

FILED
02-20-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV002101

BY THE COURT:

DATE SIGNED: February 20, 2023

Electronically signed by Honorable Nia Trammell
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 6

DANE COUNTY

LAUGHING COW, LP et al,
Petitioners,

vs.

Case No. 22 CV 2101

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ORDER ON MOTION TO DISMISS

Petitioners, Laughing Cow, L.P., Rads Partnership, Via Cresta L.P., Westmar, Ltd., and Finger Living Trust DTD Oct. 4, 1988, seek judicial review of a decision rendered by the Wisconsin Department of Revenue (the “Department”) on July 25, 2022 in *Laughing Cow, LP et al. v. Wisconsin Department of Revenue*, Docket No. 19-I-243. The Department filed a Notice of Appearance on September 8, 2022 and sought dismissal of the petition for judicial review. It posits that the petition was improperly served on the Department and that the Court lacks competency to proceed. For the reasons set forth below, the motion is GRANTED.

BACKGROUND

For purposes of the present motion, the Court adopts the following facts proffered by the parties, as modified by the Court:

1. On July 25, 2022, the Department issued a decision in *Laughing Cow, LP et al. v. Wisconsin Department of Revenue*, Docket No. 19-I-243 (the “Decision”). (Dkt. 2 at 25; Dkt. 11, ¶ 2).
2. The Department mailed the Decision to interested parties on July 25, 2022. *Id.*
3. On August 22, 2022, the Petitioners filed their Petition for Review in this Court appealing the Decision. (Dkt. 2).
4. On August 23, 2022, at approximately 4:00 p.m., the Petitioners’ courier came to the Department’s offices at 2135 Rimrock Road, Madison, Wisconsin. (Dkt. 23, Ex. A; Dkt. 24, ¶ 2).
5. The courier, Theresa (Tracey) Reams (“Reams”), was sent on behalf of the Petitioners to the Department with the Petition for Review. (Dkt. 35, Ex. A at 6, 14).
6. Reams served legal papers on “a very occasional basis” as part of her job duties and estimated that she served legal papers less than once per month. *Id.* at 7.
7. Reams had served legal papers on the Department on three occasions and could not differentiate whether some were for “initiating a lawsuit.” *Id.* at 8-11.
8. Erica Johnson, a tax paralegal at the law firm retained by the Petitioners, asked Reams “to take the document to the Department of Revenue for service on three individuals.” *Id.* at 14.
9. Reams could not recall being told anything about the process for serving. *Id.* at 14–15.
10. The office of the Secretary of the Department is located on the 6th floor of the Department’s office building, which is accessible only by the elevators behind the

reception/security desk or by a stairwell that is accessible only with keycard access. (Dkt. 23, Ex. C, Dkt. 26, Tr. 23:3-22, 40:12-23; Dkt. 23, Ex. B, Dkt. 25 Tr. 41:7 – 42:16).

11. In order for a visitor to access the elevator bank the Department's policy is that the visitor must (1) check in with the security guard at the reception/security desk, (2) wear a visitor sticker prepared by the security guard, and (3) be escorted by an employee of the Department. (Dkt. 23 ¶ 5; Dkt. 23, Ex. C, Dkt. 26, Tr. 21:4-21).

12. Authorization for a representative of the Department to accept service is done via "authorization letters" signed by the Secretary; such letters have been issued to Emily Pegram ("Pegram"), Kathy Traxler ("Traxler"), Heidi Andrews, and Maria Guerra-Lapacek. (Dkt. 23, Ex. B, Dkt. 25 at 19).

13. The Customer Service counter is not authorized to accept service on behalf of the Department or the Secretary of the Department. (Dkt. 11 ¶ 5).

14. At the Department, Reams had three envelopes, each respectively addressed Secretary Barca, Jared M. Boucher, Esq. and Mark S. Zimmer, Esq. (Dkt. 23, Ex. E; Dkt. 23, Ex. C, Dkt. 26, Ex. 2; Dkt. 23, Ex. E; Dkt. 23 ¶ 9; Dkt. 23, Ex. G, Dkt. 30 ¶ 2).

15. Each envelope contained a conformed copy of the Petition for Review. (Dkt. 23, Ex. F, Dkt. 29 Tr. 17:10 – 18:16; Dkt. 23, Ex. G, Dkt. 30 ¶ 2; Dkt. 23 ¶ 9).

16. At the Department's office, Reams spoke to a security guard, Ben D. Ash ("Ash"), who was working the reception desk/security desk. She advised Ash that she "had some papers for the three people listed on each envelope" and that "they were documents from the law firm of Reinhart, Boerner, Van Deuren." (Dkt. 35, Ex. A at 16, 25–26).

17. Ash is an employee of Star Protection and Patrol which has a contract to provide security and reception services at the Department office building; he answers to Martin Wright who is an employee of the Department. (Dkt. 23, Ex. C; Dkt. 26 Tr. 7:14-16, 9:4 – 10:2).

18. Although Reams initially testified that she also used the term “legal documents,” when describing the contents of the envelopes, she clarified that she “cannot recall specifically that phrase.” (Dkt. 35, Ex. A at 25–26).

19. Ash testified that Reams did not tell him that the documents “were legal documents or service of process.” (Dkt. 23, Ex. C, Dkt. 26 Tr. 8–9, 11, 28–29, 37; Dkt. 23, Ex. A, Dkt. 24, ¶¶ 1-2, 4).

20. Ash looked at all three envelopes. (Dkt. 23, Ex. C, Dkt. 26 Tr. 44:9-16; Dkt. 23 ¶ 12).

21. Ash did not open the envelopes Reams’ brought to the Department as he was not authorized to do so. (Dkt. 23, Ex. C, Dkt. 26 Tr. 8–9, 11, 28–29, 37; Dkt. 23, Ex. A, Dkt. 24 ¶¶ 1-2, 4).

22. Ash had access to the Department’s Teams chat function but did not call or text Pegram or the other addressees on the envelopes and he did not check to see if Pegram or the other addressees were present at the time. (Dkt. 23, Ex. F, Dkt. 29 Tr. 27:7-16).

23. Ash did not reach out to any of the other employees authorized to accept service. (Dkt. 23, Ex. C, Dkt. 26 Tr. 39:9 - 40:19).

24. Ash responded to the effect that “you’ll have to go back to the other customer service desk.” (Dkt. 35, Ex. A at 17).

25. The customer service desk is accessible to the public at any time the building is open. (Dkt. 23, Ex. B, Dkt. 25 Tr. 17:6 – 18:17; Dkt. 23 ¶ 3- 4).

26. At the customer service desk, Reams told employee Jamie Altenbach (“Altenbach”) something to the effect that “I had papers for these three individuals.” (Dkt. 35, Ex. A at 17).

27. Altenbach often receives papers at the customer service desk related to tax filings and response letters, and she did not know at the time that Reams was attempting to personally serve a lawsuit or legal documents. (Dkt. 23, Ex. F, Dkt. 29 at 13, 20–22).

28. Altenbach “indicated that she would take the documents.” (Dkt. 35, Ex. A at 18).

29. Altenbach “did not make any representations . . . that [she] was authorized to accept service of process on behalf of the Department.” (Dkt. 35, Ex. A at 28).

30. Altenbach was not authorized to accept service on behalf of the Secretary or the Department. (Dkt. 23, Ex. F, Dkt. 29 at 21; Dkt. 23, Ex. G, Dkt. 30 ¶ 4).

31. Reams did not “ask Jamie Altenbach if she was authorized to accept service on behalf of Secretary Barca.” (Dkt. 35, Ex. A at 19).

32. Altenbach did not sign anything, and Reams did not then know Altenbach’s identity. (Dkt. 35, Ex. A at 19).

33. At some point “after [Reams] had gone,” Altenbach opened the envelopes and saw it was “some sort of legal document”; she contacted her supervisor about what to do with them. (Dkt. 23, Ex. F, Dkt. 29 at 20–21).

34. There is a chat transcript indicating that Altenbach was instructed to reach out to Traxler, an employee of the Department who works in the Office of General Counsel located on the sixth floor of the Department’s office building, but Altenbach determined that she was gone for the day. The transcript indicated that Altenbach noted that she would stamp the envelopes with an August 23, 2022 date and email Traxler about them. (Dkt. 23, Ex. H; Dkt. 32 at ¶ 1).

35. Traxler received an e-mail from Altenbach at about 4:30 p.m. on August 23, 2022, which she saw the following morning on August 24, 2022. (Dkt. 32 at ¶ 2).

36. At about 8:00 a.m. on August 24, 2022, Traxler went down to the customer service desk and picked up all three copies of the Petition for Review, putting the copy addressed to Jared Boucher in his mailbox and putting the other two copies in the office of Mark S. Zimmer, an attorney working in the Department's Office of General Counsel. *Id.*

APPLICABLE LEGAL STANDARD

“The application of a statute to an undisputed set of facts presents a question of law.” *Park Bank-West v. Mueller*, 151 Wis. 2d 476, 482, 444 N.W.2d 754, 757 (Ct. App. 1989). Section 227.53(1) of the Wisconsin statutes dictates the procedural requirements for filing and serving a petition for judicial review of an agency decision. The statute mandates that a petitioner must serve the petition “personally or by certified mail” upon the agency or one of its officials within thirty days of the final decision in order to properly effectuate service. Wis. Stat. §§ 227.53(1)(a)1, (1)(a)2m. While limited exceptions exist, strict compliance is required under § 227.53(1)(a)1. *Currier v. DOR*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 520. Failure to comply with the time limitation in § 227.53(1)(a)1 causes the court to lose competency to proceed, necessitating the dismissal of the petition. *Wisconsin Power & Light Co. v. Public Serv. Comm'n*, 2006 WI App 221, ¶ 11, 296 Wis. 2d 705, 725 N.W.2d 423.

ANALYSIS

On July 25, 2022, the Department issued its decision in *Laughing Cow, LP et al. v. Wisconsin Department of Revenue*, Docket No. 19-I-243, which was mailed to interested parties on the same date. (Dkt. 2 at 25; Dkt. 11, Zimmer Aff. ¶ 2)). Chapter 227 provided the procedural mechanism to seek review from the trial court if any aggrieved party was dissatisfied with the Decision. Judicial review of an agency's decision is commenced by filing a petition

with the clerk of the circuit court's office and "by serving... [the] petition ... personally or by certified mail upon the agency or one of its officials." Wis. Stat. § 227.53(1)(a)1.

Section 227.01(1), Stats., defines an agency as "a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer" and § 227.01(7), Stats., states that an "[o]fficial of the agency" refers to a secretary, commissioner or member of a board of an agency. Service on an agency is accomplished by personally serving an individual who is authorized to accept service on the entity's behalf." *Weisensel v. Wisconsin Dept. of Health and Social Services*, 179 Wis. 2d 637, 644, 508 N.W.2d 33 (Ct. App. 1993). To trigger a trial court's review of the Decision, the Petitioners must have, among other things, served the Department "within 30 days after the service of the decision of the agency," which "commences on the day after personal service or mailing of the decision by the agency." Wis. Stat. § 227.53(1)(a)2. In this case, the Petitioners had until August 24, 2022 to file and serve their petition for judicial review of the Decision.

On August 22, 2022, the Petitioners filed their Petition for Review with the clerk of courts. As for service of the petition, Reams was tasked by Petitioners' counsel to serve the Petition for Review. Erica Johnson, a tax paralegal working for Petitioners' counsel, instructed Reams "to take the document to the Department of Revenue for service on three individuals." (Dkt. 35, Ex. A at 14). Reams did not normally serve papers as part of her job and she did not seem to comprehend that service papers were for initiating a lawsuit. She had no recollection of receiving instructions about the process for serving papers on the Department.

On August 23, 2022, Reams took three envelopes, each addressed to Secretary Barca, Jared M. Boucher, Esq. and Mark S. Zimmer, Esq., to the Department. Initially she met with Ash, a security guard at the reception desk. Reams indicated that she "had some papers for the

three people listed on each envelope” and that “they were documents from the law firm of Reinhart, Boerner, Van Deuren.” (Dkt. 35, Ex. A at 16, 25–26). She could not recall if she described the contents of the envelopes as legal documents. Reams did not advise Ash that the documents were for “service of process.” (Dkt. 35, Ex. A at 25.) Ash directed Reams to the customer service counter, after assuming that the documents were either a tax filing or response letter.

At the customer service counter, Reams informed Altenbach, a Department employee, that she “had papers for these three individuals.” (Dkt. 35, Ex. A at 17.) Altenbach was unaware that Reams was there to personally serve a lawsuit or legal documents, and “indicated that she would take the documents.” (Dkt. 35, Ex. A at 18; Dkt. 23, Ex. F, Dkt. 29 at 13, 22). Reams did not “ask Jamie Altenbach if she was authorized to accept service on behalf of Secretary Barca.” (Dkt. 35, Ex. A at 19.) Altenbach “did not make any representations . . . that [she] was authorized to accept service of process on behalf of the Department.” (Dkt. 35, Ex. A at 28.) It was not until after Reams left the Department that Altenbach determined that the contents of the three letters were legal documents that needed to be served.

Altenbach was not authorized to accept service of process for Secretary Barca on behalf of the Department. Pegram, Traxler, Heidi Andrews, and Maria Guerra-Lapacek were authorized under “authorization letters” signed by Secretary Barca to accept service of process. Consequently, the Petition for Review was not personally served on the Secretary or any of the people authorized to accept service on the Department’s behalf. The Petition for Review was not served via certified mail either. This error is fatal because the failure to strictly comply with the service requirements of § 227.53(1) deprives the Court of subject matter jurisdiction. See *Sunnyview Village, Inc. v. DOA*, 104 Wis. 2d 396, 399, 311 N.W.2d 632, 634 (1981);

Wisconsin's Env'tl. Decade, Inc. v. Public Serv. Comm'n, 84 Wis. 2d 504, 515, 267 N.W.2d 609, 616 (1978).

The Petitioners argue that Department employees or agents frustrated Reams' attempt at service of the petition. They blame the Department's security protocols and complain that the Department employees or agents failed to follow the Department's own internal policy for directing mail to appropriate staff. While the Wisconsin Supreme Court has carved out a limited number of exceptions to the strict service and filing requirements of § 227.53(1), the Court does not find that this case rises to a level warranting the application of an exception. For example, the *Wisconsin's Env'tl. Decade* court found that a party did not have to strictly comply with the service requirements of § 227.53(1) when it failed to serve all 150 parties who appeared at Public Service Commission hearings. See *Wisconsin's Env'tl. Decade*, 84 Wis. 2d at 504, 267 N.W.2d at 609. Based on policy, the court found that applying the strict compliance standard would discourage parties from challenging orders of the Public Service Commission. *Id.* In another case, the court concluded that a party did not have to strictly comply with the filing requirement under § 227.53(1) where the agency erred by issuing three invalid orders and the clerk of court failed to accept the petition for judicial review for filing and did not promptly notify the filing party of the non-acceptance, thereby frustrating an otherwise timely filed petition for review. *Hamilton v. DILHR*, 56 Wis. 2d 673, 203 N.W.2d 7 (1973).

The Court is unable to equate the case at hand to either *Wisconsin's Env'tl. Decade* or *Hamilton*, lest the exception swallows the rule. Lack of communication caused the missteps that subsequently occurred when Reams took the Petition for Review to the Department. Reams, who did not regularly serve documents as part of her job duties, was not fully aware of the measures that ought to have been taken to effectuate service of process on the Department.

Reams did not inform Department representatives that she was there with legal documents or a petition for judicial review. Although Reams may have stated that the envelopes needed to be directed to the addressees on the envelopes, she did not communicate that personal service was indicated or necessary on the Department. No questions were asked about who was authorized by the Department to accept service of the Petition for Review. The envelopes were left with Altenbach without confirming her identity or ensuring that she could accept service on behalf of the Department. Altenbach did not represent that she could accept service of the Petition for Review. As espoused by our courts “[i]f the statutory prescriptions are to be meaningful, they must be unbending.” *Weisensel*, 179 Wis. 2d at 647, 508 N.W.2d 33. The record simply does not support ascribing fault to the Department and allowing an exception under § 227.53(1).

Because the Department was improperly served and has not accepted service of the Petition for Review, the Court lacks jurisdiction and is required to dismiss the petition before it. *Weisensel*, 179 Wis.2d at 643 508 N.W.2d 33 (Ct. App. 1993).

ORDER

In light of the foregoing, this action is hereby DISMISSED with prejudice.