

Clearinghouse Rule 13-077

STATE OF WISCONSIN
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF SAFETY AND
 : PROFESSIONAL SERVICES
DEPARTMENT OF SAFETY AND : ADOPTING RULES
PROFESSIONAL SERVICES : (CLEARINGHOUSE RULE)

PROPOSED ORDER

An order of the Wisconsin Department of Safety and Professional Services to amend SPS 1.08 (2), SPS 2.10 (1) and SPS 8.03 (3).

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted: § 440.03 (1) and § 440.205

Statutory authority: § 440.03 (1), § 440.205, §227.11 (2)

Explanation of agency authority:

§ 227.11 (2), Wis. Stats. 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.

§ 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.

§ 440.205, Wis. Stats. The department shall promulgate rules establishing uniform procedures for the issuance and use of administrative warnings.

Related statute or rule: SPS 1, SPS 2 and SPS 8

Plain language analysis:

SPS 1.08(2) and 2.10(1) currently provide for the designation of the presiding officer of a disciplinary or application denial review hearing to be employed by the Department

unless the credentialing authority designates otherwise. These sections also indicate the administrative law judge shall be an attorney in the department designated by department general counsel, an employee borrowed from another agency or a person employed as a special project or limited term employee.

The Department of Safety and Professional Services no longer has designated administrative law judges within the Department and contracts with Department of Administration, Division of Hearing and Appeals to preside over hearings. The proposed policy is to have the presiding officer of Class 1 and Class 2 hearings be an administrative law judge employed by the Department of Administration.

The rule also proposes to correct a typographical error in SPS 8.03 (3).

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.

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.

Agency is defined as each board, commission, department, officer or other administrative office or unit of the state in Iowa Code Section 17A.2.

The Division of Administrative Hearings established in section 10A.801 shall be treated as a wholly separate agency from the Department of Inspections and Appeals (Iowa Code Section 17A.11).

Any person serving or designated to serve alone or with others as a presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in Iowa Code Chapter 17A or for which a judge is or may be disqualified (Iowa Code Section 17A.11).

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.

Summary of factual data and analytical methodologies:

DSPS currently does not employ an administrative law judge. This change updates the rule to reflect the policy that the Department of Administration, Division of Hearing and Appeals employs the administrative law judges that DSPS and attached boards use to preside over their contested denial and disciplinary hearing cases.

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

The rule was posted currently 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 Greg.Gasper@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 October 30, 2013 to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. SPS 1.08 (2) is amended to read:

SPS 1.08 (2) DESIGNATION OF PRESIDING OFFICER. An administrative law judge employed by the department shall preside over denial hearings, ~~unless the credentialing authority designates otherwise.~~ The administrative law judge shall be ~~an attorney in the department designated by the department general counsel, an employee borrowed from another agency pursuant to s. 20.901, Stats., or a person employed as a special project or limited term employee by the department,~~ except that the administrative law judge may not be an employee in the division employed by the department of administration.

SECTION 2. SPS 2.10 (1) is amended to read:

SPS 2.10 Administrative law judge. (1) DESIGNATION. Disciplinary hearings shall be presided over by an administrative law judge employed ~~by the department unless the disciplinary authority designates otherwise. The administrative law judge shall be an attorney in the department designated by the department general counsel, an employee borrowed from another agency pursuant to s. 20.901, Stats., or a person employed as a special project or limited term employee by the department, except that the administrative law judge may not be an employee in the division by the department of administration.~~

SECTION 3. SPS 8.03 (3) is amended to read:

SPS 8.03 (3) That the misconduct is a minor violation of a statute or rule related to the profession or other conduct for which discipline may be imposed.

SECTION 4. 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