**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 11, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP346** **Cir. Ct. No. 2011CV3396**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**HALLIS DAVID MAILEN,**

**PETITIONER-APPELLANT,**

**V.**

**STATE OF WISCONSIN EDUCATIONAL APPROVAL BOARD,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. Hallis Mailen appeals an order of the circuit court dismissing Mailen's petition for review of a decision of the Educational Approval Board. Mailen argues that the circuit court erred in concluding that the

Board's letter closing his complaint against Madison Media Institute (hereafter MMI) was not a final order subject to review. We conclude that the Board's decision was a final order. We also reject the Board's alternative argument that Mailen lacked standing. We reverse the circuit court's order dismissing Mailen's petition for review, and remand for further proceedings.

## *Background*

¶2 The Board is an agency of the State of Wisconsin that regulates private post-secondary trade, correspondence, business, and technical schools. *See* WIS. STAT. § 38.50(1)(e) and (2) (2009-10).[1] The Board's statutory responsibilities include "protect[ing] the general public by inspecting and approving private … schools." WIS. STAT. § 38.50(2).

¶3 The Board is also tasked with investigating student complaints against regulated schools. WIS. ADMIN. CODE § EAB 4.08(2)(b)1. If the Board receives a complaint from a student of a regulated school, the Board "shall conduct an investigation" into the complaint. WIS. ADMIN. CODE § EAB 4.08(2)(b). If the Board's investigation indicates a violation of WIS. STAT. § 38.50, the Board's own regulations, or an established school policy, the Board "shall attempt" to negotiate a settlement between the student and the school. WIS. ADMIN. CODE § EAB 4.08(2)(b)1. If the school rejects the proposed settlement, the Board "may conduct a hearing" and may impose sanctions under WIS. ADMIN. CODE § EAB 4.01(4m). WIS. ADMIN. CODE § 4.08(2)(b)2.

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

¶4 Mailen is a military veteran who has been diagnosed with post-traumatic stress disorder. Mailen attended MMI, a post-secondary school regulated by the Board, starting the fall term of 2009. Mailen was enrolled at MMI pursuant to an enrollment agreement that reserves MMI's right to dismiss a student for "inappropriate behavior." The enrollment agreement provides dismissed students with the right to appeal the decision to terminate enrollment within ten days of notice of termination. MMI's school catalog also provides the right to apply for readmission. MMI also had a policy providing for reasonable accommodation of students' disabilities.

¶5 In November 2009, Mailen was placed on probation because of unprofessional and disrespectful behavior. In June 2010, while participating in MMI's summer term, Mailen's enrollment was terminated. MMI did not provide Mailen with a written notice of termination, but the school's president did meet with Mailen to discuss termination and possible re-entry in June 2010. By letter dated August 11, 2010, MMI denied Mailen re-entry. MMI provided Mailen with a refund of his tuition for the summer term only.

¶6 In June 2011, Mailen filed a complaint with the Board regarding his expulsion. He claimed his expulsion violated the school's policy because MMI did not provide Mailen with a notice of termination or an opportunity to appeal, and that MMI discriminated against him on the basis of his age and disability. The Board, through a "consultant" employed by its executive secretary, investigated Mailen's complaint. The consultant reported that she found no support for Mailen's allegations of discrimination. She found that MMI had "missed a step" in following its policies by not providing Mailen with a letter of dismissal, but concluded that this error did not warrant further action on the part of the Board. Based on this information, the Board, again via the consultant, sent Mailen a letter

informing him that the Board would take no further action. It is this final letter from the consultant for the Board that is the focus of much of our discussion below.

¶7 Mailen filed a petition with the circuit court seeking judicial review under WIS. STAT. § 227.52. The Board moved to dismiss Mailen's petition on the grounds that the Board's action was not judicially reviewable because the letter was not a final order of the agency, and that Mailen was not a person aggrieved by the Board's action. The circuit court found that the letter was not a final order and, thus, not judicially reviewable. Mailen appeals.

## ***Discussion***

¶8 The issue on appeal is limited to whether the circuit court properly determined that it lacked jurisdiction because the action of the Board was not a final order reviewable under WIS. STAT. ch. 227. We acknowledge that the Board makes arguments suggesting that there is no underlying merit to Mailen's challenge, but we stress that we do not address the merits. Our focus is on whether the circuit court correctly agreed with the Board that the court lacked jurisidiction.

### *A. Standard Of Review*

¶9 Judicial review is available for "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form." WIS. STAT. § 227.52. "[A]ny person aggrieved by a decision" specified in § 227.52 is eligible to bring an action for judicial review. WIS. STAT. § 227.53(1). Whether an administrative decision is subject to judicial review is a question of law that we review de novo. ***Gimenez***

***v. State Med. Examining Bd.***, 229 Wis. 2d 312, 315, 600 N.W.2d 28 (Ct. App. 1999).

¶10 Because our review is de novo, and although Mailen is the appellant, we choose to structure this opinion around the Board's arguments in favor of dismissal.

*B. Whether The Board's Letter Is A Final Order*

¶11 Under WIS. STAT. § 227.52, only agency decisions that are final orders are judicially reviewable. ***Pasch v. DOR***, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973). Final agency orders are agency decisions that determine the further legal rights of the party seeking review. *See* ***id.*** at 355. If the decision sought to be reviewed is not a final order under § 227.52, the circuit court lacks jurisdiction to proceed on the merits and must dismiss the petition for review. ***State v. WERC***, 65 Wis. 2d 624, 630, 223 N.W.2d 543 (1974).[2]

¶12 The Board seemingly contends that its decision was not final because it was a discretionary determination. The Board cites ***Wisconsin's Environmental Decade, Inc. v. PSC***, 93 Wis. 2d 650, 655, 287 N.W.2d 737 (1980), for the proposition that an agency action is not a "decision" for purposes

[2] We note that the Board does not contest, as a general matter, that its decisions are subject to judicial review under WIS. STAT. ch. 227. Thus, we will assume that the Board's final decisions are subject to judicial review. The Board's apparent concession appears to be appropriate. "The right to judicial review of an agency's decision is entirely statutory, and such decisions are not reviewable unless made so by statute." ***Madison Landfills, Inc. v. DNR***, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993). Under WIS. STAT. § 227.52, any "[a]dministrative decisions which adversely affect the substantial interests of any person" are subject to review under ch. 227 "except as otherwise provided by law," or as exempted by § 227.52. Because WIS. STAT. § 38.50 does not limit the reviewability of the Board's decisions, nor is review exempted under § 227.52, it appears that the Board's final orders are subject to judicial review pursuant to § 227.52.

of WIS. STAT. § 227.52 if it is a "discretionary determination." If that is the Board's view, we disagree.

¶13 In ***Wisconsin's Environmental Decade***, the court addressed whether the PSC's decision not to conduct an investigation into allegedly discriminatory utility rates was a reviewable action under WIS. STAT. ch. 227. ***Id.*** at 654. The PSC regulations at issue provided that the PSC "may" investigate potentially discriminatory public utility rates. ***Id.*** at 655 (citing WIS. STAT. § 196.28). Rather than state a general rule that discretionary determinations are non-reviewable, the ***Wisconsin's Environmental Decade*** court declared that the particular discretionary decision before it was non-reviewable. *See* ***id.*** ("The decision of the PSC not to investigate this complaint against these utilities under secs. 196.28 and 196.29 is a nonreviewable, discretionary determination.").

¶14 Moreover, in addition to the lack of any such rule in ***Wisconsin's Environmental Decade***, WIS. STAT. ch. 227 itself plainly contemplates judicial review of discretionary agency decisions, as has been repeatedly recognized in case law. *See, e.g.*, ***Aldrich v. LIRC***, 2012 WI 53, ¶93, 341 Wis. 2d 36, 814 N.W.2d 433 ("Section 227.57(8) states that 'the court shall not substitute its judgment for that of the agency on an issue of discretion.'"); ***Lake Beulah Mgmt. Dist. v. DNR***, 2011 WI 54, ¶26, 335 Wis. 2d 47, 799 N.W.2d 73 ("On matters left to an agency's exercise of discretion, we may not substitute our judgment for that of the agency and must give 'due weight' to an agency's 'experience, technical competence, and specialized knowledge ... as well as discretionary authority conferred upon it.' If, however, we conclude that an 'agency's exercise of discretion is outside the range of discretion delegated to the agency by law,' we must reverse and remand the case to the agency. WIS. STAT. § 227.57(8)." (citations omitted)); ***National Motorists Ass'n v. Office of Comm'r of Ins.***, 2002

WI App 308, ¶22, 259 Wis. 2d 240, 655 N.W.2d 179 (courts "review an agency's discretionary decisions under WIS. STAT. § 227.57(8)"). Accordingly, to the extent the Board contends that its action was not a "decision" within the meaning of ch. 227 because it was a discretionary decision, we reject the argument.

¶15 Once we strip away that part of the Board's argument in which it contends the decision was not final because the Board was not obligated to act further (i.e., that its decision to take no further action was discretionary), we are uncertain what remains. The Board places reliance on ***Waste Management of Wisconsin, Inc. v. DNR***, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986), for the proposition that only agency actions that "determine the further legal rights of the person seeking review" are final and thus reviewable, but we find no developed argument in this regard that is distinct from the Board's position that, in closing Mailen's complaint, the Board did not determine his further legal rights because the Board exercised its discretion not to act further.

¶16 The Board apparently asserts that its decision does not affect Mailen's legal rights because Mailen has alternative avenues for seeking legal recourse against MMI. The Board points to legal actions that Mailen had pending before two federal agencies. The Board, however, does not provide support for the proposition that such alternatives mean that the Board's action did not affect Mailen's legal rights. More specifically, the Board does not explain why the Board's action did not constitute a determination that Mailen was not entitled to a legal remedy from the Board.[3] For example, by deciding that Mailen's complaint

[3] Courts have found that, if an agency retains an action for further review, there is no reviewable final decision because the matter is more appropriately reviewed at the culmination of the agency's decision of the issue. *See* ***Pasch v. DOR***, 58 Wis. 2d 346, 354, 206 N.W.2d 157 (1973). However, here, the Board did not retain Mailen's complaint for further review.

was unfounded, the Board appears to have determined that it need not accord to Mailen benefits he might derive from a hearing on his complaint or from Board-initiated negotiations with MMI. We fail to understand, and the Board does not explain, why Mailen's ability to pursue other administrative and civil channels means that, with respect to any right to relief provided in WIS. STAT. § 38.50 and the related administrative rules, the Board's action did not affect Mailen's legal rights.

¶17 Based on the arguments before us, we see no reason why the Board's letter was not a final order of the agency and reviewable as such.

*C. Mailen's Standing To Seek Review*

¶18 We understand the Board to be arguing, in the alternative, that, even if its decision was a final order, Mailen's action was nonetheless properly dismissed because Mailen lacks standing. WISCONSIN STAT. § 227.53 requires that a person seeking judicial review of an agency decision must be "aggrieved" by that decision. WIS. STAT. § 227.53(1). An aggrieved person is one "whose substantial interests are adversely affected by a determination of an agency." WIS. STAT. § 227.01(9); *see also* ***Madison Landfills, Inc. v. DNR***, 180 Wis. 2d 129, 140, 509 N.W.2d 300 (Ct. App. 1993). The Board argues that Mailen was not a person aggrieved by the Board's decision because that decision did not affect Mailen's substantial interests. That is, the Board contends that Mailen did not have a substantial interest in continuing as a student at MMI that was affected by the Board's determination to close his complaint. The Board relies on ***Coe v. Board of Regents of University of Wisconsin System***, 140 Wis. 2d 261, 273, 409 N.W.2d 166 (Ct. App. 1987), for the contention that Mailen had only a

unilateral expectation in continuing at MMI and not the substantial interest requisite to support his standing to seek review.

¶19 Mailen responds that the Board forfeited this standing argument by failing to include it in a motion to dismiss filed within 20 days of filing its notice of appearance. We agree. Under WIS. STAT. § 227.56(3), the Board had 20 days from the date of filing its notice of appearance to move to dismiss Mailen's petition on the grounds that Mailen did not establish that he was a person aggrieved by the Board's decision.[4] *See also* ***Jackson v. LIRC***, 2006 WI App 97, ¶17, 293 Wis. 2d 332, 715 N.W.2d 654. The Board filed its motion to dismiss more than 20 days after it served its notice of appearance.[5]

¶20 The Board contends that its motion was sufficient because Mailen had received notice of the standing issue in the Board's notice of appearance. We reject this argument. As Mailen points out, WIS. STAT. § 227.56(3) states that a motion to dismiss for failure to state sufficient facts showing that the party seeking review is aggrieved may be filed by a party wishing to do so within 20 days of that

[4] WISCONSIN STAT. § 227.56(3) states:

> **(3)** Within 20 days after the time specified in s. 227.53 for filing notices of appearance in any proceeding for review, any respondent who has served such notice may move to dismiss the petition as filed upon the ground that such petition, upon its face, does not state facts sufficient to show that the petitioner named therein is a person aggrieved by the decision sought to be reviewed. Upon the hearing of such motion the court may grant the petitioner leave to amend the petition if the amendment as proposed shall have been served upon all respondents prior to such hearing. If so amended the court may consider and pass upon the validity of the amended petition without further or other motion to dismiss the same by any respondent.

[5] The Board's notice of appearance was filed on August 12, 2011, and its motion to dismiss on September 9, 2011.

party's notice of appearance. This statute plainly requires a motion on this precise topic, and plainly requires that it be filed within 20 days of the notice of appearance.

¶21 The Board does not dispute this interpretation of WIS. STAT. § 227.56(3). Instead, the Board relies on WIS. STAT. § 802.02(3) for the proposition that the Board was not required to raise the defense again in its motion to dismiss because that statute provides: "If an affirmative defense permitted to be raised by motion under s. 802.06(2) is so raised, it need not be set forth in a subsequent pleading."

¶22 We conclude that WIS. STAT. § 227.56(3) is controlling because it is a more specific statute. Specific statutes govern over general statutes. ***Gottsacker Real Estate Co. v. DOT***, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984) ("[T]he general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute."). Moreover, civil procedure statutes may apply to judicial review under WIS. STAT. ch. 227, but only where no conflict arises between the two. ***State ex rel. Town of Delavan v. Circuit Court for Walworth Cnty.***, 167 Wis. 2d 719, 731, 482 N.W.2d 899 (1992) ("[V]arious civil procedure statutes apply to ch. 227 judicial reviews as long as there is no conflict between the civil procedure statute and ch. 227.").

¶23 Because we conclude that WIS. STAT. § 227.56(3) is controlling, the Board did not timely file its motion to dismiss on the grounds that Mailen was not a person aggrieved by its decision, and we need not reach the merits of that issue.

## *Conclusion*

¶24 Based on the arguments before us, we conclude that the Board's letter was a final order and that the motion to dismiss on the basis that Mailen was not an aggrieved party was not timely filed. We remand to the circuit court to review the Board's decision to close Mailen's complaint.

*By the Court.*—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.