

STATE OF WISCONSIN
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

IN THE MATTER OF RULE-MAKING : ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF SAFETY AND
 : PROFESSIONAL SERVICES
DEPARTMENT OF SAFETY AND : ADOPTING RULES
PROFESSIONAL SERVICES : CLEARINGHOUSE RULE 14-019

ORDER

An order of the Wisconsin Department of Safety and Professional Services to repeal SPS 1 Appendix I, 1 Appendix II, 2 Appendix I, 3 Appendix I, 4.07 (30), 4.07 (59), 4.08 (2), 8.02 (5) (a), 8.02 (5) (b), 8.02 (5) (c), 8 Appendix I, 500.03 (2) (Note 1), 500.03 (2) (Note 3), and 500.03 (2) (Note 4); to amend SPS 1.03 (6), 1.03 (4), 2.03 (6), 2.08 (2), 2.15 (5), 2.18 (4), 3.03 (4), 4.01, 4.04 (1), 6.03 (7), 6.08, 6.09 (2), 6.09 (3), 6.09 (5), 6.11 (1) (intro.), 6.11 (1) (a), 6.11 (1) (b), 6.11 (2), 7.02 (4), 8.02 (4), 8.02 (5) (intro.), 500.02, and 500.03 (2); to repeal and recreate SPS 500.10; and to create SPS 6.11 (1) (c), 500.03 (3), 500.03 (3) (Note), and 500.04 relating to administrative procedures and small business discretion.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: § 227.11 (2) (a), § 227.46 (1), § 440.205

Statutory authority: § 227.11 (2) (a), § 227.04 (2m) (a), § 440.03 (1), § 440.03 (13) (am)

Explanation of agency authority:

§ 227.04 (2m) (a), Wis. Stats. Each agency shall promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in the enforcement of rules against a small business that has committed a minor violation.

§ 227.11 (2) (a), Wis. Stats. Rule-making authority is expressly conferred as follows: (a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency: 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the

agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature. 2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature. 3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

§ 440.03 (1), Wis. Stats. The department may promulgate rules defining uniform procedures to be used by the department, the real estate appraisers board, and all examining boards and affiliated credentialing boards, attached to the department or an examining board, for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings.

§ 440.03 (13) (am), Wis. Stats. A person holding a credential under chs. 440 to 480 who is convicted of a felony or misdemeanor anywhere shall send a notice of the conviction by 1st class mail to the department within 48 hours after the entry of the judgment of conviction. The department shall by rule determine what information and documentation the person holding the credential shall include with the written notice.

Related statute or rule: § 227.04, Wis. Stats., § 227.51, Wis. Stats.; and §440.205, Wis. Stats.

Plain language analysis:

The rulemaking project updates the Department's administrative procedures through a number of modifications to SPS 1-9. Modifications include:

1. Clarifying procedures for summary judgment motions.
2. Eliminating references to former Division titles.
3. Modifying deadlines associated with the assessment of costs in SPS 2.18, Wis. Adm. Code.
4. Repealing outdated appendices.
5. Improving the efficiency of the procedures for the Department's filing of papers with disciplinary authorities.
6. Adding pertinent rule authority references to SPS 4, Wis. Adm. Code.
7. Amending SPS 6.11, Wis. Adm. Code, to allow an administrative law judge from the Department of Administration to preside over show cause hearings.
8. Revising the definition of "first occurrence" in SPS 8, Wis. Adm. Code, to more closely align with §440.205, Wis. Stats.

The rule project incorporates rule changes to SPS 500, Wis. Adm. Code, as affected by 2013 Wisconsin Act 296.

The rule project also incorporates rule changes to SPS 4, Wis. Adm. Code, as affected by the enactment of 2011 Wisconsin Act 255.

Summary of, and comparison with, existing or proposed federal regulation:

None.

Comparison with rules in adjacent states:

Illinois:

The Illinois Administrative Procedure Act states that the agency head, one or more members of the agency head, or any other person meeting the qualifications set forth by rule under Section 10-20 may be the administrative law judge. The agency must provide by rule for disqualification of an administrative law judge for bias or conflict of interest. An adverse ruling, in and of itself, shall not constitute bias or conflict of interest (5 ILCS 100/10-30).

Section 10-20 requires that all agencies adopt rules concerning the minimum qualifications of administrative law judges for contested case hearings. The agency head or an attorney licensed to practice law in Illinois may act as an administrative law judge or panel for an agency without adopting any rules under this Section.

All papers filed or submitted to the Department or Committee in a contested case shall be typewritten, on 8 ½ by 11 inch white paper (1110 Ill. Adm. Code 50). Service of any document may be by mail or personal delivery. Proof of service should be attached to the original of any document served. In the absence of evidence to the contrary, the date shown on the proof of service shall be deemed the date of service (1110 Ill. Adm. Code 60).

The Illinois Department of Professional Regulation administrative rules are silent with regards to the deadlines associated with the assessment of costs in contested case hearings.

Iowa:

Iowa Code section 17A.11 states that if the agency or an officer of the agency under whose authority the contested case is to take place is named a party to that proceeding or a real party in interest to that proceeding the presiding officer may be, in the discretion of the agency, the agency, one or more members of a multimember agency, or one or more administrative law judges assigned by the Division of Administrative Hearings in accordance with the provisions of section 10A.801. However, a party may, within a time period specified by rule, request that the presiding officer be an administrative law judge assigned by the Division of Administrative Hearings. The agency must grant a request by a party for an administrative law judge unless otherwise provided by statute or one of a list of conditions exists.

If the agency or an officer of the agency under whose authority the contested case is to take place is not named party to that proceeding or a real party in interest to that proceeding the presiding officer may be, in the discretion of the agency, either the agency, one or more members of a multimember agency, an administrative law judge assigned by the Division of Administrative Hearings in accordance with the provision of section 10A.801, or any other qualified person designated as a presiding officer by the agency. Any other person designated as a presiding officer by the agency may be employed by and officed in the agency for which that person acts as a presiding officer, but such a person shall not perform duties inconsistent with that person's duties and responsibilities as a presiding officer.

A document is deemed to be filed at the time it is delivered (in person) to the department and date-stamped received, delivered to an established courier service for immediate delivery, mailed by first-class mail or by state interoffice mail so long as there is adequate proof of mailing, or sent by facsimile transmission (Iowa Adm. Code r. 11-7.12).

Parties in a contested case have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Any party may be represented by an attorney or another person authorized by law. The cost of representation is the responsibility of the party (Iowa Adm. Code r. 11-7.12).

Michigan:

The Michigan Administrative Procedures Act of 1969 states that the presiding officer of a contested case may be an agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases (Michigan Statutes Section 24.279).

Michigan Executive Order 2011-4 created the Michigan Administrative Hearing System (MAHS), an independent and autonomous agency within the Michigan Department of Licensing and Regulatory Affairs. Administrative law judges from MAHS preside over professional licensure disciplinary and denial hearings.

Minnesota:

Minnesota Statutes Chapter 214, Section 10, subd. 2. states that examining and licensing boards schedule disciplinary hearings in accordance with Chapter 14 which specifies that hearings are required to be conducted by an administrative law judge employed by the Office of Administrative Hearings (OAH). The Chief Administrative Law Judge of the OAH must assign a judge to hear the case (Minnesota Code Section 1400.5010 to 1400.8400). The OAH is an independent tribunal within the executive branch.

All documents must be submitted to the office on standard size 8 ½ inch y 11 inch paper. A person may file any document with the office using facsimile transmission. Filing a facsimile is equivalent to filing the original document, and is effective when the office

receives it. A transmission commenced before 4:30pm on the last day of filing is timely filed (Minn. R. 1400.2030).

A party seeking an award of expenses an attorney's fees must submit an application to the judge. The state agency or any other party may respond or object to all or any part of the application for expenses and fees within 14 days following the service of the application. Within 30 days following the close of the record in the proceeding for the award of expenses and attorney's fees, the administrative law judge must issue a written order including the amounts awarded for fees and other expenses (if any) (Minn. R. 1400.8401).

Summary of factual data and analytical methodologies:

The Department conducted a review of SPS chapters relating to procedures. Many existing rules for Department administrative procedures are unclear and inefficient. Proposed modifications would update the rules to create greater efficiencies, align rules more closely with statute, and incorporate technological changes. Adjacent states' rules were also reviewed.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis:

The rule was posted for public comment on the economic impact of the proposed rule, including how this proposed rule may affect businesses, local government units, and individuals, for a period of 14 days. No comments were received relating to the economic impact of the rule.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at Tom.Engels@wisconsin.gov, or by calling (608) 266-8608.

Agency contact person:

Katie Paff, Program and Policy Analyst, Department of Safety and Professional Services, Division of Policy Development, 1400 East Washington Avenue, Room 151, P.O. Box 8935, Madison, Wisconsin 53708; telephone 608-261-4472; email at Kathleen.Paff@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Katie Paff, Program and Policy Analyst, Department of Safety and Professional Services, Division of Policy Development, 1400 East Washington Avenue, Room 151, P.O. Box 8935, Madison, WI 53708-8935, or by email to Kathleen.Paff@wisconsin.gov. Comments must be received on or before March 17, 2014 at 11a.m. to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. SPS 1.03 (6) is amended to read:

SPS 1.03 (6) “Division” means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 2. SPS 1.09 (4m) is created to read:

SPS 1.09 (4m) SUMMARY JUDGEMENT. The parties may use the summary judgment procedure provided in s. 802.08, Stats.

SECTION 3. SPS 1 Appendix I is repealed.

SECTION 4. SPS 1 Appendix II is repealed.

SECTION 5. SPS 2.03 (6) is amended to read:

SPS 2.03 (6) “Division” means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 6. SPS 2.08 (2) is amended to read:

SPS 2.08 (2) Any paper required to be filed with a disciplinary authority may be mailed to the disciplinary authority office or, if an administrative law judge has been designated to preside in the matter, to the administrative law judge and shall be deemed filed on receipt at the disciplinary authority office or by the administrative law judge the date of the postmark. Materials submitted by personal service and by inter-departmental mail shall be considered filed on the date they are received at the disciplinary authority office or by the administrative law judge. An answer under s. SPS 2.09, ~~and~~ motions under s. SPS 2.15, and any other documents required to be filed may be filed and served by facsimile transmission or by electronic mail. ~~A document filed by facsimile transmission under this section shall also be mailed to the disciplinary authority. An answer or motion filed by facsimile transmission shall be deemed filed on the first business day after receipt by the disciplinary authority.~~ For materials transmitted by facsimile, the date received shall determine the date of filing. For materials transmitted by electronic mail, the filing date shall be the date that the electronic mail was sent.

SECTION 7. SPS 2.15 (5m) is created to read:

SPS 2.15 (5m) SUMMARY JUDGEMENT. The parties may use the summary judgment procedure provided in s. 802.08, Stats.

SECTION 8. SPS 2.18 (4) is amended to read:

SPS 2.18 (4) When costs are imposed, the division and the administrative law judge shall file supporting affidavits showing costs incurred ~~within 15 days of the date of the final decision and order.~~ The respondent shall file any objection to the affidavits ~~within 30 days of the date of the final decision and order~~ 15 days of the date of mailing of both affidavits from the division and administrative law judge to the respondent. The disciplinary authority shall review any objections, along with the affidavits, and ~~affirm or modify its order~~ issue an order fixing costs without a hearing.

SECTION 9. SPS 2 Appendix I is repealed.

SECTION 10. SPS 3.03 (4) is amended to read:

SPS 3.03 (4) “Division” means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 11. SPS 3 Appendix I is repealed.

SECTION 12. SPS 4.01 is amended to read:

SPS 4.01 Authorization. The following rules are adopted by the department of safety and professional services pursuant to ss. 440.03 (13) (a) and (am), 440.05, 440.06, and 440.07, Stats.

SECTION 13. SPS 4.04 (1) is amended to read:

SPS 4.04 (1) EXAMINATION FEE SCHEDULE. A list of all current examination fees may be obtained at no charge from the Office of Examinations, Department of Safety and Professional Services, 1400 East Washington Avenue, P. O. Box ~~8935~~ 8366, Madison, WI 53708-8366.

SECTION 14. SPS 4.07 (30) and (59) are repealed.

SECTION 15. SPS 4.08 (2) is repealed.

SECTION 16. SPS 6.03 (7) is amended to read:

SPS 6.03 (7) “Petitioner” means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 17. SPS 6.08 is amended to read:

SPS 6.08 Service of summary suspension order. An order of summary suspension shall be served upon the respondent ~~in the manner provided in s. 801.11, Stats., for service of summons~~ by mail.

SECTION 18. SPS 6.09 (2), (3), and (5) are amended to read:

SPS 6.09 (2) The request for hearing to show cause shall be filed with the licensing authority which issued the summary suspension order. The hearing shall be scheduled and heard promptly by the licensing authority or its delegate, but no later than 20 days after the filing of the request for hearing with the licensing authority, unless a later time is requested by or agreed to by the licensee.

(3) At the hearing to show cause the petitioner and the respondent may testify, call, examine and cross-examine witnesses, and offer other evidence. Unless the parties otherwise agree, no discovery is permitted, except for the taking and preservation of evidence as provided in ch. 804, Stats., with respect to witnesses described in s. 227.45(7) (a) to (d), Stats. A respondent may inspect records under s. 19.35, Stats., the public records law.

(5) ~~At the~~ Immediately upon conclusion of the hearing to show cause the licensing authority or its delegate shall make findings and an order on the record. If it is determined that the summary suspension order should not be continued, the suspended license shall be immediately restored.

SECTION 19. SPS 6.11 (1) (intro.), (1) (a), and (1) (b) are amended to read:

SPS 6.11 Delegation. (1) A board may by two-thirds vote delegate authority to rule on a petition for summary suspension, to issue a summary suspension order, and to preside over and rule in a hearing provided for in s. SPS 6.09 through one of the following methods:

(a) Designate under s. 227.46 (1), Stats., a member of the board or an employee of the department ~~to rule on a petition for summary suspension, to issue a summary suspension order, and to preside over and rule in a hearing provided for in s. SPS 6.09;~~ or.

(b) Appoint a panel of no less than two-thirds of the membership of the board ~~to rule on a petition for summary suspension, to issue a summary suspension order, and to preside over and rule in a hearing provided for in s. SPS 6.09.~~

SECTION 20. SPS 6.11 (1) (c) is created to read:

SPS 6.11 (1) (c) Designate under s. 227.46 (1), Stats., an administrative law judge employed by the department of administration.

SECTION 21. SPS 6.11 (2) is amended to read:

SPS 6.11 (2) In matters in which the department is the licensing authority, ~~the department secretary or the secretary's designee~~ an administrative law judge employed by the department of administration shall rule on a petition for summary suspension, issue a summary suspension order, and preside over and rule in a hearing provided for in s. SPS 6.09.

SECTION 22. SPS 7.02 (4) is amended to read:

SPS 7.02 (4) "Division" means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 23. SPS 8.02 (4) is amended to read:

SPS 8.02 (4) "Division" means the division of ~~enforcement~~ legal services and compliance in the department.

SECTION 24. SPS 8.02 (5) (intro) is amended to read:

SPS 8.02 (5) "First occurrence" means ~~any of the following:~~ no informal complaint alleging the same or similar misconduct has been filed with the department against the credential holder, other than the matter pending before the disciplinary authority.

SECTION 25. SPS 8.02 (5) (a), (b), and (c) are repealed.

SECTION 26. SPS 8 Appendix I is repealed.

SECTION 27. SPS 500.02 is amended to read:

SPS 500.02 Policy. The department acknowledges the objectives under s. ~~895.59~~ 227.04, Stats., as an obligation to evaluate and consider the potential impacts on small businesses with regard to the department's enforcement actions. This obligation is shared by all divisions of the department.

SECTION 28. SPS 500.03 (2) is amended to read:

SPS 500.03 (2) "Small business" has the meaning given in s. ~~895.59 (1) (b)~~ 227.114 (1), Stats.

SECTION 29. SPS 500.03 (2) (Note 1), (Note 3), and (Note 4) are repealed.

SECTION 30. SPS 500.03 (3) is created to read:

SPS 500.03 (3) "Minor violation" has the meaning given in s. 227.04 (1) (a).

SECTION 31. SPS 500.03 (3) (Note) is created to read:

SPS 500.03 (3) Note: Section 227.04 (1) (a) of the Statutes reads as follows: “‘Minor violation’ means a rule violation that does not cause serious harm to the public, is committed by a small business, and the violation is not willful, the violation is not likely to be repeated, there is a history of compliance by the violator, or the small business has voluntarily disclosed the violation.”

SECTION 32. SPS 500.04 is created to read:

SPS 500.04 Exercise of discretion. The department may exercise leniency in the enforcement of rules against small businesses, as compared to other regulated businesses if all of the following apply:

(1) The department has statutory authority to exercise discretion.

(2) The exercise of discretion, in favor of small business, is not contrary to the situations set out in s. 227.04 (2m) (c), Stats., or other applicable law.

(3) The rule violation committed by the small business is a minor violation.

SECTION 33. SPS 500.10 is repealed and recreated to read:

SPS 500.10 Enforcement of rules. The department shall consider the following criteria for allowing discretion in the enforcement of rules and the reduction or waiver of penalties with respect to an entity that identifies itself as a small business, when the penalties are under the direct control of the department:

Note: Most monetary penalties are determined and imposed by the judicial system. The department may only determine the amount of a monetary penalty that is imposed by citation or administrative forfeiture under specific statutory authority.

Note: Under s. 101.02 (6), Stats., the department may grant an extension of time to any entity, regardless of size, as may be reasonably necessary to achieve compliance with a rule or guideline.

(1) The difficulty and cost of compliance with the rule by the small business.

(2) The financial capacity of the small business, including the ability of the small business to pay the amount of any penalty that may be imposed.

(3) The compliance options available, including options for achieving voluntary compliance with the rule.

(4) The level of public interest and concern.

(5) The opportunities available to the small business to understand and comply with the rule.

(6) Fairness to the small business and to other persons, including competitors and the public.

SECTION 34. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.), Stats.

(END OF TEXT OF RULE)

Dated _____

Agency _____

Dave Ross, Secretary
Department of Safety and
Professional Services