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STATE OF WISCONSIN )  
 ) ss.  
DEPARTMENT OF AGRICULTURE, )  
TRADE AND CONSUMER PROTECTION )

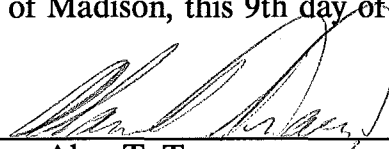
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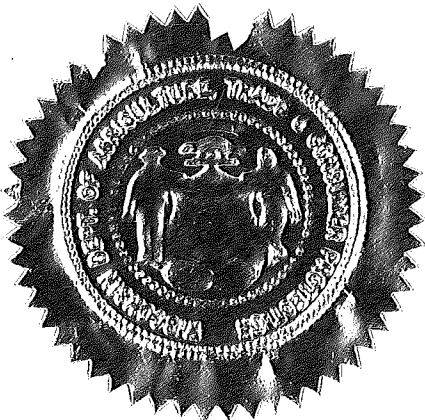
TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Alan T. Tracy, Secretary, State of Wisconsin, Department of Agriculture, Trade and Consumer Protection, and custodian of the official records of said Division, do hereby certify that the annexed order repealing and recreating chapter Ag 1, Wisconsin Administrative Code, relating to administrative orders and contested cases was duly approved and adopted by the Department on April 9, 1992.

I further certify that said copy has been compared by me with the original on file in the Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the Department offices in the city of Madison, this 9th day of April, 1992.

  
\_\_\_\_\_  
Alan T. Tracy  
Secretary



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ORDER OF THE STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION  
REPEALING AND RECREATING RULES

The Wisconsin department of agriculture, trade and consumer protection repeals and recreates ch. Ag 1, relating to administrative orders and contested cases.

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

Statutory authority: ss. 93.07(1), 227.11  
Statutes interpreted: ss. 93.14, 93.18, subch. III of  
ch. 227, Stats.

This rule repeals and recreates current rules related to administrative orders and "contested cases" before the department of agriculture, trade and consumer protection (DATCP). Current rules, contained in ch. Ag 1, Wis. Adm. Code, were last amended in 1977.

Administrative Orders

DATCP enforces chs. 91-100 and ch. 127, Stats., and a variety of other statutes. As part of its enforcement program, DATCP often takes formal administrative enforcement actions prescribed by statute. Administrative enforcement actions typically involve some type of "special order" directed to a named or identified party. "Special orders" may include license suspensions or revocations, administrative injunctions (e.g., orders prohibiting unfair business practices), hazardous product bans, temporary holding orders to prevent further distribution of suspect commodities, plant and animal quarantine orders, orders condemning adulterated food, and a variety of other orders specified by statute.

In some cases, administrative orders are issued by DATCP's line divisions, subject to review by the DATCP secretary. This is especially true of temporary holding orders, quarantine orders, food condemnation orders, grade A dairy farm permit suspensions, and other "on site" orders issued by DATCP field staff pursuant to specific statutory authority. However, other orders, including most license suspensions, license revocations, administrative injunctions and product bans, may only be issued by the DATCP secretary or the secretary's designee.

This rule identifies various categories of "special orders" issued by DATCP, and indicates which of those orders must be issued by the DATCP secretary or the secretary's designee. The rule merely codifies DATCP's current delegation of authority related to special orders, and does not significantly alter that delegation of authority.

Normally, before issuing a special order against any person, DATCP gives that person prior notice and an opportunity to contest the order. But DATCP is authorized to issue some special orders on a "summary" basis -- without prior notice or hearing -- in order to protect the public health, safety or welfare. (See chs. 91 to 100 and 127, Stats.) This rule provides that, whenever DATCP issues a summary special order to any person, that person is entitled to an immediate informal hearing on the summary order. If the matter is not resolved in an informal hearing, the order recipient is entitled to a formal "contested case" hearing under ch. 227, Stats.

#### "Contested Cases;" General

This rule updates DATCP's current rules of procedure in administrative "contested cases." A "contested case" hearing closely resembles a court trial. An impartial hearing examiner, who represents the DATCP secretary, sits as administrative "judge" between the adversary parties -- e.g., between a line division (which is pursuing enforcement action) and an individual or business entity (which is the subject of the action). Each party may introduce relevant testimony and evidence to support its position. Testimony is given under oath, subject to cross-examination. Based on the hearing record, the hearing examiner issues a proposed decision. The secretary, or a final decisionmaker appointed by the secretary, issues a final decision which is subject to judicial review.

#### Initiating a "Contested Case"

The rule spells out the procedure by which a DATCP division, or an affected member of the public, may initiate a "contested case" proceeding. With minor modifications, this procedure conforms to the department's current practice.

An administrative "contested case" may be initiated in any of the following ways:

- (1) A line division may file a formal complaint with the secretary, asking the secretary to issue a special order against a respondent named in the complaint. (The department of justice may also file a complaint with the secretary under the "Little FTC Act," s. 100.20, Stats.) The respondent may contest the division's complaint in a "contested case" proceeding.

(2) A person adversely affected by a DATCP action (e.g., a license or permit denial, holding order, grade A dairy farm permit suspension or other line division action) may request a hearing on that action. If the DATCP secretary grants the request, DATCP holds a "contested case" hearing on the matter. If the secretary denies the request, the denial is reviewable in circuit court.

(3) An interested person may request a declaratory ruling, under s. 227.41, Stats., to determine the applicability to that person of any statute or rule enforced by DATCP. The DATCP secretary, in his or her discretion, may grant or deny the request. If the secretary grants the request, the proceeding for declaratory ruling is conducted as a "contested case."

(4) If a fruit or vegetable processor, dairy plant, grain warehousekeeper or grain dealer fails to pay producers, DATCP's trade and consumer protection division may, on behalf of unpaid producers, ask the DATCP secretary to initiate a financial default proceeding under s. 100.03 or 100.06 or ch. 127, Stats. A financial default proceeding, which may result in an order against the defaulting party, is conducted as a "contested case."

#### Hearing Examiner

The rule spells out the authority and duties of the hearing examiner in a contested case. An examiner appointed by the DATCP secretary is authorized, on behalf of the department, to preside over a contested case proceeding and issue orders regulating the conduct of the proceeding. (DATCP "contested cases" are currently heard by a classified civil service examiner who answers directly to the DATCP secretary.)

Among other things, the examiner may schedule and reschedule proceedings, hold prehearing conferences and hearings, rule on motions, issue subpoenas and administer oaths, make evidentiary rulings and receive relevant evidence, supervise the creation of the hearing record, and issue a proposed decision in the case. If the DATCP secretary designates the hearing examiner as the final decisionmaker, the examiner may also issue the final decision in the case.

The examiner must be impartial, and must avoid ex parte communications with the parties in a case. An examiner must withdraw from a case if the examiner has a personal conflict of interest which prevents him or her from acting impartially.

If a party, without reasonable excuse, fails to appear in a contested case proceeding, fails to file a required answer or pleading, fails to comply with a subpoena or discovery order, or fails to comply with other procedural orders issued by the examiner, the examiner may take appropriate action in response to

the disobedient party's failure. For example, if a respondent fails to appear or file an answer in response to a complaint, the examiner may issue a decision based on the uncontested complaint allegations. Other potential sanctions are specified in the rule.

#### Party May Appear by Representative

In a "contested case," a party may appear by an attorney or other representative. If the representative is not an attorney, the party must file a written authorization stating that the representative has full authority to act on the party's behalf. The actions of a representative are binding on the represented party.

#### Hearing Notice

To initiate a contested case, the DATCP secretary issues a hearing notice to the parties. The hearing notice appoints the hearing examiner and final decisionmaker in the case. (The DATCP secretary is the final decisionmaker unless the secretary delegates that authority to another person, such as the hearing examiner.) The hearing notice identifies the parties and the basic matters at issue in the case, and includes a copy of any complaint filed in the case. (Respondents named in a complaint are required to file a written answer to the complaint within 20 days, as provided in the hearing notice.) The hearing notice also schedules the time and place for hearing or prehearing conference.

#### Prehearing Conference

The examiner may hold one or more prehearing conferences to explore possibilities for settlement, to clarify issues for hearing, to rule on motions and discovery requests, and to address other matters which may aid the orderly consideration and disposition of a "contested case." A prehearing conference may be held by telephone.

#### Discovery

In a class 2 "contested case" (e.g., involving an administrative enforcement action) every party is entitled to discovery as provided in ch. 804, Stats. In other "contested cases," the examiner may authorize discovery at the request of any party. In any "contested case," the examiner may issue orders compelling or limiting discovery, as appropriate.

In every "contested case," unless the examiner directs otherwise, parties must disclose to opposing parties the witnesses and evidence which they intend to produce at hearing. Disclosure must be made at least 7 days prior to hearing.

### Settlement

The parties may settle a contested case at any time. Parties wishing to settle a case must file a written stipulation, signed by the parties, together with a proposed order disposing of the case. The settlement is approved when the final decisionmaker signs the proposed order.

### Hearing

Hearings are held at a time and place specified in the hearing notice, or by the examiner. In choosing the hearing location, the examiner considers the convenience of all parties. Hearings are open to the public unless the examiner, for a lawful reason, restricts public attendance. Hearings are conducted according to ch. 227, Stats., and the rule.

### Decisions

If the examiner is not the final decisionmaker in a contested case, the examiner must prepare a proposed decision for consideration by the final decisionmaker. The proposed decision must be based on the hearing record. The proposed decision includes proposed findings of fact, proposed conclusions of law, a proposed order, and the examiner's signed opinion explaining the proposed decision. Parties have 20 days to file written objections to the proposed decision.

The DATCP secretary is the final decisionmaker in a "contested case" unless the secretary delegates that authority to another person, such as the hearing examiner. The final decisionmaker, after considering objections to the examiner's proposed decision, issues the final decision in a contested case. If the final decision differs from the proposed decision, the final decisionmaker must explain the difference. If the examiner is designated as the final decisionmaker, the examiner may issue a final decision without first issuing a proposed decision.

A party to a "contested case" may seek judicial review of DATCP's decision in that case. The examiner is responsible for certifying the "contested case" record to the reviewing court.

### Award of Costs and Attorneys Fees

If an individual, small nonprofit corporation or small business prevails in a "contested case" against a state agency, the prevailing party may request an award of costs and attorneys fees under s. 227.485, Stats. A DATCP order granting or denying an award is subject to judicial review.

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SECTION 1. Chapter Ag 1 is repealed and recreated to read:

**ADMINISTRATIVE ORDERS AND CONTESTED CASES**

Subchapter I  
Definitions

Ag 1.01 Definitions

Subchapter II  
Orders

Ag 1.03 Special Orders  
Ag 1.04 Final Orders in Contested Cases

Subchapter III  
Initiating a Contested Case

Ag 1.05 Complaint Requesting Special Order  
Ag 1.06 Request for Hearing on Department Action  
Ag 1.07 Request for Declaratory Ruling  
Ag 1.08 Request for Financial Default Proceeding

Subchapter IV  
General Provisions

Ag 1.10 Hearing Examiner's Authority and Duties  
Ag 1.11 Failure to Appear, Answer or Comply with Examiner's Order  
Ag 1.12 Party May Appear by Representative  
Ag 1.13 Documents; Filing, Identification and Service  
Ag 1.14 Motions  
Ag 1.15 Subpoenas  
Ag 1.16 Record of Oral Proceedings; Transcripts

Subchapter V  
Contested Case Proceedings

Ag 1.20 Hearing Notice  
Ag 1.21 Answers; Required Pleadings  
Ag 1.22 Prehearing Conference  
Ag 1.23 Discovery  
Ag 1.24 Settlement  
Ag 1.25 Hearing

Subchapter VI  
Decisions and Judicial Review

Ag 1.30 Proposed Decision  
Ag 1.31 Final Decision  
Ag 1.32 Award of Costs and Attorneys Fees  
Ag 1.33 Judicial Review; Certifying Record to Court



**SUBCHAPTER I****DEFINITIONS; SCOPE OF CHAPTER**

Ag 1.01 DEFINITIONS. In this chapter:

(1) "Claim filing order" means an order directing producers to file claims under s. 100.03(9)(b), 100.06(4)(a) or 127.14(1)(a), Stats.

(2) "Claim" means a producer claim under s. 100.03(9), 100.06(4) or 127.14, Stats.

(3) "Claimant" means a producer claimant under s. 100.03(9), 100.06(4) or 127.14, Stats.

(4) "Class 1 contested case," "class 2 contested case" or "class 3 contested case," means a class 1, class 2 or class 3 proceeding, respectively, as defined in s. 227.01(3), Stats.

(5) "Complainant" means any of the following persons or entities that file a complaint with the secretary under this chapter:

(a) A division.

(b) A person or agency authorized to file a complaint under s. 100.20(4) or 100.201(9)(f), Stats.

(6) "Complaint" means a written complaint, filed with the secretary under s. Ag 1.05, asking the department to issue a special order against a person or persons identified in the complaint.

(7) "Contested case" has the meaning given under s. 227.01(3), Stats.

(8) "Department" means the state of Wisconsin department of agriculture, trade and consumer protection.

(9) "Division" means a principal subunit of the department which is headed by a division administrator. "Division" includes authorized division staff.

(10) "Division administrator" means a division head whose position is authorized under s. 230.08(2)(e)2, Stats. "Division administrator" includes an acting division administrator appointed by the secretary, or a person designated by a division administrator to act on the administrator's behalf in the administrator's absence.

(11) "Examiner" means the secretary, or a person whom the secretary appoints, in writing, under s. 227.46(1), Stats., to preside over a contested case proceeding.

(12) "File" means deliver in writing to any of the following:

(a) The office of the secretary.

(b) The final decisionmaker, if the filing pertains to a matter which is pending before the final decisionmaker.

(c) The examiner, if the filing pertains to a matter which is pending before the examiner.

(d) A recipient designated by the department to receive filed documents.

NOTE: Documents intended for filing with the secretary's office may be sent to the following address:

Secretary  
Wisconsin Department of Agriculture, Trade and  
Consumer Protection

801 West Badger Rd.  
P.O. Box 8911  
Madison, WI 53708

(13) "Final decisionmaker" means the secretary, or a person whom the secretary appoints, in writing, to issue a final decision in a contested case. "Final decisionmaker" may include an examiner whom the secretary appoints as final decisionmaker.

(14) "Financial default proceeding" means a proceeding initiated by the department under s. 100.03(9), 100.06(4) or 127.14, Stats., to determine the amount of allowable producer claims against a fruit or vegetable contractor, a dairy plant operator, or a grain warehousekeeper or grain dealer.

(15) "Hearing" means a contested case hearing under ch. 227, Stats., except as otherwise provided in this chapter.

(16) "Intervenor" means an interested or affected person who files a request to be admitted, and who is admitted as a party in a contested case. "Intervenor" does not include a complainant, respondent, petitioner or claimant.

(17) "License" has the meaning specified under s. 227.01(5), Stats.

(18) "Order determining claims" means an order allowing or disallowing producer claims in a financial default proceeding.

(19) "Party" means any of the following persons or entities, unless that person or entity is dismissed as a party:

- (a) A division which appears or is named as a party.
- (b) A complainant.
- (c) A respondent who has been served with a complaint or

notice from the department identifying him or her as a respondent.

- (d) A petitioner.
- (e) A claimant.
- (f) An intervenor.

(20) "Person" includes a natural person, corporation, partnership, association, trust, division of the department, or other government or business entity.

(21) "Petitioner" means a person who files a request for a hearing or declaratory ruling under this chapter.

(22) "Proceeding" means a contested case proceeding before the department under ch. 227, Stats.

(23) "Representative" means an attorney or other person authorized by a party to represent that party in a contested case.

(24) "Respondent" means either of the following:

- (a) A person against whom a complaint is filed.
- (b) A person, other than a complainant, petitioner, claimant or intervenor, who is named as a party to a proceeding.

(25) "Secretary" means the secretary of the department.

"Secretary" includes both of the following:

- (a) The deputy secretary of the department.
- (b) A department official whom the secretary has specifically authorized to act on the secretary's behalf.

(26) "Special order" means an enforceable or purportedly enforceable administrative order which the department issues

against a named or identified person under chs. 91 to 100 or ch. 127, Stats., or other laws administered by the department.

"Special order" includes special orders identified under s. Ag 1.03(1)(a). "Special order" does not include any of the actions listed under s. Ag 1.03(1)(b).

(27) "Subpoena" means a command to give testimony or provide evidence.

(28) "Summary special order" means a special order which the department issues without prior notice to the order recipient, or without a prior opportunity for the order recipient to appear or contest the order.

(29) "Trade and consumer protection division" means the trade and consumer protection division of the department.

## SUBCHAPTER II

### ORDERS

Ag 1.03 SPECIAL ORDERS. (1) ORDERS INCLUDED. (a) A "special order," as defined in s. Ag 1.01(26), includes all of the following:

1. An order suspending, revoking or imposing conditions on a license.

2. An administrative injunction, including any order issued under s. 94.645(4), 94.71(3)(c), 97.12(3)(a), 100.03(18), 100.19(3), 100.20(3), 100.201(9)(b), 100.21(4), 100.22(4)(a), 100.30(5)(a), or 127.17(1), Stats.

3. An order banning or restricting the sale of a hazardous

consumer product or household substance, including any order issued under s. 100.37(2)(e), 100.41(5), 100.42(3) or 100.43(4)(b), Stats.

4. An order determining claims in a financial default proceeding.

5. A temporary holding order or stop sale order, including any order issued under s. 94.10(2)(b), 94.46, 94.64(11), 94.65(10), 94.71(2), 94.72(13), 95.72(4)(d), 97.12(2), 97.42(9)(b)1 or 100.37(5), Stats.

6. An order for the quarantine, control, destruction or disposal of plants, plant pests or animals, including any order issued under s. 94.01, 94.02, 94.10(2)(b), 94.76(1), 95.20, 95.23 or 95.31, Stats.

7. An order condemning unwholesome or adulterated animal carcasses, meat or food, including any order issued under s. 95.72(4)(d), 97.12(2) or 97.42(9)(b)2, Stats.

8. An order prohibiting the use of specified equipment or facilities, including any order issued under s. 95.72(6)(c), 97.42(9) or 98.05, Stats.

9. A subpoena or formal investigative demand, except as provided under par. (b)4 or 5.

(b) The term "special order," as defined in s. Ag 1.01(26), does not include any of the following:

1. A rule.
2. A warning notice.
3. A division's denial of an initial license application.

4. A division's nonrenewal of a license if the license holder fails to file a required renewal application or pay a required fee.

5. A subpoena or discovery demand issued in a contested case proceeding by a party or the party's representative.

6. An order issued by an examiner or final decisionmaker in a contested case, other than an order identified under par. (a).

(2) WHO MAY ISSUE A SPECIAL ORDER. (a) Except as provided under par. (b) or by department rule, no person other than the secretary or final decisionmaker may issue a special order on behalf of the department.

(b) Paragraph (a) does not apply to any of the following:

1. A special order, issued by a division, which imposes conditions on an initial license when that initial license is first issued.

2. Special orders identified under subs. (1)(a)5 to 9.

NOTE: Special orders under subs. (1)(a)5 to 8 are normally issued by the responsible divisions. Subpoenas and investigative demands under sub. (1)(a)9 are normally issued by department attorneys or other authorized officials of the department.

(4) SUMMARY SPECIAL ORDER; RIGHT TO HEARING. (a) If the department issues a summary special order against any person, that person may request a hearing on the summary special order. The request may be made to the secretary or, if the summary special order is issued by a division, the request may be made to the division that issued the summary special order. A request

may be made orally, but the department may require the requester to confirm the request in writing. A written request, if required, shall comply with s. Ag 1.06(2). A request for hearing does not stay or modify a summary special order.

(b) A person who requests a hearing on a summary special order under par. (a) is entitled to a class 2 contested case hearing. Pending completion of the class 2 contested case hearing, the requester is also entitled to a prompt informal hearing.

(c) The informal hearing under par. (b) shall be held as soon as reasonably possible, but not more than 10 days after the department first receives an oral or written hearing request under par. (a). The informal hearing may be held in person or by telephone. The requester may waive the informal hearing, or may agree to an extension of time for the informal hearing.

(d) The informal hearing under par. (b) shall be conducted by a person who was not involved in the investigation of the case, or in the decision to issue the summary special order. The person conducting the informal hearing need not be the examiner who presides over the class 2 contested case hearing. The person conducting the informal hearing may stay or modify the summary special order or, if the summary special order was issued by the secretary, recommend a stay or modification to the secretary or final decisionmaker.

(5) SPECIAL ORDER AGAINST OUT-OF-STATE PERSON. Unless limited by statute, the department's jurisdiction to issue a



special order against an out-of-state person is commensurate with the jurisdiction of a court under s. 801.05, Stats.

Ag 1.04 FINAL ORDERS IN CONTESTED CASES. The final decisionmaker shall, on behalf of the department, issue every final decision and final order in a contested case, as provided under s. Ag 1.31. An order dismissing any party, proceeding or cause of action is a final order under this section.

### SUBCHAPTER III

#### INITIATING A CONTESTED CASE

Ag 1.05 COMPLAINT REQUESTING SPECIAL ORDER. (1) DIVISION COMPLAINTS. To obtain a special order from the secretary or final decisionmaker, other than in a financial default proceeding, a division shall file a written complaint with the secretary. The complaint shall be signed by the division administrator and shall comply with sub. (3).

(2) OTHER COMPLAINTS. (a) To obtain a special order under s. 100.20(4) or 100.201(9)(b), Stats., a complainant authorized under s. 100.20(4) or 100.201(9)(f), Stats., shall file a written complaint with the secretary. The complaint shall be signed by the complainant and shall comply with sub. (3).

NOTE: A complaint may be filed with the secretary at the following address:

Secretary  
Wisconsin Department of Agriculture, Trade and  
Consumer Protection  
801 West Badger Rd.  
P.O. Box 8911  
Madison, WI 53708

(b) Before filing a complaint with the secretary under s. 100.20(4), Stats., the department of justice shall provide a copy of the complaint to the trade and consumer protection division.

(3) COMPLAINT FORM AND CONTENTS. A complaint shall be captioned as provided under s. Ag 1.13(2), and shall include all of the following:

(a) The identity of the complainant.

(b) The statutory authority under which the complaint is filed.

(c) The identity and address of each respondent against whom the complaint is filed.

(d) An identification of the statutes, rules or orders, if any, which each respondent allegedly violated.

(e) A concise statement of facts constituting the alleged violations, or forming the basis for the complaint.

(f) A concise statement describing the order requested of the secretary or final decisionmaker, and the department's authority to issue that order.

(g) If the complainant seeks a summary special order, the additional material required under sub. (5)(b).

**EXAMPLE:** If a division seeks a special order suspending a retail food establishment license, the division's complaint may be captioned as follows:

STATE OF WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND CONSUMER PROTECTION

In the Matter of the Retail  
Food Establishment License  
of Acme, Inc. d/b/a Acme Fine  
Foods,  
Respondent

Docket No. \_\_\_\_\_  
COMPLAINT

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

(5) REQUEST FOR SUMMARY SPECIAL ORDER. (a) In addition to or in lieu of other relief, a complainant may ask the secretary or final decisionmaker to issue a summary special order which is authorized by law. A complainant may request a summary special order as part of a complaint under sub. (1) or (2), or may file the request in the form of a motion at any time after a complaint is filed.

(b) A request for a summary special order shall include all of the following:

1. A statement of the department's authority to issue the summary special order.
2. A statement indicating why the summary special order is necessary and justified.
3. An affidavit setting forth the facts which justify the summary special order.

4. A copy of the proposed summary special order.

(6) AMENDING OR WITHDRAWING A COMPLAINT. A complainant may, with leave from the examiner, amend or withdraw a complaint at any point in a contested case proceeding. The examiner may withhold leave if the amendment or withdrawal would unduly delay or disrupt the proceeding, or would work a significant injustice against any party.

Ag 1.06 REQUEST FOR HEARING ON DEPARTMENT ACTION. (1)  
WHO MAY REQUEST. A person adversely affected by a department action may request a hearing on that action. Except as provided under s. Ag 1.03(4)(a), a request for hearing shall be filed with the secretary and shall comply with sub. (2). A request for hearing on a department action does not stay or modify that action.

NOTE: See s. 227.42, Stats., and Ag 1.03(4). A request for hearing may be filed with the Secretary at the following address:

Secretary  
Wisconsin Department of Agriculture, Trade and  
Consumer Protection  
801 W. Badger Rd.  
P.O. Box 8911  
Madison, WI 53708

(2) REQUEST FORM AND CONTENTS. Except for an oral request under s. Ag 1.03(4)(a), a hearing request under sub. (1) shall be in writing, but need not be in any particular form. The request shall identify the action on which a hearing is sought, the grounds for the hearing request, and the relief sought. The secretary may require the requester to file additional clarifying information before deciding whether to grant or deny the hearing

request.

(3) NOTICE GRANTING OR DENYING REQUEST. (a) Except as provided under s. Ag 1.03(4), the secretary shall grant or deny a hearing request under sub. (1) within 20 days after a complete request is filed, unless the requester agrees to an extension of time.

(b) If the secretary grants a hearing request under sub. (1), the secretary shall initiate a contested case proceeding by issuing a hearing notice under s. Ag 1.20.

EXAMPLE: Acme Foods, Inc. requests a hearing on the denial of a retail food establishment license for which Acme has applied. A hearing notice granting the request may be captioned as follows:

STATE OF WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND CONSUMER PROTECTION

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In the Matter of the Retail  
Food Establishment License  
Application of Acme Foods,  
Inc.,  
Petitioner

Docket No. \_\_\_\_\_  
HEARING NOTICE

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(c) If the secretary denies a hearing request under sub. (1), the secretary shall issue a written denial notice to the person who requested the hearing. The denial notice shall comply with the provisions of s. Ag 1.31. The denial is subject to judicial review, to the extent provided under ss. 227.42(2) and 227.52, Stats.

Ag 1.07 REQUEST FOR DECLARATORY RULING. (1) FILING A PETITION. An interested person may petition the secretary for a declaratory ruling under s. 227.41, Stats., to determine the applicability to that person of any statute or rule enforced by

the department. The petition shall comply with s. 227.41(2), Stats., and shall be filed with the secretary.

NOTE: A petition for declaratory ruling may be filed with the Secretary at the following address:

Secretary  
Wisconsin Department of Agriculture, Trade and Consumer Protection  
801 W. Badger Rd.  
P.O. Box 8911  
Madison, WI 53708

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

EXAMPLE: A notice denying a petition for declaratory ruling may be captioned as follows:

STATE OF WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND CONSUMER PROTECTION

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In the Matter of John Doe,		Docket No. _____
Petitioner		NOTICE DENYING PETITION FOR DECLARATORY RULING

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Ag 1.08 REQUEST FOR FINANCIAL DEFAULT PROCEEDING. (1)  
DIVISION FILING. To initiate a financial default proceeding under s. 100.03(9), 100.06(4) or 127.14, Stats., the trade and consumer protection division shall file all of the following with the secretary:

(a) A written request, signed by the division

administrator, asking that a financial default proceeding be initiated.

(b) Copies of one or more producer claims alleging a financial default, or other evidence of default under s. 100.03(9)(a), 100.06(4)(a) or 127.14(1)(a), Stats.

(c) A proposed claim filing order.

(2) CLAIM FILING ORDER. Upon receiving documents from the trade and consumer protection division under sub. (1), the secretary may initiate a financial default proceeding by issuing a claim filing order. If the secretary issues a claim filing order, the department shall publish the claim filing order as required by s. 100.03(9)(b), 100.06(4)(a), or 127.14(1)(a) and (b), Stats.

EXAMPLE: A claim filing order in a dairy plant default proceeding may be captioned as follows:

STATE OF WISCONSIN DEPARTMENT OF  
AGRICULTURE, TRADE AND CONSUMER PROTECTION

-----  
In the Matter of the  
Claims of Producers for  
Milk Sold to Acme Dairy,  
Inc.,  
Respondent

Docket No. \_\_\_\_\_  
CLAIM FILING ORDER  
-----

(3) AUDITING CLAIMS; PROPOSED DECISION. The trade and consumer protection division shall audit claims filed in response to the claim filing order. Based on its audit, the trade and consumer protection division shall file with the secretary a proposed decision determining claims. The proposed decision shall include proposed findings of fact, proposed conclusions of

law and a proposed order determining claims.

(4) NOTICE AND HEARING. (a) After the trade and consumer protection division files its proposed decision with the secretary under sub. (3), the department shall hold a class 2 contested case hearing on the proposed decision. To initiate the contested case proceeding, the secretary shall issue a hearing notice under s. Ag 1.20.

(b) The notice under par. (a) shall include a copy of the proposed decision under sub. (3). The notice shall invite affected parties to present their objections, if any, at the contested case hearing. The notice may require affected parties to file their objections in writing before the hearing, by a specified date.

(c) The notice under par. (a) shall be issued to all of the following parties:

1. The respondent who is alleged to have defaulted on payment obligations to producers.
2. Any trustee or surety who may be obligated as a result of the default.
3. Each producer claimant who has filed a timely claim with the department.

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

(e) If, upon hearing under par. (a), there is no objection to the division's proposed decision and order under sub. (3), the



department may adopt that proposed decision and order as the department's final decision and order in the proceeding, without further notice to the parties.

#### **SUBCHAPTER IV**

#### **GENERAL PROVISIONS**

##### **Ag 1.10 HEARING EXAMINER'S AUTHORITY AND DUTIES. (1)**

**AUTHORITY.** An examiner may, on behalf of the department, preside over a contested case proceeding and issue orders regulating the conduct of the proceeding. In a contested case proceeding, unless otherwise provided by the secretary, the examiner may do all of the following:

- (a) Require the parties to submit supplementary pleadings in order to clarify positions or issues.
- (b) Consolidate proceedings and order the joinder of parties, as appropriate.
- (c) Admit intervenors as parties to a proceeding.
- (d) Make procedural rulings and issue scheduling orders.
- (e) Adjourn or postpone proceedings.
- (f) Grant continuances or extensions of time.
- (g) Administer oaths and affirmations.
- (h) Issue subpoenas to compel the attendance of witnesses and the production of evidence.
- (i) Make evidentiary rulings and receive relevant evidence.
- (j) Regulate discovery proceedings, and issue orders to compel or limit discovery.

(k) Hold prehearing conferences.

(l) Preside over hearings and regulate the course of hearings.

(m) Require or permit the parties to file written briefs and arguments.

(n) Supervise the creation of the contested case record.

(o) If necessary, order that a written transcript of oral proceedings be prepared, and supervise preparation of the transcript.

(p) Issue proposed decisions.

(q) Advise the final decisionmaker on final decisions and orders.

(r) Impose or recommend sanctions for disobedient parties under s. Ag 1.11.

(s) Issue final decisions and orders if appointed as final decisionmaker by the secretary.

(t) Certify the contested case record to a circuit court, if necessary for a judicial review proceeding.

(2) LIMITS ON AUTHORITY. The examiner may not exercise any authority which is reserved to the secretary or final decisionmaker under this chapter, unless the secretary appoints the examiner as final decisionmaker or delegates the secretary's authority to the examiner in writing.

(3) IMPARTIALITY. (a) An examiner shall withdraw from a contested case if the examiner determines that there is a conflict of interest or other circumstance which prevents the

examiner from acting impartially, or which creates an undue appearance of bias.

(b) No person who participates in the investigation or advocacy of a case, or in the decision to initiate an enforcement action in that case, may act as examiner in the case.

(c) An examiner is not disqualified solely because of the examiner's employment with the department, or solely because the examiner has presided over cases involving the same parties, facts or issues in the past.

(4) EX PARTE COMMUNICATIONS. If an examiner receives an ex parte communication which violates s. 227.50(1), Stats., the examiner shall deal with the ex parte communication as provided under s. 227.50(2), Stats.

Ag 1.11 FAILURE TO APPEAR, ANSWER OR COMPLY WITH EXAMINER'S ORDER. (1) SANCTIONS AGAINST DISOBEDIENT PARTY. If a party, without reasonable excuse, fails to file an answer or pleading as required by s. Ag 1.21, fails to make a required appearance in a proceeding, fails to disclose witnesses or evidence under s. Ag 1.23(3), fails to comply with a subpoena or order issued by the examiner, or fails to comply with the provisions of this chapter, the examiner may take any of the following actions which the examiner considers just in relation to the disobedient party's failure:

(a) Accept an opposing party's allegations as true, and issue a decision and order in the case based on those allegations.

(b) By order, disqualify the disobedient party from further participation in the proceedings.

(c) By order, stay further proceedings until the disobedient party cures the failure.

(d) By order, prohibit the disobedient party from arguing designated issues or introducing designated matters in evidence.

(e) By order, dismiss the proceeding, or any part of the proceeding, if the proceeding was initiated at the request of the disobedient party.

NOTE: A person who, in wilful violation of a department subpoena or order, fails to appear as a witness or fails to produce evidence in a contested case proceeding, may be coerced as provided in ss. 93.14(3) and 885.12, Stats., or may be subject to criminal penalties as provided under s. 93.21(4), Stats.

(2) NOTICE; OPPORTUNITY TO CONTEST. (a) Before issuing an order under sub. (1), the examiner shall mail a copy of the proposed order to the disobedient party, and shall give the disobedient party not less than 10 days to show cause why the proposed order should not be issued. This paragraph does not apply to proposed orders issued under par. (b).

(b) If the examiner is not the final decisionmaker, and if an order under sub. (1) would constitute a final order in the contested case, the examiner shall issue the order as a proposed order under s. Ag 1.30. The final decisionmaker shall issue any final order under s. Ag 1.31 after the final decisionmaker considers objections to the proposed order under s. Ag 1.30(2). An order dismissing any party, proceeding or cause of action is a final order under this paragraph.

Ag 1.12 PARTY MAY APPEAR BY REPRESENTATIVE. (1) GENERAL.

In any contested case, a party may be represented by an attorney or other authorized representative. If a party's representative is not an attorney, the represented party shall file a written authorization for the record stating that the representative has full authority to act on the party's behalf in the contested case.

(2) ACTIONS BINDING. Actions and omissions by an authorized representative are binding on the authorizing party, as if the authorizing party had taken or omitted those actions directly.

(3) SERVICE OF DOCUMENTS. If a party appears by a representative, a document is deemed to be served on that party if it is served on the party's representative.

Ag 1.13 DOCUMENTS; FILING, IDENTIFICATION AND SERVICE. (1) DOCKET FILE. The department shall create a docket file for every contested case. The docket file shall be captioned with the docket number and title of the case, "In the matter of....." The docket file shall include the record of the case and any other material filed in connection with the case, subject to the direction of the examiner or final decisionmaker.

(2) DOCUMENTS CAPTIONED. Pleadings, notices, motions, briefs, stipulations, decisions, orders and other documents filed in a contested case shall, to the extent practicable, be captioned with all of the following:

(a) The name of the department.

- (b) The title of the contested case.
- (c) The docket file number assigned to the contested case.
- (d) The name of the document.

(3) FILING DEADLINES. If a party is required to file a document on or before a specified date, the party complies with the filing deadline if the party mails the document on or before the deadline date.

(4) DOCUMENTS FILED BY PARTIES; SERVICE ON OTHER PARTIES.

(a) Except as provided under par. (d), whenever a party files a document in a contested case, that party shall mail or deliver a copy of the document to every other party in the case.

(b) By filing a document in a contested case, the filing party certifies that he or she has mailed or delivered a copy of the filed document to every other party as required by par. (a). No other affidavit of mailing or service is required.

(c) If any party claims not to have received a copy of any document filed under par. (a), an affidavit of mailing constitutes presumptive proof of service.

(d) Par. (a) to (c) do not apply to a complaint, request for hearing, or other document filed under subch. III to initiate a contested case.

NOTE: When the department initiates a contested case in response to a complaint, request for hearing, or other document filed under subch. III, the department provides notice to the other parties in conjunction with the department's hearing notice under s. Ag 1.20. Accordingly, the party filing the complaint or request for hearing need not serve a copy on the other parties at the time of filing.

(5) DOCUMENTS ISSUED BY SECRETARY, FINAL DECISIONMAKER OR EXAMINER. Whenever the secretary, final decisionmaker or examiner issues a hearing notice, order, subpoena or other process in a contested case, a copy of that document shall be mailed or delivered to each party in the case. Service by mail may be proved by a signed return receipt. Proof of mailing does not constitute presumptive proof of service.

Ag 1.14 MOTIONS. (1) GENERAL. Except as provided under subch. III, a person requesting an order from the examiner or final decisionmaker shall make that request in the form of a motion. A motion shall clearly describe the order sought, and the grounds for granting that order. A person may move the examiner or final decisionmaker for any substantive or procedural order authorized by law, including either of the following:

(a) An order dismissing a party or case for lack of personal or subject matter jurisdiction. A motion to dismiss for lack of jurisdiction may be made at any point in the proceeding, but should be made as soon as the basis for the motion becomes apparent to the moving party.

(b) An order dismissing a case, prior to hearing, for failure to state a claim on which relief can be granted.

(2) FORM OF MOTION. Every motion, except the following, shall be submitted in writing:

(a) A motion made orally at a prehearing conference or hearing, unless the examiner requires that the motion be submitted in writing.

(b) An oral motion for an extension of time, if the examiner agrees to hear that oral motion.

(3) WRITTEN MOTIONS. A person filing a written motion shall comply with s. Ag 1.13(2) and (4). If the moving person offers any affidavit, brief or other document in support of a motion, the moving person shall include a copy of that document with the motion.

(4) MOTION HEARING; NOTICE. (a) Except as provided under par. (b) or (c), the examiner or final decisionmaker shall give all parties an opportunity to argue a motion before the examiner or final decisionmaker rules on the motion. The examiner shall notify every party of any scheduled motion hearing.

(b) Paragraph (a) does not prohibit a final decisionmaker from issuing a summary special order which is authorized by law.

(c) An examiner or final decisionmaker may, on an ex parte basis, rule on a motion for extension of time.

Ag 1.15 SUBPOENAS. (1) GENERAL. The final decisionmaker, examiner, or a party's attorney of record may issue a subpoena in a contested case to compel the attendance of any witness or the production of relevant evidence.

(2) REQUEST FOR SUBPOENA. A party may request the examiner or final decisionmaker to issue a subpoena on behalf of that party. The requesting party shall submit the proposed subpoena for signature by the examiner or final decisionmaker. The examiner or final decisionmaker shall not sign a subpoena in blank. The requesting party is responsible for serving the



subpoena, and for paying any service, witness or travel fees.

NOTE: A person may request form subpoenas from the examiner which may be used in preparing subpoenas under this section. If a person fails to comply with a department subpoena, that person may be compelled as provided under s. 885.12, Stats., or may be subject to penalties under s. 93.21(4), Stats.

Ag 1.16 RECORD OF ORAL PROCEEDINGS; TRANSCRIPTS. (1)

RECORD OF ORAL PROCEEDINGS. The department shall make a stenographic or electronically recorded record of oral proceedings in a contested case. Proceedings shall be electronically recorded unless the examiner determines that a stenographic record is necessary.

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

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

(4) TRANSCRIPT FEES. If the department provides a written transcript to a requester under sub. (3), the department shall

charge a fee as follows:

(a) Except as provided under par. (b) or (c), the department shall charge the requester a transcription fee of \$1.75 per page and a copying fee of \$.25 per page. If 2 or more persons request a written transcript, the department shall charge each requester a copying fee of \$.25 per page, but may divide the transcription fee equitably among the requesters.

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

(c) The department may provide a written transcript free of charge to a requesting party if the requesting party demonstrates, to the department's satisfaction, that the requesting party is impecunious and has a legal need for the transcript.

(5) INFORMATION PROTECTED FROM DISCLOSURE. This section does not require the department to disclose information in violation of an order under s. Ag 1.25(2)(b).

#### **SUBCHAPTER V**

#### **CONTESTED CASE PROCEEDINGS**

Ag 1.20 HEARING NOTICE. To initiate a contested case proceeding, the secretary shall issue a hearing notice to each of

the parties. The hearing notice shall be signed and dated by the secretary, and shall be captioned as provided in s. Ag 1.13(2).

The hearing notice shall include all of the following:

(1) NATURE OF THE PROCEEDING. A statement of the general nature of the proceeding, including whether the proceeding is a class 1, class 2, or class 3 proceeding under s. 227.01(3), Stats.

(2) LEGAL AUTHORITY. A statement of the department's legal authority to conduct the contested case proceeding.

(3) HEARING EXAMINER. The name of the examiner who is appointed to preside over the contested case, unless the secretary intends to preside in person.

(4) FINAL DECISIONMAKER. The name and position of the final decisionmaker who is appointed to issue a final decision in the case, unless the secretary intends to issue the final decision.

(5) HEARING. Except as provided under sub. (6), the date, time and location at which a hearing will be held in the proceeding. Except in emergency, or by agreement of all parties, the hearing date shall be not less than 10 days after the hearing notice is issued. If any party is required to file an answer or other pleading under s. Ag 1.21, the hearing date shall not precede the last date for filing the answer or other pleading.

(6) PREHEARING CONFERENCE. Instead of scheduling a hearing, the hearing notice may schedule a prehearing conference under s. Ag 1.14. The hearing notice may specify that the

prehearing conference is to be conducted by telephone, or it may authorize the parties to request a telephone prehearing conference.

NOTE: If the hearing notice schedules a prehearing conference, rather than a hearing, the examiner will schedule the hearing after consulting the parties.

(7) **MATTERS ASSERTED.** A short and plain statement of the matters asserted. This statement may incorporate, by reference, the complaint or pleading filed by the initiating party under subchapter III. If the contested case is initiated in response to a complaint under s. Ag 1.05, a copy of the complaint shall be included with the hearing notice.

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

(9) **CONSEQUENCES OF FAILING TO APPEAR OR FILE ANSWER.** A statement that, if a party fails to appear or file an answer or pleading as required, the department may issue a decision and order against that party without further notice or hearing.

Ag 1.21 ANSWERS; REQUIRED PLEADINGS. (1) **ANSWER.** (a) If a respondent is named in a complaint under s. Ag 1.05, and is served with a copy of the complaint and the hearing notice issued under s. Ag 1.20, the respondent shall file a written answer to the complaint. The respondent shall file the answer within 20

days after the complaint and hearing notice are served on the respondent. Upon request by a respondent, the examiner may grant the respondent an extension of time to file an answer.

(b) An answer under par. (a) shall be in writing, and shall be captioned as provided in s. Ag 1.13(2). The answer shall be signed by the respondent or the respondent's representative, and shall briefly state the respondent's position with respect to each allegation in the complaint.

(2) OTHER PLEADINGS. In a hearing notice under s. Ag 1.20, the secretary may require the parties to file written pleadings in order to identify the positions of the parties and the matters at issue in the proceeding. The examiner may require the parties to file any supplementary pleadings which the examiner considers necessary.

(3) AMENDMENTS. A party may, with leave from the examiner, amend an answer or pleading at any point in a contested case proceeding. The examiner may withhold leave if the amendment would unduly delay or disrupt the proceeding, or would work a significant injustice against any party.

Ag 1.22 PREHEARING CONFERENCE. (1) GENERAL. The hearing notice under s. Ag 1.20 may require the parties to appear at a prehearing conference. The examiner may also require the parties to attend one or more prehearing conferences.

NOTE: A prehearing conference is normally held in every contested case proceeding unless the examiner determines that a prehearing conference is unnecessary. Prehearing conferences are electronically recorded.

(2) PURPOSES. A prehearing conference may be held to

consider any of the following:

- (a) Possibilities for settling the case.
- (b) The clarification of issues.
- (c) The necessity or desirability of amending the pleadings.
- (d) The possibility of obtaining stipulations of facts, law or evidence that will avoid unnecessary arguments or offers of proof.
- (e) The identification of witnesses and evidence for hearing.
- (f) Prehearing motions and discovery requests.
- (g) The scheduling of proceedings in the contested case, including the date, time and location of hearing.
- (h) Other matters which may aid the orderly consideration and disposition of the contested case.

(3) MEMORANDUM. At the conclusion of a prehearing conference, the examiner shall prepare a memorandum for the record under s. 227.44(4)(b), Stats., which summarizes the action taken and the agreements reached at the conference. The examiner may, in conjunction with the memorandum, issue any procedural orders which may be necessary to implement the actions taken at the prehearing conference. Copies of the memorandum shall be mailed or delivered to all parties.

Ag 1.23 DISCOVERY. (1) CLASS 2 CONTESTED CASES. In a class 2 contested case, every party is entitled to discovery as provided in s. 227.45(7) and ch. 804, Stats.

(2) OTHER CONTESTED CASES. In a class 1 or class 3 contested case, the examiner may by order authorize discovery by any party under s. 227.45(7) and ch. 804, Stats. Except as provided in s. 227.45(7)(a) to (d), Stats., the decision to grant or deny a discovery request in a class 1 or class 3 contested case is subject to the examiner's discretion. The examiner may issue a discovery order in response to a motion by any party, and may impose such limits on discovery as the examiner considers appropriate.

(3) EXCHANGE OF EVIDENCE AND WITNESS LISTS. (a) Except as provided under par. (b), and unless the examiner directs otherwise, every party in a contested case shall provide every other party with all of the following at least 7 days prior to hearing:

1. The name and address of every person whom the party intends to call as a witness in the proceeding. Proposed expert witnesses shall be identified as such.

2. A copy of every document which the party intends to offer as evidence in the proceeding.

3. A description of every item of physical evidence which the party intends to offer as evidence in the proceeding. Upon request by any other party, the party offering the physical evidence shall permit the requesting party to make reasonable inspection of the physical evidence prior to hearing.

(b) Paragraph (a) does not apply to witnesses or evidence used solely to impeach witness testimony.

(4) PROTECTIVE ORDERS. Upon motion by any party, and for good cause shown, the examiner may issue a protective order under s. 804.01(3), Stats., limiting discovery. The examiner may issue a protective order in any contested case, including a class 2 contested case.

(5) ORDER COMPELLING DISCOVERY. If a person fails to respond to a discovery request under this section, the party seeking discovery may move the examiner for an order compelling discovery. Upon motion by any party, the examiner may issue an order compelling discovery under s. 804.12, Stats.

NOTE: If a party fails to comply with sub. (3), or with an examiner's order under sub. (2), (4) or (5), the party is subject to possible sanctions under s. Ag 1.11. If any person wilfully fails to testify or provide evidence in compliance with an examiner's order under sub. (5), that person may be coerced under ss. 93.14(3) and 885.12, Stats., or may be subject to criminal penalties as provided under s. 93.21(3) or (4), Stats.

Ag 1.24 SETTLEMENT. (1) GENERAL. At any point in a contested case proceeding, the parties may agree to settle the case. Parties wishing to settle a case shall file both of the following:

(a) A written stipulation, signed by the parties or their representatives, setting forth the agreed terms of settlement.

(b) A proposed order disposing of the case, for signature by the final decisionmaker.

(2) APPROVAL. A proposed settlement under sub. (1) is subject to approval by the final decisionmaker. The final decisionmaker signifies approval by signing the proposed order submitted by the parties.



(3) SETTLEMENT PRIOR TO COMPLAINT FILING. (a) A respondent, as part of a stipulation under sub. (1), may waive the filing of a complaint under s. Ag 1.05, and may consent to the entry of a proposed special order without further notice or hearing.

(b) The secretary may sign a proposed special order, without the filing of a complaint under s. Ag 1.05, if each respondent named in the order agrees to waive the filing of a complaint. The waiver shall be included as part of the stipulation accompanying the proposed order under sub. (1).

(c) Before filing a stipulation and proposed special order under s. 100.20, Stats., the department of justice shall provide a copy of the stipulation and proposed order to the trade and consumer protection division.

Ag 1.25 HEARING. (1) HEARING TIME AND LOCATION. (a) A contested case hearing shall be held at a time and location specified in the hearing notice under s. Ag 1.20, or at a time and location specified by the examiner. In determining the hearing time and location, the examiner shall consider all of the following:

1. The location and convenience of the parties.
2. The location and convenience of department personnel involved in the proceeding.
3. The location and convenience of witnesses involved in the proceeding.
4. Public interest and convenience in attending the

proceeding.

(b) A hearing, or any portion of a hearing, may be held by telephone if the examiner determines that the telephone hearing is justified for the convenience of any party or witness, and that no party is unfairly prejudiced by the telephone hearing.

(c) The examiner may adjourn, recess or postpone a hearing as the examiner deems appropriate.

(2) HEARINGS OPEN TO PUBLIC. (a) Except as ordered by the examiner, every contested case hearing is open to attendance by the public.

(b) Upon motion by any party, the examiner may do either of the following:

1. By order, prohibit the disclosure of information or restrict attendance at any portion of a proceeding if the examiner determines that the order is necessary to prevent disclosure of a trade secret or other information which is protected by law from public disclosure.

2. By order, exclude prospective witnesses from attending portions of a proceeding if the examiner determines that the order will promote the interests of justice. Exclusionary orders shall conform to s. 906.15, Stats.

(c) The examiner may, by order, prohibit any person from further attendance at a proceeding if that person engages in disruptive behavior which inhibits the orderly conduct of the proceeding.

(3) OPENING STATEMENTS AND CLOSING ARGUMENTS. Opening

statements and closing arguments are optional, and do not constitute evidence. The examiner may limit opening and closing arguments as the examiner deems necessary.

(4) ORDER OF HEARING. (a) Except as provided under par. (b) or (c) or other applicable law, the party requesting a contested case hearing has the initial burden of going forward with proof at the hearing.

(b) If the propriety of a division's order is at issue in a contested case, the examiner may require the division to go forward with proof that the order was proper.

(c) The examiner may determine the order of proof in a contested case, in order to promote an orderly consideration of the case.

(5) EVIDENCE. The receipt of testimony and other evidence in contested cases is subject to s. 227.45, Stats. The examiner shall admit evidence which has reasonable probative value, but shall exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which lacks reasonable probative value.

(6) WITNESSES. (a) All witness testimony shall be given under oath or affirmation. The examiner shall administer the oath or affirmation to each witness.

(b) At the discretion of the examiner under sub. (1)(b), a witness may testify by telephone rather than in person.

(c) Cross-examination is not limited to matters covered on direct examination. The examiner may limit cross-examination, as necessary, to avoid needless waste of time or undue harrassment

of witnesses.

(d) Leading questions may not ordinarily be used in the direct examination of witnesses, but may be used in the cross-examination of witnesses. A party may use leading questions in the direct examination of either of the following:

1. An opposing party, or an employe or agent of an opposing party.
2. A witness who is hostile, unwilling, adverse or evasive, if the examiner permits the examining party to use leading questions in the examination of that witness.

Ag 1.26 BRIEFS. The examiner may require or permit the parties to file arguments in the form of written briefs, or in the form of a proposed decision. The examiner may establish deadlines for the filing of briefs, and may refuse to consider any brief which is not filed on a timely basis.

## SUBCHAPTER VI

### DECISIONS AND JUDICIAL REVIEW

Ag 1.30 PROPOSED DECISION. (1) ISSUED BY EXAMINER. If the examiner is not the final decisionmaker in a contested case, the examiner shall prepare a proposed decision for consideration by the final decisionmaker. The proposed decision shall include proposed findings of fact, proposed conclusions of law, a proposed final order, and the examiner's signed opinion explaining the proposed decision. A copy of the proposed decision shall be mailed or delivered to every party to the

contested case.

(2) OBJECTIONS BY PARTIES. (a) Any party may file written objections to the examiner's proposed decision under sub. (1). Unless the final decisionmaker specifies a different time period, an objecting party shall file objections within a time period specified by the examiner. The objecting party shall identify the legal or factual grounds for each objection, and may file a written brief or argument in support of his or her objections.

(b) A final decisionmaker may do either of the following:

1. Extend or limit the time for filing objections.
2. Permit the parties to make further oral or written arguments to the final decisionmaker.

Ag 1.31 FINAL DECISION. (1) GENERAL. The final decisionmaker, after considering any proposed decision and objections under s. Ag 1.30, shall issue the final decision in a contested case. The final decision shall include findings of fact, conclusions of law and an order.

(2) EXAMINER AS FINAL DECISIONMAKER. If the examiner is also the final decisionmaker, the examiner may issue a final decision under sub. (1) without first issuing a proposed decision under s. Ag 1.30.

(3) IDENTIFICATION OF PARTIES; SERVICE ON PARTIES. The department shall mail or deliver a copy of the final decision to every party in a contested case. The name and address of every party shall be included with the final decision.

(4) VARIANCE FROM PROPOSED DECISION. If the final decision

varies from the examiner's proposed decision, the final decision shall explain the reasons for the variation.

(5) PETITION FOR REHEARING OR JUDICIAL REVIEW; NOTICE OF RIGHTS. The following statement, or its equivalent, shall be included with the final decision pursuant to s. 227.48, Stats.:

"A party adversely affected by this final decision may file a written petition for rehearing under s. 227.49, Stats., within 20 days after he or she is served with the decision under s. 227.48. A petition for rehearing, if any, shall specify in detail the grounds for rehearing.

A party adversely affected by this final decision may also seek judicial review under ss. 227.52 and 227.53, Stats., by filing a petition for judicial review within 30 days after he or she is served with the decision under s. 227.48. In any petition for judicial review, the Wisconsin Department of Agriculture, Trade and Consumer Protection shall be named as the respondent."

(6) MOTION FOR COSTS AND ATTORNEYS FEES; NOTICE OF RIGHTS.

If a prevailing party in a contested case may be entitled to costs and attorneys fees under s. 227.485, Stats., the final decision shall include notice of the procedure for requesting an award of costs and attorneys fees under s. Ag 1.32.

Ag 1.32 AWARD OF COSTS AND ATTORNEYS FEES. (1) MOTION; ITEMIZED STATEMENT. If an individual, small nonprofit corporation or small business is a prevailing party in a contested case, that prevailing party may submit a motion for costs and attorneys fees under s. 227.485, Stats. A prevailing party shall submit the motion, if any, within 30 days after the final decisionmaker issues the final decision and order under sub. (1). The motion shall specify the grounds for awarding costs and attorneys fees, and shall include an itemized statement

of costs and attorneys fees under s. 227.485(5), Stats.

(2) REPLY. A division or state agency which is a party to the contested case, and whose action gave rise to the motion for costs and attorneys fees under sub. (1), may file a written response to that motion. The response shall be filed within 15 days after the prevailing party's motion is filed under sub. (1).

(3) DECISION. (a) The examiner shall issue a decision granting or denying a motion for costs and attorneys fees under sub. (1). The examiner may make a partial award of costs and attorneys fees, as provided under s. 227.485(4), Stats. The examiner's decision shall include findings of fact, conclusions of law, and an order granting or denying an award. Except as provided under par. (b), the examiner's decision is final and shall comply with s. Ag 1.31(1) to (5).

(b) If the examiner is not the final decisionmaker in a contested case, the examiner's decision under par. (a) shall be issued as a proposed decision. Within 15 days after the examiner issues a proposed decision under this paragraph, the parties may file written objections to the proposed decision. After considering the written objections, the final decisionmaker shall issue a final decision granting or denying an award of costs and attorneys fees. The final decision shall comply with s. Ag 1.31(1) to (5).

(c) A final decision under this subsection is subject to judicial review under s. 227.52, Stats. A party may seek judicial review of a final decision granting or denying an award

of costs and attorneys, regardless of whether the party petitions for judicial review of the department's final decision on the merits of the contested case.

Ag 1.33 JUDICIAL REVIEW; CERTIFYING RECORD TO COURT. If a party seeks judicial review of a contested case decision under s. 227.52, Stats., the department shall certify the record of the contested case proceeding to the reviewing court as provided in s. 227.55, Stats. The examiner shall, on behalf of the department, certify the contested case record to the court.

SECTION 2. The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22(2), Stats.

Signed this 9th day of April, 1992.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By   
Alan T. Tracy, Secretary