

IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1429

DOMENICO CALCATERRA,
Petitioner-Appellee,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT HANSON, JUDGE

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF THE ISSUES IN THE REPLY BRIEF

I. Strong public policy arguments support the Board's position.

Authorities

Iowa Board of Medicine – Board Overview,
<https://medicalboard.iowa.gov/board-overview>

Iowa Code chapter 272C

Iowa Capital Dispatch, Dec. 9, 2020,
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Iowa Code chapter 17A

Iowa Code chapter 22

Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.,
165 N.W.2d 771, 774 (Iowa 1969)

Iowa Code section 272C.6

42 C.F.R. Part 60

II. Appellee raises arguments not preserved and not applicable to the matter before this court.

Authorities

Iowa Code section 272C.6(4)(a)

Iowa Code 272C.6(4)

RESPONSE TO APPELLEE’S ARGUMENT

I. Strong public policy arguments support the Board’s position.

The Appellee contends that the Appellant-Board misconstrues the meaning of the District Court’s order when it argues that the District Court considered statements of charges in general to be public policy. Appellee’s Brief at 20. However, this is a distinction without a difference. The District Court in no way precluded statements of charges from being published on the Board’s website, nor did it preclude the press releases from being published. Ruling on Petition for Judicial Review; App. P.72-74 (“Despite Petitioner’s assertions to the contrary, the Board is not precluded from issuing press releases and statements of charges in general[.]”).

Regardless of whether the language is read to mean that the District Court begrudgingly admits or wholeheartedly supports the assertion that statements of charges and press releases are public records, the result is the same. The District Court recognized that there was nothing in statute that prevented the Board from publishing either statements of charges or press releases related to public information. Because the Appellee did not cross-appeal that portion of the decision, the only question remaining before this court is whether the basic,

rudimentary investigative information currently contained in statements of charges is afforded the same protection as all other investigative information prior to statements of charges being filed, and the Board contends that it is not.

The Appellee also argued that there was no public policy argument strong enough to overcome the licensee's interests. Appellee's Brief at 36-37. In fact, the Appellee argued that public policy should be read to only favor licensees. *Id.* However, the Appellee neglects to recognize one of the main duties of the Iowa Board of Medicine, which is "charged with enforcing these rules and laws *to protect the public* from licensee who do not practice medicine, acupuncture, and genetic counseling within prevailing and acceptable standards of the practices of medicine and acupuncture." Iowa Board of Medicine – Board Overview, <https://medicalboard.iowa.gov/board-overview>. The Board contends that part of protecting the public is also informing them about the basis for allegations against licensees.

The Board's duty to inform the public of not only the grounds but the basis for those grounds has been a long-standing practice with the Board of Medicine as well as every other Board governed under Iowa Code chapter 272C. As a result of the District Court's refusal to order a

stay in this matter, the Board has already started the practice of removing investigatory information, even at the most level, from its public statements of charges. In response, the public's reaction to this change has already come to a head. Kaufman, C., "Iowa Licensing Board Isn't Disclosing Reason for Alleging Surgeon is Incompetent", *Iowa Capital Dispatch*, Dec. 9, 2020, <https://iowacapitaldispatch.com/briefs/iowa-licensing-board-isnt-disclosing-reason-for-alleging-surgeon-is-incompetent/>. "Rather than include a basic description of the allegation against [licensee] in its public statement of charges, the board has opted to include that information only in a separate "Statement of Matters Asserted" that the board considers confidential and is sharing only with [licensee]." *Id.*

The Appellee attempts to equate a statement of charges with "a determination of guilt," which is a comparison that is wholly without substance. Appellee's Brief at 30. That comparison would be the equivalent of finding every criminal charge the equivalent of a determination of guilt without due process or that every district court petition is the determination of liability, both of which are public records. That is why all of the Board's statements of charges include a date of hearing or pre-hearing on them and include a date by which the

licensee can answer to respond to the charges, because the licensee is allotted the same due process he or she would receive in any other proceeding.

The Appellee also asserts that the Board failed to find a single case that rendered a statute inoperable of public policy grounds. Appellee's Brief at 35. However, the Board does not want to render the statute inoperable, it asks that this court choose to *interpret* the statutes in the manner most consistent with the Board's notice requirements under Iowa Code chapter 17A, open record requirements of Iowa Code chapter 22, and public policy. This is based on the longstanding principle of "in pari material," which requires statutes that are related to the same subject to be read together. *Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 774 (Iowa 1969) ("We have also consistently held that statutes relating to the same subject matter or to closely allied subjects must be construed, considered, and examined in light of their common purposes and intent."). Public policy arguments supporting the use of limited investigatory information to inform the public and the licensee of the basis for the Board's allegations are reasonable and should support the Board's interpretation of Iowa Code section 272C.6.

Appellee also argues that public policy weighs in his favor because he can cite to instances where employers have reviewed his case before the Board and this has created issues with the Appellee finding employment. Appellee's Brief at 42. However, the Board has obligations to report all discipline to the National Practitioner Data Bank (NPDB) and employers such as hospitals and health care entities can access that data bank when they make queries for specific licensees. 42 C.F.R. Part 60. Information regarding any adverse actions against the licensee would be available to employers regardless of whether the Board publicly posted such information or not and this argument by Appellee fails to overcome the public policy reasoning it raises.

II. Appellee raises arguments not preserved and not applicable to the matter before this court.

Appellee, for the first time in the course of these proceedings, alleges that “[i]f this Court upholds the district court decision, licensees will be able to review, for the first time in decades, the investigative information gathered to prosecute them and make an informed decisions about whether to settle before allegations are made public.” Appellee's Brief at 38 n.1. This assertion is patently false, not an issue preserved for appeal, and a flagrant attempt to back-door a completely

incorrect reading of the statute in order to garner an advantage to licensees. The question the Appellee posed to the Board and the *only* question that is preserved for appellate review is whether Iowa Code section 272C.6(4)(a) prohibits the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases when contain investigative information. Petition for Declaratory Order; App. P. 1 - 4. No part of that question addresses anything that happens *prior* to a statement of charges being filed and any assertion by Appellee to the contrary, in an attempt to get broader access to investigative information than licensees are legally entitled to, should be censured by this court.

The Appellee also argues that the legislative intent in drafting Iowa Code 272C.6(4) was to protect the licensee from everything but the final order. Appellee's Brief at 25. The Appellee continues with the novel argument that because there is now a House Study Bill clarifying the language of that statute, it means that the Board is in agreement with Appellee's interpretation of the legislative intent and seeking to amend it. Appellee's Brief at 26. In fact, the opposite is the case. Because the Board believes its original interpretation of the statute was the legislative intent, it now seeks guidance and clarity from the

legislature to avoid such confusion moving forward. The passage of such a bill would not mean that the Board had changed the law, only clarified an existing belief and principle. The non-passage of such a bill would not mean that the Board's interpretation was not what the legislature intended, but could simply mean that the legislature did not believe it required clarity. Even if the Board was attempting to change the law to favor its interpretation, this would not be a circumvention of the Court's authority because the Court's authority is to interpret existing law, not to change it. Therefore, the Board is well within its rights to argue a case in court at the same time that it requests clarity from the legislature.

CONCLUSION

Numerous public policy arguments support the Board's contentions and interpretation of law, as well as long-standing principles and appellate case law. The Board's interpretation should be given proper deference, the statute should be interpreted to allow for the use of limited investigative material and the Appellee should not be permitted to argue issues not properly before this court.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,403** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: February 17, 2021

/s/ Anagha Dixit
ANAGHA DIXIT
Assistant Attorney General

CERTIFICATE OF FILING

I, Anagha Dixit, hereby certify that on the 24th day of February, 2021, I, or a person on my behalf, did file Appellee's Proof Reply Brief and Request for Oral Submission with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Anagha Dixit
ANAGHA DIXIT
Assistant Attorney General