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Report From Agency

**DATCP Docket No. 09-R-03
Rules Clearinghouse No. 09-054**

**Proposed Final Draft
March 10, 2010**

**PROPOSED ORDER OF THE WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

2 The Wisconsin department of agriculture, trade and consumer protection proposes the following
3 order *to repeal* ATCP 1.01(14); *to renumber* ATCP 1.01(15) to (17) and (19) to (22), 1.11(1)(b)
4 to (e), 1.25(1)(b) and (c), and 1.33; *to renumber and amend* ATCP 1.01(18); *to amend* ATCP
5 1.01(1), (2), (3) and (4), 1.03(1)(a)4. and 12., 1.05(1) and (6), 1.06(1) and (note) and (3)(title)
6 and (a), 1.07(2), 1.08(title), (1)(intro.) and (a) to (c) and (2), 1.08(4)(c)2. and (d), 1.10(1)(intro.),
7 (h), (n), (o), (q) and (t), 1.11(title), 1.12, 1.15(2), 1.16(1) to (3) and (4)(a) and (b), 1.20(5) and
8 (8), 1.21(1)(b), 1.23(3)(a)(intro.), 1.24(2) and (3)(title), 1.25(4)(b) and (c), 1.25(6)(b) and 1.32(2)
9 and (3)(b); *to repeal and recreate* ATCP 1.03(3), 1.05(4), 1.06(2), 1.08(3), and 1.24(3)(a) and
10 (b); and *to create* ATCP 1.01(22), 1.03(2)(b)3., 1.05(4)(note), 1.06(3)(d) and (note), 1.07(3) and
11 (note), 1.11(1)(b), 1.23(6), 1.25(1)(d), and 1.33; *relating to* administrative orders and contested
12 cases.

**Analysis Prepared by the Department of
Agriculture, Trade and Consumer Protection**

The department of agriculture, trade and consumer protection (DATCP) administers a wide range of laws related to food safety, disease control, trade regulation, consumer protection, agricultural resource management and other matters. Under these laws, DATCP may issue various kinds of administrative orders and take other administrative actions that have the force of law.

Persons adversely affected by these orders and actions may request a trial-type “contested case” hearing under ch. 227, Stats., and ch. ATCP 1, Wis. Adm. Code (ATCP 1). This rule updates and clarifies current “contested case” procedures under ATCP 1.

Statutes Interpreted

Statutes Interpreted: s. 93.18, Stats., ch. 126, Stats., and subch. III of ch. 227, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 227.10 and 227.11, Stats.

Explanation of Statutory Authority

DATCP has broad authority under s. 93.07(1), Stats., to adopt rules needed to implement laws under its jurisdiction. DATCP has specific authority, under the provisions cited above, to adopt rules related to administrative orders and contested cases.

Related Rules and Statutes

DATCP administers a wide range of statutes, including chs. 88, 91 to 100, 126 and 136, Stats. In the administration of these statutes, DATCP may issue administrative orders such as license suspensions, administrative injunctions (e.g., orders prohibiting unfair business practices), hazardous product bans, holding orders to prohibit the distribution of adulterated food or commodities, plant and animal quarantine orders, orders condemning adulterated food or diseased animals, and a variety of other orders specified by statute.

Background

An impartial administrative law judge (ALJ) presides over a “contested case” hearing. DATCP recently transferred its ALJ functions to the department of administration, division of hearings and appeals. ALJs from the division of hearings and appeals will conduct DATCP “contested case” hearings, subject to ch. 227, Stats., and ATCP 1. DATCP will pay the division of hearings and appeals for the ALJ services.

The DATCP secretary or designee typically makes the final decision in a “contested case,” after reviewing the ALJ’s proposed decision. The final decision is subject to judicial review, as provided in ch. 227, Stats.

Plain Language Analysis

Administrative Law Judge

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

Producer Security; Recovery Proceedings

DATCP currently administers an agricultural producer security program under ch. 126, Stats., to protect agricultural producers against financial defaults by grain warehouse keepers, grain dealers, milk contractors and vegetable contractors. In the event of a default, DATCP may initiate a recovery proceeding to determine the amount of producer claims allowed under the producer security program. The recovery proceeding is conducted as a “contested case” according to ch. 126, Stats., and ATCP 1. This rule updates ATCP 1 to incorporate current procedures and terminology under ch. 126, Stats., including how recovery proceedings are commenced, how default claims are audited, and what is to be contained in a proposed decision determining claims in a recovery proceeding.

“Contested Case” Hearing Requests and Assignments

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

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

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

Hearing on Summary Special Orders

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

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

Informal hearings are conducted by DATCP managers or staff who have had no prior involvement in the case, and who are authorized to take or recommend remedial action as

necessary. This rule clarifies that informal hearings are not governed by formal “contested case” procedures. If a matter is not successfully resolved by informal hearing, the affected party may request a formal “contested case” hearing.

Parties Represented by Attorney

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

ALJ Authority

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

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

Disclosure of Witnesses and Evidence; Discovery

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

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

Hearing Transcripts

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

- Under current rules and this rule, any party may request a written transcript.

- Under current rules and this rule, if a written transcript is prepared in response to a request from any party, that party must pay the transcription and copying cost. Under this rule, DATCP must charge its actual per-page transcription cost (compared to a standard per-page charge of \$1.75 under current rules) plus a copying cost of 25 cents per page. Other parties may obtain copies by paying a copying cost of 25 cents per page.
- Under current rules and this rule, if DATCP orders a written transcript for its own purposes or for purposes of judicial review, DATCP must pay the transcription cost. Other parties may obtain copies for 25 cents per page.
- Persons who are not parties to a contested case may make public records requests to obtain copies of the contested case transcript or recording.

Videoconferencing

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

Order of Proof

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

Proposed ALJ Decision; Objections

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

Settlement

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

Frivolous Claims; Cost Award

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

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

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

Fiscal Estimate

This rule will have no fiscal effect on DATCP or local units of government. A complete *fiscal estimate* is attached.

Business Impact

This rule will have no significant effect on business. A complete *business impact analysis* is attached.

Federal Regulations

A variety of federal regulations govern procedures in federal “contested cases.” However, none of those regulations has a direct bearing on this rule.

Comparison with Adjacent States

Surrounding states, including Illinois, Indiana, Iowa, Michigan and Minnesota, have their own procedural regulations related to administrative “contested cases” in those states. None of those regulations has a direct bearing on this rule. Wisconsin is generally regarded as having more well-developed “contested case” procedures and standards than most other states.

Data and Analytical Methods

This rule does not depend on any complex analysis of data. This rule makes minor changes to current rules.

Agency Contact for Submitting Comments

Questions or comments related to this rule may be sent to the following address:

Karen Schultz
Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53718
Telephone: (608) 224-5023
Karen.Schultz@wisconsin.gov

1 **SECTION 1.** ATCP 1.01(1), (2), (3) and (4) are amended to read:

2 ATCP 1.01(1) “Administrative law judge” means the secretary or an examiner whom the
3 secretary appoints in writing, under s. 227.46(1), Stats., to preside over a contested case. The
4 secretary may appoint an examiner from the department, the department of administration, or
5 another state agency with the agreement of that agency.

6 (2) “Claim filing order” means an order directing producers or depositors to file claims
7 under subch. ~~VI~~ VII of ch. 126, Stats.

8 (3) “Claim” means a producer or depositor claim under subch. ~~VI~~ VII of ch. 126, Stats.

9 (4) “Claimant” means a producer or depositor claimant under subch. ~~VI~~ VII of ch. 126,
10 Stats.

11 **SECTION 2.** ATCP 1.01(14) is repealed.

12 **SECTION 3.** ATCP 1.01(15) to (17) are renumbered (14) to (16).

13 **SECTION 4.** ATCP 1.01(18) is renumbered (17) and amended to read:

14 ATCP 1.01(17) “Order determining claims” means an order allowing or disallowing
15 producer or depositor claims in a ~~financial default~~ recovery proceeding.

16 **SECTION 5.** ATCP 1.01(19) to (22) are renumbered (18) to (21).

17 **SECTION 6.** ATCP 1.01(22) is created to read:

1 ATCP 1.01(22) “Recovery proceeding” means a proceeding initiated by the department
2 under subch. VII of ch. 126, Stats., to determine the amount of allowable producer or depositor
3 claims against a vegetable contractor, milk contractor, grain warehouse keeper or grain dealer.

4 **SECTION 7.** ATCP 1.03(1)(a)4. and 12. are amended to read:

5 ATCP 1.03(1)(a)4. An order determining claims in a ~~financial default~~ recovery
6 proceeding.

7 12. A temporary animal hold order issued under s. ATCP 10.90 or a destruction or
8 removal order issued under s. ATCP 10.91.

9 **SECTION 8.** ATCP 1.03(2)(b)3. is created to read:

10 ATCP 1.03(2)(b)3. A voluntary compliance agreement under s. 97.12(3), Stats.

11 **SECTION 9.** ATCP 1.03(3) is repealed and recreated to read:

12 ATCP 1.03(3) SUMMARY SPECIAL ORDER; HEARING. (a) If the department issues a
13 summary special order against any person, that person may do any or all of the following:

14 1. Request a contested case hearing on the summary special order, pursuant to s. ATCP
15 1.06.

16 2. Request an informal hearing on the summary special order. A request for informal
17 hearing may be made to the secretary or, if the summary special order is issued by a division, to
18 the issuing division. The request shall be in writing. The request shall briefly identify the
19 summary special order on which an informal hearing is requested, how the order causes or
20 threatens substantial harm to the requester, the material facts or legal issues in dispute, and the
21 relief requested.

22 (b) If it is not clear whether a requester under par. (a) is requesting a contested case
23 hearing or an informal hearing or both, the department may require the requester to specify the

1 type of hearing requested. A request for an informal hearing does not preclude a subsequent
2 request for a contested case hearing.

3 (c) The department shall hold a prompt informal hearing in response to a request under
4 par. (a)2. An informal hearing is not subject to contested case hearing procedures under this
5 chapter or ch. 227, Stats. The department shall hold the informal hearing as soon as reasonably
6 possible, but not more than 20 days after the department receives the hearing request, unless the
7 requester agrees to a later date. The department may hold the informal hearing in person or by
8 telephone.

9 (d) An informal hearing under par. (c) shall be conducted by an individual who was not
10 involved in the investigation of the case, or in the decision to issue the summary special order.
11 The individual conducting the informal hearing may not act as administrative law judge in any
12 contested case hearing conducted on the same summary special order.

13 (e) A person conducting an informal hearing under par. (c) may stay or modify the
14 summary special order or, if the order was issued by the secretary or division administrator,
15 recommend a stay or modification to the secretary or division administrator.

16 (f) A request for hearing under par. (a) does not automatically stay or modify a summary
17 special order.

18 **SECTION 10.** ATCP 1.05(1) is amended to read:

19 ATCP 1.05(1) DIVISION COMPLAINTS. To obtain a special order from the secretary or
20 final decisionmaker, other than in a ~~financial default~~ recovery proceeding, a division shall file a
21 written complaint with the secretary. The complaint shall be signed by the division administrator
22 and shall comply with sub. (3).

23 **SECTION 11.** ATCP 1.05(4) is repealed and recreated to read:

1 ATCP 1.05(4) PROCEEDINGS INITIATED IN RESPONSE TO COMPLAINT. (a) In response to a
2 complaint under sub. (1) or (2), the secretary shall initiate a contested case proceeding by issuing
3 a hearing notice under s. ATCP 1.20. The department shall mail or deliver a copy of the notice,
4 together with a copy of the complaint, to the administrative law judge, the complainant, and each
5 respondent identified in the complaint.

6 (b) Notwithstanding par. (a):

7 1. A party may move for dismissal of a contested case at any point in a contested case
8 proceeding.

9 2. The final decisionmaker may dismiss a contested case at any point in a contested case
10 proceeding if the final decisionmaker determines, based on the record, that the proceeding should
11 be dismissed for lack of jurisdiction or other reasons.

12 **SECTION 12.** ATCP 1.05(4)(note) is created to read:

13 **NOTE:** For example, based on a party's pre-hearing motion, the administrative law
14 judge and final decisionmaker may conclude that a contested case should be
15 dismissed for jurisdictional or other reasons notwithstanding the secretary's action
16 under par. (a).
17

18 **SECTION 13.** ATCP 1.05(6) is amended to read:

19 ATCP 1.05(6) AMENDING OR WITHDRAWING A COMPLAINT. A complainant may, with
20 leave from the ~~examiner~~ administrative law judge, amend or withdraw a complaint at any point
21 in a contested case proceeding. The ~~examiner~~ administrative law judge may withhold leave if
22 the amendment or withdrawal would unduly delay or disrupt the proceeding, or would work a
23 significant injustice against any party.

24 **SECTION 14.** ATCP 1.06(1) and (note) are amended to read:

25 ATCP 1.06(1) WHO MAY REQUEST. A person adversely affected by a department action
26 may request a contested case hearing on that action. ~~Except as provided under s. ATCP~~

1 ~~1.03(3)(a), a~~ A request for a contested case hearing shall be filed with the secretary and shall
2 comply with sub. (2). A request for hearing on a department action does not automatically stay
3 or modify that action.

4 **NOTE:** See s. 227.42, Stats., and s. ATCP 1.03(4)(3). A request for hearing may be
5 filed with the secretary at the following address:

6
7 Secretary
8 Wisconsin Department of Agriculture, Trade and Consumer Protection
9 2811 Agriculture Drive
10 P.O. Box 8911
11 Madison, WI 53708-8911
12

13 **SECTION 15.** ATCP 1.06(2) is repealed and recreated to read:

14 ATCP 1.06(2) REQUEST FORM AND CONTENTS. (a) A contested case hearing request
15 under sub. (1) shall be in writing and shall describe all of the following:

- 16 1. The department action on which a hearing is requested.
- 17 2. The requester's substantial interest claimed to be adversely affected.
- 18 3. How the department's action adversely affected the requester's substantial interest.
- 19 4. The grounds for the hearing request, including material facts or legal issues that are in
20 dispute.
- 21 5. The relief sought.

22 (b) The secretary may require the requester to file additional clarifying information, as
23 necessary for the secretary to decide whether to grant or deny a hearing request.

24 **SECTION 16.** ATCP 1.06(3)(title) and (a) are amended to read:

25 ATCP 1.06(3) ~~NOTICE GRANTING~~ GRANTING OR DENYING REQUEST. (a) ~~Except as~~
26 ~~provided under s. ATCP 1.03(4), the~~ The secretary shall grant or deny a contested case hearing
27 request under sub. (1) within ~~20~~ 30 days after a complete request is filed, unless the requester
28 agrees to an extension of time. The secretary may grant a contested case hearing request if, upon

1 preliminary review, it appears that the department has jurisdiction over the matter and that a
2 contested case proceeding is warranted under s. 227.42, Stats., or other applicable law.

3 **SECTION 17.** ATCP 1.06(3)(d) and (note) are created to read:

4 ATCP 1.06(3)(d) Notwithstanding par. (a):

5 1. A party may move for dismissal of a contested case at any point in a contested case
6 proceeding.

7 2. The final decisionmaker may dismiss a contested case at any point in a contested case
8 proceeding if the final decisionmaker determines, based on the record, that the proceeding should
9 be dismissed for lack of jurisdiction or other reasons.

10 **NOTE:** For example, based on a party's pre-hearing motion, the administrative law
11 judge and final decisionmaker may conclude that a contested case should be
12 dismissed for jurisdictional or other reasons notwithstanding the secretary's action
13 under par. (a).
14

15 **SECTION 18.** ATCP 1.07(2) is amended to read:

16 ATCP 1.07(2) RESPONSE TO PETITION. Within ~~20~~ 30 days after a petition is filed under
17 sub. (1), the secretary shall issue a written notice granting or denying the petition. If the petition
18 is granted, the secretary shall initiate a contested case proceeding under s. 227.41(1), Stats., by
19 issuing a hearing notice under s. ATCP 1.20. If the petition is denied, the denial notice shall
20 specify the reasons for the denial.

21 **SECTION 19.** ATCP 1.07(3) and (note) are created to read:

22 ATCP 1.07(3) DISMISSAL. Notwithstanding sub. (2):

23 (a) A party may move for dismissal of a proceeding under this section at any point in the
24 proceeding.

1 (b) The final decisionmaker may dismiss a proceeding under this section at any point in
2 the proceeding if the final decisionmaker determines, based on the record, that the proceeding
3 should be dismissed for lack of jurisdiction or other reasons.

4 **NOTE:** For example, based on a party's pre-hearing motion, the administrative law
5 judge and final decisionmaker may conclude that a proceeding for declaratory
6 ruling should be dismissed for jurisdictional or other reasons notwithstanding the
7 secretary's action under sub. (2).
8

9 **SECTION 20.** ATCP 1.08(title), (1)(intro.) and (a) to (c), and (2) are amended to read:

10 **ATCP 1.08(title) Request for ~~financial default~~ recovery proceeding.** (1) DIVISION
11 FILING. To initiate a ~~financial default~~ recovery proceeding under subch. ~~VI-VII~~ of ch. 126, Stats.,
12 the trade and consumer protection division shall file all of the following with the secretary:

13 (a) A written request, signed by the division administrator, asking that a ~~financial default~~
14 recovery proceeding be initiated.

15 (b) Copies of one or more producer claims alleging a financial default, or other evidence
16 of default under subch. ~~VI~~ VII of ch. 126, Stats.

17 (c) A proposed default claim filing order.

18 (2) CLAIM FILING ORDER. Upon receiving documents from the trade and consumer
19 protection division under sub. (1), the secretary may initiate a ~~financial default~~ recovery
20 proceeding by issuing a default claim filing order. If the secretary issues a default claim filing
21 order, the department shall publish the default claim filing order as required by subch. ~~VI-VII~~ of
22 ch. 126, Stats.

23 **SECTION 21.** ATCP 1.08(3) is repealed and recreated to read:

24 ATCP 1.08(3) AUDITING CLAIMS; PROPOSED DECISION. The trade and consumer
25 protection division shall audit claims filed in response to the default claim filing order under sub.

1 (2). Based on its audit, the trade and consumer protection division shall file with the secretary a
2 proposed decision determining claims. The proposed decision shall do all of the following:

3 (a) Specify proposed findings of fact, proposed conclusions of law and a proposed order
4 determining claims and appropriate sources for payment of claims.

5 (b) Allow or disallow each default claim according to s. 126.70(4), Stats., and specify the
6 amount of each allowed claim.

7 (c) Specify, for each allowed claim, the amount that the department is authorized to pay
8 under s. 126.71, Stats.

9 (d) Specify the method, under s 126.71, Stats., by which the department will pay the
10 authorized amounts.

11 (e) Explain a claimant's right under s. 126.87(4), Stats., to seek court recovery of that
12 portion of an authorized claim that is not paid by the department.

13 (f) Specify a date by which the contractor, claimant, surety or trade credit insurer may
14 file written objections to the proposed decision.

15 (g) If a respondent is covered by the department's trade credit insurance policy, specify
16 what claimants must do to qualify for coverage under the policy.

17 (h) Include other provisions, if any, that the division finds necessary for the just and
18 orderly determination of claims under ch. 126, Stats..

19 **SECTION 22.** ATCP 1.08(4)(c)2. and (d) are amended to read:

20 ATCP 1.08(4)(c)2. Any ~~trustee~~ financial institution, insurance company or surety who
21 may be obligated as a result of the default to pay the department.

1 (d) If any party files a timely objection to the division's proposed decision under sub.
2 (3), the ~~examiner~~ administrative law judge shall hear that objection in the contested case hearing
3 under par. (a).

4 **SECTION 23.** ATCP 1.10(1)(intro.), (h), (n), (o), (q) and (t) are amended to read:

5 ATCP 1.10(1) AUTHORITY. An administrative law judge may, on behalf of the
6 department and according to this chapter, preside over a contested case proceeding and issue
7 orders regulating the conduct of the proceeding. In a contested case proceeding, unless
8 otherwise provided by the secretary, the administrative law judge may do all of the following:

9 (h) ~~Issue~~ With the approval of the secretary, issue subpoenas to compel the attendance of
10 witnesses and the production of documents.

11 (n) Supervise the creation of the contested case record for that portion of the contested
12 case that is conducted under the auspices of the administrative law judge.

13 (o) If necessary and with the secretary's approval, order ~~that~~ and supervise the
14 preparation of a written transcript of oral proceedings ~~be prepared, and supervise preparation of~~
15 ~~the transcript~~ conducted before the administrative law judge.

16 (q) ~~Advise~~ At the request of the final decisionmaker, advise the final decisionmaker on
17 final decisions and orders.

18 (t) Certify the contested case record ~~to a circuit court~~ for that portion of the contested
19 case that is conducted under the auspices of the administrative law judge, if certification is
20 necessary for a judicial review proceeding.

21 **SECTION 24.** ATCP 1.11(title) is amended to read:

22 **ATCP 1.11 Failure to appear, answer or comply with examiner's administrative**
23 **law judge's order.**

1 **SECTION 25.** ATCP 1.11(1)(b) to (e) are renumbered (c) to (f).

2 **SECTION 26.** ATCP 1.11(1)(b) is created to read:

3 ATCP 1.11(1)(b) Adopt an opposing party’s proposed findings of fact, conclusions of
4 law and order as the administrative law judge’s findings of fact, conclusions of law and order.

5 **SECTION 27.** ATCP 1.12 is amended to read:

6 **ATCP 1.12 Party may appear by representative attorney.** (1) GENERAL. In any
7 contested case, a party may be represented by an attorney ~~or other authorized representative who~~
8 is authorized to practice law in this state. ~~If a party’s representative is not an attorney, the~~
9 ~~represented party shall file a written authorization for the record stating that the representative~~
10 ~~has full authority to act on the party’s behalf in the contested case.~~ An attorney retained to
11 represent any party in a contested case shall immediately give notice of that representation to the
12 department and to all other parties to the contested case.

13 (2) ACTIONS BINDING. Actions and omissions by ~~an authorized representative~~ a party’s
14 attorney in a contested case are binding on ~~the authorizing~~ that party, as if the ~~authorizing~~ party
15 had taken or omitted those actions directly.

16 (3) SERVICE OF DOCUMENTS. If a party ~~appears by a representative~~ in a contested case is
17 represented by an attorney, a document served on that attorney is deemed to be served on that
18 party ~~if it is served on the party’s representative.~~

19 **SECTION 28.** ATCP 1.15(2) is amended to read:

20 ATCP 1.15(2) REQUEST FOR SUBPOENA. A party may request the administrative law
21 judge or final decisionmaker to issue a subpoena on behalf of that party. The requesting party
22 shall submit the proposed subpoena for signature by the administrative law judge or final
23 decisionmaker, and shall mail or deliver a copy of the request to every other party. A party may

1 object to a subpoena or subpoena request and may request a hearing on the objection. The
2 administrative law judge or final decisionmaker shall not sign a subpoena in blank. ~~The~~
3 ~~requesting~~ A party requesting a subpoena is responsible for serving ~~the~~ that subpoena, and for
4 paying any service, witness or travel fees.

5 **SECTION 29.** ATCP 1.16(1) to (3) and (4)(a) and (b) are amended to read:

6 ATCP 1.16(1) RECORD OF ORAL PROCEEDINGS. ~~The department shall make a~~
7 ~~stenographic~~ Oral proceedings in a contested case shall be stenographically or electronically
8 recorded ~~record of oral proceedings in a contested case. Proceedings~~ Oral proceedings in a
9 contested case shall be electronically recorded unless the administrative law judge determines
10 that a stenographic record is necessary and the department approves the creation of a
11 stenographic record.

12 (2) ELECTRONIC RECORDING; COPIES. ~~If the department makes an electronic recording of~~
13 an oral proceedings proceeding in a contested case is electronically recorded, the department
14 ~~shall furnish~~ a copy of the recording shall be furnished at cost; to any ~~person~~ party who requests
15 a copy. ~~The fee for an audio cassette recording is \$5.00 per cassette or any part of a cassette.~~

16 (3) WRITTEN TRANSCRIPT. Upon request by any ~~person~~ party, the department shall
17 provide the requester with a written transcript of oral proceedings in a contested case. The
18 written transcript may be made from an electronic recording of the oral proceedings. The
19 department shall charge a fee for the written transcript as provided under sub. (4). If the
20 department provides a written transcript of a contested case proceeding to any requester, the
21 department shall inform every party to that case that the written transcript is available.

22 (4)(a) Except as provided under par. (b) or (c), the department shall charge the requester
23 a transcription fee ~~of \$1.75~~ that covers the department's per page and transcription costs plus a

1 copying fee of \$.25 per page. If 2 or more ~~persons~~ parties request a written transcript, the
2 department shall charge each requester a copying fee of \$.25 per page, but may divide the
3 transcription fee equitably among the requesters.

4 (4)(b) If the department prepares a written transcript for its own purposes, or at the
5 request of any party for purposes of a judicial review proceeding under s. 227.53, Stats., the
6 department shall assume the costs of transcription. Any ~~person~~ party may obtain a copy of the
7 transcript for a copying fee of \$.25 per page.

8 **SECTION 30.** ATCP 1.20(5) and (8) are amended to read:

9 ATCP 1.20(5) HEARING. Except as provided under sub. (6), the date, time and location
10 at which a hearing will be held in the proceeding. Except in an emergency, or by agreement of
11 all parties, the hearing date shall be not less than ~~10~~ 30 days after the hearing notice is issued. If
12 any party is required to file an answer or other pleading under s. ATCP 1.21, the hearing date
13 shall not precede the last date for filing the answer or other pleading. The administrative law
14 judge may reschedule a hearing as the administrative law judge deems appropriate.

15 (8) REQUIRED ANSWER OR PLEADING. A notice to affected parties that they are required
16 to file an answer or responsive pleading, if such is the case. If a proceeding is initiated in
17 response to a complaint under s. ATCP 1.05, the notice shall inform each respondent named in
18 the complaint that he or she must file an answer to the complaint under s. ATCP 1.21(1).

19 **SECTION 31.** ATCP 1.21(1)(b) is amended to read:

20 ATCP 1.21(1)(b) An answer under par. (a) shall be in writing, and shall be captioned as
21 provided in s. ATCP 1.13(2). The answer shall be signed by the respondent or the respondent's
22 ~~representative~~ attorney, and shall ~~briefly~~ clearly and specifically state the respondent's position
23 with respect to each allegation in the complaint.

1 **SECTION 32.** ATCP 1.23(3)(a)(intro.) is amended to read:.

2 ATCP 1.23(3)(a)(intro.) Except as provided under par. (b) ~~, and unless the administrative~~
3 ~~law judge directs otherwise~~ or ordered by the administrative law judge, every party in a contested
4 case shall provide every other party with all of the following at least 7 10 days prior to hearing:

5 **SECTION 33.** ATCP 1.23(6) is created to read:

6 ATCP 1.23(6) COMPLETION OF DISCOVERY. Discovery in a contested case shall be
7 completed at least 10 days prior to the date the on which the contested case hearing is scheduled
8 to begin, except as otherwise ordered or allowed by the administrative law judge.

9 **SECTION 34.** ATCP 1.24(2) and (3)(title) are amended to read:

10 ATCP 1.24(2) APPROVAL. A proposed ~~settlement~~ order under sub. (1) or (3) is subject
11 to approval by the final decisionmaker. The final decisionmaker signifies approval by signing
12 the proposed order as submitted by the parties.

13 (3)(title) SETTLEMENT PRIOR TO COMPLAINT FILING OR HEARING REQUEST.

14 **SECTION 35.** ATCP 1.24(3)(a) and (b) are repealed and recreated to read:

15 ATCP 1.24(3)(a) The parties to a potential contested case may agree to settle that
16 potential case prior to the filing of any complaint under s. ATCP 1.05 or hearing request under s.
17 ATCP 1.06, and prior to the issuance of any hearing notice under s. ATCP 1.20.

18 (b) The parties to a settlement under par. (a) may stipulate to the issuance of a
19 department order without the filing of any complaint or hearing request, and without further
20 notice, hearing or other contested case procedures. Parties seeking a stipulated order shall file all
21 of the following with the secretary:

22 1. A copy of the proposed order.

1 2. A written stipulation, signed by the parties or their attorneys, in which the parties
2 consent to the entry of the proposed order without the filing of a complaint or hearing request,
3 and without further notice, hearing or other contested case procedures. The stipulating parties
4 waive any right to hearing, reconsideration or judicial review of the stipulated order, including
5 any rights under ss. 227.42, 227.49 or 227.52, Stats.

6 **SECTION 36.** ATCP 1.25(1)(b) and (c) are renumbered (c) and (b).

7 **SECTION 37.** ATCP 1.25(1)(d) is created to read:

8 ATCP 1.25(1)(d) The administrative law judge may on his or her own motion, or on the
9 motion of any party, hold a hearing or any portion of a hearing by videoconferencing technology
10 as defined in s. 885.52(3), Stats., if all of the following apply:

11 1. The administrative law judge determines that the standards and criteria set forth in ss.
12 885.54 and 885.56, Stats., are met.

13 2. The department or the party requesting the use of videoconferencing technology
14 agrees to pay the cost of using that technology.

15 **SECTION 38.** ATCP 1.25(4)(b) and (c) are amended to read:

16 ATCP 1.25(4)(b) ~~If the propriety of a division's order is at issue in a contested case a~~
17 party contests a division's legal authority to issue an existing order, the administrative law judge
18 may require the division to go forward with proof that it had adequate legal authority to issue the
19 order was proper.

20 (c) ~~The~~ Subject to the general order of proof under par. (a), the administrative law judge
21 may determine the order of proof in a contested case, ~~in order~~ to promote an orderly presentation
22 and consideration of the case.

23 **SECTION 39.** ATCP 1.25(6)(b) is amended to read:

1 ATCP 1.25(6)(b) At the discretion of the administrative law judge under sub. (1)~~(b)(c)~~ or
2 (d), a witness may testify by telephone or videoconferencing rather than in person.

3 **SECTION 40.** ATCP 1.32(2) and (3)(b) are amended to read:

4 ATCP 1.32(2) **REPLY.** A division or state agency which is a party to the contested case,
5 and whose action gave rise to the motion for costs and attorneys fees under sub. (1), may file a
6 written response to that motion. The response shall be filed within ~~45~~ 30 days after the
7 prevailing party's motion is filed under sub. (1).

8 (3)(b) If the administrative law judge is not the final decisionmaker in a contested case,
9 the administrative law judge's decision under par. (a) shall be issued as a proposed decision.
10 Within ~~45~~ 30 days after the administrative law judge issues a proposed decision under this
11 paragraph, the parties may file written objections to the proposed decision. After considering the
12 written objections, the final decisionmaker shall issue a final decision granting or denying an
13 award of costs and attorneys fees. The final decision shall comply with ss. ATCP 1.31(1) to (5).

14 **SECTION 41.** ATCP 1.33 is renumbered ATCP 1.34.

15 **SECTION 42.** ATCP 1.33 is created to read:

16 **ATCP 1.33 Costs upon frivolous claim.** (1) Upon motion by any party under s. ATCP
17 1.14, and in accordance with s. 227.483, Stats., if the administrative law judge finds that a party
18 has initiated or pursued a frivolous action, claim or defense in a contested case, the
19 administrative law judge may order the party to reimburse another party for the direct costs,
20 including reasonable attorney fees, that the other party has incurred in responding to that
21 frivolous action, claim or defense.

22 (2) An administrative law judge may not find that an action, claim or defense is frivolous
23 under sub. (1) unless the administrative law judge finds at least one of the following:

1 (a) The action, claim or defense was initiated or pursued in bad faith, solely for the
2 purpose of harassing or maliciously injuring another.

3 (b) The party or party's attorney knew or should have known that the action, claim or
4 defense was without any reasonable basis in law or equity, and could not be supported by a good
5 faith argument for an extension, modification, or reversal of existing law.

6 (3) If an administrative law judge issues an order under sub. (1) against a party other
7 than a public agency, the administrative law judge may assess those costs against the party or the
8 party's attorney, or may allocate the cost assessment between the party and the party's attorney.

9 **SECTION 43. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on
10 and first applies to cases filed on or after the first day of the month following publication in the
11 Wisconsin administrative register, as provided under s. 227.22(2) (intro), Stats.

Dated this ____ day of _____, _____.

STATE OF WISCONSIN,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen,
Secretary