COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1931

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

R.A. NIELSEN, D.P.M.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN MEDICAL EXAMINING BOARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. R.A. Nielsen, D.P.M., appeals from the circuit court order affirming the final decision and order, on remand, of the State of Wisconsin Medical Examining Board. Nielsen argues that the Board's decision

should be reversed because it violates due process, is not supported by substantial evidence, and is arbitrary and capricious. He also contends that assessing him two-thirds of the costs of the disciplinary proceeding is unreasonable. We disagree and affirm.

BACKGROUND

¶2 In 1993 and 1994, the Wisconsin Department of Regulation and Licensing, Division of Enforcement, filed two complaints against Nielsen, a podiatrist licensed to practice in Wisconsin since 1951. The first complaint contained two counts, each concerning a different patient, and the second complaint concerned a third patient. Regarding all three patients, the Division alleged "unprofessional conduct contrary to Wis. Stats. sec. 448.02(3) and Wis. Admin. Code sec. MED 10.02(2)(h) in that [Nielsen] engaged in conduct which tended to constitute a danger to the health, welfare and safety of a patient."[1]

¶3 The Division specifically alleged that on February 26, 1987, Nielsen's conduct "fell below the minimum standards of competence established in the profession" when he: (1) failed to "take a history sufficient to permit him to adequately assess [P]atient A's circulatory status"; (2) failed to "conduct a clinical evaluation sufficient to permit him to adequately assess [P]atient A's circulatory status"; (3) performed elective surgery "which may have been contraindicated by [P]atient A's compromised circulatory status, without further evaluation of the circulatory status by objective noninvasive or invasive vascular studies"; and (4)

[1] "The [medical examining] board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board." Section 448.02(3), STATS. The definition of "unprofessional conduct" includes "[a]ny practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public." WIS. ADM. CODE § MED 10.02(2)(h).

failed to "take an adequate history of [Patient A's] hypertension and past treatment for that condition." The Division further alleged that Nielsen's conduct "created the unacceptable risks [sic] that [P]atient A would develop the post-surgical complications associated with compromised circulation to the lower extremities including poor healing, greater susceptibility to infection, impaired ability to fight infection, irreversible and progressive tissue damage and loss of all or a portion of the extremity."[2]

¶4 Over Nielsen's objection, the administrative law judge (ALJ) consolidated the two complaints. Following a disciplinary hearing, the ALJ filed a proposed decision containing his findings of fact, conclusions of law, order, and opinion. The findings of fact stated, in pertinent part:

> 9. Dr. Nielsen's routine vascular and neurological foot examination in 1987 consisted of checking pulses, doing a capillary refill test, seeing if the foot was red or swollen, checking the temperature and the hair, and doing a Babinski test for reflexes. Dr. Nielsen noted no abnormal vascular or neurological findings in his examination of Patient A's foot.
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> ….
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> 21. The circulation in Patient A's left foot was reduced in August of 1986 and in March of 1987. Logically, it was also reduced at the time of Dr. Nielsen's surgery on 2-26-87. Nevertheless, the reduction was not to the point where any of five treating physicians recorded any unusual observations regarding the capillary refill test, skin color, skin temperature, or hair growth; only one noted "minimal edema[,"] and only one was unable to palpate a pulse.

(record references omitted). The ALJ's conclusions of law stated, in relevant part:

> Because the circulation in Patient A's left foot on 2-26-87 was not reduced to the point where pedal pulses were

[2] Because the specific allegations concerning Patient B and Patient C are not germane to this appeal, they will not be detailed here.

> absent, nor were skin color, skin temperature, hair growth, or capillary refill time notably insufficient, a minimally competent history and physical examination would not necessarily have revealed that Patient A had severely compromised circulation, nor that she was not a candidate for surgery. Patient A's history of treated hypertension also did not contraindicate surgery. Therefore, it cannot be said that Dr. Nielsen did not perform a minimally competent history and physical examination on Patient A on 2-26-87, or that by performing surgery on that date Dr. Nielsen created unacceptable risks to Patient A of a failure to heal and its sequelae.

¶5 The ALJ ordered the dismissal of all charges except the one alleging that Nielsen failed to "adequately document his findings, both positive and negative, in his medical records" regarding Patient B, which, the ALJ concluded, the State had proven. Additionally, the ALJ ordered that Nielsen be reprimanded for failing to provide adequate documentation, and that he successfully complete an educational program addressing this failure.

¶6 The ALJ's proposed decision also discussed the assessment of the costs of the proceeding:

> The assessment of costs against a disciplined professional is authorized by § 440.22(2), Wis. Stats. and § RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole. Another approach is to use costs as an incentive to encourage respondents to cooperate with the process, and thus to impose costs only if the respondent is uncooperative or dilatory. I prefer the latter approach and, although this case was not heard until 22 months after it was filed, the respondent was not obstructionist or dilatory. In addition, the recommendation contained in this proposed decision is to dismiss all but one of the charges and, although the prosecution may have been justified in bringing the charges (especially given the silence on most issues in Dr. Nielsen's records), a single finding of unprofessional conduct based on inadequate record-keeping hardly justifies the imposition of the entire cost of this

> action on the respondent. Therefore, I have not included an order for costs.

¶7 The Board accepted all but two of the ALJ's findings. The Board modified finding #9 by inserting the clause "[t]hough Dr. Nielsen has no recollection of Patient A or of the examination he conducted," at the beginning of the first sentence. The Board modified finding #21 to read:

> The circulation in Patient A's left foot was reduced in August of 1986 and in March of 1987. A preponderance of the evidence establishes that circulation in Patient A's left foot was also reduced at the time of Dr. Nielsen's surgery on February 26, 1987, to an extent that a minimally competent clinical evaluation would have permitted him to adequately assess Patient A's peripheral vascular circulatory status and to determine that surgery was contraindicated.

(record references omitted).

¶8 In contrast to the ALJ's conclusions of law, the Board declared that "Dr. Nielsen['s] failure to conduct a minimally competent clinical evaluation, which would have permitted him to adequately assess Patient A's peripheral vascular circulatory status and to determine that surgery was contraindicated, constitutes a violation of sec. Med 10.02(2)(h), Code, and sec. 448.02(3), Stats." The Board ordered a reprimand for this failure, in addition to affirming the reprimand ordered by the ALJ. Additionally, the Board expanded the ALJ's remedial education order to address this failure.

¶9 Regarding the assessment of costs, the Board noted:

> [T]he ALJ failed to assess costs in the matter based on his conclusion that the respondent was not "obstructionist or dilatory" and on the basis that all but one of the charges in the Complaint were recommended to be dismissed. Sec. 440.22, Stats., is intended to permit the department to recover the costs expended in conducting a disciplinary proceeding rather than as a penalty for a respondent's failure to cooperate in such a proceeding.

Based upon its finding of violations regarding two of the three counts, the Board ordered two-thirds of the costs of the proceeding assessed against Nielsen. Affidavits submitted to the Board indicated that the costs of the proceeding for the Division and the Office of Board Legal Services totaled $49,676.81. Accordingly, the Board assessed Nielsen $33,117.87.

¶10 On August 14, 1996, Nielsen filed a petition for circuit court review, seeking reversal of the Board's order and requesting the adoption of the ALJ's order as the final order of the Board. He also requested costs, attorney fees, and "such further relief as [the] court deems just and proper."[3] Upon Nielsen's motion, the circuit court ordered the Board's decision stayed, pending resolution of the petition for review.

¶11 In its memorandum decision of May 28, 1997, the circuit court remanded the matter to the Board, noting that "[s]ince the Board did not consult with the ALJ of record, the due process requirements of the review process were not followed." The circuit court directed the Board to "consult with the ALJ regarding his impressions of witness credibility and demeanor prior to issuing a new decision."

¶12 The Board consulted with the ALJ on July 24, 1997, reviewing with him the portions of his proposed decision in which he commented on the

[3] In a letter to the Board dated August 15, 1996, Nielsen requested that his assessed costs be reduced to $21,833.70. As grounds for the reduction, he contended: (1) the amount of time claimed by the prosecuting attorney was "in excess to [sic] that which would reasonably be required"; (2) the claimed expenses of one expert witness (Dr. Hecker) were inappropriate and excessive; and (3) because his attorney had advised the prosecuting attorney that he would appear voluntarily for the deposition and hearing, "there was no need to expend the monies for subpoena." On September 25, 1996, the Board denied Nielsen's petition for reduction of costs.

credibility of the expert witnesses. The comments on which the Board focused included the following:

> [Dr. Hecker] ultimately lost some credibility as an expert witness because his testimony regarding what a "minimally competent podiatrist" would do, repeatedly struck me as a description of what a "maximally proficient podiatrist" would do. In other words, his standard for minimum competence was extremely high. He also lost some credibility because of his extreme positions on some issues ….

Following the review of the ALJ's comments, the Board asked the ALJ three questions:

> 1. In addition to the comments regarding the credibility of the expert witnesses set forth in your opinion, was there any other aspect of witness credibility relating to the internal consistency or general believability of their testimony which you [sic] led you to make the findings that you did?
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> 2. Did you make any judgments relating to the credibility of these expert witnesses based upon your observing their demeanor on the witness stand, such as their general appearance, facial expressions as they testified, physical reactions to specific questions, including inflection in the witnesses['] voices as they responded to questions, which led you to make the findings that you did?
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> 3. Is there anything else relating to your judgment as to the credibility of these expert witnesses that was relevant to your findings and that you feel the board should be aware of?

The ALJ indicated that the answer to each question was "no."

¶13 The Board did not modify its original final decision and order after consulting with the ALJ. The Board concluded it lacked any basis for modification "[b]ecause all of the ALJ's impressions of witness credibility were included in the Opinion section of his Proposed Decision, and because he had nothing to add to what was included in that Opinion."

¶14 On September 5, 1997, Nielsen petitioned the circuit court for review of the Board's July 31, 1997, final decision and order on remand. He contended that the Board failed to properly follow the circuit court's orders on remand in that it: (1) "did not discuss, in detail, the ALJ's assessment of credibility that had been set forth in the ALJ's proposed findings and order"; and (2) "gave no deference to the decision of [the] ALJ, the face-to-face examiner." Additionally, Nielsen contended that the Board's decision was arbitrary and capricious and relied on "findings of fact not supported by substantial evidence in the record."

¶15 On May 28, 1998, the circuit court issued a final order affirming the Board's final decision and order on remand and dismissing Nielsen's petition for judicial review.[4] Nielsen appeals from this order. On August 18, 1998, the circuit court granted Nielsen's motion to stay the Board's order, pending this appeal.

DISCUSSION

¶16 As this court has stated:

> In reviewing a trial court's ruling on an administrative decision, … we review the agency's decision, not the trial

[4] In its order of May 28, 1998, the circuit court identifies the "July 7, 1997, Final Decision and Order of the Medical Examining Board" as the subject of the petition for judicial review, and it affirms that decision and order in its entirety. Nielsen's petition for review, however, clearly indicates that the subject of the petition is the Board's July 31, 1997, final decision and order on remand. Because the circuit court's erroneous substitution of "July 7" for "July 31" clearly does not affect Nielsen's substantial rights, we will disregard the error and construe the May 28, 1998, order as an affirmance of the Board's July 31, 1997, final decision and order on remand. *See* RULE 809.84, STATS. ("An appeal to the court [of appeals] is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."); § 805.18(1), STATS. ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.").

> court's reasoning. Nonetheless, we apply the same standard and scope of review as that which the trial court employed when it reviewed the agency's decision. The subsections of § 227.57, STATS., delineate the specific scope of review we use to resolve each issue ….

Jocz v. LIRC, 196 Wis.2d 273, 289-90, 538 N.W.2d 588, 592 (Ct. App. 1995) (citations omitted). Additionally, in disciplinary proceedings before the Board, the burden of proof is a preponderance of the evidence. *See* § 440.20(3), STATS.[5]

¶17 Nielsen, relying on ***Burton v. Industrial Commission***, 43 Wis.2d 218, 225, 168 N.W.2d 196, 199, *modified*, 43 Wis.2d 218, 170 N.W.2d 695 (1969), contends that due process requires "some explanation as to why the [Board] decided that Dr. Hecker was worthy of belief, when the ALJ had discredited his testimony." Nielsen claims "[t]he law is clear that special deference should be given to the ALJ, who actually sat through the hearing and listened to the testimony of each and every witness, when credibility of witnesses is a central issue as it is here." *See* ***Transamerica Ins. Co. v. DILHR***, 54 Wis.2d 272, 282-83, 195 N.W.2d 656, 662 (1972).

¶18 Whether the Board's procedures violated Nielsen's due process rights is a question of law subject to our *de novo* review. *See* ***Tateoka v. City of Waukesha Bd. of Zoning Appeals***, 220 Wis.2d 656, 669, 583 N.W.2d 871, 876 (Ct. App. 1998). The ultimate responsibility for credibility determinations rests with the administrative agency, not with the hearing examiner. *See* ***Hakes v. LIRC***, 187 Wis.2d 582, 589, 523 N.W.2d 155, 158 (Ct. App. 1994). "The hearing examiner may make initial determinations on witness credibility, but these determinations are subject to the [administrative agency's] independent review."

[5] The constitutionality of § 440.20(3), STATS., has been upheld by this court. *See* ***Gandhi v. Medical Examining Bd.***, 168 Wis.2d 299, 304-11, 483 N.W.2d 295, 298-301 (Ct. App. 1992).

Id. "Due process requires only that the [administrative agency] consult with the hearing examiner and submit a memorandum opinion explaining its basis for rejecting the hearing examiner's findings." ***Id.*** at 588, 523 N.W.2d at 158. Additionally, § 227.46(2), STATS., provides, in pertinent part: "If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance."

¶19 The Board's original final decision and order contained the mandated "explanation of the basis for each variance" supporting its modification of two of the ALJ's findings of fact. The explanation included observations regarding the testimony of Nielsen's expert witnesses, Dr. Lawrence Kobak and Dr. Stephen Weissman, and the Board's expert witness, Dr. Richard Hecker—all podiatrists, as well as observations regarding the testimony of Dr. James Bass, a thoracic and vascular surgeon. The Board noted:

> Dr. [] Kobak testified that there is no indication in Dr. Nielsen's records that he had found any abnormalities as to pulse, capillary refill, skin temperature, nails, hair, color of the skin, or edema, and that Dr. Kobak could therefore not "find any such indication that … there was no vascular examination." … Dr. Kobak further testified that based on his examination of Dr. Nielsen's records as well as the records of Patient A's subsequent hospitalization, and to a reasonable medical certainty, Dr. Nielsen's treatment did not create an unacceptable risk to the patient.
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> Dr. Weissman's testimony was similar in that he assumed that Dr. Nielsen conducted an evaluation sufficient to permit him to adequately assess Patient A's circulatory status because of the absence of abnormal findings in Dr. Nielsen's medical records. Also similar was his testimony that the hospital records of procedures performed prior and subsequent to Dr. Nielsen's intervention supported the conclusion that Dr. Nielsen's treatment did not create an unacceptable risk to Patient A.
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> In stark contrast to the foregoing expert testimony, Dr. Hecker testified that absent any intervening surgical correction, Patient A's compromised peripheral vascular

> circulation at the time of Dr. Nielsen's treatment on February 26, 1987, would not have improved since the arterial flow velocity and pressure examination conducted on August 15, [1986], at Mount Sinai Medical Center, which established arterial flow pressure index of 0.59 on the left extremity. The board accepts that expert testimony, as well as Dr. Hecker's testimony that given that pressure index, a minimally competent evaluation would have revealed the diminished circulation.
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> That Patient A's vascular insufficiency of the left lower extremity was of such severity as to permit a minimally competent circulation evaluation to reveal such insufficiency is also demonstrated by tests performed following her admission to Northwest General Hospital on March 23, 1987, less than one month after Dr. Nielsen's treatment. The admission physical performed noted that dorsalis pedis pulses and posterior tibial pulses were "decreased at +1/4 bilaterally." Dr. Hecker credibly testified that such a finding means that the pulses were diminished and barely palpable. Two days later, on March 25, 1987, Dr. James Bass, Jr., a thoracic and vascular surgeon, examined Patient A. He testified that on that date, he was unable to palpate any peripheral pulses in the left lower extremity. Accordingly, only a few weeks following the procedure performed by Dr. Nielsen, Dr. Bass diagnosed severe vascular disease and nonhealing ulcers secondary to the peripheral vascular disease. Dr. Bass further testified that in his expert opinion, the situation in terms of Patient A's peripheral circulatory status present on March 25, 1987 was, in all likelihood, the same situation present a month earlier. That credible testimony is accepted by the board. The board concludes that Patient A's severe circulatory disease existed at the time of Dr. Nielsen's treatment on February 26, [1987], and that a minimally competent examination would have revealed the existence of her compromised vascular status.

(record references omitted). The explanation of variance stated the Board's conclusion that "the more persuasive expert testimony is that, given the extent of [Patient A's] vascular disease, she was not a candidate for [podiatric] surgery."

¶20 "In evaluating medical testimony, the [administrative agency] is the sole judge of the weight and credibility of the witnesses. … Where there are inconsistencies or conflicts in medical testimony, the [administrative agency], not

the court, reconciles the inconsistencies and conflicts." ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis.2d 583, 598, 286 N.W.2d 540, 547 (1979). As the State correctly notes, the Board's explanation of variance meets the requirements of § 227.46(2), STATS., and the requirements of due process.

¶21 Nielsen next contends that the Board's decision, on remand, is not supported by substantial evidence. He argues that "the Department failed to show, by the preponderance of the evidence, that a clinical evaluation [of Patient A] by [a] minimally competent podiatrist would have detected a circulation problem." He cites ***Reinke v. Personnel Board***, 53 Wis.2d 123, 139, 191 N.W.2d 833, 841 (1971), in support of his contention that "[w]hat is substantial evidence and what a reasonable person might consider to be adequate support of a conclusion lies within the domain of the reviewing court."

¶22 Substantial evidence has been defined as "evidence sufficient to permit a reasonable finder of fact to reach the conclusion of the agency." ***Abbyland Processing v. LIRC***, 206 Wis.2d 309, 317-18, 557 N.W.2d 419, 422 (Ct. App. 1996). We are required to review only evidence that would support the Board's decision. *See* ***id.*** at 318, 557 N.W.2d at 423. Because this court has no authority to substitute its judgment for that of the Board regarding "the weight of the evidence on any disputed finding of fact," *see* § 227.57(6), STATS., we may set aside the Board's decision only when a reasonable person would be unable to reach the same decision from the evidence in combination with inferences drawn from that evidence, *see* ***Sterlingworth Condominium Ass'n v. DNR***, 205 Wis.2d 710, 727, 556 N.W.2d 791, 797 (Ct. App. 1996).

¶23 Dr. Hecker testified that the August 15, 1986, arterial flow and velocity pressure examination conducted on Patient A indicated compromised

peripheral vascular circulatory status related to severe arteriosclerosis. Based on those results, he stated "to a reasonable degree of professional certainty" that Patient A was not a candidate for the surgery performed on February 26, 1987, "providing there was no surgical intervention or treatment for that vascular disease that she presented in '86." Dr. Hecker further testified that a minimally competent podiatrist "would through history and examination come up with the fact that there's a problem here of diminished circulation." Dr. Hecker also reviewed Dr. Nielsen's records and the results of vascular studies performed on Patient A at Northwest General Hospital within a month following her February 1987 surgery. He testified that Dr. Nielsen could not have performed a minimally competent physical examination of Patient A on February 26, 1987, given that "[t]he physical findings that were [present] prior to that visit of February 26th and the physical findings that were documented in even greater detail, within a month after that situation, were present before and after and therefore had to [be] present on February 26th." Dr. Hecker testified that Dr. Nielsen's performance in regard to Patient A fell below the minimum standards of competency in that "a minimally competent podiatrist would have taken a history and physical, an adequate one to find that there was circulatory embarrassment and would have not proceeded to surgery." Dr. Hecker's testimony satisfies the substantial evidence standard.

¶24 Relying on ***J.F. Ahern Co. v. Wisconsin State Building Commission***, 114 Wis.2d 69, 95, 336 N.W.2d 679, 691 (Ct. App. 1983), Nielsen also contends that the Board's decision, on remand, is arbitrary and capricious. He argues that the Board "made a wilful and irrational choice of conduct" by finding that he violated minimum standards of professional competence regarding Patient A. He maintains:

> If the [Board] had considered the record as a whole, as was done by the ALJ, it would have concluded that the count concerning Patient A should have been dismissed. The Department called only one podiatrist to address the issue of whether or not a minimally competent clinical examination by a podiatrist would have revealed any problems. That podiatrist was Dr. Hecker. Dr. Hecker's testimony was based upon 20-20 hindsight and was at a higher standard then [sic] that required.
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> ….
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> [T]he Department failed to show, by the preponderance of the evidence, that a clinical evaluation by [a] minimally competent podiatrist would have detected a circulation problem. Dr. Hecker's opinion to the contrary is "20-20" hindsight without any basis. For the same reason, the [Board's] decision is arbitrary and capricious.

¶25 "When applying the arbitrary and capricious standard, we determine whether the agency's action had a rational basis …. Rational choices can be made in a process which considers opinions and predictions based on experience." ***J.F. Ahern Co.***, 114 Wis.2d at 96, 336 N.W.2d at 692. "A presumption exists that public officers discharge their duties in accordance with law and they act fairly, impartially and in good faith." ***Gandhi v. Medical Examining Bd.***, 168 Wis.2d 299, 311, 483 N.W.2d 295, 301 (Ct. App. 1992). Our review of the record reveals no evidence to counter this presumption. The Board considered all of the expert testimony and based its decision on that which it found to be most persuasive. The Board's decision had a rational basis; it was not arbitrary and capricious.

¶26 Finally, Nielsen contends that assessing him two-thirds of the costs of the disciplinary proceeding is "wholly unreasonable" and "unconscionable" because the Department "barely established two of the sixteen charges." He argues that fundamental fairness requires a different result. While Nielsen acknowledges that § 440.22(2), STATS., grants the Board discretionary authority to assess against him "all or part of the costs" of the disciplinary proceeding, he

argues that he should not be compelled to pay any of the costs.[6] He cites no legal authority for this position.

¶27 Because the Board's assessment of costs is a discretionary determination, this court's authority to substitute its judgment for that of the Board is limited. *See* § 227.57(8), STATS.[7] For a discretionary determination to be upheld, it must be: (1) based upon facts of record; (2) made "in reliance on the appropriate and applicable law"; and (3) produced by "a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

¶28 The Board explained that because it found violations regarding two of the three counts against Nielsen, it "consider[ed] it appropriate to assess two-thirds of the costs of the proceeding against [him]." The Board's assessment of costs meets the ***Hartung*** criteria.[8]

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[6] "In any disciplinary proceeding against a holder of a credential in which the … examining board … orders suspension, limitation or revocation of the credential or reprimands the holder, the … board … may … assess all or part of the costs of the proceeding against the holder." Section 440.22(2), STATS.

[7] Section 227.57(8), STATS., provides:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

[8] We note, however, that costs assessed under § 440.22, STATS., "may be collected only as a condition to reinstatement of the disciplined practitioner's credentials." ***State v. Dunn***, 213 Wis.2d 363, 365, 570 N.W.2d 614, 615 (Ct. App. 1997), *review denied*, 217 Wis.2d 520, 580 N.W.2d 690 (1998).

By the Court.—Order affirmed.[9]

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[9] "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action." Section 227.57(2), STATS.