

STATE OF WISCONSIN )  
 ) SS  
 DEPARTMENT OF EMPLOYE TRUST FUNDS )

I, Eric O. Stanchfield, Secretary of the Department of Employee Trust Funds and custodian of the official records, certify that the annexed rule, relating to the Department of Employee Trust Funds refunding contributions to the Wisconsin Retirement System that exceed contribution limits set forth in the internal revenue code and Wis. Stats., was duly approved and adopted by the State of Wisconsin Teachers Retirement Board and Wisconsin Retirement Board on September 25, 1997 and by the State of Wisconsin Employee Trust Funds Board on September 26, 1997.

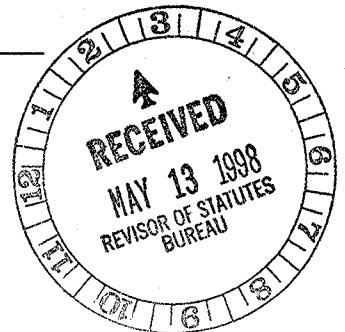
I further certify that this copy has been compared by me with the original on file in this department and that it is a true copy of the original, and of the whole of the original.

(no seal)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Employee Trust Funds at 801 West Badger Road in the city of Madison, this

13<sup>th</sup> day of May 1998

Eric O. Stanchfield  
 Eric O. Stanchfield



**State of Wisconsin**  
**DEPARTMENT OF EMPLOYE TRUST FUNDS -- OFFICE OF THE SECRETARY**  
**and**  
**EMPLOYE TRUST FUNDS BOARD**  
**TEACHER RETIREMENT BOARD**  
**WISCONSIN RETIREMENT BOARD**

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Clearinghouse Rule #CR 97-104

AN ORDER creating ss. ETF 10.65, Wisconsin Administrative Code, relating to the Department of Employee Trust Funds refunding contributions to the Wisconsin Retirement System that exceed the contributions limits set forth in internal revenue code and Wis. Stats.

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REPORT OF THE WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS  
ON THE FINAL DRAFT RULE

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This report, prepared in compliance with ch. 227, Wis. Stats., includes the following:

- Part 1 - Analysis prepared by the Department of Employee Trust Funds;
- Part 2 - Rule text in Final Draft Form;
- Part 3 - Recommendations of the Legislative Council Staff;
- Part 4 - Report prepared pursuant to the provisions of s. 227.19 (3),  
Wis. Stats., including:
  - (a) Statement of the Need for the Rule;
  - (b) Explanation of Modifications to the Rule after Public Hearings;
  - (c) List of Persons Appearing or Registering an Opinion;
  - (d) Response to Legislative Council Staff Recommendations;
  - (e) Final Regulatory Flexibility Analysis.

Submitted by:

Linda Owen  
Division of Retirement Services  
Wisconsin Department of Employee Trust Funds  
801 East Badger Road  
P.O. Box 7931  
Madison, Wisconsin 53713-2526  
Telephone: (608) 261-8164

## Analysis Prepared by the Wisconsin Department of Employee Trust Funds

Contributions to the WRS are limited by section 415(c) of the internal revenue service code and by ss. 40.32, and ss. 40.32 (3) requires the department to refund any employee and/or employer contributions that exceed those limits. A rule is needed to define the sequence in which contributions will be refunded, the methods of refund and the corresponding effects on WRS earnings and creditable service.

### General Summary of Rule

If a participant's and/or an employer's contributions exceed the limits in s. 40.32, ss. 40.32 (3) specifies that the department shall first refund amounts voluntarily contributed by a participating employee, either as employee additional contributions or monies paid to purchase creditable service. This rule specifies the order in which contributions would be refunded in a certain sequence until the requirements of s. 40.32 have been met.

If the contribution limits made by a participating employee or by an employer on behalf of a participating employee exceed the contribution limits, the contributions will be refunded in the following order; employee additional contributions, employer additional contributions, benefit adjustment contributions and employee and employer required contributions. In the event that it becomes necessary to refund benefit adjustment and required contributions, the earnings and hours of service for the annual earnings period(s) reflected will be reduced in proportion to the amount of benefit adjustment and required contributions refunded to preclude unfunded benefit liabilities based on service and earnings for which no contributions are credited to the employee and/or employer reserves.

Authority for Rule. Sections 40.05 (2r) and 40.32, Stats.

Statutes Interpreted: Sections 40.02 (17), 40.05 (2r) and 40.32, Stats.

Initial Fiscal Estimate. The Department estimates that there will be no direct fiscal impact from this rule making upon the state and anticipates no effect upon the fiscal liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education school district or sewerage district, other than the reduction of fiscal liabilities that would result if employer-paid contributions are refunded under this rule.

Initial Regulatory Flexibility Analysis. The Department anticipates that the provisions of this proposed rule will have no direct adverse effect on small businesses.

Copies of Rule and Contact Persons. Copies of this rule are available without cost by making a request to the Department of Employee Trust Funds, Office of the Secretary, P.O. Box 7931, Madison, Wisconsin 53707, telephone (608) 261-8167. For questions about this rule making, please call Linda Owen, Benefit Plan Policy Analyst, (608) 261-8164.

### TEXT OF RULE

**ETF 10.65 is hereby created to read:**

ETF 10.65 REFUND OF EXCESS CONTRIBUTIONS (1) The department shall refund contributions to be allocated to a participant's account that exceed the limits specified in s. 40.32, Stats., in accordance with s. 40.08 (6), Stats., in the following order:

(a) Employee additional contributions under s. 40.05 (1) (a) 5, Stats., paid directly to the department by the participant shall be refunded to the participant.

(b) Employee additional contributions under s. 40.05 (1) (a) 5, Stats. that are transmitted to the department by the employer shall be refunded as a credit to the employer, to be offset against subsequent employer contributions due to the department, who shall pay the amount of the credit to the employee as specified in s. 40.08 (6) (c), Stats.

(c) Employer additional contributions under s. 40.05 (2) (g) 1, Stats., shall be refunded as a credit to the employer, to be offset against subsequent employer contributions due the department.

(d) Benefit adjustments contributions paid by the participant under s. 40.05 (2m), Stats., that are transmitted to the department by the employer shall be refunded as a credit to the employer, to be offset against subsequent employer contributions due to the department, who shall pay the amount of the credit to the employee as specified in s. 40.08 (6) (c), Stats.

(e) Benefit adjustment contributions paid by the employer under s. 40.05 (2m), Stats., shall be refunded as a credit to the employer, to be offset against subsequent employer contributions due to the department, as provided in s. 40.08 (6) (b) and (c), Stats..

(f) Equal amounts of employee and employer required contributions under s. 40.05 (1) and (2), Stats., shall be refunded as provided in s. 40.08 (6) (b) and (c), Stats.

(2) (a) If the department refunds employee-paid benefit adjustment contributions under (1) (d) and credits employer-paid benefit adjustment contributions under (1) (e), or credits employer required contributions and refunds employee required contributions under par. (1) (f), the department shall reduce the hours of service recorded under s. ETF 10.03 (1) and the earnings recorded for that calendar year by a percentage equal to the sum of the employee refund and employer credits under sub. (1) (d), (e) and (f) divided by the sum of the benefit adjustment contributions and employee and employer required contributions made by or on behalf of the participant for that calendar year. The department shall grant adjusted creditable service to the nearest hundredth of a year, disregarding over- and under-payments equivalent to less than one one-

hundredth of a year of service. If the participant's annual earnings period is not the calendar year, the reduction in creditable service and earnings shall be allocated equally to all annual earnings periods that fall during the calendar year.

(b) The adjusted creditable service and earnings under par. (b) shall apply only to benefits calculated under s. ETF 50.52 and under ss. 40.23, 40.25, 40.27 and 40.63, Stats.

(3) Nothing in this section shall be interpreted as a basis for a determination of whether any payments credited to an employer are required to be paid by the employer to an employee under contractual agreements or other negotiated agreements or provisions of law.

Effective Date: This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Wis. Stats.

Approved for publication: This proposed rule making is approved for submission to the Legislative Council Staff for review under s. 227.15, Stats., and for submission to the Revisor of Statutes under s. 227.17, Stats., in order to provide notice of the scheduled public hearing.

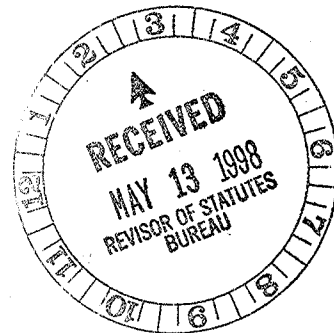
(END OF RULE TEXT)

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Signed at Madison, Wisconsin this 30th day of September, 1997.

*Eric O. Stanchfield*

Eric O. Stanchfield, Secretary  
Wisconsin Department of Employee Trust Funds



WISCONSIN LEGISLATIVE COUNCIL STAFF



**RULES CLEARINGHOUSE**

**Ronald Sklansky**  
Director  
(608) 266-1946



**David J. Stute, Director**  
Legislative Council Staff  
(608) 266-1304

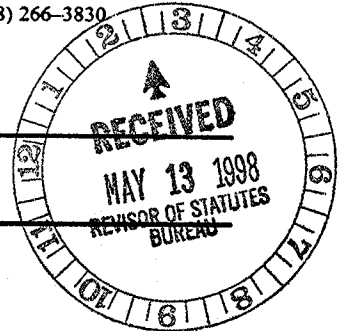
**Richard Sweet**  
Assistant Director  
(608) 266-2982

One E. Main St., Ste. 401  
P.O. Box 2536  
Madison, WI 53701-2536  
FAX: (608) 266-3830

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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 97-104**

AN ORDER to create ETF 10.65, relating to the department of employe trust funds refunding contributions to the Wisconsin retirement system that exceed the contributions limits set forth in the internal revenue code and the Wisconsin statutes.

Submitted by **DEPARTMENT OF EMPLOYE TRUST FUNDS**

07-24-97 RECEIVED BY LEGISLATIVE COUNCIL.

08-21-97 REPORT SENT TO AGENCY.

RNS:GAA:kjf:jt

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]  
Comment Attached      YES       NO
  
2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]  
Comment Attached      YES       NO
  
3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]  
Comment Attached      YES       NO
  
4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]  
Comment Attached      YES       NO
  
5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]  
Comment Attached      YES       NO
  
6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]  
Comment Attached      YES       NO
  
7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]  
Comment Attached      YES       NO

# WISCONSIN LEGISLATIVE COUNCIL STAFF

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 97-104

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

#### 2. Form, Style and Placement in Administrative Code

- a. In s. ETF 10.65 (1), par. (a) should begin in the left margin, as should subd. 1. of par. (b).
- b. In s. ETF 10.65 (2) (b), "and/or" should not be used. [See s. 1.01 (9), Manual.] Where two alternatives are given, the word "or" means either or both of the alternatives.
- c. In s. ETF 10.65 (2) (b), "ETF" should precede "10.03 (1)" on the fourth line. On the sixth line, "sub." should precede the citation.
- d. In s. ETF 10.65 (2) (c), "ETF" should follow, not precede, "s." in the second line. Also, the reference to the statute sections should be to "ss. 40.23, 40.25, 40.27 and 40.63, Stats."

#### 4. Adequacy of References to Related Statutes, Rules and Forms

In s. ETF 10.65 (1) (e), it appears that the reference in the third line to "par. (d)" should be to "par. (c)."

#### 5. Clarity, Grammar, Punctuation and Use of Plain Language

Is any portion of the Note to s. ETF 10.65 (2) (a) substantive? If so, it should be included in the text of the rule.



## Part 4

### Report Required by s. 227.19 (3), Wis. Stats.

(a) Need for the Rule. Internal Revenue Code restricts the amount of contributions that can be made to a participant's Wisconsin Retirement System (WRS) account. To retain its status as a qualified retirement plan, contributions to the WRS that exceed those limits must be refunded. This rule is necessary to codify the sequence in which various types of contributions will be refunded, and how the contributions will be refunded to employees and credited to employers' accounts.

(b) Modifications to the Rule.

Sub. ETF 10.65 (3) was added in response to the verbal and written testimony of the one individual who appeared at the public hearing. This change reflects the individual's concerns that employer contributions may be part of an employee's compensation package; however, the fact that the rule does not require refunded employer contributions to then be paid to the participant as an alternative form of compensation could be used as a basis for an employer's refusal to pay the refunded contributions to the employee. What happens to refunded employer contributions is beyond the scope of this Department's authority; this is a compensation agreement issue between the employee and employer. However, sub. ETF 10.65 (3) clarifies that this rule does not restrict the employer from paying refunded excess employer contributions to an employee as part of a compensation agreement.

Another significant change was that all references to refunding excess contributions that were paid to the WRS to purchase creditable service was deleted from the rule. Due to changes in federal law, effective January 1, 1998 (the first possible effective date of this rule), payments to purchase WRS creditable service will no longer be tested against the contribution limits in 415(c) in the Internal Revenue Code. Therefore, since such contributions will no longer be subject to the contribution limits, they would not be refunded as excess contributions.

The only other changes were those recommended by the Legislative Council staff, which were minor technical corrections.

(c) List of Persons Who Appeared or Registered For or Against the Proposed Rule at a Public Hearing.

Attorney Simon Karter appeared at the public hearing, and subsequently submitted written testimony. A transcript of Mr. Karter's verbal testimony and a copy of his written testimony are attached.

(d) Response to Legislative Council Staff Recommendations.

All recommendations of the Legislative Council Staff were implemented, except that some suggestions related to portions of the rule which were deleted for the reasons explained in the "Modifications to the Rule" section of this report.

(e) Final regulatory flexibility analysis. The proposed rule does not directly affect small businesses.

(END OF FINAL DRAFT REPORT)

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# WISCONSIN EDUCATION ASSOCIATION COUNCIL

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Affiliated with the National Education Association

EMPLOYEE TRUST FUNDS

Direct Dial 1-800-362-8034 Extension 243

SEP 2 '97

August 29, 1997

Linda Owen  
Department of Employee Trust Funds  
801 West Badger Road  
Post Office Box 7931  
Madison, Wisconsin 53707-7931

**RE: Rule ETF.10.65**

Dear Ms. Owen:

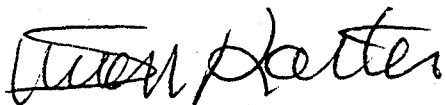
Pursuant to our discussion after the public hearing on the proposed rule, I suggest either of the following phraseologies in an effort to prevent an interpretation of the rule that will contradict obligations arising under negotiated agreements or QEO legislation (or any future legislation).

*The provisions of this rule shall not affect any obligation of an employer to whom payments are credited, to pay credited amounts to an employee, which arises under a contractual agreement or other provision of law.*

*The provisions of this rule shall not be basis for a determination of whether any payments credited to an employer are required to be paid by the employer to an employee under contractual agreements or other provisions of law.*

Thank you for your attention to the concerns we have expressed during this process.

Very truly yours,



Simon M. Karter, Staff Counsel  
State Bar No. 1013307

cc: Don Krahn

Terry Craney, President

PS10747 SK

Charles N. Lentz, Executive Secretary

**Department of Employee Trust Funds**  
801 West Badger Road  
P.O. box 7931  
Madison, WI 53707-7931

**Hearing on Proposed Administrative Rule**

This proposed rule would create ETF 10.65, which would specify the order in which contributions to a participant's WRS account that exceed the limits set forth in s. 415(c) of the IRS code would be refunded.

Time and Date of Hearing: 9:00 A.M. on Wednesday, August 27, 1997  
Location of Hearing: Room 2A, 801 West Badger Road, Madison, WI

Your Name: Simon Karter

Representing: Wisconsin Education Association Council

Mailing Address: PO Box 8003  
Madison 53708-8003

**I wish to speak:**

- In favor of the proposed rule.
- Against the rule.
- For information only.

**I do not wish to speak, but wish to register my opinion as:**

- Generally in favor of the proposed rule.
- Generally opposed to the proposed rule.

**Department of Employee Trust Funds**

**TRANSCRIPT  
OF  
PUBLIC HEARING  
ON PROPOSED ADMINISTRATIVE RULES**

**August 27, 1997**

Good morning. I hereby call this hearing to order. My name is Linda Owen and I am a Benefit Plan Policy Analyst with the Retirement Services Division of the Department of Employee Trust funds. This public hearing is being held pursuant to ss. 227.18, Wis. Stats., at 9:00 a.m., on August 27, 1997 in Room 2A, at 801 W. Badger Road, Madison, Wisconsin. The purpose of this hearing is to consider a proposed administrative rule creating section ETF 10.65, which interprets subsection 40.32 of the Wisconsin Statutes. This rule is necessary to define the sequence in which excess contributions to a participant's Wisconsin Retirement System account will be refunded. Notice of today's hearing was given as required by s. 227.17, Wis. Stats., and was published in the Administrative Register on August 14, 1997. The following documents are entered in the hearing record.

- Exhibit A     The Scope Statement, Proposed Rulemaking Order and Fiscal Estimate.
- Exhibit B     The Analysis, General Summary and Text of the Proposed Rule.
- Exhibit C     The Notice of Public Hearing printed in the Wisconsin Administrative Register
- Exhibit D     The Legislative Council Clearinghouse Report

If you would like a copy of any of these documents, a supply is available on the table. All interested persons may present facts, views and arguments concerning the proposed administrative rule. If you wish to present written testimony to the department, your testimony will be included in the record of the public hearing on the proposed rule.

Any written statements received before 4:00 p.m., on Sept. 3, 1997 will be included in the hearing record.

Written testimony should be delivered to this address. If you would like to fax your testimony to the department, please fax it to (608) 261-6908. I will present the final proposed draft rule and summary of this hearing to the Employee Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in September. The Boards must approve the proposed rule before the Secretary of the Department can proceed with the promulgation process. This hearing is being recorded so that all oral arguments will be included in the hearing record. If you wish to

Speak at this hearing or to register your opposition to or support for this proposed rule, please fill out a registration form and return it to me. I will call on each person who registers to speak so you can present your testimony. When I call your name please come to the microphone and identify yourself and any organization that you may represent; state whether you are speaking for the rule, against the rule or for information purposes only; and then present your testimony. Please speak into the microphone so your testimony can be recorded accurately. A list of all persons who speak or register an opinion will be sent to the Legislature in the final draft report on the proposed rule. I now call Simon Karter.

**Simon Karter:** Thank you. I am here representing the Wisconsin Education Association Council which has 83,000 affiliated members who are employees of the public schools in the State of Wisconsin. I am here today regarding two aspects of the rule. The first is section (2)(b) which requires a reduction of earnings and a reduction of credited hours when refunds of required contributions are made. I understand that it is unlikely that the situation will arise and I also understand that potentially there would be some benefit in some situations to prospective annuitants in doing it this way. Our concern, after discussion internally at WEAC, is that there is no basis in statute for reduction of credited hours. And we think this is a path that it is better not taken. It would be precedent and there is no telling what types of situations might in the future arise. The statutory scheme, I think clearly, and in fact other administrative rules indicate the separateness of credited earnings and credited hours of service. In some cases the reduction of both will work against annuitants. In other cases it might be a wash or might be slightly advantageous, but there is, we think, no basis in the law for doing what is proposed. And, we think it is an unwise course. There really ought to be parameters as to where this might lead. Clearly whatever the compensation the contribution is made on, if the period of service is a year, the period of service is a year. So we strongly urge that the Department reconsider and provide for reduction of earnings only.

The second matter in the rule that I am here to address has to do with the treatment in the rule of the statutory provision 40.08(6) subs (b) and (c). The statute is referenced in either or both of its subsections at various places in the rule and then at other places in the rule where it would be logical to reference it, it is not referenced. The concern that we have in this has to do with what will be made of the rule by employers following the rule and I can illustrate the concerns that we have and then talk generally about what is behind our concerns by explaining a little bit about the collective bargaining that does go on. In section (1)(b) dealing with refund of employee additional contributions, the rule does require that the employer who is credited with the refunded amount shall pay the amount of the credit to the employee as specified in 40.08(6)(c). That is of course exactly what the statute requires. But moving on to (1)(d), it is provided that additional employer contributions shall be credited back to the employer. There is no reference to the refund statute and that creates contrast in the rule. In that someone looking at the rule, and no doubt looking at it with the handicap of legal training, will say that the rule in one place requires crediting and another place does not. The implication is...I am sorry requires payment

over to the employee. The implication is that in the second reference of what the rule is indicating is that there is not to be a payment over to the employee. The problem is that I cannot think of any situation in which an employer would make an additional contribution as a result of anything other than a negotiated agreement. In other words the employer's additional contribution is in every case, a bargained benefit to the employee. The rule therefore creates a "basis in law" for refunded amounts not to be paid over... I am sorry... credited amounts not to be paid over to the employee. Going to (1)(e), payments made by the employer to purchase creditable service. Again here there is no reference or no indication of whether or not the amounts credited to the employer are then to be paid over to the employee. Again saying a legal argument could arise between the employer and the employee. Again it is very very unlikely that an employer would make the payments to purchase creditable service for an employee outside of the context of a bargained agreement that the employer will do so.

If you go to (1)(f) on benefit adjustment contributions paid by the participant, again the rule does here specify 40.08(6)(c), which requires payment over to the employee. So now we have a situation where, thus far in the rule, we have two provisions that say the amounts credited to the employer are to be paid over to the employee and two sections of the rule that do not make that provision. It is clear that what the rule is doing is tracking the statutes. That is to say, it is treating payments transmitted by the employer as though they were employer payments outside of the context of statute and that is a leap that should not be made because as I indicated with reference to two of the types of payments we have talked about already, those really are negotiated... going to be negotiated payments if they occur. In other words they are part of the compensation, the negotiated compensation of the employee.

Section (1)(g), benefit adjustment contributions paid by the employer, does make a reference to 40.08(6)(b) and (c). That is the said total employer required payment. Nonetheless it does reference sub (c) of the refund statute. That is an inconsistency that will only reinforce a reader's conclusion that where sub (c) of the refund statute is not referenced, it is not under the rule to apply. Parenthetically what we say is that contract provisions that are found to be contrary to law are not enforceable. Therefore, if there is a conclusion that the rule by implication does not intend that certain payments credited to the employer should be paid over by the employer to the employee, then an agreement may not withstand that.

Section (1)(h), equal amounts of employee/employer required contributions, that does reference subs (b) and (c), and I think the way the rule is currently written, the reading that will be given is that sub (c) will apply insofar as it is the required employee contribution, but sub (c) will not apply insofar as what is at issue is the required employer contribution. That may seem to be the right result looking at textbooks. But it is not the right result for a few reasons that I'll touch on briefly in collective bargaining. What needs to be understood is that the employer required contribution is a factor in collective bargaining and it happens in two situations and the implication of both is that the employer required contribution is compensation to the employee.

First of all, let me talk to you about what is called total package bargaining. Total package bargaining is very very common. What it consists of is the school district and the union sit down and say the total of all forms of employe compensation last year was "x" dollars. We agree that the total package compensation of the employes for the next year will be "x" dollars plus 3% of "x" dollars. That gives them the total package for the forthcoming year which is called "y." They then take the total dollar amount of "y" and say health insurance is going to cost so much. They deduct it from "y." Retirement system contributions are going to cost so much. They deduct it from "y." Whatever is left when they deduct all of the benefits is what is put onto the salary schedule. In other words the retirement contribution in total, whether it is 11%, 12% whatever, if it is employer or employe. Whatever the employer pays to the retirement system has been deducted from the total package compensation number in the situation under the rule, if it ever were to occur. What you would have is the employer would get some of the "employer required" contribution back. The rule offers a very good argument for the proposition that the employer keeps it. I am currently arbitrating a couple of cases where the employers have done precisely that. They have kept it. It is from the employes' perspective, money that had it not been paid to the retirement system by the employer would have gone onto the salary schedule. It is as simple as that. Under the statutes it is called an "employer required." In bargaining it comes out of the total compensation package. The other situation we have now since 1993, state law has permitted employers to make what is called a "qualified economic offer" which puts an end to collective bargaining. In other words it is an offer that the employes have to accept. They don't have a choice. A qualified economic offer is one that increases benefits and salary by certain ceiling percentage. The combined increase is I believe 3.8% and once an offer is made at the appropriate level, negotiation ends. That is what the employes have to accept. In the costing sheet for qualified economic offer, the retirement contribution is a separate line item. This is very much by statute an imposed total package. Approached so that in a situation where a QEO has been made and negotiation ends what has happened is that money that goes to the retirement system is not available to go into salary. So it is in direct parallel with a total package agreement. So that in the collective bargaining world what, by statute, looks like a separate required employer contribution on the employe's salary is in fact a bargained benefit and its a benefit whose presence, it's mandated presence, ends up in as a practical matter inducing salary. Therefore, we would urge that you not have anything in this rule that will create an argument for the employer that any employer contribution to the system or any refund of contributions to the system transmitted by the employer adheres because of this rule to the benefit of the employer. My suggestion is that you leave the matter... you make clear that the matter is not to be decided by reference to the terms of your rule. That you make very clear that the eventual fate of overpayments credited to the employer is to be decided outside the context of the rule. I think you can accomplish that, and should accomplish it as a matter of fact, in two separate ways. One of them is to make consistent throughout the rule that monies are being credited to the employer pursuant to 40.08(6)(b) and (c). That is to say anytime that you reference a credit to the employer you reference sub (c). That will not determine what happens to that credited amount whether the employer keeps it or the employe is paid it because if you look at sub (c) of the



refund section, it leaves it open. What the participant will eventually get from the employer are payments made on behalf of the participant. The employer is free, if you simply reference the statute, to argue that an employer's required contributions are paid on behalf of the employer not paid on behalf of the employee. In other words, what I am suggesting is that you neutralize the rule by always referring to subs (b) and (c). That will be the question only. The other thing I suggest for clarity, is that you have a provision in the rule to counter the employers' argument that because the rule references the statutes, the required contribution of the employer is not paid on behalf of the employee. Whatever, please do not underestimate the inventiveness of lawyers for management or for employees. I suggest that you add a provision to the rule in addition which would provide something along the following order:

"The provisions of this rule are not intended to be a basis for the determination of whether any payment credited to an employer is required to be paid by the employer to the employee under contractual agreements or other provisions of law."

That language might not be perfect, but I think that is the sense of what you would get across. Thank you very much for listening. Those are the two issues.

Owen: Ok. Is your testimony concluded?

Karter: Yes it is.

Owen: Ok

This a complete transcription of the tape provided by Linda Owen of the public hearing held on August 27, 1997. The tape was transcribed on September 5, 1997, by Janet Klosterman, Administrative Assistant, Office of the Secretary, Department of Employee Trust Funds.

A handwritten signature in cursive script that reads "Janet Klosterman". The signature is written in dark ink and is positioned at the bottom right of the page.



STATE OF WISCONSIN

**Department of Employee Trust Funds**

May 12, 1998

**Eric Stanchfield**  
*Secretary*  
801 West Badger Road  
P.O. Box 7931  
Madison, Wisconsin 53707-7931

GARY L. POULSON, DEPUTY REVISOR  
REVISOR OF STATUTES BUREAU  
8TH FLOOR  
131 W WILSON ST  
MADISON, WISCONSIN 53707

RE: Clearinghouse Rule No. 97-104

Dear Mr. Poulson:

Enclosed is a Certificate and two copies of an Order creating and adopting rules. A certified copy of this Order has been forwarded to the Secretary of State.

I request that the rule be published in the June 30 issue of the administrative register. I also enclose a copy of the rule on disk, in Wordperfect format.

Please contact me if you have any questions.

Sincerely,

David Stella, Administrator  
Division of Retirement Services  
(608) 267-9038  
FAX # (608) 261-4549  
TDD # (608) 267-0676

