

ISSUE PRESENTED

Wis. Stat. § 227.53(1)(a)1 and 2 require that a petition for judicial review be served upon the agency, either personally or by *certified* mail, within 30 days after service of the agency's decision upon the parties. Absent strict compliance with the statutory requirements, the reviewing court is deprived of competency to proceed and must dismiss the proceeding. *See Currier v. Wis. Dep't of Revenue*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 529. In this case, Henige served his petition upon the Board by priority mail, but not personally or by certified mail. Is this court deprived of competency to proceed because Henige failed to timely serve his petition upon the Board either personally or by certified mail?

STATEMENT OF THE CASE

On February 12, 2018, in accordance with Wis. Stat. § 227.48(1), the Board mailed a copy of its final decision and order in *In the Matter of the Recommended Dismissal of Associate Professor Christopher C. Henige, a Tenured Faculty Member at UW-Whitewater*, to Christopher Henige. *See* Affidavit of David C. Rice, ¶ 2, Ex. 1. The order states in pertinent part: "This decision may be judicially reviewed by filing a petition for review in the appropriate circuit court, as specified in Wis. Stat. section 227.53(1)(a)3 . . . within 30 days of the mailing of this order, which must name as a party respondent the Board of Regents of the University of Wisconsin System." *See* Affidavit of Rice, ¶ 3, Ex. 1.

On March 12, 2012, Henige filed a petition for review with the Clerk of Circuit Court for Walworth. The petition states that is made “pursuant to Wis. Stat. §§ 227.52 and 227.53.” *See* Affidavit of Rice, ¶ 4, Ex. 2.

On March 5, 2018, Henige served a copy of his petition upon the Board by priority mail. *See* Affidavit of Rice, ¶ 5, Ex. 3. Henige enclosed a cover letter with the petition he served upon the Board. The cover letter states that he was enclosing the petition “pursuant to Wis. Stat. 227.53(1)(a)1.” *See* Affidavit of Rice, ¶ 6, Ex. 4.

Henige did not serve a copy of his petition upon the Board, either personally or by certified mail, within 30 days after the Board served the decision and order upon him. *See* Affidavit of Rice, ¶ 7.

ARGUMENT

THE COURT LACKS COMPETENCY TO PROCEED BECAUSE HENIGE FAILED TO TIMELY SERVE HIS PETITION UPON THE BOARD EITHER PERSONALLY OR BY CERTIFIED MAIL.

The right to judicial review of the decisions of administrative agencies is dependent upon strict compliance with the requirements of Wis. Stat. § 227.53(1). *See Cudahy v. Wis. Dept. of Revenue*, 66 Wis. 2d 253, 259, 224 N.W.2d 570 (1974). Absent strict compliance with the statutory requirements, the reviewing court is deprived of competency to proceed and must dismiss the proceeding. *See Currier*, 2006 WI App 12, ¶ 23. Although dismissal may seem harsh, statutory requirements must be unbending if they are to be meaningful. *Id.*

Wis. Stat. § 227.53(1)(a)1 and 2 require that a petition for judicial review be served upon the agency, either personally or by *certified* mail, within 30 days after service of the agency's decision upon the parties. An agency's decision may be served by mailing a copy to a party to the administrative proceeding. *See* Wis. Stat. § 227.48(1).¹ The circuit court is without authority to extend the time limits for serving a petition for review. *See Cudahy*, 66 Wis. 2d at 262-63.

Service by regular mail does not satisfy the statutory requirement of certified mail. *See County of Milwaukee v. LIRC*, 142 Wis. 2d 307, 314, 418 N.W.2d 35 (Ct. App. 1987); *cf. Sorenson v. Batchelder*, 2016 WI 34, ¶¶ 3, 46, 368 Wis. 2d 140, 885 N.W.2d 362; *519 Corp. v. Department of Transportation*, 92 Wis. 2d 276, 278-288, 284 N.W.2d 643 (1979). Although registered mail sometimes may be used as a substitute for certified mail, *see Patterson v. Bd. of Regents*, 103 Wis. 2d 358, 309 N.W.2d (Ct. App. 1981), *cf. Trojan v. Bd. of Regents*, 104 Wis. 2d 277, 311 N.W.2d 586 (1981), that is largely because Wis. Stat. § 990.001(13) permits it and because registered mail provides even greater proof of service than certified mail. Priority mail has never been recognized as a permissible substitute for certified mail.

¹ Wis. Stat. § 227.48(2) provides that the time for filing a petition for judicial review does not begin to run until an agency provides notice of (1) the right to petition for judicial review of an adverse decision, (2) the time allowed for filing a petition, and (3) the identification of the party to be named as respondent. It does require notice of the manner of serving a petition for review. In this case, the Board's order fully complies with the requirements of Wis. Stat. § 227.48(2). It provides notice of the right to judicial review, the time allowed for filing the petition, and the identification of the party to be named as respondent.

In this case, it is undisputed that Henige served his petition upon the Board by priority mail – not personally or by certified mail. Henige may argue that the Board was not prejudiced by his use of priority mail, but “the test is not whether the method of service was reasonable or whether the agency was prejudiced, but whether the service strictly complied with statutory requirements.” *See Weisensel v. Wis. Dep’t of Health and Social Services*, 179 Wis. 2d 637, 644, 508 N.W.2d 33 (Ct. App. 1993). Since Henige did not timely serve his petition upon the Board, either personally or by certified mail, this court lacks competency to proceed. Accordingly, the court must dismiss this proceeding.

CONCLUSION

For the reasons stated in this brief, the Board respectfully submits that the court lacks competency to proceeding. The Board respectfully requests that the court enter a final order dismissing this action.

Dated at Madison, Wisconsin, this 30th day of March, 2018.

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