

STATE OF WISCONSIN
SUPREME COURT

Case No. 2017AP2278

KRISTI KOSCHKEE, AMY ROSNO, CHRISTOPHER MARTINSON,
and MARY CARNEY

Petitioners,

v.

ANTHONY EVERS and the WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION

Respondents.

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
PETITION TO THE SUPREME COURT TO TAKE
JURISDICTION OF AN ORIGINAL ACTION**

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION

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INTRODUCTION

On November 20, 2017, pursuant to Wis. Stat. §§ 806.04 and 809.70, the Petitioners filed a “Petition to Supreme Court to Take Jurisdiction of an Original Action,” and a memorandum in support (collectively, “the Petition”). That same day, the Petitioners served a copy of the Petition and memorandum on the State Superintendent of Public Instruction and Department of Public Instruction (collectively, “SPI”) and the Attorney General. (Nilsestuen Decl. ¶¶ 3-5) No copy was served at that time – or any time since – on the Legislature’s Joint Committee for Review of Administrative Rules (“JCRAR”) as required by Wis. Stat. § 806.04(11). (*Id.*)

The Petition requests a declaratory judgment regarding the application of Wis. Stat. § 227.135 and 227.135 as amended by 2017 Wis. Act 57 to the State Superintendent and the Department of Public Instruction (the “SPI”).¹ Pet. at 2. By having failed to timely serve JCRAR, the Petitioners deprived this Court of jurisdiction to hear the Petition.²

¹ The Petitioners refer to the statute as the “REINS Act.” For ease of understanding, this motion and brief in support will only reference the actual statutes and enacting legislation.

² It is unclear if the Petitioners are raising an issue regarding the application of all of the Act 57 in its entirety or just the changes to Wis. Stat. § 227.135 and 227.185. Regardless, requirement to serve JCRAR still applies.

ARGUMENT

I. The Petitioners placed in issue the application and constitutionality of Wis. Stat. §§ 227.135 and 227.185.

The Petitioners state that they, “ask this Court to take this matter as an original action in order to issue a declaratory judgment that DPI is required to comply with all portion of the [2017 Act 57]...” (Mem. in Support of Pet. at 19) Their Petition asserts that the amendments to Chapter 227 found in 2017 Wisconsin Act 57 render the provisions of 2011 Act 21, which were held in *Coyne v Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, to be unconstitutional as applied to the State Superintendent, to now be constitutional as applied to the State Superintendent.

Section VI of the Petitioner’s memorandum in support is entitled, “This Court Should Take this Case to Determine if the Portion of [2017 Wis. Act 57] Requiring Gubernatorial Approval of a Statement of Scope is Constitutional.” (Mem. at 14-18). In it, the Petitioners ask this Court to “undertake a fresh constitutional analysis” to determine whether there is “anything in the Constitution that prevents the Legislature from placing limits such as a gubernatorial veto on DPI’s rule-making authority.” (Mem. at 15).

The Petitioners further state that:

...this case involves significant legal and constitutional questions – a state agency (part of the executive branch) refusing to comply with state law and promulgating rules that purport to have the force and effect of state law but without complying with the Legislature’s directives for promulgating such rules. *It also involves a significant issue of interpretation of the Wisconsin Constitution.*

(Pet. at 9; emphasis added).

Consequently, without doubt, the Petitioners have placed before the Supreme Court an issue involving the application and constitutionality of sections of Chapter 227 to the State Superintendent.

II. This Court lacks subject matter jurisdiction to hear the petition because the Petitioners failed to serve the petition on Joint Committee for Review of Administrative Rules within 90 days of filing.

Because the Petition puts in issue the application and constitutionality of sections of Chapter 227, the Petitioners were required by Wis. Stat. § 806.04(11) to serve a copy of the petition on the JCRAR within 90 days of filing. That section reads:

In any proceeding under this section in which the constitutionality, construction or application of any provision of ch. 227...**is placed in issue** by the parties, the joint committee for review of administrative rules shall be served with a copy of the petition and, with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard.

Wis. Stat. § 806.04(11) (emphasis added).

This Court has previously held that "[b]ecause the declaratory action itself is a creature of statute, **the maintenance of a declaratory action requires strict compliance with sec. 806.04.**" *In re Estate of Fessler*, 100 Wis. 2d 437, 444, 302 N.W.2d 414, 418 (1981) (emphasis added). Similarly, the Court in *O'Connell v. Board of Education* held that the requirements of Wis. Stat. § 806.04 "**must be strictly complied with** in order to vest subject matter jurisdiction in the courts." *O'Connell v. Bd. of Educ.*, 82 Wis. 2d 728, 735, 264 N.W.2d 561, 564 (1978) (emphasis added); *see also Cudahy v. Wis. Dep't of Revenue*, 66 Wis. 2d 253, 261-62, 224 N.W.2d 570 (1974); *Wisconsin's Env'tl. Decade, Inc. v. Pub. Serv. Comm'n*, 84 Wis. 2d 504, 516, 267 N.W.2d 609 (1978). As such, "[i]n a declaratory action the failure to give the notice required by sec. 806.04(11) is fatal to the jurisdiction of the court." *Fessler*, 100 Wis. 2d at 444 (emphasis added); *see also O'Connell*, 82 Wis. 2d at 735; *Town of Center v. City of Appleton*, 70 Wis. 2d 666, 669, 235 N.W.2d 504 (1975); *Bollhoffer v. Wolke*, 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974).

Importantly, service must be completed within the timeframe specified by Wis. Stat. § 893.02. In *Richards v. Young*, this Court held that a declaratory judgment action under Wis. Stat. § 806.04 is an action within the

meaning of Wis. Stat. § 893.02. *Richards v. Young*, 150 Wis. 2d 549, 557, 441 N.W.2d 742, 745 (1989). Thus, service must be completed within 90 days after the filing of the declaratory judgment action. *Id.* at 558; *see also State v. Town of Linn*, 205 Wis. 2d 426, 448-49, 556 N.W.2d 394, 404-05 (Ct. App. 1996). Here, that means that the Petitioners were required to serve JCRAR within 90 days after filing the petition on November 20, 2017 (i.e., February 19, 2018) and cannot now timely serve JCRAR.³

CONCLUSION

By having failed to timely serve JCRAR by February 19, 2018, the Petitioners have deprived this Court of the subject matter jurisdiction necessary to allow it to hear and determine the “constitutionality, validity or application” of 2017 Wis. Act 57. *Town of Linn*, 205 Wis. 2d at 449. The Court must dismiss the Petition.

³ Ninety days from November 20, 2017, is Sunday, February 19, 2018. Pursuant to Wis. Stat. § 990.001(4)(b), the Petitioners had until Monday, February 20, 2018, to serve JCRAR.

Dated this 5th day of March, 2018.

Respectfully submitted,

A handwritten signature in black ink, reading "Ryan Nilsestuen". The signature is fluid and cursive, with the first name "Ryan" and last name "Nilsestuen" clearly legible.

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