

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0918**

Twin City Petroleum and Properties, LLC, et al.,
Appellants,

vs.

Katrina Kessler, in her capacity as
Commissioner of the Minnesota Pollution Control Agency,
Respondent.

**Filed January 17, 2023
Affirmed
Reyes, Judge**

Stearns County District Court
File No. 73-CV-21-8986

Christopher J. Heinze, Kirsten J. Libby, Libby Law Office, P.A., St. Paul, Minnesota (for appellants)

Keith Ellison, Attorney General, Peter Surdo, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Considered and decided by Reyes, Presiding Judge; Slieter, Judge; and Frisch, Judge.

SYLLABUS

A petition for review of an administrative penalty order under Minn. Stat. § 116.072, subd. 7(a) (2022), must be dismissed as untimely if the person subject to the order fails both to serve and file the petition within 30 days of receiving the order.

OPINION

REYES, Judge

Appellants challenge the dismissal of their petition for review of administrative penalty orders (APOs) issued by the respondent-agency, which the district court dismissed because appellants failed to serve the petition timely under Minn. Stat. § 116.072, subd. 7(a). We affirm.

FACTS

On November 10, 2021, respondent Katrina Kessler, in her capacity as Commissioner of the Minnesota Pollution Control Agency (the MPCA), through a designee, issued nine APOs against appellants Twin City Petroleum and Properties, LLC and Molo-Twin LLC (collectively, TC Petroleum).¹ TC Petroleum received the APOs the same day they were issued. Under Minn. Stat. § 116.072, subd. 7(a), and according to TC Petroleum’s alleged timeline, TC Petroleum had until December 10, 2021, to seek judicial review of the APOs by filing a petition, together with proof of service, in district court.

On December 10, 2021, TC Petroleum filed with the district court a petition and an “affidavit of service.” The affidavit of service stated, “I served the Joint Petition to Review Administrative Penalty Orders by placing a true and correct copy of the document in an envelope” and mailing it to the MPCA and the Attorney General’s Office (the AGO), which represents the MPCA in this matter. The AGO alleged that it did not receive the petition until December 14, 2021. Thus, the AGO contacted TC Petroleum, informing it that the

¹ The parties do not dispute that the APOs were issued and received by TC Petroleum on November 10, 2021.

MPCA had not been served but would accept service without waiving jurisdictional defenses or objections.

According to the MPCA, on December 17, 2021, TC Petroleum sent a summons and a prepared form 22B (waiver of service of summons) for acknowledgment of service. That same day, the AGO executed the following waiver of service of summons:

I received your request that I waive service of a summons in th[is] law suit I understand that I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons A party who waives service of the summons . . . may later object to the jurisdiction of the court or to the place where the action has been brought.

The AGO filed the waiver of service of summons form with the district court on December 20, 2021, and TC Petroleum filed the summons with the district court on December 22, 2021.

Three weeks later, the MPCA moved to dismiss the petition pursuant to Minn. Stat. § 586.07 (2022) and Minn. R. Civ. P. 12.02(a),² (e) based on untimely service. See Minn. Stat. § 116.072, subd. 7 (2022). TC Petroleum argued that the MPCA waived service by executing the waiver of summons. The district court held a hearing and later granted the MPCA's motion to dismiss. The district court determined that TC Petroleum's "failure to personally service or file a waiver of personal service within 30 days as provided by statute deprived [the district court] of subject matter jurisdiction." This appeal follows.

² While the MPCA's notice of motion to dismiss only mentions Minn. R. Civ. P. 12.02(e), its memorandum uses Minn. R. Civ. P. 12.02(a) extensively to support its request to dismiss.

ISSUE

Did the district court err by dismissing TC Petroleum’s petition for review of the APOs?

ANALYSIS

The sole issue in this appeal is whether the district court erred by dismissing TC Petroleum’s petition for review of the APOs because TC Petroleum failed to serve timely the petition on the MPCA. We review this jurisdictional issue de novo. *Bode v. Minn. Dep’t of Nat. Res.*, 612 N.W.2d 862, 866 (Minn. 2000).³

The relevant statute authorizing a petition for review, or appeal, of an APO reads:

Within 30 days after the receipt of an order from the commissioner . . . the person subject to an order under this section may file a petition in district court for review of the order in lieu of requesting an administrative hearing under subdivision 6. The petition *shall be filed with the court administrator with proof of service on the commissioner*

Minn. Stat § 116.072, subd.7(a) (emphasis added). The statute does not specify what types of proof of service are allowed but “[i]n the absence of a statute authorizing service by mail, the notice of appeal . . . must be actually received” on or before the filing deadline.

³ The parties discuss dismissal in the context of Minn. R. Civ. P. 12.02, but that rule addresses how defenses must be raised in response “to a claim for relief in any pleading,” and “pleadings” are defined in the rules to include only complaints, answers, replies to counterclaims, and answers to cross-claims. See Minn. R. Civ. P. 7.01. We address this motion to dismiss in the context of statutory law governing petitions for review of APOs in district court. *Cf. Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 230-31 (Minn. 2014) (rejecting reliance on Minn. R. Civ. P. 56.03 standard as incompatible with statutory requirement for dismissal under anti-SLAPP (Strategic Lawsuit Against Public Participation) statute).

City of St. Paul v. Wiplinger, 186 N.W.2d 540, 542-43 (Minn. 1971). Service must comply strictly with statutory requirements. *Berryhill v. Sepp*, 119 N.W. 404, 404 (Minn. 1909).

Courts strictly construe statutory time limits for appeals of administrative decisions, and such time limits are jurisdictional. *Langer v. Comm'r of Revenue*, 773 N.W.2d 77, 80 (Minn. 2009); *see also Reynolds v. Minn. Dep't of Hum. Servs.*, 737 N.W.2d 367, 369 (Minn. App. 2007) (“The failure of an aggrieved party to commence an appeal of a state agency decision within the time limits in the statute governing such appeals properly results in dismissal for lack of jurisdiction.”).

In *Langer*, appellant “mailed the notice of appeal, affidavit of service, and filing fee to the tax court and mailed a copy of the notice of appeal to the commissioner.” 773 N.W.2d at 79. While the commissioner received the notice of appeal before the statutory deadline, the tax court did not receive it until after the deadline. *Id.* The Minnesota Supreme Court held that “[n]otice of appeal of tax court decision, affidavit of service, and filing fee mailed before but received after the filing deadline are untimely.” *Id.* at 78. The Minnesota Supreme Court affirmed the tax court’s dismissal of the appeal for “lack of subject matter jurisdiction.” *Id.* at 81.

Although *Langer* involved an appeal to the tax court, an executive-branch court, the requirement for strict compliance has been applied similarly in appeals of administrative decisions to the district court. *See Flame Bar, Inc. v. City of Minneapolis*, 295 N.W.2d 586 (Minn. 1980); *Elbert v. Tlam*, 830 N.W.2d 448, 449 (Minn. App. 2013), *rev. granted* (Minn. July 16, 2013) *and ord. granting rev. vacated* (Minn. Sept. 25, 2013). *Elbert* is particularly instructive. In that case, appellants filed their appeal to the district court within

the 30-day time period but failed to serve the notice of appeal on respondent within the 30-day period. *Elbert*, 830 N.W.2d at 449. In *Elbert*, we held that “the appealing party must serve notice of appeal on the adverse party or parties within the 30-day time period set forth in the statute; failure to do so is an incurable jurisdictional defect.” *Id.* at 448.

Applying the principles recognized in *Langer* and *Elbert* here, we hold that a petition for review of an APO under Minn. Stat. § 116.072, subd. 7(a), must be dismissed as untimely if the person subject to the order fails both to serve and file the appeal within 30 days of receiving the APO. And applying that holding to the facts of this appeal, we conclude that the district court did not err by dismissing TC Petroleum’s petition for review of the APOs.

TC Petroleum received the APOs on November 10, 2021. Under Minn. Stat. § 116.072, subd. 7(a), TC Petroleum had 30 days to appeal by filing its petition “with the court administrator with proof of service on the commissioner or county board.” Because the statute does not clarify what types of proof of service are allowed, the notice of appeal should have been received by the MPCA and filed with the district court within the 30-day time period. Instead, on December 10, 2021, TC Petroleum filed its petition with the district court and mailed an affidavit of service to the AGO. The AGO alleged that it did not receive the petition until December 14, 2021. Like the tax court in *Langer*, the MPCA did not receive the petition within the statutory appeal period. *See Langer*, 773 N.W.2d at 79. And like the appellant in *Elbert*, TC Petroleum timely filed the petition but failed to serve it within the statutory appeal period. *See Elbert*, 830 N.W.2d at 449. As a result, the district court correctly determined that it lacked authority to hear the matter.

TC Petroleum argues that the district court erred by dismissing the case because the MPCA waived the service requirement. Assuming without deciding that the MPCA could waive compliance with the statutory requirements, we conclude that it did not do so here.⁴

TC Petroleum relies on the following language in the waiver of service of summons to support its waiver argument: “I understand that I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction . . . except for objections based on a defect in the summons or in the service of the summons.” Through this language, the MPCA waived any defenses based on two types of defects: (1) defects in the summons itself and (2) defects in the service of the summons.⁵ The MPCA did not rely on either of those types of defects in moving to dismiss the petition. Rather, the MPCA asserted TC Petroleum’s failure to serve the petition timely. Moreover, in the form waiver that the MPCA executed, the MPCA specifically retained its defenses

⁴ TC Petroleum relatedly argues that the district court erred by treating the issue here as implicating *subject-matter jurisdiction*, which cannot be waived, rather than *personal jurisdiction*, which is subject to waiver. See *McCullough & Sons, Inc. v. City of Vadnais Heights*, 883 N.W.2d 580, 590 & n.3 (Minn. 2016) (distinguishing between subject-matter and personal jurisdiction and recognizing that it has sometimes conflated the two). Because we conclude that the MPCA did not waive compliance with the statutory requirements to perfect an appeal of an agency decision, we need not determine whether the failure to comply with such requirements is properly characterized as implicating subject-matter jurisdiction, which the MPCA would not have authority to waive, or personal jurisdiction, which could be waived.

⁵ A summons is defective if it fails to include the information required by Minn. R. Civ. P. 4.01. See, e.g., *DeCook v. Olmsted Med. Ctr., Inc.*, 875 N.W.2d 263, 267 (Minn. 2016) (holding that “a summons is defective if it is not subscribed by either the plaintiff or an attorney licensed to practice law in Minnesota” as required by rule 4.01). A defect in the service of the summons occurs, for example, when a party to an action attempts to serve the adverse party personally. *Lewis v. Contracting Nw., Inc.*, 413 N.W.2d 154, 157 (Minn. App. 1987).

and objections to jurisdiction. The waiver stated, “A party who waives service . . . may later object to the jurisdiction of the court.” Additionally, the rule governing a form waiver also provides that “[w]aiving service of a summons does not waive any objection to personal jurisdiction or to venue.” See Minn. R. Civ. P. 4.05(e). As a result, MPCA did not waive its ability to object to TC Petroleum’s failure to comply with the jurisdictional statutory requirements for perfecting an appeal from the APOs.

We finally note that service of the summons, through the waiver of service of summons, did not become effective until the waiver was signed. See Minn. R. Civ. P. 4.05(d). In this case, the AGO executed the waiver of service of summons on December 17, 2021. This was after the expiration of the December 10, 2021 statutory deadline to perfect an appeal under Minn. Stat. § 116.072, subd. 7(a). Thus, the belatedly executed waiver of service of summons did not effect timely service of the petition under the statute.

DECISION

In order to timely petition for review of an APO under Minn. Stat. § 116.072, subd. 7(a), the party seeking review must both serve and file the petition within 30 days of receiving the APO. Because statutory deadlines for judicial review of administrative decisions are strictly construed, and because TC Petroleum failed to serve timely its petition for review, the district court did not err by dismissing the petition.

Affirmed.