

Chapter DWD 75

APPEAL PROCEDURES FOR PERSONS APPLYING FOR OR RECEIVING VOCATIONAL REHABILITATION SERVICES

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Note: Corrections made under s. 13.93 (2m) (b) 1., 6. and 7., Stats. Register, December, 1996, No. 492.

DWD 75.01 Authority and purpose. This chapter is promulgated under the authority of ss. 47.02(5) and 227.11(2)(a), Stats., and in conformity with requirements under 29 USC 711 (c) and 722(d), and 34 CFR 361.48, to establish procedures for appealing decisions of the department's division of vocational rehabilitation concerning eligibility for services or the furnishing or denial of services under the rehabilitation act of 1973, as amended.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.02 Applicability. This chapter applies to the department, to applicants for and recipients of services under the act who wish to appeal decisions of the department's division of vocational rehabilitation concerning eligibility for or the furnishing or denial of services under the act, and to hearing officers appointed to hear the appeals.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.03 Definitions. In this chapter:

(1) "Act" means the federal rehabilitation act of 1973, as amended, 29 USC 701 et seq.

(2) "Administrator" means the administrator of the division.

(3) "Appeal" means a request for relief filed with the division based a decision of the division relating to eligibility for services or the furnishing or denial of services under the act.

(4) "Appellant" means the person who filed the request for a hearing or an appellant's representative.

(5) "Department" means the Wisconsin department of workforce development.

(6) "Division" means the department's division of vocational rehabilitation.

(7) "File" or "filed" means the physical receipt of a document by the person designated in this chapter.

(8) "Hearing" means a formal review of a decision of the division by an impartial hearing officer.

(9) "Hearing coordinator" means the person who maintains records of hearings under the act, contacts hearing officers to initiate hearings and ensures that required time limits for completion and reporting of hearings are observed.

(10) "Hearing request" means a written request for a hearing signed by an appellant or an appellant's representative which states the issue involved in the appeal and the desired outcome.

(11) "Intent to review" means that the administrator will review the decision of a hearing officer to determine if the decision will be allowed to stand or will be modified as provided by the act.

(12) "IWRP" means individualized written rehabilitation program.

(13) "Order of selection" has the meaning prescribed in s. DWD 65.03 (17).

(14) "Party" means the appellant or appellant's representative or the administrator's representative.

(15) "Prehearing interview" means a joint face-to-face meeting, a telephone conference, separate meetings or separate telephone calls by the hearing officer with the parties prior to the hearing to formulate a statement of the issue or issues presented by an appeal, to identify potential witnesses, to establish a schedule for discovery and deadlines for exchange of witness lists and exhibits, to receive motions and to clarify any remaining issues to be considered or excluded from a hearing.

(16) "Representative" means a parent or guardian of an appellant under age 18, a person designated in writing by an adult appellant as the representative, a person appointed by a court to represent an appellant or the person designated by the administrator as his or her representative for a hearing.

(17) "Wisconsin client assistance program" or "client assistance program" means a service program established by the governor under 34 CFR 370.2 (a)to(d) and funded in whole or in part by the act to assist individuals with disability-related issues and appeals under the act.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.04 Right to a hearing. An individual or a representative of an individual may appeal a decision concerning eligibility for services or the furnishing or denial of services under the act, including a decision relating to an order of selection for services.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.05 Filing a hearing request. (1) TIME LIMITS. The time limit for filing a hearing request shall be 12 months after the notice of a decision or action was mailed to the appellant. Failure to file within the 12 month limit shall be cause for the hearing request to be dismissed.

(2) HOW TO FILE. A hearing request shall be filed with the hearing coordinator.

Note: The address for requesting a hearing is Hearing Coordinator, Division of Vocational Rehabilitation, P.O. Box 7852, Madison, Wisconsin 53707.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.06 Acknowledgment of a hearing request. The hearing coordinator shall notify the parties when a hearing request has been properly filed within 5 working days after receiving the request. If a representative has been designated, the notice shall be sent to the representative. If the appellant has a representative, a copy shall also be sent to the appellant by certified mail.

This notice shall include as enclosures a copy of this chapter, a brochure explaining the appeal process and a client assistance program brochure.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.07 Time limit for hearing. A hearing shall be held within 45 days of the receipt of the hearing request by a hearing coordinator unless the hearing officer grants an extension for good cause at the request of either party.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.08 Motions relative to a hearing. Motions shall be filed by the parties in writing as soon as possible and are expected at least 5 working days prior to a hearing. A motion shall state the grounds of the motion and the relief or order requested. Briefs, affidavits, documentary evidence and other papers in support of a motion shall be filed with the motion. The following are examples of common motions but motions are not limited to these examples:

(1) **MOTION TO EXTEND TIME LIMITS.** A motion to extend any time limit, including the 45 day time limit for holding a hearing shall be filed with the hearing officer.

(2) **MOTION TO DISMISS A HEARING REQUEST FOR LACK OF SUBJECT MATTER JURISDICTION.** A motion to dismiss a hearing request on the grounds that the division does not have subject matter jurisdiction may be filed at any time with the hearing officer.

(3) **MOTION TO AMEND A HEARING REQUEST.** A motion to expand or restrict the nature or scope of the hearing shall be filed with the hearing officer.

(4) **MOTION TO WITHDRAW A HEARING REQUEST.** An appellant may withdraw from the appeal process at any time. If the appellant has made a verbal request to withdraw and a motion has not been filed with the hearing officer within 10 days, the hearing officer shall act on the verbal request and issue a decision.

(5) **MOTION FOR A SUBSTITUTE HEARING OFFICER.** Either party may file a motion for a substitute hearing officer for reasons of conflict of interest, bias or qualifications. A motion for a substitute hearing officer shall be filed with the hearing coordinator. The hearing coordinator shall immediately forward the request with his or her recommendation to the administrator with a copy of any relevant comments regarding that hearing officer's performance. If the motion is granted, the hearing coordinator shall assign a different hearing officer. The hearing coordinator shall forward a copy of any administrator's comments regarding the performance of that hearing officer to the division contract administrator as comments on hearing officer's performance under a contract.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.09 Identification of a representative.

(1) **ADMINISTRATOR'S REPRESENTATIVE.** The administrator shall designate a representative for each hearing.

(2) **APPELLANT'S REPRESENTATIVE.** Designation of a representative is optional for the appellant. An appellant may select any responsible adult as a representative or, as permitted under federal law, an appellant may ask the Wisconsin client assistance program to provide assistance in resolving the disagreement, including preparing the request for a hearing or serving as the appellant's representative.

(3) **NOTICE OF REPRESENTATION.** Notice of representation shall be filed with the hearing officer as part of the prehearing interview or at least 5 working days in advance of the scheduled hearing. If an appellant's representative has been properly designated prior to a hearing request, that designation shall be valid for a hearing unless revoked by the appellant. If the appellant is not present at a hearing to introduce a representative, the hearing officer may require the representative to present identification before the hearing may proceed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.10 Filing documents. (1) **DOCUMENTS FILED WITH REPRESENTATIVE.** If a party has designated a representative, all correspondence and other documents related to the hearing shall be mailed to the representative. For documents sent by mail, the date the document is received by the addressee named in this chapter determines the date of filing.

(2) **FILING IN PERSON.** For papers filed in person, the date the addressee named in this chapter receives the document determines the filing date.

(3) **DOCUMENT EXCHANGE.** Filing of any document with the hearing officer or the hearing coordinator constitutes a certification that a copy of the document has been served on the other parties.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.11 Services while a hearing officer's decision is pending. Pending the decision of a hearing officer, the department may not suspend, reduce or terminate services under an IWRP unless the services were obtained through misrepresentation, fraud, collusion or criminal conduct.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.12 Hearing officer qualifications. A hearing officer shall be knowledgeable about the delivery of rehabilitation services, the requirements of the state plan for services under the act, the rules governing the provision of the services and the procedures for conducting an impartial hearing, but may not:

(1) Be an employe of the division or other public agency involved in any decision about furnishing or denying vocational rehabilitation services except as an administrative law judge, a hearing examiner or an employe of an institution of higher education. An individual is not considered an employe of the division solely because the individual is paid by the division to serve as a hearing officer.

(2) Be a member of the state rehabilitation planning advisory council.

(3) Have been involved in previous decisions regarding the vocational rehabilitation of the appellant.

(4) Have any personal or financial interest that may conflict with the hearing officer's obligation to be objective.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.13 Authority of the hearing officer. (1) The hearing officer shall conduct a prehearing interview, may receive and act on motions under s. DWD 75.08, may use the power of subpoena under s. 885.01, Stats., and may contact any party prior to a scheduled hearing to obtain needed information or to suggest mediation if the parties agree that agreement is possible prior to the hearing. The parties retain all rights under this chapter regardless of their participation or nonparticipation in mediation.

(2) The hearing officer shall control the course and conduct of the hearing to ensure that all required procedures are followed, that the parties are fairly represented and that the issues are presented clearly and briefly.

(3) The decision of the hearing officer is final except when the administrator acts under s. DWD 75.19 to change the decision.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.14 Prehearing interview. (1) **PURPOSE.** The hearing officer shall ask the parties to participate in a prehearing interview to do one or more of the following:

(a) Formulate a statement of the issue or issues presented by an appeal.

(b) Identify potential witnesses and receive motions.

(c) Confirm the scheduled hearing.

(d) Clarify any other issues to be considered or excluded from a hearing.

(2) **PARTICIPATION.** The administrator's representative shall participate in the prehearing interview. If the appellant fails to par-

ticipate in a prehearing interview without prior notice, the hearing officer shall continue the prehearing interview period for 5 working days. During this period the appellant may file a good cause explanation and request that the prehearing interview be rescheduled. If a motion is not filed within 5 working days, the hearing officer shall schedule the hearing within the 45 day limit and notify the parties and the hearing coordinator of this decision. The administrator may review this decision as provided in s. DWD 75.19.

(3) HEARING NOT DELAYED BY PARTICIPATION IN A PREHEARING INTERVIEW. Participation in a prehearing interview shall not delay a hearing and does not affect time limits under this chapter. The parties shall not forfeit any rights under this chapter by participating in a prehearing interview or meeting to reach agreement prior to a hearing.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.15 Agreement prior to a hearing. (1) NOTICE OF AGREEMENT. If the parties reach agreement prior to a hearing, the hearing officer shall notify the parties by certified mail that the issue has been resolved by mutual agreement and is dismissed without prejudice. The dismissal notice shall include a brief summary of the agreement between the parties and advise the parties that failure to meet the conditions of the agreement shall be grounds for a new hearing request.

(2) IF PROPOSED SETTLEMENT REJECTED. If either party rejects a proposal prior to a scheduled hearing, the scheduled hearing shall be held without additional notice.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.16 Hearing procedures. (1) HEARING IS CLOSED. A hearing shall be closed to the public as a confidential matter under the act unless the appellant files a motion to open the hearing at least 5 working days in advance of the scheduled hearing.

(2) HEARING NOT A COURT. The hearing officer is not bound by the rules of evidence and customary procedures of a court of law. However, the hearing officer shall adhere to the hearing procedures in this section unless there is good cause and shall document, on the record of the hearing, the reasons for deviation from any procedure required under this chapter.

(3) ATTENDANCE AT A HEARING. Parties and witnesses shall attend a scheduled hearing unless a motion has been filed with the hearing officer at least 5 days prior to the hearing stating reasonable cause for an individual to participate in the hearing by a live, real time electronic means as an alternative to a appearing in person. The hearing officer may grant the request if the other party has no objection.

(4) TESTIMONY BY WITNESSES. Witnesses may testify in person by answering questions posed to them, in narrative form, or by deposition provided that the witness agrees in advance, as part of the deposition, to permit the recording of the testimony and any subsequent cross-examination and the witness understands that he or she may be subpoenaed to appear by the hearing officer based on the information in the deposition. Requests for testimony by witnesses by deposition or electronic means shall be filed with the hearing officer at least 5 days prior the hearing date. The hearing officer may grant the request if the other party does not object provided that the witness agrees in advance, on the record, to permit the recording of his or her telephone testimony and any subsequent cross-examination.

(5) IDENTIFICATION OF WITNESSES AND EXHIBITS. Each party shall file lists of witnesses and copies of exhibits not previously identified in the prehearing conference with the hearing officer and the other party at least 5 working days prior to a scheduled hearing.

(6) RECORD OF THE HEARING. (a) Tape recording. The hearing officer shall record the hearing on tape. The appellant may obtain

one free copy of the tape from the hearing coordinator. No other tape recording of the hearing is permitted

(b) Transcript. Transcripts of the hearing record may be provided at the expense of the requestor. However, a party who cannot, due to a disability, use the free copy of the tape provided in s. DWD 75.17 may file a written request with the hearing coordinator for a copy of the record in a different media as a reasonable accommodation.

(7) OPENING STATEMENT BY HEARING OFFICER. The hearing officer shall open the hearing with a brief statement of the date, the location of the hearing, the issues, the parties directly involved in the hearing and the standard procedures, and shall remind all participants that all personally identifiable information made available for the hearing is confidential.

(8) ROLL CALL. (a) The hearing officer shall determine if the parties and announced witnesses are present. The hearing officer may admit other individuals to the hearing for good cause at the request of either party.

(b) If either party fails to appear at a hearing without prior notice, the hearing officer shall immediately reschedule the hearing to a date at least 5 working days after the current date to allow the absent party to explain the absence. The hearing officer shall notify the parties and the hearing coordinator by certified mail of the new hearing date and the reason for rescheduling the hearing. If the appellant fails to appear at the rescheduled hearing, the hearing officer shall dismiss the appeal. This dismissal shall not be construed as violation of the 45 day limit for holding a hearing since the hearing was scheduled and held but the appellant did not appear to present his or her arguments. The administrator may review this decision as provided in s. DWD 75.19.

(9) ADMISSIBILITY OF EVIDENCE OR TESTIMONY. At the request of either party, the hearing officer may exclude testimony or evidence. The hearing officer may also exclude immaterial, irrelevant or unduly repetitious testimony. A decision to exclude evidence or testimony shall be made on the record and shall include the rationale and arguments used by the hearing officer to exclude the material. The hearing officer may issue reserved rulings on evidence and determine, before the close of the hearing, if the material will be considered in his or her decision.

(10) ADMINISTERING OATH. The hearing officer shall swear in the parties and all witnesses. After the roll call, witnesses shall be present in the hearing room only while giving testimony.

(11) CROSS-EXAMINATION. Cross-examination is not limited to matters to which a party or witness testified on direct examination.

(12) PRELIMINARY STATEMENTS BY THE PARTIES. The hearing officer shall ask the parties to state their names for the record.

(13) REQUEST FOR DIRECT TESTIMONY, EVIDENCE AND ARGUMENTS. (a) The hearing officer shall ask the parties to present written and oral statements regarding the facts, issues and desired outcome of the hearing. This includes new information which may not have been available when the original request for a hearing was filed.

(b) Witnesses may testify either by answering questions posed to them or in narrative form. Written or electronic depositions may also be used with the understanding that a witness may be asked or subpoenaed to appear by the hearing officer based on the information in the deposition.

(c) Cross-examination is not limited to matters to which a party or witness testified on direct examination.

(d) The hearing officer shall ensure that the parties have an opportunity to review and comment on all evidence.

(e) At the request of either party, the hearing officer may exclude the testimony of a witness.

(14) DIRECT TESTIMONY. (a) The hearing officer shall ask the appellant to make the first presentation and to question the administrator's representative and witnesses.

(b) The hearing officer shall ask the administrator's designee to make the second presentation and to question the appellant and witnesses.

(15) REBUTTAL AND QUESTIONS. The hearing officer shall give the appellant the opportunity to make a rebuttal of evidence presented at the hearing and to question the administrator's representative and witnesses and then give the same opportunity to the administrator's representative.

(16) CLOSING ARGUMENTS. The hearing officer shall ask the administrator's representative to present closing arguments, than ask the appellant to present closing arguments. Closing arguments may be submitted both as verbal arguments and as written briefs.

(17) ENDING THE HEARING. The hearing officer shall inform the parties that a written decision will be sent to them by certified mail within 30 working days after the date of the hearing and state the date time at which the hearing was closed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.17 Notice of hearing officer's decision. The hearing officer shall issue a written decision within 10 days of a written motion and within 30 days of a hearing. The hearing officer shall provide a report of the hearing including the findings and the grounds for the decision. This decision notice shall state that the decision is final unless the administrator acts under s. DWD 75.19 to change the decision or the appellant, under s. 227.53, Stats., chooses to petition the circuit court. The notice shall specify the procedures for filing a claim in circuit court. The hearing officer shall send the original to the appellant and send copies of the notice to the administrator's representative, to the division office of record for placement in the appellant's case record and to the hearing coordinator.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.18 Hearing officer's report. The hearing officer shall forward the tape of the hearing, a written summary of the hearing and any other items specified by contract to the hearing coordinator. The hearing coordinator shall ensure that all required

materials have been received and shall forward the materials to the administrator for a decision as to whether a formal review of the hearing officer's decision is needed.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.

DWD 75.19 Administrator's review of hearing officer's decision. (1) NOTICE OF INTENT TO REVIEW. If the administrator decides to review the hearing officer's decision, written notice of this decision shall be filed with the parties by certified mail within 20 days of the date that the decision of the hearing officer was mailed. The intent to review notice shall advise the parties that additional evidence and information relevant to the final decision may be filed with the administrator not later than 30 days following the date of the intent to review notice and that the administrator may also collect new evidence from other sources during that period.

(2) NO DELEGATION OF ADMINISTRATOR'S AUTHORITY. Authority for modifying the decision of a hearing officer under this chapter is reserved to the administrator and may not be delegated.

(3) BASIS FOR CHANGING HEARING OFFICER DECISION. The administrator may not modify a decision of a hearing officer which supports the position of the appellant unless, based on clear and convincing evidence, the decision is clearly contrary to law or federal policy issuances.

(4) CONSULTATION WITH HEARING OFFICER. The administrator may consult with the hearing officer regarding the decision.

(5) NOTICE OF OUTCOME OF ADMINISTRATOR'S REVIEW. The administrator shall notify the parties in writing by certified mail of the outcome of the review within 30 calendar days after the date of the intent-to-review notice. The notice shall state the findings, the grounds for the final decision, that it is the final decision unless modified by a court and how to file a request for circuit court review. The administrator shall send copies of the letter and any attachments to the hearing coordinator, to the hearing officer and to the division office of record for placement in the appellant's case record.

History: Cr. Register, December, 1996, No. 492, eff. 1-1-97.