

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2002

Cornelia G. Clark
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. 01-0547
STATE OF WISCONSIN

Cir. Ct. No. 00-CV-1167

**IN COURT OF APPEALS
DISTRICT IV**

JENS O. LUEBOW,

**PETITIONER-RESPONDENT-CROSS-
APPELLANT,**

v.

**WISCONSIN DEPARTMENT OF REGULATION & LICENSING
AND WISCONSIN VETERINARY EXAMINING BOARD,**

**RESPONDENTS-APPELLANTS-CROSS-
RESPONDENTS.**

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, P.J., Dykman, and Lundsten, JJ.

¶1 PER CURIAM. The Wisconsin Department of Regulation and Licensing and the Wisconsin Veterinary Examining Board (the board) appeal from

an order affirming discipline imposed against Jens Luebow but requiring the reduction of the \$86,114.90 in costs imposed against him. Luebow cross-appeals pro se from the determination that he engaged in unprofessional veterinary practice. We affirm that portion of the circuit court's order affirming the disciplinary determination and reverse that portion of the order requiring a reduction in costs.

BACKGROUND

¶2 In 1997 a disciplinary complaint was filed against Luebow alleging six counts of unprofessional conduct based on investigations which started in 1993 and 1994. Luebow raised affirmative defenses of failure to state a claim, laches, equitable estoppel, issue and claim preclusion, denial of due process by delay in filing the complaint, selective prosecution, and vindictive prosecution. Extensive discovery demands were made. The affirmative defenses were either withdrawn or dismissed during the two and one-half years between the filing of the complaint and the final evidentiary hearing, which was conducted over a seven-day period in August 1999.

¶3 The board found that Luebow acted in an unprofessional manner by failing to completely remove all ovarian tissue when he spayed two dogs and a cat in 1992 and 1993. The board also found that with respect to a spay performed on a cat in 1994, Luebow had failed to properly suture the left ovarian pedicle but that he had not used an excessive amount of heparin, an anti-clotting agent, during the procedure. The board declared that the count alleging that Luebow failed to diagnose an osteosarcoma in a dog was not proven. The sixth count in the complaint was dismissed before the hearing. As discipline, the board required Luebow to participate and successfully complete clinical and classroom study in

the performance of spays on small animals. Luebow's veterinary license was suspended for a period of not less than twenty days, or until he satisfied the remedial education requirement imposed by the board and paid costs. The entire cost of proceeding was imposed against Luebow: \$86,114.90.

¶4 On Luebow's petition for judicial review, the circuit court entered a lengthy memorandum decision and order. The court found that Luebow's brief was inadequate with respect to all issues except the imposition of fees and costs. It held "that Dr. Luebow has not met his burden of showing that the decision of the board should be overturned," and that "even if Dr. Luebow had adequately briefed his issues, the Court would still affirm the board's decision, except with respect to the amount of fees and costs." As to costs imposed against Luebow, the court determined that the board had not used appropriate legal principles and did not consider the facts of record, including the board's own failure to be cooperative during the proceeding. The court concluded that Luebow should not be assessed costs related to the board's wrongful withholding of information or less than "above-board" conduct, Luebow's "legitimate" claims that the board deviated from its internal agency case-processing guidelines and engaged in vindictive prosecution, and litigation of counts which did not result in discipline. The court reversed the imposition of costs and remanded the matter back to the board to redetermine costs consistent with its opinion.¹

¹ The circuit court suggested, but did not require, that costs be determined by subtracting fees related to litigation on three identified matters, divide remaining costs by six, and then multiply that sum by three and one-half (the number of counts proven).

STANDARD OF REVIEW

¶5 When an appeal is taken from a circuit court order on administrative review, we review the decision of the agency, not the circuit court. *Zip Sort, Inc. v. DOR*, 2001 WI App 185, ¶11, 247 Wis. 2d 295, 634 N.W.2d 99. We must affirm the board’s factual findings if supported by substantial evidence. *Walag v. DOA*, 2001 WI App 217, ¶5, 247 Wis. 2d 850, 634 N.W.2d 906.

“Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. An agency’s decision may be set aside by a reviewing court only when, upon examination of the entire record, the evidence, including the inferences therefrom, is such that a reasonable person could not have reached the decision from the evidence and its inferences.”

Id. (quoted source omitted). Moreover, we cannot substitute our judgment for that of the board with respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 118, 438 N.W.2d 823 (1989). Our review is confined to the record made before the board. *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 720, 556 N.W.2d 791 (Ct. App. 1996).

¶6 The imposition of costs in a disciplinary proceeding is authorized by WIS. STAT. § 440.22(2) (1999-2000),² which provides that costs “may” be

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

assessed against the licensee.³ The imposition of costs is discretionary. We review an agency's exercise of discretion to determine if it was made upon the relevant facts, applied a proper standard of law and, represents a determination that a reasonable person could reach. *Verhaagh v. LIRC*, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996). "In reviewing an administrative agency's discretionary decision, we defer to the administrative agency.... The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper." *Id.* at 160-61.

DISCUSSION

Appeal

¶7 We conclude that the board's imposition of costs is based on two primary factors. The first factor is a policy choice on who should bear the costs of a disciplinary proceeding—the profession as a whole by increased licensing fees or the individual licensee whose conduct necessitated the proceeding. The second factor is the board's consideration of the conduct of the licensee that contributed to the prosecutorial effort needed to bring the disciplinary proceeding to a successful

³ WISCONSIN STAT. § 440.22(2) provides in part:

In any disciplinary proceeding against a holder of a credential in which ... an examining board ... orders suspension, limitation or revocation of the credential or reprimands the holder, the ... examining board ... may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

conclusion. We conclude that both these factors are appropriate.⁴ The imposition of costs against the individual licensee can be used as incentive for compliance with professional standards and cooperative conduct with disciplinary matters.

¶8 Under the board's determination that Luebow, and not the veterinary profession as a whole, be responsible for the costs of the disciplinary proceeding, the board was not required to reduce costs by charges not proven. WISCONSIN STAT. § 440.22(2) does not require any reduction of costs based on charges not proven.⁵ Not only would segregating costs of the successful and unsuccessful charges detract from the policy of insulating the profession as a whole from the costs necessitated in disciplining one individual, it is a difficult task to perform. This is demonstrated by the circuit court's own suggested manner for resolving the cost issue in an arithmetical manner. An arithmetical approach does not comport with the discretion afforded the board.

¶9 The board found that Luebow, by his own combativeness, protracted the nature and duration of the disciplinary proceeding. This finding is supported by substantial evidence in the record.⁶ That the proceeding was excessively

⁴ These factors can be found in attorney disciplinary proceedings in which costs are imposed under SCR 22.24(1) and language nearly identical to that found in WIS. STAT. § 440.22(2). See *Matter of Disciplinary Proc. Against Strasburg*, 217 Wis. 2d 318, 336, 577 N.W.2d 1 (1998); *Matter of Disciplinary Proc. Against Wolf*, 165 Wis. 2d 1, 11-12, 476 N.W.2d 878 (1991).

⁵ The board concedes that a finding that a charge of frivolousness may justify the reduction of costs. No such finding was made here with respect to the charges not proven. Luebow's reliance on *Gordon v. State Medical Examining Board*, 225 Wis. 2d 552, 593 N.W.2d 481 (Ct. App. 1999), is misplaced. *Gordon* concerned costs under WIS. STAT. § 227.485, which mandates consideration of whether the agency's position was substantially justified.

⁶ The circuit court made findings of fact independent of and contrary to those made by the board as to the conduct the board engaged in and whether Luebow's claims were legitimately advanced. In this way, the circuit court failed to adhere to the standard of review.

litigated is reflected by the summary of the procedural history which reflects 197 entries. Twenty-six pre-hearing conferences were conducted to deal with the myriad of motions and discovery. The character of the allegations Luebow made and the resistance he interposed at every stage of the proceeding was beyond the pursuit of a vigorous defense.

¶10 Luebow continues to argue that costs cannot be imposed for the board's own misconduct during the proceeding. This is nothing more than disagreement with the board's finding that Luebow's own conduct protracted the disciplinary proceeding. Although the board found that "the division took some unfortunate actions during the lengthy course of this case which unnecessarily antagonized Dr. Luebow," it did not find any misconduct with respect to the charges brought and prosecuted. The board's findings are contrary to Luebow's contention that there was prosecutorial misconduct.

¶11 We conclude that the board properly exercised its discretion in imposing the entire cost of the proceeding against Luebow. We reverse the circuit court's decision on this issue.

Cross-Appeal

¶12 Luebow raises seven issues in his cross-appeal. We agree with the board that Luebow's failure to brief these issues before the circuit court in a comprehensible manner should serve as a waiver of the right to raise them on appeal. However, we decline to simply affirm the circuit court's decision on this basis because our mandate is to review the decision of the board and not merely the circuit court. We address Luebow's claims, combining them where appropriate.

Finding of Unprofessional Conduct

¶13 Luebow argues that he is not guilty of unprofessional conduct simply because ovarian tissue was found after the spays he conducted on the animals. He characterizes the board's finding of unprofessional conduct as arbitrary and lacking in scientific foundation because the failure to remove all ovarian tissue is "relatively common." He also contends that the circuit court erred by adopting the findings of the board and citing to expert testimony that supports the board's determination.

¶14 Luebow's argument is nothing more than a failure to apply the proper standard of review. We review the evidence in the light which supports the determination made. *See Kimberly-Clark Corp. v. LIRC*, 138 Wis. 2d 58, 67, 405 N.W.2d 684 (Ct. App. 1987). We need not consider evidence that would permit a contrary finding. *Abbyland Processing v. LIRC*, 206 Wis. 2d 309, 318-19, 557 N.W.2d 419 (Ct. App. 1996). Here, expert testimony of record supports the finding that the failure to remove all ovarian tissue was a failure to perform in a minimally competent manner. The board's findings are supported by substantial evidence.

Vindictive Prosecution/Lack of Due Process/ Abuse of Discretion

¶15 Using the terms vindictive prosecution, lack of due process, and abuse of discretion, Luebow begins his principal attack on the board's decision. Luebow lists the type of conduct that he believes represents the board's vindictive prosecution. The list includes retaliation for Luebow's challenge to the initial denial of his license, acceptance of complaints and information from disgruntled former employees, an alleged conflict of interest for the board chairman, recruitment of complaints from Luebow's competitors who would benefit from his

demise, release of false and misleading information, permitting board members to hold office after expiration of their terms, and failure to prosecute any other veterinarians for the same type of allegations. He contends that the entire proceeding violated his right to due process not only because of vindictive prosecution but for delay in bringing the proceeding to an end. He characterizes the decision as an “abuse of discretion.”

¶16 These claims were fully litigated before the board. The board determined that Luebow failed to establish his claims that the complained of conduct brought about and permeated the prosecution. It is sufficient to say that based on our review of the record, the board’s findings that the claimed conduct did not occur or did not demonstrate vindictive motivation are supported by substantial evidence. Thus, there was no vindictive prosecution, lack of due process, or misuse of discretion.

Impartial Tribunal

¶17 Luebow argues that the administrative law judge (ALJ) was biased against him. Other than the allegation that the ALJ demonstrated bias by hand-delivering documents to Luebow in front of clients and employees, Luebow raises his claim for the first time on appeal.

It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency. Judicial review of administrative agency decisions contemplates review of the record developed before the agency. Ordinarily an appellate court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver of the right to raise the issue before a reviewing court.

State v. Outagamie County Bd. of Adjustment, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 (footnotes omitted). For this reason, we do not address the claims Luebow did not raise before the board.

¶18 With respect to the occasions that the ALJ hand-delivered documents to Luebow, we conclude they do not demonstrate bias. Inferentially, the documents were time-sensitive. The ALJ noted that there was sometimes a delay in mail service from his office. The ALJ was merely making every effort to give Luebow adequate notice of rulings that affected the proceedings.

By the Court.—Order affirmed in part; reversed in part and cause remanded.⁷

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

⁷ The board is entitled to the taxation of costs against Luebow for both the appeal and cross-appeal since we reverse on the appeal and affirm on the cross-appeal. WIS. STAT. RULE 809.25(1).

