

## Chapter ATCP 1

### ADMINISTRATIVE ORDERS AND CONTESTED CASES

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**Note:** Chapter Ag 1 as it existed on May 31, 1992 was repealed and new ch. Ag 1 was created effective June 1, 1992; Chapter Ag 1 was renumbered ch. ATCP 1 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

#### Subchapter I — Definitions

**ATCP 1.01 Definitions.** In this chapter:

(1) "Administrative law judge" means the secretary or an examiner whom the secretary appoints in writing, under s. 227.46 (1), Stats., to preside over a contested case. The secretary may appoint an examiner from the department, the department of administration, or another state agency with the agreement of that agency.

(2) "Claim filing order" means an order directing producers or depositors to file claims under subch. VII of ch. 126, Stats.

(3) "Claim" means a producer or depositor claim under subch. VII of ch. 126, Stats.

(4) "Claimant" means a producer or depositor claimant under subch. VII of ch. 126, Stats.

(5) "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.

(6) "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.

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

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

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

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

(11) "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.

(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 administrative law judge, if the filing pertains to a matter which is pending before the administrative law judge.

(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  
2811 Agriculture Drive  
P.O. Box 8911  
Madison, WI 53708-8911

(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 administrative law judge whom the secretary appoints as final decisionmaker.

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

(15) "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.

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

(17) "Order determining claims" means an order allowing or disallowing producer or depositor claims in a recovery proceeding.

(18) "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.

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

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

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

(22) "Recovery proceeding" means a proceeding initiated by the department under subch. VII of ch. 126, Stats., to determine the amount of allowable producer or depositor claims against a vegetable contractor, milk contractor, grain warehouse keeper or grain dealer.

(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 that the department issues against a named or identified person under chs. 88 to 100, Stats., or ch. 126, Stats., or other laws administered by the department. "Special order" includes special orders identified under s. ATCP 1.03 (1) (a). "Special order" does not include any of the actions listed under s. ATCP 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; renum. (1) to (10) to be (2) to (11) and renum. (11) to be (1) and am., am. (12) (c) and (13), Register, June, 1999, No. 522, eff. 7-1-99; CR 02-113: am. (26) Register April 2003 No. 568, eff. 5-1-03; corrections in (2), (3), (4) and (14) made under s. 13.93 (2m) b. 7., Stats., Register April 2003 No. 568; CR 09-054: am. (1) to (4), r. (14), renum. (15) to (22) to be (14) to (21) and am. (17), cr. (22) Register December 2010 No. 660, eff. 1-1-11.

## Subchapter II — Orders

**ATCP 1.03 Special orders. (1) ORDERS INCLUDED.** (a) A "special order," as defined in s. ATCP 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. 88.11 (7), 94.645 (4), 94.71 (3) (c), 97.12 (3) (a), 100.19 (3), 100.20 (3), 100.201 (9) (b), 100.21 (4), 100.22 (4) (a), 100.30 (5) (a) or 126.85, 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 recovery 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.

10. A corrective action order under s. 94.73 (2), Stats.

11. Animal health import requirements that the state veterinarian imposes on an import permit holder under s. ATCP 10.07 (1) (b), unless the department has adopted those import requirements by rule.

12. A temporary animal hold order issued under s. ATCP 10.90 or a destruction or removal order issued under s. ATCP 10.91.

(b) The term "special order," as defined in s. ATCP 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 administrative law judge 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 sub. (1) (a) 5. to 9., 11. and 12.

**Note:** Special orders under sub. (1) (a) 5. to 8., 11. and 12. 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.

3. A voluntary compliance agreement under s. 97.12 (3), Stats.

(3) SUMMARY SPECIAL ORDER; HEARING. (a) If the department issues a summary special order against any person, that person may do any or all of the following:

1. Request a contested case hearing on the summary special order, pursuant to s. ATCP 1.06.

2. Request an informal hearing on the summary special order. A request for informal hearing may be made to the secretary or, if the summary special order is issued by a division, to the issuing division. The request shall be in writing. The request shall briefly identify the summary special order on which an informal hearing is requested, how the order causes or threatens substantial harm to the requester, the material facts or legal issues in dispute, and the relief requested.

(b) If it is not clear whether a requester under par. (a) is requesting a contested case hearing or an informal hearing or both, the department may require the requester to specify the type of hearing requested. A request for an informal hearing does not preclude a subsequent request for a contested case hearing.

(c) The department shall hold a prompt informal hearing in response to a request under par. (a) 2. An informal hearing is not subject to contested case hearing procedures under this chapter or ch. 227, Stats. The department shall hold the informal hearing as soon as reasonably possible, but not more than 20 days after the department receives the hearing request, unless the requester

agrees to a later date. The department may hold the informal hearing in person or by telephone.

(d) An informal hearing under par. (c) shall be conducted by an individual who was not involved in the investigation of the case, or in the decision to issue the summary special order. The individual conducting the informal hearing may not act as administrative law judge in any contested case hearing conducted on the same summary special order.

(e) A person conducting an informal hearing under par. (c) may stay or modify the summary special order or, if the order was issued by the secretary or division administrator, recommend a stay or modification to the secretary or division administrator.

(f) A request for hearing under par. (a) does not automatically stay or modify a summary special order.

**(4) 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; cr. (1) (a) 10., Register, August, 1994, No. 464, eff. 9-1-94; am. (1) (a) 2., Register, June 1995, No. 474, eff. 7-1-95; am. (1) (b) 6. and (3) (d), Register, June, 1999, No. 522, eff. 7-1-99; cr. (1) (a) 11. and 12., am. (2) (b) 2., Register, November, 2000, No. 539, eff. 12-1-00; correction in (1) (a) 2. made under s. 13.93 (2m) (b) 7., Stats; CR 02-113; am. (1) (a) 2. Register April 2003 No. 568, eff. 5-1-03; correction in (1) (a) 12. made under s. 13.93 (2m) (b) 7., Stats., Register October 2004 No. 586; CR 06-009; am. (1) (a) 11. and 12. Register September 2006 No. 609, eff. 10-1-06; CR 09-054; am. (1) (a) 4., 12., cr. (2) (b) 3., r. and recr. (3) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 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. ATCP 1.31. An order dismissing any party, proceeding or cause of action is a final order under this section.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92.

**Subchapter III — Initiating a Contested Case**

**ATCP 1.05 Complaint requesting special order.**

**(1) DIVISION COMPLAINTS.** To obtain a special order from the secretary or final decisionmaker, other than in a recovery 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  
2811 Agriculture Drive  
P.O. Box 8911  
Madison, WI 53708-8911

(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. ATCP 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 Application of Acme Foods, Respondent	Docket No. _____ COMPLAINT
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**(4) PROCEEDINGS INITIATED IN RESPONSE TO COMPLAINT.** (a) 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. ATCP 1.20. The department shall mail or deliver a copy of the notice, together with a copy of the complaint, to the administrative law judge, the complainant, and each respondent identified in the complaint.

(b) Notwithstanding par. (a):

1. A party may move for dismissal of a contested case at any point in a contested case proceeding.

2. The final decisionmaker may dismiss a contested case at any point in a contested case proceeding if the final decisionmaker determines, based on the record, that the proceeding should be dismissed for lack of jurisdiction or other reasons.

**Note:** For example, based on a party's pre-hearing motion, the administrative law judge and final decisionmaker may conclude that a contested case should be dismissed for jurisdictional or other reasons notwithstanding the secretary's action under par. (a).

**(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 administrative law judge, amend or withdraw a complaint at any point in a contested case proceeding. The administrative law judge may withhold leave if the amendment or withdrawal would unduly delay or disrupt the proceeding, or would work a significant injustice against any party.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; CR 09-054; am. (1), (6), r. and recr. (4) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 1.06 Request for hearing on department action.**

**(1) WHO MAY REQUEST.** A person adversely affected by a department action may request a contested case hearing on that action. A request for a contested case hearing shall be filed with the secretary and shall comply with sub. (2). A request for hearing on a department action does not automatically stay or modify that action.

**Note:** See s. 227.42, Stats., and s. ATCP 1.03 (3). A request for hearing may be filed with the secretary at the following address:

Secretary  
Wisconsin Department of Agriculture, Trade and Consumer Protection  
2811 Agriculture Drive  
P.O. Box 8911  
Madison, WI 53708-8911

**(2) REQUEST FORM AND CONTENTS.** (a) A contested case hearing request under sub. (1) shall be in writing and shall describe all of the following:

- 1. The department action on which a hearing is requested.

2. The requester's substantial interest claimed to be adversely affected.

3. How the department's action adversely affected the requester's substantial interest.

4. The grounds for the hearing request, including material facts or legal issues that are in dispute.

5. The relief sought.

(b) The secretary may require the requester to file additional clarifying information, as necessary for the secretary to decide whether to grant or deny a hearing request.

**(3) GRANTING OR DENYING REQUEST.** (a) The secretary shall grant or deny a contested case hearing request under sub. (1) within 30 days after a complete request is filed, unless the requester agrees to an extension of time. The secretary may grant a contested case hearing request if, upon preliminary review, it appears that the department has jurisdiction over the matter and that a contested case proceeding is warranted under s. 227.42, Stats., or other applicable law.

(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. ATCP 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	
In the Matter of the Retail Food Establishment License Application of Acme Foods, Inc., Petitioner	Docket No. _____ HEARING NOTICE

(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. ATCP 1.31. The denial is subject to judicial review, to the extent provided under ss. 227.42 (2) and 227.52, Stats.

(d) Notwithstanding par. (a):

1. A party may move for dismissal of a contested case at any point in a contested case proceeding.

2. The final decisionmaker may dismiss a contested case at any point in a contested case proceeding if the final decisionmaker determines, based on the record, that the proceeding should be dismissed for lack of jurisdiction or other reasons.

**Note:** For example, based on a party's pre-hearing motion, the administrative law judge and final decisionmaker may conclude that a contested case should be dismissed for jurisdictional or other reasons notwithstanding the secretary's action under par. (a).

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1), correction in (2) made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482, eff. 3-1-96; CR 09-054: am. (1), (3) (title), (a), r. and recr. (2), cr. (3) (d) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 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  
2811 Agriculture Drive  
P.O. Box 8911  
Madison, WI 53708-8911

**(2) RESPONSE TO PETITION.** Within 30 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. ATCP 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

In the Matter of John Doe, Petitioner	Docket No. _____ NOTICE DENYING PETITION FOR DECLARATORY RULING
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**(3) DISMISSAL.** Notwithstanding sub. (2):

(a) A party may move for dismissal of a proceeding under this section at any point in the proceeding.

(b) The final decisionmaker may dismiss a proceeding under this section at any point in the proceeding if the final decisionmaker determines, based on the record, that the proceeding should be dismissed for lack of jurisdiction or other reasons.

**Note:** For example, based on a party's pre-hearing motion, the administrative law judge and final decisionmaker may conclude that a proceeding for declaratory ruling should be dismissed for jurisdictional or other reasons notwithstanding the secretary's action under sub. (2).

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; CR 09-054: am. (2), cr. (3) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 1.08 Request for recovery proceeding.**

**(1) DIVISION FILING.** To initiate a recovery proceeding under subch. VII of ch. 126, 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 recovery proceeding be initiated.

(b) Copies of one or more producer claims alleging a financial default, or other evidence of default under subch. VII of ch. 126, Stats.

(c) A proposed default 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 recovery proceeding by issuing a default claim filing order. If the secretary issues a default claim filing order, the department shall publish the default claim filing order as required by subch. VII of ch. 126, 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 default claim filing order under sub. (2). Based on its audit, the trade and consumer protection division shall file with the secretary a proposed decision determining claims. The proposed decision shall do all of the following:

(a) Specify proposed findings of fact, proposed conclusions of law and a proposed order determining claims and appropriate sources for payment of claims.

(b) Allow or disallow each default claim according to s. 126.70 (4), Stats., and specify the amount of each allowed claim.

(c) Specify, for each allowed claim, the amount that the department is authorized to pay under s. 126.71, Stats.

(d) Specify the method, under s. 126.71, Stats., by which the department will pay the authorized amounts.

(e) Explain a claimant's right under s. 126.87 (4), Stats., to seek court recovery of that portion of an authorized claim that is not paid by the department.

(f) Specify a date by which the contractor, claimant, surety or trade credit insurer may file written objections to the proposed decision.

(g) If a respondent is covered by the department's trade credit insurance policy, specify what claimants must do to qualify for coverage under the policy.

(h) Include other provisions, if any, that the division finds necessary for the just and orderly determination of claims under ch. 126, Stats.

(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. ATCP 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 financial institution, insurance company or surety who may be obligated as a result of the default to pay the department.

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 administrative law judge 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; corrections in (1) (b) and (2) made under s. 13.93 (2m) b. 7., Stats., Register April 2003 No. 568; CR 09-054: am. (title), (1), (2), (4) (c) 2., (d), r. and recr. (3) Register December 2010 No. 660, eff. 1-1-11.

#### Subchapter IV — General Provisions

**ATCP 1.10 Administrative law judge's authority and duties.** (1) AUTHORITY. An administrative law judge may, on behalf of the department and according to this chapter, 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 administrative law judge 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) With the approval of the secretary, issue subpoenas to compel the attendance of witnesses and the production of documents.

(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 for that portion of the contested case that is conducted under the auspices of the administrative law judge.

(o) If necessary and with the secretary's approval, order and supervise the preparation of a written transcript of oral proceedings conducted before the administrative law judge.

(p) Issue proposed decisions.

(q) At the request of the final decisionmaker, advise the final decisionmaker on final decisions and orders.

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

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

(t) Certify the contested case record for that portion of the contested case that is conducted under the auspices of the administrative law judge, if certification is necessary for a judicial review proceeding.

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

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

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

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

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) (intro.) and (2) to (4), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (1) (intro.), (h), (n), (o), (q), (t) Register December 2010 No. 660, eff. 1-1-11.

#### ATCP 1.11 Failure to appear, answer or comply with administrative law judge's order.

(1) SANCTIONS AGAINST DISOBEDIENT PARTY. If a party, without reasonable excuse, fails to file an answer or pleading as required by s. ATCP 1.21, fails to make a required appearance in a proceeding, fails to disclose witnesses or evidence under s. ATCP 1.23 (3), fails to comply with a subpoena or order issued by the administrative law judge, or fails to comply with the provisions of this chapter, the administrative law judge may take any of the following actions which the administrative law judge 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) Adopt an opposing party's proposed findings of fact, conclusions of law and order as the administrative law judge's findings of fact, conclusions of law and order.

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

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

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

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

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) (intro.) and (2) (a) and (b), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (title), renum. (1) (b) to (e) to be (1) (c) to (f), cr. (1) (b) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 1.12 Party may appear by attorney. (1) GENERAL.** In any contested case, a party may be represented by an attorney who is authorized to practice law in this state. An attorney retained to represent any party in a contested case shall immediately give notice of that representation to the department and to all other parties to the contested case.

(2) **ACTIONS BINDING.** Actions and omissions by a party's attorney in a contested case are binding on that party, as if the party had taken or omitted those actions directly.

(3) **SERVICE OF DOCUMENTS.** If a party in a contested case is represented by an attorney, a document served on that attorney is deemed to be served on that party.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; CR 09-054: am. Register December 2010 No. 660, eff. 1-1-11.

**ATCP 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 administrative law judge 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) Paragraphs (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. ATCP 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 ADMINISTRATIVE LAW JUDGE.** Whenever the secretary, final decisionmaker or administrative law judge 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) and (5), Register, June, 1999, No. 522, eff. 7-1-99.

**ATCP 1.14 Motions. (1) GENERAL.** Except as provided under subch. III, a person requesting an order from the administrative law judge 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 administrative law judge 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 administrative law judge requires that the motion be submitted in writing.

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

(3) **WRITTEN MOTIONS.** A person filing a written motion shall comply with s. ATCP 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 administrative law judge or final decisionmaker shall give all parties an opportunity to argue a motion before the administrative law judge or final decisionmaker rules on the motion. The administrative law judge 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 administrative law judge or final decisionmaker may, on an ex parte basis, rule on a motion for extension of time.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) (intro.), (2) (a), (b), (4) (a) and (c), Register, June, 1999, No. 522, eff. 7-1-99.

**ATCP 1.15 Subpoenas. (1) GENERAL.** The final decisionmaker, administrative law judge, 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 administrative law judge or final decisionmaker to issue a subpoena on behalf of that party. The requesting party shall submit the proposed subpoena for signature by the administrative law judge or final decisionmaker, and shall mail or deliver a copy of the request to every other party. A party may object to a subpoena or subpoena request and may request a hearing on the objection. The administrative law judge or final decisionmaker shall not sign a subpoena in blank. A party requesting a subpoena is responsible for serving that subpoena, and for paying any service, witness or travel fees.

**Note:** A person may request form subpoenas from the administrative law judge 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (2) Register December 2010 No. 660, eff. 1-1-11.

#### **ATCP 1.16 Record of oral proceedings; transcripts.**

(1) **RECORD OF ORAL PROCEEDINGS.** Oral proceedings in a contested case shall be stenographically or electronically recorded. Oral proceedings in a contested case shall be electronically recorded unless the administrative law judge determines that a stenographic record is necessary and the department approves the creation of a stenographic record.

(2) **ELECTRONIC RECORDING; COPIES.** If an oral proceeding in a contested case is electronically recorded, a copy of the recording shall be furnished at cost to any party who requests a copy.

(3) **WRITTEN TRANSCRIPT.** Upon request by any party, 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 that covers the department's per page transcription costs plus a copying fee of \$.25 per page. If 2 or more parties 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 party 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. ATCP 1.25 (2) (b).

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (1) to (3), (4) (a), (b) Register December 2010 No. 660, eff. 1-1-11.

### **Subchapter V — Contested Case Proceedings**

**ATCP 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. ATCP 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) **ADMINISTRATIVE LAW JUDGE.** The name of the administrative law judge 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 an emergency, or by agreement of all parties, the hearing date shall be not less than 30 days after the hearing notice is issued. If any party is required to file an answer or other pleading under s. ATCP 1.21, the hearing date shall not precede the last date for filing the answer or other pleading. The administrative law judge may reschedule a hearing as the administrative law judge deems appropriate.

(6) **PREHEARING CONFERENCE.** Instead of scheduling a hearing, the hearing notice may schedule a prehearing conference under s. ATCP 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 administrative law judge 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. ATCP 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. ATCP 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. ATCP 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (3), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (5), (8) Register December 2010 No. 660, eff. 1-1-11.

#### **ATCP 1.21 Answers; required pleadings.**

(1) **ANSWER.** (a) If a respondent is named in a complaint under s. ATCP 1.05, and is served with a copy of the complaint and the hearing notice issued under s. ATCP 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 administrative law judge 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. ATCP 1.13 (2). The answer shall be signed by the respondent or the respondent's attorney, and shall clearly and specifically state the respondent's position with respect to each allegation in the complaint.

(2) **OTHER PLEADINGS.** In a hearing notice under s. ATCP 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 administrative law judge may require the parties to file any supplementary pleadings which the administrative law judge considers necessary.

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

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) (a), (2) and (3), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (1) (b) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 1.22 Prehearing conference. (1) GENERAL.** The hearing notice under s. ATCP 1.20 may require the parties to appear at a prehearing conference. The administrative law judge 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 administrative law judge 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 administrative law judge 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 administrative law judge 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) and (3), Register, June, 1999, No. 522, eff. 7-1-99.

**ATCP 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 administrative law judge 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 administrative law judge's discretion. The administrative law judge may issue a discovery order in response to a motion by any party, and may impose such limits on discovery as the administrative law judge considers appropriate.

**(3) EXCHANGE OF EVIDENCE AND WITNESS LISTS.** (a) Except as provided under par. (b) or ordered by the administrative law judge, every party in a contested case shall provide every other party with all of the following at least 10 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 administrative law judge may issue a protective order under s. 804.01 (3), Stats., limiting discovery. The administrative law judge 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 discov-

ery may move the administrative law judge for an order compelling discovery. Upon motion by any party, the administrative law judge may issue an order compelling discovery under s. 804.12, Stats.

**Note:** If a party fails to comply with sub. (3), or with an administrative law judge's order under sub. (2), (4) or (5), the party is subject to possible sanctions under s. ATCP 1.11. If any person willfully fails to testify or provide evidence in compliance with an administrative law judge'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.

**(6) COMPLETION OF DISCOVERY.** Discovery in a contested case shall be completed at least 10 days prior to the date on which the contested case hearing is scheduled to begin, except as otherwise ordered or allowed by the administrative law judge.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (2), (3) (a), (4) and (5), Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: am. (3) (a) (intro.), cr. (6) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 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 order under sub. (1) or (3) is subject to approval by the final decisionmaker. The final decisionmaker signifies approval by signing the proposed order as submitted by the parties.

**(3) SETTLEMENT PRIOR TO COMPLAINT FILING OR HEARING REQUEST.** (a) The parties to a potential contested case may agree to settle that potential case prior to the filing of any complaint under s. ATCP 1.05 or hearing request under s. ATCP 1.06, and prior to the issuance of any hearing notice under s. ATCP 1.20.

(b) The parties to a settlement under par. (a) may stipulate to the issuance of a department order without the filing of any complaint or hearing request, and without further notice, hearing or other contested case procedures. Parties seeking a stipulated order shall file all of the following with the secretary:

1. A copy of the proposed order.
2. A written stipulation, signed by the parties or their attorneys, in which the parties consent to the entry of the proposed order without the filing of a complaint or hearing request, and without further notice, hearing or other contested case procedures. The stipulating parties waive any right to hearing, reconsideration or judicial review of the stipulated order, including any rights under s. 227.42, 227.49, or 227.52, Stats.

(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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; CR 09-054: am. (2), (3) (title), r. and recr. (3) (a), (b) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 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. ATCP 1.20, or at a time and location specified by the administrative law judge. In determining the hearing time and location, the administrative law judge 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) The administrative law judge may adjourn, recess or postpone a hearing as the administrative law judge deems appropriate.



(c) A hearing, or any portion of a hearing, may be held by telephone if the administrative law judge 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.

(d) The administrative law judge may on his or her own motion, or on the motion of any party, hold a hearing or any portion of a hearing by videoconferencing technology as defined in s. 885.52 (3), Stats., if all of the following apply:

1. The administrative law judge determines that the standards and criteria set forth in ss. 885.54 and 885.56, Stats., are met.

2. The department or the party requesting the use of videoconferencing technology agrees to pay the cost of using that technology.

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

(b) Upon motion by any party, the administrative law judge 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 administrative law judge 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 administrative law judge determines that the order will promote the interests of justice. Exclusionary orders shall conform to s. 906.15, Stats.

(c) The administrative law judge 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 administrative law judge may limit opening and closing arguments as the administrative law judge 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 a party contests a division's legal authority to issue an existing order, the administrative law judge may require the division to go forward with proof that it had adequate legal authority to issue the order.

(c) Subject to the general order of proof under par. (a), the administrative law judge may determine the order of proof in a contested case to promote an orderly presentation and consideration of the case.

**(5) EVIDENCE.** The receipt of testimony and other evidence in contested cases is subject to s. 227.45, Stats. The administrative law judge 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 administrative law judge shall administer the oath or affirmation to each witness.

(b) At the discretion of the administrative law judge under sub. (1) (c) or (d), a witness may testify by telephone or videoconferencing rather than in person.

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

(d) Leading questions may not ordinarily be used in the direct examination of witnesses, but may be used in the cross-examina-

tion of witnesses. A party may use leading questions in the direct examination of either of the following:

1. An opposing party, or an employee or agent of an opposing party.

2. A witness who is hostile, unwilling, adverse or evasive, if the administrative law judge permits the examining party to use leading questions in the examination of that witness.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) (a) (intro.), (b) and (c), (2), (3), (4) (b) and (c), (5), (6) (a) to (c) and (d) 2., Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: renum. (1) (b) and (c) to be (1) (c) and (b), cr. (1) (d), am. (4) (b), (c), (6) (b) Register December 2010 No. 660, eff. 1-1-11.

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

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. Register, June, 1999, No. 522, eff. 7-1-99.

## Subchapter VI — Decisions and Judicial Review

**ATCP 1.30 Proposed decision. (1) ISSUED BY ADMINISTRATIVE LAW JUDGE.** If the administrative law judge is not the final decisionmaker in a contested case, the administrative law judge 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 administrative law judge'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 administrative law judge'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 administrative law judge. The objecting party shall identify the legal or factual grounds for each objection, and may file a written brief or argument in support of the 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.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (1) and (2) (a), Register, June, 1999, No. 522, eff. 7-1-99.

**ATCP 1.31 Final decision. (1) GENERAL.** The final decisionmaker, after considering any proposed decision and objections under s. ATCP 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) ADMINISTRATIVE LAW JUDGE AS FINAL DECISIONMAKER.** If the administrative law judge is also the final decisionmaker, the administrative law judge may do either of the following:

(a) Issue a proposed decision under s. ATCP 1.30 before issuing a final decision under sub. (1).

(b) Issue a final decision under sub. (1) without first issuing a proposed decision under s. ATCP 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 administrative law judge'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 deci-

sion 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. ATCP 1.32.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (2) and (4), Register, June, 1999, No. 522, eff. 7-1-99; CR 01-028: r. and recr. (2), Register September 2001 No. 549, eff. 10-1-01.

### ATCP 1.32 Award of costs and attorneys fees.

**(1) MOTION; ITEMIZED STATEMENT.** If an individual, small non-profit 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 within 30 days after the administrative law judge issues a proposed decision under s. ATCP 1.30 (1) or 1.31 (2) (a) or, if the administrative law judge issues a final decision under s. ATCP 1.31 (2) (b) without issuing a proposed decision, within 30 days after the administrative law judge issues that final decision.

**(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 30 days after the prevailing party's motion is filed under sub. (1).

**(3) DECISION.** (a) The administrative law judge shall issue a decision granting or denying a motion for costs and attorneys fees under sub. (1). The administrative law judge may make a partial award of costs and attorneys fees, as provided under s. 227.485 (4), Stats. The administrative law judge'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 administrative law judge's decision is final and shall comply with s. ATCP 1.31 (1) to (5).

(b) If the administrative law judge is not the final decision-maker in a contested case, the administrative law judge's decision under par. (a) shall be issued as a proposed decision. Within 30 days after the administrative law judge 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. ATCP 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 fees, regardless of whether the party petitions for judicial review of the department's final decision on the merits of the contested case.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. (3) (a) and (b), Register, June, 1999, No. 522, eff. 7-1-99; CR 01-028: am. (1), Register September 2001 No. 549, eff. 10-1-01; CR 09-054: am. (2), (3) (b) Register December 2010 No. 660, eff. 1-1-11.

**ATCP 1.33 Costs upon frivolous claim.** (1) Upon motion by any party under s. ATCP 1.14, and in accordance with s. 227.483, Stats., if the administrative law judge finds that a party has initiated or pursued a frivolous action, claim or defense in a contested case, the administrative law judge may order the party to reimburse another party for the direct costs, including reasonable attorney fees, that the other party has incurred in responding to that frivolous action, claim or defense.

**(2)** An administrative law judge may not find that an action, claim or defense is frivolous under sub. (1) unless the administrative law judge finds at least one of the following:

(a) The action, claim or defense was initiated or pursued in bad faith, solely for the purpose of harassing or maliciously injuring another.

(b) The party or party's attorney knew or should have known that the action, claim or defense was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

**(3)** If an administrative law judge issues an order under sub. (1) against a party other than a public agency, the administrative law judge may assess those costs against the party or the party's attorney, or may allocate the cost assessment between the party and the party's attorney.

**History:** CR 09-054: cr. Register December 2010 No. 660, eff. 1-1-11.

### ATCP 1.34 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 administrative law judge shall, on behalf of the department, certify the contested case record to the court.

**History:** Cr. Register, May, 1992, No. 437, eff. 6-1-92; am. Register, June, 1999, No. 522, eff. 7-1-99; CR 09-054: renun. from ATCP 1.33 Register December 2010 No. 660, eff. 1-1-11.

## Subchapter VII — Enforcement—Discretion; Small Business

**ATCP 1.40 Purpose.** This subchapter describes, as required by s. 227.04 (2m), Stats., the discretion the department may exercise in the enforcement of rules against small businesses.

**History:** CR 06-028: cr. Register November 2006 No. 611, eff. 12-1-06; correction made under s. 13.92 (4) (b) 7., Stats., Register June 2015 No. 714.

### ATCP 1.41 Definitions.

In this subchapter:

**(1)** "Minor violation" means a violation of a department rule by a small business that is not a serious violation because the violation does not cause serious harm to the public and either the violation is not willful, the violation is not likely to be repeated, there is a history of compliance by the violator, or the small business has voluntarily disclosed the violation.

**(2)** "Small business" has the meaning given in s. 227.114 (1), Stats.

**History:** CR 06-028: cr. Register November 2006 No. 611, eff. 12-1-06; CR 12-043: r. and recr. Register May 2013 No. 689, eff. 6-1-13; correction in (2) made under s. 13.92 (4) (b) 7., Stats., Register June 2015 No. 714.

**ATCP 1.42 Exercise of discretion.** (1) The department may exercise leniency in the enforcement of rules against small businesses, as compared to other regulated businesses, if all of the following apply:

(a) The department has statutory authority to exercise discretion.

(b) The exercise of discretion, in favor of small businesses, is not prohibited by s. 227.04 (2m), Stats., or other applicable law.

**Note:** The department exercises enforcement discretion based on a wide variety of variable factors that may be relevant to each case.

(c) The rule violation committed by the small business is a minor violation.

**(2)** The department may consider relevant factors in its exercise of discretion under sub. (1), including any of the following that may be relevant:

(b) The difficulty and cost of compliance for a small business, as compared to other businesses.

(c) The financial capacity of a small business, as compared to other businesses.

(d) The compliance options available, including options for achieving voluntary compliance.

(i) The level of public interest and concern.

(j) Whether the small business has had a reasonable opportunity to understand and comply with the rules.

(k) Fairness to the small business and other persons, including competitors and the public.

**(3)** An exercise of discretion under sub. (1) may include a decision to forego formal sanctions, or to seek reduced sanctions for a small business as compared to other businesses.

**Note:** Fines and civil forfeitures are determined and imposed by courts, not by the department.

**History:** CR 06-028: cr. Register November 2006 No. 611, eff. 12-1-06; CR 12-043: cr. (1) (c), r. (2) (a), (e) to (h), (L) Register May 2013 No. 689, eff. 6-1-13; **correction in (1) (b) made under s. 13.92 (4) (b) 7., Stats., Register June 2015 No. 714.**