

IN THE COURT OF APPEALS OF IOWA

No. 2-144 / 11-1184
Filed April 25, 2012

OFFICE OF CONSUMER ADVOCATE,
Petitioner-Appellee,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano,
Judge.

The Iowa Utilities Board appeals from the district court's order concluding the Board erred in finding no reasonable ground existed for further investigation into an allegation of an unauthorized charge for telecommunications services.

REVERSED AND REMANDED.

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

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

Heard by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

A consumer submitted a complaint alleging a company had placed unauthorized charges on his local telephone bill. After staff of the Iowa Utilities Board issued a proposed resolution finding no cramming¹ had occurred, the Office of Consumer Advocate (OCA) filed a petition for proceeding to consider civil penalty. The Board found no reasonable ground for formal investigation of the complaint and denied the OCA's petition. On judicial review, the district court ruled the Board erred in determining there was no reasonable ground for further investigation. The district court found disputed information constituted a reasonable ground for investigating the complaint. The Board appeals the district court's ruling, which we reverse.

I. Background Facts and Proceedings

On June 9, 2009, Dan Morgan submitted a written complaint to the Iowa Utilities Board alleging Silv Communication, Inc., through a billing agent, had placed unauthorized charges on his local phone bill. In response to this complaint, Silv stated it had a third-party verification (TPV) audiotape recording of Morgan's authorization for the charges and included an electronic copy of the TPV recording with its response. Nevertheless, Silv terminated the challenged service and credited the full amount charged to Morgan's account.

Silv's response and the TPV recording were sent to Morgan, who spoke with a Board employee after listening to the recording. The employee noted that Morgan informed her, "[I]t sounds like his voice in the beginning of the record but

¹ "Cramming" refers to charging a consumer for services that were not ordered, authorized, or received. Iowa Admin. Code r. 199-22.23(1).

not in the middle and then it is his voice again at the end. The birth date is correct. He further states the recording may have been tampered with.”

The recording is part of the record on appeal. It begins with questions to the consumer, who the questioner refers to as Dan throughout the call. The consumer replies “yes” when asked whether he is at least eighteen years of age and authorized to make changes to or incur charges on the account. The questioner then asks the consumer for his official title, and the consumer responds, “I’m the owner.” Two questions follow, seeking a yes or no answer whether the consumer authorized the services he now complains were unauthorized. The consumer’s response to each of the questions is “yep.” The questioner then reads a long litany of instructions to the consumer about the method for canceling the service along with a phone number to call and an address to which the consumer can write to cancel the service. The questioner next reads back the consumer’s billing information, including the consumer’s company name, address, phone number, and local telephone company. When asked whether the billing information is correct, the consumer again responds “yep.” The questioner ends by stating that the service has been authorized and asking again for the first and last name and birthdate of the consumer, who gives the name Dan Morgan and Morgan’s correct birthdate. Morgan apparently acknowledges it is his voice at the beginning and end, but disputes that it is his voice responding “yep” to the authorization questions.

On October 14, 2009, Board staff issued a proposed decision finding no unauthorized change in service had taken place. Board staff noted Silv had

produced an authorization for service, which Morgan acknowledged included his voice, and the birthdate used to confirm the verification was correct.

On October 28, 2009, the OCA filed a petition pursuant to Iowa Code section 476.3 (2009) asking the Board to commence a proceeding to consider a civil penalty for the alleged cramming violation. The OCA noted that Morgan had stated it was not his voice in the middle portion of the recording—the portion of the recording where the charge was authorized. In support of its contention that the recording had been altered, the OCA stated that in the recording Morgan provided an affirmative answer when asked if the name of his company as listed on his phone bill was Farmers Options and Hedging. However, Morgan informed the OCA that he had changed the name of his company to Grain and Livestock Hedging in February 2004. The OCA therefore argued Morgan would not have agreed that Farmers Options and Hedging was the name of his company.

Silv responded that it had diligently complied with the Board's investigation and with all regulations governing verification of consumer authorization for a change in service. Silv argued it had authorization to make the changes to Morgan's services and characterized Morgan's allegation that the recording had been altered as "purely speculative." Silv also sent signed affidavits from its president and from the owner of the independent TPV company engaged by Silv. Each affidavit stated the company complied with state and federal regulations and faithfully and accurately recorded all TPVs of new subscribers to Silv as spoken by the subscribing party without change or amendment.

The OCA replied, arguing the factual dispute as to whether the recording had been doctored justified further investigation. The OCA asserted the fact that

Silv credited Morgan for the charge to his account was not sufficient to address the alleged cramming problem. The OCA also noted that in 2009, sixty-five consumers had filed complaints against Silv, and Silv was found to have violated regulations on forty occasions. The OCA stated these previous orders finding violations cast doubt on Silv's credibility.

On March 31, 2010, the Board issued an order denying the OCA's petition for a proceeding to consider the imposition of a civil penalty. The Board found there was no reasonable ground for formal investigation of the complaint, noting Silv had produced verification information that complied with state and federal requirements and included accurate identifying information for Morgan. The Board noted it was not persuaded by the OCA's argument regarding Morgan's change of business name as Morgan's bill from his local service provider continued in the name of his former business. The Board also found the previous orders finding Silv had violated applicable regulations were not on point as the violations were not similar to the alleged violation in this case.

The OCA filed a petition for judicial review, asserting the Board erred in: (1) failing to conduct further investigation to resolve the factual dispute; (2) failing to acknowledge that Silv's previous violations cast doubt on its credibility; and (3) erroneously relying on the fact that Silv credited Morgan's account as a reason to forego a civil penalty.

On June 30, 2011, the district court filed its ruling on the OCA's petition for judicial review. The district court did not give deference to the agency's interpretation of the applicable code provisions and found the Board had erred in interpreting the statutory standard of "any reasonable ground" in determining

when the Board must initiate a formal proceeding. The district court found the Board had overlooked disputed facts regarding whether the TPV recording had been doctored. The court found the affidavits submitted by Silv were not dispositive of whether the TPV recording had been altered, given Morgan's claim and his willingness to testify. The court ruled, "In light of the disputed information, the Board erred in concluding that there was not 'any reasonable ground' for investigating Morgan's complaint." The court also noted Silv's decision to issue a credit to Morgan "does not speak to whether any reasonable ground exists for investigating the initial billing as a violation of the cramming statute." The court found a formal hearing was necessary to permit the fact finder to gather additional information and to decide whether a violation had occurred. The Board appealed, asserting it did not commit error when it determined there was no reasonable ground for further investigation.

II. Standard of Review

Iowa Code section 17A.19(10) governs judicial review of agency decision making. We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court. The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).

Evercom Sys., Inc. v. Iowa Util. Bd., 805 N.W.2d 758,762 (Iowa 2011) (internal citations and quotation marks omitted).

We defer to the agency's interpretation of a statute when the legislature has clearly vested the agency with the authority to interpret a statute. When the legislature has clearly vested the agency with such authority, we will only reverse a decision of statutory construction which is irrational, illogical, or wholly unjustifiable. If, however, the agency has not clearly been vested

with such authority, we review questions of statutory interpretation for correction of errors at law.

Westling v. Hormel Foods Corp., ___ N.W.2d ___ (Iowa 2012) (internal citations and quotation marks omitted). In the present case, the district court was required to determine whether the Board properly interpreted the phrase “any reasonable ground” for initiating formal proceedings to consider a civil penalty under section 476.3. We believe the phrase “any reasonable ground” has an independent legal definition not limited to the specialized work of the Board and is not “uniquely within the subject matter expertise of the agency.” See *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 13–14 (Iowa 2010). Therefore, we do not give deference to the Board’s statutory interpretation of the relevant statute.

III. Analysis

Iowa Code section 476.3 details the procedures to be followed when a consumer files a complaint regarding a public utility. This section 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.” Iowa Code § 476.3. The question before us is whether the board correctly decided that the disputed information regarding the integrity of the recording did not constitute a reasonable ground to initiate a formal proceeding on the issue of whether the alleged intentional misconduct was sufficient to support a civil penalty.

The Board argues the mere suspicion of illegal activity does not constitute a reasonable ground to grant proceedings under section 476.3. The Board notes

Silv produced a TPV recording that complied with applicable state and federal regulations in which Morgan authorized the charge to his account. The Board also notes Morgan admitted it was his voice at the beginning of the recording—when the caller stated he was authorized to make changes to his telephone service—and at the end of the recording—when the caller gave his full name and birthdate for identification purposes. The Board asserts there is no logical reason for Morgan to have participated in these parts of a conversation had he not intended to change his telephone service. The Board states there was nothing in the record to support Morgan’s statement that the recording was altered.

The OCA argues the factual dispute in this case constitutes a reasonable ground for further investigation. The OCA asserts the consumer’s belief that the TPV recording was altered, by itself, constitutes a reasonable ground for further investigation. The OCA argues that the Board has made a credibility finding against the consumer and in favor of the company in a paper review, without hearing the consumer’s testimony. The OCA also asserts that Morgan’s complaint was corroborated by multiple factors including the use of his company’s former name; Silv’s history of violating federal verification requirements; the fact that Morgan’s flippant response of “yep” was “not commensurate with the seriousness of the business supposedly being conducted”; and the very fact that Morgan complained.

The Board concluded that these additional factors did not amount to “any reasonable ground” for investigating the complaint. We discern no error in this conclusion. First, Morgan had used his company’s former name on other occasions, and his local service provider still used his company’s former name,

making it possible he would have agreed to its use in this instance. Second, Silv's prior violations referenced by the OCA, although troubling, were not similar to the violation alleged in this case. All twelve of the violations on which the OCA relies involved a failure by the TPV company to follow scripting requirements.² The OCA requested the court use these prior violations in analyzing Silv's credibility, given Silv's argument that it complies with federal and state verification procedures. We cannot find these violations diminished Silv's credibility to the point where the Board is required to hold a hearing on Morgan's claim that the TPV recording had been altered. The third-party verifier's failure to follow a given script is much different than Silv itself altering the recording. Finally, we do not find that the consumer's "flippant" response or the very existence of Morgan's complaint are reasonable grounds to schedule a hearing. We are mindful that the legislature has given the Board the authority to deny a hearing when no reasonable ground exists, and the Board reasonably could have concluded that the disputed fact of authorization, under the unique circumstances of this case, fell short of the threshold for a hearing.

The Board considered the information it had gathered during the complaint stage and determined that a "he said/she said" dispute, without more, would not support an assessment of civil penalties and therefore did not provide a reasonable ground for formal proceedings. Although the authenticity of the recording was questioned, a formal hearing would not necessarily provide the

² For instance, in the most recent case, the third-party verifier stated, "We are recording this conversation for quality control and account data entry purposes" while the true purpose of the call was to obtain verification and authorization of the intent to switch carriers. In several other cases, the third-party verifier failed to convey that long distance service included international calls.

fact finder with sufficient information to determine that a cramming violation had occurred and a civil penalty should be imposed.

This result is consistent with this court's decisions in two similar but unpublished decisions, *Office of Consumer Advocate v. Iowa Utilities Board*, No. 10-0347 (Iowa Ct. App. Oct. 20, 2010) (referred to by the parties as OCA III), and *Office of Consumer Advocate v. Iowa Utilities Board*, No. 10-1363 (Iowa Ct. App. May 11, 2011) (referred to by the parties as OCA IV). In OCA III, the utility company's evasive treatment of requests for the recording and failure to provide the recording to the Board created a substantial question to be resolved at a hearing. In OCA IV, the amount and strength of information corroborating the consumer's claim that she had not authorized the change in service necessitated a formal hearing to determine whether a civil penalty was appropriate. In OCA IV, the birthdate used to verify the consumer's identity was incorrect and the consumer cast doubt on the IP address allegedly used to request the service. Also, in OCA IV the utility did not provide any record of the authorization as it did not provide the application screen the consumer allegedly used to request the service online. We believe the overarching concerns we discussed in OCA III and OCA IV regarding the need to protect the public from unauthorized charges and the Board's countervailing concerns about cost are applicable to this case; however, we do not believe the consumer's allegation that the authorizing response on the TPV recording was not his voice is sufficient to constitute a "reasonable ground" to initiate formal proceedings to consider a civil penalty.

We have found no basis to reverse the Board's decision denying the OCA's petition for proceeding to consider the imposition of a civil penalty. We

therefore reverse the decision of the district court and remand this case for entry of an order affirming the Board's decision.

REVERSED AND REMANDED.