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March 9, 1999

JOINT COMMITTEE FOR REVIEW OF
ADMINISTRATIVE LAW
c/o Senator Judith Robson
15 S State Capital
P O Box 7882
Madison, Wisconsin 53707-7(

c/o Assemblyman Glenn Grothman
15 N. State Capital
P O Box 8952
Madison, Wisconsin 53708-84(

Dear Senator and Assemblyman:

I am sending this letter with the enclosed to Senator Robson and am requesting that she please make a copy of all papers and send that copy to Assemblyman Glenn Grothman (x I simply do not have money to make copies for both.

The enclsed is self-explanatory. have propsoed new legislation to Representative Ourada who no loger works in that capacity. I have been told that I need a sponsor and am asking if either of you would agree to be the sponsor.

In addition to that which is prOopod, or in lieu of the proposed legislation, possibly a new rule under administrative procedure could be enacted which reads:

> 227.55. (xx) The agency is to file the certified record (or original) with the clerk of the circuit court in which the judical review will be conducted and to transmit a copy to the Petitiioenr.

Federal practice, especially in public aid cases, forwards a copy to the petitioenr, of the entire record when same is filed with the clerk of the district court.

I pray that the enclsoed is worthy of support.

Sincerely,

Libbie Pesek
Enc
cc; Assemblyman Glenn Grothman w/o enc.

December 16

October 1, 1998

Repr Tom Ourada
P O Box 8953
Madiosn, Wis. 53708

Re: Wisocnsin Statutes - Possible New Law
Cahptewr 227 Administrative Procedures
Chapter 801 Civil Procedures

Dear Repor Ourada:

Pursuant with my telcon fo September 29th with Loni, I am enclsoing my file on what I believe could support gorunds for proposing new legislation. I am also going to try to summarize my proposal herein.

Becuase I Have painful rheumatoid arthisits crippling my fingers and wrists, my typing if full of errors hwoever I beleive you can get the guist of what I am trying to present. I would appreicate your review.

CHAPTER 227 ADMINISTRATIVE PROCEDURES

The proposed legislation would cover procedures for judical review to be followed by the aprties, the clerks for the government agency werehin the record is kept and filed and the clerks of the circuit court(the reviewing court) and specifically concerns the adminsitrative record which is under review by the circuit court.

Preliminary statement

Actions and proceedings before a circuit court, municipal court, juvenille court, etc, are subject to review as a matter of right when the presiding judge enters a final order idsposing of the case/action. 808.03 Wis. Stats., and thus a aprty may appeal for review by an appeallate court.

Actions by an government agency and the administrative decision resulting from a requested hearing reviewign such action, such decision being made by the governemnt state department for whom the agency works and who assigned a hearing examienr (administrative law judge) to enter a decision, is also subject to review as a matter of right. 227.52 and 227.53 Wis. Stats., and thus an aggrieved aprty may appeal for judical rev iew by a circuit court.

Presumably these rights for such reviews are within the U.S. Const. Article XIV and Amend Articles I and IX; and/or Wis. Const. Articles I sections 1 and 21.

Wis. Const. Article I, Sec. 21:

Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

Many times the adminsitrative appeals have to do with actions affecting public aid with various kinds of public aid being defined/classified as "property".

Our legislature has enacted Chapter 808 Stats., concerning appeals from lower courts. Apparently for the smooth processing of appeals, jurisdiciton, and preservation and protection of parties rights in procedures, Chapter 809 rules of Appellate Procedures were developed and established by the Suprme Court, to be followed by the revieiwng appelalte court, all parties and the lower circuit court, Rules 809.01-809.85 Wis. Stats.

Our legislature has enacted Cahpter 227 Administrative procedure and Review concerning appeals as a result of government actions. Apparently for the smooth processing of appeals, jurisdiction and preservations and protection of aprties rights, Chapter 227 procedures are to be followed and were developed and enacted by our legislature with some modeled after the federal mdoel for state administrative procedures, 227.42-227.58Wis. Stats. These procedures are to be followed by the revieiwng circuitg court, all parties, and the agency who provided a hearing examienr who entered the adminsitrative decision under review, 227.52-227.57 (judical review). Apparently it is not feasible for each state circuit court, in its reviewing capacity of adminsitrative decision, to establish their ownindividual rules of procedures in judicla reviews and thus our legislature has attempted to establish uniform procedure in a judical review 227.52-227.57 Wis. Stats.

The Division of Hearings and Apooeals, which is the agency the government agency/department will use to assign hearing examienrs to decide "contested cases" (adminsitrative appeals) has also established and promulgated rules (allowed udner 227.43(1)(d)) known as Adminsitrative Code HA 1. As such is the caretaker of the adminsitrative reocrd and "files" materials, papers and documents etc. into the record, conducts quasi-judical proceedings and enters the decisiion affirming or altering the agency's actions on behalf of the "agency" referred to in Chpt 227.

I- Proposed Legislation - Establishing Uniform Rules of Procedure concerning the Record on JudicalReview (suggested wording)

(Patterned after 809.15 Wis. Stats.)

Stat.,Reference

227.55 Record on Judical Review

(1) Composition of Record. (a) The record in judicial review consists of the following unless the parties stipulate to the contrary:

1.	Paper by which administrative hearing or action was commenced;	227.42(1)
2.	denial of request for hearing;	227.42(2)

3.	Notice of petitoenr's ~~appeal~~ request for hearing to local government agency.	
4.	Government agency's required summary report.	
5.	Notice(s) of hearing(s).	227.44 HA1.06
6.	Application initiating government action.	227.44(6)(a)
7.	Pleadings, motins, intermediate rulings and exhibits and appendices thereto	227.44(6)(a)
8.	Evidence recieved or considered, stipulations, interrogratories, admissions	227.44(6)(b) 227.45 HA1.11 HA1.14
9.	A Statement of matters officially noted.	227.44(6)(c) 227.45
10.	Questions and offers of proof, objections and rulings thereon	227.44(6)(d) 227.45
11.	Any proposed findings or decisons and exemptions.	227.44(6)(e) 227.47
12.	Any decision, opinion or report by the agency or hearing examiner.	227.44(6)(f) 227.485, 227.47
13.	Petition for rehearing	227.49
14.	Order granting or deny8ing rehearing	227.49
15.	Exhibits material to the judical review whether or not received in evidence.	
16.	Any other paper or exhibit filed with Division of Hearings and Appeals/Agency requested by a party to be included in the record.	
17.	Transcripts of hearings	227.48(8) HA1.1
18.	Copy of Petition for Judical Review.	227.53(1)
19.	Certificate of agency.	227.55

(b). The agency may request by letter permission of the court to substitute a photocopy for the actual paper or exhibit filed in the trial court. (optional, see 227.55).

(2). Compliation and approval of the Record. The agency shall assemble the record in the order set forth in sub. (1)(a), identify by number or letter each paper, and prepare

a lsit of the numbrred or lettered papers. At least 10 days prior to the due date for filing the record in the court, the agency shall notify in writing each party appearing in the trial court that the record has been assembled and is available for inspection. The ~~xlxxk~~ agency shall include with the notice the lsit of the papers constituting the record.

(b) By stipulation of all parties to the review proceedings the record may be shortened by eliminating any portion thereof. Any party, other than the agency, refusing to stipulate to limit the record may be taxed by the court for the additional costs. (227.55)

(3) Defective Record. A party who believes the record, including the transcript of the stenographic or recorded hearing, is defective or does not accurately reflect what occured in the administrative review may move the agency or court in which the record is lcoated to correct the record. Motions under this subsection may be heard under s.807.13.

(b) the Cout may require or permit subsequent corrections or additions to the record when deemed desirable.(227.55)

(4) Transmittal of the Record. The agency shall transmit the record to the reviewing court within 30 days after service of the petition for review upon the agencyd, or within such further time as the court may allow. The agency shalsl transmit to the revieiwng court the original or a certified copy of the entire record of the proceedings in which the decision udner review was made, except as noted in sec. (2)(b). The clerk of the reviewing court shalsl notify the agency and all aprties appearing in the judical review of the date the record was filed. (227.53(2)). under sec 227.53(2)

(5) Agreed Statement in Lieu of Record. The aprties may file in the court wihtin the time prescribed by sub (4) an agreed statement of the case in lieu of the record on judical review. The statement msut:

> (a) Shwo how the issues presented by the judical review arose and were decided by the agency, and
>
> (b) Recite sufficient facts proved or sought to be proved as are essential to a resolution of the issues presented.

<u>Some grounds to justify new legislation</u>

1. HA1.16(1) states that if the Division (the Div of Hearings and Appeals) determines that an transcripts is necessary, ~~parties~~ copies shall be furnished to the parties upon payment of reasonable fee and request. A lsit of the record on judical review will alert a party that transcripts exist and where ordered by the other party.

   Upon such knowledge a copy can be ordered and the time limits for corrections under HA1.16(3) possibly met.

2. HA 1.17(2) allow reference to specific pages of the record. However, there is no statutory or administrative code provision for the pagination of the record to be made, the Div of Hearings and Appeals doe snot paginate the record. This proposed legislation would require pagination of the record for easy reference not only byxgh the parties, but also for the reviewing court.

3. 227x.55 requires the transmittal of a certified record. Alxthough the record when transmitted is being x certified as xxxxxx containing all of the documents etc entered into that particular record, I have experienced in no less than 4 cases wherein that is not sos I assume other have also.

   Many times, there are parts of another record, totally irrelevant to the particular record bieng reviewed sent along with the certified record for a case. Sometimes even transxcriptws that do not pertaian at all were sent and only by chance discovered as existing in the record.

   The receipt of items never submitted by a party to thet particular administrative appeal and/or belonging to a dfferent administrative case number altogether can not only be avoided with the passing of this legislation placing more attention by the clerk at the Divison of Hearings and Appeals as to what is and should be in the record, but also a listing of what is contained in the record <u>before</u> it is sent and such listing sent to the aprites would alert them and allow corection at a time before the record is xsent. It would even allow a correction but discovery of an error after the record has been snet to the review court if by some chance it was not discovered before the record was sent.

4. Many times, items have been omitted from the record and only disdcovered per chance. The Division of Hearings and appeals send a copy of the entire certified record to the Justice Department who will represent the State depa4tment/agency involved. they appear only to send a copy of their cover letter, transmitting the record to the circuit ocurt clerk (this is the time they forward a copy of their reocrd to the Justice Dept).

   Beleiving the reocrd to contain everything that was submitted since it is "certified" as being so, it is shocking to discover that many itmes have been omitted, and sometimes this discvoery appears after briefing and reference or supportive exhibits from what should be in the reocrd have been determined by the reviewing court not to exist.

   the progposed legislation wuould also prevent this with ample timexand for correction of the reocrd.

5. It should be noted that in appelalte proecudures, it appears to be the appelalnt's reasponsiblity to make sure that the record is complete and accurately reflects what happened at the circuit court. However, in administrative procedures that burden shifts to the government and thus the government appears to be the only person who knows for sure what is in the record, having a copy, while the opposing party does not.

The proposed legilation would allow the opposing party to know for sure what is contained in the record being sent to the revieiwng court.

6. In the past the assistant attorney general would send the pro se in forma pauperis xxxx petitiner (usually a pettioenr because of an affirmativon of denial of some form of public assistance and unable to obtain a pro buno lawyer) a copy of the tentrie certified record as he recieved it, or have the Divsion of Hearings and Apepasl send the aprty a copy.

   Inquiry to the assistant attorney general disclosed that they believed they were statutory duty to do so under 801.14 Wis. Stats. However, currently, a new "regime" will assistant attorney generals (in my cases at least) will no longer do this delcaring they have no stautuory duty to do so. A challenge to compell under 801.14 Wis. Stats. was not upheld by circuit court nor the court of appeals (see enclosed.)

   This thus requires the pro se informa pauepris to either pay a high exeroxing fee for an entire copy so that she and her adversary are equally advantaged, ot she must travel sometimes over 300 miles to view the record in the court conducting the review, when cost is also prohibited as well as the xeroxing of the record is prohibited to poor people. Thge travels of voer 300 miles would also require motel charges for overnight.

   The progpsoed legislation would surely benefit poor people who are unable to obtain pro buno counsel.

7. Apparently the requdirements that the judcuail review be conducted in the cirucit court for the county wherein the peittioner resides per 227.53(1)(a)3. Stats. was made for the convinence for the peittieonr in case of jury trial and/or hearings. Hoever, even tho in the county wherein they reside the review is being conducted, many, esepcially disalbed, are not readily able to travel sometimes the 300 30-35 miles one way to the circuit court. This also become an expensive requirement, if this legislation is not passed, inorder for such people to know what is contained in the record, many times entailing the payment of drivers of the disabled, such costs are nonmedically necessary, and also prohbitive.

   Gemnerally the agent for the state deparmtnet, that bieng the lcoal department of social services etc., took the initial action, and an adminsitrative hearing is generaly held in their offices, these proor persons must expend the fundsxx to travel, either self or hire someone, which becomes costly. they also do not have monies to xerox copeis of all the evidnce they want to enter to for which a reocrd will be held open to recieve at some later time, and mroe than likely end of giving their originals and do not have copies for themselves.

Time passes and they no longer remember what was on an exhibit or papers given nor that they even entered that document/paper.

at least,
This legislation would allow/a lisitng to know what is in the reocrd. wihtout ahving to tranvel and expend xx scare public aid monies to review and or learn what is in the reocrd.

8. Pro buno represnetation is fast disappearing cas federal govenrment has drastically cut back its funding and local judicare/legal assistant offices were forced to cut back staff attornyes. In my area at least, only the staff attorneys assisted with public aid cases. their list of pro buno attorneys all specific the ares they would only consider cases for and did not and does not include these public aid cases.

   for SSI ro Social Security disability there is and are attorneys in htese specialized areas, hwoever. They do require 1/3 of the retroactive payments as their fee.

   Yet almost all of the cases on behalf of poor people have to do with AFDC, food stamps, medical assistance, general relief, etc. wherein there is no pro buno assistance once the staff attorneys have been cut.

   The lsitators should conisder this when considering this proposed legislation as this would be helpful to these pro se in forma pauperis lay invidivuals trying to appeal denials on their own.

9. Since the justice dpearmtne recieved an entire copy of the entire record, this legislation would at least allow the opposing aprty some advantage by allowing him/her to know at least what is contained in the record. It would also grant some rights and allow a person to know for sure the procedures involved in constructing the reocrd for judicla review.

   Judicial review are conducted solely on the adminsitrative record developed at the adminsitrative level. 227.57(1) Stats.

   A more better piece of legislation would requdire the
***** govenrment to provide a copy of the certigied reocrd, free, upon request by the peittioenr, once the peititon for judical review has been initiated. Then for sure, both
s side would be on equal ground, and would be fair to all.

I bleeive other arguments could also be developed in support of this legilation by professionals and attorneys who could place themselves in the positon of the peittioenr who is poor and wihtout legal counsel.

The above proposal for new legislation would also assist with a more speedier, efficient jducial review. Because of the proglems experienced, x which I will list later, I am xx also proposing the following new legislation:"

II. Proposed ligislation - Grnating power to sanction governemnt for non-compliance to Chater 227 time limits and procedures

(new)	227.555 For failure to comply with the statutory time limits. For failure of the agency to comply with the statutory time limits as provided in
(opt: add 227.53(3)	sec. 227.55, the court in which the judical review is pending may make such orders in regard to the failure as are just, inclduing but not limited to an award of a monetary sanction and/or an order authorized under s. 804.12(2)(a), xx

Reasons in support of new legislation

L. Sec. 227.55 Stats. 30-days x time limit is mandatory pursuant to supreme court decision Wagner v State Medical Examining Board 181 Wis2d 633, 511 NW2d 874 (1994). Wagner grants court discretion to impose penalties and/or sanctions as a result for failure to comply.

Based upon past experience, the government rarely keeps those time limits. The government states that even tho it does not meet the time limits in sec. 227.53(2) and sec 227.55, the court cannot issue a default judgment and therefore must consider the governments position and allow bvriefing on the arguments.

They have absolutely no incentive to keep these time limits and the court's appears to be powerless to deter blanant noncompliance. The majority of the courts are not only relunctant to assess sanction against the government because:

(a) They are paid by the government;
(b) It is politically dangerous;
(c) They equate a monetary sanction as a taxation of costs agaisnt the state.

2s 2. Persons suffering from government abuses of these subsections and chapter 227 abuses and time limits is not only monumental but expensive since they usually are the ones to motion for compliance. In my cases, the govern,ment has been habitiual and simply not fearful of any deterence (even tho I currently have pending motions for sanctions agisnt the government and its attorneys with trial to take place in March 1999), there is simply no case law wherein a suffering party has been made whole xx by assessment of a monetary sanctions.

3. As it would apply to monetary sacntins, arguemnts were presented to the court concerning its ability to sanction the government and/or its attorney. (see copies of briefs enclosed).

   Yet, the court's mindsets are to related "assessments" to "taxation" and to only sanction an attorney, not the agency xxx who even tho it is the agency's statutory duty and did not comply cuasing litigation to enforce compliance.

   Also please note that the court still, while agreeing parties may be assess, only believe it can sacntion the attorney representing the party (in this case the government agency).

4. Based upon my past experience I have judical reviews before the bar wherein the govenremnt agency violated sec 227.55 as follows:

   a) 96xCVxlk 96-CV-176, record delayed over 9 months, request for sanction was denied without findings or conclusions;

   b) 96-CV-187 record delayed over 6 months request for sanctions is pending. (also incomplete)

   c) 96-CV-x4162 record delayed and incomplete request for sanctions deneid, no findings or conclusioins;

   d) 98-CV-404 (Dane County Circuit Court, Branch 5) record delayed over 3 months, not complete and still not complete, requests for costs as sanctions dneied, (I am unsure as to if the court's order has actual fidnings with conclucsions of law or jsut findings and a denial.

   e) other reviews, 94-CV-149, 94-CV-73 (over a yeqar late).

   I assume I am not the only party the government does this to.

5. In order to invoke the court's discretion to impose sanctions against the government ageny, a party should have plaink, precise, statutory rights to expect the court's to see plainly the government agency can and should be assessed monetary sanctions for its failure to comply. Apparently our federal courts are not relunctant to sanction not only the g federal agenies but also state governemtn as a aprty.

6. chapter 227 statutes and procedure are exclusive and therefoe it would be proepr to place a sanction specifically addressed to these time limits in Chapter 227.

7. Wagner has proved meaingless and simply does not grant monetary sacntions to make the suffering party whole.

The government agency and its attornyes realize that Wagner is meaningless and readly has no bite or deterence,. This observation is not only becuase of their flagrant abuse of the mandatory time limits of 227.53(3) and 227.55 Stats., but verbal to the court.

the court itself states that it as a sanction it did not consider the agency's psotion on judical review, then it has x the added time-consuming burden to sift through the reocrd to establish the government's case.

The issuance of an mandamus order to compell still does not grant costs to the movant because of the taxation of costs limitation imposed when it comes to costs agaisnt the xgovernment.

8. this new legislation would open the closed mindset of the courts to award costs to the movant, as a sanction, against a governemnt agency and/or its attorney, esepcially agaisnt the agency.

9. Evcen if the court's order compliance to the procedures and court orders udner chatper 227 review, what can the court do if the governemnt agency refuses to comply? Our supreme court in Wagner stated that a default jdugment is not available under jducuail reviews?

(Our federal court's do allow default judgments in adminsitrative appeals and judical reviews for noncompliance to statutory time limits and procedures).

As you review the briefs I have written, please understand they are of a lay person attempting to present law in support of the argument that both the government agency and its xx attorneys are subject to assessments of a monetary sanction and the governemnt agency cannot claim the eleventh amendement immunity. My bfiefs should be read more liberally and with an opinion that I have tried my best.xx

thank you for your consideration of these proposals.

I remain,your servant.

Libbie Pesek.

DISTRICT IV
Office of the Clerk
COURT OF APPEALS
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Marilyn L. Graves
Clerk

June 1, 1998

To:

Hon. Robert R. Pekowsky, Trial Court Judge
Dane County, City-County Bldg
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

Judith Coleman, Trial Court Clerk
Dane County, City-County Bldg
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

J. Denis Moran
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Madison, WI 53707

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Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

98-1475-W State of Wisconsin ex rel. Libbie Pesek v. Circuit Court for Dane County, et al. - (L.C. #98-CV-404)

Before Vergeront, J.

Libbie Pesek has filed a *pro se* petition for a writ in this court. The essential facts, as stated by Pesek in her petition, are as follows. Pesek has petitioned in circuit court for judicial review of a proceeding which was held under ch. 227, STATS., before the Department of Administration's Division of Hearings and Appeals. She is attempting to obtain a copy of the administrative record that has been filed in the circuit court by the Division. She apparently filed a document in circuit court, captioned as a "motion for

mandamus," in which she requested that a copy of the record be sent to her. The court concluded, in an order dated April 27, 1998, that the Division was not required to send her a copy of the record. The order noted that no such requirement is provided in § 227.55, STATS., which relates to transmission of the record for judicial review. The court also noted that nothing prevents the Division from providing her with a copy as a courtesy.

Pesek acknowledges that the time to appeal from a nonfinal order under RULE 809.50(1), STATS., has expired. It appears that she is seeking relief by writ petition as a substitute for a petition for leave to appeal. To be entitled to a writ, the petitioner must lack an adequate remedy at law. *See **State ex rel. Oman v. Hunkins***, 120 Wis.2d 86, 88, 352 N.W.2d 220, 221 (Ct. App. 1984). We have the authority to extend the time to file a petition for leave to appeal, *see* RULE 809.82(2)(a), STATS., and would do so in this case if we believed the petition had merit. This would provide Pesek with an adequate remedy at law.

However, we conclude that Pesek's petition, in its present form, does not give us reason to believe the circuit court erred, based on the arguments she apparently presented to it, and which she presents here. She argues that service of the record on her is required by those portions of § 801.14, STATS., which apply to service of other papers in civil cases. We do not agree that the administrative record is a pleading or paper for purposes of that statute. The trial court was also correct in its conclusion that § 227.55, STATS., does not require the Division to send her a copy of the record. Therefore, it does not appear that the circuit court erred in its response to Pesek's arguments.

However, we note that there may be another method for Pesek to obtain at least the transcript of the administrative proceeding. Agencies are authorized by § 227.44, STATS., to make rules regarding transcripts.[1] The Division of Hearings and Appeals has issued a rule which governs the preparation of transcripts. *See* WIS. ADM. CODE § HA 1.16.[2] It appears that Pesek may be able to obtain the transcript by sending a request to

[1] Section 227.44(8), STATS., provides:

> A stenographic, electronic or other record of oral proceedings shall be made in any class 2 or class 3 proceeding and in any class 1 proceeding when requested by a party. Each agency may establish rules relating to the transcription of the record into a written transcript and the providing of free copies of the written transcript. Rules may require a purpose for transcription which is deemed by the agency to be reasonable, such as appeal, and if this test is met to the satisfaction of the agency, the record shall be transcribed at the agency's expense, except that in preparing the record for judicial review of a decision that was made in an appeal under s. 227.47 (2) or in an arbitration proceeding under s. 230.44 (4) (bm) the record shall be transcribed at the expense of the party petitioning for judicial review. Rules may require a showing of impecuniousness or financial need as a basis for providing a free copy of the transcript, otherwise a reasonable compensatory fee may be charged. If any agency does not promulgate such rules, then it must transcribe the record and provide free copies of written transcripts upon request. In any event, an agency shall not refuse to provide a written transcript if the person making the request pays a reasonable compensatory fee for the transcription and for the copy. This subsection does not apply where a transcript fee is specifically provided by law.

[2] That rule provides:

> (1) METHOD AND COPIES. Hearings shall be recorded either stenographically or electronically. A typed transcript will be made when it is determined that one is necessary by the division or the administrative law judge. If a transcript is made by the division copies shall be furnished to all persons upon request and prepayment of a reasonable fee, as determined by the division. If no transcript is deemed necessary by the division and a party requests that one be

(continued)

the administrative law judge who presided at her hearing. Copies of most or all of the remaining papers in the record were probably provided to Pesek during the administrative proceeding.

IT IS ORDERED that the petition for writ is denied *ex parte* under RULE 809.51(2), STATS.

Marilyn L. Graves
Clerk of Court of Appeals

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prepared, that party shall be responsible for costs of transcript preparation. If several parties request transcripts, the division may divide the costs of transcription equally among the parties. In lieu of a transcript the division may provide any person requesting a transcript with a copy of the tape recording of the hearing upon payment of a reasonable fee. All requests for transcription shall be made at the hearing or in writing and sent to the administrative law judge who presided at the hearing.

(2) FINANCIAL NEED. Any person who by affidavit or other appropriate means can establish to the satisfaction of the division that the person is indigent and has a legal need, may be provided with a copy of a transcript without charge.

(3) CORRECTIONS. Any party, within 14 days of the date of mailing of the transcript, may file with the administrative law judge a notice in writing of any claimed error, and shall mail a copy of such notice to each party of record. Other parties may contest any claimed error within 20 days of the date of the mailing of the transcript by notifying the administrative law judge and other parties of record. All parties shall be advised by the administrative law judge of any authorized corrections to the record.

STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

LIBBIE PESEK
W3284 Grundy Road
Irma, Wisconsin 54442

Petitiioenr,

v.

JUDGE ROBERT PEKOWSKY, BRANCH 5,
DANE COUNTY CIRCUIT COURT
210 Martin Luther King Jr. Blvd.
Madison, Wis. 53709

and

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATIION c/o Loenard Martin,
Wisconsin Dept of Justice,
P. O. Box 7857, Madison, Wis. 53707;

Respondents.

PETITION FOR WRIT

No.________________

Trial Court Case
No. 98-CV-404

PARTIES IN INTEFREST (806.04(11) Wis. Stats):

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES
c/o Assemblyman Glenn Grothman, 125 W. State Capitqal, Madison, Wis. 53702
c/o Senator Robert Welch, 201 E. State Capital, Madison, Wis. 53702

JOINT COMMITTEE ON LEGISLATIVE ORGANIZATIION
c/o Speaker of Assembly, Scott Jensen
211 W. State Capital, Madison, Wis. 53702

ATTORNEY GENERAL OF THE STATE OF WISCONSIN
James Doyle, Justice Dept. P. O. Box 7857
Madison, Wis. 53707

PETITION FOR WRIT AND SUPPORTIVE MEMORANDUM
AND REQUEST FOR TEMPORARY RELIEF

Petitioner, Libbie Pesek, in prioria personal in forma pauperis, pursuant to Rule 809.51 Wis. Stats., 806.04 and/or any other applcialbe statutue, hereby requests this court to exercise its original juridsdiction and/or its supervisory juridiction and issue a Writ over Honorable robert R. Pekwosky of the above-anmed circuit

and issuing in conjunction thereto an order declaring Petitioner's and the aprties' rights, status, and other legal relations as herein presented in the relief section of this Petition.

ISSUES PRESENTED BY THE CONTROVERSY:

1. Do sections 801.14(1) ~~and~~ through 801.14(4) Wis. Stats., conflict with Chapter 227?

2. If not, should not all aprties comply with the requirements of sections 801.14(1) ~~and~~ through 801.14(4) Wis. Stats. in judical review proceedings; and the cirucit court require such compliance when petitioned to do so?

3. Is section 227.55 Wisconsin Statutes unconstitutional?

STATEMENT OF THE FACTS NECESSARY TO UNDERSTAND THE ISSUES:

1. On July 20, 1997 Petitioner timely filed and served on Respondents State of Wisconsin Department of Administration a Petition for Judical Review of their administrative decision concerning an energy assistance matter. She was allowed to proceed in forma pauperis.

2. On August 25, 1997 the Respodnents to the jsudical review ~~filed~~ transmitted for filing their notice of appearance and statement of position;

3. On November 15, 1997 Petitioenr advised Respodnents that as of that date they had not yet filed the administrative record with the clerk, to do so and to forward a copy to her (see copy of letter dated Novmeber 15, 1997 to Attorney Leonrad Martin as attachemnt "A" hereto);

4. Filed January 22, 1997 Petitioner motioned for Writ of Mandamus to compell production of administrative reocrd and Csots and Sanctions Accordingly which was not acted on by the ocurt and she filed March 9, 1998 she resubmitted same for action;

5. While the above was pending before the court, the

Respondents did file on March 13, 1998 the record and on March 24, 1998 the transcripts with the clerk of court. (see copy of March 11, 1998 and March 19, 1998 letters of transmittal attached hereto as Attachments "B" and"§C§" respectively). On March 27, 1998 in a letter to the court, Petitioner frequested the court require the Respondents to forward to her a copy of everything filed with the clerk of the circuit ocurt pursuant to 801.14(1)-(4) Wis. Stats., (See copy of letter as Attachment "D"); the respondnents replied that 801.14 Wis. Stats., does not apply to proceedings under ch. 227, (see copy of letter dated April 7, 1998 to Pesek copied to the court attached hereto as xxx attachment "E");

5. The letters of transmittal by the Respodnents show that Petitieonr was neither copied, advised of the filings of the record, nor advised of the contents of the record being filed;

6. The court issued its order denying the motion for writ of mandamus and sanctions and denying her request for a copy of the filingswith the cirucit court of the administrative record, see Dane County, Branch 5, Circuit court Order dated April 27, 1998 attached as Attachment "F" hereto;

7. The time limits for xppxx seeking leave to appeal a nonfinal order not appealable as of right under s. 808.03(1) have past per Rule 809.50(1) Wis. Stats.

RELIEF RE QUESTED

1. Compell Honorable Robert R. Pekowsky of the Branc 5, Dane Court Circuit court to:

(a) Require Respondent's compliance with sections 801.14(1) through 801.14(4) Wis. Stats., such compliance to include serving on Petitioner a copy of [redacted] being filed with the clerk of the circuit court;

3/6 all paper

(b) To stay briefing on the merits of the judical review until Petitioner has been served by Respondents a copy of all their filings made with the clerk of the circuit court by their March 11 and March 19, 1998 letters of transmittals and has had an opportunity to review same;

2. to issue an order declaring the rights of Petitioner and of the aprties, their statuts and/or other legal relations as presented and alleged as follows:

(a) Petitioenr is a resident of Lincoln County, Wisconsin residing at W3284 Grundy Road, Irma, Wisconsin and is disabled receiving as her sole income Supplemental Security Income-Disability ("SSI-D") per affidavits of indigency filed with this court and with the circuit court;

(b) Petitioenr filed with the circuit court a Petition for Judical Review of an administrative decision in an energy assistance matter, which is currently before the Dane County Circuit Court, BX Branch 5, Pesek v Department of Administration Case 98-CV-404;

(c) The Respondnet, Department of Administration, is a state of Wisconsin government agency administering the Wisconsin's Energy Assistance program also known as Low-Income Energy Assistance under Wisconsin statutes 16.385(2)(a) and contracts with avarious types of government agencies to administer the program lcoally within the state of Wisconsin pursuant to 16.385(4) Wis. Stats.;

(d) Heretofore, the legislature of the state of Wisconsin enactred into law what is referred to as the "Administrative Procedure" as set forth in Chapter 227 opf the Wisconsin Statutes with sections 227.42 through section 227.59 governing review of an administrative agency's actions, i.e., sections 227.42 through 227.51 governing the procedures conducting the administrative hearing and

decision process to review upon request of a party the agency's actions, and sections 227.52 through section 227.57 governing the procedures for judical review of the resultant agency's administrative decision, and section 227.58 providing appellate review of the circuit court's review;

(e) Respondent has within it a division conducting hearings in contested cases concerning the agency's actions, such division is called the Division of Hearings and Appeals as provided under 227.43(1) Wis. Stats., and as such is the caretaker of the agency's administrative record developed in contested cases;

(f) The Respondent is also known as an administrative agency and is THE agency referred to as "the agency" throughout Chapter 227 prursuant to section 227.01(1) Wis. Stats;

(g) That Pesek is a party (Petitioenr) in this instant judical review and the Department of Administration is a party (respondnent) in this instant case pursuant to section 227.53 Wis. Stats.;

(h) That section 227.55 Wis. Stats is unconstitutional in that it violates article 4, section 1 and thus violates the Fourteenth Amendment of the Constituion of the Uniged States in that it denyis parties equal protection of the law and due process rights in not having standards requiring service of parties of all filings of other papers with a clerk of the circuit court under the adversary system;

(i) That Chapter 227, section 227.02 provides that compliance with this chapter does not eliminate the necessity of complying with a procedure required by another statute; with Ch. 227 contemplating the limited use of civil procedure statutes which do not conflict with ch 227, <u>Wagner v State Medical Examining</u>

Board 181 Wis2d 633, 511 NW2d 874 (1994); State v Walworth County Circuit Court 167 Wis 2d 719, 725;

(j) Taht Chapter 801 to 847 governs procedures and practice in the circuit courts of the state of Wisconsin in all civil actions and special proceedigns except where different procedure is prescribed by statute or rule prusuant to section 801.10(2) Wis. Stats.;

(k) That a judical review under Cahpter 227 is considered a special proceeding Ashwaubenon v Public Service Comm 15 Wis 2d 445, 448, 113 NW 2d 412 (1962); Walworth 167 Wis2d at 725;

(l) That Chapter 801 to 847 governs procedures in judical review under ch. 227 that do not conflict with ch 227;

(m) Heretofore, the legislature of the state of Wisconsin enacted into law under the Civil Procedure statutes sections 801.14(1) through 801.14(4) and such statutes do not conflict with any ch. 227 statute;

(n) That sec 801.14(1) requires service upon the parties of pleadings and other papers and that sec. 801.14(4) requires that pleadings and other papers required to be served upon the parties be filed with the court after a reasonable time after service and also that the filing of such pleadings and other papers constitutes certificaion by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served;

(o) That the circuit court has declared by virtue of its May 15, 1998 letter to Petitioenr, copy attached as Attachment "G", THAT "other papers" and "any paper" referred to in sections 801.14(1) through 801.14(4) Wis. Stats. would include also correspondnece submitted to the court by a party;

(p) That respondnet transmitted the certified administrative record to the clerk of Dane County by virtue of letters of transmittals dated March 11 and March 19 (copies attached hereto) and did not serve a copy of either the letters of transmittal nor a copy of the record to Petitioenr;xx

(q) That the term "other papers" in section 801.14(1) and "any papers" through section 801.14(4) required to be served on parties includes a copy of the certified administrative record being filed with the clerk of the circuit court and includes a copy of all correspondnece by the agency with the clerk of the circuit court and/or the circuit court;

(r) That a controversy exists between Petitioenr and Respondnent and there is immediate need for a judical declaration that Respondnents pursuant to 801.14(1) through 801.14(4) Wis. Stats., must serve upon Petitieonr (and aprties) a copy of their filings with the circuit court including all correspondnece and pleadings and other papers and that the circuit court for Dane county be required to require such complaince by respodnents and stay the briefing on gtkxx the merits until such complaince has been completed;

(s) That the respondnents in this jduical review untimely served and filed their Notice of Appearnace and Statment of Postiion being xxxxxx served some 16 days after the mandatory time limits of 20 days required in sectiion 227.53(2) Wis. Stats.,;

(t) That the respodnnents in this judical review unteimly xxxxxx filed their certified administrative record, being filed some 1 4 9 months after the mandatory time limits of 30 days required in section 227.55 Wis. Stats.;

(u) That Respondent's attorney has been forwarded a copy of all papers filed with the clerk of the circuit court by the Division of Hearings and Appeals on behalf of the agency, and that their adversary, Peittiioenr, proceedings in this instant case <u>pro se</u>, was not served nor forwarded a copy and is thus disadvantaged and prejudiced;

s/b proceeds

3. That by virtue of the declarations made in No. 2 above, and as any are applciable hereto, determine the right of parties, inclduing Petitioenr in this instant judical review, to be served a copy of all papers being filed with the clerk of the circuit court in ch. 227 judical review or before bxxxg such filing in compliance with 8x4x0 801.14(10 and 801.14(4) Wis. Stats., and declare that it is the agency's duty and responsiblity under 801.14(4) Wis. Stats. that all filing of papers with the clerk of the circuit court constituting a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served;

4. That by virtue of the declarations made in No. 2 above, and as any are applicable hereeto, and by the authority of a court in writ proceedings to review loer discretionary acts, whether the discretiion exercised was abused or arbitarily and capricious16 exercised <u>State ex rel Thomas v State</u> 198 nw 2d 675, 55 Wis 2d 343 (1972) declare the circuit court's refusal to impose sanctions including refusing to grant Peititoner's request that the court not consider respondnents statmeent of position and a b response brief on the merits was an abuse of discretion and/or exercised arbitarily and capriciously;

s/b lower

5. Stay proceedings pursuant Rule 809.52(4) in the circuit court case 98-CV-404 pending dispositon of this action and also to stay such proceedings until Peititoenr has been served a copy of all previously filed papers by respodnents

with the clerk of the circuit court;

6. Costs and expenses of this action and issue pursuant to Rule 809.51(3) Wis. Stats.

7. If this Peititon is improperly filed with this court, that Petitioenr prays that she be allowed to refile same with the proepr designated court;

8. Any other and just relief this court deems appropirate.

REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

L. The action sought to be brought is publici juris in that the laws and statutes in question are to be complied with by every governing and administrative body in the state of Wisconsin and every party to circuit court judical review proceedings udner ch. 227;

2. That a controversey exists between Petitioenr and Respondnents rights and duties under 801.14(1) through 801.14(4) wis. Stats., as it pertains to filings by Respodnnents of papers in ch. 227 judical reviews with the circuit court;

3. That the trial court, knowing that Petitieonr as pro se [struck out] was not served a copy of the transcripts nor the other parts of the papers and documents filed as the certified record with the clerk of the circuit court, but has ordered briefing on the merits, Petitioenr is unable to submit a brief without knowing what is contained in the certified record and having a copy thereof inclduing the trnascirpts to prove reversible error thus vioalting her due process rights to rpesent reversible error on appeal referencing to apge nubmer of the record and supporting verbatim testimony at hearings while Respodnents adver4sary does have a copy of the entire reocrd and all papers filed with the court and thus Petitioenr is prejudiced by not also having a copy of same;

3. Therefore there exists an immediate need for a judical order and writ as hereinabove requested which also concerns fair play in the adversary system of jsutice;

4. It is within the pwoer of this court to exercise original jurisdiction for the purpose of issuing write and in relations thereto, of making a declaratory ~~judgme~~ order for which purpose this action is borugnbt; State ex rel Memmel v Mundy 75 Wis2d 276' 249 NW 2d 573;

5. This will clarify an issue of genereal importance in the administration of jsutice and guide circuit court accordingly in ch. 227 judical reviews;

6. This is a case of first impression of 801.14(1) through 801.14(4) Wis. Stats. applicability to ch 227 judical review and a determiantiion is needed by this court that same does nto conflcit with ch 227;

7. There is not other adequate remedy at law as the ahrm being done is inherent in the situatiion State ex rel Dept of Public Dep½t of Instruction v ILHR 68 Wis 2d 677, 229 NW 2d 591;

SUPPORTIVE MEMORANDUM

In addition to the cited cases presented hereinabove, the following is presented for this court's considerations:

The Circuit Court Has a Duty to Require all aprties to special Proceedngs to Comply with 801.14(1) thourgh 801.14(4) Wis. Stats.

"A judge should, without being arbitrary or forcing matter to trial unjustly, endeavor to hold counsel to a proper appreciation of of their duties to assist in combating delay and in promoting prompt justice" SCR Cahpter 60:01(8) "A judge should always bear in mind the need of scrupulous adherence to the rules of fair play" SCR 60:01(10). "A judge should grant to all aprties the opportunity to present, by a

full and fair record or transcript, questions exactly as they xx are presented and determined...." SCR 60:01(11). In this particular case, Honorable Pekowsky is forcing to trail (briefing on the merits) unjustly without endeavoring to hold respondent's counsel and respondnents to a proper appreciation of their duty to serve upon their opponent party a copy of all papers being filed with the clerk of the circuit court, including correspondnence, transcripts of the administrative hearing under review and other papers: i.e., to require compliance with 801.14(1) through 801.14(4) Wis. Stats in special proceedings, especially he should bear in mind the need for fair play, petitoner's disadvantqge of not having being served a copy of the filings made by repsondnent., By not requiring the respodnennts to perform their duty, the court is violating Pesek's due process rights to fair play, and as a pro se litigant, she is her own"attorney" a disadvantage as an"attorneyx" in the adversary system of only one side must comply with 801.14(1) Wis. Stats. Also, the court should have required repsondnents compliance to 801.14(1) because 801.14(4) by its terms sttes that the party making the filing with the clerk of court certifcies that they have served all parties a copy thereof.

xx

This action is publici juris

Wisconsin's legislative intent was to establish a uniform procedure for judical review in contested cases. Ralph M. Hoyt, The Wisconsin Administrative procedure Act, 1944 Wis. L. Rev. 214 (hereinafter "Administrative procedure"):

> The Wisconsin Administrative procedure Act of 1943 represented almost the first attempt by any state legislature to codify in a single chapter of

> the statutes, and make applicalbe to virtually all state-xixwide administrative agencies, the procedure to be followed by administrative agencies with reference to their rules and regualtions and their conduct of contested cases, and to the method of judically reviewing their determiantions.

Id at 214 (footnote omitted). The Wisconsin Administrative Procedure Act was designed to establish a more simple and uniform system of judicial review "with full definition of the procedure to be followed and specification of the grounds on which the (circuit) court may set aside the administrative determinatioin" Id at 229. One product of this legislation was the establishment of a subsection defining the scope of judical review. In the present form of ch 227, the scope of judicial review is defined in sec. 227.57.

> 227.52 Judical review; decisions revciwable. Administrative decisions which adversely affect the substantial interests of any person...are subject to review xx...

It has been held that a court has no descretion with respect to assuming jurisdiction when the writ is invoked in matters publici juris State ex rel Continental Ins Co v Doyle 40 Wis 220. The "substantial interests" affected by administrative decisiion include: claims for regulatory enforcemtn, challenges to government regualtions, challenges to government valuations, disputes over government operations and claims for rights, xxx Judicature Volume 77, Number 1 July-Agusut 1993 p. 18. Also see 227.53(1) Wis. Stats. ep

Compliance with Wisconsin Civil Procedure statutes sections 801.14(1) through 801.14(4) doe snot conflict with ch 227 with ch 227 contemplating compliance with civil procedures sections 801.14(1) through 801.14(4)

The applicability of the rules of civil procerdures to a ch 227 administrative review proceedings is a question of law, which is answered without deference to the decisions of the lower courts.

Wagner v Wisconsin Medical Examining Board 181 Wis 2d 633, 511 NW2d 874 (1993); Pulsfus Farms v Town of Leeds 149 Wis 2d 797, 803-04, 440 NW 2d 329 (1989).

> 227.02 Compliance with other statutes. Compliance with this chapter does not eliminate the necessity of complying with a procedure required by another statute.

> 227.53 Parties and proceedings for review. (1) Escept as otherwise specifically provided by law, any person aggrieved by a decision specified in s 227.52 shall be entitled to judicial review thereof,,,

Wisconsin courts have issued a nubmer of opinions holding that various civil procedure statutes may apply to ch 227 judical review if there is no conflict between the specific procedure and 227: Cruz v ILHR Department 81 Wis 2d 442, 260 NW 2d 692 (1978) sec. 807.07(1) Stats. allowing for the correction of minor irrgularities on appeal, does not conflict with a circuit court's reviewing functiion in a ch 227 proceeding; Shopper Ad vertiser v Department of Rev 117 Wis 2d 223, 344 NW 2d 115 (1984) (the transfer of judicial review form one circuit to another under sec. 807.07(2) is not in conflict with ch 227); Tatum v. LIRC 132 Wis 2d 411, 392 NW2d 840 (Ct App 1986) (sec 814.025 frivolous costs may be awarded in a ch 227 proceeding); Metro Greyhound Mfgt Corp v Racing Bd 157 Wis 2d 678, 460 NW2d 802 (Ct App 1990) (circuit courts may grant relief pending appeal, under secs. 808.07(2) and 808.075(1) wihtout conflicting with ch. 227 scope of judical review).

Section 801.14(1) through 801.14(4) do not conflict with ch. 227 scope of judical review nor the circuit court's reviewing function: (quoted in pertinent part):

> 801.14 Service and filing of pleadings and other papers. (1) Every order required bvy its terms to be served, every pleading unless the court otherwise order's because of numerous defendants, every paper relating to discovery required to be served upon a party unless the

court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, xxxx undertaking, and similar paper shall be served upon each of the parties...

(2) Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party in person is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing it to the last-kn0own address.... Service by mail is complete upon mailing....

(4) All papers after the summons required to be served upon a party, except as provided in s. 804.01(6), shall be filed with the court wihtin a reasonable time after service. The filing of any paper reqduried to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all aprties required to be served....

Not specifically listed is transcripts, yet transcripts are determined to be a "document" State v Perry 401 NW 2d 748, 136 Wis 2d 92; briefs afre not spcifically mentioed but they are "other papers" status reports, vior instructions, etc. are also considered "other papers" under "similar paper" and/or"undertakings". The tranxcripts and the adminsitrative record are "other papers" "docuemnts" and "similar papers" incljuding "undertakings". Sections 801.x14(1) and 801.14(4) "any paper" refer to all papers filed with the clerk of the circuit court and require same to be served on all parties by the party or attorney xxxxxxxx effectuating the filing. These re mandatory court procedures in the adversary ssystem of justice, unviersal to all xxxxx proceedings, civil and special:

801.01 Kinds of proceedings, scope of chs. 801 to 847. (1) Kinds. Proceedings in the courts are divided into actions and special proceedings. "Actiion" as used in chs 801 to 847, includs "special proceeding" unless a specific provision of procedure in special proceedings exists.

(2) SCOPE. Cahpters 801 to 847 govern procedure and practices in circuit courts of this state in all civil actions and special proceedings...except where different procedure is prescribed by statute or rule. Cahpter 801 to 847 shall be construed to secure the just, speedy and inexpensive determiantion of every action and proceeding....

Our higher court have determined judical reviews udner ch. 227 to be "special proceedings" <u>Ashwaubenon v Public Service Comm</u> 15 wis2d 445, 448, 113 NW 2d 412 (1962); <u>Statev Walworth County Circuit Court</u> 167 Wis2d 719, 725;. A review of the ch. 227 statutes does not indicate any procedure established upon filings of pleadings and other papers with the circuit court jduring ~~proceedings~~ during judical review proceedings except the filing of the peittion fur judical review under section 227.53 and section 227.55 simply requring the filing of the certified adminsitrative record within certain time limits. Section 227.53 also covers service to the aprties of the Notice of Appearance and Statmenet of Position. Ch 227 simply does not show any procedures to follow or reqduirements to follow and service of motions, subsequent notices, reports, intermediate orders, discovery papers, demands, offers, udnerstakings, and other papers being filed with the circuit court during judical review proceedings.

Ch 227 does not provides procledures to follow or rules for compliation, notice to aprties and approval of the adminsitrative record with opportuntiy of the parties to review same and correct same including the transmcirpts ~~inxthat~~ such as that regualtions in Wisocnsin staututes udner 809.15 Wis. Statutes. As it is, and as this case openly shows, only the agency and its attorney have knowledge of what is actually contained in the record submitted to the circuit court for filing, what is extra papers from a different case yet contained in the record; what shouldbe in and what is not

or other types of corrections cannot be made, page nubmers to the record are not known, etc by the other party. Until such time as the legislature enacts additiional sections udner the Adminsitrative Procedure to cover steps and procedures similar to rule 809.15 on appeal and reviews to be followed by the adminsitrative agency and its caretaker of the filings made at the adminsitrative level in advising the aprties of what is contained in the record, the page nubmers and allowing time for reveiw and correctiion within the time limits it is to stautotry file the record, the agency should be reqduired to follow 801.14(1) through 801.14(4) Wis. Stats. with serving a copy of their filing of these papers upon the aprties.

Petitieonr meets the reqduirements of grounds for issuance of writ

In additiion to the ground of publici juris, an appeal would not be an adequate rememdy since since the harm being done (required to submit a brief wihtout being able to present references to the record and transxcripts wherein error occurs and attaching same to a brief) and thus a party is unable to present a supportive arguemnt on the merits to prove reversible error, such harm being done inclueds being asked to proceed in a proceedings wihtout copies of appers filed with the clerk and having no idea of what all is contained in those papers. The court has ordered briefing on the merits of this case while it is fully aware that a party does not know of what was filed by the res½odnents with the clerk of court and what is contained in the other papers filed. Additionally, the reocrd shows that she requested a copy of the record on Novmeber 15, 1997 in her lette r to the respodnents and since the respodnnets were approximately 7 months in submtiting any record, she dhas absolutely no recollection of what the transdcripts of the hearing before an administraitve agency over a year ago contain or

should contain based upon any ntoes she may have. She is being forced to trial in the dark xihtxxt prejudiced in not having the same papers served on her that were served on respodnnents by the Division of Hearings and Appeals. Thus Peitieonr bleieves her harm is "inherint in the situatiion" State ex rel Dept of Public Dept of Instruction v ILHR 68 wis 2d 677, 229 NW 2d 591.

Additioinally, the trial court is acting in violation of its duty tx as hereinabove presented. See Order dated May 12, 199 attached as attachment "H"

Section 227.55 is unconstitutioinal

this stauttues is overbroad wihtout any protection of the rights of aprties to know what is in the reocrd that is being sent to the clerk of court. Party assumptioins simply cannot be legal nor binding and if a party assumes an document shouldbe in the reocrd and it is not and the aprty did not correct the record before the judical review began, thafg party is deemed to ahve waive any objections of the court;'s not using same:

> 227.57Scpope of review. (1) the review shall be conducted by the court wihtout a jury and shall be confined to the record....

How important therefore, it is to ahve a record that will reflect the grounds and prove same for reversal, remand, or vacation of the appealed adminsitrative decision and the actions of the agency. Section 227.55 simply does not provide any standards, safeguards, etc as does rule 809.15 on appeal from the circuit court to the court of appeals. For due process proetections, such rules and standards should exist. It is also vague not describing conduct of aprties with filinjgs to the circuit court that parties are uncertain as to their rights and duties. City of Bossier City v Gray 483 So2d 1090.

The Circuit Cout abused its discretiion not to awasrd sanctiions for untimely filed adminsitrative reocrd and ntoice of appearance etc.

In this instant case, the respodnets were served a copy of the peititon for judical review by certified mail on July 20, 1997. Wisconsin Statutes 227.53(2) requires that any person who desires to participate in the proceedings for review after being served a copy of the petition is to serve upon Petitioner within 20 days after service of the peititon a notice of appearance and statment of positiion. Petitioner ws not serve a copy of the notice and statmeent until Agusut 25, 1997, some 16 days untimely and dated September 4, 1997 motion the court to disregard the agency's statement of position.

On November 15, 1997 Peititoner adivsed the repsodnent they had not yet filed the certified reocrd and requested they do so and to forward a copy to her. This was followd up on November 24, 1997 (letter in reocrd of case 98-CV-404). On janaury 22, 1998 she filed a motion for writ of mandamus to compell compliance with 227.55 which has a mandatory time limit of 30 days after service of the peittion for judical review. With the court not acting on the motion it was resubmtited in early March, 1998. Respondent complied with 227.55 some 7 months untimely.

The time limits in 227.53(2) and 227.55 have been determined to be mandatory and reocmmended relief was cited by our Surpeme Court in its decision in Wagner v State Medical Examining Board 181 Wis 2d 633, 511 NW2d 874 (afrirming 173 Wis2d 422, 496 NW2d 213) (1994). Such relief would be that the circuit court could disregard the the Baord's statment of position. It further stated ¶

> The underlying goals of ch. 227 would not be met if both parties were not required to comply with the mandatory time provisions.

Id 181 Wis at 644. Because of even after the xxxxxxxxx declaration of our Surpeme court in Wagner that the time limits are mandatory, abuses by the go venrment administrative agency's in not complying with these statutues continues and as noted by affidavit of Petitioenr in the record of case 98-CV-404, has been persoanlly experienced by herself.

Wis. Stats. 805.03 require compliance with statutory procedures. The courts are able to sanction under this statute 805.03 with sanctions that would xxx deter such noncompliance. Sanctions under ch. 227 are aloso allowed per Wagner.

The district court refused to sanctiion x determining that there was a delay and noncomplaicne hwoever peititoenr is not prejudiced.

The court abused its discretion and/or capriously and arbitrarily made its decision on a standard of law not applicalbe. Surely, any such hindrance to the"legislative intent to establish (a) a uniform method of promulgating, publishing, and judicially revewing rules and regulations; (b) a univform procedure for the issuance and judical review of declaratory rulings; and (c) a uniform procedure for judicial review in ocntested cases. Administrative Procedure, 1944 Wis. L. Rev at 214. The underlying goals of ch. 227 would not be met if both aprties were not required to comply with the mandatory time provisions". Id. 181 Wis 2d at 643-644.

There can be no doubt that such tactics bieng exercised by the government and its adminsitrative agencies and the courts refusal to deter such actions leaves doubt in parties minds on justice and obedience to statutues by government agencies as example of how they should also act or not comply.

This is apparently also a case of first impression as to such sanctions for violation of ch. 227 statutes.

CONCLUSION

SA Section 227.02 provides compliance with other statutes, i.e., that compliance with ch 227 statutes does not eliminate complaicne with a procedure required by anotehr statute.

Sections 8i4x0i4(i)xxthxmmghx 801.14(1) through 801.14(4) are procedures under sivil proceedings covering special proceedings with sectioin 801.01 requiring compliance if same does not conflict with toehr special proceedings procledures statutorily established. R Other papers language of 801.14(1) should also include all documents filed with the clerk of the circuit court by parties to judical reviews, and in this instant case, the transxcripts and the certified administrative record. Such compliance does not conflict with any ch. 227 provision and would also enhance the legislature intent for fiar play, uniform procedures, rights of aprties to be served copies of what is being filed with the clerk and placed into a circuit court record.The words "shall" in sections 801.14(1) through 801.14(4) are mandatory.

There simply is not statutory procedure frequiring a litigant party to travel some 380 miles and expend scarce funds for gas and motel room to review a adminsitrative record, expend more scarce funds to make copies at the high price of $1.25 per page (see Attachment "G" hereto) with a cost of $146.25 xhex especially when the party is proceding in forma pauperis unable to pay the filing fee to initial a peition for jduical review, nor is that a requirement to be imposed upon disabled persons.

sb rulas

A thread rungs through our entire jruisprudence that there not only be a right to appeal (sections 227.52 and 227.53(1) provide to the aprty rights to appeal administrative actions and decisions for judical reviews), but that the appeal be a

meaningful one. A copy of trnascirpts, filngs being made with the circuit cout of other papers and documents should be served on parties with the unserved parties prevented from being in the dark. these sectioins of the civil procedures should be required to be complied with by all parties including the record so that supportive docuemntation to demonstrate reversible error may be had by a party. Any failure of the appelalte process which prevents an appellant from demonstrating possible error constitutues a constitutional deprivation of the right to appeal, such right given and secured by Wisconsin Cosntitutiion Art. I, sec 21(1). State v Perry 401 NW2d 748, 136 Wis 2d 92 (Wis 1987).

Until such time as the legislature anacts such sectiions governing procedures comaprable to rule 809.15, all filings with the circuit court should be governed with civil procledures sections 801.14(1) through 801.14(4) Wis. Stats. which do not conflict with ch. 227 proceedings/statutes.

for all of the reasons presented in the Peition, this court should grant the Petition and all relief requested herein.

Respectfully submitted this 22nd day of May 1998.

Libbie Pesek
W3284 GFrundy Raod
Irma, Wisconsin 54442

*Due to severe rheumatoid arthriitis Peitioner is unble to stop the tyogrpahical errors and ask the courts and those served to consider same and use common sense to meanings of warods etc.

November 15, 1997

Attorney Leonard Martin
Justice Dept.
P O Box 7857
Madison, Wis. 53707

Re: Case 97-CV-135

Dear Attorney Martin:

Confirming our telcon of Novmeber 13th, I am enclosing a retyped Stipulation for your signature.

oxYou noted in our telcon that you have no objection to transferring this judical review to any county and suggested that I palce the specific county's name in the Stipulation.

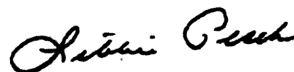
I would appre;ciate your signing this original and returning same to me as lquickly as possible.

Thank you for your cooperation in this matter.

Sincerely,

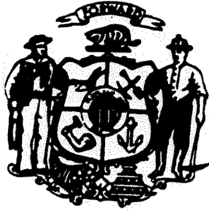
LIbbie Pesek
Enc
cc: Clerk of Circuit Court, LC

PS. Sir, I note from the clerk that the administrative record has not to date been filed in this case. I would appreciate your contacting the Department and having them forward same to the clerk and a copy to me. Thank you.



ATTACHMENT "A"

98 CV 404



State of Wisconsin/DIVISION OF HEARINGS AND APPEALS

David H. Schwarz, Administrator
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
TDD: (608) 264-9853
FAX: (608) 267-2744

March 11, 1998

Judith Coleman
Clerk of Circuit Court
Dane County
210 Martin Luther King Jr. Blvd.
Madison, WI 53709-0001

Re: Libbie Pesek v. Wisconsin Department of Administration
Case No. 98-CV-404
DHA File No. ENE-35/10721 & 11603

Dear Ms. Coleman:

The Wisconsin Department of Administration was served with a Petition for Review of this Division's decision in the above-entitled matter. A certified copy of the record of the proceedings of the Division of Hearings and Appeals, with the exception of the transcript of hearing, is enclosed. We apologize for the delay in filing these documents with the court as we were just last week informed that an appeal had been filed in this case. Therefore, so as not to delay this any further, I am at this time sending the file. We are at this time unable to locate the tapes of the hearing but are continuing to search. When the tapes are found we will prepare the transcript and send it under separate cover.

If you have any questions regarding the contents of this file, please contact me at (608) 267-7377.

Sincerely,

Marsha M. Jafferis
Marsha M. Jafferis
Administrative Assistant

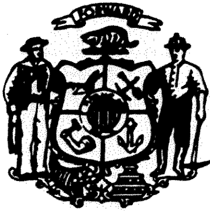
Enclosures

cc: Leonard Martin, Attorney General's Office

CIRCUIT COURT
MAR 13 9 11 AM '98
DANE COUNTY, WI

ATTACHMENT "B"

Br. 5



State of Wisconsin/DIVISION OF HEARINGS AND APPEALS

David H. Schwarz, Administrator
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
TDD: (608) 264-9853
FAX: (608) 267-2744

March 19, 1998

CIRCUIT COURT
MAR 24 3 51 PM '98

Judith Coleman
Clerk of Circuit Court
Dane County
210 Martin Luther King Jr. Blvd.
Madison, WI 53709-0001

Re: Libbie Pesek v. Wisconsin Department of Administration
Case No. 98-CV-404
DHA File No. ENE-35/10721 & 11603

Dear Ms. Coleman:

Enclosed is the transcript of the April 16, 1997 hearing which is part of the above-named record and not included with the record sent on March 11, 1998. Please add this to that file.

If you have any questions, please contact me at (608) 267-7377.

Sincerely,

Marsha M. Jafferis
Administrative Assistant

Enclosures

cc: Leonard Martin, Attorney General's Office

ATTACHMENT "C"

March 27, 1998

The Honorable Robert R. Pekowsky
Ciruciut court Judge, Branc 5
Dnae County courhouse
210 Martin Luther King Jr Blvd
Madison, Wis 53709

Re: Pesek v Dept of Administration
98-CV-404
Petitieonr's Motion for Writ of Mandamus (etc)

Your Honor:

I have this date received Attorney Martin's response the court required of him.

I would very much like to respond to this. I have two briefs due to the court of appeals by April 6. Therefore, I would appreciate the opportunity to rebut the response by sending my reply to your court shortly thereafter, allowing for mails. I proppose by the 13th. Please advise the time.¶

I also would like the court to consider that I attend physical and occupatiional therapy three times a week and msut be gone from my home from 8:30 - thrugh 12:30 or 1:00 p.m.

In addition, I wish to bring to the court's attention further disregard for the statutorry procedures ~~being~~ at this time being committed by the respondnets and/or their attorney. I have not been copied by the Divison of Hearings and Appeals and I have not been sent a copy of the administrative record nor the transcripts. It is my understanding that everything filed with a clerk of court and to be palced into the circuit court file ~~should it are~~ copies of which should also be ~~given~~ sent either to the aprties or the opposing aprty. See Wis. Stats. 801.14(1)-(4).

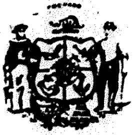
I asks the court to reqduire the respndnents to forward to me a copy of all that was sent to the court constituting the certified ~~xx~~ adminsitrative record and the letters of transmittal and response and certifications.

Thank you for all your ocnsideration in these matters.

Sincerely,

Libbie Pesek
cc: Attorney Martin

ATTACHMENT "D"



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Leonard E. Martin
Assistant Attorney General
608/266-8407
martinle@doj.state.wi.us
FAX 608/267-2223
TTY 608/267-8902

April 7, 1998

Ms. Libbie Pesek
W3284 Grundy Road
Irma, WI 54452

Re: Libbie Pesek v. Department of Administration
Case No. 98-CV-404
(formerly Lincoln County Case No. 97-CV-135)

Dear Ms. Pesek:

I am responding to your letter to the Court dated March 27, 1998, a copy of which I received from you. Section 227.55, Stats., directs the agency involved in a judicial review to transmit the record to the reviewing court. That section does not appear to direct the agency to provide a copy of that record to the petitioner. Additionally, sec. 801.14, Stats., applies to orders, pleadings, papers relating to discovery, motions, notices, appearances, demands, offers of judgment, undertakings, and similar papers in civil actions and special proceedings. That statute does not appear to apply to the administrative record in a judicial review proceeding under ch. 227, Stats. It is my understanding that the record can be viewed at the court. Further, as the person involved in this case at the administrative level, it is my understanding that you would normally already have a copy of the items in the administrative file. I hope this letter addresses your concerns.

A copy of this letter is being sent to the court. Thank you.

Sincerely,

Leonard E. Martin

Leonard E. Martin
Assistant Attorney General
State Bar #1020770

LEM:cma
c: The Honorable Robert R. Pekowsky
Dane County Circuit Court
s:\martin\cases\pesek404\ltrs\ccadmnrc.doc

Last week notified
filed 3/4 notification
by Dept of Admin

ATTACHMENT "E"

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 5	DANE COUNTY

LIBBIE PESEK,

Petitioner,

v.

Case No. 98-CV-404

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Administrative Review

Respondent.

DECISION AND ORDER DENYING MOTION FOR WRIT OF MANDAMUS

This is an administrative review brought pursuant to sec. 227.53, Stats., of a June 27, 1997, decision by the Division of Hearings and Appeals. Presently before the Court is petitioner Libbie Pesek's "Motion for Writ of Mandamus to Compel Production of Administrative Record and Costs and Sanction for Noncompliance of Statutory Procedure and Refusal to Produce Record."

The petition was filed in Lincoln County on July 28, 1997. Respondents were served by certified mail on that same date. A notice of appearance and statement of position was filed on August 25, 1997, on the respondent's behalf by Assistant Attorney General Leonard E. Martin. At petitioner's request, the parties stipulated to transferring venue to Dane County, which then received the court file from Lincoln County on February 13, 1998.

Although sec. 227.55, Stats., requires that the record in an administrative review be filed with the court within thirty days of service of the petition upon the agency, for unknown reasons the record in this matter was not filed with the Court until March 13, 1998. The transcripts followed on March 24, 1998. Thus, while petitioner's motion to compel had merit when originally filed, it is now moot. As to petitioner's request for costs and sanctions, the Court is not persuaded that such measures are warranted here. Respondent's delay in producing the

ATTACHMENT "F"

record is in no way condoned by the Court. Nevertheless, petitioner has failed to demonstrate that she was in any way prejudiced by this delay. Nor is there any evidence of misconduct on part of the respondent. The request for costs and sanctions is denied.

Finally, petitioner states that in previous administrative reviews where she has appeared *pro se* the respondents provided her with copies of everything filed with the clerk of court, including a copy of the certified record and hearing transcripts. In this review, however, she has not been provided with a copy of the record.

There is no requirement in sec. 227.55, Stats., that a copy of the record and transcripts be provided to the petitioner. While petitioner may have received her own copy of the record in other administrative reviews, the statutes do not compel the respondent to supply copies to the petitioner; she is free to review the record filed with the Court if she wishes to check for errors and omissions. Of course, nothing prevents the respondent from sending the petitioner a copy of the record as a courtesy.

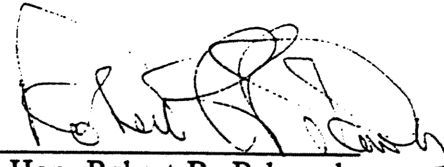
ACCORDINGLY,

Petitioner's Motion for Writ of Mandamus and for Costs and/or Sanctions is DENIED.

SO ORDERED.

Dated this 27th day of April, 1998.

BY THE COURT:



Hon. Robert R. Pekowsky
Circuit Judge, Branch 5

cc: AAG Leonard E. Martin
Ms. Libbie Pesek, *pro se*

HONORABLE ROBERT R. PEKOWSKY
DANE COUNTY CIRCUIT COURT BRANCH 5
PRESIDING JUDGE-JUVENILE DIVISION
210 Martin Luther King Jr. Blvd. - Room 223
Madison, WI 53709

Telephone: (608) 266-9095 Facsimile: (608) 267-4153

Lois Altenburg, Clerk 266-9299
Bonnie Hamer, Secretary 266-9095
Nadine Ripp, Court Reporter 266-9285

May 15, 1998

Ms. Libbie Pesek
W3284 Grundy Rd.
Irma, WI 54442

Dear Ms. Pesek:

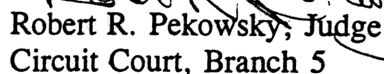
Re: Pesek v. WDOA
Case No. 98 CV 404

In response to your letter dated May 10, 1998, please be advised that the filed record and transcript consists of 117 pages and the Clerk's office charges $1.25 per page which would total $146.25.

If you want to have a copy of the record please submit your check payable to the Dane County Clerk of Court's Office and the copies will be made and sent to you.

Also, as a reminder, any correspondence submitted to the Court must be copied to opposing counsel.

Sincerely,



Robert R. Pekowsky, Judge
Circuit Court, Branch 5

RRP:la

cc:
AAG Leonard E. Martin, w/ enclosure (5/10/98 letter from Ms. Pesek)

ATTACHMENT "G"

Rec'd 5/19/98

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 5	DANE COUNTY

LIBBIE PESEK,

Petitioner,

v.

Case No. 98-CV-404

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Administrative Review

Respondent.

DECISION AND ORDER REGARDING MOTION FOR STAY OF BRIEFING SCHEDULE

This matter comes before the Court upon Ms. Pesek's "Motion for Stay of Briefing Schedule." The motion was filed with the Court on April 21, 1998. Ms. Pesek requests that the briefing schedule for this administrative review be stayed pending receipt by her of a copy of the administrative record and the disposition of her previously filed "Motion for Writ of Mandamus to Compel Production of Administrative Record and Costs and Sanction for Noncompliance of Statutory Procedure and Refusal to Produce Record." The latter was dealt with by the Court's "Decision and Order Denying Motion for Writ of Mandamus," issued on April 27, 1998. In that Decision the Court noted that the Respondent was not statutorily required to supply Ms. Pesek with a copy of the administrative record. Therefore, the Court will not stay the briefing schedule for the reasons presented by Ms. Pesek.

However, the interruption resulting from the Motion for Mandamus warrants an adjustment to the briefing schedule. Under the March 30 Briefing Schedule Ms. Pesek was to submit her brief on or before April 30, 1998. Obviously, that deadline has passed. Accordingly, the Court hereby amends the briefing schedule.

With respect to the merits of this administrative review, briefs shall be filed as follows:

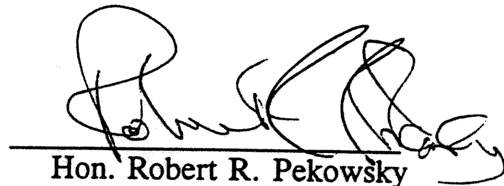
ATTACHMENT "H"

Petitioner:	on or before 5/29/98
Respondent:	on or before 6/29/98
Reply if any:	on or before 7/10/98

SO ORDERED.

Dated this 13th day of ~~April~~ May, 1998.

BY THE COURT:



Hon. Robert R. Pekowsky
Circuit Judge, Branch 5

cc: AAG Leonard E. Martin
Ms. Libbie Pesek, *pro se*

STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

DECISION

LIBBIE PESEK VS. STATE OF WISCONSIN DEPT. OF ADMINISTRATION
CASE 96 CV 187

LIBBIE PESEK VS. STATE OF WISCONSIN DEPT. OF HEALTH
CASE 94 CV 149

LIBBIE PESEK VS. DEPARTMENT OF WORKFORCE DEVELOPMENT
CASE 96 CV 162

The parties have briefed the issue of whether, and under what circumstances, a court has authority to impose costs or sanctions against the State of Wisconsin or its attorney's. The court has considered those briefs.

Case law supports the proposition that, absent statutory authority, costs may not be taxed against the State or an administrative agency of the State. See Guthrie vs. Wisconsin Employment Relations Commission 107 Wis. 2d sec.306, 317 320 NW 2nd 213. As stated in this decision "statutes allowing costs are in derogation of the common law and should be strictly construed."

The parties in their briefs apparently concede this point. The court finds that the only statutory authority for awarding

costs against the State is Wis. Statutes sec. 814.245. Subsection (3)of that Statute provides that "the court shall provide costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust."

The court finds that since sec. 814.245 specifically covers when and under what circumstances costs may be taxed against the State, other more general statutes can not stand as authority for the taxation of such costs. Accordingly the court finds that sec. 814.036 of the statutes does not allow such taxation. In addition such section refers to situations "not covered by sections 814.01 to 814.035..." of the statutes and therefore does not include section 814.245.

The court finds that it does have authority to impose costs or other monetary sanctions in order to uphold the authority of the court or to penalize conduct disruptive to the administration of justice. This court finds that this authority is provided both by case law as " inherent" authority and is also provided by section 814.036 of the statutes. See Schultz vs. Darlington Mutual Insurance Company 181 Wis.sec.646,656, 511 NW 2nd 879.

A court has inherent authority, apart from statutory authority, to impose costs and sanctions in appropriate circumstances. See of Schaefer vs. Northern Assurance Company 182 Wis.sec.148,162 513 NW 2nd 615. In this case the court states, "a trial court is not limited only to its statutory authority to sanction parties, for it also has "inherent authority to sanction

parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders." Citing Johnson vs. Allis Chalmers Corp. 162 Wis.sec.261, 273-74, 470 NW 2nd 859,863 (1991).

Accordingly this court holds that in the above entitled matters the court does have the authority to sanction attorney's for the State if that is necessary to uphold the authority of the court or to enforce the orderly administration of justice. However, this is not to be done lightly.

The petitioner claims that the record will support her contention that such sanctions should be applied. Except for, perhaps, case #96 CV 187, the court is skeptical of the petitioners position. However the court will hold a further hearing on the issue of sanctions and allow the petitioner to make an oral presentation and argument bearing in mind that the court has the authority to impose sanctions and costs against the petitioner if her position is frivolous or without sufficient merit.

The court will also allow the petitioner to present her position that she is the "prevailing party" and therefore should be allowed costs pursuant to statute sec. 814.245 (3). The petitioner has requested that she be allowed to present a brief on this issue. The court finds that further briefing by either party will not be helpful. (1)

The petitioner has also requested that substantial time be set aside for evidentiary hearings. The court is of the view that this amount of time is not needed and that the parties should be able to

present their positions to the court in a succinct manner. Accordingly, the court will schedule motion and oral argument time not to exceed one and one half hours. The court requires that within three weeks of the date of this decision the petitioner inform the respondent and the court in writing of the points and portions of the record in each case which she intends to rely upon in pursuing her motions for sanctions and costs.

Dated this 6th day of July, 1998

BY THE COURT:

J. Michael Nolan
Circuit Judge

(1) The Court of Appeals has covered this subject well in the case of Stern vs. Wisconsin Department of Health and Family Services 212 Wis. 2d 393, 569 N.W. 2d 79.