on 6-9-95. The DOC also has extended my Maximum total Discharge date from 1998 to 2001. I never caught a new charge. This is from a Burglary I committed at the age of 18. I am 30 now and I can't get rid of

the DOC. I have the right to a Discharge.

The legal authority of the DOC ends as described by DOC 328.17. This rule is there for a reason and that reason is to protect peoples freedom. DOC 328.17 also states in the Appendix that, "Any action taken by the department must be in accordance with DOC 328.17."

I believe that type of language clearly does not allow the DOC to use Rule 302.25 in the manner it is by extending the Maximum Discharge dates. The DOC clearly refuses to follow its own rules. This rule is there to protect peoples right to freedom. The DOC has usurped an Authority beyond its limit. It Cannot be allowed to pick and choose what rules it wants to follow. This type of action is totally Arbitrarily and capricious behavior. Violates Civil Rights and must not be allowed. This also is a reason for prison overcrowding.

I believe my issue and point is Valad and my argument does have merit. DOC 328.17 is there to clearly point out exactly when the Departments legal Authority of Custody, Control and supervision legally ends.

Sincerely,

Terry L Hooker 170673
Dodge Correctional Inst.
P.O. Box 700
Waupun, WI 53963

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
CIVIL DIVISION

Branch 06, The Honorable Richard J. Callaway

Case No: 97-CV- 1993
CHIROFF v. WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

The plaintiff, by her attorney and with these eight (8) numbered pages including this page, replies the defendant's brief in opposition to the plaintiff's motion for declaratory judgment as follows.

THE RULE

HHS 135.08. Pronouncement of death outside of a hospital or nursing home. The coroner or medical examiner of a county *shall establish* procedures *for use within that county* for the legal pronouncement of deaths occurring outside of a hospital or nursing home. Wis. Admin. Code §HHS 135.08 (emphases added).

STANDING

The defendant argues that the compliant in this action must be dismissed and asks this court to do so because the plaintiff has failed to allege facts sufficient to claim standing and invoke this court's subject matter jurisdiction under §227.40 Wis. Stats.. *Defendant's Brief, pgs. 2 -3.* This motion is plaintiff's motion for declaratory judgment. The plaintiff recognizes that under §227.40(1) the court must deny this motion if it finds that it lacks subject matter jurisdiction over the complaint. However, if the defendant wished to request an order from the court dismissing the plaintiff's complaint on the grounds that the court lacks jurisdiction, then the defendant should have made a motion for dismissal on those grounds, provided the plaintiff

with fair notice thereof as required by procedural due process and the Wisconsin Rues of Civil Procedure, and risked that the plaintiff, in response, would have moved the court for an order for sanctions against the defendant for its counsel filing what would have been a blatantly frivolous motion.

The defendant is correct when it quotes our supreme court and argues that the plaintiff's complaint (and papers attached thereto by §802.04(3) Wis. Stats.) must show that the validity of Wis. Admin. Code §HHS 135.08 has a "direct effect on her legally protected interests" for this court to have jurisdiction over this action and motion for declaratory judgment under section 227.40 Wis. Stats.. *Defendant's Brief, pg. 3 (quoting Wisconsin's Environmental Decade at 9.)* But in support of its request for dismissal, the defendant is only willing to state that this declaratory judgment action "*apparently* arises from a civil action in Milwaukee County Circuit Court . . .(emphasis added)." *Defendant's Brief, pg. 2.* Any reasonable and diligent inquiry into the relevant facts and applicable law should have disclosed to the defendant's counsel that: (1) The Milwaukee County action is *real* and a matter of public record; (2) Under §227.40(3) Wis. Stats., the Milwaukee County Circuit Court's order establishes, *as a matter of law*, that the validity of Wis. Admin. Code §HHS 135.08 not only directly, but materially, affects the plaintiff's legal interests; and, (3) By attaching a copy of Judge Manion's order to the complaint in this action and by following the procedure for bringing this action under §227.40(1) and (3) and related statutes *to the letter*, the plaintiff has *more than* made a sufficient showing that this court has subject matter jurisdiction over the complaint.

It is not for this court to rehear the plaintiff's motion for a stay of the trial proceedings in Milwaukee County or second guess the Milwaukee County Circuit Court's determination that the validity of Wis. Admin. Code §HHS 135.08 directly effects the plaintiff's legal interests. With a copy of Judge Manion's order attached to the complaint in this action, the plaintiff does much more than merely allege that she has standing for this action. The plaintiff shows that this court has subject matter jurisdiction as a matter of law. If the defendant wishes to satisfy it's curiosity about the facts of the Milwaukee County case, it may pull and read the case file there. But no

matter how much the defendant wants this court to consider the facts of the case in Milwaukee County in ruling on this motion, a consideration of those facts would be completely improper. This motion is for an order of declaratory judgment. A declaratory judgment is a judgment *as a matter of law.* Except for facts sufficient to show that the court has subject matter jurisdiction to entertain this action, this motion is *supposed* to be decided in what the defendant calls "a factual vacuum."

UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

The defendant begins its argument that The Rule is constitutional by reciting the defendant's enabling legislation. This argument belongs as a rebuttal to the plaintiff's argument that The Rule exceeds the defendant's *statutory* authority, and the plaintiff will address it later in this reply brief. Suffice it to say now, that the defendant's enabling legislation cannot be interpreted as enabling the defendant to violate the state constitution.

As the defendant appears to acknowledge on page 4 of its brief in opposition to this motion, under article IV, section 1 of the Wisconsin Constitution, only the *legislature* may delegate the authority to make law. What the plaintiff is able to glean from pages 4 -6 of the defendant's brief in opposition, is that defendant feels The Rule does not unconstitutionally delegate legislative authority to county coroners and medical examiners because absent a state statute or administrative regulation establishing procedures for the legal pronouncement of deaths outside hospitals and nursing homes, "counties may do so without constitutional infirmity." *Defendant's Brief in Opposition, pg. 6.* In this case neither the legislature nor the defendant has established any such procedures. The defendant, by The Rule, seeks to force county coroners and medical examiners to do so from scratch without restriction or guidance. The defendant completely fails to understand the constitutional issue before the court.

In this action and by this motion, the plaintiff does not seek to invalidate any county ordinance or procedure. The plaintiff seeks to invalidate Wis. Admin. Code §HHS 135.08. The issue here is *not* whether counties *may*, in the absence of legislative action by the legislature or administrative action by an agency, "make law" regarding procedures for legal death pronouncements for use within their counties. The issue is whether *the defendant*, by The Rule, can act as the state legislature or county government and constitutionally *command* particular county officers with a regulation that mandates that *they must* make this law.[1] As the plaintiff cogently argued in her brief in support of this motion, The Rule mandates, without *any* restrictions or guidelines whatsoever, that county coroners and medical examiners exercise legislative authority. The Rule, *on it's face*, delegates legislative authority to these county officers. The defendant is *not* the state legislature. The defendant is *not* the elected representatives of county government. The defendant cannot act for our elected representatives and delegate our representative's constitutionally-vested legislative authority to coroners and medical examiners, or *anyone*. The defendant does not even attempt to argue for the constitutional validity of The Rule under the Milwaukee v. Sewerage Comm. test cited in the plaintiff's principle brief in support of this motion. The Rule, on its face, is an unconstitutional delegation of legislative authority under the test set forth by our supreme court in Milwaukee v. Sewerage Comm, 268 Wis. 342, 350, 67 N.W.2d 624 (1954).

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[1] The unconstitutionality of The Rule is further exposed by a hypothetical: What if a county properly exercised its legislative power and established procedures for the legal pronouncement of deaths occurring outside of hospitals and nursing homes by an ordinance which only authorized county paramedics or emergency medical technicians to carry them out? The defendant recognizes the constitutional authority of county governments to legislate where the state legislature has not occupied the field by statute and where there are no valid administrative regulations on point. Thus, given that the state legislature has not enacted a single statute related to procedures for the legal pronouncement of deaths and that the defendant has not itself established any such procedures, the defendant should also accept that, the authority to establish such procedures is, by default, constitutionally vested in elected county boards. The conclusion is compelled that Wis. Admin. Code §HHS 134.08 unconstitutionally delegates the legislative authority of county governments to establish procedures for the legal pronouncements of deaths occurring outside hospitals and nursing homes to particular county officers (i.e. coroners and medical examiners) by commanding these officers to exercise the legislative authority of elected county boards.

THE RULE EXCEEDS THE DEFENDANT'S STATUTORY AUTHORITY

First of all, the plaintiff clarifies that the "public policy" argument she raises in her principle brief in support of this motion is her argument that Wis. Admin. Code §HHS 135.08 conflicts with the public policy as codified by the legislature in enacting Chapters 69 and 979 of the Wisconsin Statutes. Thus, the plaintiff does not rely on some ethereal notion of public policy, but that as codified by law. The plaintiff uses the term "public policy" to distinguish between two arguments that The Rule exceeds the defendant's statutory authority. The plaintiff argues both that The Rule exceeds the defendant's statutory authority under the statutes as it both represents an exercise of regulatory authority which the defendant is not authorized to exercise by it's enabling legislation (i.e. commanding county officials outside the defendant's statutory jurisdiction -- *Plaintiff's Principle Brief, argument 2, pg.3*) *and* that The Rule directly conflicts with the public policy codified in Chapters 69 and 979 of the Wisconsin Statutes. *Plaintiff's Plaintiff's Principle Brief, argument 3, pg.4*. The "public policy" argument refers to the latter argument to distinguish it from the former one. However, the argument labels used in the plaintiff's principle brief supporting her motion notwithstanding, *both* arguments show that The Rule exceeds the defendant's statutory authority and is thus, invalid under §227.40(4)(a) Wis. Stats..

The plaintiff is not able to discern any argument put forth by the defendant which meets argument 2 of the plaintiff's principle brief. The plaintiff's argument that The Rule is an invalid exercise of the defendant's administrative power in excess of its statutory jurisdiction given that county coroners and medical examiners are not subject to the defendant's supervisory or regulatory control -- they are not "local health officers", labs established by the defendant, hospitals, nursing homes, prisons, funeral homes, etc. -- remains unrebutted by the defendant. Since the defendant raises no argument to meet the plaintiff's here, the plaintiff will focus it's reply to the defendant's response to argument 3 of the plaintiff's principle brief.

The Rule clearly exceeds the defendant's authority under it's enabling legislation as it

directly conflicts with it. As the defendant acknowledges, *uniformity* in the system of vital statistics is one of the mandates of the defendant's enabling legislation. Uniformity is a legislative mandate that pervades all of Chapter 69 of the Wisconsin Statutes. Section 69.03(7) expressly recognizes the mandate of uniformity in the system of vital statistics. But even though §69.03(7) clearly mandates the defendant to "conduct training programs to promote *uniformity* of policy and procedures in *this state* in the system of vital statistics" (emphases added), and states *nothing more*, the defendant's rose-colored glasses are so powerful that the defendant can read this language and find that it "contemplates that there will be some differences in procedures counties use, perhaps based on county size, population and whether the coroner or medical examiner has assisting staff." *Defendant's Brief, pg. 5.* Wishful thinking based on fantasy does not constitute statutory construction based on reason. Not only is the defendant's interpretation of §69.03(7) unreasonable, it is totally unreal.

The Rule, on it's face, ensures that each county must establish it's own procedures which is directly contrary to the defendant's legislative mandate to promote state-wide uniformity in the system of vital statistics. The defendant takes the incredible position that if procedures for the legal pronouncements of deaths occurring outside hospitals and nursing homes had to be uniform, then there would be no need for the defendant to *promote* uniformity. *Defendants' Brief, pg.7.* Thus, the defendant seems to take the view that as The Rule ensures *non*-uniformity in the system of vital statistics, it is consistent with the defendant's mandate of *promoting* uniformity in the system, apparently because The Rule helps to ensure that the defendant has something to promote. By this twisted logic, because it must uphold the Bill of Rights, the court would be justified in issuing orders to police compelling them to follow arrest procedures which would ensure that the civil rights of those they arrest would be violated in the process. The defendant's position is patently absurd. As The Rule, *on it's face*, ensures that there be different procedures regarding legal death pronouncements from county to county and clearly conflicts with the defendant's legislative mandate under Chapter 69 of the Wisconsin Statutes to promote state-wide uniformity of procedures in the system of vital statistics, The Rule is invalid as exceeding the defendant's statutory authority. The Rule also directly conflicts with an important

public policy expressed in Chapter 979 of the Wisconsin Statutes.

> "We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency. . . We recognize of course, that public welfare may and does require governmental control in many respects for the protection of life and health of the people, and for discovery of crime connected with the death of a person, and to such interests the private right is subservient *so far as necessary*." Korber v. Patek, 123 Wis. 453, 463 (1905) (emphasis added).

In enacting Chapter 979 of the Wisconsin Statutes, our legislature clearly sought to balance the government's interest in health and investigation of crime with the citizen's right to bury their dead loved ones free from governmental interference. Thus, Chapter 979 only gives coroners and medical examiners jurisdiction over a deaths in specific circumstances. If the death is not the result of a suicide or crime or otherwise suspicious, or if a physician has not refused to sign a death certificate, or if a family member has not requested that samples be taken from the corpse or there is to be no autopsy, the coroner or medical examiner has *no* lawful jurisdiction and right to interfere. Wisconsin Administrative Code §HHS 134.08, gives county coroners and medical examiners total and complete discretion in establishing procedures for the legal pronouncement of *all* deaths occurring outside of hospitals and nursing homes. Thus, by the authority of The Rule, these county officers could require that they be notified of all deaths occurring outside a hospital or nursing home and further grant themselves the sole authority to make the legal pronouncements of these deaths. Thus, by The Rule, county coroners and medical examiners -- governmental officials with police powers -- could essentially give themselves jurisdiction and the power to interfere with the legally protected sacred rights of grieving families, even though *none* of the factual predicates required to be present to take jurisdiction over a death under Chapter 979 is present. It is not for the defendant to empower county coroners and medical examiners with jurisdiction clearly not intended by our legislature. The Rule is clearly directly contrary to an important public policy expressed by our legislature in enacting Chapter 979 of the Wisconsin Statutes. Section HHS 135.08 of the Wisconsin

Administrative Code, on it's face, conflicts with this law and exceeds the defendant's statutory authority.

REQUEST FOR RELIEF

WHEREFORE, the plaintiff requests that the court enter an order declaring HHS §135.08 of the Wisconsin Administrative Code invalid, and that the plaintiff be award her costs and disbursements of this action and this motion, including her reasonable actual attorneys fees.

October 15, 1997.

By: _____
David Mirhoseini, Attorney for Plaintiff
State Bar No.: 1023785

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Phone: (414) 521-2257
Fax: (414) 521-2527

cc: State Senators Grobschmidt and Chvala; State Assemblymen Grothman and Brancal; Wisconsin Attorney General -- Assistant Attorney General Sumi.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

KEITH SCHOFF, individually
and in his capacity as
Executor of the Estate of
Gretchen Schoff,
2129 Kendall Avenue
Madison, WI 53705

97CV3191

Plaintiff,

Case No. _____

v.

Code No. 30607
Code No. 30701

EMPLOYE TRUST FUNDS BOARD
Department of Employe Trust Funds
801 West Badger Road
P. O. Box 7931
Madison, WI 53707-7931

and

Eric Stanchfield
In his official capacity as
Secretary of Employe Trust Funds Board
801 West Badger Road
P. O. Box 7931
Madison, WI 53707-7931

and

ELIZABETH HOLSTEIN DELGASS
491 Maple Street
West Lafayette, IN 47906-3066

Defendants.

SUMMONS

THE STATE OF WISCONSIN to each person named above as Defendant:

You are hereby notified that the Plaintiff above named has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The Court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the Court, whose address is Clerk of Circuit Court, Dane County Courthouse, 210 Martin Luther King, Jr., Blvd., Madison, WI 53719 and to Waltraud A. Arts and Lauri D. Morris, Quarles & Brady, Plaintiff's attorneys, whose address is One South Pinckney Street, P.O. Box 2113, Madison, Wisconsin 53701-2113. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the Court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate

you own now or in the future, and may also be enforced by garnishment or seizure of property.

Respectfully submitted this 14th day of November, 1997.

QUARLES & BRADY

By: _____

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State Bar No. 1008822
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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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Plaintiff,

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and

ELIZABETH HOLSTEIN DELGASS
491 Maple Street
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Defendants.

COMPLAINT

NOW COMES the Plaintiff, Keith Schoff, by his attorneys Quarles & Brady, and as and for his Complaint in this matter alleges and states as follows:

BACKGROUND

1. Plaintiff Keith Schoff is an adult male resident of Madison, Wisconsin, residing at 2129 Kendall Avenue, Madison, Wisconsin 53705. Keith Schoff has been appointed as the Executor of the Estate of Gretchen Schoff.

2. Defendant Employe Trust Funds Board ("Board") is the board charged by the Wisconsin legislature with the responsibility for direction and supervision of the Department of Employe Trust Funds ("DETF"). The DETF has been entrusted with, among other things, administering the disbursement of retirement monies deposited by or on behalf of eligible public employees pursuant to Chapter 40 of the Wisconsin Statutes and associated death benefits. The Board is an "agency" as defined by Section 227.01(1), Stats.

3. Defendant Secretary of Employe Trust Funds Board ("Secretary") is an appointed official of the State of Wisconsin as provided in Sections 40.03(1)(c), Stats., and 15.05(1)(b), Stats.

4. The Secretary is in charge of all administrative duties of the Department of Employe Trust Funds and has the power to promulgate administrative rules in accordance with statutory procedures pursuant to Sections 15.05(1)(b), Stats., and 40.03(2)(a) and (i), Stats.

5. Defendant Elizabeth Holstein Delgass is an adult female residing, on information and belief, at 491 Maple Street in West Lafayette, Indiana, 47926 and is a necessary party to this action.

6. Gretchen Schoff, f/k/a Gretchen Holstein, was a participant in what is now the Wisconsin Retirement System ("WRS"), formerly the State Teachers' Retirement System, from the date of her first eligibility on July 31, 1958 through the time of her death on July 10, 1994.

7. Gretchen Schoff executed a Teacher's Affidavit ("Affidavit") on July 31, 1958 listing "Mr. and Mrs. Floyd G. Holstein" as the primary beneficiaries, and "Miss Betty Holstein" as the secondary beneficiary, of her WRS death benefits.

8. Gretchen Schoff failed to provide all the information requested on the Affidavit for designation of the primary beneficiary. She failed to (a) specify the relationship of the primary beneficiaries to her, (b) name "Mrs. Floyd G. Holstein" by her given name, (c) include a birthdate for either Mr. and Mrs. Floyd G. Holstein, and (d) provide their address.

9. Gretchen Schoff similarly failed to provide information requested on the Affidavit regarding the secondary beneficiary. She did not (a) specify the relationship of "Miss Betty Holstein" to her, (b) provide her birthdate, or (c) her address.

10. Gretchen Schoff also failed to provide her social security number on the Affidavit.

11. When Gretchen Schoff executed the Affidavit in July of 1958 she was unmarried and had no children.

12. Gretchen and Keith Schoff were married on August 22, 1959 and remained so until Gretchen Schoff's death on July 10, 1994. They had three sons and maintained a close relationship throughout their marriage.

13. Gretchen and Keith Schoff never discussed or executed a marital property agreement pursuant to Chapter 766 of the Wisconsin Statutes. Gretchen and Keith Schoff never discussed Gretchen's WRS benefits, and never executed wills.

14. Gretchen Schoff's mother, Esther Holstein, died in 1967.

15. Mr. Floyd G. Holstein, Gretchen Schoff's father, married Agnes Jackson in 1969 and remained married to Agnes Jackson Holstein until the date of his death in 1990. Agnes Jackson Holstein had a close relationship with Gretchen Schoff and was the only grandmother Gretchen Schoff's children knew.

16. The July 31, 1958 Affidavit is the only beneficiary designation form that was ever completed by Gretchen Schoff and submitted to DETF.

17. The DETF, by determination letter dated December 13, 1994, denied Keith Schoff's application for the WRS death

benefits from Gretchen Schoff's account, informing him it had determined he was not the beneficiary, based on its interpretation of the Affidavit in its file.

18. Keith Schoff filed a timely appeal, designated as Appeal No. 94-61-ETF, asserting (a) that the Affidavit submitted by Gretchen Schoff in 1958 was void for indefiniteness for failure to comply with relevant Wisconsin Statutes or DETF rules and policies and should never have been filed; (b) that the Statutory Reference Guide ("SRG") used by the DETF to implement and interpret Chapter 40 of the Wisconsin Statutes as directed by the legislature should have been adopted by the DETF pursuant to Ch. 227 Wis. Stats., rulemaking procedures; and (c) alternatively, that Gretchen Schoff's WRS death benefits are subject to the Marital Property Act, Chapter 766, Stats.

19. The Board, by final decision dated October 28, 1997, denied Keith Schoff's application for the death benefits; the Board relied on DETF policies and procedures compiled and summarized in the "Statutory Reference Guide" ("SRG"). The DETF, on information and belief, never provided a copy of its SRG to participants.

20. The Board held that the DETF correctly relied on the SRG to support its conclusion that Gretchen Schoff's Affidavit should be interpreted to determine the identity of the beneficiary of her account, even though that Affidavit was "on

file with the DETF" contrary to its policies, practices and procedures now and at the time the Affidavit was filed.

21. The Board held the DETF correctly relied on the SRG in making the determination that the 1958 Affidavit, despite Gretchen Schoff's failure to provide the information requested by the form and by practice and policy of the DETF, was sufficiently definite to be interpreted to discern the beneficiaries.

22. The Board held that the DETF correctly relied on the policies, practices and procedures set forth in the SRG in finding that "Mrs. Floyd G. Holstein" did not mean "Agnes Jackson Holstein," the individual who was "Mrs. Floyd G. Holstein" on the date of Gretchen Schoff's death.

23. The Board affirmed the decision made by the DETF, in reliance on the policies, practices and procedures set forth in the SRG, finding that Gretchen Schoff's death benefits should be paid to Elizabeth Holstein Delgass, who it interpreted to be the secondary beneficiary named in Gretchen Schoff's 1958 Affidavit.

24. The Board, although acknowledging that the SRG was developed by the DETF to (a) assist it in administering the requirements of Chapter 40 of the Wisconsin Statutes, (b) aid in determining beneficiaries of WRS death benefits, and (c) aid in determining when beneficiary designations should be regarded as being "on file with the DETF," determined that the Secretary of

the DETF is not required to promulgate the SRG as a rule under Subchapter II of Ch. 227, Stats.

25. The Board also rejected Keith Schoff's assertion that Gretchen Schoff's death benefits are classified as marital property under the Wisconsin Marital Property Act, Chapter 766, et seq., and that he is entitled to his marital property share of said death benefits.

CLAIM FOR CERTIORARI REVIEW

26. The allegations of paragraphs 1 through 25 are repeated and realleged herein by reference.

27. The Board acted contrary to the law and the evidence, acted arbitrarily, and abused its discretion in concluding that the Affidavit executed by Gretchen Schoff was "in the form approved by the DETF" as required by Section 42.50, Stats. (1957-58), now renumbered as Section 40.02(8)(a), Stats., when it determined the Affidavit was properly on file with the DETF.

28. The Board acted contrary to the law and the evidence, acted arbitrarily, and abused its discretion when it determined the Affidavit was properly on file with the DETF.

29. The Board acted contrary to the law and the evidence, acted arbitrarily, and abused its discretion when it held that Elizabeth Holstein Delgass is the beneficiary of Gretchen Schoff's WRS account.

30. The Board acted contrary to law and acted arbitrarily in rejecting Keith Schoff's claim for his marital property share of the WRS death benefits of Gretchen Schoff, his wife.

CLAIM FOR DECLARATORY RELIEF

31. The allegations of paragraphs 1 through 25 are repeated and realleged herein by reference.

32. The Board, via its Secretary, has the authority and has been directed to promulgate the general policies and interpretations used by it to govern its enforcement and administration of Chapter 40 pursuant to Sections 227.10, Stats., and 40.03(2)(i), Stats.

33. The SRG is a "rule" within the meaning of Section 227.01(13), Stats. The SRG is a statement of policy, of general application, having the effect of law, issued by the DETF to interpret and administer Chapter 40, Stats., statutes administered by the Board.

34. The Board's promulgation of the SRG as a summary of its policies, practices and procedures for its use in administration of Chapter 40 is the adoption of a rule as defined in Section 227.10(1), Stats., that must be promulgated in accordance with Subchapter II, Ch. 227, Stats.

35. The Board's failure to adopt the SRG as a rule pursuant to administrative rule making procedures as required by Chapter 227 Stats violated Keith and Gretchen Schoff's rights to notice

and a hearing on the substance of a proposed rule as guaranteed by Chapter 227 Stats.

36. The Board interfered with and impaired Gretchen and Keith's Schoff's legal rights in utilizing the SRG to determine the validity of and interpret the 1958 Affidavit executed by Gretchen Schoff.

37. The Board's ruling that the 1958 Affidavit executed by Gretchen Schoff is valid to distribute her WRS death benefits is further a conclusion which is not supported by the plain language of Section 40.02(8)(a), the Statute it is directed to administer.

WHEREFORE, Plaintiff demands judgment as follows:

1. An order of this Court directing the Board to find the Affidavit void, and to designate Keith Schoff as the sole beneficiary of the WRS death benefits of his wife, Gretchen Schoff.

2. A declaratory ruling pursuant to Section 227.40 Stats. that the SRG is an invalid rule which was not promulgated according to the rule-making procedures of Chapter 227 of the Wisconsin Statutes, ordering the Board to refrain from applying the SRG to Petitioner's Appeal Number 94-61-ETF, and an order directing payment of the WRS death benefits to Keith Schoff.

3. A declaratory ruling pursuant to Section 806.04, Stats., declaring that the use of the SRG to determine the validity of the Teacher's Affidavit filed by Gretchen Schoff is

contrary to law and beyond the authority of the Board as defined by state law.

4. Alternatively, for an order directing payment of Keith Schoff's marital property interest in the WRS death benefits of Gretchen Schoff to Keith Schoff, together with prejudgment interest as provided by law.

5. For such other and further relief which the Court deems just and equitable.

6. For Plaintiff's costs and expenses in this action, including interest and reasonable attorney's fees as provided by law.

Respectfully submitted this 14th day of November, 1997.

QUARLES & BRADY

By: 

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