

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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JUL 27 1988

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

WISCONSIN EDUCATION
ASSOCIATION COUNCIL,

Petitioner,

v.

Case No. 86-CV-2748

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent,

Decision No. 23648

LOCAL 3271, WFT, AFT, AFL-CIO,

Respondent-Intervenor.

NOTICE OF ENTRY
OF MEMORANDUM DECISION AND ORDER

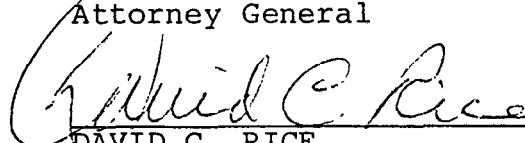
TO: Stephen Pieroni
Wisconsin Education Association Council
Post Office Box 8003
Madison WI 53708

Timothy E. Hawks
Shneidman, Myers, Dowling & Blumenfield
Post Office Box 442
Milwaukee WI 53202-0442

PLEASE TAKE NOTICE that a memorandum decision and order, of which a true and correct copy is hereto attached, was signed by the court on the 13th day of July, 1988, and duly entered in the Circuit Court for Dane County, Wisconsin, on the 13th day of July, 1988.

Dated at Madison, Wisconsin this 25th day of July, 1988.

DONALD J. HANAWAY
Attorney General



DAVID C. RICE
Assistant Attorney General

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Post Office Box 7857
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Attorneys for Respondent.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

* * * * *

WISCONSIN EDUCATION ASSOCIATION
COUNCIL,

Petitioner,

vs.

Case No. 86-CV-2748

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION

Respondent,

Decision No. 23648

LOCAL 3271, WFT, AFT, AFL-CIO,

Respondent-Intervenor.

* * * * *

MEMORANDUM DECISION AND ORDER

Petitioner filed a petition for review of a decision of the Wisconsin Employment Relations Commission (WERC).

Respondent-Intervenor (Intervenor) has filed a motion to dismiss the petition for lack of subject matter jurisdiction on the ground that petitioner did not serve the petition in compliance with section 227.53(1)(c), Stats. (1985-86).

I find that there are no special circumstances which confer subject matter jurisdiction on the court despite petitioner's failure to comply with section 227.53(1)(c), Stats. (1985-86). Accordingly, intervenor's motion to dismiss is granted.

FACTS

On May 29, 1986, petitioner, Wisconsin Education Association Council, mailed a petition for review of WERC's

order to the Clerk of Court for Dane County. Petitioner also mailed a copy of the petition to Attorney Hawks, who represented intervenor, Local 3271, WFT, AFT, AFL-CIO, throughout the proceedings before WERC.

Within thirty days, Attorney Hawks filed a Notice of Appearance and Statement of Position on behalf of intervenor. Approximately one year later, Hawks filed a brief in opposition to the petition for review and presented oral argument to the court on behalf of intervenor.

On December 3, 1987, the court raised an issue of subject matter jurisdiction and requested comment by the parties. Attorney Hawks responded on behalf of intervenor by letter dated December 18, 1987. In the letter intervenor raised a separate issue of subject matter jurisdiction by objecting to petitioner's failure to serve a copy of the petition for review directly upon intervenor as required under section 227.53(1)(c), Stats. (1985-86). On February 5, 1987, intervenor formally raised the issue by filing the motion to dismiss which is currently before the court. In an affidavit in support of the motion, Attorney Hawks' stated that "[a]t no time has [intervenor] by its officers or agents expressly authorized me to act as its agent for the purpose of accepting service of . . . a 'Petition for Review of Administrative Agency Decisions.'" (Affidavit of Timothy E. Hawks at 2, para. 5).

STATUTES INVOLVED

The relevant portions of section 227.53(1)(c), Stats.

(1985-86) provide:

Copies of the petition shall be served, personally or by certified mail . . . not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

DECISION

Strict compliance with the requirements of section 227.53(1)(c), Stats. (1985-86), is essential to the subject matter jurisdiction of the court. Wisconsin Environmental Decade v. PSC, 84 Wis. 2d 505, 515 (1978); Cudahy v. Department of Revenue, 66 Wis. 2d 253, 260 (1974). Section 227.53(1)(c), Stats. (1985-86), requires that a copy of the petition for review be served "personally or by certified mail . . . upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made."

Petitioner did not serve a copy of the petition for review directly upon intervenor. Petitioner served the copy on Attorney Hawks instead. The court, therefore, lacks subject matter jurisdiction over the proceeding unless Attorney Hawks was authorized to accept the petition on behalf of intervenor. Tomah-Mauston Broadcasting Co. v. Ecklund, 143 Wis. 2d 648, 652-56 (Ct. App. 1988); County of Milwaukee v. LIRC, 142 Wis. 2d 307 (Ct. App. 1987), cert. denied, No. 87-0727 (Jan. 19, 1988).

An attorney is not authorized by general principles of agency to accept, on behalf of a client, service of process commencing an action. Gangler v. Wisconsin Elec. Power Co.,

110 Wis. 2d 649, 657 (1983); County of Milwaukee, supra, at 313. In the context of condemnation proceedings, however, the supreme court has held that when notice of judicial review is served on the attorney who represented a party in the administrative proceeding and where "special circumstances" exist, the circuit court has jurisdiction to proceed. Gangler, supra, at 658. The "special circumstances" analysis has been extended to cases involving section 227.53(1)(c), Stats. (1985-86). See, Ecklund, supra, at 652-56; County of Milwaukee, supra.

Petitioner contends that special circumstances are present in the instant case because intervenor filed a notice of appearance and "proceeded to litigate the case to its virtual conclusion" before objecting to petitioner's failure to comply with the service requirements of section 227.53(1)(c), Stats. (1985-86). (Petitioner's Brief in Opposition to the Motion to Dismiss for Lack of Subject Matter Jurisdiction at 5).

"It is fundamental that parties cannot confer subject matter jurisdiction on a court by their waiver or consent." Environmental Decade, supra, at 515. It is also fundamental that a party may allege lack of subject matter jurisdiction at any point in a proceeding. Moreland Corp. v. Retail Store Employees Union, 16 Wis. 2d 499, 502 (1961). Intervenor's delay in objecting to petitioner's failure to comply with section 227.53(1)(c), Stats. (1985-86), therefore, does not, in and of itself, constitute a "special circumstance" which

confers jurisdiction upon the court. See, Environmental Decade, supra, at 515-16.

"Special circumstances are limited to actions clearly establishing that the attorney was expressly authorized to act as an agent for the party to be served." County of Milwaukee, supra, at 314, citing Gangler, supra, at 658. In both cases in which the supreme court concluded that special circumstances were present, the attorney made a written acknowledgment or admission of receipt, of the notice of appeal, on behalf of the client. Big Valley Farms, Inc. v. PSC, 66 Wis. 2d 620, 626 (1975) (Attorney marked "Due and Personal Service of the within Notice of Appeal is hereby admitted" and signed notice); Fontaine v. Milwaukee County Expressway Comm'n, 31 Wis. 2d 275, 278 (1966) ("Copy Rec'd . . . Roland J. Steinle, Sr. and Gregory Gramling, Jr. Attys. for Myrtle Fontaine by Gregory Gramling, Jr." written on notice of appeal).

The record in the instant case contains no evidence that Attorney Hawks made a written acknowledgment or admission of receipt, of the petition for review, on behalf of intervenor. The record contains no other evidence of "actions clearly establishing" that Attorney Hawks was "expressly authorized" to accept service, of the petition, on behalf of intervenor. Indeed, the only evidence on the issue is Attorney Hawk's sworn statement that "[a]t no time has [intervenor] by its officers or agents expressly authorized me to act as its agent for the purpose of accepting service of . . . a

'Petition for Review of Administrative Agency Decisions.'" (Affidavit of Timothy E. Hawks at 2, para. 5). I, therefore, must conclude that petitioner has failed to establish the existence of special circumstances which confer subject matter jurisdiction on the court. Ecklund, supra, at 656; County of Milwaukee, supra, at 314.

Petitioner contends that there are two policy considerations which counsel against the court granting intervenor's motion to dismiss. First, granting the motion will encourage parties to unduly delay raising objections to the method of service of process. Second, granting the motion at such an advanced stage in the proceedings results in the waste of judicial resources.

Petitioner's first policy argument is unpersuasive. The possibility of obtaining dismissal of a proceeding provides parties with a strong incentive to raise the issue of lack of subject matter jurisdiction as early in a proceeding as possible. Thus, as intervenor points out, common sense suggests that parties will raise objections to the method of service of process as soon as the grounds for objection become apparent.

Petitioner's second policy argument is not relevant. A court must dismiss a proceeding at any point in the proceeding where it becomes apparent that the court lacks subject matter jurisdiction. Sheehan v. Industrial Comm'n, 272 Wis. 595, 601 (1956); see also, Moreland, supra, at 502. Implicit in this rule is that the considerations of judicial

economy raised by petitioner are not relevant to the court's determination whether to grant intervenor's motion to dismiss.

The court is not unmindful of the harsh result of dismissing these proceedings. The supreme court has repeatedly stressed the requirement of strict compliance with the provisions of section 227.53, Stats. Environmental Decade, supra, at 515; Cudahy, supra, at 260; Brachtl v. Department of Revenue, 48 Wis. 2d 184, 187 (1970). The legislature recently amended section 227.53, Stats. to permit service of a copy of the petition for review upon a party's attorney. 1987 Wis. Laws 313. However, at the time petitioner initiated these proceedings section 227.53, Stats., required that a copy of the petition be served directly upon all parties. The harsh result of dismissing these proceedings does not justify excusing petitioner's failure to comply with the requirement. See, Gangler, supra, at 660.

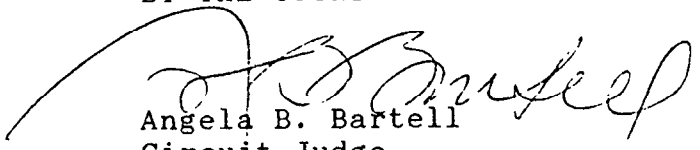
CONCLUSION AND ORDER

For the reasons state above, and based on the record herein, I find that there are no special circumstances which confer subject matter jurisdiction on the court despite petitioner's failure to comply with section 227.53(1)(c), Stats. (1985-86).

Accordingly, intervenor's motion to dismiss is granted, and the petition for review is hereby dismissed.

Dated this 13th day of July, 1988.

BY THE COURT:


Angela B. Bartell
Circuit Judge

cc: Atty. Stephen Pieroni, Wis. Educ. Association Council,
P.O. Box 8003, Madison WI 53708
Atty. Timothy E. Hawks, P.O. Box 442, Milwaukee WI 53201-0442
✓ Asst. Atty. Gen. David C. Rice, P.O. Box 7857, Madison WI 53707-78
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