BY THE COURT:

DATE SIGNED: October 10, 2023

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

MICHELLE O. HOFFNER,

Plaintiff,

v. Case No. 23-CV-1412

LABOR AND INDUSTRY
REVIEW COMMISSION, et al.,

Respondents.

DECISION AND ORDER

INTRODUCTION

Michelle Hoffner seeks review under Wis. Stat. § 108.09(7) of a decision of the Labor and Industry Review Commission ("LIRC"). That decision dismissed Hoffner's petition to review the Department of Workforce Development's ("DWD") April 5, 2022, decision finding Hoffner had been overpaid unemployment insurance benefits. Now, LIRC and DWD move to dismiss Hoffner's complaint. They say that Hoffner fails to state a claim because she never exhausted her administrative remedies. According to her complaint, Hoffner did not ask LIRC to review DWD's final decision. Instead, the April 5 decision she asked LIRC to review had been set aside pursuant to the statutory procedure in § 108.09(4)(f)1. Hoffner could have sought relief, and then appealed to LIRC, from any

final decision DWD would later make. But because Hoffner did not seek relief from DWD's final decision, and because exhaustion is a necessary predicate to judicial review, LIRC and DWD conclude Hoffner's complaint must be dismissed.

The Court agrees, accepting the allegations in the complaint as true, that Hoffner never exhausted administrative remedies available to her. Accordingly, the Court concludes it does not have competency to award Hoffner any relief. The complaint is therefore dismissed.

I. BACKGROUND

The Court accepts the following factual allegations in Hoffner's complaint as true. *Data Key Partners v. Permira Advisers, LLC,* 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

During the COVID-19 pandemic, Hoffner sought pandemic unemployment assistance ("PUA") benefits to help sustain her wedding photography business. Compl., ¶¶4-5. Sometime in January 2022, DWD made an initial determination that Hoffner committed unemployment fraud by reporting herself as self-employed rather than as a corporate owner and further determined that she concealed facts from her PUA application. *Id.*, ¶6. On April 5, 2022, ALJ Christopher Johnson modified these determinations by concluding Hoffner had not concealed facts, but that Hoffner nevertheless owed $326 for over-payments DWD had given her in 2020. *Id.*, ¶7. On April 12, a different ALJ—Tim Zuberbier—set aside ALJ Johnson's April 5 decision. *Id.*, ¶8. DWD then held further hearings at some unspecific times, after which it concluded Hoffner owed approximately $17,000. *Id.*, ¶9.

On March 30, 2023, Hoffner petitioned LIRC to review the April 5, 2022 decision—that is, the decision set aside by ALJ Zuberbier on April 12, 2022. *Id.*, ¶10. LIRC assumed the petition was timely despite the passage of about a year, but still dismissed Hoffner's petition because it concluded that a set-aside decision could not be reviewed. *Id.*, ¶11. Specifically, LIRC relied on Wis. Stat. § 108.09(6)(a), which requires a reviewable decision to contain an ALJ's findings of fact and conclusions

of law. LIRC Decision, dkt. 5:3.[1] Because it concluded a set-aside decision contains neither findings nor conclusions, LIRC reasoned that Hoffner's "recourse is to appeal the new decision [the decision later finding Hoffner owed approximately $17,000], at which point she can argue that the previous decision was improperly set aside." *Id.* at 4.

On June 5, 2023, Hoffner commenced this action seeking judicial review of LIRC's dismissal. On June 26, DWD and LIRC filed motions to dismiss. Both motions are now fully briefed.

II. LEGAL STANDARD

DWD and LIRC both move to dismiss the complaint for lack of competency. However, the parties do not agree on what standard the Court should apply to these motions. According to DWD and LIRC, the Court should treat their motions as motions to dismiss for failure to state a claim under which relief may be granted under Wisconsin's ordinary rules of civil procedure. *See* Wis. Stat. § 802.06(2)(a)6.; *Data Key*, 2014 WI 86.

Hoffner says Wis. Stat. § 108.09(7) and *Ellis v. DOA*, 2011 WI App 67, 333 Wis. 2d 228, 800 N.W.2d 6, instead require application of a unique and self-contained procedure for judicial review, which procedure does not contain any provision for a motion to dismiss. Hoffner Resp. Br., dkt. 18:3-4. Put simply, Hoffner would like the Court to deny the motions to dismiss as procedurally impossible. However, neither citation helps Hoffner's cause. *Ellis* dealt with a different statutory procedure altogether (worker's compensation under § 102.23(1)(a)) and, even assuming the rules of civil procedure did not apply under § 108.09(7)), Hoffner still does not explain why a circuit court without competency would allow a complaint to proceed. In any event, it is not necessary to resolve the parties' dispute about what procedure applies because the Court must determine whether it has competency to

[1] Nothing in the "four corners" of Hoffner's complaint alleges the specific reasons why LIRC dismissed her petition. However, she filed LIRC's decision alongside her complaint, so the Court will consider this document under the incorporation by reference doctrine. *Soderlund v. Zibolski*, 2016 WI App 6, ¶38, 366 Wis. 2d 579, 874 N.W.2d 561.

award Hoffner any relief.[2] In doing so, the Court will assume all of the facts alleged in Hoffner's complaint are true.

Competency refers to "[a] circuit court's ability to exercise its subject matter jurisdiction in individual cases …." *Vill. of Trempealeau v. Mikrut,* 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190. Failure to abide a statutory mandate "'central to the statutory scheme' of which it is a part" will result in a loss of competency. *Id.* ¶10 (citations omitted). Generally, "dismissal is the default remedy for want of competency …." *DWD v. LIRC,* 2016 WI App 21, ¶32, 367 Wis. 2d 609, 877 N.W.2d 620.

III. DISCUSSION

A. Circuit courts cannot competently award relief under Wis. Stat. § 108.09(7) unless a petitioner first exhausts her administrative remedies.

DWD and LIRC present essentially the same argument based on the same two premises. First, Wis. Stat. § 108.09(4)(f)1.[3] permits an administrative law judge to set aside his or her decisions within twenty one days, then make new decisions. The second premise is that Wis. Stat. § 108.09(7)(a)[4] limits judicial review of LIRC's decisions to only those petitions brought "after exhausting the remedies provided under this section …." Put together, LIRC concludes its decision should be affirmed because

[2] In *Lamar Central Outdoor, LLC v. DOT,* the court of appeals questioned whether competency was the correct framework for deciding matters of exhaustion. 2008 WI App 187, ¶8 n.6, 315 Wis. 2d 190, 762 N.W.2d 745. Here, however, if the Court determines it lacks competency because Hoffner did not exhaust her administrative remedies, then the Court would necessarily also have to affirm LIRC's decision dismissing her complaint for identical reasons.

[3] Wis. Stat. § 108.09(4)(f)1. reads, in full:

> Within 21 days after its decision was electronically delivered or mailed to the parties, the appeal tribunal may, on its own motion, amend or set aside its decision and may thereafter make new findings and issue a decision on the basis of evidence previously submitted in such case, or the same or another appeal tribunal may make new findings and issue a decision after taking additional testimony.

[4] Wis. Stat. § 108.09(7)(a) reads, in full (emphasis added):

> Any party that is not the department may commence an action for the judicial review of a decision of the commission under this chapter <u>after exhausting the remedies provided under this section</u>. The department may commence an action for the judicial review of a commission decision under this section, but the department is not required to have been a party to the proceedings before the commission or to have exhausted the remedies provided under this section. In an action commenced under this section by a party that is not the department, the department shall be a defendant and shall be named as a party in the complaint commencing the action. If a plaintiff fails to name either the department or the commission as defendants and serve the commission as required by this subsection, the court shall dismiss the action.

it correctly concluded that (1) an ALJ properly set aside the April 5 decision under § 108.09(4)(f)1., (2) but Hoffner never pursued her administrative remedies by challenging that decision before the ALJ and then seeking appeal of a final decision, so as a result, the circuit court cannot competently award Hoffner any relief.[5]

Hoffner responds by first criticizing DWD and LIRC for not addressing the lack of reasoning in ALJ Zuberbier's April 12 order setting aside the ALJ Johnson's April 5 decision. Hoffner Resp. Br., dkt. 18:3. As best the Court can tell, Hoffner thinks SCR 60.04(1)(g)3., a provision in the judicial code of conduct, prohibits one ALJ from setting aside a second ALJ's decisions without sufficient reasoning for doing so. This argument is not persuasive because Wisconsin's code of judicial conduct does not apply to ALJs. SCR 60.01(8) (defining "judge"). While reasonable persons might question why one ALJ would set aside another ALJ's decision without an explanation, Hoffner alleges no facts that might overcome the "presumption of regularity in the decisions of administrative agencies." *Ashleson v. LIRC*, 216 Wis. 2d 23, 34, 573 N.W.2d 554 (Ct. App. 1997).

Hoffner next argues that she could not have failed to exhaust administrative remedies because there were none to pursue. To show this, Hoffner begins by citing at great length several of LIRC's past decisions, but this is unhelpful for two related reasons. First, it does not appear any of these past decisions explain how or why a petitioner whose administrative decision was set aside might lack further administrative remedies. Or, even if LIRC had reached such a conclusion in those previous decisions, Hoffner does not explain why it would matter to a circuit court. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶3, 382 Wis. 2d 496, 914 N.W.2d 21 ("We have also decided to end our practice of deferring to administrative agencies' conclusions of law.").

Finally, Hoffner appears to challenge an ALJ's statutory authority to set aside past decisions

[5] DWD casts the same argument under the framework that the circuit court "lacks subject matter jurisdiction." DWD Br., dkt. 11:6. DWD is wrong: "a circuit court is never without subject matter jurisdiction." *Mikrut*, 2004 WI 79, ¶1.

as a violation of her right to due process. Hoffner Resp. Br., dkt. 18:18-20. According to Hoffner, "the set aside orders here are without explanation [so] Ms. Hoffner had no notice about why the prior appeal tribunal decisions were being set aside or even what would happen next in her case …." *Id.* at 20. Based on this lack of explanation, Hoffner concludes "due process is violated when a party is unaware of the issues being litigated …." *Id.* (citing *Waste Mgmt. v. LIRC*, 2008 WI App 50, ¶14, 308 Wis. 2d 763, 747 N.W.2d 782). The Court does not understand what Hoffner means to say. Nothing in *Waste Mgmt.* creates a due process test based on a litigant's "awareness of issues." Instead, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted); *see, e.g., Waste Mgmt.*, 2008 WI App 50, ¶9 ("Denial of a 'fair hearing' is a due process violation …."). Here, Hoffner had an opportunity for a fair hearing because Wis. Stat. § 108.09(4)(f)1.[6] told her the effect of the April 12 order setting aside the previous order. That statute tells petitioners that an ALJ will do one of two things after setting aside an order: "the appeal tribunal may … [1] make new findings and issue a decision on the basis of evidence previously submitted in such case, or [2] the same or another appeal tribunal may make new findings and issue a decision after taking additional testimony." *Id.*

Ultimately, the Court understands that Hoffner would like a judge to review LIRC's decision. The problem here is that Wis. Stat. § 108.09(7) requires a petitioner "to have exhausted the remedies provided under this section." This statute means that even if DWD has erroneously set aside its prior decision, a petitioner cannot seek judicial review until DWD makes a final decision and the petitioner next asks LIRC to review DWD's erroneous final decision. Properly applied, this system "allows the

[6] Wis. Stat. § 108.09(4)(f)1. reads, in full:

> Within 21 days after its decision was electronically delivered or mailed to the parties, the appeal tribunal may, on its own motion, amend or set aside its decision and may thereafter make new findings and issue a decision on the basis of evidence previously submitted in such case, or the same or another appeal tribunal may make new findings and issue a decision after taking additional testimony.

agency to correct its own error, thus promoting judicial efficiency; and, in the event judicial review is necessary, the complete administrative process may provide a greater clarification of the issues." *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶13, 305 Wis. 2d 788, 741 N.W.2d 244 (note omitted, citing *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶8, 242 Wis. 2d 94, 624 N.W.2d 150). Here, however, Hoffner alleges no facts that plausibly suggest she followed these steps, or that she was otherwise denied a fair opportunity to exhaust her administrative remedies. And, because exhaustion is central to the statutory scheme for judicial review under § 108.09(7), Hoffner's choice to seek review of DWD's non-final decision deprives this Court of competency. The complaint must therefore be dismissed.

ORDER

For these reasons, the complaint is dismissed.

This is a final order for purpose of appeal.