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DISTRICT I

April 25, 2023

To:

Hon. Lindsey Canonie Grady
Circuit Court Judge
Electronic Notice

Basil M. Loeb
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Appeals Division
Electronic Notice

Beauregard William Patterson
Electronic Notice

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

2021AP1789

Nicole Flenorl v. Wisconsin Department of Children and Families
(L.C. # 2020CV5627)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Nicole Flenorl appeals from an order of the circuit court dismissing her petition for judicial review of a decision by the Wisconsin Department of Children and Families (DCF) to revoke her home-based childcare license. The petition was dismissed on the grounds that Flenorl failed to timely serve DCF with the petition. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21(1) (2021-22). We summarily affirm.

In August 2015, Flenorl was granted a license to operate a childcare center for up to eight children. She received payments for the center from the Wisconsin Shares program, which subsidizes childcare for low-income parents.

After “monitoring visits” to Flenorl’s childcare center in September 2018 revealed violations relating to inaccurate attendance records, DCF launched an investigation of the center. DCF staff found on nine occasions in 2018 and 2019 that they were unable to gain access to the center during its regular hours of operation. Additionally, video surveillance of the center was conducted to track the number of children who entered and exited the center, to compare with the number of students shown in the attendance records. Several discrepancies with those numbers were found.

Flenorl had been paid Wisconsin Shares funds based on the number of children that were supposed to be at the center during those times. Therefore, in October 2019, DCF refused to issue Flenorl payments under the Wisconsin Shares program, and sought to recover an overpayment of \$280.67. DCF ultimately revoked Flenorl’s childcare license in November 2019.

Flenorl requested review of that decision. A hearing was held in January and February, 2020, before an administrative law judge (ALJ). The ALJ found that DCF had provided sufficient evidence to support its violation claims against Flenorl, that Flenorl had provided only “scant evidence” to rebut those claims, and that “the majority” of her rebuttal arguments “were not supported by credible evidence.” Therefore, the ALJ concluded that DCF’s actions—refusing to issue Flenorl the Wisconsin Shares payments, seeking recovery of the overpayment, and revoking her childcare license—were reasonable and proper.

That decision was issued on July 6, 2020. Flenorl timely filed a request for a rehearing of that decision, but it was denied on August 24, 2020. That denial order was sent on that date via electronic mail to the parties, including Flenorl’s counsel.

Subsequently, Flenorl—who at that point was acting *pro se*—filed a petition with the circuit court for judicial review on September 24, 2020, and sent the petition to DCF via certified mail on that same date. However, DCF filed a motion to dismiss the petition on the grounds that the petition had not been timely served pursuant to WIS. STAT. § 227.53(1)(a)2. (2019-20)¹ which requires a petition for judicial review to be filed and served within thirty days after the service of the final order issued by DCF. Accordingly, the thirty days commenced when DCF sent the order denying rehearing, with the deadline for filing a petition for review being September 23, 2020. *See id.* DCF further asserted that it never received the petition, as its staff was unable to locate the certified correspondence, nor was there a record of any certified mail from Flenorl being received at DCF.

Flenorl conceded that she filed and served the petition one day past the statutory deadline. However, she claimed she was entitled to relief under WIS. STAT. § 801.15(1)(b), which allows for the last day of a time period prescribed by the statutes to be excluded from computation if it falls on “a day the clerk of courts office is closed.” *See id.* Flenorl explained that she had attempted to file the petition at the Milwaukee County Courthouse on September 23, 2020, but that it was closed; at that time, the courthouse had limited hours, from 10:00 a.m. until 3:00 p.m., due to the pandemic. The circuit court rejected this argument, noting that the

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

courthouse hours on that date were “not an unexpected or crisis closure,” and that relief for an extension of time for filing a petition is not available.

Flenorl further argued that DCF’s service of its final order did not strictly comply with the statutory requirements, because WIS. STAT. § 227.48(1) requires that agency orders be served either in person or by mail, and in this case the final order was emailed to Flenorl’s counsel. The circuit court rejected this argument as well, finding that email delivery was “sufficient to confer service” of DCF’s decision under ch. 227.

As a result, the circuit court granted DCF’s motion to dismiss. Flenorl appeals.

Construing the relevant statutes to determine whether the circuit court’s jurisdiction was invoked in a WIS. STAT. ch. 227 proceeding presents a question of law that we review *de novo*. See *Milwaukee Cnty. v. LIRC*, 142 Wis. 2d 307, 310, 418 N.W.2d 35 (Ct. App. 1987). We begin with the thirty-day time limitation of WIS. STAT. § 227.53(1)(a)2., because the “failure to comply with the mandatory time limitation results in the loss of the circuit court’s competency to proceed and the petition must be dismissed.” See *Wisconsin Power & Light Co. v. Public Serv. Comm’n of Wis.*, 2006 WI App 221, ¶11, 296 Wis. 2d 705, 725 N.W.2d 423.

Once that timeline was triggered—when DCF sent its order denying Flenorl’s request for a rehearing—“strict compliance” with the statutory deadline was required. *Id.* In fact, this court has recognized that “[t]o dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending.” *Currier v. DOR*, 2006 WI App 12, ¶23, 288 Wis. 2d 693, 709 N.W.2d 520 (citation omitted).

As noted above, Flenorl concedes that she failed to comply with the thirty-day statutory deadline for serving and filing her petition, but maintains that she is entitled to relief from this requirement pursuant to WIS. STAT. § 801.15(1)(b) because the clerk of court’s office was closed when she got there on September 23, 2020. However, even if we were to set aside the strict compliance rules for filing a petition, the fact is the clerk’s office was *not* closed that day; rather, the standard hours of operation at that time were limited to 10:00 a.m. to 3:00 p.m., due to the pandemic. It was Flenorl’s responsibility to ensure that the petition was filed within the statutory time frame. *See* WIS. STAT. § 227.53(1)(a)2.; *Currier*, 288 Wis. 2d 693, ¶20. Therefore, it was incumbent on her to confirm the office hours for the clerk of courts, given that closures and limited hours were the norm for government offices and other businesses during that time—especially since her initial filing attempt was made on the last possible day to file her petition within the statutory deadline.

We will not alter the plain-language of WIS. STAT. § 801.15(1)(b) to accommodate Flenorl’s failure to conduct due diligence in order to timely file her petition in accordance with the strict time constraints of WIS. STAT. § 227.53(1)(a)2. *See Fond Du Lac Cnty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989) (“One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.”). Therefore, Flenorl would not be entitled to relief under § 801.15(1)(b).

Furthermore, service of the petition on DCF, as is also required within the thirty-day time frame of WIS. STAT. § 227.53(1)(a)2., was also not timely accomplished. Again, Flenorl concedes that she did not mail the petition to DCF until September 24, 2020—outside of the thirty-day deadline for service. *See id.* Furthermore, DCF submitted evidence that there is no

record the petition was ever received at its office, and also noted that the proof of mailing provided by Flenorl “clearly shows” that the address for DCF was “altered at some point[.]”

Additionally, Flenorl’s argument that DCF did not comply with the service requirements of WIS. STAT. § 227.48(1) when it emailed its final order to her counsel also fails under the rules of statutory construction. That subsection requires either personal service of the order, or “mailing a copy to each party to the proceedings or to the party’s attorney of record.” *Id.* There is no verbage in the statute that requires an order be sent through the United States Postal Service, as asserted by Flenorl. See *Fond Du Lac Cnty.*, 149 Wis. 2d at 334. In fact, the “mailing” requirement of § 227.48(1) can be compared and contrasted to the service requirement of WIS. STAT. § 227.53(1)(a), which specifically mandates service “by certified mail upon the agency[.]” See *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (explaining that statutory language should be “interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results”).

Furthermore, DCF presented evidence that it began offering electronic-only services on July 1, 2017 for WIS. STAT. ch. 227 cases, with the consent of the party or his or her counsel. Flenorl’s counsel for the DCF proceedings consented to electronic service, and it is undisputed that DCF’s final order was sent via email to counsel on August 24, 2020.

Therefore, we conclude that Flenorl failed to comply with the filing and service deadlines mandated in WIS. STAT. § 227.53(1)(a). As a result, the circuit court did not have competency to proceed in this matter. See *Wisconsin Power & Light Co.*, 296 Wis. 2d 705, ¶11. We therefore affirm its order dismissing Flenorl’s petition.

Therefore, upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2021-22).

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

Sheila T. Reiff
Clerk of Court of Appeals