

**State of Wisconsin
Department of Employee Trust Funds
Employee Trust Fund Board
Wisconsin Retirement Board
Teachers Retirement Board
Group Insurance Board
Deferred Compensation Board**

The Wisconsin department of employee trust funds proposes an order to renumber 11.08 (6), to amend ETF 11.01 (1), 11.02 (3), 11.02 (8), 11.03 (2) (b), 11.03 (2) (bm), 11.03 (3m), 11.03 (4) (b), 11.03 (8), 11.03 (11), 11.04 (2), 11.04 (4), 11.04 (4) (f), 11.04 (4) (h), 11.04 (8), 11.05 (4), 11.05 (7), 11.06 (1), 11.07 (1), 11.08 (2) (b) 1., 11.09 (1), 11.09 (3), 11.12 (1) (a), 11.13 (3), 11.14 (2) (c), 11.14 (4) (intro) and 11.16 (4), and to create ETF 11.02 (3m), 11.03 (9) Note, 11.03 (14), 11.03 (15), 11.03 (16), 11.04 (4) (i), 11.04 (4) (j), 11.04 (k), 11.08 (2) (f), 11.08 (2) (g), 11.08 (6) 11.09 (3) (c), 11.12 (8), 11.13 (1) (h) relating to the ETF appeals process.

Notice of Public Hearing

A public hearing on this proposed rule will be held on October 21, 2011, at 10:00 a.m. in Conference Room GB at the offices of the Department of Employee Trust Funds, 801 West Badger Road, Madison, Wisconsin. Persons wishing to attend should come to the reception desk up the stairs (or by elevator) from the main entrance to the building.

Analysis Prepared by the Department of Employee Trust Funds

1. **Statutes interpreted:**
Sections 40.03 (1) (j), (2) (m), (3), (6) (j), (7) (f), (8) (f), (9), 40.06 (1) (e), 40.80 (2), (2m), and 227.44 to 227.48, 227.485, 227.49, and 227.50, Stats.
2. **Statutory authority:**
Sections 40.03 (2) (i), (ig), (ir), and 227.11 (2), Stats.
3. **Explanation of agency authority:**
By statute, the DETF Secretary is expressly authorized, with appropriate board approval, to promulgate rules required for the efficient administration of any benefit plan established in ch. 40 of the Wisconsin statutes. Also, each state 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.

4. Related statute or rule:
There are no other related statutes or administrative rules directly related to this rule.
5. Plain language analysis:
The purpose of this rule is to update the department's appeal procedures, to improve and clarify the process for members, the administrative law judge, the boards that decide appeals, the department, and others who are involved in the process.
6. Summary of, and comparison with, existing or proposed federal regulations:
There are no existing or proposed federal regulations that directly pertain to this proposed rule.
7. Comparison with rules in adjacent states:
Many other retirement systems in adjacent states promulgate rules to provide an appeals process for their members. The appeals process established by the department of employee trust funds is consistent with those other retirement systems in Illinois, Iowa, Michigan, and Minnesota.
8. Summary of factual data and analytical methodologies:
The department is proposing this rule to clarify and improve the existing appeals process established by this department.
9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:
This rule does not have an effect on small businesses because private employers and their employees do not participate in, and are not covered by, the Wisconsin Retirement System.
10. Effect on small business:
The rule has no effect on small businesses.
11. Agency contact person (including email and telephone):
Please direct any questions about the proposed rule to David Nispel, General Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707. The email address: david.nispel@etf.state.wi.us. The telephone number is: (608) 264-6936.
12. Place where comments are to be submitted and deadline for submissions:
Written comments on the proposed rule may be submitted to David Nispel, General Counsel, Department of Employee Trust Funds, 801 West Badger Road, P.O. Box 7931, Madison, WI 53707. Written comments must be received at the Department of Employee Trust Funds no later than 4:30 p.m. on October 21, 2011.

Text of Proposed Rule

SECTION 1. ETF 11.01 (1) is amended to read:

ETF 11.01 Purpose and scope. (1) The purpose of this chapter is to establish a regular and uniform system of procedures and rules governing the review of appealable department of employee trust funds determinations by the board responsible for the subject matter. This chapter interprets the provisions of ss. 227.44 to 227.48, 227.485, 227.49 and 227.50, Stats., concerning the conduct of proceedings, as those provisions apply to the deferred compensation board, group insurance board, teachers retirement board and Wisconsin retirement board and establishes rules for appeals to the employee trust funds board and its designees. Any appeal to a board of a determination made by the department shall be conducted in accordance with this chapter.

SECTION 2. ETF 11.02 (3) is amended to read:

ETF 11.02 (3) "Appeal" means the review of a written finding, notification or decision specifically set forth in a determination made by the department conducted by a board under s. 40.03 (1) (j), (6) (i), (7) (f), or (8) (f), Stats.

SECTION 3. ETF 11.02 (8) is amended to read:

ETF 11.02 (8) "Determination made by the department" means a written finding, notification or decision of the department, applying law or contract terms to actual facts to determine a benefit, right, obligation or interest under ch. 40, Stats., including contracts authorized by ch. 40, Stats., of a person who is, or claims the status of, a participant, annuitant, beneficiary, employer, insured, insurer or deferrer. Such a written finding, notification or decision includes notice of appeal rights.

SECTION 4. ETF 11.02 (3m) is created to read:

ETF 11.02 (3m) "Appeals Coordinator" means the department staff responsible for receiving appeals, forwarding appeals to the hearing examiner, and working directly with the hearing examiner and board on administrative matters regarding an appeal.

SECTION 5. ETF 11.03 (2) (b) is amended to read:

ETF 11.03 (2) (b) A right or benefit under~~In accordance with the limitations on board remedies established by~~ ch. 40, Stats., a right or benefit may not be granted by the board as the result of an appeal unless under the facts proven and the provisions of ch. 40, Stats., and other applicable law, the appellant is eligible for the right or benefit, and meets all qualifications established by statute, administrative rule and any applicable contract authorized by ch. 40, Stats., as of the commencement of the appeal. ~~This paragraph applies regardless of any allegation that an employee or agent of the department or member or agent of the board gave erroneous or mistaken advice or was negligent in the performance of any alleged duty to the aggrieved person. Erroneous or~~

mistaken advice or negligence in performance of a duty shall not be the basis for granting a right or benefit to someone under ch. 40, stats.

SECTION 6. ETF 11.03 (2) (bm) is amended to read:

(bm) ~~There is no remedy in an appeal before a board based on a theory of undue influence.~~ Regardless of proof offered by an appellant, the board may not change or void any choice, designation, application or other action of a participant, annuitant, beneficiary, insured, or deferrer on the grounds that person was acting under the undue influence of another. The board does not have authority to hear appeals involving allegations of retaliation or discrimination or to issue any decision based on such allegations. Nothing in this paragraph shall be construed to prevent an aggrieved party from bringing an action against the beneficiary of the alleged undue influence or the person responsible for the alleged retaliation or discrimination in a court of competent jurisdiction and seeking any remedy available under the law.

SECTION 7. ETF 11.03 (3m) is amended to read:

ETF 11.03 (3m) NEW DETERMINATION; NEW TIME LIMITS. The department may internally review a previous determination made by the department. If the department then issues a new determination that revises the original determination, reaches a different result from the original determination, or relies upon different material facts or law from those stated in the original determination, any person aggrieved by the new determination shall have 90 days from its issuance to request an appeal.

SECTION 8. ETF 11.03 (4) (b) is amended to read:

ETF 11.03 (4) (b) The request identifies the particular ~~departmental~~ department determination being challenged and the factual and legal basis for the appeal, including specifically identifying the particular material facts and legal interpretations underlying the ~~departmental~~ department determination which the appellant believes are erroneous. Any question about the sufficiency of the pleading under this paragraph shall be resolved by the hearing examiner at the pre-hearing conference.

SECTION 9. ETF 11.03 (8) is amended to read:

ETF 11.03 (8) BURDEN OF PROOF. The appellant shall have the burden of proceeding and the burden of proving each element necessary to establish that the appellant is entitled to, and has fully qualified for, the claimed right or benefit: provided by ch. 40, stats.

SECTION 10. ETF 11.03 (9) Note is created to read:

Note: The "Limited Power-Of-Authority For Appeal" form, ET-4944, "Authorization To Disclose Non-Medical Personal Information" form, ET-7406, and "Authorization To

Disclose Medical Information” form, ET-7414, required by this rule may be obtained at no charge by writing to: department of employee trust funds, P. O. Box 7931, Madison, WI 53707-7931, or by calling: (608) 266-3285 or toll free at (877) 533-5020. The forms also are available on the department’s website: etf.wi.gov.

SECTION 11. ETF 11.03 (11) is amended to read:

ETF 11.03 (11) PRE-HEARING CONFERENCE. The hearing examiner shall hold a pre-hearing conference for the purpose of: determining the proper parties, defining the issues to be resolved, and identifying the material factual and legal disputes between the parties. ~~If the parties have not reached a stipulation on material facts not in dispute, the hearing examiner shall set~~ setting a deadline for the parties to reach agreement on a factual stipulation of facts or advise the examiner that they are unable to do so. ~~The hearing examiner may set and setting~~ the date for the evidentiary hearing at the pre-hearing conference. The pre-hearing conference may be held by telephone with the call initiated by the hearing examiner. Following the pre-hearing conference, the hearing examiner shall prepare a memorandum to the parties summarizing the actions taken, amendments allowed to the pleading, recording agreements of the parties, specifying the issues to which the hearing is limited and making appropriate orders to the parties. This memorandum shall control the subsequent course of the appeal, unless modified at the hearing to prevent manifest injustice.

SECTION 12. ETF 11.03 (14) is created to read:

ETF 11.03 (14) HEARING LOCATION. The evidentiary hearing will be held at the offices of the hearing examiner except as may otherwise be necessary for the convenience of all parties to the appeal.

SECTION 13. ETF 11.03 (15) is created to read:

ETF 11.03 (15) EXPEDITED APPEAL PROCESS. Requests for an expedited appeal process shall be considered by the hearing examiner upon receipt of a written request from a party to the appeal. The hearing examiner shall allow for written objections to be filed within ten days of the date that notice is sent to the parties that such a request has been received. Upon receipt of such a request, the hearing examiner shall schedule a pre-hearing conference for the specific purpose of discussing with the parties the reasons for the request, any objections, and a possible procedure for expediting the time period for issuing a final decision in the appeal. The hearing examiner shall grant a request for an expedited appeal process based on financial hardship or other extraordinary circumstances demonstrated by a party. Following the pre-hearing conference, the hearing examiner shall prepare a memorandum to the parties summarizing the expedited process to which the parties have agreed and the hearing examiner has approved. If the parties did not reach an agreement during the pre-hearing conference, the hearing examiner shall issue an order either approving or denying the request for an expedited appeal.

SECTION 14. ETF 11.03 (16) is created to read:

ETF 11.03 (16) The parties may agree to have the appeal decided without holding an evidentiary hearing and on the basis of filing legal briefs with the hearing examiner. If there is such an agreement, the parties shall inform the hearing examiner in writing. Upon submission of the legal briefs by the parties, the hearing examiner shall prepare a proposed decision in the manner set forth in s. ETF 11.09.

SECTION 15. ETF 11.04 (2) is amended to read:

ETF 11.04 (2) QUALIFICATIONS. ~~Board staff~~The department shall contract with a person to serve as a hearing examiner. The person shall be an attorney or administrative law judge knowledgeable in administrative law practice and ch. 40, Stats., or similar statutory benefit programs, or a person deemed otherwise qualified by the board. No person who directly participated in making the determination appealed from may be designated or serve as hearing examiner.

SECTION 16. ETF 11.04 (4) (Intro.), (4) (f), and (4) (h) are amended to read:

(4) POWERS. In addition to other powers expressly granted or delegated to the hearing examiner by this chapter, the hearing examiner ~~may~~ shall:

(f) Limit testimony to only those matters which are disputed ~~and which can be resolved by the board pursuant to this rule and ch. 40, stats.~~

(h) Require briefs ~~following the evidentiary hearing unless the parties and the hearing examiner agree briefs are not necessary.~~

SECTION 17. ETF 11.04 (4) (i), (j), and (k) are created to read:

ETF 11.04 (i) Encourage the parties to submit a stipulation of facts and if the parties cannot reach agreement on a stipulation, then the hearing examiner shall issue a statement of facts based on submissions from the individual parties.

(j) Limit testimony and exhibits at the evidentiary hearing to only those matters which are relevant to the findings, notifications, and decisions set forth in the determination made by the department.

(k) Rule on any request by a party for an expedited hearing process as provided in s. ETF 11.03 (15).

SECTION 18. ETF 11.04 (8) is amended to read:

ETF 11.04 (8) EXAMINER'S FILE. In the course of presiding over the appeal, the hearing examiner shall maintain the official record of the appeal, as well as filing correspondence to the examiner relating directly to the appeal but not part of the record. The hearing examiner may delegate some or all of this responsibility to board staff. After preparing the final or proposed decision, the hearing examiner shall forward the record and hearing examiner's file to the appeals coordinator for the department. The

examiner's personal notes shall not be forwarded to the department and are not part of the official record. Disposition of the examiner's personal notes is at his or her discretion.

SECTION 19. ETF 11.05 (4) is amended to read:

ETF 11.05 (4) A party to the appeal may request that the hearing examiner review individual personal information in the records of the department in camera. If the hearing examiner determines that the information is relevant to the appeal and disclosure is required to assure proper administration of a benefit program under ch. 40, Stats., the examiner may order the department to disclose the information as provided in sub. (3).

SECTION 20. ETF 11.05 (7) is amended to read:

ETF 11.05 (7) ~~For the convenience of a party or witness, but only by~~ By advance written agreement between all parties, the oral or written deposition of a witness, as described by ss. 804.05 and 804.06, Stats., may be taken and used at the hearing in its entirety, so far as it is admissible under this chapter, as if the witness were then present and testifying.

SECTION 21. ETF 11.06 (1) is amended to read:

ETF 11.06 Evidence at hearing. (1) PRIVILEGES; RULES OF EVIDENCE. Rules of privilege recognized by law shall be given effect. However, common law or statutory rules of evidence do not apply except as provided in s. ETF 11.12 (2) (b) concerning hearsay. The hearing examiner shall admit all testimony having a reasonable probative value to the issue that was established at the pre-hearing conference and that is to be resolved by the evidentiary hearing. The hearing examiner shall exclude from the record irrelevant, immaterial, or unduly repetitious testimony.

SECTION 22. ETF 11.07 (1) is amended to read:

ETF 11.07 Informal disposition. (1) Disposition of an appeal under this section requires no further action by the hearing examiner or board. After the parties have informed the hearing examiner in writing that the appeal has been informally disposed of pursuant to this section, the hearing examiner shall forward the record to the appeals coordinator.

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SECTION 23. ETF 11.08 (2) (b) 1. is amended to read:

ETF 11.08 (2) (b) 1. The appeal was not filed within 90 days after the ~~departmental~~ department determination appealed from was ~~mailed~~ sent by mail or e-mail to the person aggrieved by the determination. The entire appeal shall be dismissed.

SECTION 24. ETF 11.08 (2) (f) and (g) are created to read:

ETF 11.08 (2) (f) No issue has been identified which can be resolved by the hearing examiner or board under this rule or ch. 40, Stats.

(g) There is no remaining issue to be decided from the issues that are set forth in the department determination letter.

SECTION 25. ETF 11.08 (6) is renumbered to read 11.08 (7).

SECTION 26. ETF 11.08 (6) is created to read:

ETF 11.08 (6) The hearing examiner shall issue the final decision of an appeal if each of the parties informs the hearing examiner in writing that they agree to have the appeal decided pursuant to a motion for summary judgment. The motion must be filed with the hearing examiner and include the signatures of the parties.

SECTION 27. ETF 11.09 (1) is amended to read:

ETF 11.09 Proposed decision. (1) CONTENTS. The proposed decision shall be in the same form and comply with the same standards as is required for a final decision. If the hearing examiner concludes that the decision may depend upon the interpretation of an ambiguous statute, the proposed decision shall include the hearing examiner's basis for concluding that the statute is ambiguous as a matter of law and a recommended interpretation giving the same weight to the interpretations of the department, attorney general and administrative rules as is required for a final decision. If the proposed decision does not dispose of an issue raised by a party, the hearing examiner shall state in the proposed decision why Wis. Stat. ch. 40 or this rule does not permit such a disposition.

SECTION 28. ETF 11.09 (3) is amended to read:

(3) OBJECTIONS. Any party ~~aggrieved by the proposed decision~~ may file a written objection to the proposed decision with the hearing examiner within 20 days of the date of the notice of the proposed decision. The ~~aggrieved~~ party shall specify, in detail, the following:

SECTION 29. ETF 11.09 (3) (c) is created to read:

ETF 11.09 (3) (c) Any written objections to the proposed decision shall be included in the record of the appeal that is forwarded to the board.

SECTION 30. ETF 11.12 (1) (a) is amended to read:

ETF 11.12 (1) (a) Findings of fact, consisting of a concise and separate statement of the ultimate conclusion upon each material issue of fact, without recital of

evidence. If the findings of fact do not include an ultimate conclusion on an issue raised by a party, a statement shall be made indicating why Wis. Stat. ch. 40 or this rule do not authorize the hearing examiner to make such a ruling.

SECTION 31. ETF 11.12 (8) is created to read:

ETF 11.12 (8) No party to an appeal of a determination made by the department may contact any member of the board about that appeal prior to the issuance of a final decision by the board, unless the board specifically requests information from the parties.

SECTION 32. ETF 11.13 (1) (h) is created to read:

ETF 11.13 (1) (h) Letters and e-mails sent to the hearing examiner or the board by a party.

SECTION 33. ETF 11.13 (3) is amended to read:

ETF 11.13 (3) The board staff shall arrange for a stenographic, electronic or other record of the hearing proceedings to be made. A written transcript of the hearing shall be prepared only if deemed necessary by upon request of a party, the hearing examiner, the board or the department. ~~Unless otherwise prepared for the hearing examiner's, board's or department's own use, a written transcript shall not be prepared at the specific request of any person, unless needed by that person for judicial review purposes or other valid reason.~~ If a written transcript is prepared, the stenographic, electronic or other record need not be retained.

SECTION 34. ETF 11.14 (2) (c) is amended to read:

ETF 11.14 (2) (c) The discovery of new evidence no later than 20 days after notice of the final decision is mailed that is sufficiently strong to reverse or modify the original decision, which could not have been previously discovered by due diligence.

SECTION 35. ETF 11.14 (4) (intro) is amended to read:

ETF 11.14 (4) DECISION ON MOTION PETITION. The board chair shall determine whether the petition shall be added to the agenda of the next board meeting or whether to delegate final authority to decide the motion-petition to the hearing examiner who presided over the appeal. The parties to the appeal shall immediately be notified of the decision to grant or deny the petition. If the board itself considers and grants the petition, the appeal will be referred to a hearing examiner and proceedings conducted under sub. (6). If the decision is delegated to the hearing examiner:

SECTION 36. ETF 11.16 (4) is amended to read:

ETF 11.16 (4) DEPARTMENT AND BOARD MAILING ADDRESS. (a) Mail to a board shall be addressed to the board, in care of the ~~department~~ appeals coordinator and mailed or delivered to the department.

Note: The present mailing address of the department is: ~~Department of Employee Trust Funds~~ department of employee trust funds, Post Office Box 7931, Madison, Wisconsin 53707-7931.

(end of rule text)

Proposed Effective Date:

This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro), Stats.

Fiscal Estimate:

The proposed rule has no direct fiscal impact. The proposed rule generates no revenues for any employer. The proposed rule itself has no effect on the fiscal liabilities of any county, city, village, town, school district, technical college district or sewerage. The rule has no state fiscal effect during the current biennium and no fiscal impact on state funds.

Free Copies of Proposed Rule:

Copies of the proposed rule are available without cost from David Nispel, General Counsel, Department of Employee Trust Funds, P.O. Box 7931, Madison, WI 53707-7931. The telephone number is: (608) 264-6936.

Approved for Publication:

This proposed rule is approved for publication in the Wisconsin Administrative Register.

Dated this ____ day of September, 2011.

David Stella, Secretary
Department of Employee Trust Funds