

FILED

NOV - 3 2020

RAMONA M. GEIB
FOND DU LAC COUNTY, WIS.
Clerk Of Circuit Court**CIRCUIT COURT
BRANCH 3***Judge Richard J. Nuss*HOLLY J. FORD
KAREN S. FREDRICK
Court ReportersCITY-COUNTY GOVERNMENT CENTER
160 SOUTH MACY STREET
FOND DU LAC, WI 54935
PHONE 920-929-3188
FAX 920-929-7507SARA SCHMIDT
Judicial Assistant

November 3, 2020

**RE: Timothy E. Jochman vs. State of Wisconsin Employment Relations Commission
Case No. 2020CV000239 (Fond du Lac County, WI)****DECISION**

To: Mr. Kenny Tilleman and Attorneys Daniel P. Bach, David C. Rice and Mpoli Simwanza-Johnson:

On July 15, 2020 Kenny Tilleman, as POA for Timothy E Jochman, filed a Request for Hearing to Reverse Decision and Order 38450 issued by the Wisconsin Employment Relations Commission dated July 13, 2020 regarding Sgt. Jochman's employment status.

Following certain filings and judicial intervention the Wisconsin Department of Corrections (DOC) and the Wisconsin Employment Relations Commission (WERC) filed a Motion to Dismiss and Brief in Support of their Motion to Dismiss on September 11, 2020. A telephonic status conference to address a briefing schedule and related matters was noticed for October 30, 2020. Notwithstanding the same on September 17, 2020 the Petitioner filed a Petitioner's Memorandum in Opposition to Motion to Dismiss and on October 26, 2020 the Respondent filed a Reply Brief in Support of Motion to Dismiss.

During the telephonic status conference on October 30, 2020 it was agreed to among counsel that the Court would issue a written decision on the Respondent's Motion to Dismiss given the above referenced filings, COVID-19 protocols and as an accommodation to all concerned.

The DOC and WERC assert in their Motion to Dismiss that the Court lacks competency to proceed because the action was commenced by a non-attorney on behalf of the petitioner. Their Brief provides their argument, legal principles, authority and analysis. Specifically, they assert (1) that the Petition can only be signed by the Petitioner or an attorney and that Kenny Tillman had no legal authority to sign it as "POA for Timothy E. Jochman" and (2) that a properly subscribed legally sufficient Petition must be filed and served within 30 days and that did not


occur in this case. They maintain that those defects are fundamental and fatal to the Court's competency. This Court agrees.

The Petitioner asserts in his Memorandum that (1) Wis. Stat. 802.05 is not applicable to a Petition for Judicial Review, (2) that any defect regarding the Petition was properly and timely cured, (3) that any defect in the initial Petition does not deprive the Court of competency to preside over the case and (4) that the Respondents have waived any challenge to the Court's competency.

However, the Respondent in their Reply Brief, a copy of which is attached hereto and incorporated herein by reference, have properly refuted all of the Petitioner's assertions and provided a concise, thorough and accurate analysis of the applicable legal standard and the Petitioner's response which this Court finds to be compelling and persuasive.

Accordingly, based on the foregoing, the Respondent's Motion to Dismiss is granted. Respondent's counsel is directed to cause an appropriate Order of Dismissal to be forwarded to this Court for signature and filing at their earliest convenience.

BY THE COURT:



Richard J. Nuss, Circuit Judge

CC: Mr. Kenny Tilleman
Attorney Daniel P. Bach
Attorney David C. Rice
Attorney Mpoli Simwanza-Johnson

STATE OF WISCONSIN CIRCUIT COURT FOND DU LAC COUNTY
BRANCH 3

TIMOTHY E. JOCHMAN,

Petitioner,

v.

Case No. 2020CV0239
Administrative Agency
Review: 30607

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Timothy Jochman was discharged by the Wisconsin Department of Corrections (DOC). He appealed his discharge to the Wisconsin Employment Relations Commission (WERC). Wis. Stat. § 230.44. He was represented in the civil service appeal proceeding by Kenny Tilleman who is not an attorney.

On July 13, 2020, WERC issued a decision modifying the discipline to a demotion and reinstatement without back pay. On July 15, 2020, Jochman signed a form (DHS Form F-00036) designating Tilleman as his “Power of Attorney for Finances and Property” under Wis. Stat. ch. 245 for “claims and litigation.”

On July 15, 2020, a petition for judicial review of WERC’s decision was filed in the circuit court. (Dkt. 1.) The petition was entitled “Kenny Tilleman POA for

Timothy E. Jochman v. WERC.” (Dkt. 1.) The petition was signed solely by Kenny Tilleman. (Dkt. 1.)

On July 20, 2020, WERC filed a notice of appearance and statement of position stating in part that “a power of attorney does not permit one person to represent another person in a legal proceeding in state circuit court.” (Dkt. 5.)

On August 26, 2020, more than 30 days after WERC served its decision on Jochman, an amended petition for judicial review was filed which was signed by Attorney Daniel Bach. (Dkt. 25.)¹ On August 27, 2020, both WERC and DOC filed notices of appearance and statements of position regarding the amended petition, but neither raised the issue of the review proceeding having been commenced by a non-attorney (Tilleman) on behalf of Jochman. (Dkt. 29, 33.)²

On September 11, 2020, DOC and WERC jointly filed a motion to dismiss the review action on the ground that the court lacked competency to proceed because the action was commenced by a non-attorney on behalf of Jochman. (Dkt. 41.) They filed a brief in support of the motion. (Dkt. 43.) On September 17, 2020, Jochman filed a brief in opposition to the motion. (Dkt. 46.)

Jochman does not argue that Tilleman’s “power of attorney” permitted him to file a petition for review himself on behalf of Jochman. Rather, he argues that (1) a petition for judicial review under Wis. Stat. ch. 227 need not be signed by the

¹ On August 26, 2020, the court granted Jochman’s motion to file an amended complaint. (Dkt. 28.)

² On September 11, 2020, Jochman filed a motion for leave to present additional evidence. (Dkt. 38.) On the same day, WERC filed a written response opposing the motion. (Dkt. 40.)

petitioner or an attorney, (2) any failure to comply with a requirement that the petition be signed by the petitioner or by an attorney was properly and timely cured by the filing of an amended petition signed by an attorney, (3) any failure to comply with a requirement that the petition be signed by the petitioner or by an attorney does not deprive the court of competency to proceed, and (4) DOC and WERC waived any challenge to the court's competency to proceed. None of these arguments withstands scrutiny, but each will be addressed in this reply brief.

ARGUMENT

A COURT LACKS COMPETENCY TO PROCEED IN A CHAPTER 227 JUDICIAL REVIEW PROCEEDING UNLESS A PETITION FOR REVIEW, SIGNED BY THE PETITIONER OR AN ATTORNEY, IS FILED AND SERVED WITHIN 30 DAYS AFTER SERVICE OF THE AGENCY'S DECISION.

A court has competency to proceed in a judicial review proceeding only when a petition for review is filed and served within 30 days after service of the agency's decision. Wis. Stat. § 227.53(1)(a); *Currier v. DOR*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 520; *Brachtel v. DOR*, 48 Wis. 2d 184, 188, 179 N.W.2d 921 (1970). Further, every petition for review must be signed by the petitioner or by an attorney. Wis. Stat. § 802.05(1).³ An unsigned paper must be stricken unless the omission of

³ Compliance with Wis. Stat. ch. 227, regarding judicial review of administrative decisions, "does not eliminate the necessity of complying with a procedure required by another statute." Wis. Stat. § 227.02; see also *State ex rel. Town of Delevan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 724–25, 482 N.W.2d 899 (1992) (a chapter 227 judicial review is a "special proceeding" to which the requirements of chapters 801 to 847 apply, so long as they do not conflict with chapter 227).

the signature is corrected promptly after being called to the attention of the petitioner or attorney. *Id.*⁴

Further, Wisconsin Stat. § 757.30(1) prohibits practicing law *without* a license, including appearing on behalf of another person “in any action or proceeding in or before any court of record.” Wisconsin Stat. § 757.30(2). “A person not admitted to practice law has no authority to sign a pleading on behalf of another to invoke” a court’s jurisdiction. *Brown v. MR Group, LLC*, 2004 WI App 122, ¶ 6, 274 Wis. 2d 804, 683 N.W.2d 481; *see also Ditech Fin., LLC v. Estate of Stacey*, 2018 WI App 18, ¶¶ 10–11, 380 Wis. 2d 447, 909 N.W.2d 180 (following the rule in *Brown* and holding that “it is clear that a nonlawyer may not represent an entity like an estate in a mortgage foreclosure and, thus, may not commence an appeal from a mortgage foreclosure”). Further, “[a] fundamentally defective notice of appeal cannot be cured by the filing of an amended notice of appeal which is not otherwise timely vis-a-vis the order or judgment appealed from.” *Brown*, 2004 WI App 122, ¶ 6.

Here, the court lacks competency to proceed because Jochman failed to file and serve a petition for judicial review, that was signed by him or by an attorney, within 30 days after WERC served its decision upon him by mail. The subsequent service and filing of an “amended” petition for review signed by an attorney) more than 30 days after service of WERC’s decision does not cure the defect or give the court competency to proceed. *Brown*, 2004 WI App 122, ¶ 6.

⁴ Here Jochman never signed the petition even though WERC notified him just five days after he filed his petition that “a power of attorney does not permit one person to represent another person in a legal proceeding in state circuit court.” (Dkt. 5.)

A. Wis. Stat. § 802.05(1) requires that a petition for judicial review be signed by the petitioner or by an attorney.

Compliance with Wis. Stat. ch. 227 “does not eliminate the necessity of complying with a procedure required by another statute,” Wis. Stat. § 227.02, if the procedures required by other statutes do not conflict with chapter 227. *State ex rel. Town of Delevan*, 167 Wis. 2d at 723-24. Specifically, the rules of civil procedure, Wis. Stat. chs. 801 to 847, apply to chapter 227 proceedings if there is no conflict. *Id.* at 724-25. Wis. Stat. § 802.05(1), which requires that a pleading be signed by a party or any attorney, does not conflict with any provision in chapter 227. Indeed, requiring that a petition for judicial review be signed by a petitioner or by an attorney, rather than by another person, furthers the purpose of prohibiting the practice of law without a license.

Jochman notes that Wis. Stat. § 227.53(1) does not specifically require that a petition for judicial review be signed by the petitioner or by an attorney. But that misses the point of *State ex rel. Town of Delevan*. Rules of civil procedure apply in chapter 227 judicial proceedings unless there is a conflict.

Jochman cites *Omernick v. DNR*, 94 Wis. 2d 309, 313, 287 N.W.2d 841 (Ct. App. 1979) and *Wisconsin Environ. Decade, Inc. v. PSC*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977) for the proposition that judicial review proceedings are governed exclusively by chapter 227 and that statutes relating to civil procedure are inapplicable to judicial review proceedings. But these cases long predate *State ex rel. Town of Delevan* and are overruled by it *sub silentio* to the extent they conflict.

Jochman notes that chapter 227 administrative proceedings are less formal than court proceedings, and that WERC permits non-attorneys to represent parties in civil service appeals. Wis. Admin. Code § ERC 91.02(18) and 91.04(1). But WERC's administrative rules only permit a person to represent a party "before the Commission." *Id.* They do not permit a non-attorney representative to file a petition for judicial review *in court*.

B. Filing and service of an untimely “amended” petition for judicial review, signed by an attorney, does give the court competency to proceed.

Jochman argues that any failure to comply with a requirement that his petition be signed by the petitioner or by an attorney was properly and timely cured by the filing of an amended petition signed by an attorney. He initially argues, however, that his complaint was not untimely because WERC failed to give him notice that his petition for review had to be served and filed within 30 days.⁵ Such argument is incorrect. WERC sent a cover letter to Jochman and Tilleman with its decision, explaining in detail Jochman’s right to petition for judicial review, the time allowed for filing a petition, and the party to be named as respondent. A copy of the cover letter is attached to this brief as Exhibit 1.

Jochman acknowledges that the court of appeals ruled in *Brown* that “[a] fundamentally defective notice of appeal cannot be cured by the filing of an amended notice of appeal which is not otherwise timely vis-a-vis the order or judgment appealed from.” 2004 WI App 122, ¶ 6. He argues, however, that Wis. Stat. § 809.23(3)(b) provides that a *per curiam* opinion cannot be cited for its persuasive value as precedent. Such argument is incorrect. Wis. Stat. § 809.23(3)(b) only applies to *unpublished* opinions – *Brown* is a published decision.

⁵ Wis. Stat. § 227.48(2) provides: “Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified . . . under s. 227.53(1)(a) for filing a petition for judicial review . . . begins to run until the agency has complied with this subsection.”

Jochman further argues that Wis. Stat. § 802.05(1) itself provides that an unsigned paper must be stricken “unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.” Here Jochman never signed the petition even though WERC notified him on July 20, 2020, just five days after he filed his petition, that “a power of attorney does not permit one person to represent another person in a legal proceeding in state circuit court.” (Dkt. 5.) His amended petition for judicial review, signed by an attorney, was not filed until August 26, 2020, more than 30 days later. His amended petition therefore was not filed “promptly” after he was notified of the defect in his petition, and the omission of his signature was not cured by the filing of the amended petition.

Jochman cites *Rabideau v. Stiller*, 2006 WI App 155, 295 Wis. 2d 417, 720 N.W.2d 108, to support his argument that a signature omitted from a complaint can be corrected by filing an amended complaint. But *Rabideau* is distinguishable. In *Rabideau* where the plaintiff’s attorney signed the original summons but not the original complaint, the omission was “promptly” corrected because the attorney filed a signed, amended summons and complaint on the same day that he was notified of the error. 2006 WI App 155, ¶ 18. Here Jochman waited more than 30 days after notice of his error to file an amended petition for review.

C. The court is deprived of competency to proceed because Jochman’s petition for review was not signed by him or by an attorney.

Jochman argues that any failure to comply with a requirement that his petition be signed by the petitioner or by an attorney does not deprive the court of jurisdiction

because an attorney signed and filed an amended petition. He cites *Village of Trempealeau County v. Mikrut*, 2004 WI 79, ¶ 10, 273 Wis. 2d 76, 681 N.W.2d 190, for the proposition that failure to abide by a statutory mandate is “central to the statutory scheme” of which it is a part. He then argues that “strict adherence to the 30 day timeline for filing a petition for judicial review cannot be central to the statutory scheme set forth in Chapter 227 when that scheme is meant to advance the proper resolution of all of the appellant’s claims, envisions representation by non-attorneys, and permits the correction of deficient petitions for review without regard to timing.” (Dkt. 46: 7.) Such argument is unavailing.

Controlling precedent holds that a court lacks has competency to proceed in a judicial review proceeding if a petition for review is not filed and served within 30 days after service of the agency’s decision. *Currier*, 2006 WI App 12; *Brachtl*, 48 Wis. 2d at 188. Even if the “policy and purpose” of Chapter 227 is to “afford the appellant every opportunity to get into court and secure a reversal upon any ground that the statute may countenance, so long as he apprises of the nature of his grievances at least by the time the appeal comes on for hearing,” *Brachtl*, 48 Wis. 2d at 188, *quoting* Hoyt, Wisconsin Administrative Procedure Act, 1944 Wisconsin L. Rev. 232, *Bractl* itself teaches that compliance with the 30 time limit in Wis. Stat. § 227.53(1)(a) is essential to give the reviewing court competency to proceed. Further, while WERC’s own administrative rules permit non-attorneys to represent parties in proceedings before WERC, Wis. Admin. Code § ERC 91.02(18) and 91.04(1), there is no legal authority for the proposition that non-attorneys can represent parties in Chapter 227

proceedings in court. Further, while Wis. Stat. § 227.56(3) permits amendment of a petition for review, an amended petition cannot cure the failure to have timely filed and served the *initial* petition within 30 days after service of the agency's decision.

D. DOC and WERC did not waive their challenge to the court's competency to proceed.

Jochman argues that DOC and WERC waived their challenge to the court's competency to proceed because they did not raise the issue in their notices of appearance and statements of position in response to his *amended* complaint. He further argues that the motion of DOC and WERC, to dismiss this proceeding for lack of competency to proceed, would be untimely under Wis. Stat. § 802.06(2) if that statute applied. Such arguments are without merit for two reasons. First, WERC did raise the issue in its notice of appearance and statement of position in response to Jochman's *initial* complaint. Second, a challenge to a circuit court's competency to proceed is waived if not made in the circuit court. *See Village of Trempealeau*, 2004 WI 79 at ¶¶ 27, 29-30. DOC and WERC have challenged the court's lack of competency to proceed in the circuit court. Further, failure to raise an objection to competency in a notice of appearance does not waive the right to raise such an objection in the circuit court. *Id.* at ¶ 28.

CONCLUSION

Jochman failed to properly initiate his judicial-review action by filing a timely properly subscribed petition for judicial review. The court therefore lacks competency

to proceed. For the reasons stated in their initial brief and this reply brief, DOC and WERC respectfully request that the court enter a final order dismissing this action.

Dated at Madison Wisconsin, this 26th day of October, 2020.

JOSHUA L. KAUL
Wisconsin Attorney General

Electronically signed by:

s/ Mpoli N. Simwanza-Johnson
MPOLI N. SIMWANZA-JOHNSON
Assistant Attorney General
State Bar #1095053

Attorneys for Wisconsin Department of
Corrections

s/ David C. Rice
DAVID C. RICE
Assistant Attorney General
State Bar #1014323

Attorneys for Wisconsin Employment Relations
Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2070 (MSJ)
(608) 266-6823(DCR)
(608) 294-2907 (Fax)
johnsonms@doj.state.wi.us
ricedc@doj.state.wi.us