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DISTRICT IV

July 7, 2014

To:

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You are hereby notified that the Court has entered the following opinion and order:

2013AP758

Zhengnan Shi v. Richard J. Telfer (L.C. #2013CV23)

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

Zhengnan Shi appeals a circuit court order denying his motion for reconsideration of a prior order dismissing his petition for judicial review of a decision made by the chancellor of the University of Wisconsin-Whitewater. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm. On today's date, we also issue an order in a related case, appeal number 2013AP576.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Shi, a non-tenured, tenure track faculty member at the University of Wisconsin-Whitewater, received notification that his contract as a faculty member was not being renewed and that he would not be reappointed. The decision was conveyed to Shi in a letter dated May 4, 2012, from the chancellor, Richard Telfer. The letter informed Shi that he had ten days from receipt of the decision to file a request for reconsideration. Shi did file a request for reconsideration and, in a letter to Shi dated June 28, 2012, Telfer reaffirmed the decision not to reappoint Shi as a tenure-track faculty member.

After Shi received Telfer's letter of June 28, 2012, Shi emailed Telfer to request a "formal faculty panel" for an appeal of the chancellor's decision. Shi received an email on December 10, 2012, from the university's legal counsel stating that "because this matter is in litigation there will be no further action taken at UW-Whitewater regarding your request for further appeals of the non-renewal decision."

On January 3, 2013, Shi filed a petition for judicial review in the circuit court. The court dismissed the case on the basis that it lacked competency to proceed because Shi had failed to file and serve the petition for review within thirty days of personal service or mailing of the final agency decision,² as required under WIS. STAT. § 227.53(1)(a)2m. Shi filed a motion for reconsideration based on "new evidence" and, in an order dated February 20, 2013, the circuit court denied the motion. Shi now appeals.

² Under WIS. STAT. § 227.01(1), an agency "means a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer."

On appeal, Shi argues that his petition for judicial review was timely. He asserts that it was unclear from Telfer's June 28, 2012 letter whether it was a final decision and that it was not clear until after he received the December 10, 2012 email from the university's counsel that there would be no further action on behalf of UW-Whitewater. We reject Shi's argument that it was unclear from Telfer's June 28, 2012 letter that the letter represented the final decision on the matter of Shi's non-renewal and non-reappointment. The letter states on its face that the decision is "final" and that Shi had "exhausted any further appeal to a faculty panel." Given our conclusion that the June 28, 2012 letter represents the final decision, the question then becomes when the time to appeal that decision had run. WISCONSIN STAT. § 227.53(1)(a)2m. provides, "Petitions for review of cases other than contested cases shall be served and filed within 30 days after personal service or mailing of the decision by the agency." In contested cases, the time for appeal does not begin to run until the agency has complied with the service requirements of WIS. STAT. § 227.48.

A "contested case" is "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order." WIS. STAT. § 227.01(3). In this case, no hearing was required by law, nor are we persuaded that there was a substantial interest involved. Shi requested and received a hearing. However, the Board Approved Rules for UW-Whitewater, which are included in relevant part in the appellant's appendix, provide only that a faculty member has a *right to request* that a panel be assembled to hear an appeal, not that a hearing is required. Additionally, it is within the nature of a non-tenured faculty position that employment is temporary and that there is no due process right to a renewed contract. *See, e.g., Bd. of Regents of State Colleges v. Roth*, 408 U.S.

564, 578 (1972) (non-tenured assistant professor in the Wisconsin university system had an “abstract concern” in being rehired, but not a property interest sufficient to invoke due process requirements).

Having concluded that Shi’s case is not a contested case, as that term is defined in WIS. STAT. § 227.01(3), it is clear that the thirty-day time limit in WIS. STAT. § 227.53(1)(a)2m. for filing a petition for judicial review applies. Thus, Shi had thirty days after personal service or mailing of the June 28, 2012 decision to file his petition. There is no dispute that the decision was mailed to Shi on June 28, 2012. The petition for judicial review filed by Shi on January 3, 2013 was, therefore, untimely under § 227.53(1)(a)2m. Shi’s failure to comply with the statutory time limit for judicial review resulted in the loss of the circuit court’s competency to proceed. *See Currier v. Wisconsin Dep’t of Revenue*, 2006 WI App 12, ¶6 n.2, 288 Wis. 2d 693, 709 N.W.2d 520. Therefore, the circuit court properly dismissed the petition for judicial review.

Shi argues that the circuit court should have reconsidered its order based on “new evidence.” “To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact.” *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. However, the evidence Shi presented to the court as “new” were emails from Richard Schauer of the Academic Freedom and Tenure Committee to the chair of the faculty senate, on which Shi was copied. Even if Shi had been able to carry his burden of showing that the Schauer emails were newly discovered evidence, despite the fact that he had been copied on them, Shi fails to explain why the emails would have mattered. The Schauer emails were sent in August of 2012 and posed questions about prior correspondence from the

chair. The fact that Schauer and Shi continued to send emails to various members of UW-Whitewater faculty after receiving the final decision of June 28, 2012, does not change the fact that the decision stated on its face that it was final. Thus, we conclude that Shi's motion for reconsideration was properly denied.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals