



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 14-072

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

In s. DCF 40.02 (1) and (9), the definitions of “abuse” and “neglect” adopt the meaning provided in state statutes, specifically s. 48.02 (1) and (12g), Stats. However, both definitions also include the following text: “and as further defined in the standards established by the department for conducting child abuse and neglect investigations under s. 48.981 (3) (c) 1. a., Stats.”. Are these standards consistent with the definitions provided in s. 48.02 (1) and (12g), Stats.? If not, under what authority does the agency define “abuse” and “neglect” differently than the statutory definitions?

2. Form, Style and Placement in Administrative Code

a. In the “Summary of the Proposed Rules”, the agency replaces the term “Division of Hearings and Appeals” with the acronym “DHA”. The acronym should replace this term in the first full paragraph on page 2. The agency should also ensure that the acronym consistently replaces the term throughout the rule summary. [s. 1.01 (8), Manual.]

b. Section DCF 40.04 (2) is a list of information that must be included in the notice of final determination. When dividing a unit of a rule into subunits, each subunit following the introduction should form a complete sentence when read with the introduction. [s. 1.03 (3), Manual.] Subsection (2) (b) and (c) should be rewritten to ensure each subunit more clearly forms a complete sentence with the introduction. In addition, in sub. (2) (b) 2. (intro.), “one of” should be inserted before “the following”.

c. Section DCF 40.05 (3) provides that a review or appeal of an initial or final determination shall be governed by the standards established by the agency under s. 49.981 (3) (c) 1. a., Stats. It is unclear why this is placed in a section entitled “Other requirements” and not in s. DCF 40.03 or 40.04. The agency should consider placing the contents of s. DCF 40.05 (3) in s. DCF 40.03 or 40.04. In addition, why are the standards referenced in s. DCF 40.05 (3) not included in the text of the proposed rule?

3. Conflict With or Duplication of Existing Rules

Section DCF 40.04 (2) (b) 2. a. states: “If the postmark date is illegible or absent, the filing date shall be the date of receipt by the division of hearings and appeals.”. Unlike the other provisions in subd. 2., this provision does not appear to be taken from s. HA 1.03 (3). Why is this provision included in the proposed rule if it is not included in s. HA 1.03 (3)?

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

a. In s. DCF 40.01, the first statutory cross-reference should read “s. 48.981 (3) (c) 5m. and 5p., Stats.”. The second cross-reference should read “s. 48.981 (3) (c) 5r., Stats.”. [s. 1.07 (2), Manual.]

b. In s. DCF 40.02 (9), a comma is missing after the abbreviation “Stats.” in the first cross-reference. The cross-reference should read “s. 48.02 (12g), Stats.,”. [s. 1.07 (2), Manual.]

c. In s. DCF 40.04 (2) (b) 4., “subd. 3.” should replace “subd. 2.”.

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

a. At the end of discussion on the “Division of Hearings and Appeals Contested Case Hearing”, found in the “Summary of the Proposed Rules”, the proposed rule states: “If the contested case hearing or judicial review overturns the agency determination ... ,the agency shall update the authorized information ...”. It is unclear what type of determination is being discussed. The agency should clarify whether the determination referenced is a final determination, an initial determination, or both.

b. Throughout the proposed rule, “person” or “specific person” is used to identify a person who is the subject of a determination. The proposed rule should more clearly describe the “person” to which a provision applies, perhaps by using language such as “person who is the subject of the initial determination”.

c. In s. DCF 40.02 (6) and (7), the definitions of a “final determination” and “initial determination” are confusing and do not clarify what the difference is between the two determinations. For example, the definition of “final determination” cross-references s. 48.981 (3) (c) 5m., Stats. However, this statutory cite discusses both initial and final determinations without defining them. Also, the definition of “initial determination” cross-references s. 48.981 (3) (c) 4., Stats., which requires the agency to make a determination that appears to be broader than an initial determination that “a specific person has abused or neglected a child” discussed in s. 48.981 (3) (c) 5m., Stats. The agency should clarify these two definitions.

d. In s. DCF 40.03 (1) (b), the term “contested case hearing” is used but is not defined in the proposed rule. The agency should consider defining this term.

e. In s. DCF 40.03 (2) (a), it is unclear how a person may request a review and whether it must be in writing. Also, under par. (g), it is unclear when the 45-day period for a review of an initial determination is determined. The agency should clarify whether it begins when the request is received by the agency or another date.

f. Section DCF 40.03 (2) (c) states that “the agency shall send the person a notice of final determination under s. DCF 40.04 within 5 days”. The agency should clarify when the five-day period begins.

g. Section DCF 40.03 (2) (d) and (e) states that a review of the initial determination may be made by an individual or a panel and that any person who conducts the review must have knowledge of child protective services in Wisconsin. The proposed rule does not specify who determines whether a person meets this criteria or who determines whether an individual or panel reviews the initial determination. The agency should consider explaining these selection processes.

h. The title of s. DCF 40.04 is misleading. The title is “Notice of final determination and right to hearing”; however, sub. (1) includes the requirement that a final determination be made. The agency should consider using a title that is more precise and accurate.

i. It is unclear under s. DCF 40.04 how a final determination is issued if the person who is the subject of the initial determination did not request a review of the initial determination. The agency should clarify this process in the proposed rule.

j. In s. DCF 40.04 (1), the phrase “within 10 days after the date of the review of the initial determination” should be placed at the beginning of the first sentence, rather than at the end of the sentence.

k. Section DCF 40.04 (2) is a list of information that must be included in the notice of final determination. However, it appears that most of the information that must be included in the notice are substantive requirements of the appeals process. The agency should rewrite sub. (2) to clarify whether pars. (b) and (c) are substantive requirements or just pieces of information that must be included in the notice of final determination.

l. In s. DCF 40.04 (2) (b) 6., a final decision must be issued by the Division of Hearings and Appeals within 60 days after the “close of the hearing”. The agency should clarify what hearing it is referencing.

m. Sections DCF 40.04 (2) (c) (intro.) and 40.06 discuss “record checks” conducted under ss. 48.685 and 50.065, Stats. However, ss. 48.685 and 50.065, Stats., use the term “search”. The agency should amend the proposed rule to use terminology consistent with the statutes.