

Comment Report

HSB 75

A bill for an act relating to disciplinary hearings conducted by professional licensing boards.(See HF 764.)

Subcommittee Members: Bergan-CH, Bennett, Jeneary

Date: 01/26/2021

Time: 01:00 PM

Location: RM 103, Sup. Ct. Chamber

Name: Jefferson Fink

Comment: Please see the attached. Thank you.

January 25, 2021

RE: House Study Bill 75, An Act relating to disciplinary hearings conducted by professional licensing boards.

Dear Representative Bergan, Representative Jeneary, and Representative Bennett;

Please allow this correspondence to serve as a comment to House Study Bill 75, "An Act relating to disciplinary hearings conducted by professional licensing boards."

The undersigned are attorneys who work primarily in agency defense. Many of these cases involve representing licensees before the various licensing boards in Iowa.

The changes the licensing boards' intend to make in this proposed legislation legalizes what has been these boards' practice for decades in violation of the existing Iowa Code § 272C.6.

In essence, Iowa Code § 272C.6(4)(a) makes investigative information gathered in a disciplinary case against a licensed professional confidential until a licensing board has included such information in a final agency action. What the boards prefer is to release this information to the public in a statement of charges before a licensee is given an opportunity to defend themselves. This means any allegation – no matter how untrue – could be disseminated to the public at large.

The boards have presented these amendments now because our office recently won a district court case that would require the Iowa Board of Medicine (and presumably all licensing boards) to comply with the confidentiality provisions of Iowa Code § 272C.6. Included with this correspondence is the district court decision (CVCV057453), which has been appealed by the Iowa Board of Medicine to the Iowa Supreme Court. It details many of the reasons why Iowa Code § 272C.6 should remain intact in its present form.

The lawsuit specifically challenges the Board's longtime practice of publishing investigative information in statements of charges and press releases in violation of this statute.

Keeping investigative information confidential protects doctors, nurses, pharmacists, dentists, social workers, therapists, and numerous other professionals from unwarranted disclosure of embarrassing or professionally damaging information. This information should be confidential at least until it can be vetted by a licensing board and under the guidance of an administrative law judge after a licensee has been given an opportunity to explain and defend themselves.

Licensees are granted few protections in defending their careers. The rules of evidence do not apply. Hearsay is authorized and widely accepted in agency proceedings. The standard of proof to sanction is, in practice, less than a preponderance, and boards rely on their professional discretion instead of established legal elements in deciding to discipline. If an agency case is subject to judicial review, the courts, in most cases, must give these agencies deference.

One public accusation against a professional of incompetence or impropriety is enough to end a career. Even if an allegation is ultimately proven untrue, the drafters of Iowa Code 272C.6(4) knew that once a public impression has been made, a professional's career can be irreparably harmed. Often, complaints are made by competitors who hope to drive a licensee out of practice, even for a short while, to capture some extra business.

The sound policy the Legislature has established in the current Iowa Code § 272C.6(4) strikes a balance between protecting the public and giving a licensee the chance to defend their careers. It at least prevents licensing boards from publishing unvetted and undefended allegations until due process has run its course. To keep the confidentiality in Iowa Code § 272C.6(4) limited to the listed exceptions – which includes a *final order* of a licensing board – also prevents boards from coercing licensees into a settlement to avoid the allegations from being made prematurely public. This is a common practice.

This legislation also includes forcing a licensee to pay for the privilege of being investigated by a licensing board, which is simply appalling.

Licensing boards are appointed bodies that wield far greater power over those who fall in their jurisdiction than do the courts over criminals. Licensees have often spent years pursuing education and honing their skills to pursue their chosen careers. They are often celebrated and critical members of our communities. They should at least be given the opportunity to defend their careers before being publicly convicted and hanged, as these boards are now asking this committee to allow.

If anything, the Legislature should explicitly demand that disciplinary charges remain confidential until a licensing board has arrived at a final decision.

If you should have any additional questions or concerns, please do not hesitate to contact us at 515-221-0111 or by email.

Thank you for your time and consideration.

Sincerely,

Michael M. Sellers, Attorney
msellers@sgniowalaw.com

Jefferson Fink, Attorney
jfink@sgniowalaw.com

Trent Nelson, Attorney
tnelson@sgniowalaw.com

Name: Jefferson Fink

Comment: Please see the Ruling from the District Court.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DOMENICO CALCATERRA,

Petitioner,

v.

IOWA BOARD OF MEDICINE,

Respondent.

Case No. CVCV057453

**RULING ON PETITION FOR JUDICIAL
REVIEW**

INTRODUCTION

The issues for the Court to decide in this case are limited to those arising out of the Board's declaratory order on August 29, 2019 (the "Declaratory Order"), which is the final agency action being appealed. It is apparent to the court from the record, exhibits, and briefs that this judicial review action may be motivated by previous interactions between the Board and Petitioner. However, the Court will not entertain any tangential issues because they are not properly before the Court in this judicial review action.

The Declaratory Order from the Board answered "No" to Petitioner's question: "Does Iowa Code section 272C.6(4)(a) prohibit the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases which contain investigative information?"

This matter came before the court on January 17, 2020, for hearing on Petitioner's petition for judicial review. Having entertained the arguments of counsel, having reviewed the court file, and being otherwise fully advised in the premises, the court enters the following ruling:

BACKGROUND FACTS AND PROCEDURE

I. Brief Summary of Events Prior to the Declaratory Order in this Case

In March, 2013, the Board issued a statement of charges against Petitioner, which the Board posted on its website. The Board provided the alleged factual basis for the charges. Days later, the Board issued a press release on its website and to email subscribers that included the charges and alleged factual

basis. Then, in December, 2013, the Board amended its statement of charges against petitioner, which the Board again posted on its website. Days later, the Board issued another press release on its website and to email subscribers that included the charges and alleged factual basis. In April, 2014, Petitioner entered into a settlement agreement with the Board, resolving the pending charges.

II. Declaratory Order, Procedure, and Facts Relevant to the Merits of this Case

On September 26, 2018, Petitioner filed a petition for declaratory order with the Board. In his petition, Petitioner asked the Board to answer: “Does Iowa Code 272C.6(4)(a) prohibit the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases which contain investigative information?” Petitioner requested “that the Iowa Board of Medicine issue a ruling declaring that all statements of charges and press releases issued and published by the Board are violative of state law and subsequently remove them from the public record and the Iowa Board of Medicine Website.”

On December 14, 2018, the Board issued a ruling on Petitioner’s petition for a declaratory order, declining to issue a declaratory order answering the question that Petitioner posed.

On December 21, 2018, Petitioner filed his Petition for Judicial Review in this case, asking the Court to find that the Board erred in denying his request for a declaratory order.

On January 8, 2019 the Board filed a motion to dismiss Petitioner’s action for Judicial Review.

On May 9, 2019, Petitioner filed a motion to stay the Board’s publications of the press releases relating to Petitioner on its website, pending the outcome of this Judicial Review action.

On July 7, 2019, the Court entered an order denying the Board’s motion to dismiss and ordering the Board to issue a declaratory ruling answering the question posed by Petitioner.

On July 10, 2019, the Court entered an order granting Petitioner’s motion to stay the Board’s publication of the press releases relating to Petitioner for the duration of this administrative appeal or further order by the Court.

On August 29, 2019, the Board issued the Declaratory Order, answering the question originally posed by Petitioner in the negative.

On September 27, 2019, Petitioner filed an amended petition for judicial review.

On January 17, 2020, the Court heard oral arguments by the parties regarding Petitioner's amended petition for judicial review and request for legal fees.

STANDARD OF REVIEW

Iowa Code Chapter 17A governs judicial review of the Iowa Board of Medicine's orders and decisions. "The court may affirm the agency action or remand to the agency for further proceedings." Iowa Code §17A.19(10). In an action for judicial review of agency action, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief" if both of the following elements are met: (1) the agency's action was invalid for at least one of the reasons listed in Iowa Code 17A.19(10)(a-n) and (2) the substantial rights of the person seeking judicial relief were prejudiced by the invalid action. *Id.* The party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code §17A.19(8)(a).

In exercising the power of judicial review, the district court acts in an appellate capacity. *Nance v. Iowa Dept. of Revenue*, 908 N.W.2d 261 (Iowa 2018) (quoting *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004)). The applicable standard of review depends on the nature of the agency action. *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012).

In general, there are three basic types of appealable agency actions: contested cases, rulemaking, and other agency action. *Iowa Farm Bureau Fed'n v. Env'tl. Prot. Comm'n*, 850 N.W.2d 403, 414 (Iowa 2014). "The importance of the distinction between the categories lies in the due process afforded to parties involved in contested case proceedings." *Greenwood Manor v. Iowa Dep't of Pub. Health, State Health Facilities Council*, 641 N.W.2d 823, 834 (Iowa 2002). Courts must first consider whether the challenged agency action is classified as rulemaking or a contested case before concluding that the challenged agency action falls under 'other agency action,' which is the catchall classification. *Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 387, 389 (Iowa 1993).

"Rulemaking means the process for adopting, amending, or repealing a rule." Iowa Code § 17A.2(12). Under the Iowa Administrative Procedure Act, a rule is an "agency statement of general

applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency...” Iowa Code § 17A.2(11). In this case, the Declaratory Order does not adopt, amend, or repeal a rule. As such, the Board was not rulemaking when it issued the Declaratory Order.

On the other hand, a contested case is “a proceeding... in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.” Iowa Code § 17A.2. Although a declaratory order has the same status and binding effect as a contested case hearing, a declaratory order is not a contested case because an opportunity for an evidentiary hearing is not required and the facts may be hypothetical. *See generally* Iowa Code § 17A.9.

Since the Declaratory Order in this case is neither rulemaking nor a contested case, it is classified as ‘other agency action.’ “At most, other agency action entitles affected parties to an informal hearing. Parties are only entitled to those procedures voluntarily promulgated by the agency, and to the general requirement that the agency act reasonably.” *Greenwood Manor*, 641 N.W.2d at 834 (citations omitted). The applicable standard of review for ‘other agency action’ is whether the agency committed errors at law or acted arbitrarily, capriciously, or unreasonably. *Id.* at 831.

DISCUSSION

Petitioner makes several arguments on appeal, which may be addressed by discussing the two material issues in this case: (I) whether Petitioner met his burden to prove both elements of his judicial review action and (II) whether Petitioner is entitled to legal fees for the entire agency action pursuant to Iowa Code § 625.29. Each issue is discussed in turn below.

I. Merits of Judicial Review Action

A. Whether the Board erred in interpreting Iowa Code Section 272C.6 (4)

The issue properly in front of the Court is whether the Board erred in interpreting Iowa Code Section 272C.6(4). The Board interpreted Iowa Code section 272C.6(4)(a) to mean that it is not prohibited from issuing or publishing statements of charges that contain investigative information nor are

they prohibited from issuing or publishing press releases that contain investigative information. Petitioner argues that the Board does not have the authority to interpret Iowa Code Section 272C.6(4), even though Petitioner petitioned the Board to do just that. Petitioner further argues that the Board's interpretation is wrong.

In *Doe v. Iowa Board of Medical Examiners*, the Iowa Supreme Court held:

The legislature did not give the board discretion to determine what information is, and is not, confidential. Instead, the legislature attempted to draw a line between confidential and public information in the context of licensee discipline and, in so doing, chose not to give the board discretion to do so. Therefore, we review the board's interpretation of section 272C.6(4) for correction of errors at law pursuant to section 17A.19(10)(c) and not under the more deferential standard of section 17A.19(10)(I).

Doe v. Iowa Bd. of Med. Examiners, 733 N.W.2d 705, 708 (Iowa 2007). Again, the question presented to the Board was: "Does Iowa Code Section 272C.6(4)(a) prohibit the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases which contain investigative information?" The Board's answer was "No."

Iowa Code Section 272C.6(4)(a) states:

In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee acting under the authority of a licensing board or its employees or agents which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in licensee discipline, and are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline. However, investigative information in the possession of a licensing board or its employees or agents which relates to licensee discipline may be disclosed to appropriate licensing authorities within this state, the appropriate licensing authority in another state, the coordinated licensure information system provided for in the nurse licensure compact contained in section 152E.1 or the advanced practice registered nurse compact contained in section 152E.3, the District of Columbia, or a territory or country in which the licensee is licensed or has applied for a license. If the investigative information in the possession of a licensing board or its employees or agents indicates a crime has been committed, the information shall be reported to the proper law enforcement agency. **However, a final written decision and finding of fact of a licensing board in a disciplinary proceeding, including a decision referred to in section 272C.3, subsection 4, is a public record.**

Iowa Code § 272C.6(4)(a) (emphasis added).

The plain language of the statute is clear and unambiguous. Subject to certain exceptions not relevant here, investigative information is privileged and confidential unless and until such information is disclosed in the findings of fact section of a final written decision made at the conclusion of a disciplinary proceeding. The purpose of Section 272C.6(4)(a) is “to ensure the ‘free flow of information’ for complaint and investigative purposes.” *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 710 (Iowa 2007). This code section protects both complainants and licensees. *Id.* at 711. “Section 272C.6(4) ensures that the general public does not have access to complaint or investigative information unless, and until, a final written decision is published and is, therefore, a public record. *Id.* This would preclude the Board from publishing information in its statements of charges and press releases that would constitute investigative information, as that term is used in section 272C.6(4)(a), prior to issuing a written final decision containing such information. Accordingly, the Board erred in determining that it was not prohibited by Iowa Code Section 272C.6(4)(a) from disseminating investigative information contained in statements of charges and press releases.

The next logical question is: what constitutes investigative information for purposes of Iowa Code Section 272C.6(4)(a)? This issue can be very fact specific but not properly in front of the Court in this case as the Declaratory Order itself is absolute in the question presented and its answer. The Board did not make any factual findings or analyze any facts in issuing the Declaratory Order. It is clear however, that investigative information includes at least the specific factual allegations against a licensee that have not been substantiated and decided in a disciplinary proceeding. For example, a statement of charges published on the Boards website may include the charges themselves without divulging the factual basis. The facts that brought about the charges are precisely the type of investigative information that the legislature intended to be privileged and confidential in Iowa Code Section 272C.6(4)(a).

Despite Petitioner’s assertions to the contrary, the Board is not precluded from issuing press releases and statements of charges in general, but the board cannot disseminate investigative information

before they issue a final written decision in the matter. Of course, the circumstances in which the Board may release investigative information prior to issuing a final decision are contained in the statute.

The Board points to its own rules and practices as well as the rules of other, similarly situated, professional licensing boards in support of its decision in the Declaratory Order. To the extent that the Board's regulations conflict with a statute, the statute takes precedence. *Iowa Nat. Indus. Loan Co. v. Iowa State Dep't of Revenue.*, 224 N.W.2d 437, 441 (Iowa 1974). The licensing boards of the State of Iowa must act within the bounds provided in statutes passed by the legislature. The Supreme Court of Iowa has stated, "Since the central legislative body is the source of an administrative agency's power, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation." *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 243 N.W.2d 610, 615 (Iowa 1976). While the Board and other agencies may be tasked by statute with creating rules and regulations, boards and agencies themselves cannot legislate.

The Board further argues that it considers the statements of charges published on its website to be orders by the Board. This is unpersuasive as the statements of charges are not final written orders or conclusive findings of fact in a disciplinary proceeding. Statements of charges are simply that, charges against someone – complaints that have not been resolved yet in a disciplinary proceeding.

The Board points to Iowa Code Sections 148.7(2) and 17A.12 to support the notion that investigative information cannot always be kept privileged and confidential because providing proper notice could require the publication of investigative information. The Court disagrees. Iowa Code Section 148.7 states in relevant part, "If the whereabouts of the licensee is unknown, service may be had by publication as provided in the rules of civil procedure upon filing the affidavit required by the rules." Iowa Code § 148.7(2). This would make the notice available to the general public. However, this is clearly a fallback option and not the preferred method of service. Also, Iowa Code 17A.12 (2)(d) provides that a notice must contain:

A short and plain statement of the **matters** asserted. **If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.** Thereafter upon application a more definite and detailed statement shall be furnished.

Iowa Code § 17A.12(2) (emphasis added). Read together, Iowa Code Sections 272C.6(4)(a), 148.7(2), and 17A.12(2) make the Boards responsibilities regarding notice clear. In the unlikely case that the Board does not know the whereabouts of the licensee and must serve the licensee by publication, the Board's "initial notice may be limited to a statement of the issues involved." This would allow the Board to comply with the notice, service, and confidentiality requirements of the law.

In sum, the Board committed an error at law because the Declaratory Order was "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19 (10)(c). The next issue is whether the Declaratory Order prejudiced Petitioner's substantial rights.

B. Whether the Declaratory Order prejudiced Petitioner's substantial rights

This is not the appropriate action to determine whether or not Petitioner was prejudiced by previous actions by the Board. The sole issue for the Court to address here is the validity of the agency action on appeal and no other agency actions by the Board. Petitioner must also meet his burden to prove that the Declaratory Order prejudiced his substantial rights. Petitioner hints at how he has been prejudiced by the Board's previous actions. However, Petitioner does not discuss how, if at all, the Declaratory Order prejudiced him. Accordingly, Petitioner failed to meet his burden to prove the second element of his action for judicial review.

II. Legal Fees

The issue is whether Petitioner is entitled to legal fees pursuant to Iowa Code Section 625.29. Section 625.29 allows recovery of fees and expenses by the prevailing party in a civil action subject to certain qualifications and exceptions. Petitioner is not entitled to fees and expenses in this case because he is not the prevailing party – Petitioner failed to meet his burden to prove that the declaratory order prejudiced his substantial rights. Regardless, the Board's role in this case was primarily adjudicative

because it was deciding a question brought to it by Petitioner. *See* Iowa Code 625.29(1)(b); *See also* *Remer v. Bd. of Med. Examiners of Iowa*, 576 N.W.2d 598, 601 (Iowa 1998). Accordingly, Petitioner is not entitled to recover his legal fees from the Board.

CONCLUSION

The Board's Declaratory Order, interpreting Iowa Code Section 272C.6(4)(a) is REMANDED to the agency for further proceedings consistent with this order.

Costs are taxed equally to both parties.

IT IS SO ORDERED.



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
CVCV057453	DOMENICO CALCATERRA VS IOWA BOARD OF MEDICINE

So Ordered

A handwritten signature in cursive script that reads "Robert B. Hanson".

**Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa**