

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 24, 1995

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

NOTICE

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

No. 95-0522

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JERRY LU EPSTEIN,

Petitioner-Respondent,

v.

**JOHN T. BENSON, STATE SUPERINTENDENT OF
PUBLIC INSTRUCTION, IN HIS OFFICIAL CAPACITY,**

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL P. SULLIVAN, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. John T. Benson, State Superintendent of Public Instruction, appeals from an order of the circuit court reversing his administrative decision to revoke Jerry Lu Epstein's teaching licenses. Benson claims the circuit court erred in concluding that he violated §§ 227.46(4) and 227.46(6), STATS. Because Benson's conduct in this case clearly violated these statutory dictates, we affirm the circuit court order and remand to the circuit court with directions to remand to the administrative forum for further proceedings.

I. BACKGROUND

This case involves a school teacher, Epstein, whose teaching licenses were revoked in the aftermath of criminal charges that were filed against her relating to a shooting incident. On June 30, 1992, Epstein shot and killed her former son-in-law when he made threats against the life of her daughter and grandchildren while backing up his automobile toward a parked car with the children in the rear seat and her daughter partially in the car. Epstein had access to a loaded gun because she was carrying it in her purse. She said the gun was in her purse because she was going to target practice later that day. She kept the gun in her home for protection and only carried it with her in her purse when going to target practice. Epstein was acquitted of all criminal charges arising out of this incident with the exception of a carrying a concealed weapon charge.

In April 1993, the Department of Public Instruction issued a notice of probable cause and intent to revoke Epstein's teaching licenses. A three-day hearing was held before hearing examiner Dr. Julie Underwood, Esq. Superintendent Benson did not attend any portion of the hearing. The Department was represented by Attorney Kathleen Kalashian. The hearing examiner issued her decision in January 1994, finding that the Department had not proven by clear and convincing evidence that Epstein had committed an immoral act and that Epstein's actions in this shooting incident did not have a nexus to, or endanger, the health, welfare, education or safety of any pupil.¹

Kalashian filed objections to the hearing examiner's decision and submitted alternate findings of fact and conclusions of law recommending that Epstein's teaching licenses be revoked. In February 1994, Benson summarily reversed the hearing examiner's decision and adopted Kalashian's alternative conclusions and decision. He neither gave Epstein an opportunity to object to this new decision nor did he set forth any explanation for his departure from the hearing examiner's decision. Epstein filed a Chapter 227, STATS., appeal.

¹ Wisconsin statutes provide that a teacher's license may be revoked if he/she engaged in immoral conduct and such conduct "endangers the health, safety, welfare or education of any pupil." See §§ 115.31(1)(c) and 115.31(2), STATS.

The circuit court reversed Benson's decision because of his failure to comply with certain statutory requirements. Benson now appeals.

II. DISCUSSION

Benson argues that the trial court's analysis of the statutory provisions at issue was incorrect and that an independent statutory analysis reveals that he did not violate any statutory provisions in issuing his final decision. Epstein argues that the plain language of these statutory provisions required Benson to follow certain procedures, which he did not. In reviewing a circuit court's ruling on an administrative decision, we apply the same standard and scope of review as that which the trial court employed when it reviewed the agency's decision. *Barakat v. DHSS*, 191 Wis.2d 770, 778, 530 N.W.2d 392, 395 (Ct. App. 1995). Our standard of review under Chapter 227, STATS., is governed by § 227.57, STATS. The subsections of § 227.57 delineate the specific scope of review depending on the issues raised. The subsection applicable to the instant case is § 227.57(4), STATS., which provides that “[t]he court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.” In order to determine whether any procedural violations occurred, we must analyze the statutes involved. Statutory analysis presents a legal issue that we review *de novo*. *L & W Constr. Co., Inc. v. DOR*, 149 Wis.2d 684, 688-89, 439 N.W.2d 619, 620 (Ct. App. 1989).

The statutes at issue are §§ 227.46(4) and (6), STATS., which provide in pertinent part:

(4) [I]n any contested case, if a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposed decision is served upon the parties and an opportunity is afforded to each party adversely affected to file objections and present briefs or oral

argument to the officials who are to render the decision.

....

(6) The functions of persons presiding at a hearing or participating in proposed or final decisions shall be performed in an impartial manner.

The procedures required by these statutes are clear and unambiguous and, therefore, must be applied as written. See *Ball v. District No. 4 Area Bd.*, 117 Wis.2d 529, 538, 345 N.W.2d 389, 394 (1984). Although we review this case without deference to the circuit court's decision, we agree with the circuit's court's statutory analysis. Accordingly, we adopt the following portion of its decision as our own:

The petitioner states that since Attorney Kalashian was the person who reviewed the record and prepared the Superintendent's decision, that decision violates subsection (6) of §227.46. That is because as the lawyer who presented the Department's case against Epstein, Kalashian can hardly be a person performing in an "impartial manner." I agree. Kalashian's position in this matter was clearly adversarial. At Epstein's hearing, she presented evidence on behalf of the Department of Public Instruction, a body that had informed petitioner it was considering revoking her teaching licenses. Kalashian took the Department's position (license revocation) when filing a proposed decision and order. She simply was not performing in [an] impartial manner.

Nor should she have been. Attorney Kalashian was merely doing her job. What Chapter 227.46(6) requires is that the *decision-maker and those participating in the proposed or final decision* act impartially. Therefore, since Kalashian was, in effect, the DPI's prosecutor at Epstein's hearing, she could

not then be the person [who] review[ed] the record and submit[ed] a proposed decision. The plain language of the statute requires that someone other than an advocate at the hearing prepare the proposed decision. Therefore, it was for the Superintendent to either review the record himself or assign some other - impartial -person in his office to do it for him and advise him on the matter. A proposed decision - if adverse to Epstein - should then have been served upon her pursuant to §227.46(4) so she could react to it and argue her case to the person who would render the decision, presumably Benson.

The respondent argues that such a literal reading of Chapter 227 is inappropriate and that there was substantial compliance with the intent of the law. He further argues that it is an unreasonable burden on him to review the voluminous records in each case he is to decide. The answer to the first argument of the Superintendent is contained in the previous paragraph. As to his second argument, §227.46 does not require him *personally* to review all the records in all the cases he must decide, only that *some impartial person* read the record and prepare the proposed decision.... The case must, therefore, be remanded for compliance with Chapter 227 of the statutes and the preparation and filing of new documents bringing this administrative hearing to conclusion.

(Emphasis in circuit court's decision).

We add to the circuit court's analysis only to address additional arguments raised by Benson. First, Benson contends that § 227.46(4), STATS., does not apply to this case, but rather § 227.46(2), STATS., applies. We do not agree. The introductory language of § 227.46(4) – “in any contested case” – allows the application of this subsection to the instant case because it was contested. Therefore, Benson was required to serve his “proposed decision” on

Epstein and afford her the opportunity to object and present briefs or oral argument.

Second, Benson contends that the impartiality requirement of § 227.46(6), STATS., was not violated when Kalashian submitted her own findings, conclusions and decision. We agree. Kalashian was free to submit such proposals. The violation occurred, however, when Benson adopted Kalashian's suggestions *in toto* without examining the record. Thus, the decision, in essence, was Kalashian's decision because Benson adopted her position without having any independent knowledge of the particular circumstances. As a result, the decision was not an impartial one.

In sum, we agree that material errors in procedure occurred when Benson did not comply with §§ 227.46(4) and (6), STATS. Therefore, in accord with § 227.57(4), STATS., we remand this case to the circuit court with directions to remand it to the administrative forum to correct the statutory violations that occurred.²

By the Court.—Order affirmed and cause remanded with directions.

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

² We acknowledge Epstein's request to decide the merits of her claim. Unfortunately, our scope of review precludes us from addressing the substantive issues at this time. *See* § 227.57, STATS.