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STATE PERSONNEL BOARD

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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DAVID STEINERT,

Petitioner,

vs.

STATE PERSONNEL BOARD,

Respondent.

RULING and ORDER ON

MOTION TO DISMISS

Case No. 160-240

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BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1  
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Petitioner seeks review of an order of the State Personnel Board dated August 1, 1977 affirming the denial of petitioner's request for reclassification from Teacher 5-Supervisor to Teacher 6-Supervisor. The decision was served on petitioner on August 3, 1977. No request for rehearing was made within 20 days of the entry of the decision. No petition for review was filed and served within 30 days of the date of service. On October 31, 1977, the petitioner moved for rehearing. On November 15, 1977, the board denied the motion without comment. Petitioner filed the petition for review with the Clerk of Courts on November 30, 1977, and served the petition on the respondent on December 1, 1977.

The respondent board has moved to dismiss on the grounds that the petition for review is untimely, and the court therefore lacks subject matter jurisdiction.

Section 227.12, Stats., provides:

"(1) A petition for rehearing shall not be a prerequisite for appeal or review. Any party to a contested case who deems such party aggrieved by a final order may, within 20 days after entry of the order, file a written petition for rehearing... An agency may order a rehearing on its own motion within 20 days after a final order..."

Section 227.16 (1), Stats., provides:

"(a) Proceedings for review shall be instituted by serving a petition therefor ... upon the agency ... and by filing such petition in the office of the clerk of the circuit court for the county where the trial shall be held ... all within 30 days after the service of the decision of the agency upon all parties ... or, in cases where a rehearing is requested, within 30 days after the service of the order finally disposing of the application for such rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing..."

It is undisputed that the petition for rehearing was filed with the board some 90 days after entry of the board's decision. It was not, therefore, timely under sec. 227.12 (1), Stats. Since no petition for rehearing was filed within the prescribed 20-day period, the time for commencing a judicial review action was not tolled, and expired 30 days following the date of service of the agency decision, August 3, 1977, under sec. 227.16 (1) (a), Stats. Since the petition for judicial review was not filed and served within this time period, the court is without subject matter jurisdiction and must dismiss the action.

The respondent contends that the petition for review was timely because it was served and filed within 30 days of the board's decision denying the untimely petition for rehearing. This is simply a bootstrap argument. The board's decision became final and unreviewable before the petition for rehearing was ever filed, due to petitioner's failure to seek rehearing or judicial review within the statutory time period. The case relied upon by the respondent, Claflin v. Dep't. of Natural Resources, 58 Wis. 2d 182 (1973), is not in point. In Claflin, the petitioner filed an application for rehearing within 14 days of the agency's final decision, and a petition for judicial review 33 days following the petition for rehearing, since nothing had been heard from the agency. The court reasoned that the agency should have a reasonable time in which to consider the petition for rehearing, and held that Claflin had filed his petition for judicial review within 30 days after he had reason to believe that his request for rehearing would not be granted. In this case, there was no timely application for rehearing as there was in Claflin. Petitioner's rights are clearly spelled out in the statutes, and he chose not to exercise them. Compliance with the mandatory time requirements of sec. 227.16 is essential to the subject matter jurisdiction of the court, Cudahy v. Dep't. of Revenue, 66 Wis. 2d 253, 259-260 (1974). The board may not, by waiver or otherwise, create subject matter jurisdiction where none

exists under the statute.

Accordingly, IT IS ORDERED that the motion to dismiss is granted, and the action is dismissed.

Dated February 16, 1978.

BY THE COURT:

Richard W. Baudette  
Circuit Judge