SUPREME COURT NO. 20-0657
POLK COUNTY DISTRICT COURT NO. CVCV057831

IN THE SUPREME COURT OF IOWA

Adam Klein,

Petitioner-Appellant,

v.

Iowa Public Information Board,

Respondent-Appellee,

and

Burlington Police Department and Iowa Department of Public Safety, Division of Criminal Investigations,

Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SAMANTHA GRONEWALD

FINAL REPLY BRIEF OF APPELLANT

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Authorities

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ARGUMENT

Klein addresses the arguments raised by Intervenor Burlington Police Department ("BPD") and Respondent Iowa Public Information Board ("IPIB") below. Intervenor Iowa Department of Criminal Investigation ("DCI") has waived the filing of its brief. (Waiver of Brief, Oct. 28, 2020.)

I. Klein is "A Person or Party Who Has Exhausted All Adequate Administrative Remedies".

The district court erred by finding that Klein lacked standing to pursue a judicial review action under the Iowa Adminsitrative Procedures Act ("IAPA") because he was not "[a] person or party who has exhausted all adequate administrative remedies". Iowa Code § 17A.19(1). In their respective briefs, the IPIB and BPD make two arguments that Klein has not satisfied this standing requirement. First, the IPIB argues that section 17A.19(1) should be read to bar non-named parties from filing judicial review actions in contested cases. (IPIB Br. 21.) Second, the IPIB and BPD rely on the *Stohr*, *Fisher*, *Alons*, and *Tredway* cases to argue that Klein was required to intervene in the IPIB proceedings after filing his Complaint in order to acquire standing to file a judicial review

action of the IPIB's final decision on his Complaint. (IPIB Br. 17-23; BPD Br. 24-27.) For the reasons set forth below, these two arguments fail.

A. The IAPA Grants the Right of Judicial Review of Contested Cases to a "Person or Party" Who Has Exhausted Judicial Review.

For the first time on appeal, the IPIB makes the novel argument that, despite the express statutory language in section 17A.19(1) to the contrary, "person or party" should be read to exclude persons who were not named parties in an administrative agency action from the right of judicial review. (IPIB Br. 21.) This argument fails as irrelevant and meritless.

It is irrelevant because the record shows that as the Complainant, Klein actually was a party to the IPIB final agency action rendered on his Complaint, as set forth in his opening brief. (Klein Br. at 49-53.) But even if the Court determines Klein was not a "party" before the IPIB, this argument fails on the merits—both for the reasons set forth by the district court construing the disjunctive "or" in the phrase "person or party", (App. 0456, Order 20), and because it would violate two cardinal rules of statutory

interpretation. First, "When the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute". *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005) (*quoting State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999)). Second, "'a statute should not be interpreted to read out what is in a statute as a matter of clear English' and should not render terms superfluous or meaningless." *Des Moines Flying Serv., Inc. v. Aerial Servs., Inc.*, 880 N.W.2d 212, 220 (Iowa 2016) (quoting 1A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction,* § 21:1, at 163 (7th ed. 2009)). Here, the text of the statute is plain, and its meaning is clear. The Court should decline the IPIB's invitation to search for meaning beyond the plain, express words of the statute, and in so doing read out the words of the statute.

The IPIB does not cite any case law in support of this argument, because there is none. Instead, it argues that other parts of the IAPA, which by their own terms do not pertain to judicial review, distinguish between "parties" and "persons". (IPIB Br. at 22.) If, for the sake of argument, the Court takes the IPIB up on its

invitation to search other parts of the IAPA to find textual support to read-out the word "person" from the judicial review subsection when dealing with contested cases, it will find the textual support lacking. Contrary to the IPIB's argument, in treating contested cases, the IAPA recognizes: "real parties in interest", (*see, e.g.,* Iowa Code § 17A.11(b) (distinguishing from "named parties"); "persons with a direct or indirect interest in such a case", (*see, e.g.,* Iowa Code § 17A.17(2)); and nonparty "persons" who may be required to comply with an emergency adjudicative proceeding, (*see* Iowa Code § 17A.18A(4)). These are all examples of non-party "persons" who may have standing to bring a judicial review action under the language of 17A.19(1).

B. Klein was not required to intervene in the case below to have standing to bring his judicial review action.

The IPIB and BPD argue that only the Board and any respondents are considered parties as of right to an IPIB contested case and that an underlying complainant is not a party absent intervention. (IPIB Br. 19; BPD Br. 24.) The IPIB and BPD variously rely on *Stohr, Fisher, Alons, and Tredway* in making this

argument. (IPIB Br. 17, 19-20, 21-23; BPD Br. 24-25, 27.) The IPIB also argues that allowing Klein to file a judicial review action in this case would invite unwarranted litigation appealing final agency action by other administrative agencies. (IPIB Br. at 27-28.) For the reasons set forth below, these arguments fail.

As already set forth by Klein in his opening brief, chapter 23 expresses a clear legislative intent to confer party status on a Complainant in a contested case regarding his or her Complaint. (*See* Klein Br. at 51-53.) Subsequent intervention after filing a Complaint is not required by the statute in order to possess the right of judicial review on the IPIB's final agency action taken on the Complaint. (*Id.*)

The IPIB's and BPD's reliance on *Stohr*, *Fisher*, *Alons*, and *Tredway* is misplaced. Klein's case is easily distinguishable from *Stohr*. *Fisher* does not stand for the proposition for which the IPIB and BPD cite it. *Fisher* supports, rather than defeats, Klein's arguments. *Alons* and *Tredway* are easily dispensed with, because they are not judicial review cases and are otherwise distinguishable to Klein's case.

In *Stohr,* the County petitioned the Public Employment Relations Board ("PERB") for declaratory relief, contesting an election due partially to changed rules. *Pub. Employment Relations Bd. v. Stohr*, 279 N.W.2d 286, 288–89 (Iowa 1979). After the PERB dismissed the county's petition, the County and four individual county landowners and taxpayers filed a petition for judicial review. *Id.* The Court sustained the PERB's motion to strike the names of individual petitioners who did not participate in the proceedings before the agency, leaving only the County as a proper party for judicial review. *Id.* at 291.

The IPIB and BPD draw a false parallel between Klein and the landowner parties. Klein participated in the IPIB proceedings. Klein's role was more akin to the County's in the *Stohr* case. Like the County, Klein was the original, initiating party to request agency action. (App. 0568-80, CR 8-20.) Klein's Complaint to the IPIB sought enforcement of chapter 22 against the Respondents by the IPIB to force them to provide Klein the disputed records. (App. 0568-80, CR 8-20.) The outcome of the contested issue was entirely focused on Klein's rights under chapter 22 to the disputed records:

Whereas the ALJ had granted relief to Klein by ordering Respondents to provide him with the disputed records, the IPIB's final agency action denied him that relief. (App. 2059, CR 1499; App. 2149, CR 1589.) As such, like the County in *Stohr*, he has a right to judicial review of that denial.

In Stohr, the landowners only appeared for the first time in a judicial review action following the dismissal of the County's petition, and they would not directly be granted any relief through the resolution of administrative proceedings in favor of the County. *Stohr*, 279 N.W.2d at 288-289. By contrast, Klein participated in the IPIB proceeding from the start, his Complaint was the only reason that the proceedings occurred, and he was the one who would benefit from the sought relief from the agency. Because Klein was the initiating party who was adversely impacted as a result of the IPIB's final agency action denying him the relief he sought in his Complaint, he had standing to file his judicial review action under section 17A.19(1).

The IPIB and BPD misstate the holding of the *Fisher* case. (IPIB Br. at 19-20; BPD Br. at 24-25) (citing *Fisher* for the

proposition that Klein was required to intervene before the IPIB after filing his Complaint.) *Fisher* holds that whether a person is a party to administrative proceedings "must be determined from the record rather than from the entitlement of the proceedings." *Fisher v. Iowa Bd. of Optometry Exam'rs*, 476 N.W.2d 48, 50 (Iowa 1991). Klein satisfies this test. The special prosecutor's petition initiating the contested case proceedings against Respondents idenfied Klein under the heading "Parties, Jurisdiction, and Venue." (App. 1280-81, CR 720- 721.) He was also named in the caption of the Probable Cause finding, (App. 1279, CR 719.) The IPIB even consistently referred to the case by Klein's name in all IPIB agendas and minutes. (App. 2159-2242, CR 1599-1682.) The record is clear that it was Klein's Complaint that the IPIB adjudicated in its final agency action, which specifically denied him the records he sought. (Klein Br. 50.)

Alons and *Tredway* also fail to support the IPIB and BPD's arguments. In *Alons,* state legislators and others who were not parties to an original divorce case filed a certiorari action challenging the resulting dissolution of marriage order. *Alons v.*

Iowa District Court, 698 N.W.2d 858, 862 (Iowa 2005). The Court found that they did not have standing to bring the certiorari action. *Id.* In *Tredway*, a taxpayer asked the district court to set aside a decree rendered against the county, several years prior, in an action brought by a railroad company awarding specific performance of a contract. *Tredway v. Sioux City & P.R. Co.*, 39 Iowa 663, 665 (1874). The Court held that a party in interest who permits an adjudication to be made without moving to protect his rights until he finds it adverse to himself, in the absence of any excuse for his failure to intervene, is estopped from demanding in another action that the judgment be set aside. *Id.*

These are not IAPA cases and do not govern Klein's standing to bring a judicial review action under the IAPA. But Klein's position is otherwise easily distinguishable from the plaintiffs in *Alons* and *Tredway*. Unlike those plaintiffs, Klein was a party in the case below, and played a pivotal role in its initiation. He was the original Complainant; the agency's role was to render a decision on the legal question of whether the BPD and DCI improperly denied Klein the public records sought in his Complaint. The

express language and purpose of chapter 23 do not require Klein to have done anything more than file his Complaint with the IPIB in order to possess the right to judicial review of the final agency action rendered on his Complaint. Iowa Code § 23.10. It does not even mention, much less require, intervention by the Complainant. *Id.*; (Klein Br. 44.).

The IPIB is also far afield in arguing that allowing Klein to seek judicial review "would result in unintended consequences in other categories of enforcement proceedings brought by the state and its administrative agencies"—citing the Iowa Board of Medicine as an illustration. (IPIB Br. 27-28.) Each administrative agency is a creature of statute, created by the legislature for a specific purpose. *See, e.g., City of Des Moines v. Iowa Dep't of Transportation*, 911 N.W.2d 431, 440-41 (Iowa 2018) ("[A]gencies have no inherent power and have only such authority as they are conferred by statute or is necessarily inferred from the power expressly given.") (internal citations and quotation omitted). That means each administrative agency's purpose and scope must be determined on its own by the Court from those statutes, applying

the relevant principles of statutory construction. What is true of one agency's purpose and proper role in contested cases is not necessarily true of another's.

Here, for example, the Iowa Board of Medicine was created to license physicians and regulate the practice of medicine. Iowa Admin. Code R. 653—1.2(17A); Iowa Code §§ 147, 148, 148E, 272C. It was not created to resolve disputes between patients and doctors. Quite oppositely, the IPIB was created specifically to provide a cost-effective and easy-to-navigate alternative to filing a court action seeking to force a public records custodian to provide disputed public records. Iowa Code § 23.1 (providing the Legislature created the IPIB "to provide an alternative means by which to secure compliance with and enforcement of the requirements of chapters 21 and 22 through the provision by the Iowa public information board to all interested parties of an efficient, informal, and cost-effective process for resolving disputes."). The legislature specifically provided: that an individual may seek to resolve a dispute with a public records custodian by filing a complaint with the IPIB, Iowa Code § 23.5(1); that the IPIB may order the public

records custodian to provide access to that record as a remedy following a contested case, Iowa Code § 23.6(4), 23.6(8); and that Complainants have the right of judicial review of final agency action, Iowa Code § 23.10(d). Thus, the Court should give proper effect to the legislature's express purpose in creating the IPIB to allow Complainants to seek judicial review of the final agency action rendered on his Complaint. Doing so will not risk simultaneously granting the right of a patient to seek judicial review of an Iowa Board of Medicine physician disciplinary matter.

Finally, neither the IPIB nor the BPD address Klein's argument that intervention would have been fruitless, and thus not required. (Klein Br. 45-47.) *See* Iowa Rs. App. P. 6.903(3), 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *see also Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 360 (Iowa 1982) (appellees' failure to cite authority for their argument "render[ed] it waived"). Intervention would have been wasteful and fruitless in this case, because the only contested matter was the question of whether Klein was entitled to the records he sought in his Complaint, upon which final

agency action was being rendered, and Klein disputed no facts as set forth by the special prosecutor. *See Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979). As the IPIB and BPD must concede, Klein was not required to intervene because intervention would have served no purpose.

Klein was a "person or party who exhausted all adequate administrative remedies" by filing his Complaint, upon which final agency action was rendered by dismissing his Complaint. Nothing more was required by Klein to exhaust administrative remedies to now seek judicial review under Iowa Code section 17A.19(1) and 23.10(3)(d).

II. Klein has Standing to Challenge the Denial of all Public Records Included in his Underlying Complaint.

The district court erroneously determined that Klein lacked standing to challenge the denial of all the disputed records other than the dash camera footage. (App. 0448-49, Order at 12-13.) The IPIB and BPD make no new arguments on this point which are not already refuted by Klein's opening brief. As Klein set forth in his opening brief, Klein has standing to seek the denial of all the

records because he requested them all in his Complaint, the special prosecutor pursued all of those records, and the IPIB fully adjudicated his Complaint and denied him all of those records. (Klein Br. 54-62.)

Instead, the IPIB and BPD argue an alternative basis for finding Klein lacks standing, asserting that Klein lacks injury as to *all* the disputed records, *including* the dashcam video. They argue Klein has no injury because he has already been able to obtain all the records he seeks in this case, that his interest is no different than the general public, and that the court cannot provide him with all of the remedies he seeks because of the protective order entered in the *Steele* civil suit. These arguments, considered in turn below, all fail because they lack any factual and legal support.

First, the IPIB and BPD argue that Klein has no injury because he has already obtained all the disputed records. (IPIB Br. 31; BPD Br. 29.) That is simply not an accurate recitation of the facts in the record. As Klein has set forth in full in his opening brief, not all of the disputed records have been publicly released, not all were provided in discovery, and of those records which were

provided in discovery, a protective order prohibits him from any further distribution, if he even still possesses them.[1] (Klein Br. 54-62.)

Second, IPIB relies on *Dickey* to support their claim that Klein has no specific personal or legal interest in obtaining the public records he seeks or in the assessment of statutory damages against the Respondents. (IPIB Br. 30-31.) However, *Dickey* is inapposite.

In *Dickey*, Mr. Dickey, an attorney with campaign finance experience, filed a judicial review action challenging an Iowa Ethics and Campaign Disclosure Board decision that the Governor's campaign committee had violated no law in disclosing a gift of free travel on a donor's private jet. *Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34, 36-37 (Iowa 2020). The Court held that he was not an "aggrieved or adversely affected" party within the meaning of Iowa Code section 17A.19's standing requirement,

[1] The protective order requires Mr. Klein either to have returned the records to the producing party, certified that he has destroyed them, or retained them in his files on the condition that those files will remain confidential. (App. 0149, Resistance to Mot. to Dismiss, Ex. 01: Protective Order, at 4 ¶ 10.) Indeed, Mr. Klein is not able even to confirm the existence of particular records. (App. 0147, *Id.* at 2 ¶ 5.)

because "he does not allege that *he* is lacking any relevant information and merely voices a disagreement over the reporting method used by the candidate committee." *Id.* at 36 (emphasis added).

The holding of *Dickey* is relevant to the question of what kind of injury suffices to challenge a campaign disclosure reporting decision by the Iowa Ethics and Campaign Disclosure Board, a totally different agency than the one here. Yet even in that distinct context, this Court specifically recognized that parties who allege they are *missing information* that the campaign laws require to be disclosed may have standing. *See Id.* at 35 *(citing FEC v. Akins*, 524 U.S. 11, 21, 118 S. Ct. 1777, 1784, 141 L.Ed.2d 10 (1998)).

In this case, unlike Mr. Dickey, Klein has a specific legal and personal injury to his statutory rights to under chapter 22 to "examine", "copy", "publish", or "otherwise disseminate" the public records he sought and was denied. Iowa Code § 22.2; 22.10(1). He also has a statutory right to seek enforcement of his chapter 22 rights either through a civil enforcement action, or by timely filing a complaint with the IPIB. Iowa Code § 23.5(1). And Klein has a

statutory right of judicial review of the IPIB's decision on his Complaint. Iowa Code § 23.10(3)(d). As the party whose legal and personal interest in the disputed records has been injured, he possesses standing to file this action for judicial review. Under the IPIB's and BPD's reasoning, no person denied public records would have an interest different than the general public in obtaining and disseminating copies of those records. This absurd outcome would render the enforcement provision of Chapters 22 and 23 meaningless. *See Des Moines Flying Serv., Inc. v. Aerial Servs., Inc.*, 880 N.W.2d at 220 (statute should not be read to render words meaningless). The IPIB's and BPD's argument that Klein lacks a personal or legal interest in the records he was denied is untenable.

The IPIB also argues that under *Dickey*, Klein lacks standing to seek statutory damages because they are payable to the State of Iowa, not to Klein. (IPIB Br. 30.) This argument also fails. As the aggrieved citizen from whom public records have been withheld in violation of the law, Klein has an interest distinct from the general public in ensuring that the records custodians are deterred from further violations of chapter 22.

Third, the BPD argues that "there is no remedy that the District Court could have provided Mr. Klein without forcing the BPD to violate the federal protective order." (BPD Br. 30.) The BPD makes this argument for the first time on appeal; as such, error has not been preserved. Regardless, it is factually incorrect and legally meritless.

The protective order only limits what Klein can distribute as "the receiver" of such documents, not what was originally in the possession of BPD as the "designating party". (App. 0146-51, Resistance to Mot. to Dismiss Ex. 1: Protective Order.) DCI, not a party to the protective order, is also not bound by the protective order. (*Id.*) Moreover, opposite to what the IPIB and BPD repeatedly represent to the Court, Mr. Klein does not actually already possess all the disputed records. (*See* Klein Br. 21-29.)

As the District Court properly recognized, Mr. Klein's statutory rights under chapter 22 specifically include his right "to publish or otherwise disseminate" the records. Iowa Code § 22.2(1); (App. 0449, Order 13; App. 0452, Order 16.). While the BPD questions the value of the right to disseminate public records over

the right to possess them, (BPD Br. 29-30), the Legislature in enacting chapter 22, and this Court in construing it, have recognized the high value of the right of dissemination of public records. Such dissemination is the means through which chapter 22 may "open the doors of government to public scrutiny" and prevent "secreting its decision-making activities from the public." *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) (recognizing, *inter alia*, the difference in the rights to possess and disseminate under chapter 22 and the rights to merely possess adhering to the right of discovery by litigants.)

Because Klein has standing to seek judicial review of the IPIB's final agency action denying him access to all of the disputed records in this case, the district court's narrowing of the disputed records to only the dashcam footage must be reversed.

III. Declaratory Relief is Expressly Available Under the IAPA, and Klein Properly Sought Declaratory Relief in his Petition for Judicial Review.

For the reasons set forth in Klein's opening brief, the district court erred in determining that Klein could not seek declaratory relief in his action for judicial review. (App. 0448-49, Order 12-13;

Klein Br. 62-70.) The district court misconstrued his request for declaratory relief, expressly available in IAPA judicial review cases, for the declaratory relief available through the filing of an original action. (*Id.*) The IPIB and BPD make no new arguments beyond the determinations of the district court on this point. (IPIB Br. 32.-34; BPD Br. 32-36.) Their arguments are already refuted by Klein's opening brief. (Klein Br. 62-70.) Declaratory relief is generally available in judicial review proceedings under the IAPA, and Mr. Klein's Petition does not improperly combine a petition for judicial review with an original action under chapter 22.

CONCLUSION

For the foregoing reasons, Klein respectfully seeks an order reversing and remanding this matter back to the district court and requiring that the court adjudicate the merits of Klein's judicial review action, which are fully submitted.

Respectfully submitted:

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