IN THE COURT OF APPEALS OF IOWA

No. 1-103 / 10-1363
Filed May 11, 2011

OFFICE OF CONSUMER ADVOCATE,
Petitioner-Appellee,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

The Iowa Utilities Board appeals from the district court's order on judicial review. **AFFIRMED.**

David Lynch of the Iowa Utilities Board, Des Moines, for appellant.

Mark R. Schuling and Craig Graziano of the Office of the Consumer Advocate, Des Moines, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts and Proceedings.

This case deals with an alleged cramming violation, which is "charging a consumer for services that were not ordered, authorized, or received." *Office of Consumer Advocate v. Iowa Utils. Bd.*, 770 N.W.2d 334, 336 (Iowa 2009) (citing Iowa Code § 476.103; Iowa Admin. Code r. 199-22.23(1)). On May 16, 2008, the Iowa Utilities Board (Board) received a complaint from Lisa Arechavaleta regarding $47.17 in charges on her local telephone bill from Cheap2Dial Telephone, L.L.C. She asserted the charges were not authorized and the company was "defrauding consumers."

In response to the complaint, Cheap2Dial claimed Arechavaleta had subscribed to its services via its website at 4:14 p.m. on February 18, 2008, from an IP address from a nearby city. It provided general identifying information for Arechavaleta, including her address, email address, phone number, and date of birth. Cheap2Dial also reported that it cancelled Arechavaleta's account and issued her a refund in the amount of $47.17.

On June 19, 2008, the Board's staff issued a proposed resolution stating that it was "possible one of [Arechavaleta's] teenage children could have provided information on a website" or it was "possible an error was made[ ] resulting in the billing," but they did not believe a cramming violation had taken place.

Dissatisfied with this result, the Consumer Advocate petitioned the Board for a determination that Cheap2Dial had committed a cramming violation and requested a hearing to consider a civil monetary penalty pursuant to Iowa Code

sections 476.3 and 476.103 (2007). The Consumer Advocate disputed much of the "verification" information Cheap2Dial had provided—Arechavaleta's birth date was wrong, and she could not have ordered the service at the time specified. It also disputed that Arechavaleta's daughter ordered the service. Although Cheap2Dial stated Arechavaleta had received a gift card for signing up for its service, Arechavaleta denied ever receiving one, and Cheap2Dial did not provide any proof regarding a gift card.

On October 14, 2008, the Board denied the Consumer Advocate's request. It found the data provided by Cheap2Dial demonstrated it had received an order from Arechavaleta and further investigation was not required. The Consumer Advocate requested the Board reconsider its decision, which the Board denied. It found there were not "any reasonable grounds" for initiating formal proceedings because,

> [T]his case does not justify the expenditure of resources required for a formal investigation. Thus, in this case it is conceivable that Ms. Arechavaleta did not order service from Cheap2Dial, but that mere possibility does not justify formal proceedings when there is very little likelihood that further investigation will provide useful information that may affect the existing outcome.
>
> The record already shows that Cheap2Dial has the type of verification information in its records that is typically considered to be sufficient.

On July 24, 2009, the Consumer Advocate petitioned for judicial review. On July 30, 2010, the district court disagreed with the Board's conclusion that there were no reasonable grounds for a formal hearing and stated,

> [I]t appears the Iowa Utilities Board had determined that so long as the offending provider provides minimal information about the consumer and removes the complained-of charges from the consumer's bill, the Board need take no further action. . . .

> In this case, Ms. Arechavaleta correctly filed her complaint alleging she did not authorize the service, the telephone company supplied minimal information concerning the request for change and credited her account, and the Board considered the matter resolved and concluded. This decision by the Board is unreasonable and arbitrary under the facts presented and not supported by substantial evidence. This court believes that further evidence of an application made by Ms. Arechavaleta, such as the application screen she allegedly filled out to request the service, was needed for the Board to reasonably conclude Cheap2Dial's claim the service was requested.

The district court reversed and remanded to the Board to conduct a hearing. The Board appeals.

II. Standard of Review.

The provisions of Iowa Code section 17A.19(10) (2009) control judicial review of an agency decision. Our review of the district court's decision upholding the Board's action is limited to deciding whether that court correctly applied the law in exercising its own review function under section 17A.19. *See IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001).

If the legislature has clearly vested the agency with interpretative authority for the phrase under consideration, we will reverse only if the interpretation is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*l*). In contrast, if the legislature has not clearly granted an agency interpretive authority, we do not defer to the agency's interpretation and will reverse "upon an erroneous interpretation." *Id.* § 17A.19(10)(c), (11)(b). The phrase at issue in this case—"any reasonable ground"—is not a phrase "uniquely within the subject matter expertise of the agency." *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 13 (Iowa 2010). Consequently, we do not give deference to the Board's statutory interpretation of that standard.

III. Analysis.

Iowa Code section 476.3(1) provides:

> If the consumer advocate determines the public utility's response to the complaint is inadequate, the consumer advocate may file a petition with the board which shall promptly initiate a formal proceeding if the board determines that there is any reasonable ground for investigating the complaint.

In its rulings, the Board explained there were not reasonable grounds because Cheap2Dial's verification was sufficient and a formal hearing would not provide any useful information. Yet, the Board overlooked the inaccurate information provided by Cheap2Dial and the disputed facts between the consumer complaint and Cheap2Dial's response.

Under section 476.103(3), the Board is required to "adopt rules prohibiting an unauthorized change in telecommunications service." Those rules must require the service provider to "obtain verification of customer authorization of a change in service before submitting such change in service" and for "[v]erification appropriate under the circumstances for all other changes in service." Iowa Code § 476.103(3)(a). Accordingly, Iowa Administrative Code rule 199-22.23(2)(a)(5) sets forth the verification required for a "change in service resulting in additional charges to existing accounts,"

> [A] service provider shall establish a valid customer request for the change in service through maintenance of sufficient internal records. At a minimum, any such internal records must include the date and time of the customer's request and adequate verification under the circumstances of the identification of the person requesting the change in service. . . . The burden will be on the telecommunications carrier to show that its internal records are adequate to verify the customer's request for the change in service.

The Board claims Cheap2Dial had in its records the type of verification information required by the above rule. After Arechavaleta asserted that she did not authorize the charges, the only undisputed information Cheap2Dial responded with was general identifying information—her name, phone number, home address, and email address. Cheap2Dial may have provided some easily obtainable identification information, but there was no evidence Arechavaleta actually authorized the service in question.

Furthermore, much of the information provided by Cheap2Dial was disputed. The date of birth Cheap2Dial provided was wrong, and Arechavaleta disputed she could have signed up for the service at the alleged time, which also cast doubt on the IP address. The Consumer Advocate obtained a sign-up form from Cheap2Dial's website, and Arechavaleta and her daughter denied having seen it before. Additionally, Cheap2Dial stated that Arechavaleta received a gift card for signing up for its service, but Arechavaleta denied ever receiving one, and Cheap2Dial did not provide any proof regarding a gift card. From the record before it, the Board could not determine whether the change in service was authorized.

In light of the disputed information, a formal hearing would permit the fact-finder to gather additional information and make a determination as to whether a cramming violation occurred. While we acknowledge the Board's concern about cost, the legislature has provided that an investigation occurs where there exists "any reasonable ground," which deters companies from committing cramming violations. *See In re Canales Complaint*, 637 N.W.2d 236, 245 (Mich. Ct. App. 2001) (holding that without imposition of civil penalties, companies would not

have sufficient incentive to stop slamming "because they would simply reimburse those customers who complain . . . but continue to collect fees from the other slammed customers"). Under these circumstances, the reasons cited by the Board fall short of satisfying its statutory obligation to proceed if the Consumer Advocate finds the response inadequate and there is "any reasonable ground" for investigating the consumer complaint.

The Board also argues that the district court should not have relied on memos written by the Board's staff and points to two statements in the district court's order: (1) "the Board staff's conclusion that one of Ms. Arechavaleta's children could 'possibly' have requested the service" and (2) the "Board's staff's conclusion that they should deny a hearing because it would be impossible to determine how Ms. Arechavaleta was enrolled in Cheap2Dial's service." We need not determine whether the district court could rely on the staff memos because we find it did not. While the memos written by the Board's staff put forth both of those propositions, the Board also acknowledged and adopted the logic in its own orders. The Board's orders support these statements. In its order denying the Consumer Advocate's petition, the Board stated: "Board staff noted that it was possible that one of Ms. Arechavaleta's teenage children signed up for a free gift." In its order denying reconsideration, the Board stated, "[T]here is very little likelihood that further investigation will provide useful information that may affect the existing outcome" and "[f]rom all available information . . . , the record is as good as it is going to get."

Because the Board's conclusion that it lacked "any reasonable ground" to investigate was erroneous on this record, we affirm the district court and remand for the Board to investigate whether civil penalties are appropriate.

AFFIRMED.

Vaitheswaran, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent and would find that the district court interfered with the Board's own rules and did not give the required deference to the Board's decision. In the present case, there is little, if any, dispute about the facts. Rather, the issue is whether the information provided by Cheap2Dial is sufficient to comply with the Board's verification rule. *See* Iowa Admin. Code r. 199-22.23(2)(a)(5). The Board found that it was, stating "Cheap2Dial had the type of verification information in its records that is typically considered to be sufficient." Further, the Board acknowledged that it was "conceivable that Ms. Arechavaleta did not order the service from Cheap2Dial," but Cheap2Dial provided information it deemed adequate and there were not reasonable grounds for a hearing.

I believe the district court did not give the appropriate deference to the Board's interpretation of its own rule. Essentially, the Board was interpreting Iowa Code section 476.3(1) and rule 199-22.23(2)(a)(5). When examining whether an agency correctly interpreted a law, there are two standards to apply—when the legislature has not clearly vested the interpretation of a law in the discretion of the agency, the court applies a clearly erroneous standard, Iowa Code § 17A.19 (10)(c), (11)(b); but when the legislature has clearly vested the interpretation of a law in the discretion of an agency, the court only reverses the agency if its ruling is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law," Iowa Code § 17A.19(10)(*l*). *Office of Consumer Advocate v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008).

Unlike the majority, I would find that the phrase "any reasonable ground," in this case, is a phrase "uniquely within the subject matter expertise of the

agency." This is because the Board must have the power to interpret such a generic term so that it may run its own agency, delegate its limited resources, and carry out its statutory duties. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 12 (Iowa 2010) (noting that in *City of Marion v. Iowa Department of Revenue & Finance*, 643 N.W.2d 205 (Iowa 2002), the power to interpret the term "athletic sport" was clearly vested in the agency "in order to carry out its duties"). Consequently, I would give deference to the Board's statutory interpretation and only reverse if the agency's ruling is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law." *See Office of Consumer Advocate*, 744 N.W.2d at 643 ("[W]e will only reverse the Board's decision if it is based upon an irrational, illogical, or wholly unjustifiable interpretation of section 476.103."); *see also* Iowa Code § 17A.19(10)(*l*).

The district court found that in light of the consumer complaint, Cheap2Dial had not provided adequate verification information. It explained that Cheap2Dial should have provided further evidence, such as the application Ms. Arechavaleta allegedly filled out to request the service. While the district court may not have been satisfied with the verification information obtained by the Board, it was improper for the court to rewrite the Board's own rules. Because the district court dabbled into the Board's standards of acceptable verification, it then found the Board's decision was "unreasonable and arbitrary under the facts presented and was not supported by substantial evidence."

I believe the district court reweighed the evidence, instead of examining the evidence presented and applying a "substantial evidence review." *See Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 153–

54 (Iowa 1988) ("Agency fact-finding is binding on courts if it is supported by substantial evidence when the record is viewed as a whole. . . . Substantial evidence need only be that which a reasonable mind could accept as adequate . . . ."). I would find that there was substantial evidence to support the Board's decision Cheap2Dial complied with its verification rule and this decision was not "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law." Iowa Code § 17A.19(10)(*l*).