



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT II

December 4, 2024

To:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Erika L. Bierma
Electronic Notice

Michele Jacobs
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

Michael D. Morris
Electronic Notice

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

2023AP943

James R. Strauss v. Wisconsin Department of Financial Institutions
(L.C. #2022CV655)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

James R. Strauss appeals from a circuit court order granting a motion to dismiss his petition for judicial review of a final order entered by the Wisconsin Department of Financial Institutions (DFI). The court dismissed the petition on the ground that it lacked competency to proceed because Strauss failed to timely request a hearing on DFI's order before it became final. Strauss contends that the court should not have dismissed his petition because his hearing request was timely or, even if it was not timely, the DFI notice governing hearing requests violated Strauss' due process rights. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We reject Strauss’ arguments and summarily affirm.

The following summary of undisputed facts is derived from Strauss’ petition for judicial review and the circuit court order granting DFI’s motion to dismiss.

On May 25, 2022, after determining that Strauss had violated multiple state securities laws, DFI issued various proposed orders pursuant to WIS. STAT. § 551.604 in a document we refer to as “the summary order.” DFI mailed the summary order to Strauss and his attorney via certified mail on the day it was issued. As relevant here, the summary order provides the following notice: (1) Strauss has a right to request a hearing, pursuant to § 551.604(2); (2) the request for a hearing may be made by mailing, delivering in person, or faxing a written request to DFI; (3) the request for a hearing must be made “within [thirty] days after the date of service of this order;” (4) the date of service of the order is the “date it is placed in the mail;” and (5) failure to timely request the hearing will result in the temporary order becoming “final by operation of law,” as provided in § 551.604(2).

Attached to the summary order was an “Affidavit of Service and Compliance with WIS. STAT. § 551.611.” In the affidavit, also dated May 25, 2022, the affiant swore that on that date, she had “caused to be served by certified mail upon” both Strauss and his attorney the summary order and affidavit.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Strauss' attorney received the summary order on May 27, 2022. Assuming the date of receipt and not the date of mailing to be the date of service, Strauss' attorney filed a hearing request by fax on June 27, 2022.² Thereafter, DFI notified Strauss and his attorney that Strauss' request was denied as untimely because it was received after the thirty-day window to request a hearing had closed. DFI's notification recited the provisions from the summary order, as enumerated above, specifying how and when a hearing request must be filed to be valid. Citing to WIS. STAT. § 551.604(2), the notification informed Strauss that he "did not timely request a hearing within [thirty] days of the May 25, 2022 date" of service as was necessary "to prevent the summary order from becoming final as a matter of law." The notification further explained: "[h]ad your request for a hearing been filed prior to midnight on June 24, 2022, it would have been timely and the allegations against you would have been set for hearing."

Strauss twice sought reconsideration of DFI's decision rejecting his hearing request as untimely, which DFI twice denied. DFI entered an "Amended Notice of Final Order" adopting the factual and legal allegations set forth in the summary order, including civil penalties and restitution obligations. Strauss then sought judicial review, which the circuit court denied due to its lack of competency to proceed. He now appeals.

Strauss argues that his hearing request was timely filed with DFI. However, he contends, even if it was not timely, DFI failed to provide him with constitutionally adequate notice. DFI responds that Strauss' request was untimely. DFI further asserts that its notice comported with

² The thirtieth day following Strauss' receipt of the summary order was Sunday, June 26, 2022, but DFI generally does not accept filings on weekends, so Strauss filed his hearing request on the first business day following June 26.

due process requirements because it informed Strauss of precisely what he had to do to request a hearing to preserve his rights and, as relevant here, when he needed to do so.

On appeal from administrative review, we consider the agency’s decision, not that of the circuit court. *Zimbrick v. LIRC*, 2000 WI App 106, ¶9, 235 Wis. 2d 132, 613 N.W.2d 198. We review de novo questions involving statutory interpretation and the application of undisputed facts to the law. *Currier v. DOR*, 2006 WI App 12, ¶9, 288 Wis. 2d 693, 709 N.W.2d 520. “Whether a notice is sufficient to provide due process presents a question of law, and our review is therefore de novo.” *Homeward Bound Servs., Inc. v. Office of Ins. Comm’r*, 2006 WI App 208, ¶39, 296 Wis. 2d 481, 724 N.W.2d 380.

The analysis regarding the first issue, whether Strauss timely filed a hearing request, depends solely on whether the date of service of the summary order was May 25, 2022, (the date of mailing) or May 27, 2022 (the date of receipt). If, as DFI concluded, the date of service was the date of mailing, then Strauss’ hearing request was due by midnight on June 24, 2022 and was untimely. But if, as Strauss argues, the date of service was the date of its receipt, then Strauss’ request was timely filed.

There is no question that the summary order clearly explained that the date of service meant the date of mailing. However, Strauss argues that because WIS. STAT. § 551.604 does not define “date of service,” we should apply general rules of civil procedure, which would dictate the date of receipt to be the date of service, rather than look to DFI’s definition. We disagree. Although § 551.604 is silent on the manner and date of service, under its authority established by the legislature, DFI promulgated two administrative rules that clarify both the manner and effect of service. *See* WIS. STAT. § 551.605(1)(b) (empowering DFI to adopt rules, including those

which “define terms, whether or not used in this chapter”). The first rule requires service by certified mail: “A copy of every order issued without a hearing shall be sent promptly by certified mail to each party named in the order at his or her last known address or to the party’s attorney of record,” WIS. ADMIN. CODE § DFI-Sec 8.06 (Sept. 2010). The second rule provides that mailing constitutes service: “Mailing of any order ... to the last known address of any person, or personal service, constitutes notice thereof” WIS. ADMIN. CODE § DFI-Sec 8.07 (Sept. 2010).

Together, and in accordance with the authority delegated to DFI by the legislature, these administrative rules allowing service by mail and stating that notice is effective upon mailing say exactly what the order said; namely, the date of mailing constitutes the date of service. Strauss’ position that we should conclude otherwise has no basis in the law and is contrary to the plain language of the rules and the notice in the summary order. In short, we conclude that the date of service under WIS. STAT. § 551.604(2) is the date of mailing. Both the summary order and Wisconsin law, including DFI rules, make that clear. We therefore affirm DFI’s conclusion that Strauss’ hearing request was not timely.

Our inquiry is not over, however, because Strauss argues that he is entitled to a hearing regardless of his untimely request on the ground that DFI’s notice deprived him of due process. Strauss argues that DFI’s process of issuing summary orders is constitutionally deficient as it is “not the ‘process’ long deemed necessary to summon someone into court and subject him to potential liability and penalties.” Strauss asserts that the order had to follow the “traditional legal process” of a summons in a civil action for it to comport with due process requirements.

The right to due process is protected by the United States and Wisconsin Constitutions. U.S. CONST. amend. XIV; WIS. CONST. art. I, § 1. “The fundamental requirements of procedural due process are notice and an opportunity to be heard.” *Zimbrick*, 235 Wis. 2d 132, ¶10. A notice satisfies due process if it is “reasonably calculated to inform the person of the pending proceeding and to afford him or her an opportunity to object and defend his or her rights.” *Bachowski v. Salamone*, 139 Wis. 2d 397, 405, 407 N.W.2d 533 (1987) (citation omitted). To assess whether a notice is reasonable, and therefore comports with due process, courts consider whether the notice was “sufficient to enable the recipient to determine what he must do to prevent the deprivation of his interest.” *Estate of Wolff v. Town Bd. of Weston*, 156 Wis. 2d 588, 596, 457 N.W.2d 510 (Ct. App. 1990).

Given these applicable legal standards and our de novo review of the issue, we conclude that DFI’s notice was sufficient to provide Strauss due process. Strauss provides no legal support for his argument that the order had to follow the “traditional legal process” of a summons in a civil action. Strauss also fails to explain why or how DFI’s summary process, which is authorized by WIS. STAT. § 551.604(2), is constitutionally inadequate. The summary order explains in clear detail what Strauss needed to do to contest the order: request a hearing with DFI. It also explains when he needed to do it: within thirty days after the date of mailing, which the attached affidavit of service plainly showed was May 25, 2022. Any reasonable person reading the summary order would have understood that he or she must file a hearing request no later than midnight on June 24, 2022, in order to prevent a deprivation of their interests. That is all due process requires. See *Estate of Wolff*, 156 Wis. 2d 588, 596.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed.

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

Samuel A. Christensen
Clerk of Court of Appeals