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**DISTRICT II**

January 8, 2020

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

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2018AP2210

Desmond Barker v. Racine County Human Services Dept.  
(L.C. #2018CV1433)

Before Reilly, P.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Desmond Barker appeals from an order of the circuit court dismissing this case for failure to timely file a response. Barker argues that the circuit court did not reasonably exercise its discretion as the court provided no explanation for its order. 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 (2017-18).<sup>1</sup> We affirm the order of the circuit court.

An Initial Determination of Child Abuse and/or Neglect was sent from Racine County Human Services Department (the Department) to Barker on April 23, 2018, based on an allegation that Barker used a belt to discipline two children, presumably in his care, who sustained bruising to the shoulder and the side of the head, respectively. *See* WIS. STAT. § 48.981(3)(c)4. Barker had the opportunity, but he did not request an agency review of the initial determination. *See* WIS. ADMIN. CODE § DCF 40.03 (Oct. 28, 2019). The Department then sent out a Notice of Final Determination of Child Abuse and/or Neglect and Right to Request an Appeal by certified mail in this case on May 14, 2018.<sup>2</sup> The notice provided that Barker was required to respond within ten days of the date of the notice, or May 24, 2018, to request an appeal hearing. *See* § 48.981(3)(c)5p. Barker, pro se, submitted his request for an appeal hearing on May 31, 2018, noting that he “was told that this case would be closed and there were no findings of child abuse.”

The administrative law judge (ALJ) determined it lacked jurisdiction and dismissed the appeal as untimely, noting that it had no statutory authority to extend the appeal deadline. *See Village of Silver Lake v. DOR*, 87 Wis. 2d 463, 468-69, 275 N.W.2d 119 (Ct. App. 1978); *see also Schiller v. DILHR*, 103 Wis. 2d 353, 355, 309 N.W.2d 5 (Ct. App. 1981). Barker had thirty

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> Barker signed for the certified mailing of the notice on May 21, 2018. Barker does not argue that the ten-day requirement should begin the date that he signed for the certified mail. Additionally, we note that the applicable statutory provisions provide that the ten-day time period begins on the date of the notice and notice by certified mail is not required. *See* WIS. STAT. § 48.981(3)(c)5m., 5p.; WIS. ADMIN. CODE § DCF 40.04(1), (3)(b)1. (Oct. 28, 2019).

days to appeal to the circuit court, or August 15, 2018. *See* WIS. STAT. §§ 227.52, 227.53. Barker, now represented by counsel, filed an appeal to the circuit court on August 16, 2018, and the Department filed a motion to dismiss, arguing that the appeal was late and that Barker did not provide any argument for why the ALJ's decision should be overturned. The circuit court determined, however, that the ALJ's decision was mailed, pursuant to WIS. STAT. § 227.48, on July 16, 2018 (but e-mailed on July 15, 2018), making Barker's appeal timely. The circuit court provided Barker ten additional days to address the merits pertaining to why the ALJ's decision was erroneous. It was not until November 9, 2018, or thirteen days after the deadline had passed, that Barker's attorney requested an extension, citing that he had "been without an associate attorney" and "do[es] not want to submit a hurried, incomplete response." The court denied the request and denied Barker's subsequent motion to reconsider.

We begin by noting that the briefing from both parties in this case is woefully inadequate. Further, the record is incomplete. *See State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 ("It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" (citation omitted)). A number of the documents necessary for our review of the case can only be found in the appendix to Barker's brief, and the appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

On appeal, Barker argues that the circuit court did not reasonably exercise its discretion, noting only that the court provided no explanation for its order dismissing the appeal. This argument is of no import as on appeal we may search the record to determine if it supports the circuit court's exercise of discretion. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1,

612 N.W.2d 737. More pertinent, however, is that this is an appeal under WIS. STAT. § 227.58 involving an agency decision. “When a party appeals a circuit court order reviewing a decision made by an administrative agency, we review the agency’s decision, rather than that of the circuit court.” *Tarrant v. DHS*, 2019 WI App 45, ¶4, 388 Wis. 2d 461, 933 N.W.2d 145 (citation omitted); *see also Myers v. DNR*, 2019 WI 5, ¶17, 385 Wis. 2d 176, 922 N.W.2d 47. As our review is of the agency decision, whether the circuit court properly dismissed this appeal is immaterial: we review the agency’s decision.

We conclude that the ALJ appropriately granted the Department’s motion to dismiss after finding that Barker’s request for an appeal of the final determination was untimely. By statute, to receive a contested case hearing, “the person must send to the department a written request for a hearing under [WIS. STAT. §] 227.44 within 10 days after the date of the notice ... of the determination.” WIS. STAT. § 48.981(3)(c)5p. Notice of the final determination was sent to Barker by certified mail on May 14, 2018, and his appeal request was received May 31, 2018, seventeen days later. The ALJ properly concluded that Barker’s request was untimely and properly granted the Department’s motion to dismiss.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*