

IN THE SUPREME COURT OF IOWA

NO. 18-0353
POLK CO. CASE NO. CVCV055524

MARK B. IRLAND, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE ARTHUR E. GAMBLE, JUDGE

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. **DID THE DISTRICT COURT ERR IN DISMISSING DR. MARK IRLAND'S PETITION FOR JUDICIAL REVIEW?**

Iowa Code § 17A.19

ROUTING STATEMENT

The case should be transferred to the Court of Appeals of Iowa as the issues presented can be summarily disposed of by application of existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Dr. Mark Irland, a licensed physician in the State of Iowa, received a “Confidential Letter of Warning” from the Iowa Board of Medicine dated November 29, 2017. The letter did not contain a statement of charges or allege a violation against Dr. Irland. However, the letter sanctions Dr. Irland and places conditions on his return to the practice of medicine. (App. p. 3).

Dr. Irland filed a petition for judicial review on December 29, 2017. (App. p. 5). The Board filed a motion to dismiss on January 23, 2018. (App. p. 11) The district court found that a confidential letter of warning which imposes sanctions without a formal statement of charges is not subject to judicial review and granted the Board’s motion to dismiss. (App. p. 18) Dr. Irland timely files this appeal. (App. p. 21)

STATEMENT OF THE FACTS

Dr. Mark Irland is a licensed physician primarily practicing in Marengo, Iowa. Dr. Irland received a “Confidential Letter of Warning” (“letter”) dated November 29, 2017, from the Iowa Board of Medicine. The Iowa Board of Medicine (“Board”) is a state agency with offices in Des Moines, Iowa. (App. p. 3)

The letter stated the Board conducted an investigation related to Dr. Irland’s practice in Marengo, Iowa. The Board further stated that they had “serious concerns” related to Dr. Irland’s practice. The letter does not provide a statement of charges. The letter does not allege any violations of any agency rule or Iowa law.

The letter does state, “[t]he Board . . . advises that you submit a paper to the Board describing what you have learned from this matter. Please submit the paper to Kent M. Nebel, J.D., Legal Director, Iowa Board of Medicine [.]. . . The Board also noted that you are not practicing medicine at this time. . . . If you choose to return to the practice of medicine, the Board will take appropriate action, including but not limited to, issuing an order requiring you to complete a comprehensive clinical competency evaluation, to ensure you are able to practice medicine with reasonable skill and safety.”

Dr. Irland filed a petition for judicial review on December 29, 2017, alleging the letter constituted illegal agency action under Iowa Code § 17A.19. (App. p. 5) The Board filed a motion to dismiss the petition for judicial review

(App. p. 15) which was granted by the district court on February 16, 2018.

(App. p. 18) Dr. Irland timely files this appeal. (App. p. 21)

APPELLEES' ARGUMENTS

I. THE DISTRICT COURT ERRED IN DISMISSING DR. IRLAND'S PETITION FOR JUDICIAL REVIEW.

SCOPE & STANDARD OF REVIEW/PRESERVATION OF ERROR

Review of a district court's dismissal of a petition for judicial review is for errors at law. *Paulson v. Bd. of Med. Examiners of Iowa*, 592 N.W.2d 677, 678 (Iowa 1999). Notice pleading is not applicable for the purposes of judicial review. *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984). Rather, Iowa Code § 17A.19 controls the sufficiency of pleading on a petition for judicial review.

Error has been preserved in the pleadings and orders at the district court level and the hearing held on February 12, 2018.

ARGUMENT

The Board's confidential letter of warning sanctions Dr. Irland without providing the necessary statement of charges or opportunity to contest the violations. (App. p. 3) Without opportunity to contest the sanctions, Dr. Irland appropriately filed a petition for judicial review. (App. p. 5) The letter was

statutorily subject to judicial review as Iowa Code § 17A.19 is the “exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action.” The district court’s dismissal of the petition should accordingly be reversed and the matter remanded for a hearing on the merits of Dr. Irland’s petition.

A. The confidential letter of warning constitutes illegal agency action under Iowa Code § 17A.19.

Dr. Irland seeks judicial review of the Board’s “Confidential Letter of Warning” dated November 29, 2017. (App. p. 3) Specifically, Dr. Irland seeks review of the blatantly illegal and unconstitutional agency action sanctioning him without any notice, charges, or opportunity to appeal the Board’s decision.

The Board’s authority to issue a confidential letter of warning following an investigation is limited to the grounds established in 653 IAC 24.2(e)(4), which reads:

If the board concludes that **there is not probable cause to file disciplinary charges**, the board may issue the licensee an informal letter of warning or education. A letter of warning or education is an informal communication between the board and the licensee and is not formal disciplinary action or a public document. (emphasis added).

As explicitly stated under the agency's rules, the Board can only issue a letter of warning when they conclude that there is not probable cause to file disciplinary charges. A confidential letter of warning is a distinct and separate procedural method pursued by the Board of Medicine when disciplinary charges are not appropriate.

The text of the agency rules related to a confidential letter of warning can be compared to 653 IAC 24.2(e)(5) which states, “[i]f the board determines that there is probable cause for taking formal disciplinary action against a licensee, the board shall file a statement of charges, thereby commencing a contested case proceeding.”

While the letter is titled “Confidential Letter of Warning”, it unmistakably serves as a letter of disciplinary sanctions without an accompanying statement of charges. The letter sanctions Dr. Irland in each of the following ways:

- “The Board . . . advises that you submit a paper to the Board describing what you have learned from this matter. Please submit the paper to Kent M. Nebel, J.D., Legal Director, Iowa Board of Medicine [.]”
- “The Board also noted that you are not practicing medicine at this time. . . . If you choose to return to the practice of medicine, **the Board will take appropriate action, including but not limited to, issuing an order requiring you to complete a comprehensive clinical competency evaluation**, to ensure you are able to practice medicine with reasonable skill and safety.” (emphasis added).
- “This CONFIDENTIAL LETTER OF WARNING concludes the Board's investigation of this case. The Board reserves the

right to review and reconsider this matter should it be deemed appropriate.”

Under 653 IAC 25.25, the Board may sanction a physician following a contested case hearing. No contested case hearing has been held for this matter. The potential disciplinary sanctions include license restriction, additional education or training, a physical or mental evaluation, or a clinical competency evaluation. 653 IAC 25.25(1)(c,e,g).

The Board’s letter unequivocally sanctions Dr. Irland by placing a restriction on his license to practice medicine. This restriction is imposed on Dr. Irland despite not having probable cause to file formal disciplinary charges, failing to provide any notice to Dr. Irland of a sanction, failing to file any statement of charges, or providing any opportunity for Dr. Irland to contest the allegations and sanctions against him.

B. The confidential letter of warning was subject to judicial review under Iowa Code § 17A.19.

The district court erred in finding the confidential letter of warning was not reviewable under Iowa Code § 17A.19. First, the letter is an adverse agency action against Dr. Irland for which no administrative remedies exist. Further, the Board’s identification of the letter as a confidential letter of warning is mere a pretext for disciplinary sanctions. The district court’s decision should accordingly be reversed and remanded.

“A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter.” Iowa Code § 17A.19(1).

A plain reading of Iowa Code § 17A.19 indicates Dr. Irland is entitled to judicial review. Under Iowa Code § 17A.2, agency action includes “the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceeding, investigation, sanction, relief, or the equivalent or a denial thereof.”

The decision to impose sanctions on Dr. Irland by way of a confidential letter of warning “are within the statutory mandate of the agency here and are peculiarly within its discretion and area of expertise. Clearly, then, such matters constitute agency action”. *Genetzky v. Iowa State University*, 480 N.W.2d 858, 861 (Iowa 1992). Under this definition, the Board’s sanction of Dr. Irland constitutes agency action.

Further, Dr. Irland has exhausted all administrative remedies. The letter of confidential warning is not formal discipline and therefore cannot be reviewed or appealed within the agency. In sum, Dr. Irland exhausted all administrative remedies as there were no additional remedies to challenge the letter of warning.

Finally, the letter is a final agency action. The letter closes by stating “[this letter] concludes the Board’s investigation of this case. The Board reserves the right to review and reconsider this matter should it be deemed appropriate.” A final agency action is subject to judicial review under the Iowa Administrative Procedure Act.

The “letter of warning” contains disciplinary sanctions against Dr. Irland constituting a direct contradiction of the rules regarding letters of warning. 653 IAC 24.2(e)(4) (“If the board concludes that there is not probable cause to file disciplinary charges, the board may issue the licensee an informal letter of warning”).

While the letter is labeled a confidential letter of warning in name, it is hardly a letter of warning in practical effect. The designation of the letter as a warning is merely a pretext to impose the sanctions upon Dr. Irland. Under the district court’s ruling, the letter is permitted to act as the Board’s metaphorical ‘Trojan horse’. Disciplinary sanctions are ushered past the walls of procedural protections –namely a statement of charges and a contested case hearing– under the guise of a comparatively harmless letter of warning. The letter is a disciplinary sanction and should accordingly be subject to judicial review.

CONCLUSION

The Board's confidential letter of warning imposing sanctions constitutes illegal agency action under Iowa Code § 17A.19. The sanctions were subject to judicial review under the same. The district court's dismissal of Dr. Irland's petition for judicial review should be reversed and remanded for a hearing on the merits of the petition.

APPELLEE'S REQUEST FOR ORAL ARGUMENT

Defendants-Appellees hereby request to be heard in oral argument.
Iowa Rule of Appellate Procedure 6.908.

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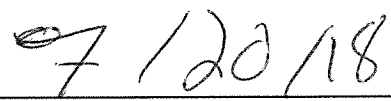
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DAVID L. BROWN



DATE