

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



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

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

CLEARINGHOUSE RULE 95-182

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.]

I. Statutory Authority

a. Section 49.02 (1) (intro.) and (a), Stats., require as a condition of receipt of a relief block grant that a tribal governing body adopt a resolution applying for a relief block grant. This requirement is reflected in s. HSS 211.04 (1) (a). However, s. HSS 211.04 (1) (b) goes one step further by providing that if a tribal governing body elects *not* to provide the relief block grant program, the tribal governing body must adopt a resolution indicating this and provide a copy of the resolution to the Department of Health and Social Services (DHSS). DHSS does not have statutory authority (nor does the state have constitutional authority or authority granted by Congress) to *require* a tribal governing body which does not apply for a relief block grant to do anything, including passing a resolution and reporting to DHSS regarding a decision not to provide the relief block grant program.

On the other hand, if s. HSS 211.04 (1) (b) is intended to require a tribal governing body which previously chose to provide the relief block grant program and then decided to discontinue providing the program to pass a resolution indicating an intent to discontinue participation, the paragraph should be amended to more explicitly limit its application to that case. In that case, it also may be appropriate to specify a deadline by which a tribal governing body must provide notice of its intent to discontinue participation in the program.

b. Section HSS 211.04 (2) requires a *tribal relief agency* to submit to DHSS a plan for providing services funded by the tribal relief block grant. However, s. 49.02 (1) (c), Stats., requires the *tribal governing body* to submit this plan.

c. Section HSS 211.05 (intro.) requires a tribal relief agency to comply with s. HSS 211.05 (1) to (4) to determine eligibility for relief, including a requirement in s. HSS 211.05 (1) that the **tribal relief agency** establish written criteria for determining dependency and review those criteria at least annually. Under s. 49.02 (1) (b), Stats., the **tribal governing body** is required to establish written criteria to be used to determine dependency and review the written criteria at least annually. [However, it is noted that s. 49.015 (1) (c), Stats., includes a reference to written criteria of dependency under s. 49.02 (1) (b), Stats., established by the relief agency (but does not include a reference to the duty to review the criteria annually).]

d. Section HSS 211.06 (2) provides that DHSS may “deny reimbursement” to a tribal relief agency for relief provided as a result of a waiver that DHSS determines is inappropriate. However, it is noted that 1995 Wisconsin Act 27 deleted language in s. 49.015 (3) (b), Stats. (as renumbered by Act 27), permitting DHSS to deny reimbursement and simply provided that DHSS is to “make a determination as to the appropriateness of the waiver under rules promulgated by [DHSS] under s. 49.02 (7m) (d).” Because Act 27 moved from the concept of reimbursement to the concept of block grants, it appears that there is no statutory authority for a provision allowing DHSS to “deny reimbursement” for a waiver which DHSS determines is inappropriate.

2. Form, Style and Placement in Administrative Code

a. In s. HSS 211.03, several terms are defined which do not appear to be used in ch. HSS 211, for example, “sanction” and “tax-free land.” [Also, “discontinuation” and “failure to comply” are defined but appear to be used only in the definition of “sanction,” which itself appears to be unnecessary.] Unless a term is used in the chapter, it should not be defined.

b. Section HSS 211.04 (3) requires a tribal relief agency to submit annually to DHSS a final report detailing costs “on a form prescribed by [DHSS].” A copy of the form must be attached to the rule or a statement must be included indicating where a copy of the form may be obtained at no charge. Also, a reference to the form should be included in a note to the rule. [See s. 1.09 (2), Manual.]

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

a. The analysis for the rule indicates that DHSS’s authority to repeal and recreate ch. HSS 211 is found, in pertinent part, in “ss. 49.046 (4) (a), 49.047 (4) and 49.048 (9), 1993 Stats.” It further indicates that the rule interprets, in pertinent part, “ss. 49.046, 49.047 and 49.048, 1993 Stats.” Because all of these provisions have been repealed by Act 27 effective January 1, 1996 (except for two definitions in s. 49.046 (1) (a) and (b), Stats., which were renumbered by Act 27 and included in s. 49.01, Stats.) and because the provisions of the rule will not apply prior to January 1, 1996, the references to the provisions in “1993 Stats.” should be deleted.

b. Section 49.029 (2), Stats., requires DHSS to promulgate rules regarding the amount of relief block grants provided to each eligible tribal governing body and the manner in which such grants will be distributed. Since ch. HSS 211 has a comprehensive title, that is, “TRIBAL

MEDICAL RELIEF PROGRAMS,” it would be helpful if ch. HSS 211 included a cross-reference to the rule promulgated under s. 49.029, Stats., or, at a minimum, included a reference to s. 49.029, Stats.

c. The definitions in s. HSS 211.03 (1) and (12) should refer to the U.S. Code cites. If references to the Social Security Act of 1935 are felt to be desirable, these references could be included in a note.

d. Because the provisions of the rule will not apply prior to January 1, 1996, the reference in s. HSS 211.03 (12) to “s. 49.177, Stats.” should be changed to “s. 49.77, Stats.” to reflect the renumbering of this section by Act 27.

e. Section HSS 211.06 (2) requires that the tribal relief agency report all waivers to DHSS “in the manner prescribed by [DHSS].” The rule should include a cross-reference to the section in the Wisconsin Administrative Code that specifies the manner prescribed by DHSS.

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

a. In the table of contents for ch. HSS 211, the period following the title for s. HSS 211.05 should be deleted.

b. In s. HSS 211.01, the word “standards” in the phrase “standards for a tribal relief agency to follow in making eligibility determinations” should be changed to “procedures” in order to be consistent with s. 49.02 (7m) (a), Stats., and the title for s. HSS 211.05.

c. In s. HSS 211.03 (intro.), a colon should be inserted following the phrase “In this chapter”.

d. In s. HSS 211.03 (1), “s.” should be changed to “ss.”

e. In s. HSS 211.03 (2), the phrase “elected tribal governing body” should be changed to the defined term “tribal governing body” inasmuch as the definition of the latter term requires that the tribal governing body be elected.

f. In s. HSS 211.03 (6), the term “a individual” should be changed to “an individual.”

g. Section HSS 211.03 (6) defines “failure to comply” as “an action or inaction of [an] individual that violates a tribal relief rule without good cause.” If there is a good cause exception, ch. HSS 211 should explain who determines if there is good cause. It should also set forth criteria as to what constitutes good cause or require that the tribal relief rules establish criteria as to what constitutes good cause. [However, see Comment 2. a., above.]

h. In s. HSS 211.03 (12), a comma should be inserted following the phrase “as amended.”

i. In s. HSS 211.03 (13), a period should be inserted at the end of the sentence.

j. In s. HSS 211.04 (2), the term “services” should be changed to the defined term “health care services.”

k. Section HSS 211.04 (3) requires the tribal relief agency to submit annually to DHSS a final report detailing costs. It is not clear if this is required on a calendar year basis or some other 12-month period. This should be clarified.

l. Section HSS 211.06 (1) (a) provides that a tribal relief agency may waive the eligibility requirement which prohibits providing relief for a person receiving Aid to Families with Dependent Children or Supplemental Security Income “in cases of unusual misfortune or hardship as determined by the **tribal governing body**” (emphasis added). Section HSS 211.06 (1) (b) provides that a tribal relief agency may waive the eligibility requirement regarding the Medical Assistance divestment barrier if, among other things, “unusual misfortune or hardship exists.” Unlike s. HSS 211.06 (1) (a), s. HSS 211.06 (1) (b) does not specify who is to make the determination as to whether there is unusual misfortune or hardship. It would help avoid ambiguity if this were specified.

m. Section HSS 211.02 discusses the appeal procedure for individuals who are “**denied** relief or whose relief benefit is **reduced, suspended or terminated**” (emphasis added). Section HSS 211.07 (1) (intro.) refers to a tribal relief agency that “**denies** an application for relief, or **discontinues** or **reduces** the relief” (emphasis added). Section HSS 211.07 (2) (intro.) refers to a tribal relief agency that “**denies, terminates, suspends or reduces** the relief” (emphasis added). It would be preferable if one set of terms were used to refer consistently to what is apparently the same concept.

n. While s. HSS 211.07 (2) (intro.) specifies that the tribal relief agency must permit an individual to **request** a fair hearing, it does not specify that the tribal relief agency must actually grant the request and hold a hearing. If this is intended, it should be explicitly stated.

o. Section HSS 211.07 (2) (intro.) provides that “A fair hearing shall:” and s. HSS 211.07 (3) (intro.) provides that “The hearing decision shall:”. Both preface a series of paragraphs, each of which ends with a period and does not contain a conjunction. The language in s. HSS 211.07 (2) (intro.) and (3) (intro.) should be changed to clearly specify that “all of the following” paragraphs apply.

p. Section HSS 211.07 (2) (d) provides that in a fair hearing, an impartial decisionmaker must be provided. However, s. HSS 211.07 (3) (intro.) indicates that it is the tribal relief agency that issues a decision. Is it intended that the appeal decision be that of an impartial decisionmaker or that of the tribal relief agency?

q. Section HSS 211.07 (3) (b) provides that a hearing decision must inform an individual of “whatever rights to review are available and **the time limits for the review**” (emphasis added). It appears that the reference should be to “whatever rights to review are available and the time limit by which a review must be requested.”