

STATE OF WISCONSIN  
CIRCUIT COURT  
COLUMBIA COUNTY

LOCAL 2698, AFSCME, AFL-CIO,  
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and COLUMBIA COUNTY,  
Respondent.

Case No. 92CV300  
Decision No. 12038-D

DECISION AND ORDER

A timely Petition was filed for review of a decision of the Wisconsin Employee Relations Commission pursuant to Sections 227.53 and 227.57 Wis. Stats., which decision was dated October 9, 1992.

Respondent, Columbia County, appeared by Hesslink Law office, S.C. and raised the issue of lack of the Court's personal and/or subject matter jurisdiction over the Petition because of insufficiency of service of process upon both Respondents. The Wisconsin Employee Relations Commission, through the office of the Wisconsin Attorney General, moved to dismiss the Petition on the basis of lack of subject matter jurisdiction or competency to proceed because the Petition for review was not served on the Commission, either personally or by certified mail, within 30 days after the Department served the decision on the petitioner and its attorney. Columbia County also moved for dismissal on the same basis.

Sec. 227.53(1)(a)1 and 2, Wis. Stats. provide, in part, as follows:

"1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held...

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under sec. 227.48... The 30 day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency."

It is undisputed that service was made on both Wisconsin Employment Relations Commission and upon Columbia County within thirty days after the service of the decision of the Commission and that such service was by regular, first class mail. It is also undisputed that there was no

personal service or service by certified mail upon either of the Respondents within the applicable 30-day period.

The sole issue is whether the Petition for Review filed with the Circuit Court by Petitioner, and served on Wisconsin Employment Relations Commission and Columbia County, was filed and served so as to confer subject matter jurisdiction on the Court.

The statute is clear and unambiguous as to the form of service upon the Commission, requiring either personal service or service by certified mail. Counsel for Petitioner cites the following two primary sources in support of the position that service as made here was sufficient to confer jurisdiction:

Patterson v. University of Wisconsin Board of Regents, 103 Wis.2d 358, 309 N.W.2d 3 (Ct. App. 1981); Hamilton v. DILHR, 56 Wis.2d 689, 203 N.W.2d 7 (1973)

The Patterson case is cited by Petitioner for the proposition that certified mail is not required in order for service by mail to meet the requirements of Section 227.53 Wis. Stats. However, Patterson is distinguishable from the present case in that it did not involve service by regular mail. The holding in that case was that certified mail and registered mail are substantially equivalent, as both provide receipts.

The Hamilton case is cited by Petitioner largely in support of a waiver argument. In Hamilton the Department of Industry, Labor and Human Relations actively engaged in the review process prior to raising the issue of the adequacy of service. Here, the Respondents moved for dismissal upon their first appearances. While Petitioner argues that the Respondent Commission should not be permitted to deny a party judicial review by remaining silent respecting defective service, nothing in their conduct constituted a waiver of this issue.

Strict construction of service requirements has been followed in interpreting other statutory provisions respecting procedures for the review of decisions of administrative agencies. Such requirements are found in the following cases cited by counsel for the Respondents: 519 Corp. v. State Department of Transportation, 92 Wis.2d 276, 284 N.W.2d 643 (1969), Sunnyview Village, Inc. v. State Department of Administration, 100 Wis.2d 34, 300 N.W.2d 878 (Ct. App. 1980), and Milwaukee County v. Labor and Industry Review Commission, 142 Wis.2d 307, 418 N.W.2d 35 (Ct. App. 1987).

In the very recent case of Kelly v. Reyes, 168 Wis.2d 743 (Ct. App. 1992) the Court of Appeals interpreted the notice provisions of Section 893.82(5) Wis. Stats. and ruled that timely notice by mail was insufficient to meet the requirement of service by certified mail. The Court reasoned, at page 747, as follows:

If only substantial compliance with subsec. (5) were permitted, the certainty created by the requirement of certified mailing would be replaced by the costly uncertainty of a case-by-case determination of whether a notice of claim was in fact sent and received and whether the lack of procedural compliance hindered the

purposes of the notice statute.

The Court acknowledges the Petitioner's equitable arguments respecting the knowledge of the Commission and the fact that notices delivered by hand and those received by mail are treated similarly. However, the conduct of the Commission in this matter did not constitute a waiver of the issue of the adequacy of service and strict compliance with notice provisions is required.

The Court finds that proper service of the notice of the petition for review upon the Commission did not occur within the mandated time period. Therefore, the Court is without Jurisdiction or competence to proceed. The Petition is dismissed.

Dated this 30th day of July, 1993.

BY THE COURT:

/s/ Richard L. Rehm

Richard L. Rehm

Circuit Judge, Branch III