



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU


RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Added To File: 11/05/2003 (Per: GMM)



 The 2003 drafting file for the following compile drafts

LRB 03-3380

LRB 03-3426 

LRB 03-3455

LRB 03-3599

have been transferred to the drafting file for

2003 LRB 03-3629

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3426/?dn

.....
RPN:Wlj

I suggest you share this draft with Legislative Council attorneys Ron Sklansky and Dick Sweet, who know chapter 227 very well.

Robert P. Nelson
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2003 DRAFTING REQUEST

Bill

Received: 10/02/2003

Received By: rnelson2

Wanted: Soon

Identical to LRB:

For: Cathy Stepp (608) 266-1832

By/Representing:

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters:

Subject: Administrative Law

Extra Copies: Dick Sweet, LC

Submit via email: YES

Requester's email: Sen.Stepp@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Administrative rules and hearing

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1/?	rnelson2	1/1 Wlj 10/2	J 10/3	J PG 10/3			

FE Sent For:

<END>

FE Sent For:

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By/Representing:

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Drafter: rnelson2

May Contact: *Bob Fassbender*
of 258-9506

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Subject: *Ha 233-3125*
Administrative Law

Extra Copies: **Dick Sweet, LC**

Submit via email: YES

Requester's email: **Sen.Stepp@legis.state.wi.us**

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/?	rnelson2 10/02/2003	wjackson 10/03/2003		_____			S&L
/P1			jfrantze 10/03/2003	_____	Inorthro 10/03/2003		S&L
/P2	rnelson2	wjackson	rschluet	_____	sbasford		

Jb 11/3 *Jch 11/3*

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	10/23/2003	10/27/2003	10/27/2003	_____	10/27/2003		

1 WJ 11/2

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By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Administrative Law**

Extra Copies: **Dick Sweet, LC**

Submit via email: **YES**

Requester's email: **Sen.Stepp@legis.state.wi.us**

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Pre Topic:

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Topic:

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Instructions:

See attached

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<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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	10/23/2003	10/27/2003	10/27/2003	_____	10/27/2003		
/1	rnelson2 11/02/2003		jfrantze 11/03/2003	_____	lemery 11/03/2003		

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	10/23/2003	10/27/2003	10/27/2003 _____		10/27/2003		
/1	rnelson2 11/02/2003		jfrantze 11/03/2003 _____		lemery 11/03/2003		

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10/6 pm
State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3426?
RPR/.....
WLJ

D-Note

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1

GEN
AN ACT ...; relating to: ^{administrative} administrative rules, guidelines, policies and hearings.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.
For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 19.52 (3)¹ of the statutes is amended to read:
3 19.52 (3) Chapters 901 to 911 apply to the admission of evidence at the hearing.
4 The ~~board~~ hearing examiner shall not find a violation of this subchapter or subch.
5 III of ch. 13 except upon clear and convincing evidence admitted at the hearing.

History: 1977 c. 277; 1983 a. 166 ss. 13, 16; 1985 a. 182 s¹57; 1987 a. 365; 1989 a. 338.

6 SECTION 2. 19.52 (4)¹ of the statutes is repealed.

7 SECTION 3. 30.02 (3)¹ of the statutes is amended to read:

8 30.02 (3) Upon receipt of a complete permit application or a request for a
9 determination under s. 236.16 (3) (d), the department shall either schedule a public

1 hearing to be held within 60 days after receipt of the application or request or provide
2 notice stating that it will proceed on the application or request without a public
3 hearing if, within 30 days after the publication of the notice, no substantive written
4 objection to issuance of the permit is received or no request for a hearing concerning
5 the determination under s. 236.16 (3) (d) is received from a person who may be
6 aggrieved by issuance of the permit or determination. The notice shall be provided
7 to the clerk of each municipality in which the project is located and to any other
8 person required by law to receive notice. The department may provide notice to other
9 persons ~~as it deems appropriate~~ who may be aggrieved by the issuance of the permit
10 or determination. The department shall provide a copy of the notice to the applicant,
11 who shall publish it as a class 1 notice under ch. 985 in a newspaper designated by
12 the department that is likely to give notice in the area affected. The applicant shall
13 file proof of publication with the department.

History: 1987 a. 374; 1997 a. 172; 2001 a. 16.

14 **SECTION 4.** 196.24 (3)[↓] of the statutes is amended to read:

15 196.24 (3) The commission may conduct any number of investigations
16 contemporaneously through different agents, and may delegate to any agent the
17 authority to take testimony bearing upon any investigation or at any hearing. The
18 decision of the commission shall comply with s. 227.46 and shall be based upon its
19 records and upon the evidence before it, except that, [↓] ~~notwithstanding s. 227.46 (4),~~
20 a decision maker may hear a case or read or review the record of a case if the record
21 includes a synopsis or summary of the testimony and other evidence presented at the
22 hearing that is prepared by the commission staff. Parties shall have an opportunity
23 to demonstrate to a decision maker that a synopsis or summary prepared under this

1 subsection is not sufficiently complete or accurate to fairly reflect the relevant and
2 material testimony or other evidence presented at a hearing.

3 History: 1975 c. 414 s. 28; 1983 a. 53; 1985 a. 182 s. 57; 1997 a. 204; 2001 a. 61.

3 **SECTION 5.** 227.12 (4)[✓] of the statutes is created to read:

4 227.12 (4) If the agency proceeds with the requested rule making, the agency
5 shall reimburse the person who petitioned for the rule for his or her costs related to
6 the petition for rule making, including reasonable attorney fees.

7 **SECTION 6.** 227.135 (1) (e)[✓] and (f)[✓] of the statutes are created to read:

8 227.135 (1) (e) A summary of any existing or anticipated federal program that
9 is intended to address the activities to be regulated by the rule and an analysis of the
10 need for the rule if a federal program exists.

11 (f) An assessment of whether the rule is inconsistent, duplicative, or more
12 stringent than the regulations under any federal program summarized in par. (e).[✓]

13 **SECTION 7.** 227.137[✓] of the statutes is created to read:

14 **227.137 Economic impact reports of guidelines, policies[ⓑ] and rules.** (1)
15 After an agency publishes a statement of the scope of a proposed rule under s.
16 227.135[✓], and before the agency submits the proposed rule to the legislative council
17 for review under s. 227.15[✓], a municipality, an association that represents a farm,
18 labor, business, or professional group, or 5 or more persons having an interest in the
19 proposed rule may petition the agency ~~requesting the agency~~[↗] to prepare an economic
20 impact report of the proposed rule. If the agency determines that the petitioner may
21 be economically affected by the proposed rule, the agency shall prepare an economic
22 impact report before submitting the proposed rule to the legislative council under s.
23 227.15.[✓]

1 (2) A municipality, an association that represents a farm, labor, business, or
2 professional group, or 5 or more persons affected by an existing or proposed agency
3 guideline or policy, including agency comments and policies in response to federal
4 regulations, may petition the agency requesting the agency to prepare an economic
5 impact report for that existing or proposed agency guideline or policy. If the agency
6 determines that the petitioner may be economically affected by the proposed or
7 existing guideline or policy, the agency shall prepare an economic impact report.

8 (3) An economic impact report shall contain information on the effect of the
9 proposed rule or existing or proposed guideline or policy on specific businesses,
10 business sectors, and the state's economy. When preparing the report, the agency
11 shall solicit information and advice from the department of commerce and
12 governmental units, associations, businesses, and individuals that may be affected
13 by the proposed rule or existing or proposed guideline or policy. The agency may
14 request information that is reasonably necessary for the preparation of an economic
15 impact report from other state agencies, governmental units, associations,
16 businesses, and individuals, but no one is required to respond to that request. The
17 economic impact report shall include all of the following:

18 (a) An analysis and quantification of the problem, including any risks to public
19 health or the environment, that the guideline, policy, or rule is intending to address.

20 (b) An analysis and quantification of the economic impact of the guideline,
21 policy, or rule, including direct, indirect, and consequential costs reasonably
22 expected to be incurred by the state, governmental units, ^{associations,} businesses and affected
23 individuals.

1 (c) An analysis of the guideline's, policy's, or rule's impact on the state's
2 economy, including how the guideline, policy, or rule affects the state's economic
3 development policies.

4 (d) An analysis of benefits of the guideline, policy, or rule, including how the
5 guideline, policy, or rule reduces the risks and addresses the problems that the
6 guideline, policy, or rule is intended to address.

7 (e) An analysis that compares the benefits to the costs of the guideline, policy,
8 or rule.

9 (f) An analysis of existing or anticipated federal programs that are intended to
10 address the risks and problems the agency is intending to address with the guideline,
11 policy, or rule, including a determination of whether the guideline, policy, or rule and
12 related administrative requirements are consistent with and not duplicative of those
13 existing or anticipated federal programs.

✓ (14) ^g (g) An analysis of regulatory alternatives to the guideline, policy, or rule,
15 including the alternative of no regulation, and a determination of whether the
16 guideline, policy, or rule addresses the identified risks and problems the agency is
17 intending to address in the most cost-efficient manner.

18 (4) No later than 60 days after the date that an agency receives a petition
✓ (19) requesting aⁿ economic impact report from a petitioner who may be economically
✓ (20) affected by the existing or proposed guideline, policy, or rule, the agency shall submit
21 the economic impact report to the legislative council staff, to the department of
22 administration, and to the petitioner.

***NOTE: There was no time frame for issuing the report, so I created a 60-day time limit. I used the same number as in the DOA review. Is it too short, too long, or OK?

***NOTE: What does the legislative council do with economic impact reports?

1 (5) This section does not apply to emergency rules promulgated under s.
2 227.24.✓

3 SECTION 8. 227.138 of the statutes is created to read:

4 **227.138 Department of administration review of proposed rules. (1)**

5 In this section:

6 (a) "Department" means the department of administration.

7 (b) "Economic impact report" means ~~the~~^a report prepared under s. 227.137.✓

8 (c) "Guideline or policy" includes any agency comments or policies in response
9 to federal regulations.

10 (2) If the department receives an economic impact report under s. 227.137 (4)✓
11 regarding a proposed rule, the department shall review the proposed rule and issue
12 a report. A municipality, an association that represents a farm, labor, business, or
13 professional group, or 5 or more persons having an interest in a proposed rule may
14 petition the department requesting the department to review the proposed rule. If
15 the department determines that the petitioner may be economically affected by the
16 proposed rule, the department shall review the proposed rule and issue a report. The
17 department shall notify the agency that a report will be prepared and that the agency
18 shall not submit a proposed rule to the legislative council for review under s. 227.15
19 (1)✓ until the agency receives a copy of the department's report. The report shall
20 include all of the following findings:

21 (a) If an economic impact report was prepared as required under s. 227.137 (1),✓
22 that the report and the analysis required under s. 227.137 (3)✓ are supported by
23 related documentation contained in the economic impact report.

24 (b) That the agency has clear statutory authority to promulgate the proposed
25 rule.

1 (c) That the proposed rule, including any administrative requirements, is
2 consistent with and not duplicative of other state rules or federal regulations.

3 (d) That the proposed rule is consistent with the governor's positions and
4 priorities, including those related to economic development.

5 (e) That the agency used data in developing the proposed rule that is complete,
6 accurate, and derived from accepted scientific methodologies.

7 (3) Before issuing a report under sub. (2),[✓] the department may return a
8 proposed rule to the agency for further consideration and revision with a written
9 explanation of why the proposed rule is returned. If the agency head disagrees with
10 the department's reasons for returning the proposed rule, the agency head shall so
11 notify the department in writing. The department secretary shall approve the
12 proposed rule when the agency has adequately addressed the issues raised during
13 the department's review of the rule. The department shall submit a statement to the
14 governor indicating the department's approval of the proposed rule, the
15 correspondence between the agency and the department related to the proposed rule,
16 and a copy of its report regarding the proposed rule.

17 (4) If the department receives an economic impact report under s. 227.137 (4)[✓]
18 regarding a proposed or existing guideline or policy, the department shall review the
19 guideline or policy and issue a report. A municipality, an association that represents
20 a farm, labor, business, or professional group, or 5 or more persons having an interest
21 in a proposed or existing guideline or policy may petition the department requesting
22 the department to review the guideline or policy^e. If the department determines that
23 the petitioner may be economically affected by the guideline or policy, the
24 department shall review the guideline or policy and issue a report. The department

1 shall notify the agency that a report will be prepared. The report shall include
2 findings consistent with those under sub. (2)[↓] and include the following findings:

3 (a) If an economic impact report was prepared as required under s. 227.137 (4),[↓]
4 that the report and the analysis required under s. 227.137 (3)[↓] are supported by
5 related documentation contained in the economic impact report.

6 (b) That the guideline or policy is consistent with and does not exceed the
7 agency's statutory authority.

8 (c) That the guideline or policy is consistent with the governor's positions and
9 priorities, including those related to economic development.

10 (d) That the guideline or policy is of the type that is not required to be
11 promulgated as a rule.

12 (5) Before issuing a report under sub. (4)[↓], the department may prohibit an
13 agency from implementing a proposed guideline or policy until the department
14 secretary determines that the proposed guideline or policy meets the criteria under
15 sub. (4) (a) to (d).[↓]

16 **SECTION 9.** 227.185 of the statutes is created to read:

17 **227.185 Approval by governor.** After a proposed rule is in final draft form
18 and approved by the department of administration under s. 227.138 (3)[↓], the agency
19 shall submit the rule to the governor. The governor may approve, modify, or reject
20 the proposed rule. If the governor approves a proposed rule, the governor shall
21 provide the agency with a written notice of that approval. No proposed rule may be
22 submitted to the legislature for review under s. 227.19 (2)[↓] or filed with the office of
23 secretary of state or revisor unless the governor has approved the proposed rule in
24 writing. This section does not apply to emergency rules promulgated under s. 227.24.[↓]

25 **SECTION 10.** 227.19 (2)[↓] of the statutes is amended to read:

1 **227.19 (2) NOTIFICATION OF LEGISLATURE.** An agency shall submit a notice to the
 2 presiding officer of each house of the legislature when a proposed rule is in final draft
 3 form and approved by the governor. The notice shall be submitted in triplicate and
 4 shall be accompanied by a report in the form specified under sub. (3). A notice
 5 received under this subsection on or after September 1 of an even-numbered year
 6 shall be considered received on the first day of the next regular session of the
 7 legislature. Each presiding officer shall, within 7 working days following the day on
 8 which the notice and report are received, refer them to one committee, which may
 9 be either a standing committee or a joint legislative committee created by law, except
 10 the joint committee for review of administrative rules. The agency shall submit to
 11 the revisor for publication in the register a statement that a proposed rule has been
 12 submitted to the presiding officer of each house of the legislature. Each presiding
 13 officer shall enter a similar statement in the journal of his or her house.

History: 1985 a. 182; 1987 a. 253; 1987 a. 403 s. 256; 1989 a. 175; 2001 a. 87.

14 **SECTION 11.** 227.19 (3) (intro.) of the statutes is amended to read:

15 **227.19 (3) FORM OF REPORT.** (intro.) The report required under sub. (2) shall be
 16 in writing and shall include the proposed rule in the form specified in s. 227.14 (1),
 17 the material specified in s. 227.14 (2) to (4), a copy of any economic impact report
 18 prepared by the agency under s. 227.137, a copy of the report prepared by the
 19 department of administration under s. 227.138, a copy of the written approval of the
 20 governor under s. 227.185, a copy of any recommendations of the legislative council
 21 staff, and an analysis. The analysis shall include:

History: 1985 a. 182; 1987 a. 253; 1987 a. 403 s. 256; 1989 a. 175; 2001 a. 87.

22 **SECTION 12.** 227.43 (1g) of the statutes is created to read:

23 **227.43 (1g)** The administrator of the division of hearings and appeals shall
 24 randomly assign hearing examiners to preside over any hearing under this section.

1 **SECTION 13.** 227.44 (2) (d)[√] of the statutes is created to read:

2 227.44 (2) (d) The name and title of the person who will conduct the hearing.

3 **SECTION 14.** 227.445[√] of the statutes is created to read:

4 **227.445 Substitution of hearing examiner.** (1) A person requesting a
5 hearing before a hearing examiner may file a written request for a substitution of a
6 new hearing examiner for the hearing examiner assigned to the matter. The written
7 request shall be filed not later than 10 days after receipt of the notice under s. 227.44.[√]

8 (2) No person may file more than one such written request in any one hearing.

9 (3) Upon receipt of the written request, the original hearing examiner shall
10 have no further jurisdiction in the matter except to determine if the request was
11 made timely and in proper form. If the hearing examiner fails to make a
12 determination as to allowing the substitution within 7 days, the hearing examiner
13 shall refer the matter to the administrator of the division of hearings and appeals for
14 the determination and reassignment of the hearing as necessary. If the written
15 request is determined to be proper, the matter shall be transferred to another
16 hearing examiner. Upon transfer, the hearing examiner shall transmit to the new
17 hearing examiner all the papers in the matter.

18 History: 1977 c. 305, 447; 1977 c. 449 s. 496; 1979 c. 32 ss. 68, 92 (17); Stats. 1979 s. 800.05; 1987 a. 151.

18 **SECTION 15.** 227.45 (7) (intro.) of the statutes is renumbered 227.45 (7)[√] and
19 amended to read:

20 227.45 (7) In any ~~class-2~~ proceeding, each party shall have the right, prior to
21 the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon
22 motion by a party or by the person from whom discovery is sought in any ~~class-2~~
23 proceeding, and for good cause shown, the hearing examiner may make any order in
24 accordance with s. 804.01 which justice requires to protect a party or person from

1 annoyance, embarrassment, oppression, or undue burden or expense. In any class
 2 ~~1 or class 3 proceeding, an agency may by rule permit the taking and preservation~~
 3 ~~of evidence, but in every such proceeding the taking and preservation of evidence~~
 4 ~~shall be permitted with respect to a witness:~~

History: 1975 c. 94 s. 3; 1975 c. 414 ss. 9, 10, 12; Stats. 1975 s. 227.08; 1977 c. 277, 418, 447; 1979 c. 162, 208; 1985 a. 182 s. 33; Stats. 1985 s. 227.45; 1989 a. 139; 1991 a. 269.

5 SECTION 16. 227.45 (7) (a) to (d) of the statutes are repealed.

6 SECTION 17. 227.46 (1) (h) of the statutes is amended to read:

7 227.46 (1) (h) Make ~~or recommend~~ findings of fact, conclusions of law and
 8 decisions to the extent permitted by law.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 196 s. 131; 1977 c. 277, 418, 447; 1979 c. 208; 1983 a. 189 s. 329 (2); 1985 a. 29; 1985 a. 182 ss. 33g, 57; 1985 a. 236; Stats. 1985 s. 227.46; 1987 a. 365; 1993 a. 16.

9 SECTION 18. 227.46 (2) of the statutes is repealed.

10 SECTION 19. 227.46 (2m) of the statutes is repealed.

11 SECTION 20. 227.46 (3) of the statutes is repealed.

12 SECTION 21. 227.46 (4) of the statutes is repealed.

13 SECTION 22. 227.46 (6) of the statutes is amended to read:

14 227.46 (6) The functions of persons presiding at a hearing or participating in
 15 ~~proposed or~~ final decisions shall be performed in an impartial manner. A hearing
 16 examiner or agency official may at any time disqualify himself or herself. In class
 17 2 and 3 proceedings, on the filing in good faith of a timely and sufficient affidavit of
 18 personal bias or other disqualification of a hearing examiner or official, the agency
 19 or hearing examiner shall determine the matter as part of the record and decision
 20 in the case.

History: 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 196 s. 131; 1977 c. 277, 418, 447; 1979 c. 208; 1983 a. 189 s. 329 (2); 1985 a. 29; 1985 a. 182 ss. 33g, 57; 1985 a. 236; Stats. 1985 s. 227.46; 1987 a. 365; 1993 a. 16.

21 SECTION 23. 227.47 (1) of the statutes is amended to read:

22 227.47 (1) Except as provided in sub. (2), every ~~proposed or~~ final decision of an
 23 agency or hearing examiner following a hearing and every final decision of an agency

1 shall be in writing accompanied by findings of fact and conclusions of law. The
 2 findings of fact shall consist of a concise and separate statement of the ultimate
 3 conclusions upon each material issue of fact without recital of evidence. Every
 4 ~~proposed or~~ final decision shall include a list of the names and addresses of all
 5 persons who appeared before the agency in the proceeding who are considered
 6 parties for purposes of review under s. 227.53. The agency shall by rule establish a
 7 procedure for determination of parties.

8 History: 1975 c. 414 s. 15; 1977 c. 418; 1979 c. 208; 1985 a. 192 ss. 33r, 57; Stats. 1985 s. 227.47; 1993 a. 16, 491; 2003 a. 33 ss. 2376, 2377, 9160.

8 **SECTION 24.** 227.47 (3) of the statutes is created to read:

9 227.47 (3) A decision of an agency or hearing examiner may not be based in
 10 whole or in part on a conclusion of law that a statute, rule, policy, procedure, or
 11 practice is unconstitutional.

12 **SECTION 25.** 227.483[√] of the statutes is created to read:

13 **227.483 Costs upon frivolous claims.** (1) If a hearing examiner finds, at any
 14 time during the proceeding, that an administrative hearing commenced or continued
 15 by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner
 16 shall award the successful party his or her costs, as determined under s. 814.04[√], and
 17 reasonable attorney fees.

18 (2) If the costs and fees awarded under sub. (1)[√] are awarded against the party
 19 other than a public agency, those costs may be assessed fully against either the party
 20 or the attorney representing the party or may be assessed so that the party and the
 21 attorney each pay a portion of the costs and fees.

22 (3) ~~In order~~ ^{to} find a petition for a hearing or a claim or defense to be frivolous
 23 under sub. (1)[√], the hearing examiner must find at least one of the following:

1 (a) That the petition, claim, or defense was commenced, used, or continued in
2 bad faith, solely for purposes of harassing or maliciously injuring another.

3 (b) That the party or the party's attorney knew, or should have known, that the
4 petition, claim, or defense was without any reasonable basis in law or equity and
5 could not be supported by a good faith argument for an extension, modification, or
6 reversal of existing law.

7 **SECTION 26.** 227.485 (5)¹ of the statutes is amended to read:

8 227.485 (5) If the hearing examiner awards costs under sub. (3), he or she shall
9 determine the costs under this subsection, except as modified under sub. (4). The
10 decision on the merits of the case shall be placed in a ~~proposed~~ decision and
11 submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within
12 30 days after service of the ~~proposed~~ decision, to the hearing examiner and to the
13 state agency which is the losing party an itemized application for fees and other
14 expenses, including an itemized statement from any attorney or expert witness
15 representing or appearing on behalf of the party stating the actual time expended
16 and the rate at which fees and other expenses were computed. The state agency
17 which is the losing party has 15 working days from the date of receipt of the
18 application to respond in writing to the hearing examiner. The hearing examiner
19 shall determine the amount of costs using the criteria specified in s. 814.245 (5) and
20 include an order for payment of costs in the final decision.

21 History: 1985 a. 52; Stats. 1985 s. 227.115; 1985 a. 182 ss. 33s, 57; 1985 s. 332 s. 253; Stats. 1985 s. 227.485; 1987 a. 186; 1997 a. 27, 79.

22 **SECTION 27.** 227.53 (1) (a) 3.¹ of the statutes is amended to read:

23 227.53 (1) (a) 3. If the petitioner is a resident, the proceedings shall be held in
24 the circuit court for the county where the petitioner resides, except that if the
petitioner is an agency, the proceedings shall be in the circuit court for the county

SECTION 27

1 where the respondent resides and except as provided in ss. 73.0301 (2) (b) 2., 77.59
 2 (6) (b), 182.70 (6), and 182.71 (5) (g). ~~The proceedings shall be in the circuit court for~~
 3 ~~Dane County if~~ If the petitioner is a nonresident, the proceedings shall be held in the
 4 county where the property affected by the decision is located or, if no property is
 5 affected, in the county where the dispute arose. If all parties stipulate and the court
 6 to which the parties desire to transfer the proceedings agrees, the proceedings may
 7 be held in the county designated by the parties. If 2 or more petitions for review of
 8 the same decision are filed in different counties, the circuit judge for the county in
 9 which a petition for review of the decision was first filed shall determine the venue
 10 for judicial review of the decision, and shall order transfer or consolidation where
 11 appropriate.

History: 1971 c. 243; 1975 c. 94 s. 3; 1975 c. 414; 1977 c. 26 s. 75; 1977 c. 187; 1979 c. 90, 208, 355; 1985 a. 149 s. 10; 1985 a. 182 ss. 37, 57; Stats. 1985 s. 227.53; 1987 a. 27, 313, 399; 1991 a. 221; 1995 a. 27; 1997 a. 27; 1999 a. 9, 85; 2001 a. 38; 2003 a. 33.

12 **SECTION 28.** 227.57 (11)^v of the statutes is created to read:

13 227.57 (11) If the decision of the hearing examiner is inconsistent with the
 14 position taken at the hearing by the agency involved in the hearing, the court shall
 15 give no deference to the examiner's decision when conducting its review.

16 **SECTION 29.** 289.27 (5)^j of the statutes is amended to read:

17 289.27 (5) DETERMINATION OF NEED; DECISION BY HEARING EXAMINER. If a
 18 contested case hearing is conducted under this section, the secretary shall issue any
 19 decision concerning determination of need, ~~notwithstanding s. 227.46 (2) to (4).~~ The
 20 secretary shall direct the hearing examiner to certify the record of the contested case
 21 hearing to him or her without an intervening proposed decision. The secretary may
 22 assign responsibility for reviewing this record and making recommendations
 23 concerning the decision to any employee of the department.

History: 1995 a. 227 s. 554, 565, 991.

24 **SECTION 30.** 448.02 (3) (b)^j of the statutes is amended to read:

1 448.02 (3) (b) After an investigation, if the board finds that there is probable
 2 cause to believe that the person is guilty of unprofessional conduct or negligence in
 3 treatment, the board shall hold a hearing on such conduct. The board may use any
 4 information obtained by the board or the department under s. 655.17 (7) (b), as
 5 created by 1985 Wisconsin Act 29, in an investigation or a disciplinary proceeding,
 6 including a public disciplinary proceeding, conducted under this subsection and the
 7 board may require a person holding a license, certificate or limited permit to undergo
 8 and may consider the results of one or more physical, mental or professional
 9 competency examinations if the board believes that the results of any such
 10 examinations may be useful to the board in conducting its hearing. A unanimous
 11 finding by a panel established under s. 655.02, 1983 stats., or a finding by a court that
 12 a physician has acted negligently in treating a patient is conclusive evidence that the
 13 physician is guilty of negligence in treatment. A finding that is not a unanimous
 14 finding by a panel established under s. 655.02, 1983 stats., that a physician has acted
 15 negligently in treating a patient is presumptive evidence that the physician is guilty
 16 of negligence in treatment. A certified copy of the findings of fact, conclusions of law
 17 and order of the panel or the order of a court is presumptive evidence that the finding
 18 of negligence in treatment was made. The board shall render a decision within 90
 19 days after the date on which the hearing is held [↓] ~~or, if subsequent proceedings are~~
 20 ~~conducted under s. 227.46 (2), within 90 days after the date on which those~~
 21 ~~proceedings are completed.~~

History: 1975 c. 383, 421; 1977 c. 418; 1981 c. 135, 375, 391; 1983 a. 188 s. 10; 1983 a. 189 s. 329 (5); 1983 a. 253, 538; 1985 a. 29; 1985 a. 146 s. 8; 1985 a. 315, 332, 340; 1987 a. 27, 399, 403; 1989 a. 229; 1991 a. 186; 1993 a. 105, 107; 1995 a. 309; 1997 a. 67, 175, 191, 311; 1999 a. 32, 180; 2001 a. 89.

22 **SECTION 31.** 448.675 (1) (b)^v of the statutes is amended to read:

23 448.675 (1) (b) After an investigation, if the affiliated credentialing board finds
 24 that there is probable cause to believe that the person is guilty of unprofessional

SECTION 31

1 conduct or negligence in treatment, the affiliated credentialing board shall hold a
2 hearing on such conduct. The affiliated credentialing board may require a licensee
3 to undergo and may consider the results of a physical, mental or professional
4 competency examination if the affiliated credentialing board believes that the
5 results of the examination may be useful to the affiliated credentialing board in
6 conducting its hearing. A finding by a court that a podiatrist has acted negligently
7 in treating a patient is conclusive evidence that the podiatrist is guilty of negligence
8 in treatment. A certified copy of the order of a court is presumptive evidence that the
9 finding of negligence in treatment was made. The affiliated credentialing board
10 shall render a decision within 90 days after the date on which the hearing is held or,
11 ~~if subsequent proceedings are conducted under s. 227.46 (2), within 90 days after the~~
12 ~~date on which those proceedings are completed.~~

13 **History:** 1997 a. 175.

(END)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3426/P1dn
RPN:wlj:jf

October 3, 2003

I suggest you share this draft with Legislative Council attorneys Ron Sklansky and Dick Sweet, who know chapter 227 very well.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Nelson, Robert P.

From: Malaise, Gordon
Sent: Monday, October 20, 2003 12:18 PM
To: Nelson, Robert P.
Subject: FW: Omnibus Draft - Ch. 227

Robert:

Here are some redrafting instructions for the ch. 227 portion of Sen. Stepp's omnibus draft.

Gordon

-----Original Message-----

From: Manley, Scott
Sent: Monday, October 20, 2003 8:27 AM
To: Malaise, Gordon
Subject: Omnibus Draft - Ch. 227

6-1832

Gordon,

Attached below are revisions to the Chapter 227 draft that we would like incorporated into the draft that was recently sent to us.

Thank you!

Scott



Requested
changes to Chap227

Who?

Requested Changes to LRB -03426/P1dn (Chapter 227)

A. EXISTING PROVISIONS

- ✓ 1. **Section 5. (Petitioner's Reimbursement)** – Delete Section 5.
- 2. **Section 7 (Economic Impact Reports).** Amend to as follows:

✓ a. Create 227.137 (3) (h) to read:

(h) A comparison of the costs on Wisconsin businesses to costs borne by similar businesses located in adjacent states and Indiana or Missouri.

✓ b. Amend s. 227.137 (4) to delete the 60-day deadline.

Note: We assume that the requirement to prepare the report prior to submittal of the rule to the legislative council under 227.15 imposes its own deadline; that is, the rule can't be advance until the report is done. Agencies and affected parties will likely need more than 60 days to prepare the report. For example, some rules take years to develop and our experience (and goal) with these types of reports are they cause rule revisions to address certain high cost/low value rule components. Thus the report analysis and findings change throughout the rulemaking process.

On the question, "what does legislative council do with the report?" They include it with the report to the legislature under 227.15. If there is no requirement to submit to legislative council, how would they know to include it?

No under 227.19(3)

But - no change in 227.15

✓ 3. **Section 15 (Evidence & Procedures)** Delete the changes relating to evidence for class 2 procedures

✓ 4. **Section 25 (Constitutional Review)** *247 - Yes* Delete this section and modify s. 227.46 (1) to reflect that the ALJ merely lacks jurisdiction to address constitutional issues. At present, parties assert constitutional claims to assure a court doesn't reject a claim do to failure to exhaust administrative remedies, despite the general understanding the ALJ has no authority to decide such issues. This change provides clarification and certainty on this issue.

5. **Section 28 (Inconsistent Decision)**

- ✓ • Delete phrase "involved in the hearing." ?

B. NEW PROVISIONS

1. Amend 227.14 (2) (a) to read:

(a) An agency shall prepare in plain language an analysis of each proposed rule, which shall be printed with the proposed rule when it is published or distributed. The analysis shall include all for the following:

1. A reference to each statute that the proposed rule interprets, each statute that authorizes its promulgation, each related statute or related rule, a summary of the relevant legal interpretations and policy considerations underlying the proposed rule, and a summary of existing or anticipated federal regulatory programs intending to address similar matters.

2. A summary of the factual data on which the proposed rule is based, the methodology used to obtain and analyze the data, how the data supports the regulatory approach chosen for the

proposed rule, and how the data supports any agency's findings required by statutes authorizing the rule's promulgation.

3. A and a brief summary of the proposed rule.

Note: It is well recognized that an agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto. See, Sen. Doc. No. 248, 79th Cong. 2d Sess. 200 (1946) on the notice provisions under APA. The agency's interpretation of its legal authority and the underlying factual justification are the usual focal points for comments on proposed rules. The above proposed language is similar to Clean Air Act provisions [42 U.S.C. s 7607 (d)] relating to information Congress required EPA to include in proposed rules. The adequacy of this information would also be subject to judicial review. (See changes to s.227.40, below)

2. Create 227.14(4) (b) 3 to read:

3. For rules that the agency determines may have a significant overall fiscal effect on the private sector, the anticipated costs to be incurred by the private sector of complying with the rule.

Note: Section 227.14(4)(a) requires the preparation of a fiscal estimate on each proposed rule, but only relating to costs imposed on local and state government. In addition, s. 227.114 requires a regulatory flexibility analysis if a proposed rule may have a significant economic impact on small business. Thus, under current law, the agency has no general statutory requirement to estimate the fiscal affect of their proposals on the regulated community. This provision fills this significant shortcoming in the formal agency rulemaking process.

Under the proposed provision, the agency would only provide such an estimate if there is a potential for significant economic impacts; unlike fiscal estimates for local and state government, which is required for all rules. Thus, this new provision should not be considered an undue burden on agencies. But it does require the agency at least contemplate such impacts, consistent with existing environmental analysis requirements under s. 1.11. (See NR 150.03, relating to required environmental analysis, which defines a Type II action as one that has the "potential to cause significant environmental effects.") The related provisions for economic impact reports (proposed s. 227.137), on the other hand, give the regulated community the option to request the preparation of an economic impact report on those limited occasions the agencies should develop a more rigid analysis.

3. Amend 227.19 (3) to read:

(3) FORM OF REPORT. The report required under sub. (2) shall be in writing and shall include the proposed rule in the form specified in s. 227.14 (1), the material specified in s. 227.14 (2) to (4), a copy of any recommendations of the legislative council staff and an analysis. The analysis shall include:

(a) A detailed statement explaining the need basis and purpose for the proposed rule, including how the proposed rule advances relevant statutory goals or purposes.

(b) An analysis of policy alternatives to the proposed rule, including reliance on federal regulatory programs, and an explanation for rejection of such alternatives.

(c) A summary of comments to the proposed rule and the agency's response to such comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at a public hearing.

(d) A list of the persons who appeared or registered for or against the proposed rule at a public hearing.

(e) Any changes to the agency's analysis prepared under s. 227.14 (2) or fiscal estimate under s. 227.14 (4).

✓ (fd) A response to the legislative council staff recommendations under s. 227.15 indicating:

Note: For federal rules, a leading administrative law expert notes that:

No court today would uphold a major agency rule that incorporates only a 'concise general statement of basis and purpose.' To have any reasonable prospect of obtaining judicial affirmation of the a rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effect of the rule, relates the factual predicate and expected effect of the rule to each of the statutory goals or purposes that agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted. K. Davis, Administrative Law Treatise, sec. 7.4 at 310 (3d. ed. 1994)

The above amendments merely recognize that agencies should go beyond a purely formal level of explanation for a rule as currently required under chapter 227. The provisions are consistent, albeit less demanding, than justifications required by federal agencies. The adequacy of this information would also be subject to judicial review. (See changes to s.227.40, below)

✓ 4. Create s. 227.40(4)(am) to read:

(am) The court shall undertake a review of the record and evaluate the reasons underlying a rule when determine its validity. The agency's record shall include the analysis and supporting documentation under s. 227.14 (2) and s.. 227.19 (3) and comments on the proposed rule. The trial court may accept other relevant evidence to supplement the agency record when reviewing the validity of a rule. The court shall find a rule invalid as not complying with rule making procedures if the agency's analysis under s. 227.14 (2), s. 227.19 (3), and s. 227.137 is not supported by substantial evidence. The court shall find an agency exceeds its statutory authority if any findings required by statutes allow an agencys to exceed federal law are not supported by clear and convincing evidence.

Note: Existing s. 227.40, relating to judicial review of the validity of a rule, is silent on the appropriate methodology for review rules, the agency's record subject to review, and the standard for such review. These provisions would codify key holdings in Liberty Homes, Inc. v. DIHLR, 136 Wis. 2d 368 (1987) relating to such review and clarifies that the agency must support its decisions with substantial evidences. Such a test is consistent with administrative law requirements in other jurisdictions. For example, "as used in the APA . . . In order to avoid the risk of judicial reversal of a rule as arbitrary or capricious, an agency must respond to all major points made in comments, state that factual predicates for its rule, support the factual predicates by linking them to something in the record of their rulemaking, explain its reasons for resolving issues as it did, relate its finding and its reasoning to decisional factors made relevant by its statute, and give reasons for rejecting plausible alternative to the rule it adopted." (Davis, Vol. I at pp. 289)

In addition, in Wis. Hosp. Ass'n v. Nat. Resources Bd, 156 Wis. 2d 688 (1990), the court acknowledged that a challenge to the statutory authority to adopt a rule is a matter of statutory interpretation or construction, and as such, it is a question of law that the court will resolve without deference to the view of the trial court or agency. However, the court found that when comparing the elements of the enabling statute to the rule, a statement that the agency made

af

the requisite findings was sufficient to establish such authority. The court found that the validity of such findings must be challenged under a constitutional due process claim, allowing the agency to justify its authority if there was any rational basis for the finding. Such a highly deferential review circumvents the clear legislative policy that certain state regulatory programs not exceed federal law. This provision clarifies that an agency must provide substantial justification when exceeding federal law in such instances.

5