

State of Wisconsin Department of Workforce Development

Transfer of Personnel Commission Responsibilities to the Equal Rights Division and Other Revisions to Civil Rights Rules

DWD 218, 220, 221, 224, and 225 and PC 1, 2, 4, 5, and 7

The Wisconsin Department of Workforce Development proposes an order to repeal chapters PC 1, 2, 4, 5, and 7; to amend ss. DWD 218.02(9), 218.03(6), 219.05(2), 218.05(3), 218.06(1), 218.12(1), 218.12(2), 218.14(2), 218.15(1), 218.17, 218.19(3), 218.21(1), 220.04(7), 220.05(2), 220.05(3), 220.07(1), 220.15(1), 220.15(2), 220.18(2), 220.18(4), 220.20, 221.03(6), 221.04(2), 221.04(3), 221.14(1), 221.14(2), 221.17(2), 221.17(4), 221.22(1), 225.01(1)(f), and 225.01(1)(L); to repeal and recreate DWD 225.06 to 225.22; and to create s. DWD 218.02(2m), s. DWD 218.06(3), s. DWD 218.24, s. DWD 220.07(2), ch. DWD 224, s. DWD 225.01(1)(bm), and ss. 225.23 to 225.26, relating to the transfer of personnel commission responsibilities to the equal rights division and other revisions to civil rights rules.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 111.375(1) and 230.89(1), Stats., as affected by 2003 Wisconsin Act 33; s. 230.45(1e)(d), Stats., as created by 2003 Wisconsin Act 33; and ss. 103.005(1), 106.50(1s), 106.52(2), and 227.11, Stats.

Statutes interpreted: Subchapter II of ch. 111 and subch. III of ch. 230, Stats., as affected by 2003 Wisconsin Act 33; ss. 16.009(5), 21.80(7)(b)1. or 2., 46.90(4)(b), 50.07(3)(b), 101.055(8), 103.10, and 146.997, Stats., as affected by 2003 Wisconsin Act 33; s. 230.45(1e), Stats., as created by 2003 Wisconsin Act 33; and ss. 106.50, 106.52, and 106.54, Stats.

2003 Wisconsin Act 33 abolishes the Personnel Commission and transfers some of its duties to the Wisconsin Employment Relations Commission (WERC) and some of its duties to the Equal Rights Division (ERD) in the Department of Workforce Development. Duties transferred to WERC include appeal of various personnel decisions affecting state employees, arbitration of state employee grievances, and appeals under the county merit system rules. Duties transferred to ERD include processing complaints based on the following:

- Employment discrimination against state employees based on a protected class.
- Violation of the family and medical leave law affecting state employees.
- Retaliation or discrimination against state employees who provide information on conditions in a long-term care facility to the Board on Aging, information on elder abuse

to a county agency or state official, or information related to licensing care and service residential facilities to a state official.

- Discrimination against state employees exercising their rights relating to occupational health and safety.
- Retaliatory discipline against state employee health care workers who report a violation of law or a quality of care standard to a supervisor, officer or director of the health care facility, or professionally-recognized accrediting or standard-setting body.
- Violation of reemployment rights of state employees after national guard, state defense force, or public health emergency service.
- Retaliatory discipline against state employee whistleblowers.

The ERD's duties have previously included processing complaints by nonstate employees for all of the issues listed in the above bullet points except whistleblower protection, which only applies to state employees. Before 2003 Wisconsin Act 33, there was a dual system whereby the Personnel Commission processed complaints on these issues by state employees and the ERD processed complaints by nonstate employees. 2003 Wisconsin Act 33 puts sole responsibility for processing complaints by state employees and nonstate employees in the ERD. The ERD has existing procedures for processing the complaints on the issues that have been within its authority:

- Chapter DWD 218 applies to employment discrimination based on a protected class.
- Chapter DWD 225 applies to violations of the family and medical leave law.
- Pursuant to the statutory authorizations for the complaint process on the other issues, they are handled in the same manner as employment discrimination based on a protected class, and the procedures in Chapter DWD 218 are followed.

2003 Wisconsin Act 33, section 9139, transfers to ERD existing Personnel Commission (PC) rules on duties transferred to ERD and transfers to WERC existing PC rules on duties transferred to WERC. There are 7 PC rules. PC 3, relating to filing appeals, and PC 6, relating to the arbitration option for classification appeals, apply to duties transferred to WERC. PC 2, relating to filing and processing complaints, applies to duties transferred to ERD. PC 1, relating to authorization and general provisions; PC 4, relating to prehearing practice and discovery; PC 5, relating to hearings, decisions, and review; and PC 7, relating to Personnel Commission meetings and records, contain information that applies to duties transferred to both WERC and ERD. This seems to mean that PC 1, 4, 5, and 7 are to be transferred to both WERC and ERD although these rules also contain information that is relevant only to one agency and not the other.

The department does not believe that adopting the PC rules for duties transferred from the PC is the best way to handle these new responsibilities. The department has well-established procedures for processing complaints against nonstate employers on these same issues (except for whistleblower protection). The department's existing rules can be amended with minor modifications to include complaints filed against state respondents. Adopting the PC rules would result in different procedures for state and nonstate respondents for no logical reason. This dual system would be more difficult to administer and would be confusing to complainants, many of whom are pro se. Adopting the PC rules would also require significant revising to remove irrelevant language on duties that have been transferred to WERC and obsolete language that

relates only to the Personnel Commission. The department's existing rules can be modified to include state respondents much more simply. The department does not believe that repealing the PC rules will harm complainants who have a pending complaint against a state respondent. The differences between the ERD and PC rules do not affect substantive rights; they are all procedural. Confusion resulting in failure to comply with proper procedures would be more likely to affect substantive rights.

The department is repealing the PC rules affecting duties within ERD, amending the existing fair employment rules and family and medical leave rules to include state respondents, and creating new whistleblower protection rules. The fair employment and family and medical leave rules are amended to add a definition of agency; add agencies to the definition of respondent; and provide that state employee parties and witnesses who are interviewed or who appear at pre-hearing conferences, conciliation sessions, or hearings receive their full pay and travel expenses in accordance with the state reimbursement schedule. Witnesses summoned by a subpoena who are not state employees receive witness and mileage fees set forth in s. 814.67 (1)(a) and (c), Stats., paid by the person issuing the subpoena. A new rule chapter is created to govern complaints filed under the whistleblower law. The new chapter is similar to the procedures used for fair employment, except department orders under the whistleblower law may not be appealed to the Labor and Industry Review Commission (LIRC). Department findings and orders under the whistleblower law are subject to judicial review under chapter 227, Stats.

The major differences between the old PC procedure and the existing and new ERD procedures include the following:

- Answer. Under the ERD rules, respondents respond in writing to the complaint within a time period set by the department or the department issues an initial determination based solely on information supplied by the complainant. A formal answer is required within 21 days after the notice of hearing on the merits following an initial determination of probable cause. Under the PC rules, a formal answer was required within 20 days after service of the complaint.
- Investigation. Under the ERD rules, the department has the power to subpoena persons or documents and seeks cooperation on obtaining other information while investigating. The PC had full discovery authority under chapter 804, Stats., and a party had 30 days to respond.
- Appeal of initial determination of no probable cause. Under the PC rule and ERD's fair employment and whistleblower rules, the deadline for appealing an initial determination of no probable cause is 30 days. Under ERD's family and medical leave rule, the deadline is 10 days.
- Discovery. Under ERD's fair employment, whistleblower, and proposed family and medical leave rules, a party seeking discovery directed at a party not represented by legal counsel must notify the party who is not represented and the chief of the hearing section or ALJ at least 10 days before conducting the discovery. All copies of demands for discovery must be filed with the department at the time they are served, and copies of responses and the original transcript of a deposition must be filed with the department. The PC had no special provisions affecting discovery directed to a party not represented by legal counsel.

- State employee witnesses. The PC rules allowed an ALJ to issue a letter to compel the attendance of a state employee witness or the production of documents from a state employee. Under the ERD rules, a subpoena is required.
- Exchange of exhibits and witness lists. Under the PC rules, witness lists and copies of exhibits had to be exchanged at least 3 days before the hearing. Under the ERD rules, they must be exchanged at least 10 days before the hearing.
- Place of hearing. The PC had discretion on the location of the hearing. Under the fair employment, whistleblower, and proposed family and medical leave rules, the ERD must hold the hearing in the county where the alleged act of discrimination occurred or another location with the consent of the parties.
- Proposed decisions. The PC hearing examiners issued proposed decisions with the opportunity for parties to file written objections. The final decision was issued by the Personnel Commissioners. The ERD hearing examiners do not issue proposed decisions.
- Appeal. Orders of the Personnel Commission were subject to judicial review under ch. 227, Stats. Orders of the ERD in fair employment cases may be appealed to the Labor and Industrial Review Commission (LIRC) and then circuit court. Family and medical leave cases and whistleblower cases may be appealed directly to circuit court and may not be appealed to LIRC.

In addition to the changes related to the transfer of Personnel Commission cases, the department proposes the following additional to the fair employment, fair housing, public accommodations, or family and medical leave rules:

- The deadline to amend a complaint absent a finding of good cause is changed from 20 to 45 days before the hearing in the fair employment, fair housing, and public accommodations rules, and a 10-day deadline is created for family and medical leave cases.
- The department may dismiss a *portion* of a complaint if that portion fails to meet the department's preliminary review that the parties are covered by the relevant law and the complaint states a claim for relief under the fair employment, fair housing, public accommodations, or family and medical leave law. Authority to dismiss the entire complaint already exists.
- The department may dismiss a complaint prior to the investigation if the complainant fails to respond to certified mail from the department within 20 days; the allegations in the complaint have been previously dismissed by the department or a state or federal court; or, for fair employment, FMLA, and whistleblower cases, if the complainant signed a waiver and release of claims. This dismissal is subject to appeal to an ALJ in the Equal Rights hearing section and, for fair employment and public accommodation cases, further appeal to LIRC.
- The respondent shall mail a copy of the answer to other parties and file a certification of mailing with the department, rather than the department serving the answer on the other parties.
- Names of witnesses and copies of exhibits must be exchanged with other parties and filed with the division at least 10 days before the hearing in fair employment, fair housing, whistleblower, and family and medical leave cases. The proposed rule makes service complete upon mailing rather than receipt.

- An appeal of a preliminary determination dismissing a complaint in a family and medical leave case will be heard by an ALJ in the ERD hearing section. Under the current rule, the division administrator of the Equal Rights Division, or a person assigned by the administrator, receives these appeals.
- The proposed rule makes conciliation discretionary, rather than mandatory, in family and medical leave cases.

The department also proposes to repeal and recreate the family and medical leave rules to correspond more closely with the fair employment rules where possible. There will be differences that remain between the two rule chapters due to differences in the family and medical leave and the fair employment statutes. The family and medical statute requires speedier processing, necessitating shorter time frames in the rule for various filing and appeal deadlines. Also, family and medical leave cases may be appealed directly to circuit court rather than LIRC. The proposed family and medical leave rule makes the following changes as compared to the current rule:

- Eliminates the requirement that complaints be notarized.
- Eliminates the requirement that the respondent file a response to the complaint within 10 days. Instead, the rule proposed that the respondent respond “within a time period specified by the department.”
- Clarifies that the department will not dismiss a complaint on timeliness grounds unless that issue is raised by the respondent. This is consistent with case law indicating that the statute of limitations is not a jurisdictional prerequisite to suit.
- Makes it discretionary, rather than mandatory, for the department to advise the complainant that a complaint should be amended.
- Allows for certain dismissals made at the investigation stage and adds an appeal process.
- Eliminates the provision that ALJ was to immediately proceed to a hearing on the merits after an ALJ determination of no probable cause. Also eliminates provision that when it was impossible for the administrative law judge to determine whether there was probable cause at the hearing, a later hearing on the merits could be scheduled but that hearing would only be to allow the parties to introduce additional evidence not previously introduced at the probable cause hearing.
- Provides a basis for dismissal of the complaint after a case has been certified to hearing in cases where the department lacks jurisdiction or where there is another procedural basis for dismissing the complaint.
- Provides that the notice of hearing shall specify a time and date of hearing not less than 10 days after the date of mailing of the notice. At least 10 days notice of hearing is required under s. 227.44, Stats.

- Provides that the place of hearing is the county where the respondent resides or where the alleged violation occurred or another location with the consent of the parties. Under the existing rule, the place of hearing is the county of the respondent's principal place of business or the county in which the prohibited action occurred.
- Provides that the respondent shall mail a copy of the answer to other parties and file a certification of mailing with the department, rather than the department serving the answer on the other parties.
- Eliminates requirement of ALJ written *consent* before discovery is allowed to a complainant who is not represented by legal counsel and creates requirement that the party seeking discovery send *notice* to the party who is not represented by legal counsel and to the ERD.
- Eliminates the requirement that certificates of service showing service of demands for discovery and responses to demands for discovery be filed with the ERD.
- Eliminates provision that the parties may stipulate that the hearing be scheduled sooner than the date set in the notice of hearing because ERD already gives FMLA cases priority in scheduling and is not likely to be able to schedule the hearing any sooner than the date set in the notice of hearing.
- Provides that if a hearing is tape-recorded, the original tapes shall remain in the division for five years following the hearing after which they may be discarded.

SECTION 1. DWD 218.02 (2m) is created to read:

DWD 218.02 (2m) “Agency” means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

SECTION 2. DWD 218.02 (9), 218.03 (6), 218.05 (2), 218.05 (3), and 218.06 (1) are amended to read:

DWD 218.02 (9) “Respondent” means the person or agency alleged to have committed an action prohibited by the act.

DWD 218.03 (6) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than ~~20~~ 45 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that ~~discrimination has been committed~~ the respondent has violated the act as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 218.05 (1).

DWD 218.05 (2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The department shall issue a preliminary determination dismissing any complaint ~~which, or any~~ portion of a complaint, that fails to meet the requirements of sub. (1). ~~In the event the respondent raises a jurisdictional defense, including but not limited to federal preemption, and the respondent admits that but for the lack of jurisdiction the allegations are not disputed and constitute a violation, the department shall proceed to only decide the jurisdictional issue, and shall issue the appropriate order.~~ The department shall send the order of dismissal ~~shall be sent~~ by first class mail to the last-known address of each party and to their attorneys of record.

DWD 218.05 (3) APPEAL OF PRELIMINARY DETERMINATION. The complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the

department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. The department shall serve the decision of the administrative law judge ~~shall be served~~ upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it ~~shall~~ may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

DWD 218.06 (1) CONDUCT OF INVESTIGATION. ~~The~~ Except as provided under sub. (3), the department shall investigate all complaints ~~which~~ that satisfy the review under s. DWD 218.05 (1). In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

SECTION 3. DWD 218.06 (3) is created to read:

DWD 218.06 (3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION. (a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint, in accordance with the provisions of s. 111.39 (3), Stats.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent that would preclude the department from finding that the respondent has violated the act.

3. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

SECTION 4. DWD 218.12 (1), 218.12 (2), 218.14 (2), DWD 218. 14 (4), 218.15 (1), 218.17, 218.19 (3), and 218.21 (1)are amended to read:

DWD 218.12 (1) WHEN REQUIRED. Within 21 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause.~~The department shall serve, along with a certification that a copy of the answer upon~~ has been mailed to all other parties.

DWD 218.12 (2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an ~~averment~~ allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including ~~without limitation~~ the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise ~~the an~~ an affirmative defense ~~that a complaint is barred by the statute of limitations in an~~ the answer ~~filed within the time permitted under sub-~~

~~(4)~~, may, in the absence of good cause, be held to constitute a waiver of such ~~affirmative~~ a defense.

DWD 218.14 (2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery ~~must~~ shall, not less than 10 days prior to conducting such discovery, state in writing ~~to the chief of the hearing section, or the administrative law judge if one has been assigned to the case,~~ that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

DWD 218.14 (4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge ~~has the same authority to~~ may compel discovery, ~~to~~ issue protective orders, and ~~to~~ impose sanctions ~~as the court has in the manner provided under ch. 804, Stats.~~ All motions to compel discovery or motions for protective orders ~~must~~ shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

DWD 218.15 (1) SUBPOENAS. The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness, and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, Stats.

DWD 218.17 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the day of hearing, the parties shall file with the division and ~~file~~ serve upon all other parties a written list of the names of witnesses and copies of the exhibits ~~which~~ that the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using prior to the hearing.

DWD 218.19 (3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the department shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. ~~Where~~ If a transcript has been provided to the court for the purpose of judicial review, the department shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

DWD 218.21 (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. Only final decisions and orders of the administrative law judge ~~are appealable~~ may be appealed. A final decision is one ~~which~~ that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

SECTION 5. DWD 218.24 is created to read:

DWD 218.24 Pay status and witness fees for state employee parties and state employee witnesses. (1) PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel

expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(2) PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats, unless the administrative law judge determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious.

(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES. State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

SECTION 6. DWD 220.04 (7), 220.05 (2), 220.05 (3), and 220.07 (1) are amended to read:

DWD 220.04 (7) AMENDMENT OF COMPLAINT. Subject to the approval of the department, a complaint may be amended no later than ~~20~~ 45 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that discrimination has been committed as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 220.05 (1).

DWD 220.05 (2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The department shall issue a preliminary determination dismissing any complaint ~~which, or any~~ portion of a complaint, that fails to meet the requirements of sub. (1). The department shall send the order of dismissal ~~shall be sent~~ by first class mail to the last-known address of each party and to their attorneys of record.

DWD 220.05 (3) APPEAL OF PRELIMINARY DETERMINATION. A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written request with the

department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. ~~The department shall serve the~~ decision of the administrative law judge ~~shall be served~~ upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it is the final decision of the department. ~~A~~ The department shall send a copy of the decision and order and notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

DWD 220.07 (1) CONDUCT OF INVESTIGATION. ~~The~~ Except as provided under sub. (2), the department shall investigate all complaints ~~which~~ that satisfy the review under s. DWD 220.05(1). In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

SECTION 7. DWD 220.07 (2) is created to read:

DWD 220.07 (2) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION. (a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last known address of the person filing the complaint, in accordance with the provisions of s. 106.50(6)(a)6.

2. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the preliminary determination, the complainant may seek judicial review if it is a final decision and order as defined in s. DWD 220.24.

SECTION 8. DWD 220.15 (1), 220.15 (2), 220.18 (2), 220.18 (4), 220.20, 221.03 (6), 221.04 (2), and 221.04 (3) are amended to read:

DWD 220.15 (1) WHEN REQUIRED. Within 10 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause. ~~The department shall serve, along with a certification that~~ a copy of the answer ~~upon~~ has been mailed to all other parties.

DWD 220.15 (2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an ~~averment~~ allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including ~~without limitation~~ the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise ~~the an~~ an affirmative defense ~~that a complaint is barred by the statute of limitations in an~~ the answer ~~filed within the time permitted under sub-~~ (4), may, in the absence of good cause, be held to constitute a waiver of such affirmative a defense.

DWD 220.18 (2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery ~~must~~ shall, not less than 10 days prior to conducting such discovery, state in writing ~~to the chief of the hearing section, or the administrative law judge if one has been assigned to the case,~~ that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

DWD 220.18 (4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge ~~has the same authority to~~ may compel discovery, ~~to~~ issue protective orders, and ~~to~~ impose sanctions ~~as the court has in the manner provided under~~ ch. 804, Stats. All motions to compel discovery or motions for protective orders ~~must~~ shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

DWD 220.20 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the day of hearing, the parties shall file with the division and serve upon the other party a written list of the names of witnesses and copies of the exhibits which the parties intend to use at the hearing. For the purpose of this section ~~only~~, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using prior to the hearing.

DWD 221.03 (6) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than ~~20~~ 45

days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that discrimination has been committed as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 221.04(1).

DWD 221.04 (2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The department shall issue a preliminary determination dismissing any complaint ~~which, or any~~ portion of a complaint, that fails to meet the requirements in sub. (1). The department shall send the order of dismissal ~~shall be sent~~ by first class mail to the last-known address of each party and to their attorneys of record.

DWD 221.04 (3) APPEAL OF PRELIMINARY DETERMINATION. A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written request with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. The department shall serve the decision of the administrative law judge ~~shall be served~~ upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 221.22 (1).

SECTION 9. DWD 221.08 (3) is created to read:

DWD 221.08 (3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION. (a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last known address of the person filing the complaint, in accordance with the provisions of s. 106.50 (6)(a)6.

2. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 221.22 (1).

SECTION 10. DWD 221.14 (1), 221.14 (2), 221.17 (4), and 221.22 (1) are amended to read:

DWD 221.14 (1) WHEN REQUIRED. Within 10 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint. ~~The department shall serve, along with a certification that~~ a copy of the answer ~~upon~~ has been mailed to all other parties.

DWD 221.14 (2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an ~~averment~~ allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including ~~without limitation~~ the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise ~~the an~~ an affirmative defense ~~that a complaint is~~

~~barred by the statute of limitations in an~~ the answer filed within the time permitted under sub-
(4), may, in the absence of good cause, be held to constitute a waiver of such ~~affirmative a~~
defense.

DWD 221.17 (2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery ~~must~~ shall, not less than 10 days prior to conducting such discovery, state in writing ~~to the chief of the hearing section, or the administrative law judge if one has been assigned to the case,~~ that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

DWD 221.17 (4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge ~~has the same authority to~~ may compel discovery, ~~to~~ issue protective orders, and ~~to~~ impose sanctions ~~as the court has in the~~ manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders ~~must~~ shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

DWD 221.22 (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. Only final decisions and orders of the administrative law judge ~~are appealable~~ may be appealed. A final decision and order is one ~~which~~ that finally disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

SECTION 11. Chapter DWD 224 is created to read:

Chapter DWD 224

WHISTLEBLOWER PROTECTION

DWD 224.01 Purpose. The purpose of this chapter is to implement the law relating to complaints filed against the state as an employer under subch. III of ch. 230, Stats., commonly referred to as the “whistleblower” law.

DWD 224.02 Definitions. When used in this chapter:

(1) “Administrative law judge” means the examiner appointed to conduct hearings under subch. III of ch. 230, Stats.

(2) “Appointing authority” has the meaning given in s. 230.80 (1m), Stats.

Note: Section 230.80 (1m), Stats., provides that “appointing authority” means “the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law.”

(3) “Complainant” means the employee who files a complaint alleging that an action prohibited by subch. III of ch. 230, Stats., has been committed.

(4) “Day” means a calendar day, except that if the last day of the time period is a Saturday, Sunday, or legal holiday, the last day shall be the next business day.

(5) “Division” means the equal rights division of the department of workforce development.

(6) “Employee” has the meaning given in s. 230.80 (3), Stats.

Note: Section 230.80 (3), Stats., provides that “employee” means “any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group s. 20.923.”

(7) “Filing” means the physical receipt of a document.

(8) “Governmental unit” has the meaning given in s. 230.80 (4), Stats.

Note: Section 230.80 (4), Stats., provides that “governmental unit” means “any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. ‘Governmental unit’ does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.”

(9) “Probable cause” means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of subch. III of ch. 230, Stats., probably has been or is being committed.

(10) “Respondent” means the appointing authority, agent of an appointing authority, supervisor, or governmental unit alleged to have committed an action prohibited by subch. III of ch. 230, Stats.

(11) “Retaliatory action” has the meaning given in s. 230.80 (8), Stats.

Note: Section 230.80 (8), Stats., provides that “retaliatory action” means “a disciplinary action taken because of any of the following:

- (a) The employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).
- (b) The employee testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employee.
- (c) The appointing authority, agent of an appointing authority or supervisor believes the employee engaged in any activity described in par. (a) or (b).”

(12) “Service of the complaint upon the respondent” under s. 230.85 (2), Stats, means mailing of the complaint to the respondent.

(13) “Unanimous vote” as it is used in s. 230.85 (3)(b), Stats, means the decision of the administrative law judge.

DWD 224.03 Complaints. (1) WHO MAY FILE COMPLAINTS. A complaint may be filed by any employee or by the employee’s duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(2) WHERE TO FILE COMPLAINTS. A complaint may be filed in person with any division office or it may be mailed to one of the following division offices:

- (a) Equal Rights Division, 201 East Washington Avenue, Madison, Wisconsin 53702.
- (b) Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203.

(3) FORM AND CONTENT OF COMPLAINT. A complaint shall be written on a form that is available at any division office or on any form acceptable to the division. Each complaint shall be signed by the employee filing the complaint or by the employee’s duly authorized representative. The signature constitutes an acknowledgment that the employee or the representative has read the complaint; that to the best of that employee’s knowledge, information, and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

- (a) The name and address of the complainant.
- (b) The name and address of the respondent.
- (c) A concise statement of the facts, including pertinent dates, constituting the alleged retaliatory action.

Note: A complaint form is also available on the Department of Workforce Development's website at <http://www.dwd.state.wi.us/> by following the link to Equal Rights.

(4) ASSISTANCE BY THE DIVISION. The division shall, upon request, provide appropriate assistance in completing and filing complaints.

(5) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the division, except that a complaint may not be amended less than 20 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the division shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent took retaliatory action as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 224.06 (1).

(6) WITHDRAWAL OF COMPLAINT. A complaint may be withdrawn at any time. A request for withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. Upon the filing of a request for withdrawal, the division shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

DWD 224.04 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT. The division shall serve a copy of a complaint that meets the requirements of s. DWD 224.03 upon each respondent prior to the commencement of any investigation.

(2) CONTENT OF NOTICE. The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the division. The notice shall further state that, if the respondent fails to answer the complaint in writing, the division may make an initial determination as to whether retaliatory action has

occurred based only on the division's investigation and the information supplied by the complainant.

DWD 224.05 Complainant's duty to respond to correspondence from the division. The division may dismiss the complaint if the complainant fails to respond to the division within 20 days from the date of mailing of any correspondence from the division concerning the complaint, provided that correspondence was sent by certified mail, return receipt requested, to the last known address of the complainant.

DWD 224.06 Preliminary review of complaints. (1) REVIEW OF COMPLAINT. The division shall review every complaint filed to determine all of the following:

- (a) Whether the complainant is protected by subch. III of ch. 230, Stats.
- (b) Whether the respondent is subject to subch. III of ch. 230, Stats.
- (c) Whether the complaint states a claim for relief under subch. III of ch. 230, Stats.
- (d) Whether the complaint was filed within the time period set forth in s. 230.85 (1), Stats., if that issue is raised in writing by the respondent.

(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The division shall issue a preliminary determination dismissing any complaint or any portion of a complaint that fails to meet the requirements of sub. (1). The division shall send the order of dismissal by first class mail to the last known address of each party and to their attorneys of record.

(3) APPEAL OF PRELIMINARY DETERMINATION. A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the division. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the division shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. The division shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, the complainant may seek judicial review if it is a final decision and order as defined in s. DWD 224.22 (1).

DWD 224.07 Investigations. (1) CONDUCT OF INVESTIGATION. Except as provided in sub. (3), the division shall investigate all complaints that satisfy the review under s. DWD 224.06. In conducting investigations under this chapter, the division may seek the cooperation of all persons to provide requested materials to the division; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. In scheduling interviews with state employees, the division may consider the programmatic needs of the appointing authority. The division may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) ADVISING COMPLAINANT TO AMEND COMPLAINT. If, during an investigation, it appears that the respondent has engaged in retaliatory action against the complainant that is not alleged in the complaint, the division may advise the complainant that the complaint should be amended.

(3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION. (a) The division may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the division concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent which would preclude the division from finding that the respondent has violated subch. III of ch. 230, Stats.

3. The allegations in the complaint have been previously dismissed by the division.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the division. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the division shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision that shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served

upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it is subject to judicial review under ch. 227, Stats., if it is a final decision and order as defined in s. DWD 224.22 (1).

DWD 224.08 Initial determination. (1) GENERAL. At the conclusion of the investigation, the division shall issue a written initial determination that shall state whether or not there is probable cause to believe that retaliatory action occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) INITIAL DETERMINATION OF PROBABLE CAUSE. If the division initially determines that there is probable cause to believe that any retaliatory action occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 224.12 to 224.21.

(3) INITIAL DETERMINATION OF NO PROBABLE CAUSE. If the division initially determines that there is no probable cause to believe that retaliatory action occurred as alleged in the complaint, it may dismiss those allegations. The division shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 224.09.

DWD 224.09 Appeal of initial determination of no probable cause. (1) WHEN FILED. Within 30 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The division shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) DISMISSAL FINAL IF NO APPEAL FILED. If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the division.

(3) CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS. If a timely appeal is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. DWD 224.12 to 224.21,

except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues the division may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

DWD 224.10 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the division. The division may assist the parties to reach a settlement agreement. The parties shall notify the division immediately upon reaching a settlement.

DWD 224.11 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed based upon the conditions set forth in s. DWD 224.06 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 224.08 (2) or 224.09 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts that may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

DWD 224.12 Notice of hearing. (1) CONTENT. In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 224.08 (2) or an appeal of an initial determination of no probable cause under s. DWD 224.09 (3), the division shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date, and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 30 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the retaliatory action that is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

(2) PLACE OF HEARING. The hearing shall be held in the county where the alleged retaliatory action occurred or at another location with the consent of the parties. For the purpose of this subsection, the county where the alleged retaliatory action occurred is the county where the complainant was employed at the time.

DWD 224.13 Answer. (1) WHEN REQUIRED. Within 21 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a certification that a copy of the answer has been mailed to all other parties.

(2) CONTENT OF ANSWER. The answer shall contain the address of the respondent and the name and address of the respondent's legal counsel or other representative. It shall also contain a specific admission, denial, or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise an affirmative defense in the answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

DWD 224.14 Pre-hearing conference. In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

DWD 224.15 Pre-hearing discovery. (1) WHEN DISCOVERY MAY BEGIN. Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery shall, not less than 10 days prior to conducting such discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing

section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the division at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the division by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

(3) SCOPE, METHOD, AND USE OF DISCOVERY. The scope of discovery, the methods of discovery, and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge may compel discovery, issue protective orders, and impose sanctions in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

(5) FILING WITH DIVISION. Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

DWD 224.17 Subpoenas and motions. (1) SUBPOENAS. The division or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness, and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) MOTIONS. Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law

judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

DWD 224.17 Disqualification of the administrative law judge. Upon the administrative law judge's own motion, or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

DWD 224.18 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the day of hearing, the parties shall file with the division and serve upon all other parties a written list of the names of witnesses and copies of exhibits which the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal that the party could not have reasonably anticipated using prior to the hearing.

DWD 224.19 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with subch. III of ch. 230, Stats., and the provisions of ch. 227, Stats.

(2) POSTPONEMENTS AND CONTINUANCES. All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

(3) APPEARANCE OF PARTIES. Parties may appear at the hearing in person and by counsel or other representative.

(4) FAILURE TO APPEAR AT HEARING. If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the

hearing, the hearing shall proceed as scheduled. If, within 10 days after the date of hearing, any party who failed to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

DWD 224.20 Record of hearing. (1) METHOD OF RECORDING HEARING. A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under subch. III of ch. 230, Stats. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is tape-recorded, the original tapes shall remain in the division for 5 years following the hearing, after which they may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim transcript of the proceedings.

(3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the division shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the division shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

DWD 224.21 Decision and order. (1) GENERAL. After the close of the hearing, including any briefs that may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision that shall include findings of fact, conclusions of law and an order, and which may be accompanied by an opinion.

(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE. After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the

decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to court if it is a final decision and order as defined in s. DWD 224.22 (1).

(3) DECISION AND ORDER AFTER HEARING ON THE MERITS. After a hearing on the merits, the administrative law judge shall issue a decision and an order that shall either dismiss the allegations of the complaint or shall order an appropriate action, including actions listed in s. 230.85 (3) (a), Stats., depending upon the administrative law judge's findings and conclusions on the merits of the complaint. The division shall serve a certified copy of the findings and order on the respondent and, if the respondent is a natural person, upon the respondent's appointing authority. The decision of the administrative law judge shall be the final decision of the division and the division for purposes of judicial review under s. 227.52, Stats.

(4) COMPUTATION OF INTEREST. Interest on any award made pursuant to this chapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter.

DWD 224.22 Appeals. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may seek judicial review of a final decision and order of the administrative law judge as provided in s. 230.87, Stats. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

(2) NOTICE OF APPEAL RIGHTS. Every decision and order of an administrative law judge under s. DWD 224.21 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review of the decision pursuant to s. 230.87, Stats.

DWD 224.23 Pay status and witness fees for state employee parties and state employee witnesses. (1) PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(2) PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats, unless the administrative law judge determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious.

(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES. State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

SECTION 12. DWD 225.01 (1)(bm) is created to read:

DWD 225.01 (1)(bm) “Agency” means any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

SECTION 13. DWD 225.01 (1)(f), 225.01 (1)(h), and 225.01 (1)(L) are amended to read:

DWD 225.01 (1)(f) “Days” means calendar days unless the context requires otherwise. When used in time computations in this chapter, “day” means a calendar day, except that if the last day of the time period is a Saturday, Sunday or legal holiday, the last day shall be the next business day.

DWD 225.01 (1)(h) ~~“Filed” or “filing”~~ “Filing” means ~~physically received at any office of the division~~ the physical receipt of a document.

DWD 225.01 (1)(L) “Respondent” means the person or agency ~~alleged in a complaint~~ to have committed an action prohibited by ~~s. 103.10(11), Stats.~~ the act.

SECTION 14 Sections DWD 225.06 to 225.22 are repealed and recreated to read:

DWD 225.06 Complaints. (1) WHO MAY FILE COMPLAINT. A complaint may be filed by any person or by the person’s duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(2) WHERE TO FILE COMPLAINTS. A complaint may be filed in person with any division office, or it may be mailed to one of the following division offices:

(a) Equal Rights Division, 201 E. Washington Avenue, Madison, WI 53702.

(b) Equal Rights Division, 819 N. 6th Street, Milwaukee, WI 53203.

(3) FORM AND CONTENT OF COMPLAINT. A complaint shall be written on a form which is available at any division office or on any form acceptable to the department. Each complaint shall be signed by the person filing the complaint or by the person's duly authorized representative. The signature constitutes an acknowledgment that the party or the representative has read the complaint; that to the best of that person's knowledge, information and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

(a) The name and address of the complainant.

(b) The name and address of the respondent.

(c) A concise statement of the facts, including pertinent dates, constituting the alleged prohibited action.

(4) ASSISTANCE BY THE DEPARTMENT. The department shall, upon request, provide appropriate assistance in completing and filing complaints.

(5) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than 10 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. After an initial determination has been issued, amendments may be allowed by the administrative law judge only for claims which relate back to the original complaint for statute of limitation purposes. If an amendment is approved after the case has been certified to hearing, the case may be remanded to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated the act as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 225.09(1).

(6) WITHDRAWAL OF COMPLAINT. A complaint may be withdrawn at any time. A request for a withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. Upon the filing of a request for a withdrawal, the

department shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

DWD 225.07 Complainant's duty to respond to correspondence from the department.

The department may dismiss the complaint if the complainant fails to respond to the department within 20 days from the date of mailing of any correspondence from the department concerning the complaint, provided that correspondence was sent by certified mail, return receipt requested, to the last known address of the complainant.

DWD 225.08 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT. The department shall serve a copy of a complaint which meets the requirements of s. DWD 225.06 upon each respondent prior to the commencement of any investigation.

(2) CONTENT OF NOTICE. The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the department. The notice shall further state that, if the respondent fails to answer the complaint in writing, the department may make an initial determination as to whether a prohibited act has occurred based only on the department's investigation and the information supplied by the complainant.

DWD 225.09 Preliminary review of complaints. (1) REVIEW OF COMPLAINT. The department shall review every complaint filed to determine all of the following:

- (a) Whether the complainant is protected by the act.
- (b) Whether the respondent is subject to the act.
- (c) Whether the complaint states a claim for relief under the act.
- (d) Whether the complaint was filed within the time period set forth in the act, if that issue is raised in writing by the respondent.

(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The division shall issue a preliminary determination dismissing any complaint, or any portion of a complaint, which fails to meet the requirements of sub. (1). The department shall send the order of dismissal by first class mail to the last known address of each party and to their attorneys of record.

(3) APPEAL OF PRELIMINARY DETERMINATION. A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the department. The

appeal shall be filed within 10 days after the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify or set aside the preliminary determination. The department shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it may be subject to review in court if it is a final decision and order as defined in s. DWD 225.25(1).

DWD 225.10 Investigations. (1) CONDUCT OF INVESTIGATION. The department shall investigate all complaints that satisfy the review under s. DWD 225.09. In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials, and to take statements of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) ADVISING COMPLAINANT TO AMEND COMPLAINT. If, during an investigation, it appears that the respondent may have committed a prohibited act which is not alleged in the complaint, the department may advise the complainant that the complaint should be amended.

(3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION.
(a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint, in accordance with the provisions of s. DWD 225.07.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent that would preclude the department from finding that the respondent has violated the act.

3. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 10 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The department shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it may be subject to review in court if it is a final decision and order as defined in s. DWD 225.25(1).

DWD 225.11 Initial determination. (1) GENERAL. At the conclusion of the investigation, the department shall issue a written initial determination which shall state whether or not there is probable cause to believe that a prohibited act occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) INITIAL DETERMINATION OF PROBABLE CAUSE. If the department initially determines that there is probable cause to believe that any prohibited act occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 225.15 to 225.24.

(3) INITIAL DETERMINATION OF NO PROBABLE CAUSE. If the department initially determines that there is no probable cause to believe that a prohibited act occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 225.12.

DWD 225.12 Appeal of initial determination of no probable cause. (1) WHEN FILED. Within 10 days after the appeal of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request

for hearing shall state specifically the grounds upon which the appeal is based. The department shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) **DISMISSAL FINAL IF NO APPEAL FILED.** If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the department.

(3) **CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS.** If a timely appeal is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. DWD 225.15 to 225.24, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues, the department may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

DWD 225.13 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the department. The department may assist the parties to reach a settlement agreement. The parties shall notify the department immediately upon reaching a settlement.

DWD 225.14 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed based upon the conditions set forth in s. DWD 225.09(1) or for any other procedural basis after the case is certified to hearing under either s. DWD 225.11(2) or 225.12(3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts that may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

DWD 225.15 Notice of hearing. (1) CONTENT. In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 225.09(1) or an appeal of an initial determination of no probable cause under s. DWD 225.11(2), the department

shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 10 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the prohibited act that is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

(2) PLACE OF HEARING. The hearing shall be held in the county where the alleged prohibited act occurred, or at another location with the consent of the parties. For purposes of this subsection, the county where the alleged prohibited act occurred is the county where the respondent resides or where the alleged violation occurred.

DWD 225.16 Answer. (1) WHEN REQUIRED. Within 10 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a certification that a copy of the answer has been mailed to all other parties.

(2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon by a respondent shall be raised in the answer unless it has previously been raised by motion in writing. Failure to raise an affirmative defense in a timely filed answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

DWD 225.17 Pre-hearing conference. In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44(4), Stats.

DWD 225.18 Pre-hearing discovery. (1) WHEN DISCOVERY MAY BEGIN. Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45(7), Stats.

(2) **DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL.** In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery shall, not less than 10 days prior to conducting such discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel, and the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

(3) **SCOPE, METHODS AND USE OF DISCOVERY.** The scope of discovery, the methods of discovery and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

(4) **FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY.** The administrative law judge may compel discovery, issue protective orders, and impose sanctions in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

(5) **FILING WITH THE DEPARTMENT.** Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

DWD 225.19 Subpoenas and motions. (1) SUBPOENAS. The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07(4), Stats. and shall be served in the manner provided in s. 805.07(5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67(1)(a) and (c), Stats. The cost of service, witness and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.12, Stats.

(2) MOTIONS. Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

DWD 225.20 Disqualification of the administrative law judge. Upon the administrative law judge's own motion, or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

DWD 225.21 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the hearing, the parties shall file with the division and serve upon the other party a written list of the names of witnesses and copies of the exhibits that the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using prior to the hearing.

DWD 225.22 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with the act and with the provisions of ch. 227, Stats.

(2) POSTPONEMENTS AND CONTINUANCES. All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

(3) APPEARANCE OF PARTIES. Parties may appear at the hearing in person and by counsel or other representative.

(4) FAILURE TO APPEAR AT HEARING. If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall proceed as scheduled. If within 10 days after the date of hearing, any party who fails to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

SECTION 15. DWD 225.23 to 225.26 are created to read:

DWD 225.23 Record of hearing. (1) METHOD OF RECORDING HEARING. A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under the act. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is tape-recorded, the original tapes shall remain in the division for 5 years following the hearing, after which they may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim transcript of the proceedings.

(3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the department shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the department shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

DWD 225.24 Decision and order. (1) GENERAL. After the close of the hearing, including any briefs that may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision which shall include findings of fact, conclusions of law and an order, and which may be accompanied by an opinion.

(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE. After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to court if it is a final decision and order as defined in s. DWD 225.25(1).

(3) DECISION AND ORDER AFTER HEARING ON THE MERITS. After a hearing on the merits, the administrative law judge shall issue a decision and an order that shall either dismiss the allegations of the complaint or shall order such action by the respondent as shall effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint. A certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

(4) COMPUTATION OF INTEREST. Interest on any award made pursuant to this subchapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter.

DWD 225.25 Appeals. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may seek judicial review of a final decision and order of the administrative law judge. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

(2) NOTICE OF APPEAL RIGHTS. Every decision and order of an administrative law judge under s. DWD 225.24 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review of the decision pursuant to the act.

DWD 225. 26 Pay status and witness fees for state employee parties and state employee witnesses. (1) PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing

conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts scheduled under s. 20.196(8), Stats.

(2) PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts scheduled under s. 20.196(8), Stats. unless the administrative law judge determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious.

(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES. State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

SECTION 16. PC 1, 4, 5, and 7 are repealed as applied to programs under the authority of the Equal Rights Division or the Department of Workforce Development and PC 2 is repealed.

SECTION 17. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.