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DISTRICT II

December 22, 2021

To:

Hon. Richard J. Nuss
Circuit Court Judge
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County
Electronic Notice

Daniel P. Bach
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Jody J. Schmelzer
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Kenny Tilleman
829 Bechaud Ave.
North Fond du Lac, WI 54937

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

2020AP2082

Timothy E. Jochman v. State of Wisconsin Employment Relations
Commission (L.C. #2020CV239)

Before Gundrum, P.J., Reilly and Grogan, 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).

Timothy E. Jochman appeals from an order granting a motion to dismiss his case for lack of competency. He contends that the movants, State of Wisconsin Employment Relations Commission (WERC) and Department of Corrections (DOC), forfeited their right to object to the circuit court's competency. 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 (2019-20).¹ We reverse and remand for further proceedings.

On January 28, 2020, Jochman was discharged from his employment with DOC for failing to perform assigned duties. He filed an appeal with WERC, complaining that he had been discharged without just cause. WERC agreed and, in a decision and order of July 13, 2020, directed DOC to modify Jochman's discipline to a demotion and reinstatement without back pay.

Two days later, Kenny Tilleman, a non-attorney who was Jochman's power of attorney, signed and filed a petition for judicial review on behalf of Jochman. WERC and DOC filed notices of appearance and statements of position in response. They asked that the decision and order of WERC be affirmed.

The circuit court initially dismissed the petition for judicial review for failing to state a claim for relief. However, it subsequently vacated that decision based on a letter from DOC citing authority that a petition may not be dismissed for failing to state grounds for relief unless the petitioner had notice and an opportunity to request leave to amend it.

On August 26, 2020, Jochman, now represented by an attorney, successfully moved the circuit court for leave to file an amended petition for judicial review. WERC and DOC did not object to the motion and filed amended statements of position in response. Again, they asked that the decision and order of WERC be affirmed. They did not challenge the circuit court's competency to proceed.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On September 1, 2020, the circuit court established a schedule for briefing the merits of the amended petition. This was done pursuant to the parties' agreement.

Ten days later, WERC and DOC moved to dismiss the case. They argued that the circuit court lacked competency to proceed because the case was commenced by a non-attorney (Tilleman) on behalf of Jochman, contrary to WIS. STAT. § 802.05(1).² After briefing on the matter, the circuit court granted the motion. This appeal follows.

Competency refers to the power of a court to exercise subject matter jurisdiction in a given case. *State v. Smith*, 2005 WI 104, ¶18, 283 Wis. 2d 57, 699 N.W.2d 508. A court may lose competency to proceed in a case if statutory procedures are not followed. *See id.*

Because a lack of competency is a non-jurisdictional defect, an objection to a court's competency may be forfeited if not timely raised. *City of Eau Claire v. Booth*, 2016 WI 65, ¶11, 370 Wis. 2d 595, 882 N.W.2d 738. Whether forfeiture applies is a question of law that we review independently. *See id.*, ¶6.

Here, we agree with Jochman that WERC and DOC forfeited their right to object to the circuit court's competency. They did so by (1) failing to object to Jochman's motion to file an amended petition for judicial review, (2) filing responses to the amended petition that did not challenge the circuit court's competency to proceed, and (3) agreeing to a scheduling order for briefing on the merits of the amended petition. Given these actions, the circuit court should have

² WISCONSIN STAT. § 802.05(1) provides in part, "Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." Although Jochman's amended petition was signed by an attorney, it was filed outside the thirty-day time period for seeking judicial review. *See* WIS. STAT. § 227.53(1)(a)2.

deemed their competency objection forfeited and addressed the merits of the amended petition. Because it did not, we reverse and remand for further proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for further proceedings.

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

Sheila T. Reiff
Clerk of Court of Appeals