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DISTRICT II

JUN 10 2015

Wisconsin Tax Appeals Commission
Madison, WI 53701

June 10, 2015

To:

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Circuit Court Judge
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Michael Lenz
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You are hereby notified that the Court has entered the following opinion and order:

2014AP2680

Michael Lenz v. Wisconsin Department of Revenue
(L.C. #2014CV1320)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

The circuit court dismissed as untimely Michael Lenz's petition to review a decision of the Wisconsin Tax Appeals Commission (TAC). Acting pro se, Lenz challenges the dismissal, the circuit court's competency to proceed, and the authority of the Wisconsin Department of Justice (DOJ) to represent the Wisconsin Department of Revenue (DOR) in this judicial review action. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the order dismissing his petition.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Lenz disputed his 2012 state tax refund. TAC denied his claim as frivolous and sanctioned him \$1000. The circuit court dismissed his petition for review on grounds he failed to properly serve DOR. It also denied his motion for reconsideration. Lenz appeals.

This appeal requires us to construe and apply WIS. STAT. § 227.53(1). The interpretation of a statute and its application to undisputed facts are questions of law that we review de novo. *Currier v. DOR*, 2006 WI App 12, ¶9, 288 Wis. 2d 693, 709 N.W.2d 520. “The purpose of statutory construction is to give effect to the legislature’s intent.” *Id.*

When Lenz sought judicial review of TAC’s decision, he served TAC by certified mail. Appearing for DOR, DOJ moved to dismiss on the basis that DOR was served only by first-class mail, not personally or by certified mail. WISCONSIN STAT. § 227.53(1)(a)1. provides:

Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials If the agency whose decision is sought to be reviewed is the tax appeals commission ... the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1. to 4.

Here, “the corresponding named respondent” is DOR. *See* § 227.53(1)(b)1.

Lenz contends the statute is ambiguous because it is not clear that DOR service requirements are “on par with” those of TAC. A statute is not ambiguous merely because parties disagree about its meaning. *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶20, 284 Wis. 2d 264, 700 N.W.2d 158. The test for ambiguity is whether the language of the statute “*reasonably* gives rise to different meanings.” *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶21, 260 Wis. 2d 633, 660 N.W.2d 656 (emphasis added). It does not.

The statute plainly states that service must be made personally or by certified mail upon “the agency” and when that agency is the TAC, also upon “the corresponding named respondent,” here, DOR. “[S]trict compliance with the service requirements of [WIS. STAT. §] 227.53(1) is essential to the circuit court’s subject-matter jurisdiction.” *Weisensel v. Wisconsin DHSS*, 179 Wis. 2d 637, 643, 508 N.W.2d 33 (Ct. App. 1993). First-class mail does not suffice. *See County of Milwaukee v. LIRC*, 142 Wis. 2d 307, 314, 418 N.W.2d 35 (Ct. App. 1987). The circuit court lacks competency to proceed when a party fails to properly complete timely service. *See Wisconsin Power and Light Co. v. PSC*, 2006 WI App 221, ¶11, 296 Wis. 2d 705, 725 N.W.2d 423. “Dismissal may be a harsh penalty for failure to comply with statutory service requirements, but ‘uniformity, consistency and compliance with procedural rules are necessary to maintain a simple, orderly and uniform system of conducting business in the courts.’” *Weisensel*, 179 Wis. 2d at 647 (citation omitted). As Lenz did not timely serve his petition for judicial review on DOR personally or by certified mail, the circuit court lacked competency to proceed. Dismissal of his petition for judicial review was proper. *See Wisconsin Power and Light Co.*, 296 Wis. 2d 705, ¶11.

As a fall-back position, Lenz argues that WIS. STAT. § 227.53(1)(c) permits service by first-class mail “when service is timely admitted in writing ... not later than 30 days after the institution of the proceeding,” and he mailed DOR a copy of the petition for judicial review twenty-eight days after TAC filed its decision. Lenz ignores that the proceeding was not instituted because he failed to properly serve DOR. Section 227.53(1)(c) is not a means by which to circumvent or remedy the matter of defective service.

Finally, Lenz contends that DOJ has no authority to appear for DOR. He argues that DOR’s chief counsel, not a “head of any department of state government,” signed the request for

representation. See WIS. STAT. § 165.25(6)(a). This argument has no merit. Section 165.25(6)(a) allows DOJ to appear for and defend state agencies on request of a department head, DOR's chief counsel acts as an agent for DOR when seeking representation for it. Further, "the department of justice shall provide legal counsel to appear for the [DOR] in all courts." WIS. STAT. § 73.03(22).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals