**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 16, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1511** **Cir. Ct. No. 2016CV7**

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

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**NATHAN PULJU, A MINOR, BY MELISSA PULJU,**

**PETITIONER-APPELLANT,**

**V.**

**WISCONSIN DEPARTMENT OF HEALTH SERVICES,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Nathan Pulju appeals an order that affirmed a decision of the Wisconsin Department of Health Services (DHS) denying Pulju's motion for attorney fees and costs under the Wisconsin Equal Access to Justice

Act (WEAJA). *See* WIS. STAT. § 227.485(3) (2015-16).[1] Pulju asserts he is entitled to attorney fees and costs because DHS's previous decision to deny him benefits was not substantially justified. We conclude the circuit court did not erroneously exercise its discretion by determining DHS's decision to deny Pulju benefits was substantially justified. We therefore affirm.

## BACKGROUND

¶2 Pulju was diagnosed with autism in January 2013, when he was thirteen years old. He received special education services through the Rice Lake School District, pursuant to an Individualized Education Program (IEP). Following his autism diagnosis, Pulju also began receiving private speech therapy from speech-language pathologist Dorian Glaze at Lakeview Medical Center.

¶3 Medical assistance covers the first thirty-five private speech therapy visits "per spell of illness," but the recipient must obtain prior authorization (PA) before medical assistance will cover additional visits. *See* WIS. ADMIN. CODE § DHS 107.18(2)(b) (Aug. 2015). During 2013 and 2014, Glaze submitted four PA requests to DHS on Pulju's behalf for additional speech therapy sessions. DHS approved the first PA request and modified the second. DHS denied the third PA request, and Pulju, pro se, appealed that denial to the Division of Hearings and Appeals (DHA).

¶4 Following a fair hearing, DHA affirmed the denial of Pulju's third PA request on September 12, 2014. Administrative law judge (ALJ) Michael

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

O'Brien concluded the private speech therapy sessions were not "medically necessary" because they were duplicative of services Pulju was receiving through the Rice Lake School District pursuant to his IEP. *See* WIS. ADMIN. CODE § DHS 101.03(96m) (Dec. 2008). DHS also denied Pulju's fourth PA request, and Pulju again appealed that denial, pro se, to DHA. ALJ O'Brien affirmed the denial on January 28, 2015, following a December 17, 2014 fair hearing, once again concluding the requested speech therapy sessions were not medically necessary.

¶5 Meanwhile, on January 2, 2015—following the fair hearing on the denial of Pulju's fourth PA request, but before O'Brien issued his decision affirming that denial—Glaze submitted a fifth PA request to DHS on Pulju's behalf. Attached to the fifth PA request were a "Prior Authorization/Therapy Attachment (PA/TA)" and an "Outpatient Speech Therapy Progress Note," both of which were authored by Glaze and dated January 2, 2015. In addition, Glaze indicated on the PA request form that Pulju's "current IEP" was "attached to PA number 5142460092"—that is, the fourth PA request.

¶6 DHS denied Pulju's fifth PA request on January 13, 2015. As grounds for the denial, DHS stated, "The documentation submitted by your provider does not support medical necessity as defined in Wisconsin Administrative Code." (Some capitalization omitted.) Pulju subsequently notified DHS he intended to appeal its decision denying his fifth PA request to DHA. Through counsel, Pulju later filed a fair hearing brief, along with sixteen exhibits. Following the fair hearing, ALJ Peter McCombs reversed DHS's decision denying Pulju's fifth PA request. Unlike ALJ O'Brien, McCombs concluded the requested speech therapy services were medically necessary, in that they were not duplicative of services Pulju was already receiving through his IEP.

¶7 Pursuant to the WEAJA, Pulju then filed a motion to recover the attorney fees and costs he incurred in conjunction with the fair hearing on his fifth PA request. He did so on the basis that DHS was not "substantially justified" in denying that request. In a proposed decision on Pulju's motion, ALJ McCombs agreed that DHS's denial of the fifth PA request was not substantially justified. However, McCombs concluded Pulju's requested award of $8,565.80 in attorney fees and costs was excessive and therefore awarded him only $4,257.81.

¶8 McCombs' proposed decision was forwarded to DHS for a final decision on Pulju's motion for attorney fees and costs. *See* WIS. ADMIN. CODE § HA 3.11(6) (Mar. 2017). DHS deputy secretary Thomas Engels subsequently issued a final decision denying Pulju's motion. Engels found that, in denying Pulju's fifth PA request, DHS considered the same IEP it considered when denying his fourth PA request, which was substantially similar to a more up-to-date IEP that Pulju subsequently provided with his fair hearing brief. Engels further found that the January 2, 2015 progress note attached to the fifth PA request was "similar in all essential respects" to an August 2014 progress note that DHS considered when denying Pulju's fourth PA request. Engels concluded:

> Given this, I do not believe that the difference in outcomes between [the fifth PA request] and the prior two cases was based on information that [DHS] should have considered but did not. Rather, the difference is largely attributable to effective counsel in the latest appeal. [DHS's] determinations in this request and the two prior PA requests were based on applying the same PA criteria to the same or similar facts. [DHS] prevailed in both those prior instances. It was entirely reasonable for [DHS] to have made the determination it did in the underlying case on the merits.

¶9 Pulju petitioned for judicial review of Engels' decision. He argued DHS's denial of his fifth PA request was not substantially justified because DHS

"had access to all material information at the time of its initial decision" but "failed to review and evaluate the relevant evidence available to it." In response, DHS argued it reasonably relied on its prior denials of Pulju's third and fourth PA requests when denying his fifth request, given that all three requests were "based on the same facts" and the two prior decisions were affirmed on appeal to DHA. DHS further asserted Pulju only prevailed at the fair hearing on his fifth PA request because he "finally presented sufficient evidence demonstrating the differences between the services for which he sought reimbursement and those the school district provided, and the necessity of those services, through testimony and additional documentation."

¶10 The circuit court concluded DHS properly denied Pulju's motion for attorney fees and costs. The court reasoned:

> The record indicates that [DHS] examined the documents supplied by [Pulju] in [his] PA request. It noted that the fifth PA request contained the same IEP information as the third and fourth requests with the addition of new goals of the same types previously upheld as being effectively duplicated by the school district's program. Considering the similarities between the fifth PA request and the previously denied third and fourth requests, [DHS] issued its denial using the justifications it successfully employed twice before. While [Pulju] claims no additional information was provided at the fair hearing, the ALJ attributed [Pulju's] success to his counsel bringing forth additional information that corrected "the deficiencies identified in those previous requests for prior authorization." In the final decision, [DHS] affirmed the effectiveness of [Pulju's] counsel as such to allow a favorable finding for his PA request. While [DHS] is not absolved from performing its due diligence in assessing the facts behind the request, the burden was on [Pulju] to show by a preponderance of the evidence that [he was] entitled to the services requested. Only then does the burden shift to [DHS] to justify its denial. Because [Pulju] had twice made similar requests on similar sets of facts without providing the kind of testimony he would later provide at

> the April 2015 hearing, [DHS] reasonably denied on the same previously successful grounds.

Pulju now appeals.

## DISCUSSION

¶11 The WEAJA is based on the federal Equal Access to Justice Act, *see* ***Behnke v. DHSS***, 146 Wis. 2d 178, 182, 430 N.W.2d 600 (Ct. App. 1988), which was enacted in response to concerns that "the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation," *see* ***Pierce v. Underwood***, 487 U.S. 552, 575 (1988) (Brennan, J., concurring).[2] To that end, WIS. STAT. § 227.485(3) provides:

> In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

Here, it is undisputed Pulju was the prevailing party at the fair hearing on the denial of his fifth PA request. In addition, DHS does not argue that "special circumstances" exist that would make an award of attorney fees and costs "unjust." The disputed issue is whether DHS was "substantially justified" in denying Pulju's fifth PA request.

[2] The Wisconsin legislature "intended that hearing examiners and courts be guided by the applicable federal case law interpreting the equivalent federal act" when interpreting the WEAJA. ***Behnke v. DHSS***, 146 Wis. 2d 178, 182-83, 430 N.W.2d 600 (Ct. App. 1988); *see also* WIS. STAT. § 227.485(1).

¶12 For purposes of the WEAJA, the term "substantially justified" means "having a reasonable basis in law and fact." WIS. STAT. § 227.485(2)(f). The government has the burden to prove its position was substantially justified. ***Sheely v. DHSS***, 150 Wis. 2d 320, 337, 442 N.W.2d 1 (1989). To meet its burden, the government "must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." ***Id.*** (quoting ***Phil Smidt & Son, Inc. v. NLRB***, 810 F.2d 638, 642 (7th Cir. 1987)).

¶13 The mere fact that the government was the losing party at a contested case hearing does not raise a presumption that its position was not substantially justified. ***Id.*** at 338. Moreover, the ***Sheely*** court observed that, "when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, [we] will defer to the agency's conclusions if they are reasonable; even if we would not have reached the same conclusions." ***Id.*** Ultimately, we review the circuit court's decision on whether a government agency's position was substantially justified for an erroneous exercise of discretion. ***Id.*** at 337. We uphold discretionary determinations if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789.

**I. Reasonable basis in truth for the facts alleged**

¶14 Pulju argues the circuit court erroneously exercised its discretion by concluding DHS' denial of his fifth PA request was substantially justified because the denial lacked a reasonable basis in truth for the facts alleged. *See* ***Sheely***, 150 Wis. 2d at 337. An agency's decision may lack a reasonable basis in truth if it is

based on an insufficient investigation of the facts or is made "without regard to whether the facts would support" it. ***Bracegirdle v. DRL***, 159 Wis. 2d 402, 427, 464 N.W.2d 111 (Ct. App. 1990). Applying these principles to the instant case, Pulju argues DHS "had access to all material information at the time of its initial decision," but it "failed to review and evaluate the relevant evidence available to it" before denying his fifth PA request.

¶15 Conversely, DHS argues its decision to deny the fifth PA request had a reasonable basis in truth because DHS "had twice before reached the same decision on the same facts," and "in both instances, the denial was upheld on appeal to the DHA." DHS asserts the only reason its decision denying the fifth PA request was reversed, whereas its previous denials were upheld, was that Pulju's attorney "presented a more compelling … case for coverage." Specifically, DHS asserts Pulju's attorney appended five documents to Pulju's fair hearing brief that were not attached to his fifth PA request. The circuit court agreed with DHS, concluding the fifth PA request contained the same or similar information as Pulju's third and fourth requests and, given those similarities, DHS was entitled to rely on its previous denials when considering the fifth PA request. The court reasoned Pulju did not meet his burden to show the requested services were medically necessary until the fair hearing on his fifth PA request.

¶16 The circuit court did not erroneously exercise its discretion. As an initial matter, we reject Pulju's claim that DHS is not entitled to rely on its denials of previous PA requests when considering subsequent, substantially similar requests. In support of his argument to the contrary, Pulju cites a "summary statement," which the Office of the Inspector General (OIG) prepared at DHA's request prior to the fair hearing on Pulju's fifth PA request in order to "outlin[e] the reasons for" DHS's denial of that request. In the summary statement, OIG

stated, "Each PA is reviewed on its own merits." Based on this single sentence, Pulju asserts DHS's reliance on its denials of previous PA requests "flies in the face of its own stated policy."

¶17 However, a single sentence in a summary statement prepared by OIG cannot reasonably be construed as a statement of DHS's "policy" regarding the information it considers when assessing PA requests. Pulju has not cited any legal authority for the proposition that DHS is precluded from considering its decisions on prior PA requests when considering a subsequent, substantially similar request. In addition, Pulju's fifth PA request expressly relied on the IEP attached to his fourth PA request and thus specifically directed DHS's attention to that prior request. Finally, as a matter of common sense, it appears reasonable for DHS to consider its prior decisions when assessing a subsequent, substantially similar PA request. We therefore reject Pulju's claim that the circuit court erroneously exercised its discretion by concluding DHS was entitled to rely on its denials of his previous, substantially similar PA requests.[3]

[3] DHS argues on appeal that its denial of the fifth PA request was substantially justified because DHS "had twice before reached the same decision on the same facts," and "in both instances, the denial was upheld on appeal to the DHA." However, as Pulju notes, DHA did not issue its decision upholding DHS's denial of the fourth PA request until after DHS denied the fifth PA request. Thus, in denying the fifth request, DHS could not possibly have relied on the fact that its denial of the fourth request was upheld on appeal to DHA. Nevertheless, DHS could rely when assessing the fifth request on the fact that it had previously denied the third and fourth requests, and its denial of the third request was upheld on appeal to DHA.

Pulju also notes that, while DHS denied his third and fourth PA requests, it approved his first PA request and modified his second. He asserts, "Were [DHS] truly relying on its own prior assessments of [Pulju's] case, it could as easily have relied on the PA requests it approved or modified." However, Pulju points to no evidence that his first and second PA requests were substantially similar to his fifth PA request. Thus, there is no support for his assertion that DHS should have relied on its decisions regarding his first and second PA requests when considering his fifth request.

¶18 We further conclude the circuit court properly exercised its discretion by finding that Pulju did not provide new information distinguishing his fifth PA request from his third and fourth requests until after DHS had denied the fifth request. As noted above, DHS asserts Pulju's attorney included five new documents with Pulju's fair hearing brief that were not attached to his fifth PA request. The record confirms these documents were not attached to the fifth PA request. We agree with Pulju that three of these five documents—Exhibits 6, 7, and 9—did not provide any new information relevant to ALJ McCombs' decision to reverse DHS's denial of the fifth PA request.[4] The same cannot be said, however, of the remaining two documents—Exhibits 11 and 16.

¶19 Exhibit 11 is a one-page letter dated January 22, 2014, from Pam Carlson, the speech pathologist at Pulju's high school, to "the Review Committee." In the letter, Carlson explained that Pulju was "receiving his language instruction" at school through a "Think Social class" that focused on: "understanding how others feel (perspective taking), why people act as they do across situations, identifying and expressing emotions in himself and others, how to join groups and work within a group, along with a host of other cognitive-social skills." Carlson clarified, "I am not working on isolated language (i.e. semantic, syntactic and supralinguistic skills) in a 1:1 or small group setting but rather targeting language from a social standpoint."

[4] Exhibits 7 and 9 were updated sections of Pulju's IEP that were virtually identical to documents DHS considered when denying Pulju's fifth PA request. Exhibit 6 was a one-page cover sheet for Pulju's IEP. It contained no relevant information regarding Pulju's abilities, the services he received through the school district, or the goals of his IEP.

¶20 Exhibit 16 is a ten-page letter from Glaze, dated December 15, 2014. The stated purpose of the letter was to "respond" to DHS's denial of Pulju's fourth PA request and to "provide additional and clarifying information for [Pulju's] appeal of [that] decision." In particular, Glaze addressed DHS's conclusion that the requested speech therapy sessions were duplicative of services Pulju was receiving through the school district pursuant to his IEP.

¶21 Exhibits 11 and 16 were directly relevant to demonstrating the medical necessity of Pulju's requested speech therapy services, because they highlighted the distinctions between those services and the services Pulju received at school, thereby supporting Pulju's argument that the speech therapy sessions were not duplicative. The inclusion of Exhibits 11 and 16 with Pulju's fair hearing brief, but not his fifth PA request, supports the circuit court's finding that Pulju did not provide new information distinguishing his fifth PA request from his prior requests until after DHS had denied his fifth request.

¶22 Pulju concedes Exhibits 11 and 16 were not attached to his fifth PA request. However, he argues those documents were nevertheless "available" to DHS at the time it denied his fifth PA request because they were part of the administrative record regarding his fourth PA request. Specifically, Pulju asserts Exhibit 11 was submitted as an exhibit at the fair hearing on the denial of his fourth PA request. Pulju similarly asserts Exhibit 16 must have been part of the administrative record related to the fourth PA request, because it expressly states it was prepared to "respond" to DHS's denial of that request and to "provide additional and clarifying information for [Pulju's] appeal of [that] decision."

¶23 The record on appeal does not conclusively resolve whether Exhibits 11 and 16 were part of the administrative record regarding Pulju's fourth

PA request. However, assuming without deciding that was the case, we nevertheless conclude the circuit court did not erroneously exercise its discretion by concluding DHS's decision to deny the fifth request was substantially justified. Pulju's argument regarding Exhibits 11 and 16 is premised on the idea that, if DHS wanted to rely on its denials of Pulju's prior PA requests when considering his fifth PA request, DHS was required to independently review the administrative records from the proceedings on those prior requests and determine whether any new information was submitted during those proceedings that would distinguish Pulju's current request from his previous requests. Pulju cites no legal authority for this proposition. It is reasonable to conclude that, if DHS intends to rely on its decision on a prior PA request when considering a subsequent PA request, DHS must review both the prior request and the current request, along with any attached documentation, to determine whether the requests are substantially similar. Absent legal authority requiring DHS to do more, however, the circuit court did not erroneously exercise its discretion by rejecting Pulju's argument that DHS was required to independently review the previous administrative records to determine whether new information was provided in those proceedings that was not attached to either the previous or the current PA requests. This is particularly true given that, under the Wisconsin Administrative Code, it was Glaze's responsibility when submitting Pulju's PA requests to ensure the "completeness of the documentation necessary to support" those requests. *See* WIS. ADMIN. CODE § DHS 106.02(9)(e)1. (Jan. 2014).

¶24 Pulju argues for the first time in his reply brief that he did, in fact, present new factual information with his fifth PA request. He specifically points to the January 2, 2015 "Outpatient Speech Therapy Progress Note" that was attached to that request. He asserts that progress note "identifie[d] the results of

two different tests that evaluate speech and language skills," and it therefore "addresse[d] the lack of objective evidence of the effectiveness of speech therapy [that was] identified during the fair hearing" on his fourth PA request as one of that request's defects. Pulju claims DHS "failed to consider" the new information in the January 2015 progress note when assessing his fifth PA request, instead relying primarily on its denials of his prior requests.

¶25 Pulju's argument in this regard fails for three reasons. First, we generally refuse to address arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Second, Pulju does not address the fact that, in its final decision denying his request for attorney fees and costs, DHS expressly found that the January 2015 progress note was "similar in all essential respects to an August, 201[4] progress note that was considered in mak[ing] [DHS's] prior PA decision that was upheld." Third, Pulju fails to acknowledge that, in reversing DHS's denial of his fifth PA request, ALJ McCombs did not rely on the new test results set forth in the January 2015 progress note. In other words, even if the January 2015 progress note contained new information, McCombs' decision to reverse DHS's decision was not based on that new information. We therefore reject Pulju's argument that any new information in the January 2015 progress note establishes DHS's decision to deny his fifth PA request lacked a reasonable basis in truth.

## II. Reasonable basis in law for the theory propounded

¶26 Pulju next argues the circuit court erroneously exercised its discretion by concluding DHS's decision to deny Pulju's fifth PA request was

substantially justified because DHS's decision lacked a reasonable basis in law for the theory propounded. *See* ***Sheely***, 150 Wis. 2d at 337. We disagree.

¶27 DHS's stated reason for denying Pulju's fifth PA request was that the documentation submitted by Glaze did not "support medical necessity as defined in Wisconsin Administrative Code." (Some capitalization omitted.) Under the relevant administrative code provisions, DHS "shall reimburse providers for medically necessary and appropriate health care services … when provided to currently eligible medical assistance recipients." WIS. ADMIN. CODE § DHS 107.01(1) (Aug. 2015). Elsewhere, the administrative code directs DHS to consider, in determining whether to approve a PA request, "[t]he medical necessity of the service." WIS. ADMIN. CODE § DHS 107.02(3)(e)1. (Aug. 2015). As relevant here, a service is not medically necessary when it is "duplicative with respect to other services being provided to the recipient." WIS. ADMIN. CODE § DHS 101.03(96m)(b)6. (Dec. 2008). In addition, the code provides that the extension of speech therapy services "shall not be approved" where "[o]ther therapies are providing sufficient services to meet the recipient's functioning needs." WIS. ADMIN. CODE § DHS 107.18(3)(e)6. (Aug. 2015).

¶28 These administrative code provisions provide ample legal basis for DHS's denial of Pulju's fifth PA request based on an insufficient showing of medical necessity. In addition, DHS could reasonably rely on the prior administrative decision affirming its denial of Pulju's substantially similar third PA request. That decision concluded the requested speech therapy sessions were not medically necessary because they were duplicative of services Pulju received at school. DHS could also reasonably rely on its decision denying Pulju's fourth PA request based on a lack of medical necessity. The fact that a subsequent decision maker (ALJ McCombs) ultimately determined the requested services

were, in fact, medically necessary does not compel a conclusion that DHS's denial of the fifth PA request lacked a reasonable basis in law. *See* ***Sheely***, 150 Wis. 2d at 338.

¶29 Pulju nevertheless argues DHS's decision to deny his fifth PA request lacked a reasonable basis in law based on three alleged defects in the summary statement OIG submitted in support of DHS's decision: (1) OIG's improper reliance on a bulletin released by the Wisconsin Department of Public Instruction "as apparent authority for the premise that federal law prohibits Medicaid reimbursement of speech therapy services whenever a child is eligible for special education services through the school district"; (2) OIG's improper citation of a prior administrative decision for the proposition that private therapy cannot be approved in cases where the recipient receives school services unless there are "some deficits that the school therapist cannot address"; and (3) OIG's erroneous argument that DHS's denial of Pulju's fifth PA request was warranted because Glaze had not identified a new disease, injury, or condition that required private speech therapy services.

¶30 Assuming without deciding that these three aspects of OIG's summary statement constitute errors of law, they do not provide a basis for us to conclude the circuit court erroneously exercised its discretion by determining there was substantial justification for DHS's decision to deny Pulju's fifth PA request. DHS's decision had an independent, reasonable basis in law, even without the three alleged defects Pulju identifies. In other words, the alleged defects in OIG's summary statement were not necessary to support DHS's decision to deny the fifth PA request. We therefore reject Pulju's argument that reversal is warranted because DHS's decision to deny his fifth PA request lacked a reasonable basis in law.

## III. Reasonable connection between the facts alleged and the legal theory advanced

¶31 Finally, Pulju argues the circuit court erroneously exercised its discretion because DHS's decision to deny his fifth PA request lacked a reasonable connection between the facts alleged and the legal theory advanced. *See* ***id.*** at 337. Again, we disagree. As discussed above, DHS concluded the fifth PA request provided insufficient evidence that the requested services were medically necessary. In so doing, DHS cited the relevant administrative code provisions and reasonably relied on the fact that two previous, substantially similar PA requests had been denied on identical grounds.

¶32 Pulju's only argument that DHS's decision lacked a reasonable connection between the facts alleged and the legal theory advanced is that OIG improperly argued in its summary statement that Glaze had failed to identify a "new spell of illness" justifying additional speech therapy sessions. However, that argument was only one basis for OIG's assertion that DHS properly denied Pulju's fifth PA request. OIG also raised the independent ground that the requested services were not medically necessary because they were duplicative of services Pulju was receiving at school. We have already determined that independent ground was reasonably supported by both the facts and the applicable law. We therefore reject Pulju's argument that, simply because OIG's summary statement presented a different, arguably erroneous justification for DHS's decision, DHS's decision lacked a reasonable connection between the facts alleged and the legal theory advanced.

*By the Court*.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).