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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER ON REMAND OF RESPONDENT'S MOTION FOR COSTS LS9107033MED
BRUCE GORDON, M.D., RESPONDENT.	:	

The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision on Remand of Respondent's Motion for Costs of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision on Remand of Respondent's Motion for Costs annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 18th day of September 1997.

A Member of the Board

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST BRUCE GORDON, M.D., RESPONDENT.	: : : : :	PROPOSED DECISION ON REMAND OF RESPONDENT'S S. 227.485 MOTION FOR COSTS (Case No. LS 9107033 MED)

The parties to this proceeding for the purposes of sec. 227.53, Stats., are:

Bruce Gordon, M.D.
501 Copper Street
Hurley, WI 54534

State of Wisconsin
Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin
Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

The Final Decision and Order in the above captioned matter was issued by the Medical Examining Board on November 18, 1993, finding unprofessional conduct on the part of Dr. Bruce Gordon on 4 out of an original 14 counts alleged in the Complaint, and imposing discipline. The terms of the discipline imposed by the Board were substantially similar to that which Gordon had offered to accept in prehearing settlement negotiations. Following issuance of the Final Decision and Order, the Complainant, Division of Enforcement (hereinafter Division), filed a motion under sec. 440.22, Stats., for assessment of part of its costs of the proceeding. Dr. Gordon filed objection to the Division's motion for costs, and filed his own motion for costs under sec. 227.485, Stats. The Division filed a Memorandum of Law supporting its motion and opposing Gordon's motion. On December 27, 1993, in separate decisions, the Board denied each of the Division's and Dr. Gordon's motions for costs. Thereafter, while not appealing the underlying Final Decision and Order, Dr. Gordon filed a petition for judicial review of the

Board's denial of his motion for costs. On August 29, 1994, the Circuit Court for Dane County issued its decision affirming the Board's order denying Dr. Gordon's motion for costs. Dr. Gordon appealed the circuit Court's decision to the Court of Appeals.

In its decision on February 23, 1995, the Court of Appeals of Wisconsin, District IV, remanded this matter back to the Medical Examining Board for further consideration of Dr. Gordon's motion for costs. The Court of Appeals determined that the Medical Examining Board (hereinafter "Board"), in its decision on Gordon's petition for costs, "erred by assigning Gordon the burden of proving that prosecuting the action [by the Division] was not substantially justified after [Gordon] offered to settle." The Court noted that the burden was on the Division, not Gordon, to prove substantial justification. The Court instructed that, "On remand, the Board must therefore decide whether the Division satisfied its burden of showing that its pursuit of the particular sanctions, including a license suspension, had any reasonable basis in the facts of the case." Court of Appeals decision, pp. 3-4.

On remand, the Board referred the matter to the undersigned ALJ. A telephone prehearing conference was held on April 12, 1996 to consider the scope of the issue(s) to be determined on remand, necessity for an evidentiary hearing, and to establish a briefing schedule. On remand, attorneys Joy L. O'Grosky and Curtis Swanson appeared for Dr. Gordon; attorney Steven Gloe appeared for the Division of Enforcement. No evidentiary hearing was held. The Division of Enforcement filed its brief on remand on April 26, 1996; Dr. Gordon filed his response brief on May 13, 1996, and the Division filed it's reply brief on May 24, 1996.

In its brief on remand, besides contending that the record shows the prosecution of the case after Gordon's settlement offer was substantially justified, the Division of Enforcement reasserts its original objection that Dr. Gordon failed to comply with the procedural requirements of sec. 227.485(5), Stats., and argues that such failure is jurisdictional and requires denial of Gordon's petition for costs. The Division also filed a motion under sec. 227.485(10)(b), Stats., for its costs in responding to Gordon's motion for costs, contending the motion is frivolous because Gordon's attorneys knew or should have known that the 30 day time period for filing an application for costs following the issuance of the proposed decision under sec. 227.485(5), Stats., is jurisdictional, that Gordon's motion was filed nearly 8 months late, that Gordon has further failed to include any itemized statement of fees and expenses as required by the statute, and that the motion was filed simply in retaliation for the Division's original motion for partial costs of the disciplinary proceeding under sec. 440.22, Stats. These two matters are also addressed herein.

On the basis of the entire record, the administrative law judge recommends that the Medical Examining Board adopt as its final decision on further consideration of Dr. Gordon's petition for costs, and on the Division's motion for costs under sec. 227.485(10(b), Stats., the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Division of Enforcement filed the Complaint in this matter on June 25, 1991, alleging 14 counts of unprofessional conduct regarding the care and treatment of four patients by Dr. Gordon. The complaint alleged a pattern of prescription of controlled substances otherwise than in the scope of professional practice and which tended to constitute a danger to the health, welfare or safety of the patient or the public, and that Dr. Gordon's treatment of chest pain, elevated blood pressure, depression and irregular heartbeat fell below minimum standards of the profession and tended to constitute a danger to the health, welfare or safety of the patient or the public. The complaint requested the Board to hear evidence on the allegations, to impose the discipline warranted, and to assess the costs of the proceeding pursuant to sec. 440.22, Stats.

2. Prior to the filing and issuance of the complaint, pursuant to sec. 448.02 (3)(b), Stats., the Board reviewed the allegations of the proposed complaint and found probable cause to believe Dr. Gordon engaged in unprofessional conduct and for issuance of the complaint. At the time the Board determined there was probable cause to issue the complaint, the Board considered initiating summary suspension proceedings. Under sec. 448.02(3), Stats., the Board may summarily suspend a license if it has in its possession evidence establishing probable cause to believe the license holder has violated Ch. 448, Stats., and it is necessary to suspend the license immediately to protect the public health, safety or welfare. Under secs. RL 6.04(1), 6.06 (1), and 6.07(7), Wis. Adm. Code, the grounds for issuing an order for summary suspension are that the "respondent has engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license" pending hearing and determination of the allegations.

3. In October 1991, Dr. Gordon's attorneys inquired of the Division regarding possible settlement of the charges against Dr. Gordon, as the complaint did not specify exactly what discipline was being sought against Dr. Gordon in the disciplinary proceeding, and that the disciplinary proceeding was very time consuming and expensive for Dr. Gordon. In response to the inquiry, the attorney for the Division, Judith Mills Ohm, advised that she could not respond until after the Division's expert witness, Dr. Radant, had reviewed the depositions of Dr. Gordon.

4. During the week of December 9, 1991, the Division's attorney advised Dr. Gordon's attorneys that following review and consultation with Dr. Radant, she decided to delete Counts XII, XIII and IV of the complaint. The Division eventually filed its Amended Complaint on January 14, 1992.

5. In formulating proposed disciplinary terms for settlement of the disciplinary action against Dr. Gordon, the prosecutor for the Division consulted with the Board Advisor assigned to the case. The Board Advisor is a member of the Board who is assigned by the Board to provide the Division with advice relating to the technical aspects of the practice of medicine involved in a case, the seriousness of the respondent's failure, if proven, to conform his or her practice to the standards of the profession, and what measures of discipline the Advisor, as a member and representative of the Board, believes would constitute an acceptable resolution of

the case by the Board, based on the facts of the particular case and the Board's actions in other cases. A Board Advisor removes himself or herself from any deliberation or adjudication on the case as a member of the Board.

6. Following consultation with the Board Advisor to the case, on December 18, 1991, the Division's attorney delivered a letter dated December 17, 1991 setting forth the proposed terms of discipline that would be acceptable to the Board Advisor and the Division for settlement of the disciplinary action. In substance, the Division's proposed disciplinary terms were:

a. Dr. Gordon's license to practice medicine would be suspended for a period of 90 days.

b. Dr. Gordon would be required to undergo an assessment and any reeducation recommended by the University of Wisconsin School of Medicine, Continuing Medical Education Department, relating particularly to management of patients with potential cardiac problems, hypertension and depression.

c. Dr. Gordon would be required to attend a course in New Jersey on the proper prescribing of controlled substances.

d. Dr. Gordon's license would be limited for a minimum period of one year to prohibit the prescribing of controlled substances.

7. On January 9, 1992, the attorneys for the parties met to discuss the proposed settlement terms outlined in the December 17, 1991 letter. Dr. Gordon's attorneys advised that Dr. Gordon would not agree to a suspension of his license, or to a limitation on his license prohibiting prescribing of controlled substances, as such measures would effectively destroy his practice of medicine in the community of Hurley, Wisconsin. Gordon's attorneys advised that Dr. Gordon would be willing to take any retraining at his own expense which the Board deemed necessary. The Division maintained the position that a suspension and limitation on prescribing controlled substances were necessary elements of a settlement. Dr. Gordon maintained his position that he would be willing to undertake at his own expense any retraining deemed necessary by the Board, but would not agree to a suspension or limitation on his license.

8. Through the course of settlement negotiations in December 1991 and January 1992, the parties did not reach a stipulated settlement of the disciplinary proceeding, and the case proceeded to hearing in March 1992. At the outset of the hearing, the Division voluntarily dismissed an additional count of the Amended Complaint, leaving 10 counts at issue in the proceeding.

9. At the hearing, in addition to other evidence and testimony, the Division presented the expert testimony of Leon Radant, M.D., who is board certified in internal medicine, supporting the allegations that Dr. Gordon's prescribing of controlled substances and evaluation and treatment of hypertension, chest pain and depression, evidenced in his care and treatment of the 3 patients involved in the remaining 10 counts of the Amended Complaint, involved

prescribing of controlled substances otherwise than in the course of legitimate professional practice, fell below the minimum standards of practice established in the profession, created unacceptable risks to the patients or public, and tended to constitute a danger to the health, welfare or safety of the patients or the public.

10. On March 19, 1993, the administrative law judge filed and served the Proposed Decision, dismissing all remaining ten counts of the Amended Complaint.

11. Dr. Gordon was the prevailing party upon service of the Proposed Decision which dismissed all remaining counts of the Amended Complaint.

12. Dr. Gordon did not file any motion for costs nor itemized application for fees and other expenses under sec. 227.485(5), Stats., within 30 days after service on March 19, 1993 of the Proposed Decision.

13. On November 18, 1993, after consideration of objections and arguments of the parties regarding the Proposed Decision, the Medical Examining Board issued its Final Decision and Order. The Board reversed the ALJ's findings and conclusions on four counts, and found and concluded that Dr. Gordon was guilty of unprofessional conduct. The Board concluded in two counts that Dr. Gordon prescriptions for Dilaudid, a Schedule II controlled substance, for two patients constituted a danger to the health, welfare or safety of the patient or the public, and concluded in two counts that Dr. Gordon's treatment of hypertension of the same two patients constituted a danger to the patient's health, safety or welfare.

14. In its Order, the discipline imposed by the Board, in substance, was the following:

a. Reprimand of Dr. Gordon.
b. Imposition of limitations on Dr. Gordon's license to practice medicine, requiring him to:
   i. Undergo an assessment of his competency to practice internal medicine;
   ii. Complete an education or training program recommended as a result of the assessment; and
   iii. Complete one of two courses specified by the Board on the prescribing of controlled substances.

15. The Board's final decision and order, which imposed discipline upon Dr. Gordon, did not include a determination pursuant to sec. RL 2.18(3), Wis. Adm. Code, of whether all or part of the costs of the proceeding should be assessed against Dr. Gordon as requested in the Amended Complaint. On December 2, 1993, the Division filed a motion pursuant to sec. 440.22, Stats., and RL 2.18, Wis. Adm. Code, to assess against Dr. Gordon that part of the Division's costs of the proceeding allocable to those counts on which the Board found unprofessional conduct on the part of Dr. Gordon.

16. On December 6, 1993, Dr. Gordon's attorneys hand delivered a letter to the Board office objecting to the Division's motion for costs and requesting an extension of the deadline for filing a response to the Division's motion. The letter also advised that a motion for costs under sec. 227.485, Stats., on behalf of Dr. Gordon was being prepared, and the letter included a supporting Affidavit of Curtis Swanson.

17. On or about December 10, 1993, Dr. Gordon first filed his motion for costs under sec. 227.485, Stats., with a corrected Affidavit of Curtis Swanson, and supporting Brief.

18. On December 13, 1993, the Division filed its Memorandum of Law and Affidavit of Judith Mills Ohm, in support of the Division's motion for sec. 440.22, Stats., costs, and in response to Dr. Gordon's December 6, 1993 notice of intent to file a motion for costs under sec. 227.485, Stats., and the original Affidavit of Curtis Swanson, all of which had been received by the Division on the same date, December 13, 1993.

19. At its meeting on December 15, 1993, the Board considered the respective motions, briefs, and affidavits for costs of the Division and Dr. Gordon, without hearing or further submissions, appearances or argument by either party. In separate decisions, both dated December 27, 1993, the Board denied each of the respective motions for costs of the Division and Dr. Gordon.

20. The Order Denying Respondent's Motion for Costs stated, "The Board concludes that the Division was substantially justified in its position relative to the prosecution and hearing of this matter, and respondent's Motion must therefore be denied."

21. On January 19, 1994, Dr. Gordon appealed the Board's Order Denying Respondent's [Gordon's] Motion for Costs to the Circuit Court for Dane County. Dr. Gordon did not appeal the Board's Final Decision and Order on the allegations of unprofessional conduct of the Amended Complaint. The Board opposed the appeal and the Circuit Court affirmed the Board's Order Denying Respondent's Motion for Costs. Gordon v. Medical Examining Board, No. 94 CV 239 (Dane Co. Cir. Ct. Decision, August 29, 1994).

22. Dr. Gordon appealed the Circuit Court's Decision to the Circuit Court of Appeals. On February 23, 1995, the Court of Appeals issued its opinion and judgment, reversing the judgment of the Circuit Court and ordering the matter remanded back to the Medical Examining Board for further consideration of Dr. Gordon's petition for costs, on the issue of the Board's determination that the Division was substantially justified in declining Dr. Gordon's settlement offer and proceeding to hearing in the disciplinary proceeding. The Court of Appeals stated:

> "The Board erred by assigning Gordon the burden of proving that prosecuting the action was not substantially justified after he offered to settle. . . . As noted, the burden was on the Division, and not Gordon, to prove substantial justification. . . . On remand, the Board

must therefore decide whether the Division satisfied its burden of showing that its pursuit of the particular sanctions, including a license suspension, had any reasonable basis in the facts of the case."

Gordon v. Medical Examining Board, No. 94-2919-FT (Ct. App. Decision, p.4).

23. The factual allegations of the remaining 10 counts of the Amended Complaint prosecuted through hearing had a reasonable basis in truth as the alleged facts were based on:

a. information contained in Dr. Gordon's treatment records,

b. the testimony of a former detective of the Duluth, Minnesota Police Department,

c. admissions by Dr. Gordon in his answer to the Amended Complaint of many of the alleged facts as to the underlying treatment of the patients involved,

d. testimony of competent professional medical opinion of the Division's expert consultant and witness, Dr. Leon Radant, relating to medical inferences and conclusions, and

e. the finding of the Board that there was probable cause to believe Dr. Gordon was guilty of unprofessional conduct and for issuance of the complaint.

24. The theories of unprofessional conduct alleged in the remaining 10 counts of the amended complaint prosecuted through hearing under secs. Med 10.02(2)(h) and (p), Wis. Adm. Code, were supported by:

a. the competent professional medical opinion of the Division's expert consultant and witness, Dr. Leon Radant,

b. the consultation and advice of the Board Advisor to the case,

c. the finding by the Medical Examining Board of probable cause to believe that Dr. Gordon was guilty of unprofessional conduct and to issue the complaint, and

d. prior disciplinary action by the Board in prior similar cases.

25. There was a reasonable connection between the facts alleged and theories of unprofessional conduct propounded in the remaining 10 counts of the amended complaint prosecuted through hearing, which was supported by:

a. the competent professional medical opinion of the Division's expert consultant and witness, Dr. Leon Radant,

b. the consultation and advice of the Board Advisor to the case,

c. the finding by the Medical Examining Board of probable cause to believe that Dr. Gordon was guilty of unprofessional conduct and to issue the complaint, and

d. prior disciplinary action by the Board in prior similar cases.

26. The following disciplinary decisions of the Medical Examining Board imposed suspension of license, revocation of license, accepted voluntary surrender, limitation of license prohibiting practice in certain areas of medicine, limitation of license prohibiting or restricting prescribing of controlled substances, or ordered surrender of the licensee's Drug Enforcement Administration authorizing the purchase, possession, prescribing or administration of controlled

substances: Final Decision and Order regarding James McDuffie 9/25/91, Philip Musari 8/25/91, Robert Wetzler 6/20/91, Steven Greenman 10/18/90, Arne Haavik 5/24/89, Austin McSweeny 3/22/89, Charles McKee 4/18/91, Frederick Dickinson 2/21/91, Irene Olson 11/15/90, James Lewis 5/23/90, Paul Haupt 12/28/89, Erika Voss 7/26/89, Austin McSweeny 3/22/89, Thomas Williams 4/20/89.

27. The Division's position in its proposed settlement terms, requiring a 90 day suspension, reeducation and license limitation on prescribing controlled substances, was based on the following:

a) The professional opinion of its expert consultant and witness, Dr. Leon Radant, that Dr. Gordon's care and treatment as alleged in the Amended Complaint, and evidenced in Dr. Gordon's treatment records, his deposition testimony and other evidence, constituted a pattern of prescribing controlled substances otherwise than in the scope of legitimate professional practice and constituted treatment which fell below the minimum standards of practice established in the profession, created unacceptable risks to the patient or the public, thereby tending to constitute a danger to the health, welfare or safety of the patients and the public.

b) Information that at the time of the Medical Examining Board's determination of probable cause to issue the original complaint, the Board considered the allegations of Dr. Gordon's misconduct very serious and considered initiating summary suspension proceedings against Dr. Gordon.

c) Discussion with and agreement of the Board Advisor, as a representative of the Board, that allegations and evidence of Dr. Gordon's misconduct in the case was very serious, that the Board could revoke Dr. Gordon's license, and that terms proposed for settlement in the December 17, 1991 letter would be acceptable.

d) Disciplinary action taken by the Board in prior cases involving similar allegations.

CONCLUSIONS OF LAW

1. The requirement of sec. 227.485 (5), Stats., that the prevailing party shall submit within 30 days after service of the proposed decision a motion for costs and an itemized application for fees and other expenses is a jurisdictional prerequisite to the right to recover costs under sec. 227.485, Stats., with which failure to comply removes jurisdiction for the Medical Examining Board to consider or grant such motion for costs.

2. Dr. Gordon was the prevailing party upon service by the administrative law judge of his Proposed Decision, which recommended dismissal of all remaining counts in the disciplinary proceedings against Dr. Gordon.

3. Dr. Gordon's motion for costs, filed nearly 9 months after service of the ALJ's Proposed Decision, failed to comply with the jurisdictional prerequisites of sec. 227.485, Stats.

4. Dr. Gordon, having failed to file any motion for costs and itemized application for fees and other expenses within 30 days following the service of the Proposed Decision, failed to establish jurisdiction under sec. 227.485, Stats., in the Medical Examining Board to consider his claim for costs.

5. The Medical Examining Board lacks subject matter jurisdiction under sec. 227.485, Stats., to consider or grant Dr. Gordon's motion for costs, and therefore Dr. Gordon's motion of for costs must be denied.

6. There is substantial evidence in the record that the position of the Division of Enforcement was substantially justified in adhering to its settlement position stated in its December 17, 1991 letter, in declining to accept Dr. Gordon's offer to undergo any reeducation at his own expense as deemed necessary by the Board without any suspension of his license or limitation prohibiting prescribing of controlled substances, and in prosecuting the remaining 10 counts of the amended complaint through hearing.

7. The Division of Enforcement satisfied its burden of showing by substantial evidence in the record that it was substantially justified in adhering to its settlement position stated in its December 17, 1991 letter, in declining to accept Dr. Gordon's offer to undergo any reeducation at his own expense as deemed necessary by the Board without any suspension of his license or limitation prohibiting prescribing of controlled substances, and in prosecuting the remaining 10 counts of the amended complaint through hearing.

8. The Division of Enforcement, having satisfied its burden of showing by substantial evidence in the record of substantial justification for its position of declining Dr. Gordon's offer to accept only reeducation at his own expense as deemed necessary by the Board, and continued prosecution of its case through hearing in pursuit of the additional disciplinary sanctions of license suspension and limitation prohibiting prescribing of controlled substances, under sec. 227.485(3), Stats., Dr. Gordon's motion for costs must be denied.

9. Based upon the treatment of the jurisdictional objection to Dr. Gordon's motion for costs in the Board's decision and on appeal, Dr. Gordon's pursuit of his motion for costs had some basis in equity, and therefore the Division's motion for costs pursuant to sec. 227.485(10)(b), Stats., in responding to Dr. Gordon's motion for costs should be denied.

ORDER

1. The motion of Bruce Gordon, M.D., for costs pursuant to sec. 227.485(3), Stats., relating to the above captioned matter, is hereby denied.

2. The motion of the Complainant, Division of Enforcement, for costs pursuant to sec. 227.485(10)(b), Stats., in responding to Dr. Gordon's motion for costs, is hereby denied.

APPLICABLE STATUTE

(In relevant part)
227.485 Costs to certain prevailing parties.
(1) The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of November 20, 1985, interpreting substantially similar provisions under the federal equal access to justice act, 5 USC 504.

(2) In this section:

(a) "Hearing examiner" means the agency or hearing examiner conducting the hearing.

. . .

(f) "Substantially justified" means having a reasonable basis in law and fact.

(3) 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.

. . .

(5) If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.47 and 227.48. The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.

(6) A final decision under sub. (5) is subject to judicial review under s. 227.52. If the individual, small nonprofit corporation or small business is the prevailing party in the proceeding for judicial review, the court shall make the findings applicable under s. 814.245 and, if appropriate, award costs related to that proceeding under s. 814.245, regardless of who petitions for judicial review In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5).

. . .

(10) If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following.

(a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.

(b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

DISCUSSION

There are three issues for decision in this matter on remand from the Court of Appeals:

1) Whether Dr. Gordon failed to comply with jurisdictional procedural prerequisites for his motion for costs under sec. 227.485, Stats., with the consequence that the Medical Examining Board lacks subject matter jurisdiction to consider or grant his motion for costs. I conclude that Dr. Gordon failed to comply with the procedural prerequisites of sec. 227.485, Stats., that the procedural requirements are jurisdictional and cannot be waived, and that Dr. Gordon's motion must be denied.

2) Whether the Division carried its burden of showing by substantial evidence that its position of prosecution of the disciplinary proceeding through hearing after Dr. Gordon's offer to settle the case was substantially justified. I conclude that the Division has carried its burden of showing substantial evidence of substantial justification for its position in prosecuting its case through hearing after Dr. Gordon's offer to settle the case.

3) Whether the Division's Motion for Costs under sec. 227.485(10), Stats., for responding to Dr. Gordon's motion should be granted. I conclude that it should not be granted.

JURISDICTION

Section 227.485(5), Stats., requires that a prevailing party file a motion and itemized application for costs and expenses within 30 days after service of a proposed decision. The Proposed Decision in this disciplinary proceeding was served on March 19, 1993. Dr. Gordon did not file a motion for costs until December 10, 1993, following the Board's Final Decision and Order.

The Division of Enforcement, in its Memorandum of Law filed on December 13, 1993, had raised the objection that Gordon had not complied with the filing requirements of sec. 227.485(5), and argued that Gordon's motion should be denied for this reason, among others.

Without explanation or indication in the record, the Division's objection relating to Gordon's failure to comply with the filing requirements under sec. 227.485(5) was not addressed by the Board's Order Denying Respondent's Motion For Costs. Presumably, this was because the Board denied Gordon's motion on other grounds under sec. 227.485, i.e., because the Board concluded that the Division's position was substantially justified. This objection to Gordon's motion for costs was also not raised or addressed in the judicial review proceeding in the Circuit Court, nor on appeal to the Court of Appeals.

However, the Division reasserts this objection to Gordon's motion for costs on remand, contending the Board lacks of subject matter jurisdiction to consider and act on Gordon's motion.

Dr. Gordon argues that this objection was implicitly rejected by the Board, because the Board proceeded to rule on Dr. Gordon's motion for costs. Further, since the Board did not cross appeal on this issue in the circuit court and the Court of Appeals, Dr. Gordon argues, the doctrine of the law of the case applies to this issue with the effect that it must be concluded that Dr. Gordon's motion for costs complied with the filing requirements of sec. 227.485. In addition, Dr. Gordon contends that his motion for costs was filed in compliance with sec. 227.485. Gordon argues that the statute should be read and interpreted such that a motion for costs is not required to be filed until after there is a final decision and order concluding the disciplinary proceeding.

THE 30 DAY FILING REQUIREMENT IS JURISDICTIONAL AND MAY NOT BE WAIVED

As argued by the Division in its briefs on remand, sec. 227.485, Stats., constitutes a waiver by the state of its sovereign immunity to suit, that such waiver of sovereign immunity amounts to a limited consent to be sued, and that the scope of such consent to suit is defined by and conditioned on the terms specified by the statute.

Section 227.485(1) provides that the legislature intends that hearing examiners and the courts of this state, in interpreting sec. 227.485, Stats., be guided by federal case law interpreting substantially similar provisions under the federal Equal Access to Justice Act, 5 USC 504.

The federal courts have addressed this jurisdictional question under the federal Equal Access to Justice Act:

> "It is well established that "the United States, as sovereign, is immune from suit save as it consents to be sued . . . .[citations omitted] The terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. . . . Any waiver of the government's sovereign immunity is to be strictly construed in favor of the government. [Citations omitted]. . . . Since jurisdiction to entertain a claim against the Untied States exists only as Congress has granted it, neither an agency nor a court has the power to entertain claims that do not meet the conditions limiting the waiver of immunity. Where

> a statute authorizing a claim against the United States contains time limits for filing the claim, those limits set the temporal boundaries of the consent to be sued; they grant the tribunal in which the claim is to be filed jurisdiction to entertain only those claims that are filed within the time allowed." Long Island Radio Company v. NLRB, 841 F.2d 474, 477 (2d Cir 1988); Monmark Boat Company v. NLRB, 708 F. 2d 1322 (8th Cir. 1983).

The Wisconsin Supreme Court has acknowledged the doctrines of sovereign immunity and strict construction of statutory waiver thereof as applicable to the Wisconsin Equal Access to Justice Act, secs. 814.245 and 227.485, Stats. Sheely v. Wisconsin Dept. of Health and Social Services, 150 Wis. 2d 320, 328-329, 330 (1989). The Court in Sheely, citing with approval a number of federal appellate cases under the federal EAJA, also acknowledged that the 30 day filing deadline is a jurisdictional requirement, which cannot be waived, and may be first raised on appeal. Id. 330.

An administrative rule extending the time period for performance of an act following service of documents by mail may not operate to extend the jurisdictional requirement set by the federal EAJA statute for the filing of an application for fees within 30 days following issuance of a final decision by an agency. Monmark Boat Company v. NLRB, 708 F. 2d 1322 (8th Cir. 1983). 'The Supreme Court has stated that, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 276, 1 L. Ed. 2d 306, 77 S. Ct. 269 (1957).' Monmark, Id. at 1329. An agency may not be estopped from raising the jurisdictional requirement to defeat a motion for costs after having granted an extension, since the agency does not have the power to waive the jurisdictional requirement in the first place, Long Island Radio Co., supra.

In this case, on December 13, 1993, the Division immediately raised this jurisdictional objection in response to Gordon's motion before the Board. However, it was not addressed by the Board's Order on Gordon's motion, nor was it raised or addressed at the Circuit Court or Court of Appeals levels. As argued by the Division, the doctrine of the law of the case does not apply, since the question was not litigated, addressed and determined by a final order of the Board, or by the courts on appeal. State v. Brady, 130 Wis. 2d 443 (1986). Also, as a jurisdictional question, the issue survives and may be dispositive of the motion. Sheely, 329-330; see also Hester v. Williams, 117 Wis. 2d 634, 640-643 (1984), and Honeycrest Farms, Inc. v. Brave Harvestore Systems, Inc., 200 Wis.2d 256 (Ct. App. 1996).

On the basis of the foregoing authorities, it is clear that sec. 227.485 constitutes a waiver by the state of its immunity to suit. Although the statute is remedial in nature, it must be strictly construed in favor of the government to the extent possible without defeating the legislative intent of the statute. The 30 day filing requirement of sec. 227.485 is jurisdictional and may not be waived as an issue, nor may such jurisdictional objection be defeated by an assertion of estoppel, nor by application of the law of the case doctrine.

Section 227.485, Stats., in pertinent part provides:

> 227.485(3) 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**, [that is, the entirety of sec. 227.485] 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. [Bracketing and emphasis added.]
>
> . . .
>
> 227.485(5) If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.47 and 227.48. **The prevailing party shall submit, within 30 days after service of the proposed decision,** to the hearing examiner and to the state agency which is the losing party **an itemized application for fees and other expenses,** including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. . . . [Emphasis added.]

Subsection (3) sets forth the right to petition for costs, and the conditions upon which costs may be awarded to a prevailing party. Subsection (5) sets forth the required procedure for filing the petition and the determination of costs. Reading the plain language of these two subsections together, if a party prevails in a contested case upon the issuance of the proposed decision and wishes to obtain an award of costs, the party is required to file a motion and itemized application for fees and other expenses within 30 days after service of the proposed decision.

On March 19, 1993, the ALJ issued and served his Proposed Decision recommending dismissal of all remaining counts of unprofessional conduct against Dr. Gordon in the Amended Complaint, and therefore dismissal of the entire disciplinary proceeding. By letter dated April 19, 1993, addressed to the Board, Gordon advised that he had no objections to the Proposed Decision. Under the terms of sec. 227.485(3), read in conjunction with the filing requirements of sec. 227.485(5), Dr. Gordon was the prevailing party in the proceeding upon service on March 19, 1993 of the ALJ's Proposed Decision recommending dismissal of the entire proceeding. Dr. Gordon was required to file his itemized application for fees and other expenses within 30 days after service of the Proposed Decision, that is by April 18, 1993. Dr. Gordon did not file any such motion or application until nearly eight months later, on December 10, 1993. Therefore, Dr. Gordon having not complied with the time limit for filing his motion and itemized application for fees and expenses, neither the Board nor the courts have jurisdiction to consider or grant Dr. Gordon's motion, and it must be denied.

Gordon argues, however, that his notice of intent to file his motion for costs in his December 6, 1993 letter and his actual motion filed on December 10, 1993, were timely under sec. 227.485.

Gordon contends that sec. 227.485 must be properly interpreted to provide that a prevailing party must file a motion for costs within 30 days after *the final decision and order of the Board,* not the ALJ's proposed decision on the allegations of unprofessional conduct as stated by the plain language of the statute.

Gordon advances a lengthy analysis and interpretation of sec. 227.485, and contends the statute sets forth the following as the proper procedure for filing his motion for costs:

1) After the Board issues its *final decision and order* on the merits of the allegations of unprofessional conduct, a motion for costs is to be made exclusively to the hearing examiner, not the Board.

2) Thereafter, the hearing examiner rules on the motion and issues a *proposed decision on whether costs should be awarded.*

3) If the hearing examiner rules in favor of the motion, it is then that an itemized application for fees and expenses is required to be filed within 30 days following service of the hearing examiner's *proposed decision on costs.*

4) Then the hearing examiner determines the amount of costs to be awarded and includes an order for costs in the Board's final decision and order, the entirety of which would then be subject to judicial review.

Gordon's contention that a motion for costs is to be made only to the hearing examiner and not the Board was specifically addressed and rejected by the Circuit Court, which held that the term "Hearing examiner" as defined in sec. 227.485(2)(a), Stats., means the agency or hearing examiner conducting the hearing, and therefore by definition includes the Board. Circuit Court Decision, p.3.

Gordon maintains that the foregoing scheme is the proper reading of sec. 227.485, and that to interpret the statute as argued by the Division is contrary to Wisconsin and federal case law, would render the above-quoted second sentence of subsection (5) redundant and surplusage, and result in duplication of effort and a "gigantic waste of everyone's time." Gordon's Brief on Remand, p.11. However, Gordon's reading and interpretation is derived from words that simply do not appear in the statute, is not supported by the case law he cites for reliance, and itself would render parts of the statute absurdity and surplusage.

Gordon's interpretation of the statute hinges on the three following premises:

1. The Wisconsin Supreme Court and federal appellate courts have held that a motion for costs is not required to be filed until after a final administrative decision in the proceeding.

2. The following highlighted terms in sec. 227.485(5): "The decision on the **merits of the case** shall be placed in a **proposed decision** . . . .", and "The prevailing party shall submit, within 30 days after service of the **proposed decision,** . . . an itemized application for fees and other expenses, ..." must be read to mean in substance, "merits of the motion for costs," and "proposed decision on the motion for costs."

3. That it does not make sense to require the motion for costs to be filed before a final decision and order because the "prevailing party" has not been determined.

At the outset, it is essential to note that Wisconsin's Equal Access to Justice Act relating to administrative proceedings, sec. 227.485, Stats., relating to the 30 day filing requirement, clearly differs from its federal counterpart in material respect. Section 5 U.S.C. s. 504(a)(2) of the federal act provides in relevant part:

> "(2) A party seeking an award of fees and other expenses shall **within thirty days of a final disposition** in the adversary adjudication, submit . . . . an application which shows that the party is a prevailing party and is eligible to receive a reward under this section, and the amount sought, including an itemized statement . . . . " (Emphasis added)

In contrast, the Wisconsin EAJA applicable to administrative proceedings, in sec. 227.485(5), Stats., provides in relevant part:

> "(5) . . . The prevailing party shall submit, **within 30 days after service of the proposed decision**, . . . an itemized application for fees and other expenses, ..." (Emphasis added)

It is clear under the respective provisions of the federal and Wisconsin EAJA that differing events trigger the running of the 30 day period for filing an application for costs. Under the federal Act, it is the "final disposition;" while under the Wisconsin Act, it is the "service of the proposed decision" (under sec. 227.48). Therefore, federal cases holding that the application and itemized statement for fees and expenses under the federal EAJA are to be filed within 30 days of the final decision, or final disposition, or the expiration of the time for filing an appeal, are inapplicable to interpretation of sec. 227.485(5), Stats., (although they may be applicable authority regarding the triggering event for the 30 day filing requirement under sec. 814.245, Stats., discussed infra.).

Gordon relies heavily on Sheely, in which the Court reviewed federal case law under the Federal Equal Access to Justice Act, for his contention that costs are not to be taxed until there is a final decision in the case. However, Gordon's reliance on Sheely is misplaced, and in fact, Sheely cuts deeply against every premise of Gordon's position.

Gordon summarized the Sheely case by stating:

> "In Sheely, the citizen had prevailed against the Department in circuit court and obtained a reversal and remand on October 2, 1986. A "final administrative order" was issued on May 15, 1987, and a petition for costs was filed on June 4, 1987. The Supreme Court held the request for costs and attorney fees was timely." (Gordon Resp. Brief, pp. 9-10.)

If Gordon means to imply by this summation of Sheely that a motion for costs under sec. 227.485 was brought in that case following a final administrative order, and that the Supreme Court held

the motion to be timely under sec. 227.485, Gordon misstates the case. Those were neither the facts of the case nor the Court's ruling.

While the Court in Sheely did adopt the position that the applicable 30 day jurisdictional filing requirement is to be measured from the date of a final judgment or other final determination of the case following remand, Sheely, at 330-331, that case involved a motion for fees under sec. 814.245(3), Stats. That statute provides for a petition for costs for a prevailing party *in circuit court actions* brought by state agencies or on judicial review of administrative actions. The Court in Sheely discussed whether a motion for costs made to the agency in the underlying administrative proceeding was a prerequisite to a motion for costs under sec. 814.245 in a proceeding for judicial review of the agency's action, and whether the term "final decision" in 227.485(5) and (6) meant a *final decision only on costs*. However, Sheely did **not** involve or decide a motion for costs under sec. 227.485.

Sections 227.485 and 814.245 are related counterparts of the Wisconsin Equal Access to Justice Act. Section 227.485 applies to prevailing parties in administrative proceedings under Ch. 227, Stats., and section 814.245 applies to prevailing parties in circuit court actions and judicial review proceedings. Despite their relation, it is essential to note that the two statutes contain clear, material differences in their respective jurisdictional filing requirements. Section 227.485(5) requires the prevailing party to file the motion for costs "within 30 days after service of the **proposed decision,** . . . ." In contrast, sec. 814.245(6) requires "A party seeking an award [for costs] under this section shall, within 30 days after **final judgment in the action**, . . . submit . . . an itemized application for fees and other expenses . . . ." The legislature established different jurisdictional filing requirements for a motion for costs in Ch. 227 administrative proceedings, on the one hand, and a motion for costs in circuit court proceedings, on the other. The determination in Sheely, that the 30 day jurisdictional filing requirement involved in that case is to be calculated from the date of a final judgment or other final determination of the case, does not apply to the filing requirement of sec. 227.485(5), Stats.

Secondly, Gordon argues that the terms, "merits of the case" and "proposed decision" as used in the second sentence in sec. 227.485(5), (**"The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.47 and 227.48."**), must be read to mean a separate, second *proposed decision on whether costs should be awarded on a motion brought under sec. 227.485.*

Gordon's interpretation simply does not square with the statutory language of sec. 227.485(5), and relies on words that are not present in the text of the statute. Subsection (5) in plain terms states in relevant part, "**The decision on the merits of the case** shall be placed in a **proposed decision** . . . . The prevailing party shall submit within 30 days after service of the **proposed decision,** . . . an itemized application for fees and other expenses, . . ." The statute does not state that the **decision on the motion for costs** shall be placed in a proposed decision, nor does it state that the decision on the merits **of the motion for costs** shall be placed in a proposed decision, nor does it state that the prevailing party shall submit within 30 days after service of **the proposed decision on costs** an itemized application for fees and other expenses. Moreover, the terms "merits of the case" used in the statutory text are commonly understood to mean the contested

legal rights and liabilities that are the primary subject of the underlying action or proceeding, as opposed to procedural, ancillary or technical issues, such as a motion for costs.

For support of the contention that "the decision on the merits of the case" means the decision on the motion for costs, Gordon quotes from Sheely the following statement: "Whether a party is a prevailing party is a question on the merits of the case as to whether that party received the benefits or relief requested." Sheely, at 332. Again, this reliance is misplaced. This statement was made by the Court in rejecting an argument by DHSS that a determination of whether the petitioner was a prevailing party presented a jurisdictional question. The Court's statement and related discussion had nothing to do with interpretation of the above quoted sentence from sec. 227.485(5), as suggested by Gordon, and the quoted statement indicates that the term "merits" refers to the underlying primary dispute that was the subject of the action.

Furthermore, the Court's rationale in Sheely in reversing the Court of Appeals decision dismissing Sheely's motion for costs also evidences an interpretation of Sec. 227.485(5) and (6) directly contrary to that advanced by Gordon.

In Sheely, the Supreme Court stated,

> "Section 227.485, however, includes **a decision on the merits** as also being a "final decision." If the court of appeals' interpretation that a "final decision" is only a decision on costs is correct, then the final sentence of sec. 227.485(5) ("The hearing examiner shall determine the amount of costs . . . and include an order for payment of costs in the final decision."), becomes superfluous and absurd. Judge Sundby reached this very conclusion in his dissent [in the court of appeals decision]." Sheely at 335, emphasis added.

In the preceding passage, the Supreme Court cited with approval the consistent conclusion made Judge Sundby of the Court of Appeals in his dissenting opinion in Sheely. A reading of Judge Sundby's reasoning leading to that conclusion demonstrates further the distinction between a decision on the award of costs and a decision on the merits, and the necessary consistency of the meaning of "merits" as applied to a proposed decision and a final decision under sec. 227.485(5). Judge Sundby states,

> "The majority must believe that sec. 227.485(6), Stats., permits judicial review only of **an order for costs and not a decision on the merits**. . . . However, that reading is contrary to the plain language of sec. 227.485(6) and the legislative purpose in enacting the WEAJA.
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> . . . .
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> An award of costs under sec. 227.485(3) , Stats., is accomplished in the usual way when a statute allows a discretionary award of costs and fees in administrative or judicial proceedings. First, the **decision on the merits is placed in a proposed decision** . . . The prevailing party may then submit, **within 30 days after service of the decision**, . . . an itemized application for fees and other expenses, ... The hearing examiner then

> determines the costs "and include[s] an order for payment of costs in the final decision. . . . . Thus, a **final decision under sub. (5)** which is subject to judicial review under sec. 227.52, Stats., **is not only the award of costs but is the final decision on the merits** under sec. 227.47." Sheely, 145 Wis. 2d 328, 338-339 (Sundby, Dissenting Opinion, Ct. App. 1988.), (Emphasis added.)

The Supreme Court and the Court of Appeals in the Sheely case, therefore, in review and interpretation of the interplay of sec. 227.485(5) and (6) with sec. 814.245, as applicable to judicial review proceedings on administrative actions, in fact adopted the position that the terms, "decision on the merits of the case" does not mean the decision on the motion for costs, but relate to the decision on the contested rights and liabilities that were the primary subject of the underlying proceeding.

Gordon contends that the second sentence of sec. 227.485(5) is rendered surplusage if his interpretation is not applied to the statute. The sentence references the requirements of secs. 227.47 and 227.48, and to the contrary, makes perfect sense in that the 30 day filing requirement of sec. 227.485 is triggered by the issuance and service of the proposed decision on the merits under secs. 227.47 and 227.48.

Furthermore, Gordon's reading of sec. 227.485 would require two separate proposed decisions, one on the merits of the case and one on the petition for costs, requirements which are neither stated nor implied in the text of the statute. A final, fatal flaw of Gordon's interpretation is that it leads to the absurdity that while 227.485(5) would require the hearing examiner to place the decision on the motion for costs in a proposed decision, there is no corresponding provision for a final decision on the motion for costs. Therefore, under Gordon's proposed reading of 227.485, the statute would require a proposed decision on costs but no final decision, and the hearing examiner's proposed decision on costs in reality would be the final decision, eliminating the Board as the final decision maker on a motion for costs. The Legislature can not have intended this result, eliminating the Board as the final decision maker at the administrative level on a motion for costs. Likewise, it is an absurdity to suggest that the Legislature would use the term "proposed decision" if it really meant "final decision."

Finally, Gordon complains that the Division unreasonably expects him to have made his motion for costs before the prevailing party in the action has been finally determined, and even "before the hearing was completed."

Gordon cites the case of Sweet v. Medical Examining Board, 147 Wis. 2d 539 (Ct. App. 1988), which construed the term "the hearing" as used in sec. 448.03(3)(b), Stats., (requiring the Medical Examining Board to render a decision within 90 days following completion of the hearing in a disciplinary proceeding) to include all proceedings subsequent to the testimonial hearing including oral argument to the Board. The term "hearing" as construed by the Court does not even appear as an operative word of sec. 227.485. The holding in Sweet interpreted the term "hearing" as used in another, unrelated section of the statutes, and is not applicable here.

Gordon also contends that the Division's interpretation of sec. 227.485 unreasonably requires him to have filed his motion for costs on the basis of a proposed decision which was modified by the Board in the final decision. In these circumstances, Gordon complains this would result in arguing he is the prevailing party on a motion for costs that references a decision materially different from the final decision, or to file a second motion, all of which he contends would be a waste of time. However, Gordon was the prevailing party upon issuance of the ALJ's Proposed Decision which recommended dismissal of the entire case against Gordon. That status did not change following the Board's final decision which modified the ALJ's Proposed Decision. Had Gordon filed his motion for costs as required under sec. 227.485(5) within 30 days after service of the proposed decision, the Board would have been in the position to rule in one final decision on the merits of the case and his motion for costs. As the Division points out, this is the judicial economy and efficiency contemplated in the statute.

Based upon the record in this matter, the briefs of the parties, and a review of the statute in question and the caselaw, this ALJ concludes that: a) The 30 day period for filing a motion and itemized application for costs under sec. 227.485(5), Stats., is a jurisdictional prerequisite, which may not be waived or extended; b) The 30 day filing period under sec. 227.485(5) began to run on the day following the service of the ALJ's Proposed Decision on March 19, 1993; and c) Gordon did not file a motion and itemized application for costs and expenses until December 10, 1993, and therefore failed to invoke subject matter jurisdiction conferring authority and power in the Board to consider and act upon his motion for costs. Accordingly, since the Board lacks subject matter jurisdiction to consider and act on the motion, Gordon's motion for costs must be denied.

SUBSTANTIAL JUSTIFICATION OF COMPLAINANT IN PROSECUTING THE CASE THROUGH HEARING AFTER DR. GORDON'S SETTLEMENT OFFER

Pursuant to the remand of this case from the Court of Appeals, this decision also addresses the issue of whether the Division carried its burden of showing that its prosecution of the disciplinary proceeding through hearing, after declining Dr. Gordon's settlement offer which closely approximated the discipline ultimately imposed by the Board, was substantially justified.

In late 1991, Dr. Gordon's attorneys inquired of the prosecuting attorney as to what discipline would be sought in the case. Following a review of Dr. Gordon's depositions by the Division's expert, and then consultation with the Board Advisor to the case, the Division's attorney delivered a letter dated December 17, 1991 setting forth the proposed terms of discipline that would be acceptable to the Board Advisor and the Division for settlement of the disciplinary action. In substance, the Complainant's proposed disciplinary terms were: a) a 90 day suspension of license, b) a competency assessment and any reeducation recommended as a result thereof, c) completion of a course on the proper prescribing of controlled substances, and d) a temporary license limitation prohibiting the prescribing of controlled substances.

The parties met in early January 1992 to discuss possible settlement, and Dr. Gordon refused to accept a suspension or a license limitation, but indicated willingness to undergo any retraining, at his expense, as deemed necessary by the Board. Both parties adhered to their respective settlement positions, settlement negotiations ended, and the case proceeded to the evidentiary hearing on 10 of the original 14 counts of the Amended Complaint, the Division having voluntarily dismissed 4 of the counts as of the commencement of the hearing.

Following the hearing, the ALJ in his proposed decision recommended dismissal of all counts of the Amended Complaint. The Board reversed the ALJ on four counts, finding unprofessional conduct on the part of Dr. Gordon. The Board concluded as to Patient 2 that Dr. Gordon's prescribing of Dilaudid constituted a danger to the health, welfare or safety of the patient or public, and that Dr. Gordon's treatment of Patient 2's hypertension constituted a danger to the health, welfare or safety of the patient or the public. As to Patient 3, the Board similarly concluded that Dr. Gordon's prescribing of Dilaudid, and treatment of hypertension, each constituted a danger to the health, welfare or safety of the patient or public. The Board reprimanded Dr. Gordon, and imposed requirements for an assessment of Dr. Gordon's knowledge and skills in the practice of internal medicine and completion of any education program recommended as a result of the assessment. The Board also required Dr. Gordon to satisfactorily complete one of two courses on prescribing of controlled substances.

The Division of Enforcement filed a motion for partial costs of the proceeding pursuant to sec. 440.20, Stats., based on the four counts in which the Board found unprofessional conduct on the part of Dr. Gordon. In its response to the Division's motion for costs, Dr. Gordon filed his own motion for costs, which was nearly 8 months late under the applicable statute, as discussed above. The Board denied both motions for costs in separate decisions. Dr. Gordon appealed the denial of his motion for costs to Circuit Court, which upheld the Board's denial. Dr. Gordon then appealed the Circuit Court's decision to the Court of Appeals. The Court of Appeals reversed the Circuit Court's decision and remanded the decision on Dr. Gordon's motion for costs back to the Board for reconsideration.

In its decision on remand of this case, the Court of Appeals stated, "The Board erred by assigning the burden of proving that prosecuting the action was not substantially justified after he offered to settle. . . . On remand, the Board must therefore decide whether the Division satisfied its burden of showing that its pursuit of the particular sanctions, including a license suspension, had any reasonable basis in the facts of the case." Gordon v. Medical Examining Board, No. 94-2919-FT (Ct. App. Decision, p.4).[1]

[1] Complainant, at page 3-4 of Complainant's Brief On Remand, notes:

"It would appear that the Court of Appeals based its conclusion of assignment of burden of proof upon a misperception. The Court states: "the Board's decision . . . states only that Gordon said little or nothing about whether the . [Division] was substantially justified in the position it took."Gordon v. Medical Examining Board, No. 94-2919-FT (Ct. App Decision, p.4). The Board's decision, however, stated:

> Respondent's argument that the Division's failure or refusal to stipulate the matter prior to hearing renders the prosecution unjustified is also unavailing. *The fact that the parties were not able to reach a mutually acceptable stipulated resolution of the matter prior to hearing says something about the parties'*

Therefore, the issue for determination is whether, after Gordon made his offer to settle the case on disciplinary terms involving only retraining, the Division was substantially justified in pursuing the additional measures of a 90 day suspension of license and a temporary license limitation prohibiting the prescribing of controlled substances.

Under sec. 227.485 (2)(f), Stats., the terms "Substantially justified means having a reasonable basis in law and fact."

The Supreme Court in Sheely further explained the identical standard under sec. 814.245 (2)(e), Stats., as follows:

> "To satisfy 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 and the legal theory advanced. [Citations omitted] . . . Losing a case does not raise the presumption that the agency was not substantially justified. [Citations omitted] . . . We also note that when a state agency makes an administrative decision and the agency's expertise is significant in rendering that decision, this court will defer to the agency's conclusions if they are reasonable, even if we would not have reached the same conclusions. [Citations omitted]" Sheely, Id. at 337-38.

There is no issue in this matter that the facts alleged and presented by the Division at hearing had a reasonable basis in truth. The underlying facts of Dr. Gordon's treatment of the patients were based upon information contained in Dr. Gordon's treatment records which were essentially

admitted in his Answer to the Amended Complaint and deposition testimony of Dr. Gordon read into the record at hearing. The Division also presented testimony of a retired police officer of Duluth Minnesota regarding contact with Dr. Gordon concerning suspicions of drug abuse or illegal drug selling by Patients 1, 2 and 3. The alleged facts relating to medical inferences and conclusions of unprofessional conduct were supported by competent professional medical opinion of the Division's expert consultant and witness, Dr. Leon Radant, and were also supported by the finding of the Board that there was probable cause to believe Dr. Gordon was guilty of unprofessional conduct and for issuance of the original Complaint.

Likewise, there is no issue that the theories of unprofessional conduct alleged and prosecuted through hearing had a reasonable basis in the law under sec. Med 10.02(2)(h) and (p), Wis. Adm. Code. Generally, the Amended Complaint alleged three types of unprofessional conduct. The amended Complaint alleged that Dr. Gordon's pattern of prescribing of controlled substances, in

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respective positions as to the seriousness and strength of the complainant's case, it says little or nothing about whether the complainant was substantially justified in the position it took."

Order denying Respondent's Motion for Costs, pg 3 (Emphasis added to designate text that the Court of Appeals omitted and for which it substituted the word "Gordon".)."

This ALJ holds a similar view of this possible misreading of the Board's Order Denying Respondent's Motion for Costs, as the full sentence from which the Court of appeals quoted, to the contrary, does not appear to place the burden on Dr. Gordon.

terms of excessive amounts, or excessive periods of time, and in combinations, while having been informed by police and/or having his own suspicions that the patients were drug abusers, drug addicts or drug dealers or known to be alcoholic, and with the extent of the medical history, medical evaluation and treatment alternatives conducted by Dr. Gordon, all constituted prescribing such controlled substances other than in the course of legitimate professional practice and therefore unprofessional conduct within the meaning of sec. Med 10.01(2)(p), Wis. Adm. Code, and sec. 448.02(3), Stats. The Amended Complaint also alleged that similar prescribing practices in combination with the patients' known underlying medical conditions constituted a danger to the health, welfare or safety of the patents or the public, and therefore unprofessional conduct within the meaning of sec. Med 10.01(2)(h), Wis. Adm. Code, and sec. 448.02(3), Stats. Finally, The Amended Complaint alleged that Dr. Gordon's evaluation and treatment of his patients' respective medical conditions, involving chest pain, high blood pressure, and depression, fell below the minimum standards of the profession, created unacceptable risks to the health of the patients, and constituted a danger to the health, welfare or safety of the patient or public and therefore unprofessional conduct within the meaning of sec. Med 10.01(2)(h), Wis. Adm. Code, and sec. 448.02(3), Stats.

These theories of unprofessional conduct under secs. Med 10.02(2)(h) and (p), Wis. Adm. Code, were based upon, and supported by the competent professional medical opinion testimony of the Division's expert consultant and witness, Dr. Leon Radant. There is also evidence in the record indicating that Dr. Radant also reviewed the proposed complaint prior to its filing and issuance for consistency with his professional opinion. Furthermore, the Board itself had reviewed the proposed Complaint and found probable cause to believe, based upon the facts and the legal theories of unprofessional conduct alleged, that Dr. Gordon was guilty of unprofessional conduct. In fact, through the course of discovery and preparation for the hearing, the prosecuting attorney, after consulting with her expert witness, determined to voluntarily dismiss 4 of the original 14 counts, apparently because of insufficiency of the evidence. The legal theories of unprofessional conduct prosecuted through hearing were thus based upon and supported by the technical professional medical opinion of the Division's expert witness, and the ratification of the Board itself when it found probable cause for issuance of the complaint.

The same support in the record and conclusion applies as to the question of whether there was a reasonable connection between the facts alleged and the legal theories of unprofessional conduct propounded. It is clear from the record that there was substantial evidence of substantial justification for prosecuting the allegations of the Amended Complaint through hearing.

The remaining issue is whether the Division was substantially justified in continuing to prosecute the disciplinary action in pursuit of disciplinary sanctions beyond the retraining offered by Dr. Gordon, including a 90 day suspension and a limitation of license prohibiting prescribing of controlled substances, which limitation could be modified after one year to allow prescribing of Schedules III, IV, V and non-narcotic substances, and removed entirely after two years, upon petition by Dr. Gordon. The record shows that there is substantial and persuasive evidence that after Dr. Gordon's offer to settle, the Division's settlement position and its prosecution of the case through hearing were substantially justified.

First of all, the Board itself had considered initiation of summary suspension proceedings at the time it found probable cause to believe that Dr. Gordon was guilty of unprofessional conduct and to issue complaint. Summary suspension is authorized specifically for the Medical Examining Board by sec. 448.02(4), Stats, and generally under sec. 227.51(3), Stats. Summary suspension is an extraordinary measure for protection of the public, intended for circumstances in which an agency finds probable cause to believe that a licensee has engaged in, or is likely to engage in, conduct such that the public health, safety or welfare imperatively requires emergency suspension of the respondent's license, pending completion of the proceeding and a final decision and order in the matter. See ch. RL 6, Wis. Adm. Code. Summary suspension of a license implies probable cause to believe that the licensee has or is likely to engage in conduct of such seriousness that immediate removal from practice is required pending proceedings for possibly permanent removal from practice. See sec. 227.51(3), Stats., providing in part, " . . . summary suspension of a license may be ordered pending **proceedings for revocation** or other action. . . ." (Emphasis added).

The Division's attorney, in her letter to Dr. Gordon's attorneys dated December 17, 1991, advised of the apparent seriousness with which the Board viewed the allegations of the Complaint:

> "As I have told you, the Board considers Dr. Gordon's misconduct in this case to be very egregious. In fact, at the time the Board determined whether there was probable cause to issue the Complaint, the Board considered initiating summary suspension proceedings against Dr. Gordon. Given that this case involves multiple allegations of inappropriate prescribing of Schedule II controlled substances and inadequate quality of care to multiple patients, it is certainly possible that the Board would revoke Dr. Gordon's license following a hearing." (Record, p. 2164)

This evidence in the record is uncontested by Dr. Gordon, although he argues against its weight and the inferences that should be drawn form it. While the Board did not go forth with summary suspension proceedings, nevertheless, the fact that the Board considered initiating summary suspension is indicative of how serious the Board viewed the allegations of the Complaint. In fact, Dr. Gordon had continued to treat on of the patients through the time of the issuance of the original Complaint. (See Count I, Amended Complaint.) Consideration by the Board of such action reasonably carried substantial persuasive force in the formulation of the Division's settlement position, and adherence to that position when Dr. Gordon refused to accept those terms nor anything more than retraining as he proposed.

Secondly, the Division's settlement position was also buttressed by the testimony of expert medical opinion. The Division's expert witness, Dr. Leon Radant, had provided testimony in support of every count of the Amended Complaint of his professional opinion that, variously as to the respective counts, that Dr. Gordon **prescribed controlled substances otherwise than in the course of legitimate professional practice** which **created unacceptable risks to the patients or the public**, and that Dr. Gordon's evaluation and treatment of hypertension and chest pain **fell below minimum standards of competence established in the profession** which also

created unacceptable risks to the patents or public. Such unacceptable risks included facilitating development of or exacerbating suspected or existing drug abuse, dependency or drug overdose, facilitating suspected illegal resale of controlled substances by the patients to others, exacerbating the patient's depression, causing or exacerbating impaired judgment and slowed reaction time on the part of the patient while operating a motor vehicle, and failure to rule out indicated conditions that were potentially very serious, including a possible cardiac condition and possible complications of hypertension such as organ damage or electrolyte imbalance, which conditions if undiagnosed and untreated could result greater morbidity or death. Thus, every count of the Amended Complaint prosecuted through hearing was supported by expert medical testimony indicating that Dr. Gordon's conduct as alleged was very serious in nature and created unacceptable risks with potentially grave consequences for the patients and/or the public. Therefore, a settlement position insisting on a limited period of suspension and limitations on prescribing of controlled substances was substantially justified by the seriousness and multiplicity of the allegations to be litigated through hearing.

As pointed out by the Division's attorney in her Memorandum of Law dated December 13, 1993, although the Board agreed with the ALJ on dismissal of some of the counts prosecuted through hearing, it did find Dr. Radant's expert opinion sufficiently credible and persuasive to conclude unprofessional conduct on four of the counts. Therefore, since Dr. Radant's testimony supported all of the counts prosecuted through hearing, the Division was substantially justified in prosecuting all counts. It follows, also, that the Division's settlement position, necessarily based on all ten counts prosecuted through hearing, was likewise substantially justified.

Thirdly, in formulating the Division's settlement position, the Division's attorney had the consultation and advice from the Board Advisor to the case. Again, in her December 17, 1991 letter to Dr. Gordon's attorneys, the Division's attorney wrote, "I have discussed the issue of what discipline is appropriate with the member of the Medical Examining Board appointed to serve as the Advisor for the case. He agrees that Dr. Gordon's misconduct in this case is very serious and that the Board could revoke his license if the case proceeded to a hearing. . . ." (Record p. 2164).

The Board Advisor is a member of the Board who is assigned by the Board to provide the Division with advice relating to the technical aspects of the practice of medicine involved in a case, the seriousness of the respondent's failure to conform his or her practice to the standards of the profession, if proven, and what measures of discipline the Advisor, as a member and representative of the Board, believes would constitute an acceptable resolution of the case to the full Board, based on the facts of the particular case at hand and the Board's disciplinary actions in other cases. Therefore, the record shows that the Division's settlement position was substantially justified because it was formulated and maintained upon the consultation and advice of a representative of the Board assigned as advisor to the case, upon considerations of the seriousness of the allegations and what the Board would find acceptable, given the apparent facts of the case.

Fourth, the Division's settlement position is supported and substantially justified by prior Board disciplinary actions. Official notice is taken of Board disciplinary actions prior to 1992 which are of public record. A review of prior Board actions indicates numerous cases involving prescribing of controlled substances other than in the course of legitimate professional practice, or which constituted a danger to the health, welfare or safety of the patient or the public, in which the Board imposed various measures of discipline, including revocation of license, accepting voluntary surrender of license, license limitations on prescribing of controlled substances, surrender of DEA registration to prescribe, dispense or administer controlled substances, and reeducation. See in particular, final decision and orders regarding James McDuffie 9/25/91, Philip Musari 8/25/91, Robert Wetzler 6/20/91, Steven Greenman 10/18/90, Arne Haavik 5/24/89, Austin McSweeny 3/22/89. Also, in cases involving quality of care violations such as involved here, the Board has imposed disciplinary measures including license limitations requiring retraining, prohibiting practice in certain areas such as obstetrics and anesthesiology, and suspension of license. See in particular final decision and orders regarding Charles McKee 4/18/91, Frederick Dickinson 2/21/91, Irene Olson 11/15/90, James Lewis 5/23/90, Paul Haupt 12/28/89, Erika Voss 7/26/89, Austin McSweeny 3/22/89, Thomas Williams 4/20/89.

Based upon these prior disciplinary actions by the Board, the Division's settlement position after Dr. Gordon's offer of settlement, and pursuit of greater sanctions including a 90 day suspension and limitation on prescribing controlled substances in addition to retraining, in this case involving multiple counts, multiple patients and multiple aspects of the practice of medicine, was clearly reasonable and substantially justified.

Dr. Gordon contends that the Division's own expert, Dr. Radant testified that reeducation was sufficient remediation (Gordon's Reply Brief, p.16), and had also accused the Division of ignoring his recommendation of reeducation for settlement of the case. (Brief in support of Respondent's Motion for Costs, p. 8). Gordon included the following deposition testimony of Dr. Radant from the record to demonstrate his point:

> "A: " . . . I would hope that these issues [prescribing controlled substances] could be addressed with training and education **and supervision. . . . short of saying he could never use these medication[s] as part of his practice again.**" (Deposition of Dr. Radant, Record p. 2163, Emphasis added.)
>
> . . . .
>
> "Q: You would agree that in this kind of situation, . . . that it could be resolved through some sort of education, correct?
>
> A: That would be my hope." (Record, p. 2167)

Gordon attempts to make much of this testimony, contending it illustrates the unreasonableness of the Division's settlement position. However, Gordon overlooks the following hearing testimony of Dr. Radant:

> "Q: Do you believe Dr. Gordon needs to have his prescribing privileges restricted or removed?
>
> A: . . . . **discipline in these issues is outside of my experience**. I'm - I'm really not comfortable answering that." (Record, p. 324, Emphasis added)

Dr. Radant's role and testimony in this matter, as an expert witness, is to provide professional opinion on the applicable standard of care of the profession and whether Dr. Gordon's conduct met that standard. It is beyond the scope of his function and competence as an expert witness, and beyond his experience as he admitted, to provide an opinion on discipline or settlement terms. That is the role and function of prosecutor and the Board Advisor, and ultimately the full Board as the final decision maker in this proceeding. Dr. Gordon's argument on this point is afforded no weight.

It seems the primary thrust of Gordon's motion is that because the Board ultimately imposed discipline approximating that which he had offered prior to hearing and which the Division declined to accept, that ipso facto the Division's settlement position and prosecution of the case through hearing was not substantially justified. It is upon this premise that Gordon attempts to argue lack of substantial justification for the Division's position. While the fact that the Board imposed approximately the same discipline Gordon had offered may have been the basis on which he may be considered the prevailing party, that fact does not equate to nor militate the conclusion that the Division's pursuit of greater discipline was not substantially justified. Such a conclusion, as the Division argues, would impose an impossible standard of *prescience* on the part of the Division, or any governmental agency in any proceeding subject to the WEAJA. Gordon has offered no case law or other authority for such a holding, and I am confident no authority exists mandating omniscience on the part of Division. Indeed, the Supreme Court in Sheely noted that, "Losing a case does not raise the presumption that the agency was not substantially justified." Id. at 338. Clearly, an ability on the part of a government agency to see into the future is not required under the WEAJA in order to avoid payment of costs.

Based upon the entire record in this matter, and the record of disciplinary actions by the Medical Examining Board in other cases from 1989 through 1991, the Division has satisfied its burden of showing substantial evidence of substantial justification for its position in: a) having declined Dr. Gordon's settlement offer requiring only retraining, b) adhering to its own settlement position requiring a 90 day suspension and a limitation on prescribing of controlled substances in addition to retraining, and c) its pursuit through hearing of the greater disciplinary measures of a 90 day suspension of license, limitation on prescribing of controlled substances and retraining, and for that matter, even revocation of license.

DIVISION'S MOTION FOR COSTS

The Division's Motion for Costs for Responding to Frivolous Motion[2] was filed pursuant to sec. 227.485(10), Stats., which provides in part:

> "(10) If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following:
>
> . . .
>
> (b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

The Division asserts that Dr. Gordon's Motion for Costs is frivolous because from the start, Gordon's attorneys knew or should have known Gordon's motion was without merit since it was not filed within the 30 day limit following service of the ALJ's proposed decision as required under sec. 227.485(5), Stats. Furthermore, the Division contends that Gordon's motion was filed simply in retaliation for the Division's original motion for partial costs of the disciplinary proceeding under sec. 440.22, Stats.

The Division's 227.485 motion does have substantial merit. Gordon's motion was filed over seven months late, and immediately on the heels of the Division's sec. 440.22 motion for partial costs. Gordon supports his theory that his motion was timely and therefore met jurisdictional requirements with federal and Wisconsin case law holding that a motion for costs must be filed within 30 days following a final decision or judgment in the proceeding. However, as discussed above, Gordon's position is fundamentally flawed in several respects. Gordon relies on authorities which are inapplicable to his motion, as they interpret and apply the federal EAJA and sec. 814.245, Stats., of the WEAJA, both of which state a filing deadline clearly different from that stated in sec. 227.485, Stats. Gordon also misstates the facts and holding of the Sheely case, which in fact also undermines his position. Finally, Gordon advances a tortuous interpretation of sec. 227.485 that simply does not square with its language, arguing that the statute's words mean something other than what they say. Putting the best light on Gordon's motion, his legal theory and arguments are more of a leap requiring a rewrite of the statute, than a good faith argument for extension, modification or reversal of existing law.

The assertion that Gordon's motion was retaliatory also has substantial merit, beyond the facts that it was filed nearly 8 months late and immediately following and apparently in response to the Division's 440.22 motion. In its Reply Brief, the Division shows persuasively, point by point, that Gordon repeatedly misreads or "misstates the record," advances "unsubstantiated

2 Hereinafter, "227.485(10) motion."

conjecture" and "unsupported inference and innuendo." (Complainant's Reply to Respondent's Response Brief on Costs, pp. 6-16). Indeed, Gordon's arguments from the record, and his hyperbolic characterizations of punitive and vindictive motivation and intent on the part of the prosecuting attorney, lack any reasonable basis in the record, and stretch the bounds of "zealous advocacy" to the extreme, approaching recklessness. To the contrary, the record shows that the Division's attorney prosecuted the action conscientiously and in good faith throughout the proceeding.

However, that being said, it is recommended that the Division's 227.485(10) motion should be denied for the following reason. The timeliness objection to Gordon's motion for costs was raised before the Board by the Division at the very start in its December 13, 1993 Memorandum of Law. The Board originally decided Gordon's motion on the issue of substantial justification and did not address the argument that Gordon's motion was not timely filed. Thereafter, on appeal to the Circuit Court and again to the Court of Appeals, the issue was neither raised on behalf of the Division or Board, nor addressed by the Courts' decisions. Ultimately on remand, the jurisdictional objection is reasserted by the Division. This treatment of the issue in the Board's decision and on appeal certainly may have encouraged Gordon's pursuit of the motion throughout appeal, allowing the inference that the objection of untimeliness had been abandoned (although the caselaw makes clear that an objection of failure to invoke subject matter jurisdiction by timely filing of the motion cannot be waived). Therefore, based on this history of the handling of this jurisdictional issue, there does appear some basis in equity for Dr. Gordon's maintaining his pursuit of his motion for costs.

Respectfully submitted this 14th day of August, 1997.

Robert T. Ganch

Robert T. Ganch
Administrative Law Judge

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE MEDICAL EXAMINING BOARD

In the Matter of Disciplinary Proceedings Against

Bruce Gordon, M.D.,

Respondent.

AFFIDAVIT OF MAILING

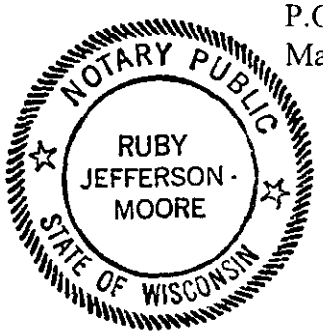
STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On September 23, 1997, I served the Final Decision and Order on Remand of Respondent's Motion for Costs dated September 18, 1997, LS9107033MED, upon the Respondent Bruce Gordon's attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 158 180.

Joy L. O'Grosky, Attorney
Axley Brynelson
P.O. Box 1767
Madison WI 53701-1767



Kate Rotenberg
Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 23rd day of September, 1997.

Ruby Jefferson-Moore
Notary Public, State of Wisconsin
My commission is permanent

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each. And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN MEDICAL EXAMINING BOARD
1400 East Washington Avenue
P.O. Box 8935
Madison. WI 53708.

The Date of Mailing this Decision is:

September 23, 1997

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)