

appeal of Ruff v State Investment Board,
78-30-PC, 5/15/79

COURT OF APPEALS
--DECISION
DATED AND RECORDED

MAR 25 1982

A party may file with the Supreme Court
a petition to review an administrative action by
the Court of Appeals pursuant to s. 808.10
within 30 days hereof, pursuant to Rule
809.62 (1).

No. 81-861

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NOTICE

This opinion is subject to further
editing. If published the official
version will appear in the bound
volume of The Official Reports.

WILLIAM C. RUFF,

Petitioner-Appellant,

v.

STATE PERSONNEL
COMMISSION,

Respondent.

APPEAL from an order of the circuit court for
Dane county: WILLIAM F. EICH, Judge. Affirmed.

Before Voss, P.J., Brown and Scott, JJ.

PER CURIAM. William C. Ruff appeals an order
which dismissed his petition to review a decision of the
State Personnel Commission. The circuit court dismissed
the petition on the ground that Ruff failed to serve a
party to the proceeding, the Wisconsin Investment Board,
with a copy of the petition as required by sec. 227.16(1)(c),
Stats. We agree with the trial court's determination that
service on the attorney general as counsel for the Board
did not satisfy the service requirement.

Strict compliance with the service requirements of sec. 227.16, Stats., is necessary to obtain judicial review of the findings and orders of administrative agencies. Cudahy v. Department of Revenue, 66 Wis.2d 253, 259, 224 N.W.2d 570, 573 (1974). Failure to comply with these requirements goes to the subject matter jurisdiction of the circuit court. Id. at 261-62, 224 N.W.2d at 574. Our supreme court has specifically held that failure to serve other parties under sec. 227.16(1)(c), Stats., is a defect as to subject matter jurisdiction. Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 84 Wis.2d 504, 515, 267 N.W.2d 609, 616 (1978).

In the instant case, service on the Board was attempted by leaving a copy of the petition for review with a secretary at the office of the attorney general. Assistant Attorney General John Glinski had represented the Board before the Personnel Commission. Ruff asserts that this satisfied the service requirements despite our recent holding that service on the attorney general is not service on an agency as required by sec. 227.16(1), Stats. Sunnyview Village, Inc. v. State Department of Administration, 100 Wis.2d 34, 38, 300 N.W.2d 878, 881 (Ct. App. 1980), rev'd on other grounds, 104 Wis.2d 396, 311 N.W.2d 632 (1981).

In Sunnyview, we concluded that allowing service on the attorney general to constitute service under sec. 227.16(1), Stats., would be contrary to the rule of strict compliance concerning those service requirements. Such an interpretation would effectively obliterate those requirements because the attorney general represents many, if not most, of the state agencies.

Ruff attempts to distinguish Sunnyview and relies on earlier cases where service on a party's attorney was held to constitute service on the party. Fontaine v. Milwaukee County Expressway Commission, 31 Wis.2d 275, 143 N.W.2d 3 (1966); Big Valley Farms, Inc. v. Public Service Corp., 66 Wis.2d 620, 225 N.W.2d 488 (1975). These cases held that where service on the party is required, service on the party's attorney is sufficient where special circumstances show that the attorney served accepts service in his capacity as attorney for that party.

In the present case, unlike Fontaine and Big Valley Farms, there is nothing to indicate acceptance of service by Assistant Attorney General Glinski in a capacity as attorney for the Board. The petition was left with a secretary at the attorney general's office. The receipt was not signed

by Glinski. This situation raises exactly the type of problem which was alluded to in Sunnyview. We see no special circumstances in this case to overcome the requirement of strict compliance with the service rules.

Ruff asserts the respondent should be estopped from objecting to improper service. As noted within, improper service, even of an additional party under sec. 227.16(1)(c), Stats., is a defect as to subject matter jurisdiction. Subject matter jurisdiction cannot be conferred by estoppel. Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 84 Wis.2d at 515-16, 267 N.W.2d at 616.

Finally, Ruff asks that he be relieved from the circuit court's order on ground of mistake, inadvertence, surprise or excusable neglect pursuant to sec. 806.07(1), Stats. Such relief is not available in a proceeding under ch. 227. Chicago & North Western Railroad v. Labor & Industry Review Commission, 91 Wis.2d 462, 475-76, 283 N.W.2d 603, 610 (Ct. App. 1979), aff'd 98 Wis.2d 592, 297 N.W.2d 819 (1980).

By the Court.--Order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

RECEIVED

WILLIAM C. RUFF,

MAR 19 1981

Petitioner,

Personnel
Commission

vs.

MEMORANDUM DECISION

STATE PERSONNEL COMMISSION,

Case No. 79 CV 2872

Respondent.

Respondent has filed a motion to vacate an order entered by this court on September 5, 1979, and to dismiss the action. Respondent renews its argument that the petitioner's failure to serve the Wisconsin Investment Board with a copy of the petition as required by sec. 227.16(1)(c), Stats., deprives the court of subject matter jurisdiction over the case.

In the prior memorandum decision on this issue, I concluded that while strict compliance with the service requirements of sec. 227.16(1)(c), Stats., was essential to subject matter jurisdiction, "the underlying concept of notice and opportunity to be heard was clearly met by the service in this case."

Subsequent to the decision and the order entered thereon, the Supreme Court held that, "[i]f the statutory prescriptions to obtain jurisdiction are to be meaningful they must be unbending." 519 Corporation v. Department of Transportation, 92 Wis.2d 276, 288, 284 N.W.2d 643 (1979). Relying heavily on that reasoning, the Court of Appeals recently held that service on the Attorney General as counsel was insufficient to give the court personal jurisdiction pursuant to sec. 227.16(1)(a), Stats., over an agency administrator. Sunnyview Village v. State Dept. of Administration,

MEMORANDUM DECISION

Page 2

#80-443, December 9, 1980.

In the case at bar, the petitioner served a copy of the petition on the Attorney General, counsel for the board, within 30 days of commencing the action. The issue is whether such service was sufficient to comply with the statutory requisites of sec. 227.16(1)(c), Stats. As indicated, it was the prior determination of the court that the service was sufficient.

Surely, compliance with the service requirements to invoke personal jurisdiction is no more necessary than compliance with those requirements to invoke subject matter jurisdiction under ch. 227. See Cudahy v. Department of Revenue, 66 Wis.2d 253, 224 N.W.2d 570 (1974); Wisconsin Environmental Decade v. Public Service Commission, 84 Wis.2d 504, 515-16, 267 N.W.2d 609 (1978).

Petitioner argues that the respondent is estopped from pursuing the instant motion because the agency failed to submit a certified copy of the record within 30 days after service of the petition for review. However, "subject matter jurisdiction [cannot] be conferred by estoppel." Wisconsin Environmental Decade v. Public Service Commission, 84 Wis.2d 504, 515-516, 267 N.W.2d 609 (1978). It is irrelevant that a decision on the merits had not been reached in this case. Section 802.06(8)(c), Stats., provides that a defense based on lack of subject matter may be raised at any stage of the action.

The motion must be granted. Dated at Madison, Wisconsin, this 16 day of March, 1981.

cc: W. Dan Bell, Jr.
John J. Glinski

BY THE COURT


WILLIAM EICH, CIRCUIT JUDGE