

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1529

Cir. Ct. No. 2010CV20361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KAREN BAKER, D/B/A K&E INDEPENDENT LIVING CENTER,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF HEALTH SERVICES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. The Department of Health Services (DHS) notified Karen Baker that her license to operate an assisted living center for adults was going to be revoked for code violations. Baker had ten days to file an appeal per

DHS regulations. She missed the deadline and her appeal was dismissed. Baker argued that her appeal was timely, as WIS. STAT. § 801.15(1)(b) (2009-10)¹ provides that when a deadline is less than eleven days, weekends and holidays are excluded from the counting period. An administrative law judge (ALJ) rejected Baker's argument and ruled that § 801.15(1)(b) only applies to proceedings before a circuit court. The circuit court affirmed the ALJ's decision and we agree: Section 801.15(1)(b) is not applicable to an appeal before an administrative agency.

BACKGROUND

¶2 Baker was licensed to run an assisted living center for adults in Milwaukee called K&E Independent Living Center. On Friday, September 3, 2010, DHS sent Baker a letter informing her that her license was being revoked for code violations. The last page of the letter contained the "notice of right to appeal," which stated, "Your written request for a hearing must be filed so that it is received by the Department of Administration's Division of Hearings and Appeals ... within ten (10) days after the date of this NOTICE and ORDER." The bottom of the appeal section stated, "**YOUR APPEAL MAY BE DENIED OR DISMISSED IF YOUR REQUEST IS INCOMPLETE OR NOT TIMELY FILED.**"

¶3 Baker received her notice on Saturday, September 4. She mailed her request for hearing to the division of hearings and appeals on September 15 and it arrived September 16. On September 23, DHS filed a motion to dismiss Baker's

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

appeal as untimely. An ALJ agreed and granted DHS's motion to dismiss. The ALJ based his decision on WIS. STAT. § 990.001(4)(a), which states that "[t]he time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last" For Baker's appeal to be timely, the ALJ stated that the division of hearings and appeals needed to receive it by September 13.²

¶4 Baker argued that WIS. STAT. § 801.15(1)(b) governed her time to appeal. Section 801.15(1)(b) provides, in relevant part, that "[w]hen the period of time prescribed or allowed is less than 11 days, Saturdays, Sundays and holidays shall be excluded in the computation." *Id.* Using the counting method of § 801.15(1)(b), the deadline for Baker's appeal would be September 20, as two Saturdays, three Sundays, and Labor Day would be excluded from the ten-day window. The ALJ pointed out that WIS. STAT. § 801.01(2) states that "Chapters 801 to 847 govern procedure and practice in circuit courts of this state in all civil actions and special proceedings" As Baker was filing an appeal in an administrative proceeding rather than before a circuit court, the ALJ ruled that § 801.15(1)(b) did not apply.

² In concluding that Baker's request for a hearing was due by September 13, the ALJ assumed that the "the date of notice" described in WIS. ADMIN. CODE § DHS 88.03(7)(a) (2011) was Friday, September 3—the day DHS mailed the revocation notice to Baker. This is incorrect. In the absence of a statutory provision, the rule in Wisconsin is that service of notice by mail is not effective until the party receives it. *Hotel Hay Corp. v. Milner Hotels*, 255 Wis. 482, 486, 39 N.W.2d 363 (1949) ("In the absence of custom, statute, estoppel, or express contractual stipulation, when a notice, affecting a right, is sought to be served by mail, the service is not effected, until the notice comes into the hands of the one to be served, and he acquires knowledge of the contents.") (Citation omitted). As DHS regulations do not define "the date of notice," the common law rule governs and the counting period did not begin to run until Baker received her notice on Saturday, September 4. Baker's request for a hearing was thus due on September 14, in which case her request was still tardy by two days. DHS and the division of hearings and appeals should be mindful of this rule in the future.

¶5 Baker filed a petition for review with the circuit court pursuant to WIS. STAT. §§ 227.52 and 227.53. The circuit court affirmed the ALJ and Baker appeals.

STANDARD OF REVIEW

¶6 We review the decision of the ALJ, not the circuit court. *See Racine Harley-Davidson, Inc. v. State Div. of Hearings and Appeals*, 2006 WI 86, ¶8 n.4, 292 Wis. 2d 549, 717 N.W.2d 184. While the interpretation and application of a statute is a question of law, we may accord one of three levels of deference to an administrative agency’s interpretation of a statute: great weight deference, due weight deference, or no deference. *See id.*, ¶¶16-19 (listing the different standards for each level of deference). As the issue of whether WIS. STAT. § 801.15(1)(b) applies to an appeal before an administrative agency is one of first impression, we give no deference to the ALJ’s decision and apply de novo review.³

DISCUSSION

¶7 The legislature has delegated to DHS the authority to issue and revoke licenses for people operating adult family homes. *See* WIS. STAT. § 50.02(2)(am)2.; *see also* WIS. ADMIN. CODE § DHS 88.01(1) (2011). DHS regulations also allow any person whose license is being revoked to request a hearing. WIS. ADMIN. CODE § DHS 88.03(7)(a). The request “shall be in writing, shall be filed with the department of administration’s division of hearings and appeals and shall be sent to that office so that it is received there within 10 days

³ Our decision is not guided by the standard of review and would be the same regardless of whether we applied great weight or due weight deference.

after the date of notice.” Sec. DHS 88.03(7)(b). Baker argues that the relevant statute for counting purposes is WIS. STAT. § 801.15(1)(b) rather than WIS. STAT. § 990.001(4)(a). We agree with the ALJ that § 801.15(1)(b) does not apply, as Baker’s appeal to the division of hearings and appeals is governed by WIS. STAT. §§ 227.42 and 227.43, rather than chapters 801 to 847. Section 801.15(1)(b) expressly provides that it only applies to periods of time prescribed or allowed by chapters 801 to 847. Section 990.001(4)(a) is therefore the appropriate statute for counting purposes.

¶8 Baker argues that *Gangler v. Wisconsin Electric Power Co.*, 110 Wis. 2d 649, 329 N.W.2d 186 (1983), and *State ex rel. Town of Delavan v. Circuit Court for Walworth County*, 167 Wis. 2d 719, 482 N.W.2d 899 (1992), extend WIS. STAT. § 801.15(1)(b) to appeals before the division of hearings and appeals. Neither of those cases compels the result Baker seeks.

¶9 In *Gangler*, the power company commenced proceedings to condemn property owned by Robert and Doris Gangler. *Gangler*, 110 Wis. 2d at 651. WISCONSIN STAT. § 32.06(10) mandates that an appeal to the circuit court of a condemnation commission’s award must be filed within sixty days. *See Gangler*, 110 Wis. 2d at 651-52. The issue of whether the appeal was timely depended upon whether WIS. STAT. § 990.001(4)(a), (b) or WIS. STAT. § 801.15(1) (1979-80) was applicable. *Gangler*, 110 Wis. 2d at 653.

¶10 If WIS. STAT. § 990.001(4)(a), (b) governed, the Ganglers’ notice of appeal was not timely because the sixtieth day after the condemnation award fell on a Saturday, not a Sunday or legal holiday. *Gangler*, 110 Wis. 2d at 654. If WIS. STAT. § 801.15(1) (1979-80) governed, then the appeal was timely, as § 801.15(1) (1979-80) stated that the final day of an appeal deadline cannot fall on

a Saturday, Sunday, or legal holiday.⁴ *Gangler*, 110 Wis. 2d at 188-89 n.4. The power company argued that § 801.15(1) (1979-80) did not apply to an appeal from a condemnation commission’s award under WIS. STAT. § ch. 32. *See Gangler*, 110 Wis. 2d at 655. Our supreme court disagreed, as the appeal was to a circuit court—rather than an administrative agency—and therefore § 801.15(1) (1979-80) applied. *Gangler*, 110 Wis. 2d 656. We hold that *Gangler* does not control the case before us, as *Gangler* involved an appeal to a circuit court while our case is an appeal to an administrative agency.

¶11 The issue in *Town of Delavan*, 167 Wis. 2d at 721, was whether the substitution of judge provision in WIS. STAT. § 801.58(7) applies to a WIS. STAT. ch. 227 judicial review. The supreme court held that it does, as “ch. 227 contemplates the limited use of those civil procedure statutes which do not conflict with ch. 227.” *Town of Delavan*, 167 Wis. 2d at 724. As § 801.58(7) does not conflict with any provision in ch. 227, it applies to ch. 227 administrative reviews. *See Town of Delavan*, 167 Wis. 2d at 724.

¶12 Using *Town of Delavan*, Baker argues that WIS. STAT. § 801.15(1)(b) applies to this case as it does not conflict with any provision in WIS. STAT. ch. 227. Baker has misinterpreted the holding of *Town of Delavan*. *Town of Delavan* applied a rule of civil procedure (the substitution of judge statute) to an appeal before a circuit court. Baker is asking this court to apply a rule of civil procedure to a proceeding before an administrative agency. WISCONSIN STAT. § 50.02(2)(am)2. provides that the rules for appealing the

⁴ The current version of the statute provides that the final day of an appeal deadline cannot fall on “a day the clerk of courts office is closed.” WIS. STAT. § 801.15(1)(b).

revocation of an adult family home operating license are determined by DHS. Pursuant to this authority, DHS promulgated WIS. ADMIN. CODE § DHS 88.03(7)(b), which states that an appeal from a license revocation must be received “within 10 days after the date of the notice.” Section 801.15(1)(b) only applies to proceedings before a circuit court and thus has no application to an appeal before an administrative agency.

CONCLUSION

¶13 As the ALJ properly dismissed Baker’s appeal as untimely, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

