

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 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. 2011AP2787

Cir. Ct. No. 2011CV13898

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DANIEL AVANTE,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND MILWAUKEE AREA
TECHNICAL COLLEGE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Daniel Avante, *pro se*, appeals a circuit court order dismissing his petition for judicial review of a decision by the Labor and Industry Review Commission in favor of his former employer, Milwaukee Area Technical

College. The circuit court concluded that it lacked the power to address the merits of the petition because Avante did not comply with the service requirements of WIS. STAT. § 227.53(1). We agree and affirm.

¶2 By a decision dated and mailed on August 11, 2011, the Commission dismissed Avante’s petition for review of an administrative law judge’s decision. The Commission also gave Avante written notice of his appeal rights. The notice reflected that he could seek judicial review within thirty days of the Commission’s decision by filing a petition with the circuit court and serving the Commission either personally or by certified mail. By letter of August 26, 2011, Avante asked the Commission to reconsider. The Commission denied the request on August 29, 2011, stating that Avante’s recourse was an appeal to the circuit court as described in the notice of appeal rights sent to him with the August 11, 2011 decision.

¶3 Avante filed a petition for judicial review in circuit court on September 2, 2011. The undisputed evidence in the Record reflects, however, that he did not timely serve a copy of his petition upon the Commission either personally or by certified mail as required by WIS. STAT. § 227.53(1). The Commission moved to dismiss the petition for failure to comply with the statutory service requirements. The circuit court granted the motion, and Avante appeals.

¶4 “WISCONSIN STAT. § 227.53(1) establishes the procedural requirements for filing and serving a petition for judicial review of an agency decision.” *Wisconsin Power and Light Co. v. Public Service Commission*, 2006 WI App 221, ¶11, 296 Wis. 2d 705, 711, 725 N.W.2d 423, 425. Our resolution of this appeal turns on application of the statute to undisputed facts. This is a question of law that we review *de novo*. *Weisensel v. Wisconsin Department of*

Health and Social Services, 179 Wis. 2d 637, 642, 508 N.W.2d 33, 35 (Ct. App. 1993).

¶5 WISCONSIN STAT. § 227.53(1)(a) provides, in pertinent part:

1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held....

2. [P]etitions for review of contested cases shall be served and filed within 30 days after the service of the decision of the agency upon all parties.... If a rehearing is requested under [WIS. STAT.] s. 227.49, any party desiring judicial review under this subdivision shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing.^[1] The 30-day period for serving and filing a petition under this subdivision commences on the day after personal service or mailing of the decision by the agency.

Ibid. Here, Avante timely filed a petition for judicial review in circuit court on September 2, 2011, but the Record is uncontroverted that he did not comply with other statutory procedures for initiating judicial review.

¶6 The Commission filed an affidavit in circuit court on October 3, 2011, reflecting that Avante had never, either personally or by certified mail, served the Commission with a copy of his petition for judicial review as required by WIS. STAT. § 227.53(1). Avante responded by filing a letter in circuit court on October 11, 2011, explaining the steps he took to initiate judicial review, but none of the steps that he described included serving the Commission personally or by certified mail with a copy of his petition. In his appellate brief, he acknowledges

¹ Pursuant to WIS. STAT. § 227.49, a person aggrieved by a final order may file a written petition for a rehearing within twenty days after service of the order.

that his efforts to serve the Commission were “not in the prescribed manner.” Thus, no dispute exists that Avante failed to comply strictly with the statutory requirements for initiating judicial review of the Commission’s decision.²

¶7 A party must strictly comply with the service requirements of WIS. STAT. § 227.53(1), before the circuit court may review an agency’s decision. *See Weisensel*, 179 Wis. 2d at 643, 508 N.W.2d at 35. The circuit court lacks competency to proceed when a party fails to complete timely service as required by that statute. *See Wisconsin Power and Light Co.*, 2006 WI App 221, ¶11, 296 Wis. 2d at 711–712, 725 N.W.2d at 425–426. “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 37, 508 N.W.2d at 647 (citation omitted). Because the Record shows that Avante did not timely serve his petition for judicial review on the Commission personally or by certified mail, the circuit court lacked competency to proceed in this matter and properly dismissed his petition for judicial review. *See Wisconsin Power and Light Co.*, 2006 WI App 221, ¶11, 296 Wis. 2d at 712, 725 N.W.2d at 426.

² The parties do not discuss whether the deadline for Avante to file and serve a petition for judicial review was thirty days after the Commission released its decision on August 11, 2011, or whether his letter seeking reconsideration of that decision constituted a request for a rehearing, resulting in a deadline thirty days after the request was denied on August 29, 2011. *See* WIS. STAT. § 227.53(1)(a)2. Because the Record reflects that Avante did not properly serve a petition for judicial review upon the Commission within either timeframe, however, we need not resolve this question. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 631 n.1, 673 N.W.2d 716, 718 n.1 (we do not address issues unnecessary to resolution of the appeal).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT.
RULE 809.23(1)(b)5.

