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CLEARINGHOUSE RULE 95-227

Comments

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

1. Statutory Authority

a. Sections 301.08 (1) (c) 2., 304.073 (3) and 304.074 (5), Stats., as created by 1995 Wisconsin Act 27, all require the department to promulgate rules setting fees or rates for supervision services and providing procedures for collection of supervisory fees. The rule fails entirely to meet these goals. For example, s. DOC 328.043 (2) (intro.) provides that the department must set the fee for supervision. [See also ss. DOC 328.044 (2) (intro.), 328.045 (2) (intro.) and 328.046 (2) (intro.).] With respect to the requirement that the department promulgate rules regarding the procedures for collection of supervisory fees, s. DOC 328.047 (2) and (4) provide that offenders must pay fees according to “procedures established by the department.” Although these rules provide the department with much desired flexibility in fashioning fees and collection procedures, they do not appear to meet the plain language requirements of the statutes. Placing the fees and procedures clearly in the rule allows the Legislature to review the decisions of the department under the process described in s. 227.19, Stats. If the department wishes to set fees and collection procedures outside of the rule-making process, the statutes should be amended appropriately. [For example, see the general presumption in s. 227.01 (13) (n), Stats., which provides that an agency does not engage in rule-making when it fixes or approves rates, prices or charges, unless a statute specifically requires them to be fixed or approved by rule.]

b. New s. 304.074 (3), Stats., created by 1995 Wisconsin Act 27, sets forth the conditions under which the department may decide not to charge a reimbursement fee. The department’s rules relating to these conditions are found in s. DOC 328.045 (3) (a). In the statute, the second condition is that the person is “pursuing a full-time course of instruction approved by the

department.” Section DOC 328.045 (3) (a) 2. does not appear to adequately reflect or appropriately expand on that statutory provision. There is no reference to full-time course of instruction or what that means to the department, there is no definition of “school” as used in the rule and there is a requirement, not found in the statute, that the “student...is unable to be employed.” It appears that this provision needs to be further developed to accurately reflect the intent of the Legislature and to clearly interpret the statutory condition for possible exemption from the fee.

c. The rule refers to both “supervision fees” and “monitoring fees.” The statutory provisions in 1995 Act 27 refer only to fees for “supervision.” Although “monitoring” and “supervision” appear to be comparable activities (i.e., monitoring is a “subset” of “supervision”), there is nothing in the analysis to indicate why monitoring is dealt with in the rule, what the difference is between monitoring and supervision, why the department thinks that Act 27 covers the imposition of fees for both of these activities, and so forth. This should be clarified in the analysis and in the rule.

2. Form, Style and Placement in Administrative Code

a. In SECTION 2, the cross-reference should be to s. 301.08 (1) (c) 1. a., Stats. Also, since the statutory definitions of “administrative supervision” and “minimum supervision” are brief, the department may wish to repeat those definitions in the rule for the convenience of those using the rule.

b. In SECTION 9, the definition of “high risk supervision” needs to be redrafted because “supervision” does not mean “an offender.” Perhaps the definition could be revised as follows: “‘High risk supervision’ means the type of supervision applicable to (or perhaps ‘necessary for’) an offender who presents risks that carry extreme consequences and who requires that plans are developed...” Also, the term “extreme consequences” is vague and should be defined, if possible. Also, since the term “offender” under the rule refers to a probationer or parolee, the term should be defined or “probationer or parolee” should be substituted for “offender” wherever appropriate throughout the entire rule.

c. Section DOC 328.043 (2) should be redrafted to read:

(2) SUPERVISION FEE. The department shall set a supervision fee for an offender that is sufficient to cover the cost of his or her supervision and shall do all of the following:

- (a) Determine the monthly cost of supervision of the offender.
- (b) Determine the supervision fee....

Also, for clarity, sub. (3) could be redrafted to separate out the duties of the department and the offender as follows:

(3) (title) With reference to the supervision fee under sub. (2):

- (a) The department shall do all of the following:

1. Record all supervision fees paid by the offender.

2. Advise....

(b) The offender shall do or is entitled to do all of the following:

1. Maintain a record of payments.

2. Have access to....

The same comments with reference to s. DOC 328.043 also apply to the structure of ss. DOC 328.044 to 328.047.

d. In s. DOC 328.044 (2) (e), “cost” should be “costs.” Subsection (3) (f) should read: “The vendor shall, at any time the department deems necessary, permit the department to audit the vendor’s records related to the payment of supervision fees by offenders under this section.” Also, since this type of provision applies to other sections in the rule, the department may wish to have a separate section setting forth this authority and making it applicable to all the sections. Finally, s. DOC 328.044 (2) (a) refers to the cost of supervision and the administration of the vendor contract. The remainder of the section refers to a supervision fee without any reference to a fee for administration. It appears that such a reference should be included. [See also s. 301.08 (1) (c) 2., Stats., as created by 1995 Wisconsin Act 27.]

e. In s. DOC 328.045 (2) (a), insert “if appropriate” after “per day” in accordance with the statutory language created in 1995 Wisconsin Act 27, which created the statutory language on which this rule is based. Paragraph (e) should be redrafted to read: “If sub. (3) is applicable, exempt the offender from paying the supervision fee.” In sub. (3) (a), substitute “Except under par. (b), an” for “An.” In subd. 1, substitute “obtain” for “gain,” insert “offender’s probation or parole” before “agent,” delete the comma after “unable” and substitute “to pay the supervision fee” for “to make payment of the supervision fee.” In subd. 2., “certify the offender’s status” as what “to the department”? In subd. 4., either “medical condition” or “medical reason” should be used, not both. In par. (b), substitute “shall” for “will.”

f. In s. DOC 328.046 (1), insert “between the offender and the vendor” after “contact.”

g. In s. DOC 328.047, reference is made to a supervision fee and a monitoring fee, but in certain places in this section, reference is made only to supervision fee. Should reference to both of these fees be consistent throughout this section? Subsection (5) (c) should read: “That the deadline for the final payment is 30 days before the offender’s discharge from supervision or monitoring.” In sub. (8), substitute “When the contract is completed, the vendor” for “The vendor.”

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

a. Section DOC 328.045 (3) (d) refers to the review of decisions to exempt an offender from the payment of the supervision fee. Who makes these decisions? Also, in sub. (4) (e), it appears that the phrase “the payment record” should be inserted after the word “comparing.”

b. In s. DOC 328.046 (3) (e), it appears that the phrase “of the department” is unnecessary and should be deleted.

c. In s. DOC 328.047 (intro.), the reference to the “supervision or monitoring fee” also should include cross-references to the appropriate sections of the rule requiring these fees. Also, it appears that subs. (3) (intro.) and (7) are duplicative.

d. In s. DOC 328.048 (2), there does not appear to be any reason for the language after “assignment” and that language should be deleted. In sub. (3), what is the meaning of the term “approved custody”? This should be explained. Also, in sub. (4), the phrase “but the offender fails to pay the fee” is redundant, in view of the introduction to this section, and should be deleted.

e. In s. DOC 328.05 (3), “The” should be “An.” Also, are the vendor’s procedures set forth in the contract with the department? This provision seems to indicate that the vendor can establish whatever procedures the vendor wants. Is this what is intended?

f. Sections DOC 328.04 (3) (n) and 328.05 (1) (d) and (11) should include appropriate cross-references to the rule provisions requiring supervision fees. Also, the treatment of s. DOC 328.04 (3) (n) should precede the creation of s. DOC 328.043 and it appears that the numbering and creation of s. DOC 328.05 in the rule conflicts with the existing s. DOC 328.05 in the current Wisconsin Administrative Code.