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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 06-062

#### 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 January 2005.]

#### 2. Form, Style and Placement in Administrative Code

a. In the last sentence of s. DWD 218.01, “these laws” should follow all of the stricken material.

b. The entire rule should be reviewed for conformance to proper use of “may” and “shall.” “Shall” should be used to denote any mandatory or absolute duty or directive; “should” or “must” should not be used. For example, in s. DWD 218.03 (2) (b), “must” should be changed to “shall,” and in s. DWD 218.25 (1) (a), “should” should be changed to “shall.” See s. 1.01 (2) of the Manual.

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

a. The reference to s. 106.50 (6), Stats., in the “Statutes interpreted” portion of the analysis to the rule, should contain the notation “as affected by 2005 Wisconsin Act 25.”

b. In s. DWD 218.01, the reference to s. 16.009, Stats., could be made more specifically to s. 16.009 (5), Stats., and the reference to s. 46.90, Stats., could be made more specifically to s. 46.90 (4) (b), Stats.

c. In s. DWD 223.02 (1), it appears that the statutory citation should be to s. 101.055, Stats., in its entirety, not just to sub. (8) of that section.

d. In s. DWD 223.20 (1), it appears that the reference to s. DWD 223.30 should be changed to s. DWD 223.19.

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

- a. Throughout the rule, it appears that the term “department” should be replaced with “division.”
- b. In s. DWD 223.03 (3), how is it determined whether a form is acceptable to the department? Also, should the first occurrence of “party” be changed to “person”?
- c. In the phrase “duly authorized,” used throughout the rule, “duly” is meaningless and should be deleted.
- d. In s. DWD 223.03 (6), what factors will the division consider to determine whether a proposed amendment to a complaint will be approved or denied? Also, in that subsection, what standards will be used by the administrative law judge to determine whether a complaint will be remanded to the investigation section? This information should be included in the rule.
- e. The rule should explain what is required to “serve” a party with a document. [For example, see s. DWD 223.04 (1).] For example, does the term require personal service, or does sending a document by regular or certified mail suffice?
- f. Section DWD 223.05 (3) should specify how a complaint is to be disposed of if a preliminary determination is modified.
- g. Are there situations in which the division will not advise a complainant that a complaint should be amended in s. DWD 223.06 (2)? If so, the rule should set forth standards for the division to follow in determining whether to provide this advice. If not, then “may” should be changed to “shall.”
- h. Section DWD 223.07 (3) states that if the department determines that there is no probable cause, it “may dismiss those allegations.” Are there circumstances under which dismissal will not occur when the department determines that there is no probable cause? If so, the rule should explain those circumstances. If not, then “may” should be changed to “shall.” Also, should the rule state that the complaint, rather than “those allegations,” should be dismissed? This last comment also applies to s. DWD 223.19 (2) and (3).
- i. Should s. DWD 223.09 set forth the procedure for disposing of a complaint when a settlement agreement is reached.
- j. Section DWD 223.11 (2) is unclear. It should be rewritten as follows: “The hearing shall be held in either the county where the alleged violation of the law occurred or the county where the respondent resides, or at another location with the consent of the parties.”
- k. Section DWD 223.12 (1) should indicate what forms of “certification” are acceptable as proof that a copy of the answer has been mailed to all other parties.
- l. In the third sentence of s. DWD 223.14 (2), should “unrepresented” be inserted before “party”?

m. In s. DWD 223.17 (4), should “may” be changed to “shall”? If not, the rule should indicate the circumstances under which an administrative law judge is authorized to refuse to reopen a hearing when good cause for failure to appear has been shown.

n. In s. DWD 223.19 (1), should “review of” be inserted after “including”?

o. Some of the material set forth in s. DWD 223.19 (2) is redundant with the material in s. DWD 223.07 (3). Would it be preferable to delete the repetitive material in s. DWD 223.07 (3), place all of the information regarding the procedure to be followed if there is a finding of no probable cause in s. DWD 223.19 (2), and insert a cross-reference to that material in s. DWD 223.07 (3)?

p. Section DWD 223.21 (2) appears to penalize a state civil service employee whose witness testimony was not useful by denying them their salary or travel expenses for attending the hearing. Does this apply to a witness who has been subpoenaed and has no control over whether or not he or she must testify or whether his or her testimony is useful? What is the rationale for this provision? In addition, what is the purpose of the phrase “or would have been”? It implies that the person did not in fact attend the hearing. In that case, why would the issue of salary or travel reimbursement be an issue?