



State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Randy Romanski, Secretary

DATE: November 11, 2010

TO: Bruce Hoesly, Legislative Reference Bureau
1 East Main Street, Suite 200

FROM: Randy Romanski, Secretary

SUBJECT: Administrative Orders and Contested Cases
Final Rule for Publication (*Clearinghouse Rule No. 10-045*)

The Department of Agriculture, Trade and Consumer Protection (DATCP) hereby submits the following rule for publication:

CLEARINGHOUSE RULE #: 09-054
SUBJECT: Administrative Orders and Contested Cases
ADM. CODE REFERENCE: ATCP 1
DATCP DOCKET #: 09-R-03

We are enclosing a copy of the final rule, as adopted by DATCP. We are also providing the following information for publication with the rule, as required by s. 227.114(6), Stats.

Final Regulatory Flexibility Analysis (Summary)

This rule will have little, if any, impact on business. This rule updates and clarifies, but does not substantially alter, current rules. This rule will not have any significant impact on business, beyond what already exists under current statutes and rules. Existing impacts have been few and minor.

Administrative Law Judge

Under current rules, the DATCP secretary may appoint an ALJ to hear a DATCP “contested case.” This rule clarifies that the secretary may appoint an ALJ from the department of administration (division of hearings and appeals) or another state agency, with the agreement of that agency. An ALJ must conduct a DATCP “contested case” according to DATCP procedural rules in ATCP 1.

Producer Security; Recovery Proceedings

DATCP currently administers an agricultural producer security program under ch. 126, Stats., to protect agricultural producers against financial defaults by grain warehouse keepers, grain dealers, milk contractors and vegetable contractors. In the event of a default, DATCP may initiate a recovery proceeding to determine the amount of producer claims allowed under the producer security program. The recovery proceeding is conducted as a “contested case”

Agriculture generates \$59 billion for Wisconsin

2811 Agriculture Drive • PO Box 8911 • Madison, WI 53708-8911 • 608-224-5012 • Wisconsin.gov

An equal opportunity employer

according to ch. 126, Stats., and ATCP 1. This rule updates ATCP 1 to incorporate current procedures and terminology under ch. 126, Stats., including how recovery proceedings are commenced, how default claims are audited, and what is to be contained in a proposed decision determining claims in a recovery proceeding.

“Contested Case” Hearing Requests and Assignments

This rule clarifies current procedures for requesting a “contested case” hearing, and for granting or denying a hearing request, consistent with current standards under ch. 227, Stats. The clarified procedures will help DATCP coordinate “contested case” hearings and ALJ assignments with the department of administration, division of hearings and appeals.

Under this rule, as under current rules, the DATCP secretary will make the initial decision to grant or deny a “contested case” hearing request, and will issue a written notice to the parties. Under this rule, the secretary must grant or deny a “contested case” hearing request within 30 days after a complete request is filed with the secretary (compared to 20 days under current rules).

If the secretary issues a notice granting a “contested case” hearing request, the notice will assign an ALJ and set a date for hearing or for a pre-hearing conference with the ALJ. If the notice sets an actual hearing date, the hearing date may be not sooner than 30 days after the notice is issued (compared to 10 days under current rules). The ALJ may schedule or reschedule a hearing date, as necessary.

Hearing on Summary Special Orders

Under many of its programs, DATCP may without prior notice or hearing issue summary special orders to named persons to protect public health, safety or welfare. These include food holding orders, food condemnation orders, animal disease quarantine and condemnation orders, invasive pest quarantine and control orders, and a variety of other orders. The recipient of a summary special order may request a hearing on that order.

This rule clarifies that the recipient of a summary special order may request an immediate informal hearing, or a formal “contested case” hearing, or both. Many cases are resolved with an informal hearing, without the need for a formal “contested case” hearing. A requested informal hearing must be conducted as soon as reasonably possible, but not more than 20 days after the hearing request (compared to 10 days under current rules). A requester may agree to a later informal hearing date.

Informal hearings are conducted by DATCP managers or staff who have had no prior involvement in the case, and who are authorized to take or recommend remedial action as necessary. This rule clarifies that informal hearings are not governed by formal “contested case” procedures. If a matter is not successfully resolved by informal hearing, the affected party may request a formal “contested case” hearing.

Parties Represented by Attorney

Under current rules, a party to a formal “contested case” hearing may appear on his or her own behalf or may have a legal representative. Under this rule, the representative must be an attorney who is authorized to practice law in this state. As under current rules, the attorney’s actions are binding on the represented party.

ALJ Authority

This rule clarifies, but does not substantially alter, the authority exercised by an ALJ (including an ALJ from the department of administration, division of hearings and appeals) in a DATCP “contested case.”

Under current rules, only certain DATCP personnel are authorized to issue DATCP subpoenas. Under this rule, if an ALJ from the department of administration (division of hearings and appeals) is appointed by the DATCP Secretary to hear a DATCP contested case, that ALJ may issue DATCP subpoenas to compel the production of testimony and evidence in that case with the approval of the DATCP Secretary. Under the current rule, any party may ask the ALJ to issue a subpoena on behalf of the requesting party. This rule clarifies that an opposing party may object and request a hearing on the subpoena request.

Disclosure of Witnesses and Evidence; Discovery

Under current rules and this rule, parties must generally disclose (to opposing parties) the witnesses and evidence that they intend to call or offer in a “contested case hearing.” Under this rule, the parties must disclose their witnesses and evidence at least 10 days prior to hearing (current rule requires 7 days).

Under current rules and this rule, parties may have a right to “discover” (via pre-hearing depositions, interrogatories, etc.) relevant information possessed by opposing parties. Under this rule, “discovery” must be completed at least 10 days prior to hearing.

Hearing Transcripts

Under current rules, hearings in DATCP “contested cases” may be electronically recorded or transcribed in writing. This rule clarifies that hearings will normally be electronically recorded (the normal method used by the department of administration, division of hearings and appeals) unless the ALJ orders a written transcript with the approval of DATCP.

- Under current rules and this rule, any party may request a written transcript.
- Under current rules and this rule, if a written transcript is prepared in response to a request from any party, that party must pay the transcription and copying cost. Under this rule,

DATCP must charge its actual per-page transcription cost (compared to a standard per-page charge of \$1.75 under current rules) plus a copying cost of 25 cents per page. Other parties may obtain copies by paying a copying cost of 25 cents per page.

- Under current rules and this rule, if DATCP orders a written transcript for its own purposes or for purposes of judicial review, DATCP must pay the transcription cost. Other parties may obtain copies for 25 cents per page.
- Persons who are not parties to a contested case may make public records requests to obtain copies of the contested case transcript or recording.

Videoconferencing

Under this rule, an ALJ may conduct a “contested case” hearing by videoconferencing if current statutory standards for videoconference court proceedings are met.

Order of Proof

This rule clarifies, but does not substantially alter, current rules related to the order of proof in “contested cases.” Generally speaking, the party bringing the case has the initial burden of going forward.

Proposed ALJ Decision; Objections

Under current DATCP rules, the DATCP secretary is normally the final decisionmaker in a “contested case” unless the secretary delegates that authority to the ALJ or another official. If the ALJ is not the final decisionmaker, the ALJ must prepare a proposed decision for consideration by the final decisionmaker. The ALJ must provide copies of the proposed decision to the parties. Under this rule, parties have at least 30 days to file objections to the proposed decision (compared to 15 days under current rules).

Settlement

This rule clarifies, but does not substantially alter, current procedures for settling “contested cases.” Parties may settle a “contested case” at any time, subject to the approval of the final decisionmaker. Among other things, the parties may stipulate to a DATCP order resolving the disputed matter.

Frivolous Claims; Cost Award

Under s. 227.485, Stats., and current DATCP rules, if an individual or small business prevails in a “contested case” against DATCP, the ALJ may order DATCP to pay costs and attorney fees to the prevailing individual or small business unless the ALJ finds that DATCP’s losing position was substantially justified. This rule does not change these current rule provisions.

Under s. 227.483, Stats., if an ALJ finds that any party (including a private party or DATCP) has asserted a “frivolous” claim in a contested case, the ALJ may order the party to reimburse another party (including a private party or DATCP) for reasonable costs and attorney fees incurred in defending that claim. This rule incorporates the provisions of s. 227.483, Stats., into ATCP 1. Under this rule, as under s. 227.483, Stats., an ALJ may not find that a claim is “frivolous” unless the ALJ finds at least one of the following:

- The action, claim or defense was initiated or pursued in bad faith, solely for the purpose of harassing or maliciously injuring another.
- The party or party’s attorney knew or should have known that the action, claim or defense was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Comments from Legislative Committees (Summary)

On April 15, 2010, DATCP transmitted the above rule for legislative review. The rule was assigned to the Senate Committee on Agriculture and Higher Education and to the Assembly Committee on Consumer Protection. Neither the Senate committee nor the Assembly committee held a hearing or took any action on the rule.