☞ **07hr_JCR-AR_Misc_pt06b**

☞ Details: Correspondence on DWD Emergency Rule, affecting Section DWD 56, relating to childcare enrollment underutilzation.

(FORM UPDATED: 08/11/2010)

# WISCONSIN STATE LEGISLATURE ...
# PUBLIC HEARING - COMMITTEE RECORDS

## 2007-08
(session year)

## Joint
(Assembly, Senate or Joint)

## Committee for Review of Administrative Rules...

## COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

## INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2012)

## Barry, Sarah

**From:** cg3706@charter.net
**Sent:** Wednesday, April 16, 2008 8:18 AM
**To:** Sen.Jauch
**Subject:** $18.6 Million needed to cover Budget Shortfall

Senator Robert Jauch
State Capitol, Room 118 South
PO Box 7882
Madison, WI 53707-7882

Dear Senator Jauch,

I am contacting you to ask that you support the $18.6 million contained in the Senate version of the budget adjustment bill to fill the shortfall in the Wisconsin Shares program.

Wisconsin Shares provides child care subsidies for low income families, allowing them to receive quality child care while continuing to work. This vital, and highly successful, program has suffered from a shortage in funding in recent years, and I hope that you will take steps to ensure that these dollars are included in the final budget bill.

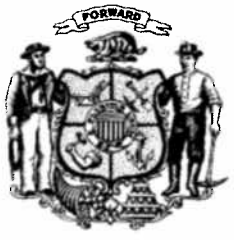
If the shortfall in the Wisconsin Shares program is not funded by the legislature the ability of child care providers to continue to offer care to families enrolled in the program will be severely jeopardized.

Without additional dollars the Department of Workforce Development?s solution will be to permanently enact harmful rule changes that will reduce payments to providers for authorized services. This rule threatens the financial security of every child care provider in Wisconsin who cares for children of WI Shares families.

I again ask you to please support increasing funding for Wisconsin Shares to cover the $18.6 million shortfall.

Sincerely,
Kimberly Gordon
PO Box 877
Bayfield, WI 54814

# WISCONSIN STATE LEGISLATURE



# LEGAL ACTION OF WISCONSIN, INC.

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X 10 Le

TO: Senator Lena Taylor
Senator Robert Jauch
Representative Tamara Grigsby

FROM: Bob Andersen Bob Andersen

RE: **Proposed DWD Administrative Rule That Deliberately Distorts Legislative Intent of 2005 Budget Bill Enactment Allowing W-2 Recipients to "Rectify" Their Failures Before Sanctions May Be Imposed – Rule Scheduled for Administrative Hearing on May 15, 2008.**

DATE: May 7, 2008

As you know, LAW provides civil legal services for low income people in 39 counties in the state. One of our principal priorities throughout those 39 counties is the provision of services in public benefits cases, including W-2. We are among the principal advocates in W-2 cases, because we devote a large amount of resources to the representation of W-2 participants in Milwaukee County, where some 80% of the state's W-2 population resides.

***Because you and your staff were centrally involved in the drafting and enactment of the legislation referred to above, we thought that we would alert you to the department's deliberate attempt to distort the effect of this legislation.***

As you know, one of the very serious problems with the administration of the W-2 program has been the number of participants who lose benefits that are essential to their very subsistence, due to the imposition of sanctions. That problem is exacerbated by the problems that accompany the imposition of sanctions. The Legislative Audit Bureau (LAB) reported in April 2005 that (1) there has been a wide disparity in the imposition of sanctions throughout the state; (2) that there has been a history of the inappropriate imposition of sanctions; and (3) that there has been a racial disparity in the imposition of sanctions. The Department of Workforce Development reported in January 2006 that there remains a significant racial disparity in the imposition of sanctions outside of Milwaukee County. Attached to this letter is a copy of excerpts taken from the LAB report and from the subsequent DWD report.

It was because of these problems that the Joint Committee on Finance adopted legislation to correct the inequities in the administration of sanctions in the 2005 budget bill. ***One of the principal ingredients of that enactment was a provision that would allow W-2 participants the opportunity to rectify the failure or deficiency they committed, so that (1) the goals of the W-2***

***program could be satisfied by the compliance of the participants and (2) that these needy families would continue to receive subsistence benefits. The idea was that, for example, if a participant missed a job interview or an appointment with a mental health provider, the participant would be given the opportunity to make-up the interview or appointment – in order to satisfy the goals of the program.***

***Yet, DWD has chosen to distort this legislation and its purposes by drafting a rule (and an Operations Memo) (both of which are attached) that both conceals the requirement that participants be given the opportunity to "rectify" their failures or deficiencies and falsely characterizes the requirement as one which relates to whether the participant has "good cause" for not complying with a program requirement.***

The effect of this rule, if adopted, will be to deprive participants of the opportunity to "rectify" their mistakes, in order to avoid sanctions, and to rob the legislature of its stated goal.

First, below is the language of the ***statute*** that was enacted:

> 49.153 **Notice before taking certain actions. (1)** Written and oral notice. Before taking any action against a participant that would result in a 20 percent or more reduction in the participant's benefits or in termination of the participant's eligibility to participate in Wisconsin Works, a Wisconsin Works agency shall do all of the following:
>
> (a) Provide to the participant written notice of the proposed action and of the reasons for the proposed action.
>
> (b) After providing written notice, explain to the participant orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action.
>
> (c) After providing the notice under par. (a) and the explanation or the attempts to provide an explanation under par. (b), ***allow the participant a reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action.***
>
> **(2)** Rules. The department shall promulgate rules that establish procedures for the notice and explanation under sub. (1) and that define "reasonable attempts" for the purpose of sub. (1) (b) and "reasonable time" for the purpose of sub. (1) (c). [emphasis added]

Next, here is the express provision of the ***proposed administrative rule*** (CR08 034):

> **SECTION 1. DWD 12.195 is created to read:**
>
> **DWD 12.195 Notice before taking certain actions.** Before taking any action against a participant that would result in a 20 percent or more reduction in the participant's benefits or in termination of the participant's eligibility to participate in Wisconsin Works due to

noncooperation with W-2 program requirements, a W-2 agency shall do all of the following:

**(1)** The W-2 agency shall provide to the participant written notice of the proposed action and of the reasons for the proposed action. The written notice shall be issued on or before the following dates:

(a) The written notice of a 20 percent or more reduction in the participant's benefits shall be issued by the W-2 agency no later than the first business day following notification to the W-2 agency of participants subject to a potential 20 percent or more payment reduction.

(b) The notice of termination of W-2 eligibility shall be issued no later than 10 days prior to the end of eligibility.

**(2)** Within 5 business days after providing written notice, the W-2 agency shall explain to the participant orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action.

(a) For purposes of this paragraph, "reasonable attempts" means at least 2 attempts to contact the participant orally in person or by phone.

(b) The explanation by the W-2 agency shall do all of the following:

1. Inform the participant which requirements were not met or which activities were missed that resulted in a 20 percent or more reduction or termination of eligibility.

2. Discuss the participant's reasons for not complying with participation requirements under s. DWD 12.16 or not cooperating with other program requirements under Chapter DWD 12.

3. ***Explain the opportunity to present good cause for failing to participate or cooperate.***

4. Inform the participant of the right to appeal the agency decision, if necessary.

**(3)** After providing the notice under sub. (1) and the explanation or the attempts to provide an explanation under sub. (2), the W-2 agency shall allow the participant a reasonable time ***to rectify*** the deficiency, failure, or other behavior to avoid the proposed action. For purposes of this subsection, "reasonable time" means 7

business days after the oral notification or after the last attempt to make oral notification. [emphasis added]

Notice under paragraph 2 above, that there is no mention at all of a notice to the participant of the right to ***rectify*** the deficiency or failure, as the statute requires. Instead, the rule inserts a notice of the right to have a ***"good cause"*** excuse for not having complied with the program requirements. This reference to "good cause" does not appear anywhere in the statute that was enacted. "Good cause" refers to a justification that ***excuses*** the participant from complying with a program requirement. The right to ***"rectify"*** a failure or deficiency does not excuse the participant from the requirement. ***It allows the participant to make-up the requirement.***

The participant already has a right to be excused from compliance with a program requirement for good cause, under the statutes and under the other provisions of this rule. There is no need to refer to refer to good cause under this section.

While it is okay that the notice provision contained in paragraph 2 includes a reference to "good cause," the ***express reference to "good cause" instead of the right to "rectify" in the notice that is to be given to the participant is a deliberate attempt to falsely characterize the right to "rectify" as a right to show "good cause." The effect is to deprive the participant of the right to rectify the deficiency. The absence of this notice to the participant of the right to "rectify," and the use of the expression "good cause" instead, nullifies the reference in the following paragraph 3 of the language cited above to the right to "rectify." It is a cynical attempt by the department to deceive people into believing that the department is intending to adhere to the legislature's mandate.***

For further proof of this, and proof that DWD has no intention of following the legislature's directive, consider the language from the following DWD Operations Memo (DWS 06-29) (again, this is attached), which is currently in effect.

> ***Does "rectify the deficiency, failure or other behavior" mean that the person can "make up" hours that are missed? No, it does not necessarily mean that a participant can make up hours missed.*** In order to rectify payment reductions, the individual can present good cause for the missed hours or, in situations such as a missed EP appointment that could be made up within the 7 working days. For case closures, again, the oral notification allows the FEP to determine if there are any specific good cause reasons or some underlying barriers to explain the noncooperation which led to the case closure. If during a conversation with the participant she says that she will cooperate within the next 7 days, the agency must give her the opportunity to rectify. For example, if the participant could provide verification of information that was previously unverified, attend a meeting that was previously missed, etc., the FEP should allow her to do so within the 7 day time frame. [emphasis added]

Here is the definition of "rectify" from the Merriam-Webster Online Dictionary:

1. To set right : remedy; 2. To purify (as alcohol), especially by repeated or fractional distillation; 3. To correct by removing errors : adjust; 4. To make (an alternating current) unidirectional. Synonym see correct.

This has nothing to do with a good cause excuse for non compliance, which, under the department's own rule, covers things like a required court appearance, the lack of child care, the lack of transportation, an illness, school emergency, religious holiday, domestic violence. These are all things which ***excuse*** a participant from compliance with a requirement. Instead ***"rectify"*** means that the participant is ***not excused*** from compliance. The participant is ***required to complete the assignment*** in order to avoid the sanction.

Below is the explanation of the Legislative Fiscal Bureau of the provision that was contained in the 2005-07 biennial budget bill. This is taken from the Comparative Summary of Budget Provisions (Enacted as 2005 Act 25). You will see that nowhere in this explanation is there any suggestion of "good cause" or any suggestion that "rectify means "good cause."

**38. NOTICE PROVISIONS FOR W-2 PARTICIPANTS**

Joint Finance/Legislature: Require W-2 agencies to do all of the following before taking any action against a W-2 participant that would result in a 20% or more reduction in the W-2 participant's benefits or in termination of the W-2 participant's eligibility to participate in W-2: (a) provide written notice of the proposed action and of the reasons for the proposed action to the W-2 participant; (b) after providing written notice, explain orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action; and (c) after providing written notice and an oral explanation, allow the W-2 participant reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action. Require DWD to promulgate rules that establish procedures for the written notice and oral explanation and that define "reasonable attempts" and "reasonable time."

We have attempted to get the department to correct this policy, without avail, dating back to communications undertaken in January 2006. Attached is a letter from Attorney Patricia DeLessio to the department.

It is difficult to imagine a clearer case of the effort of an administrative agency to wilfully violate the will of the legislature.

If you agree with our analysis, we would respectfully request that you consider expressing your view on this attempt by the department during the administrative hearing process or the legislative review that follows.

**Excerpts From April 2005 Report of Legislative Audit Bureau: An Evaluation of Wisconsin Works Program & January 2006 Report by DWD to Legislature on Racial Disparity in Sanctions**

**[Disparity in Sanctions Rates Throughout State]**

From October 1999 through June 2004, W-2 agencies imposed a total of $30.2 million in sanctions, and every agency sanctioned at least one participant. As shown in Figure 3, the percentage of sanctioned cash benefit participants varied from a high of 33.0 percent (2,204 of 6,680 participants) in November 1999 to a low of 14.4 percent (1,318 of 9,134 participants) in February 2002. In June 2004, 23.7 percent of cash benefit participants (3,021 of 12,761 participants) were sanctioned. The sanction rate has been consistently higher in Milwaukee County than in the balance of the state. Agencies do not keep the amounts that they sanction, but instead return the funds to DWD.

We reviewed sanction rates for the 46 agencies that served an average of at least ten cash benefit participants per month from January through June 2004, which is the most recent period for which data were available during the course of our fieldwork. Table 44 shows the seven agencies that sanctioned more than 20 percent of their cash benefit participants during this time period. In contrast, 25 agencies each sanctioned less than 10 percent of their participants.

Participants in community service jobs were sanctioned at higher rates than those in transitional placements. From January through June 2004, 31.2 percent of participants in community service jobs statewide were sanctioned, compared to 9.8 percent of participants in transitional placements. The relatively high sanction rates at some Milwaukee County agencies resulted, in part, from the many agency participants with community service jobs

Higher percentages of participants' cash benefits were sanctioned by W-2 agencies in Milwaukee County from March through December 2000 than from January through June 2004. For example: Maximus sanctioned 58.9 percent of participants' benefits in the earlier period, when it administered the program in one region. From January through June 2004, Maximus sanctioned 23.2 percent of participants' benefits in Region 5 and 28.9 percent in Region 6.

UMOS sanctioned 54.4 percent of participants'

benefits from March through December 2000, and 28.3 percent from January through June 2004. UMOS administered one region during both time periods.

OIC-GM sanctioned 51.7 percent of participants' benefits from March through December 2000, when it administered the program in one region. From January through June 2004, it sanctioned 32.0 percent of participants' benefits in Region 1, 35.1 percent in Region 3, and 33.8 percent in Region 4.

**[Inappropriate Sanctions]**

Statutes state that participants can be sanctioned only for missed work or training during the portion of the month when they are assigned to these activities as part of community service jobs or transitional placements. Following our 2001 evaluation, DWD determined that inappropriate sanctions most often occurred when custodial parents of infants or participants receiving only case management services were also in community service jobs or transitional placements during the same month. DWD subsequently implemented procedures by which agencies review potentially inappropriate sanctions and issue corrective payments when necessary. It also changed the program's computer system to reduce the possibility of inappropriate sanctions.

In our December 2002 progress review, we found that W-2 agencies had reviewed only 36.1 percent of cases from April 2001 through June 2002 with potentially inappropriate sanctions and had not consistently identified participants who had been inappropriately sanctioned. DWD subsequently provided training to the agencies that had imposed the largest number of inappropriate sanctions and modified its W-2 contracts so that, beginning in 2004, failure to correct an inappropriate sanction in a timely manner can result in an agency penalty of up to $5,000. Through October 2004, DWD had not imposed any monetary penalties on agencies for imposing inappropriate sanctions.

As part of this evaluation, we reviewed cases of potentially inappropriate sanctions issued from July 2002 through December 2003. During that period, DWD identified 470 instances of potentially inappropriate sanctions statewide, and W-2 agencies reviewed these cases to determine whether inappropriate sanctions had, in fact, been imposed. The agencies determined that the sanction amounts had been calculated correctly in 195 cases and

incorrectly in 275 cases. As a result, 23 agencies issued corrective payments totaling $22,482 for the 275 cases in which participants were identified as having been sanctioned inappropriately. Milwaukee County agencies accounted for 219 of the 275 cases, or 79.6 percent of the total.

**[Racial Disparity]**

We reviewed all 195 cases for which the W-2 agencies determined that participants had been sanctioned appropriately. As shown in Table 45, corrective payments were not required in 121 cases, but 26 cases required corrective payments averaging $74 each. The accuracy of sanctions could not be determined in 48 cases because of incomplete or contradictory information in the case files.
We examined sanctioning rates across racial groups during the first six months of 2004, the most recent period for which information was available, and updated information from a December 2002 letter we released on this issue. As shown in Table 49, sanctioning rates varied by racial group, with wider variation in the balance of the state than in Milwaukee County. In December 2004, DWD completed a study that determined participants of different racial groups are sanctioned at different rates.

***We recommend the Department of Workforce Development report to the Joint Legislative Audit Committee by October 1, 2005, on the actions it plans to take in response to its December 2004 study that found different racial groups are sanctioned at different rates.***

**[Report of DWD on January 2006 in Response to Directive of Legislative Audit Bureau]**

***Milwaukee County:***
• In 2000, black CSJ participants in Milwaukee County were sanctioned $38 more than whites. By 2003, the difference between black and white CSJ participants almost disappeared, and in 2004, blacks were sanctioned $13 less than whites.
• For W-2 T participants, racial differences in Milwaukee County were negligible from 2001

***Balance of State***:
• Relatively large racial disparities persisted for participants in CSJ placements. In 2004, the estimated sanction for black participants in CSJ placements in the Balance of State was $71 more than the amount for white participants, the largest disparity during the period studied.
•From 2001 through 2004 there were only slight racial differences for W-2T participants.

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**DWS OPERATIONS MEMO**

**No: 06-29**

**DATE: 06/06/2006**

| | | | | | |
|---|---|---|---|---|---|
| FS | ☐ | MA | ☐ | SC | ☐ |
| CTS | ☐ | CC | ☐ | W-2 | ☒ |
| FSET | ☐ | EA | ☐ | CF | ☐ |
| JAL | ☐ | JC | ☐ | RAP | ☐ |
| WIA | ☐ | Other EP | ☐ | | |

**PRIORITY: HIGH**

TO: **Economic Support Supervisors**
**Economic Support Lead Workers**
**Training Staff**
**Child Care Coordinators**
**W-2 Agencies**
**Workforce Development Boards**
**Job Center Leads and Managers**

FROM: Janice Peters
W-2 Policy Section
Bureau of Wisconsin Works
Division of Workforce Solutions

SUBJECT: **Modification To Notifying Participants Of Payment Reductions And Case Closures Wisconsin Works (W-2) Policy**

***CROSS REFERENCE:*** 2005 Wisconsin Act 25, s. 49.153, Stats.
Operations Memo 04-34, *Wisconsin Works (W-2) Case Closures*
Operations Memo 05-52, *Wisconsin Works Good Cause Policy Change*
Operations Memo 05-54, *Notifying Participants Of Payment Reductions And Case Closures Policy*

***EFFECTIVE DATE:*** Immediately

## *PURPOSE*

The purpose of this memo is to modify the Wisconsin Works (W-2) policy that requires W-2 agencies to notify participants before reducing payments by 20 percent or more or before terminating a participant's eligibility for W-2. This policy is based on a provision in the state biennial budget legislation, 2005 Wisconsin Act 25. In addition, based on questions the Division of Workforce Solutions has received from the W-2 agencies on this policy, this memo also includes information clarifying how this policy is implemented with existing case closure and good cause policies.

## *BACKGROUND*

There are three reports that identify participants who are on track to have their W-2 payments reduced by 20% or more: *W-2 Cases with 20% or More Benefit Reduction - 1st of the Month* report, *W-2 Cases with 20% or More Benefit Reduction - 16th of the Month* report and the *W-2 Cases with 20% or More Benefit Reduction - W-2 Pulldown* report. Currently, if a participant appears on the *1st or 16th of the Month* reports, the agency must notify the W-2 participant of the potential 20 percent or more payment reduction and the reasons for the proposed reduction using the CARES manual letter *W-2 20% PAYMENT REDUCTION LTR* (NWSN) on the first work day following the first time a participant appears on the 1st or 16th of the month reports. Once the manual letter is issued, the agency must then follow up with oral notification within five (5) working days after the mailing date of the written notification.

At initial implementation of this policy, for W-2 participants who appeared on the *W-2 Pulldown* report for the first time and not on the *1st and 16th of the Month* reports, the *Wisconsin Works Payment Statement* (CARES Letter BIL1) served as the written notification. Although this notice informed W-2 participants in writing of their W-2 payment amounts, minus various deductions including deductions for hours missed without good cause, it has been determined that it does not satisfy the notice requirements as outlined in 2005 Wisconsin Act 25, s. 49.153, Stats.

## *POLICY MODIFICATION*

No later than the first working day following the first time a participant appears on the *1st of the Month* report, *16th of the Month* report or the *W-2 Pulldown* report, the W-2 agency must notify the W-2 participant of the potential 20 percent or more payment reduction and the reasons for the proposed reduction. In order to do so, on the first working day following the first time a participant appears on any of the reports (the *1st of the Month* report, *16th of the Month* report or *W-2 Pulldown* report) the W-2 agency must issue the CARES manual letter *W-2 20% PAYMENT REDUCTION LTR* (NWSN). The *Wisconsin Works Payment Statement* (CARES Letter BIL1) can no longer serve as the written notification for those that appear for the first time on the *W-2 Pulldown* report. Once NWSN is issued, the agency must then follow up with oral notification within five (5) working days after the mailing date of the written notification.

## *POLICY CLARIFICATION*

There have been many questions regarding how the notification policy for case closures should be implemented in conjunction with other policies such as the W-2 good cause policy described in Operations Memo 05-52 and the closure policies described in Operations Memo 04-34. It has been asked whether one memo supercedes another memo. That is not the case. When appropriate, all policies must be implemented according to the instructions given.

Some of the more common questions include:

**Do we have to use the notification policy described in Operations Memo 05-54 for *all* case closures?** No. The notification process outlined in Operations Memo 05-54 is used for case closures that are related to noncooperation with program requirements. In addition to the case closure reasons listed in Operations Memo 04-34 such as failure to complete job search, failure to verify requested information, and employability plan expiration, the notification requirement must be completed for case closures due to noncooperation with child support. It would not include case closures due to residency, SSI receipt, only child or youngest child turning 18 year of age, CMC eligibility ending when a child turns 12 weeks of age (see note

below), etc.. Also, as stated in memo 04-34, the case closure polices do not apply to *nonparticipation* or, participants who fail to participate in assigned activities. Currently, a case cannot be closed for failure to participate in assigned activities. In these instances, payment reductions and strikes must be used.

> **NOTE** ➢While it is not necessary to follow the notification policies outlined in this memo or Operations Memos 04-34 and 05-54 when a CMC placement ends, a FEP must still contact CMC participants as they approach their CMC end date to discuss employment and supportive service needs once the CMC placement ends. (See Operations Memos 05-02 and 06-11 for more information on ending CMC placements).

**Does "rectify the deficiency, failure or other behavior" mean that the person can "make up" hours that are missed?** No, it does not necessarily mean that a participant can make up hours missed. In order to rectify payment reductions, the individual can present good cause for the missed hours or, in situations such as a missed EP appointment that could be made up within the 7 working days. For case closures, again, the oral notification allows the FEP to determine if there are any specific good cause reasons or some underlying barriers to explain the noncooperation which led to the case closure. If during a conversation with the participant she says that she will cooperate within the next 7 days, the agency must give her the opportunity to rectify. For example, if the participant could provide verification of information that was previously unverified, attend a meeting that was previously missed, etc., the FEP should allow her to do so within the 7 day timeframe.

**After written notice has been distributed, if a FEP makes the required two attempts to orally notify a participant of a 20% payment reduction or case closure but is unsuccessful in reaching the participant, does the FEP still have to wait 7 working days to allow the participant to rectify the deficiency, failure or other behavior?** The intent of the policy is to allow a reasonable time to rectify, which DWS has defined as 7 workings days. Regardless of whether the person says she will cooperate within those 7 working days, the FEP must wait the full 7 days.

**With regard to a case closure due to an expired employability plan, is the appointment notice that is sent to the participant scheduling the EP development meeting (as instructed in Ops Memo 04-34) sufficient to meet the written notification policy outlined in memo 05-54?** No, the notice scheduling the EP meeting is only notifying the participant that the case may close if the participant does not attend the meeting. As instructed in memo 04-34, if the participant fails to attend the meeting, the FEP must close the case using the case closure instructions provided in the memo. The closure letter that is generated by following the instructions in memo 05-54 serves as the written notification.

**Operations Memo 05-52 says that we may extend the verification due date for up to 30 days from the date the verification is requested. Operations Memo 05-54 states seven working days. Which is it?** W-2 policy allows an agency to extend verification due dates for up to 30 days from the date of request. However, under the notification policy explained in Operations Memo 05-54, the agency is required to give the participant up to 7 working days to rectify. The agency is not required to extend the due date.

In order to assist agencies in understanding how the three policies work together, below are some examples.

**Example 1:** A participant failed to verify school enrollment for her son. Prior to initiating the case closure, the FEP first took the steps outlined in Operations Memo 04-34 to explore potential barriers that may be interfering with a participant's ability to cooperate. Finding no barriers, the FEP initiated the case closure and called the participant within 5 working days of the Notice of Decision being mailed. The customer did not have a good cause reason for not verifying the information the first time and still the FEP did not discover any underlying barriers interfering with a participant's ability to cooperate. However, the participant said that she could get the information by the end of that week, which she did. The FEP then took action in CARES which prevented the case from closing.

**Example 2:** A participant failed to send in her current bank statement. Prior to initiating the case closure, the FEP first took the steps outlined in Operations Memo 04-34 to explore potential barriers that may be interfering with a participant's ability to cooperate. Finding no barriers, the FEP initiated the case closure and called the participant within 5 working days of the Notice of Decision being mailed. The customer did not have a good cause reason for not verifying the information the first time and still the FEP did not discover any underlying barriers interfering with a participant's ability to cooperate. The participant said that she could get the information by the end of that week but failed to do so, even within 7 working days. The FEP allowed the case to close on the effective date indicated in the Notice of Decision. The FEP does not need to take any further action on the case with regard to the notification process as that process was already complete.

**Example 3:** Participant is transferred to a new W-2 agency. The FEP, upon review of the case, notices that the EP is due to expire within the month. The FEP sends the participant an appointment notice for a mandatory employability plan review. The appointment notice clearly indicates that the EP is expiring and that if the participant does not appear for the appointment, eligibility for W-2 will end. This appointment is scheduled for 10 days prior to the current EP expiration date. The participant did not appear for the scheduled appointment. Deciding to close the case, the FEP first took the steps outlined in Operations Memo 04-34 to explore potential barriers that may be interfering with a participant's ability to cooperate, initiated the case closure according to the instructions in memo 04-34 and attempted to contact the participant two times with no success. The case then closed for noncooperation.

## *TWENTY PERCENT REDUCTION REPORTS UPDATE*

Based on comments from the W-2 agencies, the Division of Workforce Solutions (DWS) is considering changes to the three reports referenced above. In order to meet the needs of the agencies, this topic will be discussed once the W-2 Reports Users Group reconvenes. In the meantime, new comments or suggestions on updating the reports can be sent to Bonnie Nagel at bonnie.nagel@dwd.state.wi.us

## *CONTACTS*

For Policy Related Questions: BW-2 Regional Office Staff

For CARES Processing Questions: BHCE CARES Information & Problem Resolution Center

*Program Categories – FS – FoodShare, MA – Medicaid, SC – Senior Care, CTS – Caretaker Supplement, CC – Child Care, W-2 – Wisconsin Works, FSET – Food Stamp Employment and Training, CF – Children First, EA – Emergency Assistance, JAL – Job Access Loan, JC - Job Center Programs, RAP – Refugee Assistance Program, WIA – Workforce Investment Act, Other EP – Other Employment Programs.

DWD/DWS/BW-2/MMM

State of Wisconsin
**Department of Workforce Development**

# W-2 Sanction
# Good Cause Exceptions and Notice of Payment Reductions
# Chapter DWD 12

The Wisconsin Department of Workforce Development proposes an order to repeal and recreate DWD 12.20 and to create DWD 12.195, relating to Wisconsin Works sanction good cause exceptions and notice of payment reductions and affecting small businesses.

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## Analysis Prepared by the Department of Workforce Development

**Statutory authority:** Sections 49.148, 49.153 (2), 103.005 (17), and 227.11 (2), Stats.
**Statutes interpreted:** Sections 49.148, 49.151, and 49.153, Stats.
**Related statute or rule:** 45 CFR 261.14, 261.15, and 261.60

**Explanation of agency authority.** Section 49.153 (1), Stats., as created by 2005 Wisconsin Act 25, provides that before taking any action against a Wisconsin Works (W-2) participant that would result in a 20 percent or more reduction in the participant's benefits or in termination of the participant's W-2 eligibility, a W-2 agency must provide the W-2 participant with written notice of the proposed action and the reasons for the proposed action; make reasonable attempts to explain to the W-2 participant orally in person or by phone the reasons for the proposed action; and allow the participant a reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action. Section 49.153 (2), Stats., provides that the Department shall promulgate rules that establish the procedures for the notice and explanation and that define "reasonable attempts" and "reasonable time" as used in s. 49.153 (1), Stats.

Section 49.148, Stats., provides that for every hour that a W-2 participant in a community service job or transitional placement fails to participate in an assigned activity without good cause, the participant's grant amount shall be reduced by $5.15. Good cause is to be determined by the W-2 financial and employment planner (FEP) in accordance with rules promulgated by the department. Good cause shall include required court appearances for a victim of domestic abuse.

Section 49.151, Stats., provides that a participant who refuses to participate 3 times in any W-2 employment position component is ineligible to participate in that component. Among other ways, a participant demonstrates a refusal to participate by failing to appear for an interview or an assigned activity without good cause as determined by the W-2 agency or voluntarily leaves appropriate employment or training without good cause as determined by the W-2 agency.

**Summary of the proposed rules.** The proposed rule on notice of W-2 payment reductions provides that before taking any action against a participant that would result in a 20 percent or more reduction in the participant's benefits or in termination of the participant's eligibility to participate in Wisconsin Works due to noncooperation with W-2 program requirements, a W-2 agency shall provide to the participant written notice of the proposed action and of the reasons for the proposed action. The written notice of a 20 percent or more reduction in the participant's benefits shall be issued by the W-2 agency no later than the first business day following notification to the W-2 agency of participants subject to a potential 20 percent or more payment reduction. The notice of termination of W-2 eligibility shall be issued no later than 10 days prior to the end of eligibility.

Within 5 business days after providing written notice, the W-2 agency shall explain to the participant orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action. Reasonable attempts means at least 2 attempts to contact the participant orally in person or by phone. The explanation by the W-2 agency will inform the participant which requirements were not met or which activities were missed that resulted in a 20 percent or more reduction or termination of eligibility; discuss the participant's reasons for not complying with participation requirements or not cooperating with other program requirements; explain the opportunity to present good cause for failing to participate or cooperate; and inform the participant of the right to appeal the agency decision, if necessary.

After providing the notice and the explanation or attempting to provide an explanation, the W-2 agency shall allow the participant a reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action. For purposes of this paragraph, "reasonable time" means 7 business days after the oral notification or after the last attempt to make oral notification.

In addition, the Department proposes to amend the rule on good cause for failing to comply with W-2 participation requirements. The current rule provides that good cause for failing to comply with the W-2 participation requirements includes a required court appearance including a required court appearance for a victim of domestic abuse, unavailability of child care that is necessary to participate in required activities, and other circumstances beyond the control of the participant as determined by the FEP. The W-2 participant must provide timely notification of the good cause reason to the FEP.

The proposed rule adds the following circumstances as good cause for not complying with W-2 participation requirements:

- Lack of transportation with no reasonable alternative, as determined by the FEP. In determining the reasonableness of transportation alternatives, the FEP shall consider the length of the participant's commute, participant safety, the cost of the transportation relative to the participant's income, and other relevant factors.
- Participant or W-2 group member's illness, injury, disability, or incapacity.
- Accommodations that have been determined necessary in a formal assessment are not available to allow the participant to complete the assigned activity.
- Conflict with another assigned W-2 activity or job search attempts.
- Inclement weather that impedes transportation or travel.

- School emergency.
- Domestic violence issues.
- Observance of a religious holiday.
- Routine medical or school appointments that cannot be scheduled at times other than during assigned activities.
- Child's school holiday, excluding summer break.
- Any day that the worksite or training site is closed due to a site-specific holiday.
- Death in the participant's immediate family. Immediate family means a participant's spouse, nonmarital co-parent, step-parents, grandparents, foster parents, children, step-children, grandchildren, foster children, brothers and their spouses, sisters and their spouses, aunts, uncles, sons-in-law, daughters-in-law, cousins, nieces and nephews of the participant or the participant's spouse or nonmarital co-parent, and other relatives of the participant or the participant's spouse or nonmarital co-parent if these other relatives reside in the same household as the participant. A participant may be granted good cause for no more than 3 business days if only local travel is necessary to attend the funeral services. A participant may be granted good cause for no more than 7 business days if long-distance travel is required to attend the funeral services. In general, the good cause period may not exceed the week following the death of a member of the participant's immediate family, but the FEP may lengthen the timeframe for good cause depending upon individual circumstances.
- Other circumstances beyond the control of the participant, but only as determined by the FEP. The FEP shall consider what a reasonable employer may allow under its absence policy and hardships that make completing activities and notifying the agency of missed activities more difficult for W-2 participants.

The participant shall notify the FEP of the good cause reason within 7 business days after an absence from a required activity to prevent a payment reduction. A FEP may request written documentation before accepting a good cause reason for a participant's absence from required activities if the participant has a pattern of absences of more than 3 consecutive days or more than 5 days in a rolling 30-day period and the FEP has reason to believe that the participant is misusing the good cause policy. An absence means being absent from any one required activity. A pattern of absences may include past absences for which a good cause reason was accepted.

**Summary of factual data and analytical methodologies.** The proposed rule on notice of W-2 payment reductions or loss of eligibility is based on requirements in s. 49.153, Stats., as created by 2005 Wisconsin Act 25. In order to meet the statutory requirement that written and oral notification be made prior to taking action regarding sanctions or case closures, the Department had to implement stringent timeframes to ensure that these notifications occur before the action is finalized in the Client Assistance for Re-employment and Economic Support (CARES) automation system. Prior to this statutory change, participant notifications took place after the action had already been taken.

The proposed good cause amendments are based on the recommendations in the *W-2 Sanctions Study* released by the Department in December 2004 and the Temporary Assistance to Needy Families (TANF) rules issued February 5, 2008. The purpose of the

*W-2 Sanctions Study* was to provide information to support the Department's commitment to ensure that W-2 sanctions are not applied due to factors such as an individual's race, ethnicity, geographic location, employment barriers, or other issues that have not been adequately identified or addressed by the participant's FEP. The *W-2 Sanctions Study* incorporated the findings of a steering committee that consisted of W-2 agency administrators, state administrators, representatives of client advocacy groups, and academics.

**Comparison with federal regulations.** If an individual refuses to engage in required work, the state must reduce or terminate the amount of assistance payable to the family, subject to any good cause or other exceptions the state may establish. The state must, at a minimum, reduce the amount of assistance otherwise payable to the family pro rata with respect to any period during the month in which the individual refuses to work. The state may impose a greater reduction, including terminating assistance. A state may not reduce or terminate assistance for a single custodial parent caring for a child under age six if appropriate and affordable child care is unavailable within a reasonable distance from the parent's home or worksite.

The TANF rules issued February 5, 2008, provide that a state may count a participant's excused absences for holidays and a maximum of 10 additional days of excused absences in any 12-month period in the federal participation rate. The rule commentary explains that this policy takes into consideration varying worksite and educational practices as well as unexpected events that cause a worksite to close or an individual to miss scheduled hours. A state's flexibility to excuse other absences is not limited. The required federal participation rate is 50 percent to allow the state to balance the goals of the program, the needs of the family, and obligations under the Americans with Disabilities Act.

**Comparison with rules in adjacent states.** Minnesota. When a participant fails without good cause to comply with program requirements, a notice of intent to sanction is sent to the participant specifying the requirements that were not complied with, informing the participant that the county agency will impose the sanctions if the participant does not come into compliance within a minimum of 10 days, specifying what must be done to come into compliance, and informing the participant of the opportunity to request a fair hearing or conciliation conference. Within the 10 days, the participant may prevent a sanction by complying with program requirements, demonstrating that she is already in compliance, showing good cause for not complying with the requirements, or requesting a fair hearing or conciliation conference. If the participant does not do any of these within 10 calendar days of the mailing of the notice of intent to sanction, the job counselor must notify the county agency that the assistance payment should be reduced. The county must send a notice of adverse action to the participant at least 10 days before a sanction is imposed. The notice must inform the participant of the sanction that will be imposed, the reasons for the sanction, the effective date of the sanction, and the participant's right to have a fair hearing. If the participant requests a fair hearing or a conciliation conference, sanctions will not be imposed until there is a determination of noncompliance.

Good cause for failure to comply with program requirements exists when:

(1) appropriate child care is not available;

(2) the job does not meet the definition of suitable employment;

(3) the participant is ill or injured;

(4) a member of the assistance unit, a relative in the household, or a foster child in the household is ill and needs care by the participant that prevents the participant from complying with the employment plan;

(5) the participant is unable to secure necessary transportation;

(6) the participant is in an emergency situation that prevents compliance with the employment plan;

(7) the schedule of compliance with the employment plan conflicts with judicial proceedings;

(8) a mandatory MFIP meeting is scheduled during a time that conflicts with a judicial proceeding or a meeting related to a juvenile court matter, or a participant's work schedule;

(9) the participant is already participating in acceptable work activities;

(10) the employment plan requires an educational program for a caregiver under age 20, but the educational program is not available;

(11) activities identified in the employment plan are not available;

(12) the participant is willing to accept suitable employment, but suitable employment is not available; or

(13) the participant documents other verifiable impediments to compliance with the employment plan beyond the participant's control.

Illinois. No sanction will be imposed the participant is sent a written notice scheduling a good cause determination/reconciliation meeting to determine whether the participant had good cause for his or her failure to comply with requirements and the participant has either failed to attend the meeting or failed to show good cause. If the participant failed to show good cause, the reconciliation process will continue to enable resolving disputes related to participation. The written notice shall explain the purpose of the appointment and the consequences for failure to attend or failure to show good cause. A sanction against participants may be rescinded at any level of the sanction process up through and until the final agency decision, including any appeal hearing, if the participant establishes good cause. The notice issued for a sanction shall include a description of the acts of noncooperation, including dates where applicable and a statement that the participant's acts were without good cause.

Examples of good cause include but are not limited to:

1) temporary illness for its duration;

2) court required appearance or temporary incarceration;

3) death in the family;

4) extreme inclement weather;

5) lack of any supportive service, even though the necessary service is not specifically provided under TANF, to the extent the lack of the needed service presents a significant barrier to TANF participation;

6) if an individual is engaged in employment and/or training that is consistent with the employment related goals of the program, if such employment and training is later approved by TANF staff;

7) failure of department staff or contractor to correctly forward the information to TANF staff;

8) failure of the participant to cooperate because of attendance at a test or a mandatory class or function at an educational program, when an education/training program is officially approved by TANF;

9) failure of the participant due to his or her illiteracy;

10) failure of the participant because it is determined that he or she should be in a different TANF activity;

11) non-receipt by the participant of a notice advising him or her of a participation requirement. If the non-receipt of mail occurs frequently, the department shall explore an alternative means of providing notices of participation requests to participants;

12) non-comprehension of written and/or oral English;

13) child care (or day care for an incapacitated individual living in the same home as a child) is necessary for the participation or employment and such care is not available for a child under age 13;

14) failure to participate in a TANF activity due to a verified scheduled job interview, medical appointment for the participant or a household member, or a school appointment for the participant or his or her children;

15) the individual is homeless. Homeless individuals have no current residence and no expectation of acquiring one in the next 30 days. This includes individuals residing in overnight and temporary shelters. This does not include individuals who are sharing a residence with friends or relatives on a continuing basis;

16) documented circumstances beyond the control of the participant which prevent the participant from completing program requirements; or

17) failure to participate in a TANF work activity because of violations of workplace rights due TANF recipients as determined by the U.S. Department of Labor.

Iowa. The department must send a reminder, request, or other notification when there is a potential participation issue. The reminder or request shall identify the participation issue, clarify expectations, attempt to identify barriers to participation, explain the consequences of the limited benefit plan, and offer supervisory intervention. If the department proposes to cancel, reduce, or suspend assistance, it shall give at written notice at least ten calendar days before the date the action would become effective. The notice must include a statement of what action is being taken, the reasons for the intended action, the manual chapter number and subheading supporting the action and the corresponding rule reference, an explanation of the appellant's right to appeal, and notice that assistance shall not be suspended, reduced, restricted, or canceled, or other proposed adverse action be taken pending a final decision on a timely appeal

(1) Acceptable instances when a person is excused from participation.

a. Illness. When a participant is ill more than three consecutive days or if illness is habitual, staff may require medical documentation of the illness.

b. Required in the home due to illness of another family member. Staff may require medical documentation for the same reasons as when a participant is ill.

c. Family emergency, using reasonable standards of an employer.

d. Bad weather, using reasonable standards of an employer.

e. Absent or late due to participant's or spouse's job interview.

f. Leave due to the birth of a child.

(2) Acceptable instances when a person is excused from participation or for refusing or quitting a job or limiting or reducing hours or for discharge from employment due to misconduct.

a. Required travel time from home to the job or available work experience or unpaid community service site exceeds one hour each way. This includes additional travel time necessary to take a child to a child care provider.

b. Work offered is at a site subject to a strike or lockout, unless the strike has been enjoined or unless an injunction has been issued.

c. Violates applicable state or federal health and safety standards or workers' compensation insurance is not provided.

d. Job is contrary to the participant's religious or ethical beliefs.

e. The participant is required to join, resign from or refrain from joining a legitimate labor organization.

f. Work requirements are beyond the mental or physical capabilities as documented by medical evidence or other reliable sources.

g. Discrimination by an employer based on age, race, sex, color, handicap, religion, national origin or political beliefs.

h. Work demands or conditions render continued employment unreasonable, such as working without being paid on schedule.

i. Circumstances beyond the control of the participant, such as disruption of regular mail delivery.

(3) Jobs that participants have the choice of refusing or quitting or limiting or reducing, or instances when participants are excused for discharge from the job due to misconduct.

a. Employment change or termination is part of the family investment agreement.

b. Job does not pay at least the minimum amount customary for the same work in the community.

c. Employment is terminated in order to take a better-paying job, even though hours of employment may be less than current.

d. The employment would result in the family of the participant experiencing a net loss of cash income. Net loss of cash income results if the family's gross income less necessary work-related expenses is less than the cash assistance the person was receiving at the time the offer of employment is made.

e. The employment changes substantially from the terms of hire, such as a change in work hours, work shift, or decrease in pay rate.

(4) Instances when problems of participation could negatively impact the client's achievement of self-sufficiency. There may be instances where staff determine that a participant's problems of participation are not described, but may be circumstances which could negatively impact the participant's achievement of self-sufficiency.

Michigan. For the first instance that a worker determines a recipient to be noncompliant the department shall notify the recipient in writing within 3 business days of determining that the recipient is noncompliant. The notification shall include the reason the recipient has been determined to be noncompliant, the penalty that will be imposed for the noncompliance an opportunity for the recipient to meet in person with a caseworker within 10 business days of the determination. If the recipient meets with a caseworker within 10 business days, the caseworker and the recipient shall review and

modify the family self-sufficiency plan as determined necessary. The caseworker shall discuss and provide an official warning regarding penalties that shall be imposed if the recipient continues to be noncompliant. The caseworker shall inform the recipient that he or she must verify compliance with his or her family self-sufficiency plan within 10 business days.

For any instance of noncompliance, the recipient shall receive not less than 12 days' notice before penalties are imposed. If the recipient demonstrates good cause for the noncompliance during this period, a penalty shall not be imposed. Good cause is one or more of the following:

- The applicant or recipient suffers from a temporary debilitating illness or injury or an immediate family member has a debilitating illness or injury and the applicant or recipient is needed in the home to care for the family member.
- The applicant or employee lacks child care.
- Either employment or training commuting time is more than 2 hours per day or is more than 3 hours per day when there are unique and compelling circumstances, such as a salary at least twice the applicable minimum wage or the job is the only available job placement within a 3 hour commute per day, not including the time necessary to transport a child to child care facilities.
- Transportation is not available to the participant at reasonable cost.
- The employment or participation involves illegal activities.
- The applicant or recipient is physically or mentally unfit to perform the job, as documented by medical evidence or by reliable information from other sources.
- The applicant or recipient is illegally discriminated against on the basis of age, race, disability, gender, color, national origin, or religious beliefs.
- Credible information or evidence establishes one or more unplanned or unexpected events or factors that reasonably could be expected to prevent, or significantly interfere with, the individual's compliance with employment and training requirements, such as domestic violence, health or safety risk, religion, or homelessness.
- The applicant or recipient quit employment to obtain comparable employment.

**Effect on small businesses.** The proposed rules affect private W-2 agencies but do not have substantial economic effect on these agencies.

**Analysis used to determine effect on small businesses.** The notice of W-2 payment reductions or case closures does increase the workload of W-2 agency financial and employment planners (FEPs), but there is no significant increase in the cost of administering the W-2 program due to either the notice of payment reductions or good cause amendments.

**Agency contact person**. Margaret McMahon, W-2 Policy Section, margaret.mcmahon@dwd.state.wi.us, (608) 266-5899.

**Place where comments are to be submitted and deadline for submission.**
Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Department of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946, or elaine.pridgen@dwd.state.wi.us. The comment deadline is May 16, 2008.

**SECTION 1. DWD 12.195 is created to read:**

**DWD 12.195 Notice before taking certain actions.** Before taking any action against a participant that would result in a 20 percent or more reduction in the participant's benefits or in termination of the participant's eligibility to participate in Wisconsin Works due to noncooperation with W-2 program requirements, a W-2 agency shall do all of the following:

**(1)** The W-2 agency shall provide to the participant written notice of the proposed action and of the reasons for the proposed action. The written notice shall be issued on or before the following dates:

(a) The written notice of a 20 percent or more reduction in the participant's benefits shall be issued by the W-2 agency no later than the first business day following notification to the W-2 agency of participants subject to a potential 20 percent or more payment reduction.

(b) The notice of termination of W-2 eligibility shall be issued no later than 10 days prior to the end of eligibility.

**(2)** Within 5 business days after providing written notice, the W-2 agency shall explain to the participant orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action.

(a) For purposes of this paragraph, "reasonable attempts" means at least 2 attempts to contact the participant orally in person or by phone.

(b) The explanation by the W-2 agency shall do all of the following:

1. Inform the participant which requirements were not met or which activities were missed that resulted in a 20 percent or more reduction or termination of eligibility.

2. Discuss the participant's reasons for not complying with participation requirements under s. DWD 12.16 or not cooperating with other program requirements under Chapter DWD 12.

3. Explain the opportunity to present good cause for failing to participate or cooperate.

4. Inform the participant of the right to appeal the agency decision, if necessary.

**(3)** After providing the notice under sub. (1) and the explanation or the attempts to provide an explanation under sub. (2), the W-2 agency shall allow the participant a reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action. For purposes of this subsection, "reasonable time" means 7 business days after the oral notification or after the last attempt to make oral notification.

**SECTION 2. DWD 12.20 is repealed and recreated to read:**

**DWD 12.20 Determination of good cause. (1)** GOOD CAUSE CIRCUMSTANCES. The FEP shall determine if a W–2 employment participant had good cause for not complying with the W–2 participation requirements. No good cause shall exist unless the participant provides timely notification of the good cause reason to the FEP. Good cause for failing to comply with the W–2 participation requirements shall be any of the following circumstances:

(a) A required court appearance, including a required court appearance for a victim of domestic abuse.

(b) Necessary child care is unavailable and the W–2 agency is unable to provide child care or refer the participant to alternate child care arrangements.

(c) Lack of transportation with no reasonable alternative, as determined by the FEP. In determining the reasonableness of transportation alternatives, the FEP shall consider the length of the participant's commute, participant safety, the cost of the transportation relative to the participant's income, and other relevant factors.

(d) Participant or W-2 group member's illness, injury, disability, or incapacity.

(e) Accommodations that have been determined necessary in a formal assessment are not available to allow the participant to complete the assigned activity.

(f) Conflict with another assigned W-2 activity or job search attempts.

(g) Inclement weather that impedes transportation or travel.

(h) School emergency.

(i) Domestic violence issues.

(j) Observance of a religious holiday.

(k) Routine medical or school appointments that cannot be scheduled at times other than during assigned activities.

(L) Child's school holiday, excluding summer break.

(m) Any day that the worksite or training site is closed due to a site-specific holiday.

(n) Death in the participant's immediate family. For purposes of this paragraph:

1. "Immediate family" means a participant's spouse, nonmarital co-parent, step-parents, grandparents, foster parents, children, step-children, grandchildren, foster children, brothers and their spouses, sisters and their spouses, aunts, uncles, sons-in-law, daughters-in-law, cousins, nieces and nephews of the participant or the participant's

spouse or nonmarital co-parent, and other relatives of the participant or the participant's spouse or nonmarital co-parent if these other relatives reside in the same household as the participant.

2. A participant may be granted good cause for no more than 3 business days if only local travel is necessary to attend the funeral services. A participant may be granted good cause for no more than 7 business days if long-distance travel is required to attend the funeral services. In general, the good cause period may not exceed the week following the death of a member of the participant's immediate family, but the FEP may lengthen the timeframe for good cause depending upon individual circumstances.

(o) Other circumstances beyond the control of the participant, but only as determined by the FEP. The FEP shall consider what a reasonable employer may allow under its absence policy and hardships that make completing activities and notifying the agency of missed activities more difficult for W-2 participants.

**(2)** TIMELY NOTIFICATION. The participant shall notify the FEP of the good cause reason within 7 business days after an absence from a required activity to prevent a payment reduction under s. 49.148 (1) (b) 1., (b) 3., or (c), Stats.

**(3)** WRITTEN DOCUMENTATION. (a) In making a good cause determination, the FEP may require that the W-2 employment position participant provide written documentation that good cause existed before accepting a good cause reason for a participant's absence from required activities if both of the following apply:

1. The participant has a pattern of absences of more than 3 consecutive days or more than 5 days in a rolling 30-day period. An absence means being absent from any one

required activity. A pattern of absences may include past absences for which a good cause reason was accepted.

2. The FEP has reason to believe that the participant is misusing the good cause policy.

**SECTION 3.** EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

January 30, 2006

Roberta Gassman, Secretary
Department of Workforce Development
201 East Washington Avenue
P. O. Box 7946
Madison, Wisconsin 53707-7946

**Re: Notifying Participants of Payment Reductions and Case Closures**

Dear Secretary Gassman:

The 2005-06 Biennial Budget Bill creates Section 49.153 Wis. Stats. entitled "Notice Before Taking Certain Actions." That section requires W-2 agencies to take certain steps before taking any action that would result in a 20% or more reduction in a W-2 participant's monthly payment or in the termination of his/her eligibility to participate in the W-2 program. The W-2 agency must:

1. provide written notice to the participant of the proposed action and the reasons for the action,

2. after providing written notice, explain to the participant orally in person or by phone, or make reasonable attempts to explain to the participant orally in person or by phone, the proposed action and the reasons for the proposed action, and
3. allow the participant a reasonable time to rectify the deficiency, failure, or other behavior to avoid the proposed action.

The department has attempted to implement this new statutory requirement through Operations Memo 05-54. However, that attempt falls short of complying with state law.

The most glaring deficiency in the instructions to the W-2 agencies lies with the last section. In the Operations Memo DWD advises the W-2 agencies to allow the participant seven (7) working days after the oral notification (or last attempt to notify) to rectify the deficiency, failure or other behavior. However, the only methods identified to rectify the deficiency, failure or other behavior are for the participant to present good cause documentation for his/her failure to participate or through the identification of barriers that prevented the participant from participating. However, these are not the exclusive methods to rectify the deficiency, failure or other behavior.State law contemplates much more.

Rectify, by common definition, means to remedy, correct, or to make, put or set right. It is not simply providing a good cause reason information for failing to participate. It is the opportunity to remedy or correct the deficiency, failure or other behavior. If the W-2 agency is proposing to close a case because the participant missed appointments to update employability plans, the participant must be given the opportunity for a new appointment to update the plan. If the W-2 agency is proposing to reduce a participant's monthly payment because she missed work hours, she must be given the opportunity to make up those hours. The statutory language is clear. It requires the W-2 agency to allow the participant a reasonable time to rectify the deficiency, failure or other behavior to avoid the sanction or termination, not simply the opportunity to provide good cause information.

The second deficiency lies with notice to participants. According to the Operations Memo, notice will be provided after the first and sixteenth of the month based on reports identifying participants with potential sanctions of 20% or more. These notices require the worker to list activities, numbers of hours and dates of nonparticipation. However, the Operations Memo also indicates that some participants will receive only the CARES generated payment statement at the end of the month. This CARES notice does not constitute prior notice and does not contain specific information regarding activities, hours and dates of non-participation. As a result, participants will have no way of knowing what "deficiencies" they need to address.

All participants should receive prior notice detailing the action to be taken and the reasons for the action. In addition, the notice should be modified to advise participants how they can "rectify the deficiency, failure or other behavior to avoid the proposed action" and the date by which they must do so.

The W-2 program has consistently been plagued by a high sanction level. Yet sanctions have had little or no discernible impact on participation and employment levels. The new legislation provides the W-2 agencies with the opportunity to engage participants in a positive manner and address non-participation at an earlier stage. But this can only happen if the Budget Bill provisions are properly implemented.

The department should address this matter immediately. Therefore, I am requesting that it be placed on the agenda for the next Sounding Board meeting

scheduled for February 6, 2006.

Very truly yours,

Patricia DeLessio
Attorney at Law

PDL/eca

cc: Howard Bernstein, DWD, Office of Legal Counsel
Brenda Bell-White, DWD Area Administrator

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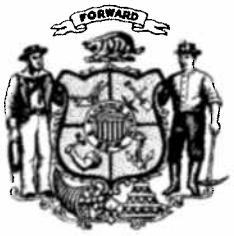
FORWARD

Section 59.075 (1), Stats., provides:

"(1) Sections 66.40 to 66.404 shall apply to counties, except as otherwise provided in this section, or as clearly indicated otherwise by the context."

A county board may create a county housing authority pursuant to secs. 66.40-66.404, Stats.

Section 66.40 (4), Stats., provides that when a housing authority is created, it is a body politic.

In 45 OAG 180 (1956) and 37 OAG 626 (1948), it was stated that once created, the authority was not an arm, department, or agency of the municipality which created it but is an independent entity separate and distinct from such municipality.

Section 66.404 (2), Stats., provides that the municipality or county can advance money to such housing authority for administrative expenses during the first year or appropriate money thereafter. Such funds may be treated as a donation or a loan as the municipality shall determine. Generally speaking, once received by the housing authority, such funds are beyond the control of the county and are to be used by the housing authority to pay its lawful obligations.

Sections 66.40 (5) (a), Stats., provides that the authority shall be governed by five commissioners, not more than two of which may be county officers.

Such commissioners, including county board members serving as such, are only permitted to be paid the amounts provided by law. Section 66.40 (5) (b), Stats., provides in part:

"* * * A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties."

I construe that provision as prohibiting the authority or the county from paying any commissioner compensation in the form of per diem or salary for housing authority services.

The authority could pay such commissioners expense amounts actually incurred or a reasonable flat sum per month to cover all expenses. Per diem is compensation whereas reimbursement for expenses is not. See *Geyso v. Cudahy* (1967), 34 Wis. 2d 476, 149 N.W. 2d 611.

RWW:RJV



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*Statutes—Legislation*—The legislature intended that emergency rules, pursuant to sec. 227.027, Stats., would only have effect for 120 days. Therefore, an emergency rule may not be perpetuated by simply refiling it in accordance with subsec. (2) of sec. 227.027, before or after the 120 days provided in subsec. (1) lapse.

December 19, 1973.

JAMES J. BURKE
*Revisor of Statutes*

You have requested my opinion with respect to sec. 227.027, Stats., regarding emergency rules.

As I understand it, an administrative agency or department recently filed emergency rules with your office. The recently filed rules are identical to previously filed emergency rules due to expire on the date the second set was filed. The agency in question advised that the emergency situation that prompted the initial filing is ongoing and that normal rule making procedures would not be completed for a number of months.

The question you pose is twofold. First, does the language of sec. 227.027, Stats., preclude the agency from refiling emergency rules so as to maintain their effectiveness beyond the intial 120-day period provided for? Second, if not specifically prohibited, is maintaining the effectiveness of an emergency rule beyond 120 days contrary to legislative intent?

In my opinion, although extending the effectiveness of an emergency rule by refiling it in accordance with subsec. (2), is not clearly prohibited by the language of subsec. (1) of sec. 227.027, Stats., it is contrary to the legislative intent of the statute.

Unfortunately, we are without judicial guidance on the meaning of sec. 227.027, Stats. The section has not yet been subjected to

judicial interpretation. Consequently, we have only the language of the statute itself and its legislative history to guide us.

Subsection (1) of sec. 227.027, Stats., provides in its relevant part:

". . . An emergency rule takes effect upon publication in the official state paper or on such later date as is specified in a statement published with the rule, *but remains in effect only for a period of 120 days.*" (Emphasis supplied.)

The emphasized phrase, in and of itself, does not clearly preclude extending the effectiveness of an emergency rule by simply refiling it in accordance with subsec. (2). But, the foreseeable consequence of interpreting the statute so as to allow refiling is that administrative agencies could completely avoid the normal notice, hearing, and publication requirements of ch. 227, simply by systematically refiling emergency rules. This cannot be what the legislature intended.

Section 227.027, Stats., was enacted as a part of the second phase of the development of Wisconsin's comprehensive administrative procedure law. Chapter 221, sec. 13, Laws of 1955. The first phase (ch. 375, Laws of 1943), was primarily devoted to establishing procedures for administrative contested case proceedings and judicial review thereof. Chapter 221, Laws of 1955, dealt with rule making. See Helstad, *New Law On Administrative Rule Making*, 1956 Wis. L. Rev. 407. The 1955 act was the product of extensive deliberations by a specially established Committee on Administrative Rule Making in conjunction with the Wisconsin Legislative Council.

The degree to which public participation should be guaranteed in rule making procedures posed a fundamental problem for the Committee. Despite the theoretical desirability of an unswerving hearing requirement, it was recognized that there would be situations where holding hearings in advance of a rule's effectiveness would be impracticable or contrary to public well-being. In seeking a means to reconcile the conflict between guaranteed public input and the practical difficulties of exigent circumstances, the Committee looked into the experience of other states. In *Legislative Council Committee On Administrative Rule Making—Staff*



*Report on Public Participation in Rule Making, April 22, 1954*, the following recommendation was made at page 14:

". . . Ohio and Virginia seek to induce compliance with notice and hearing procedures by providing that emergency rules may remain in effect for only a specified number of days unless notice and hearing procedures are complied with. This is perhaps the best type of provision if the aim is to prevent an administrative agency from using the emergency provision where no real emergency exists."

This mechanism was eventually adopted by the Committee and incorporated into the bill recommended to the legislature. On page 29 of *Draft of Bill on Administrative Rule Making—Submitted by the Committee on Administrative Rule Making to the Wisconsin Legislative Council, December 28, 1954*, the following note appears after the language of proposed sec. 227.027 (identical to sec. 227.027 as finally enacted):

"NOTE. The requirement of notice and public hearing on rule making plus the delay of the effective date of a rule until the first day of the month following publication in the monthly register may, under certain circumstances, mean that 2 to 3 months will elapse from the time an agency commences formal rule-making proceedings until the rule can be put into effect. There are situations wherein rules must take effect without such delay. A relatively recent example was the department of agriculture's rule restricting and regulating the shipment of hogs during a threatened epidemic of vesicular exanthema. This section therefore provides that emergency rules may take effect immediately upon their publication in the official state paper. This satisfies constitutional publication requirements and allows the rule to become effective without delay. Sub. (2) prescribes certain supplementary publicity procedures, but the validity of the rule is not dependent on compliance with these procedures. Emergency rules, however, remain in effect for a period of only 120 days. By the end of that period the agency will have had ample time to adopt a rule pursuant to regular rule-making procedures if such a rule is needed. This limitation on the effectiveness of an emergency rule should discourage the use of the emergency procedure to circumvent regular procedures, except in actual emergencies."

I view this language as a clear expression of intent that the effectiveness of an emergency rule may not be extended beyond the initial 120-day effective period by simply refiling it pursuant to sec. 227.027 (2), Stats. The 120-day period was intended to afford an agency the requisite time to adopt rules pursuant to the normal procedures of ch. 227, if the agency perceives that what begins as an emergency presents the need for rules of lasting effect. Therefore, I conclude that an emergency rule may only have effect for 120 days.

RWW:CAB

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*Register in Probate*—Filing fees provided in sec. 253.34 (1) (a), Stats., should be charged in informal probate proceedings authorized by ch. 865, Stats., created by ch. 39, Laws of 1973.

December 19, 1973.

M. G. EBERLEIN, *County Judge*
*Shawano-Menominee County Court*

You have requested my opinion whether the filing fees provided in sec. 253.34 (1) (a), Stats., can be charged in informal probate proceedings authorized by ch. 865, Stats., as created by ch. 39, Laws of 1973.

I am of the opinion that they should be charged and that the probate registrar should cooperate with the register of probate to see that they are collected.

Section 253.34 (1) (a), Stats., provides that the register of probate shall collect the prescribed fees:

"(a) *For filing a petition whereby any proceeding in estates of deceased persons is commenced* * * *. Such fees shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate in such proceedings * * *. *The fees* * * * *shall also be paid in survivorship proceedings* * * *." (Emphasis added.)

It is my opinion that the fees are applicable to proceedings which are *within the jurisdiction of the county court*, whether they are



proceedings formally before the court, or whether they are before the probate registrar and only subject to latent or indirect supervision of the court.

In 58 OAG 12 (1969), it was stated that the fees were applicable to an *inter vivos* trust *where a proceeding in county court was necessary* to determine the inheritance tax on the interest passing.

In an opinion to the District Attorney for Juneau County dated August 23, 1973, it was stated that the register of deeds is not authorized to collect and forward to the county court any of the fees set forth in sec. 253.34 (1) (a), Stats., under sec. 867.045, Stats., created by ch. 41, Laws of 1973, since such proceedings were not in county court. It was stated that if it were necessary for the survivors to go into county court for special purposes, it would be for the register of probate to collect appropriate fees at that time. In enacting ch. 41, Laws of 1973, it should be noted that the legislature provided, by creation of sec. 59.57 (10m), Stats., for a $10 fee for the register of deeds for recording certificates and preparing and mailing documents under sec. 867.045, Stats.

Chapter 865, Stats., as created by ch. 39, Laws of 1973, makes no reference to filing fees to be collected in informal administration of estates. However, in view of the special fee provision contained in sec. 59.57 (10m), Stats., applicable to administrative termination of joint tenancies, it would appear that the legislature contemplated that the costs of administration should be provided for in informal proceedings. The legislature must have considered it unnecessary to provide for a special fee payable to probate registrars under the belief that sec. 253.34 (1) (a), Stats., would apply to informal administration of estates which were processed by an officer of the county court.

The fees provided in sec. 253.34 (1) (a), Stats., are minimal with respect to small estates and are graduated as to increasingly larger estates. The costs of administering estates by informal proceedings will be substantial and payable out of the budget of the county court of which the probate registrar is an officer. The fees provided in sec. 253.34 (1) (a), Stats., may well be insufficient to cover such costs.

Section 253.34 (1) (a), Stats., does not restrict the applicability of the stated fees to *judicial proceedings* in the county court. I am