

STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

THOMAS TEGGATZ,

Petitioner

vs.

Case No. 80 CV 1092

STATE OF WISCONSIN
(Personnel Commission),

RECEIVED

Respondent.

JAN 15 1982

**-Personnel
Commission**

D E C I S I O N

This is a Chapter 227 judicial review of an administrative decision order of the State Personnel Commission dismissing an appeal of the petitioner, Thomas Teggatz, for lack of subject matter jurisdiction.

The record discloses that Thomas Teggatz is a resident of Winnebago County, Wisconsin, and resides at 633A Amherst Avenue, Oshkosh, Wisconsin 54901. He was employed as a Social Worker III at Winnebago Mental Health Institute. His position was covered by a collective bargaining agreement between the state and the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO.

On December 6, 1978, he filed a grievance on an Employee Contract Grievance form but which he termed "Departmental" grieving his assignment to participate in sec. 975.09, Stats, hearings. His grievance was denied at the three employing agency levels.

By letter dated March 14, 1979, received by respondent on March 15, 1979, Tegatz attempted to appeal to the Personnel Commission for a "fourth step review" of his grievance. The Commission issued its decision and order dated December 13, 1979.

The decision was served by mail on both Tegatz and his attorney on December 14, 1979. The petition for review to the Circuit Court for Dane County, dated January 9, 1980, was filed on January 9, 1980, in the Office of Clerk of Circuit Court for Dane County, Wisconsin and was given Case No. 80-CV0098 and assigned to Honorable P. Charles Jones, Branch 3. A copy was served on the Personnel Commission on January 10, 1980. Notice of appearance and Statement of Position on behalf of respondent was served January 18, 1980.

By sua sponte ex parte order, dated May 6, 1980, over the signature of Honorable P. Charles Jones, Judge, the Circuit Court for Dane County attempted to certify the above-entitled action to Winnebago County pursuant to sec. 807.07, Stats., having stated: "Pursuant to Section 227.16(1)(a), Wisconsin Statutes, the proper place of trial for this action is Winnebago County; and, therefore, Dane County lacks subject matter jurisdiction."

The transfer of the Dane County Court File No. 80CV-0098 was not made to Winnebago County until November, 1980. On or about November 12, 1980, it was given a Winnebago County number, 80-CV-1092 and was assigned to Winnebago County Circuit Court Branch I.

Respondent, by Notice of Motion and Motion filed on or about November 19, 1980, moved to dismiss the ch. 227 review proceeding on grounds that the Circuit Court for Winnebago County lacks subject matter jurisdiction since no petition for review had been filed within thirty days after service of the administrative decision in the Office of the Clerk of Circuit Court of the county of residence of the petitioner, said county of residence being Winnebago County, as required by sec. 227.16(1)(a), Stats., and that the filing of a petition with the Clerk of Circuit Court for Dane County in Case No. 80-CV-0098 did not confer subject matter jurisdiction on that court or upon any other circuit court in Wisconsin over the matter and that certification pursuant to sec. 807.07, Stats., was a nullity.

No petition for review of the December 13, 1979, decision of the Personnel Commission had been filed with the Clerk of Circuit Court for Winnebago County within thirty days after service of that decision.

The respondent has moved for dismissal of the petition for review because the petition for review was not filed in the office of the Clerk of Courts for Winnebago County, the County where petitioner resided.

Section 227.16(1)(a), Stats., provides in part:

(a) 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. Unless a rehearing is requested under s. 227.12, 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 s. 227.11.... 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. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane County if the petitioner is a nonresident.

In Kegonsa Jt. Sanit. Dist. v. City of Stoughton, 87 Wis. 2d 131, 149-50, 274 N.W.2d 598,606 (1979), it is stated: "Sec. 227.16, quoted above, requires that proceedings for administrative review be instituted within thirty days after service of the decision in question on the parties. Failure to comply is fatal; it requires dismissal for lack of subject matter jurisdiction."

Proceedings are instituted by filing with the proper court and by serving the parties within the time specified. Brachtl v. Department of Revenue, 48 Wis. 2d 184, 179 N.W. 2d 921 (1970); Ryan v. Department of Revenue, 68 Wis.2d 467, 471, 228 N.W.2d 357, 359 (1975); Cruz v. ILHR Department, 81 Wis. 2d 442, 447, 260 N.W. 2d 692, 695 (1977). In addition, "strict compliance with the service requirements of sec. 227.16(1)(c), Stats., is essential to the subject matter jurisdiction of the circuit court." Wis. Environmental Decade v. Public Service Comm., 84 Wis. 2d 504,515,267 N.W. 2d 609, 616 (1978).

The court has held that failure to comply with the caption requirements does not divest a court of jurisdiction if other jurisdictional requirements are met. Evans v. Dept. of Local

Affairs & Development, 62 Wis. 2d 622, 215 N.W.2d 408 (1974).

In that case, however, the defect was minor and the petition was served and filed in the proper court within the thirty day period.

Here the Winnebago County Court was the proper place of filing for petitioner Thomas Tegatz as he was a resident of Winnebago County. Since no petition was filed within the thirty day period with the Clerk of Court of Winnebago County, no circuit court has or can acquire jurisdiction.

The right to appeal from, or more appropriately, have judicial review of a decision of a statutory administrative tribunal in a ch. 227 proceeding is dependent upon strict compliance with that chapter. Kosmatka v. DNR, 77 Wis. 2d 558, 568, 253 N.W. 2d 887, 892 (1977).

In a recent non-ch. 227 case, the court held the state to strict compliance with the procedural requirements of a procedural statute and held that service by ordinary first class mail did not constitute timely service where the statute required certified mail or personal service. The court, while recognizing that the corporation was in fact timely apprised of the appeal and could not claim to be harmed by the state's use of ordinary mail instead of certified mail, stated: "Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice. If the statutory prescriptions to obtain jurisdiction are to be meaningful they must be unbending."

519 Corp. v. Department of Transportation, 92 Wis. 2d 276, 288, 284 N.W. 2d 643, 649(1979).

Parties cannot confer subject matter jurisdiction on a court by their waiver or consent nor can subject matter jurisdiction be conferred by estoppel. Wis. Environmental Decade v. Public Service Comm., 84 Wis. 2d 504,515, 267 N.W. 2d 609, 616 (1978).

Petitioner contends that Section 807.07(1), Stats., is applicable to establish subject matter jurisdiction. The Circuit Court for Dane County did not have subject matter jurisdiction as to a ch. 227 review proceeding, involving a decision of an administrative agency, where the petitioner was not a resident of Dane County and where petitioner had not timely filed a proper petition with the clerk of circuit court of his county of residence. Judge Jones' certification order, dated May 6, 1980, states that Dane County lacks subject matter jurisdiction.

The Wis. Rules of Civil Procedure govern civil actions and are inapplicable to judicial review proceedings which are governed exclusively by chapter 227 Stats. Omernick v. Department of Natural Resources, 94 Wis. 2d 309, 287 N.W. 2d 841 (1979).

Ch.227 provides a comprehensive, fully defined, procedure for judicial review of administrative decisions. The legislature, recognizing the difference between these judicial review proceedings and civil actions, intended to

provide in ch. 227 a single procedure to which the statutes relating to practice in civil actions are inapplicable.

Wis. Environmental Decade v. Public Service Comm., 79 Wis. 2d 161 255 N.W. 2d 917 (1976).

The Circuit Court of Winnebago County does not have subject matter jurisdiction where no petition has been filed with the Clerk of Court for Winnebago County by Teggatz, who was a resident of such county, within thirty days after service on such parties.

The respondent's motion to dismiss Petitioner's petition for lack of subject matter jurisdiction should be granted and the decision of the State Personnel Commission affirmed.

Even without the procedural defect the decision of the State Personnel Commission should be affirmed.

The Personnel Commission has no inherent powers but must look to the four corners of the statutes under which it operates.

In Village of Silver Lake v. Department of Revenue, 87 Wis. 2d 463, 468, 275 N.W. 2d 119, 122 (1978), it was stated:

Administrative boards and commissions have no common law power. Their powers are limited by statute conferring such powers expressly or by fair implication. It is the general rule that an agency or board created by the legislature only has the powers which are either expressly conferred or necessarily implied from the four corners of the statute under which it operates. The effect of this rule has generally been that such statutes are strictly construed to preclude the exercise of a power which is not expressly granted. The question of administrative authority

generally arises when boards or commissions have decided issues beyond their statutory authority.

The powers of the Personnel Commission in relation to civil service as affecting state employees are fixed and limited by statute. In Baken v. Vanderwall, 245 Wis. 147, 150, 13 N.W. 2d 502,503 (1944), the court stated that "the powers of the board are fixed by statute and are limited in authority as defined by the statute creating it." Also see Berg v. Seaman, 224 Wis. 263, 267, 271 N.W. 924, 925(1937).

What was said in Wis. Environmental Decade v. Public Service Comm., 84 Wis. 2d at 515-16, as to courts is applicable to the administrative agency, State Personnel Commission. "It is fundamental that parties cannot confer subject matter jurisdiction on a court by their waiver or consent. Nor can subject matter jurisdiction be conferred by estoppel."

Section 230.45(1)(c), Stats., does not grant the Commission power to hear the appeal. It merely empowers the Commission to serve as final step arbiter in a state employee grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure. The Commission's power as to any state employee is limited to grievances involving "conditions of employment."

In Madison Joint School Dist. No 8 v. WERC, 69 Wis. 2d 200, 216, 231 N.W. 2d 206, 215 (1975) it was stated.

"Furthermore wages, hours and conditions of employment is the

phrase commonly used to describe what are subjects of collective bargaining."

We clearly are not concerned with wages and hours here. Assignment of job duties is a managerial right and not conditions of employment. Nowhere in petitioner's brief is there claim that assignment of job duties involves conditions of employment. The latter term is generally associated with physical conditions of property and machinery of the working place. Petitioner's brief admits that the assignment of duties and responsibilities is, by law, a management right.

If assignment of job duties is not a condition of employment it does not fall within subject matter which the Personnel Commission can entertain under sec. 230.45(1)(c), Stats., by reason of the statute itself.

If assignment of job duties is a condition of employment, or related to wages or hours, petitioner has no right of appeal to the Personnel Commission since his position is covered by a labor contract and the provisions of such contract would fully control. Under the language of sec. 111.93(1), (3), Stats., which provides:

(1) If no labor agreement exists between the state and a union representing a certified bargaining unit, employees in the unit shall retain the right of appeal under s. 230.44.

. . . .

(3) If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages,

hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

The assignment of job tasks to employees is clearly a management right under sec. 111.90(1), (2), Stats. If it is subject to bargaining in any degree the remedies set forth in the contract and sec. 111.91(3), Stats, are exclusive. See sec. 111.91(1)(b) Stats.

Petitioner additionally contends that section 230.44(1)(d), Stats., grants subject matter jurisdiction to the State Personnel Commission. That section provides:


(d) Illegal action or abuse of discretion. A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The matter here was not related to the hiring process. Accordingly, the petition of Thomas Teggatz for review should be dismissed and the decision of the State Personnel Commission dismissing the appeal of petitioner for lack of subject matter jurisdiction is affirmed.

IT IS ORDERED that the petition of Thomas Teggatz for judicial review of the administrative decision of the Personnel Commission be and it hereby is dismissed and the December 13, 1979 decision of the Commission dismissing the appeal for lack of subject matter jurisdiction is affirmed.

BY THE COURT

FILED JANUARY 8, 1982


William E. Crane, Circuit Judge