

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP803

Cir. Ct. No. 2010CV399

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DUANE C. DEERING, JR.,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

**BEVERLY ENTERPRISES-WISCONSIN, INC. D/B/A BEVERLY HEALTH
AND REHABILITATION SERVICES, INC., N/K/A GOLDEN LIVING,**

INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 VERGERONT, J. Duane C. Deering, Jr., seeks judicial review of an order of the Labor and Industry Review Commission (LIRC) regarding his employment discrimination claim against Beverly Enterprises-Wisconsin, Inc. The LIRC decision determined that Beverly had good cause for its failure to attend the hearing before the administrative law judge (ALJ) at which the ALJ had determined that Beverly had discriminated against Deering. Accordingly, the LIRC order set aside the ALJ's order and remanded for a further hearing on the merits with Beverly's participation. Deering filed a petition in the circuit court under WIS. STAT. ch. 227 (2009-10)¹ for judicial review of LIRC's order and a petition for a writ of prohibition to prevent a further hearing. The circuit court dismissed both petitions on the primary ground that LIRC's order was not final.

¶2 Deering appeals the circuit court's order dismissing his petitions for judicial review and for a writ of prohibition. We conclude the circuit court properly dismissed the petition for judicial review because LIRC's order was not final, Deering does not have a due process right to judicial review at this time, and any procedural errors in the circuit court were harmless. We also conclude the circuit court properly exercised its discretion in dismissing the petition for a writ of prohibition. In arriving at this conclusion, we reject Deering's contention that LIRC does not have the authority to order a further hearing on the merits of his discrimination claim and his contention that the judicial review provisions of WIS. STAT. ch. 227 do not provide an adequate remedy. Accordingly, we affirm.

BACKGROUND

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 The procedural background to this case, although somewhat complicated, is undisputed. In June 2005 Beverly terminated Deering from his employment as a maintenance worker. Deering filed a complaint with the Equal Rights Division (ERD) of the Department of Workforce Development (DWD), alleging that the termination constituted discrimination against him based on a disability, in violation of WIS. STAT. § 111.321. ERD made an initial determination of probable cause to believe discrimination occurred and certified the matter for a hearing. Beverly failed to appear at the hearing. Based on the evidence Deering presented, the ALJ issued a decision in August 2007 concluding that Beverly had discriminated against Deering because of his diabetes and ordering reinstatement, back pay and benefits, and attorney fees.

¶4 Beverly petitioned for review to LIRC, alleging excusable neglect for not appearing at the hearing. LIRC set aside the ALJ's decision and order and remanded to the ERD for an evidentiary hearing to determine whether Beverly could show good cause for failing to appear. LIRC's order directed that, if the ALJ determined Beverly did not have good cause, the ALJ should re-issue its original decision and order. On the other hand, LIRC stated, if the ALJ determined there was good cause, the ALJ should "conduct a further hearing on the merits to allow [Beverly] to present its evidence and to permit [Deering] to present rebuttal evidence"

¶5 After an evidentiary hearing on the good cause issue, the ALJ determined that Beverly had not shown good cause for failing to attend the hearing. In January 2010 the ALJ issued a decision and order that made findings of fact and conclusions of law on the good cause issue and directed Beverly to pay Deering an amount for attorney fees incurred on remand. The order also re-issued the original ALJ decision and order on the merits in favor of Deering. We will

refer to this portion of the ALJ's January 2010 order as "the ALJ's re-issued order on the merits" or "the ALJ's re-issued order."

¶6 Beverly petitioned for review to LIRC, challenging specific findings and conclusions regarding good cause and the award of attorney fees incurred on remand. Contrary to the conclusion reached by the ALJ, LIRC concluded that Beverly had met its burden of showing good cause. LIRC therefore set aside the ALJ's January 2010 decision and order and remanded to the ERD for a further hearing on the merits of Deering's discrimination claim.

¶7 Deering sought judicial review of LIRC's order under WIS. STAT. § 227.52.² In the same action, Deering petitioned for a writ of prohibition to prevent a further hearing on the merits. LIRC moved to dismiss the action on the ground that its order was not final, and Beverly joined in the motion. The circuit court agreed with LIRC and Beverly that LIRC's order was not final and implicitly rejected Deering's argument that due process entitled him to judicial review of LIRC's order at this time. The circuit court also denied two procedural motions brought by Deering: one based on the failure of LIRC and Beverly to file notices of appearance in the circuit court under WIS. STAT. § 227.53(2), and one based on LIRC's failure to transmit the administrative record to the circuit court under WIS. STAT. § 227.55. Finally, the court dismissed the petition for a writ of prohibition.

DISCUSSION

² The findings and orders of LIRC regarding employment discrimination claims are subject to review under WIS. STAT. ch. 227. WIS. STAT. § 111.395.

¶8 Deering contends on appeal that the circuit court erred in dismissing his petition for judicial review under WIS. STAT. ch. 227 for three reasons: (1) LIRC’s order was final; (2) his right to due process is violated if he is not afforded judicial review of LIRC’s order at this time; and (3) the court erred in denying his two procedural motions. Deering also contends the circuit court erroneously exercised its discretion in denying his petition for a writ of prohibition. He is entitled to the writ, he asserts, because LIRC did not have the authority to remand for a further hearing on the merits and because the judicial review provisions of ch. 227 are inadequate.

¶9 In the sections below, we first address Deering’s challenges to dismissal of the petition for review and then address his challenges to dismissal of the petition for a writ. With respect to the petition for judicial review, we conclude dismissal was proper because LIRC’s order was not final, Deering does not have a due process right to judicial review at this time, and any circuit court procedural errors were harmless. With respect to the petition for a writ of prohibition, we conclude the circuit court properly exercised its discretion. We reach this conclusion because we determine that LIRC has the authority to remand for a further hearing on the merits and that the circuit court acted reasonably in deciding that WIS. STAT. ch. 227 provides Deering with an adequate means for judicial review.

I. Petition for Judicial Review

A. Finality of LIRC’s Order Under Chapter 227

¶10 WISCONSIN STAT. § 227.52 provides that “[a]dministrative decisions which adversely affect the substantial interest of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review” In

addition, WIS. STAT. § 227.53(1) provides that “any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision ...;” and the term “[p]erson aggrieved” is defined as “a person or agency whose substantial interests are adversely affected by a determination of an agency.” WIS. STAT. § 227.01(9).

¶11 While there is no express requirement in these provisions that an agency order must be final in order to be subject to judicial review, case law has established that WIS. STAT. ch. 227 limits judicial review to agency orders that are final. See *Sierra Club v. DNR*, 2007 WI App 181, ¶13, 304 Wis. 2d 614, 736 N.W.2d 918 (citations omitted).³ A final order “directly affects the legal rights, duties, or privileges of a person.” *Pasch v. DOR*, 58 Wis. 2d 346, 356, 206 N.W.2d 157 (1973).⁴ In contrast, an interlocutory order is one where “the substantial rights of the parties involved in the action remain undetermined and ... the cause is retained for further action.” *Id.* at 354.

¶12 Neither party discusses the meaning of “substantial interest” as used in WIS. STAT. §§ 227.52 or 227.01(9). However, in case law addressing when a person has the right to petition for judicial review under §§ 227.52 and 227.53, the requisite interest is defined as a “legally protected interest” or an “interest ... recognized by law.” *Foley-Ciccantelli v. Bishop’s Grove*

³ In addition LIRC has promulgated a rule that limits judicial review to final decisions. See WIS. ADMIN. CODE § LIRC 4.04 (Sept. 2009) (“Any person aggrieved by a *final decision* of the commission shall be entitled to judicial review in circuit court.” (emphasis added)).

⁴ The phrase in *Pasch v. DOR*, 58 Wis. 2d 346, 356, 206 N.W.2d 157 (1973), used to describe a final order—“directly affects the legal rights, duties, or privileges” of the appellant—is from the predecessor to WIS. STAT. § 227.52, WIS. STAT. § 227.15 (1971), which used that phrase instead of the current “adversely affects the substantial interests of ...” a person. § 227.52. This change in language does not affect our analysis.

Condominium Ass'n, Inc., 2011 WI 36, ¶45, 333 Wis. 2d 402, 797 N.W.2d 789 (citing *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983)). Consistent with this definition, in *Pasch*'s discussion of finality the court describes a non-final order as one in which "the appellant does not have an 'interest recognized by law' that has been aggrievedly affected." *Pasch*, 58 Wis. 2d at 357. Thus, we conclude that, in order for an agency order to be final for purposes of judicial review under ch. 227, the "substantial interest" that is directly and adversely affected must be an "interest recognized at law."

¶13 The question whether an administrative order is final for purposes of judicial review is a question of law, which we review de novo. *Sierra Club*, 304 Wis. 2d 614, ¶13 (citation omitted).

¶14 Deering contends that LIRC's order is final because he has a substantial interest in the ALJ's re-issued order on the merits and LIRC's order setting that order aside adversely affects his substantial interest. Deering presents two alternative theories to support his position that he has a substantial interest in the ALJ's re-issued order on the merits. We conclude that neither theory demonstrates that Deering has a substantial interest in the ALJ's re-issued order, that is, an interest recognized by law.

¶15 Deering's first theory is that, in LIRC's decision accompanying the order Deering appeals, LIRC adopted the ALJ's findings of fact and conclusions of law on the merits of his discrimination claim without modification, and therefore the ALJ's decision in his favor is a final decision of LIRC. This contention is based on an unreasonable reading of LIRC's decision and order. LIRC's decision states that it "adopts the findings of fact in the ALJ's decision of January 14, 2010, with certain minor modifications, as set forth below." The facts

LIRC identifies that it adopted with minor modifications all relate to the determination of whether Beverly had good cause for its failure to appear. None of the facts relate to the issue of discrimination. In addition, LIRC's order explicitly states that "[t]he ALJ's decision of January 14, 2010, which incorporates the ... decision issued on August 31, 2007, is set aside, and this matter is remanded to [the ALJ] for further hearing on the merits"

¶16 Deering's second theory is based on the fact that Beverly's petition to LIRC for review of the ALJ's January 2010 order did not specifically challenge the re-issued order on the merits, but specifically challenged only the ALJ's determination on good cause and on attorney fees for the remand. Because of this, Deering asserts, Beverly "waived" its right to appeal the ALJ's determination of discrimination and LIRC does not have the authority to set that determination aside. At bottom, Deering's argument is that LIRC's order is final because LIRC did not have the authority to set aside the ALJ's re-issued order on the merits. However, case law has established that an agency's order is not final for purposes of judicial review under WIS. STAT. ch. 227 simply because the asserted agency error is that the agency lacks authority. *See Pasch*, 58 Wis. 2d 349.⁵

¶17 In *Pasch* the court held that an order of the Wisconsin Tax Appeals Commission refusing to quash the taxpayer's tax assessment and denying the taxpayer's motion to dismiss for lack of jurisdiction was not final for purposes of judicial review. *Id.* at 350-51, 357. The court concluded that "[t]he order of the commission finding jurisdiction in the commission to proceed to a hearing upon

⁵ It is unnecessary for us to resolve in this section the issue whether LIRC had the authority to remand for a further hearing on the merits. We return to this issue in the next section on the petition for a writ of prohibition. *See infra*, ¶¶40-45.

[the] merits of the controversy does not directly affect the legal rights, duties or privileges of the appellant.” *Id.* at 357. Instead, “[t]he jurisdiction of the commission may be challenged upon review from the final decision of the commission upon the merits of the controversy.” *Id.*

¶18 The court in *Pasch* rejected the taxpayer’s argument that “the issue of the commission’s jurisdiction should be finally determined before appellant is put to the expense and inconvenience of a lengthy proceeding” *Id.* Instead, the court held, any time and expense that might be saved if the court were to determine jurisdiction at this stage would be “outweighed by the resultant delay that would accompany review of these agency determinations and the disruption of the agency’s orderly process of adjudication in reaching its ultimate determination.” *Id.*

¶19 As in *Pasch*, Deering’s argument that LIRC has exceeded its authority by remanding for a further hearing on the merits is one that he can raise on judicial review of LIRC’s final order on the merits of his claim. Deering has not identified any cogent reason why, if it is later determined that LIRC exceeded its authority, as he claims, the original order of the ALJ on the merits could not be reinstated at that time.⁶

⁶ Deering makes an argument as to why he may never be able to obtain review of LIRC’s order, but we do not see its logic. Deering acknowledges that, if he were to prevail before LIRC after a further hearing, then the issues he seeks to raise now could be moot. This potential mootness, he contends, is a reason LIRC’s order must be reviewed now. However, the very fact that he will either obtain from LIRC the result he seeks after a further hearing or have the right to judicial review of an unfavorable result demonstrates why LIRC’s order for a further hearing is not final.

¶20 It is true that the agency order appealed from in *Pasch* did not set aside an ALJ decision in the taxpayer’s favor. In *Pasch* there had not yet been a hearing on the merits as occurred here, albeit without one party being present. *See id.* at 357. Deering’s argument, as we understand it, is this: because the particular way in which LIRC allegedly exceeded its authority was setting aside the ALJ’s re-issued order on the merits, he has acquired a substantial interest in that ALJ order. We reject this argument because it is inconsistent with the applicable statute.

¶21 An order issued by an ALJ is subject to review by LIRC and becomes final only if an aggrieved party does not file a petition for review by LIRC within the requisite time period. *See* WIS. STAT. § 111.39(5)(a), (b). Beverly did timely petition for review by LIRC of the ALJ’s January 2010 order, which included the re-issuance of the ALJ’s prior order on the merits. And LIRC set aside the ALJ’s January 2010 order, specifically noting that it was setting aside the order that “incorporate[d] the ... decision issued on August 31, 2007”—that is, the original ALJ decision on the merits. Given Beverly’s timely appeal to LIRC, Deering has no interest recognized by law in the ALJ order. Deering *does* have an interest recognized by law in not being discriminated against because of a disability. *See* WIS. STAT. § 111.321. However, the merits of his claim based on this interest are still to be determined at the further hearing LIRC ordered.

¶22 Deering relies on *Friends of the Earth v. Public Service Commission*, 78 Wis. 2d 388, 254 N.W.2d 299 (1977), to support his position that LIRC’s order is final, but we conclude this case does not support his position. In *Friends of the Earth* the agency order authorized an electric company to increase its rates on a temporary basis and authorized immediate collection of the increased rates. *Id.* at 406. The court recognized that, even when further agency action is

expected “on other aspects of the case,” an order that “finally disposes of matters having an immediate impact upon the rights of a party ... may well be reviewable as to such matters [finally disposed of]” *Id.* at 407. However, the court held that, “where refund of excess rates is available, an interim rate order of the character involved here is not immediately subject to judicial review, but may be reviewed in connection with review of the final order in the case.” *Id.* at 410. Deering has not persuaded us that the “irreparable injury” to customers of having to begin immediately to pay increased rates that will not be refunded, as discussed in *Friends of the Earth*, is analogous to the impact on him of setting aside the ALJ’s re-issued order on the merits and having a further hearing on the merits.

¶23 In summary, we conclude that LIRC’s order does not adversely affect a substantial interest of Deering, that is, an interest protected by law. Instead, Deering’s substantial interest in not being discriminated against based on his disability remains to be determined at a further hearing. If, after the further hearing, the agency’s final order is adverse to Deering, he may at that time seek judicial review of both LIRC’s good cause determination and its determination on the merits.

¶24 As we stated in *Sierra Club*, we recognize that, in general, parties prefer to have judicial review as promptly as possible of issues decided against them. *Sierra Club*, 304 Wis. 2d 614, ¶26. It is true that, if Deering were able to appeal LIRC’s good cause determination now and were to prevail, then the original ALJ order in his favor would be reinstated, with no need for a further hearing on the merits. However, if Deering were able to appeal now and were *not* to prevail on the good cause issue, there would be a further hearing on the merits and a second judicial review by whichever party loses before LIRC. Thus, the rationale for requiring finality of the administrative decision before permitting

judicial review applies here: it is more efficient for the circuit courts and the court of appeals to address all the issues in one petition for judicial review rather than in two separate petitions. *See id.*, ¶¶16, 26, 27.

B. Due Process

¶25 Deering contends that he will be deprived of his procedural and substantive due process rights if he is not afforded judicial review of the LIRC order at this time. This is so, he asserts, because he acquired “protected legal interests [in the ALJ’s re-issued order] identical to a court judgment.” He refers us to cases from other jurisdictions holding that a final judgment is a property right that requires due process of law before it may be taken away. *See Kingvision Pay-Per-View LTD. v. Lake Alice Bar*, 168 F.3d 347 (9th Cir. 1999); *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988); *In re Consol. U.S. Atmospheric Testing Litig. v. Livermore Labs*, 820 F.2d 982 (9th Cir. 1987).

¶26 Beyond citing these cases, Deering does not identify the legal standards we are to apply in analyzing his claim of violations of procedural and substantive due process rights, and he does not discuss how any legal standard applies to the facts of this case. The cases he cites are concerned with procedural due process. Therefore, we address only the procedural component of due process protection.⁷

⁷ The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects both procedural and substantive rights. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997) (citation omitted). The substantive component protects individuals from “certain arbitrary, wrongful actions regardless of the fairness of the procedures used to implement them.” *Id.* (citation omitted).

¶27 The procedural component of due process protects individuals from the deprivation, by state action, of a constitutionally protected interest in life, liberty, or property without due process of law. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 473, 565 N.W.2d 521 (1997) (citation omitted). When determining whether a property interest is afforded protection by the Constitution, the court looks to whether the interest is recognized and protected by state law. *Riedy v. Sperry*, 83 Wis. 2d 158, 164, 265 N.W.2d 475 (1978).

¶28 Deering’s procedural due process argument is without merit because Wisconsin law does not recognize or protect his asserted interest in the ALJ’s re-issued order on the merits. As we have already explained, an order issued by an ALJ becomes final only if a petition for review by LIRC is not filed within the requisite time period. See WIS. STAT. § 111.39(5)(a), (b). Because Beverly timely appealed the January 2010 ALJ order and LIRC set aside that order, including the ALJ’s re-issued order on the merits, Deering has no property interest in the ALJ’s re-issued order. For this reason, that ALJ order is not the equivalent of the final judgments in the cases on which Deering relies.⁸

C. Alleged Procedural Errors Under WIS. STAT. ch. 227.

¶29 Shortly after LIRC and Beverly filed the motion to dismiss in the circuit court, Deering made two procedural motions under WIS. STAT. ch. 227. One motion asserted that LIRC and Beverly had violated WIS. STAT. § 227.53(2) by failing to file notices of appearance and a second contended that LIRC’s failure

⁸ It is unnecessary to discuss in this opinion whether there is a difference between an interest that is afforded protection by state law for purposes of procedural due process and the “substantial interests” referred to in WIS. STAT. §§ 227.52 and 227.01(9).

to transmit the record violated WIS. STAT. § 227.55. The circuit court denied both motions in the same order that granted the motion to dismiss, but the court did not explain its reasoning for denying the motions.

¶30 With respect to a notice of appearance, WIS. STAT. § 227.53(2) provides:

Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person’s position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review.

Deering contended before the circuit court that, because neither LIRC nor Beverly filed a notice of appearance within twenty days that complied with this statute, the circuit court should “refuse to consider any statement of position in response to Deering’s petition for judicial review.”⁹ Evidently LIRC and Beverly took the position in the circuit court that a statement of their positions with reference to the material allegations of the petition was not necessary until after the court ruled on the motion to dismiss and then only if the court denied the motion.

¶31 With respect to transmission of the agency record, WIS. STAT. § 227.55 provides:

Within 30 days after service of the petition for review upon the agency, or within such further time as the court may allow, the agency shall transmit to the reviewing court the

⁹ Beverly did file within twenty days of service a document titled “Notice of Appearance.” In this document Beverly joined in LIRC’s motion to dismiss but did not state its position “with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review.” WIS. STAT. § 227.53(2).

original or a certified copy of the entire record of the proceedings in which the decision under review was made, including all pleadings, notices, testimony, exhibits, findings, decisions, orders and exceptions, therein

Within thirty days from service of the petition on LIRC, LIRC informed the circuit court that “the agency record is quite large—estimated at approximately 45 inches tall if stacked on top of a desk—so [LIRC] has no intent to prepare and file that record unless this case survives dismissal.” Deering’s motion in response sought to compel transmittal of the record “immediately.”

¶32 On appeal the parties dispute the effect of a motion to dismiss for lack of a final administrative order on the requirements of WIS. STAT. §§ 227.53(2) and 227.55. However, we do not address this issue. Even if we assume LIRC and Beverly violated these statutes and the circuit court should have granted their motions, Deering does not develop an argument explaining why he was adversely affected by the court’s failure to do so. *See* WIS. STAT. § 805.18(2) (We do not reverse a judgment for procedural error “unless ... the error complained of has affected the substantial rights of the party seeking to reverse ... the judgment”).¹⁰

¶33 With respect to the notices of appearance, Deering does not contend he was adversely affected in the circuit court by the failure of LIRC or Beverly to file the notices of appearance as prescribed by WIS. STAT. § 227.53(2). The relief Deering seeks on appeal is an order “disallowing any response by LIRC or Beverly to the allegations of Deering’s Petition for Judicial Review.” However,

¹⁰ In this context, an error affects “the substantial rights of a party” when there is “a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.” *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 (citations omitted).

Deering does not explain the logic of this court issuing such an order if we affirm dismissal of that petition.

¶34 With respect to transmittal of the record, Deering does contend he was adversely affected by the lack of the entire agency record; but we conclude that, as a matter of law, there is no support for this contention. First, Deering asserts, the record was necessary because it would have shown two things: (1) that in Beverly's petition for review by LIRC of the ALJ's January 2010 order, Beverly did not appeal the portion that was the ALJ's re-issued order on the merits; and (2) that LIRC did not modify or reverse that re-issued order. However, Deering attached both Beverly's petition for review and the resulting LIRC decision and order to his petition for judicial review in the circuit court. Thus, these documents were before the circuit court and are before this court without transmittal of the entire agency record. *See supra*, ¶¶15, 16 (discussing these documents).

¶35 Second, Deering contends that the entire record would have shown that no material facts regarding the merits are in dispute and that Beverly would not have been able to establish a meritorious defense. However, the issue raised by the motion to dismiss is whether LIRC's order is final. The merits of Deering's discrimination claim are not relevant to a resolution of that issue.

¶36 In summary, we conclude that any circuit court error in denying Deering's motions under WIS. STAT. §§ 227.53(2) and 227.55 did not affect his substantial rights and therefore does not entitle him to relief on appeal.

II. Petition for Writ of Prohibition

¶37 Deering contends the circuit court erroneously exercised its discretion by dismissing his petition for a writ of prohibition. In denying the petition, the circuit court explained that “there has never been a full hearing on the merits at the administrative level, and I believe that that is the appropriate procedure to follow at this point.” Read in context, the court’s statement indicates that the court concluded the judicial review provisions in WIS. STAT. ch. 227 were adequate in this case.

¶38 “A writ of prohibition is an extraordinary remedy traditionally employed to restrain an inferior tribunal from exceeding its jurisdiction.” *City of Madison v. DWD*, 2003 WI 76, ¶9, 262 Wis. 2d 652, 664 N.W.2d 584 (citation omitted). The burden is on the petitioner seeking issuance of the writ to assert facts sufficient to demonstrate “the absence or complete inadequacy of appeal and that extraordinary hardship will result if the writ does not issue.” *State ex rel. DPI v. DILHR*, 68 Wis. 2d 677, 686, 229 N.W.2d 591 (1975). A writ may be issued to prevent an agency from exceeding its statutory authority. *City of Madison*, 262 Wis. 2d 652, ¶9 (citations omitted).

¶39 The circuit court’s decision whether to issue such a writ is a discretionary determination. *Id.*, ¶10 (citations omitted). Thus, we affirm the circuit court’s decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion which a reasonable judge could reach. *Id.* (citation omitted). “However, any question of law that arises in reviewing whether the circuit court applied a proper legal standard is subject to de novo review.” *Id.*

¶40 Deering argues that the circuit court erred in denying his petition for a writ of prohibition because, he asserts, LIRC lacked the authority to set aside the

ALJ's re-issued order on the merits and remand for a further hearing. As we noted in our discussion on the finality of LIRC's order for purposes of judicial review, Deering's contention that LIRC lacks the authority to order a further hearing on the merits is based on the absence of a specific reference to the ALJ's re-issued order in Beverly's petition for review of the ALJ's September 2010 order. It follows, according to Deering, that Beverly petitioned for review only of the ALJ's good cause determination and LIRC did not have the authority to address any issue other than good cause.

¶41 Whether LIRC acted outside its authority requires an examination of the statute bearing on LIRC's scope of review. We are thus presented with a question of law, which we review *de novo*. *See id.*, ¶¶10, 11.¹¹

¶42 Before examining the relevant statute, we point out that Deering's argument on LIRC's lack of authority overlooks LIRC's first order, which provides important context for Beverly's petition for review of the ALJ's January 2010 order. LIRC's first order plainly provided that, if Beverly had good cause for its failure to appear, a further hearing on the merits would be held. Specifically, the first LIRC order provided that, if the ALJ determined that Beverly had good cause, the ALJ "shall conduct a further hearing on the merits to allow [Beverly] to present its evidence and to permit [Deering] to present rebuttal evidence in response to [Beverly]'s case. The [ALJ] shall then issue a new decision based on all of the evidence, including the evidence received at the [first hearing]." There was no need for Beverly to specifically refer to the merits in its

¹¹ Although Deering made the argument of LIRC's lack of authority in the circuit court, the court did not expressly address it. However, the absence of a circuit court ruling on this issue does not affect our *de novo* review on appeal.

petition to review the ALJ's January 2010 order because LIRC had already ordered that a further hearing on the merits would take place if there was good cause.

¶43 Turning to LIRC's statutory authority regarding its scope of review, we find no statute that limits LIRC's authority as Deering contends. Deering does not identify any statutory provision that limits LIRC's review to the errors specified in the petition for review, let alone any such limitation that would apply in these particular circumstances. WISCONSIN STAT. § 111.39(5)(b), the statute addressing LIRC's scope of review, provides that, upon a timely petition for review, LIRC "may either affirm, reverse or modify the findings or order in whole or in part, or set aside the findings and order and remand to the department for further proceedings [and] [s]uch actions *shall be based on a review of the evidence submitted.*" (Emphasis added.) Nothing in this statute suggests that LIRC's scope of review is limited to the issues expressly raised in the petition for review.

¶44 Because there is no statute limiting LIRC's authority as Deering contends, the cases on which he relies are not applicable. *City of Madison*, 262 Wis. 2d 652, ¶29 (a writ of prohibition was proper to prevent the DWD from taking jurisdiction over a discrimination complaint that would involve review of a police and fire commission (PFC) order because the PFC, not the DWD, had jurisdiction over these kinds of discrimination claims); *State ex rel. DPI*, 68 Wis. 2d at 687 (DILHR had no authority under the Fair Employment Act to review employment practices of the DPI; therefore it was an erroneous exercise of discretion to deny a writ prohibiting DILHR from holding a hearing on whether DPI engaged in unlawful discrimination); *State ex rel. St. Michael's Evangelical Lutheran Church v. DOA*, 137 Wis. 2d 326, 334, 404 N.W.2d 114 (Ct. App.

1987) (a circuit court may issue a writ of prohibition to prevent an agency from hearing a matter when the agency’s jurisdiction is debatable).¹²

¶45 Accordingly, we reject Deering’s argument that the circuit court was obligated to issue a writ of prohibition because LIRC was acting outside its authority in setting aside the ALJ’s re-issued order and remanding for a further hearing.

¶46 Deering also asserts that dismissal of the petition for a writ of prohibition will result in “a collateral attack of the decisions and orders that Beverly did not challenge” and deprive Deering of his right to due process rights. However, we have already concluded that Deering does not have a substantial interest under WIS. STAT. ch. 227 in the ALJ’s re-issued order on the merits, and we have rejected his due process claim.

¶47 Finally, to the extent Deering is asserting that the judicial review provisions under WIS. STAT. ch. 227 are inadequate because he must wait to obtain judicial review, this argument could be made by any person with an adverse non-final order from an administrative agency. The circuit court reasonably concluded that Deering has not shown that this delay in his case makes the judicial

¹² Because we conclude that LIRC does not lack the authority to set aside the ALJ’s re-issued order, it is unnecessary to discuss the meaning of the term “jurisdiction” as used in the case law on which Deering relies. However, we note that we have recently explained: “Statutes . . . which establish the nature of the matters an administrative agency is authorized to hear[] define subject matter jurisdiction, whereas statutory requirements that pertain to the invocation of that jurisdiction in individual cases . . . may affect an agency’s competency to proceed.” *Stern v. Wisconsin Emp’t Relations Comm’n*, 2006 WI App 193, ¶24, 296 Wis. 2d 306, 722 N.W.2d 594. It is clear that Deering’s argument on LIRC’s lack of authority does not address LIRC’s subject matter jurisdiction.

review provisions under ch. 227 inadequate, let alone that it imposes an extraordinary hardship on him. *See State ex rel. DPI*, 68 Wis. 2d at 686.

¶48 Because LIRC did not act outside its authority in remanding for a further hearing on the merits and because the circuit court reasonably concluded the judicial review provisions in WIS. STAT. ch. 227 are adequate, we conclude the circuit court properly exercised its discretion when it denied the petition for a writ of prohibition.

CONCLUSION

¶49 We affirm the order of the circuit court dismissing Deering's petition for judicial review and his petition for a writ of prohibition.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

