

IN THE SUPREME COURT OF IOWA

NO. 18-0353

MARK B. IRLAND, M.D.,

Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,

Respondent-Appellee,

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

RESPONDENT-APPELLEE'S FINAL BRIEF AND
REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE BOARD OF MEDICINE IMPOSED DISCIPLINE ON DR. IRLAND'S LICENSE.

Authorities

Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs., 613 N.W.2d 674 (Iowa 2000)

Black's Law Dictionary 1341 (7th ed. 1999)

653 Iowa Admin. Code r. 25.24(1)

653 Iowa Admin. Code r. 25.32

Iowa Code § 272C.3(2)(a)

653 Iowa Admin. Code r. 25.25(1)

653 Iowa Admin. Code r. 24.4(3)

II. WHETHER THE IOWA CODE PERMITS JUDICIAL REVIEW OF THE BOARD OF MEDICINE'S DECISION TO CLOSE AN INVESTIGATION WITHOUT INITIATING DISCIPLINE.

Authorities

Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs., 613 N.W.2d 674 (Iowa 2000)

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Lewis Cent. Educ. Ass'n v. Iowa Bd. of Educ. Exam'rs, 625 N.W.2d 687 (Iowa 2001)

Iowa Code chapter 17A

Iowa Code chapter 272C

2002 Iowa Acts, ch. 1108, § 26

Iowa Code section 272C.3(1)(d)

III. WHETHER DR. IRLAND IS ENTITLED TO JUDICIAL REVIEW BECAUSE HE HAS NOT EXHAUSTED ADMINISTRATIVE REMEDIES.

Authorities

Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs., 613 N.W.2d 674 (Iowa 2000)

Iowa Code section 272C.3(1)(d)

Pro Farmer Grain v. Iowa Dep't of Agric., 427 N.W.2d 466 (Iowa 1988)

North River Ins. v. Iowa Div. of Ins., 501 N.W.2d 542 (Iowa 1993)

653 Iowa Admin. Code r. 24.4

653 Iowa Admin. Code r. 24.4(3)

ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction of this appeal.

The main issue presented in this appeal is the meaning of Iowa Code section 272C.3(d), a matter of first impression. In addition, this case involves the authority and procedures of the Iowa Board of Medicine, which are issues of broad public importance requiring prompt or ultimate determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

The Iowa Board of Medicine (“Board”) sent Dr. Mark Irland a confidential letter of warning on November 29, 2017, expressing the Board’s concern about Dr. Irland’s care of a patient who died. (Letter of Warning, App. at 3-4). The letter also requested that Dr. Irland submit a letter describing what he learned from the matter, and stated that if Dr. Irland returned to practice, the Board would order him to undergo a clinical competency evaluation. *Id.*

Dr. Irland sought judicial review of this confidential letter of warning. (Petition for Judicial Review, App. at 5-10). The District Court dismissed Dr. Irland’s petition for judicial review, ruling that the letter was, by statute, not subject to judicial review. (Order, App. at 18-19). The District Court also ruled that no grounds existed for intermediate review of the agency’s

action because Dr. Irland had not exhausted administrative remedies. *Id.* If the Board did order him to undergo a competency evaluation in the future, Dr. Irland could exhaust administrative remedies with the Board at that time. *Id.*

Dr. Irland appeals from the District Court's ruling dismissing his petition for judicial review.

STATEMENT OF FACTS

The Board received a complaint about Dr. Irland's care. (Letter of Warning, App. at 3-4). The complaint alleged that Dr. Irland provided substandard care to a 29-year-old patient who came to the emergency room in Marengo, Iowa, with a serious illness. *Id.* The complaint alleged that Dr. Irland failed to recognize the seriousness of the patient's condition, ignored the concerns of other medical staff, and failed to transfer the patient to an intensive care unit. *Id.* The patient was transferred to a hospital in Cedar Rapids after six hours in the Marengo emergency department, and subsequently died. *Id.*

The Board investigated the complaint, and considered the investigative report. The Board decided not to file a statement of charges, but instead, to confidentially advise Dr. Irland by letter that it had concerns about his care, and describe those concerns. *Id.* The letter indicated that the

Board had decided not to file charges and that the letter is not a formal disciplinary action. The letter did state that since Dr. Irland was no longer practicing medicine, the Board had chosen not to order him to complete a clinical competency evaluation, but that if he returned to practice, the Board would do so. *Id.*

ARGUMENT

Dr. Irland did not ask for the Board to review its action, appeal the letter of warning, respond to the letter of warning, or indeed take any action to raise his issues before the agency. Instead, he filed suit. Because he has not preserved any of the issues he raises here, the dismissal of his Petition for Judicial Review must be dismissed. Even if the Court reaches the issues he raises, however, the Board should prevail, because the Iowa Code expressly and properly prohibits judicial review of the Board's decision not to file charges here, Dr. Irland has not exhausted his administrative remedies, and the Board's rules grant it discretion in dealing with its licensees. Finally, the Board had probable cause to order Dr. Irland to undergo a competency evaluation, but since the Board did not act on its finding, and Dr. Irland did not challenge the Board's finding or its decision below, this Court cannot review the finding.

I. THE BOARD DID NOT IMPOSE DISCIPLINE ON DR. IRLAND'S LICENSE.

A. Preservation of Issues for Review.

Dr. Irland has not preserved this issue, since he raised it for the first time in his Petition for Judicial Review, and did not raise it (or any issue) before the agency. This Court's review is limited to questions considered by the agency. *Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000).

B. The Board Did Not Impose Discipline on Dr. Irland's License.

As the Board explicitly stated in its letter of warning, the letter is not a formal disciplinary action. Nevertheless, Dr. Irland argues that this letter does sanction him and imposes restrictions on his license to practice medicine. (Appellant's Proof Brief, pp. 10-11). Dr. Irland argues that the letter of warning imposes disciplinary sanctions when it advises that he submit a reply to the letter, and when it indicates it will issue an evaluation order if Dr. Irland returns to practice. (Appellant's Proof Brief, p. 10).

The Board's action here does not satisfy that definition of a sanction. A "sanction" is a coercive measure that results from a violation of a law, rule, or order. *Black's Law Dictionary* 1341 (7th ed. 1999). The Board has not found that Dr. Irland has violated any law, rule, or order. And since the

Board has not filed charges or held a hearing, it cannot coerce Dr. Irland with regard to his license. To the contrary, the letter simply requests that Dr. Irland reply. But nothing will happen if he does not reply.

The plain language of the Board's letter also contradicts Dr. Irland's claims. By its terms, it states it is not a formal disciplinary action. Also, the letter is confidential, whereas, all discipline in Iowa is public, and reported to other organizations such as the National Practitioner Databank. 653 Iowa Administrative Code rule 25.24(1) (a final decision of the Board is an open record); 25.32 (final Board decisions reportable to media, NPDB, other organizations). In addition, a letter to the Board explaining what was learned in a situation is not a possible disciplinary sanction for a licensed physician in Iowa. The possible sanctions include revocation or suspension of a license, probation under specified conditions, a citation, and monetary penalties. Iowa Code § 272C.3(2)(a); 653 Iowa Admin. Code r. 25.25(1).

Finally, Dr. Irland claims the letter sanctions him by ordering him to an evaluation. However, the Board has not issued an evaluation order. If the Board did issue an evaluation order, Dr. Irland would be able to challenge that order before it could take effect. 653 Iowa Admin. Code r. 24.4(3). No sanction has yet been imposed.

II. THE IOWA CODE DOES NOT PERMIT JUDICIAL REVIEW OF THE BOARD OF MEDICINE'S DECISION TO CLOSE AN INVESTIGATION WITHOUT INITIATING DISCIPLINE.

A. Preservation of Issues for Review.

Dr. Irland has not preserved this issue, since he raised it for the first time in his Petition for Judicial Review, and did not raise it (or any issue) before the agency. This Court's review is limited to questions considered by the agency. *Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000).

B. The Iowa Code Does Not Permit Judicial Review of the Board of Medicine's Decision to Close an Investigation Without Initiating Discipline.

The Iowa Code explicitly prohibits judicial review of the Iowa Board of Medicine's decision not to initiating a disciplinary proceeding. Iowa Code § 272C.3(1)(d). Accordingly, the District Court was correct to dismiss Dr. Irland's Petition for Judicial Review.

The decisions of federal agencies not to prosecute or enforce are not reviewable, because (1) these decisions involve "a complicated balancing" of factors such as allocation of agency resources and a realization that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," (2) courts generally defer to an agency's construction of the statute it enforces, and (3) an agency's refusal to enforce

is akin to a prosecutor's discretion not to indict. *Lewis Cent. Educ. Ass'n v. Iowa Bd. of Educ. Exam'rs*, 625 N.W.2d 687, 691 (Iowa 2001). However, Iowa's administrative procedure act differs from the federal law, and the Iowa Supreme Court held in 2001 that Iowa Code chapter 17A presumes that decisions not to institute discipline against a licensee is reviewable, unless the legislature expressly exempts an agency decision from review and references Chapter 17A in the statute when it does so. *Id.* Under the Iowa act, any exception under our act must be expressed and specifically name the act. *Id.*

After the Iowa Supreme Court's decision in *Lewis Central*, in the 2002 Session, the Iowa Legislature amended Iowa Code chapter 272C, to provide that decisions of the Iowa Board of Medicine and other boards of licensed professionals not to institute disciplinary proceedings are not reviewable, and named Chapter 17A when it did so. 2002 Iowa Acts, ch. 1108, § 26. This provision was codified at Iowa Code section 272C.3(1)(d).

This code provision brings the Iowa Board of Medicine in line with federal agencies, and its refusal to enforce its statute against a licensee is therefore "akin to a prosecutor's decision not to indict." The Board has discretion to decide whether to bring charges, and its decision not to do so (here, because the licensee is not practicing) is not subject to judicial review.

III. DR. IRLAND IS NOT ENTITLED TO JUDICIAL REVIEW BECAUSE HE HAS NOT EXHAUSTED ADMINISTRATIVE REMEDIES.

A. Preservation of Issues for Review.

Dr. Irland has not preserved this issue, since he raised it for the first time in his Petition for Judicial Review, and did not raise it (or any issue) before the agency. This Court's review is limited to questions considered by the agency. *Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000).

B. Dr. Irland Is Not Entitled To Judicial Review Because He Has Not Exhausted Administrative Remedies.

Even if this Court were to allow judicial review of the Board's action, despite the specific prohibition contained in Iowa Code section 272C.3(1)(d), review of the Board's action would not be appropriate at this time. The Board took no action at the time of the letter, but indicated that if Dr. Irland returned to practice, it would send Dr. Irland to a competency evaluation. The Board's letter is not a final agency action ripe for judicial review. A party seeking judicial review of a preliminary, procedural, or intermediate agency action must show that both (1) adequate administrative remedies have been exhausted and (2) judicial review of final agency action would not provide an adequate remedy. *Pro Farmer Grain v. Iowa Dep't of*

Agric., 427 N.W.2d 466, 467 (Iowa 1988). The doctrine of exhaustion of administrative remedies provides that a person may obtain judicial review of agency action only after that action is officially sanctioned and reviewed within the agency to the fullest extent provided by law. *North River Ins. v. Iowa Div. of Ins.*, 501 N.W.2d 542, 545 (Iowa 1993).

Dr. Irland has not exhausted his administrative remedies. He did not respond to the Board in any way, or raise any of the issues in his Petition before the Board. In addition, review of final Board action would provide an adequate remedy. The Board has not yet ordered Dr. Irland to go to an evaluation. He can ask for a Board hearing at the time the Board orders this, if it does so. 653 Iowa Admin. Code r. 24.4. Additionally, even if the Court believes the letter, despite its plain language, is an evaluation order, Dr. Irland failed to exhaust his remedies before the Board by failing to challenge the order under the provisions of 653 Iowa Administrative Code rule 24.4(3). Accordingly, the District Court was correct to dismiss Dr. Irland's Petition for Judicial Review.

CONCLUSION

The Board of Medicine looked at a complaint about Dr. Irland's care and decided not to initiate disciplinary proceedings. Instead, the Board communicated its concerns through a confidential letter. By statute, the

Board's decision is not subject to judicial review. Even if the Iowa Code did not prohibit judicial review, Dr. Irland could not obtain it now, because he has neither preserved the arguments he makes here, nor exhausted his administrative remedies. The Court should affirm the dismissal of his Petition.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests, pursuant to Iowa Rules of Appellate Procedure 6.908, to be heard in oral argument on all issues raised in its appeal brief.

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 Times New Roman in 14-point font and contains 2,137 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Date: July 17, 2018

/s/ Jordan G. Esbrook

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PROOF OF SERVICE

I, Jordan Esbrook, hereby certify that on the 17th day of July, 2018, I or a person acting on my behalf did serve Appellee’s Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Jordan Esbrook, hereby certify that on the 17th day of July, 2018, I or a person acting on my behalf filed Appellee’s Final Brief and Conditional Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Jordan G. Esbrook

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