

**FILED**

NOV 02 2017

DANE COUNTY CIRCUIT COURT

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**STATE OF WISCONSIN**

**CIRCUIT COURT  
BRANCH 2**

**DANE COUNTY**

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Frank A. Wessely,

Petitioner,

v.

Case No. 17-CV-2070

Wisconsin Employment  
Relations Commission,

RE: [WERC Dec. No. 36940-A]

Respondent.

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**DECISION AND ORDER**

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**INTRODUCTION**

Mr. Frank A. Wessely seeks judicial review of two decisions issued by the Wisconsin Employment Relations Commission (“WERC”). The first is WERC’s June 7, 2017 affirmance of the Department of Transportation’s decision to suspend Mr. Wessely from his place of employment. The second is WERC’s July 25, 2017 denial of Mr. Wessely’s petition for rehearing.

WERC argues that the Court lacks jurisdiction to review the June 7, 2017 substantive decision because Mr. Wessely did not timely file his petition for judicial review. WERC concedes, however, that the Court is competent to review the agency’s July 25, 2017 order denying Mr. Wessely’s petition for rehearing. It asks the Court to summarily affirm the latter. For the following reasons, WERC’s motion is **GRANTED**.

## STANDARD OF LAW

A party aggrieved by the final order of an agency may seek rehearing under Wis. Stat. § 227.49, or judicial review under Wis. Stat. § 227.53. A written petition for rehearing must be filed within 20 days after service of the order. Wis. Stat. § 227.49(1). A petition for rehearing is not a prerequisite for appeal, Wis. Stat. § 227.49(1), but an aggrieved party will likely petition for judicial review in the event that his request for rehearing is denied. In recognition of this reality, the law gives those who first seek rehearing additional time to appeal to the circuit court.

A party who directly petitions the agency for rehearing has “30 days after service of the order finally disposing of the application for rehearing” to file a petition for judicial review. Wis. Stat. § 227.53(1)(a)(2). If instead a party immediately appeals to the circuit court, then he has less time to prepare and serve his petition for judicial review. “Petitions for review of contested cases shall be served and filed within 30 days after the service of the [original] decision of the agency” if rehearing is not sought. Wis. Stat. § 227.53(1)(a)(2).

## FACTUAL BACKGROUND

On June 7, 2017, WERC served its decision on Mr. Wessely in *Frank A. Wessely v. State of Wisconsin Department of Transportation*, Dec. No. 36940 (WERC, June 7, 2017).<sup>1</sup> (Aff. David C. Rice at ¶ 2.) That decision affirmed the Wisconsin Department of Transportation’s decision to suspend Mr. Wessely for violating a departmental policy. A letter accompanying the decision informed Mr. Wessely of his right to petition the agency for rehearing within 20 days of service of WERC’s decision under Wis. Stat. § 227.49. (*Id.* at ¶ 3; Ex. B.) The letter further

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<sup>1</sup> Although Mr. Wessely seeks judicial review of a decision of the Wisconsin Employment Relations Commission in this proceeding, the petition for review improperly names the Labor and Industry Review Commission as the Respondent. The Wisconsin Employment Relations Commission is the correct Respondent. See Wis. Stat. § 227.53(1)(b).

explained that, if Mr. Wessely petitioned first for rehearing, his time to apply for judicial review under Wis. Stat. § 227.53 would be extended. (*Id.* at ¶ 3; Ex. B.)

On June 28, 2017, 21 days after WERC served its decision, Mr. Wessely filed a petition for rehearing by email. (*Id.* at ¶ 4; Ex. C.) That same day, WERC's General Counsel advised Mr. Wessely that his petition for rehearing was filed too late and would not trigger the extension for filing a petition for judicial review. (*Id.* at ¶ 4; Ex. C.) General Counsel advised Mr. Wessely that he still had time to file a petition for judicial review within 30 days from June 7, 2017, the date that WERC released its original decision. (*Id.* at ¶ 4; Ex. C.) In response, Mr. Wessely stated that he did not have time to file the petition for judicial review, but wished to continue with the petition for rehearing. (*Id.* at ¶ 4; Ex. C.)

On July 25, 2017, WERC issued an order denying Mr. Wessely's petition for rehearing on the grounds that it was untimely. (*Id.* at ¶ 5; Ex. D.) On August 24, 2017, Mr. Wessely filed a petition for judicial review.

## DISCUSSION

### **I. This Court lacks competence to review the June 7, 2017 WERC decision affirming Mr. Wessely's suspension.**

The issue here is whether a petition for rehearing, submitted after the statutory deadline, serves to extend a party's time to petition a circuit court for judicial review. If the answer to this question is yes, then Mr. Wessely filed his petition within the statutory deadline and the Court is competent to evaluate WERC's June 7, 2017 substantive decision. However if the answer is no, then the Court must find that Mr. Wessely missed his deadline by 48 days, and so it is not competent to review WERC's June 7, 2017 decision.

This very question was asked and answered in *Currier v. Wisconsin Dep't of Revenue*, 2006 WI App 12, ¶¶ 19-20, 288 Wis. 2d 693, 704-05, 709 N.W.2d 520, 526. The *Currier* court

held that, “section 227.53(1)(a)2 assumes a timely request for rehearing has been submitted.” *Id.* “[I]f a petition for rehearing is not filed within the twenty-day time limit, a rehearing is not properly ‘requested under § 227.49’ and the petitioner does not acquire the benefit of the extended deadline for petitioning for judicial review.” *Id.* (citation omitted)

Mr. Wessely did not file his petition for rehearing within the 20-day statutory deadline imposed by Wis. Stat. § 227.53(1)(a)(2). According to the *Currier* court, this means that Mr. Wessely was not granted an extension under Wis. Stat. § 227.53(1)(a)(2); thus, he had only 30 days from June 7, 2017 to serve his petition for judicial review. In fact, Mr. Wessely served his petition for judicial review on August 24, 2017, 78 days after WERC issued its original decision. This is 48 days too late.

A circuit court’s jurisdiction for judicial review of an agency order is dependent upon strict compliance with relevant statutes. *In re City of Pewaukee, Waukesha Cty.*, 62 Wis. 2d 622, 626, 215 N.W.2d 408, 410 (1974). Since Mr. Wessely did not strictly comply with Wis. Stat. § 227.53(1)(a)2, insofar as he seeks judicial review of WERC’s June 7, 2017 decision affirming his suspension, the Court lacks competency to proceed. It therefore dismisses Mr. Wessely’s petition for judicial review of WERC’s June 7, 2017 substantive decision.

**II. This Court is competent to review the July 25, 2017 WERC denial of Mr. Wessely’s petition for rehearing, and summarily affirms the agency’s action.**

The Court is, however, competent to review WERC’s July 25, 2017 denial of Mr. Wessely’s petition for rehearing. Mr. Wessely filed the petition for judicial review of the denial of his petition for rehearing on August 24, 2017, exactly 30 days after WERC’s July 25, 2017 denial, making the petition timely under Wis. Stat. § 227.53(1)(a)2. Since Mr. Wessely does not dispute any of the dates relevant to this analysis, the Court finds that there is no material issue of fact or law meriting reversal. Thus, insofar as Mr. Wessely seeks judicial review of WERC’s

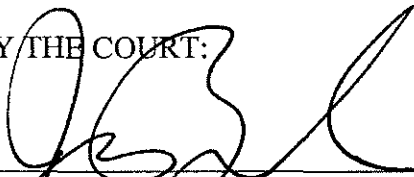
July 25, 2017 order denying his petition for rehearing, the Court summarily affirms the agency's action.

**CONCLUSION**

For these reasons, **IT IS ORDERED** that WERC's motion is **GRANTED** in both respects. This order is final for purposes of appeal pursuant to Wis. Stat. § 808.03(1).

Dated this 2 day of November, 2017.

BY THE COURT:



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Honorable Josann M. Reynolds, Br. 2  
Dane County/Circuit Court

cc: Parties of record