

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1012 / 13-0294  
Filed January 9, 2014

**ROBERT F. TOBIN, M.D.,**  
Petitioner-Appellant,

**vs.**

**IOWA BOARD OF MEDICINE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, D.J. Stovall (section 17A.17 ruling) and Michael Huppert (judicial review ruling), Judges.

A physician appeals the district court's dismissal of his judicial review petition challenging the sanctions imposed by the Iowa Board of Medicine.

**AFFIRMED.**

David L. Brown and Jay D. Grimes of Hansen, McClintock & Riley, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Julie J. Bussanmas and Laura Cathelyn, Assistant Attorneys General, for appellee.

Heard by Vogel, P.J., and Mullins and McDonald, JJ.

**MULLINS, J.**

Robert Tobin, M.D., appeals the district court's dismissal of his judicial review petition, which challenged the Iowa Board of Medicine's (the Board's) imposition of sanctions for his failure to comply with a settlement agreement. Tobin claims (1) the Board's decision was "punitive and not in accord with the facts or purpose of the board," (2) substantial evidence does not support the decision because he made a "good faith effort to comply" with the settlement agreement, and (3) the Board violated his constitutional rights, particularly his rights to procedural due process and a fair trial, when the Board violated Iowa Code section 17A.17 (2011) by deliberating in the presence of Board employees who investigated his case and by permitting an assistant attorney general to represent the Board.

We conclude substantial evidence supports the Board's imposition of sanctions against Tobin. It was clear based on the evidence that Tobin had no justifiable excuse for his delayed compliance with the 2010 settlement agreement. We also conclude the particular sanction imposed in this case is not unreasonable, arbitrary, capricious, or the result of an abuse of discretion. As the Board stated, prior sanctions imposed were insufficient to ensure compliance. Finally, because there was no evidence of a procedural due process violation, we affirm the district court's thorough and well-reasoned decision in this case.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Tobin's interactions with the Board started in December 2004 when formal disciplinary charges were filed against him, alleging he engaged in professional

incompetency and practice harmful or detrimental to the public in his ophthalmology practice. In November 2005, Tobin entered into a settlement agreement with the Board in which he agreed to receive a citation and warning, paid a \$2500 civil penalty, and agreed to comply with some terms and conditions in his practice.

The Board filed disciplinary charges against Tobin again in November of 2007, alleging he violated the terms and conditions the Board had imposed in the 2005 settlement agreement. In May 2010, Tobin once again entered into a settlement agreement whereby he received a citation and warning, and agreed to (1) pay a \$10,000 civil penalty, (2) complete a neuropsychological re-evaluation, (3) remain on probation for five years, (4) complete a Board-approved ethics program and a record-keeping program, (5) complete an approved educational program, including the appointment of an educational preceptor, (6) obtain a practice monitor who was an Iowa-licensed, board-certified ophthalmologist, (7) procure a worksite monitor who could observe and supervise his practice of medicine, (8) file quarterly reports, (9) appear at least annually in front of the Board, and (10) pay the Board's monitoring fees. Each of these conditions had specific deadlines for completion.

The current matter arose in September 2011 when the Board once again filed charges against Tobin for failing to comply with the terms of the 2010 settlement agreement. Tobin was charged under Iowa Code section 148.6(2)(i)<sup>1</sup>

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<sup>1</sup> Iowa Code section 148.6 provides in part:

2. Pursuant to this section, the board may discipline a licensee who is guilty of any of the following acts or offenses:

and Iowa Administrative Code rule 653–23.1(11).<sup>2</sup> The charges specified Tobin willfully and repeatedly (1) failed to obtain an educational preceptor in a timely manner, (2) failed to complete and/or document continuing medical education and self-study, (3) failed to complete and/or document the medical knowledge learning goals, (4) failed to participate in a Board-approved practice monitoring plan, and (5) failed to participate in Board-approved worksite monitoring.

A hearing was held before the Board in February 2012. The Board issued its decision March 29, 2012, finding the preponderance of the evidence established Tobin repeatedly failed to comply with the terms and conditions of the 2010 settlement agreement and failed to comply with the deadlines he was given. The Board also found he failed to provide a satisfactory explanation for this failure to timely comply with the educational requirements or his failure to obtain a practice and worksite monitor. Because disciplinary sanctions had thus far been insufficient to secure compliance, the Board suspended Tobin’s license

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 i. Willful or repeated violation of lawful rule or regulation adopted by the board or violating a lawful order of the board, previously entered by the board in a disciplinary or licensure hearing, or violating the terms and provisions of a consent agreement or informal settlement between a licensee and the board.

<sup>2</sup> Iowa Administrative Code rule 653–23.1 provides in part,

The board has authority to impose discipline for any violation of Iowa Code chapter 147, 148, 148E, 252J, 261, or 272C or 2008 Iowa Acts, Senate File 2428, division II, or the rules promulgated thereunder. . . . The board may impose any of the disciplinary sanctions set forth in 653—subrule 25.25(1), including civil penalties in an amount not to exceed \$10,000, when the board determines that the licensee is guilty of any of the following acts or offenses:

.....  
 23.1(11) Violation of a lawful order of the board, previously entered by the board in a disciplinary or licensure hearing, or violation of the terms and provisions of a consent agreement or settlement agreement entered into between a licensee and the board.

for six months and imposed another \$10,000 civil penalty. It also continued Tobin's probation and required him to complete the previously uncompleted terms of the 2010 settlement agreement.

Tobin filed a request for rehearing and alleged a violation of Iowa Code section 17A.17. He asserted an exhibit submitted at the hearing showed employees of the Board, specifically the Board's executive director and legal director, were unlawfully part of the Board's deliberation and the attorney general's office improperly acted as the Board's representative. The Board denied the rehearing request. Tobin subsequently requested a stay of agency action in order to delay the suspension of his medical license during the pendency of the appeal. He also filed a request for reconsideration, formally filing an affidavit alleging violations of section 17A.17. He also simultaneously filed a petition for judicial review in the district court.

The Board delegated ruling on the pending motions to an administrative law judge (ALJ), who denied the motion for reconsideration because the agency no longer had jurisdiction over the matter due to the pending judicial review petition in the district court. The ALJ also denied the request for a stay, concluding the applicable Iowa law precludes the Board from granting a stay of an order suspending a license, and even if the Board had the authority, the factors to be considered in determining whether to grant a stay in section 17A.19(5) did not support a stay.

At the district court, Tobin again attempted to obtain the Board's deliberation records by asserting a violation of section 17A.17. This motion was denied by the district court. The court also denied Tobin's judicial review petition after concluding substantial evidence supports the Board's decision: "[T]he record taken as a whole establishes that it was the petitioner's own procrastination and lack of attention that resulted in his repeated failures to comply with the 2010 settlement agreement." The court also concluded the sanctions were not unreasonable, arbitrary, capricious, or the result of an abuse of discretion: "Taking into account the history and track record of the petitioner and the Board, this court is satisfied that the sanctions meted out by the Board, while significant and potentially career-ending, were proportionate and appropriate under all the circumstances presented." The court again addressed and rejected Tobin's claim of a section 17A.17 violation. The court found the evidence submitted by Tobin in support of his claim was insufficient to prove either that the staff members of the Board were investigating his case or that the assistant attorney general was acting as both a representative for and advocate before the Board during the pendency of the case.

Tobin now appeals to this court.

## **II. SCOPE AND STANDARD OF REVIEW.**

The judicial review of agency actions is governed by Iowa Code chapter 17A. *Iowa Med. Soc'y v. Iowa Bd. of Nursing*, 831 N.W.2d 826, 838 (Iowa 2013). The district court acts in an appellate capacity when it reviews an agency's decision, and we review the district court's decision to determine whether we

reach the same result as the district court after applying the review standards of section 17A.19(10). *Id.* “Because of the widely varying standards of review [in section 17A.19(10)], it is ‘essential for counsel to search for and pinpoint the precise claim of error on appeal.’” *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) (citation omitted).

Tobin claims the Board’s decision was punitive and not in accordance with the facts or purpose of the Board, specifically he claims the Board’s decision “is unreasonable, arbitrary, capricious, [and] an abuse of discretion.”<sup>3</sup> See Iowa Code § 17A.19(10)(n).

Agency action is considered arbitrary or capricious when the decision was made without regard to the law or facts. Agency action is unreasonable if the agency acted in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based on substantial evidence.

*Doe v. Iowa Bd. of Med. Exam’rs*, 733 N.W.2d 705, 707 (Iowa 2007) (internal quotation marks and citations omitted).

Tobin also asserts substantial evidence does not support the decision. This is reviewed under section 17A.19(10)(f). Substantial evidence is defined in the Iowa Code as “the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish a fact at issue when the consequences resulting from the establishment of that fact are

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<sup>3</sup> Tobin also claims the decision “exceeded the boundaries of legitimate authority” and “is not in accord with prior agency practice or precedent.” See Iowa Code § 17A.19(10)(b), (h). However, he does not cite any case or provide any argument to support these claims. We will therefore not address them. See Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed a waiver of that issue.”). The district court likewise found these arguments unsupported and did not address them in its judicial review decision.

understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1). We review the record as whole to determine whether substantial evidence supports the decision actually made, not other findings the agency could have made based on the evidence. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012).

Finally, Tobin asserts the Board violated his constitutional right to procedural due process when two employees of the Board were involved in investigating his violations and were also present during the Board’s deliberations. He further asserts a violation occurred when an assistant attorney general represented the Board and also was an advocate before the Board. Constitutional claims are reviewed de novo. *Botsko v. Davenport Civil Rights Comm’n*, 774 N.W.2d 841, 844 (Iowa 2009).

### **III. SUBSTANTIAL EVIDENCE.**

Tobin’s substantial-evidence claim centers around his contention that by the time of the February 2012 hearing many of the requirements of the 2010 settlement agreement had been met, with the exception of the practice and worksite monitors. He also asserts he made a good faith effort to find an Iowa ophthalmologist to serve as the monitor. The evidence presented established Tobin did not complete the items in the settlement agreement according to the timeline established by the Board. He had been given a number of extensions for various conditions to be met and yet failed to complete many of the items within the extended timeline.



Tobin was required to have a neuropsychological re-evaluation done by December 31, 2010. The completion of this examination was a week late. Tobin was to complete his ethics and record keeping educational courses by July 2010. When they were not completed by October 2010, the Board gave Tobin an extension until December 31, 2010. The ethics program was not completed until mid-January 2011—over six months after the initial deadline—and the record keeping program was not completed until March 2010—over eight months after the initial deadline.

Tobin was to complete a supervised education program, which included the selection of an educational preceptor. When no progress had been made on this front by October 2010, the Board gave Tobin a week to enroll with the program and gave him until December 1, 2010, to submit a signed education plan. The plan was not signed and returned to the program company until March 24, 2011, more than three months after the deadline imposed by the Board. And Tobin still did not have a preceptor.

In April, Tobin submitted Dr. Priluck's name as his preceptor. However, by June, Dr. Priluck had not commenced his duties, and it appeared he was no longer interested in serving in this capacity. The Board then gave Tobin until July 1, 2011, to submit a new name. It was not until December 2011 that Tobin submitted Dr. Parelman's name as his preceptor and January 2012 before Tobin began his education plan—this was more than twenty months after the settlement agreement had been signed.

Tobin was informed in the settlement agreement that he needed to obtain an Iowa licensed ophthalmologist to be a practice and worksite monitor. In October 2010, he submitted to the Board the name of Dr. Parelman; however, Dr. Parelman was not licensed to practice in Iowa and was therefore rejected by the Board. Three months later, Tobin submitted the name of Dr. Priluck. This name was approved by the Board in April of 2011. However, Dr. Priluck had concerns over performing this role as he did with the educational preceptor role. In June, the Board gave Tobin until July 1, 2011, to have Dr. Priluck functioning as the monitor or to submit another name if Dr. Priluck did not agree to serve. It was not until September of 2011, after closing his Iowa office, that Tobin resubmitted Dr. Parelman's name again for the worksite and practice monitor. The request for approval of Dr. Parelman as the monitor was pending at the February 2012 hearing.

Tobin focuses on Dr. Priluck's refusal to serve and the Board's delay in discussing/approving his resubmission of Dr. Parelman's name as the reasons to justify the lack of a worksite and practice monitor as of the February 2012 hearing. Because these occurrences were out of his control, he claims they cannot serve as the basis for the sanctions imposed. While it is true Tobin cannot force Dr. Priluck to serve as the monitor or control whether the Board approves a non-Iowa licensed physician to serve as a monitor, he did control when those names were submitted.

Tobin submitted Dr. Parelman's name for the first time in October 2010, five months after the agreement had been signed. He submitted the name

despite the settlement agreement being clear that the physician must be licensed in Iowa, and the name was immediately rejected. He then waited another three months to submit the name of Dr. Priluck. The evidence is clear that Dr. Priluck had a number of concerns about performing this function, and Tobin did not comply with the Board's deadline to confirm Dr. Priluck's agreement to serve or submit a different name. It was two months after the deadline before Tobin submitted another name—a name that had already been rejected by the Board almost a year earlier. When asked at the hearing for a reason to explain or justify the multitude of delays, Tobin responded, "I guess I'm a real good procrastinator, putting things off which doesn't have much to do with cognition. Laziness."

Tobin claims the Board misstated the facts when it implied in its ruling Tobin closed his Iowa office in reaction to the current charges being filed against him. We, like the district court, find no such implication in the Board's ruling. Even the Board, in response to the motion to reconsider, stated, "[T]he basis for [Tobin's] decision to close his Iowa office is irrelevant to [the Board's] decision in this matter." Tobin also takes issue with the Board's statement that he submitted his October 2011 quarterly report two months late. He notes he sent the report to his attorney, who failed to file the report on time due to moving offices. Tobin complains the Board failed to acknowledge this late submission was not his fault. The Board also responded to this issue in its ruling on the motion to reconsider: "[Tobin] and his attorney were both aware that the report was due on October 10,

2011. The Board noted that timely quarterly reports are essential to the Board's ability to monitor [Tobin's] compliance with his order."

Much of Tobin's reply brief in this case tries to analogize the administrative proceeding to a civil contempt hearing in the district court. He asserts because he did not "willfully" fail to comply with the 2010 settlement agreement, substantial evidence does not support the Board's decision. However, the Board did not base its decision to sanction Tobin on his willfulness. While willful disobedience was pleaded in the statement of charges, the final decision of the Board was based not on willfulness under section 148.6(2)(i),<sup>4</sup> but on the violation of a lawful order or the violation of the terms of a consent agreement or informal settlement agreement. Thus, whether Tobin's violations were willful or not is irrelevant to the analysis as to whether there is substantial evidence of his failure to comply.

Tobin repeatedly failed to comply with the deadlines and extensions set by the Board. His only excuse for his failure to comply was his own laziness. We agree with the district court's conclusion substantial evidence supports the agency's decision.

#### **IV. UNREASONABLE, ARBITRARY, CAPRICIOUS, AND ABUSE OF DISCRETION.**

Tobin argues the sanction is out of proportion to the infractions, especially because his violations do not pertain to patient care. He lists the costs he has

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<sup>4</sup> Iowa Code section 148.6(2)(i) permits the Board to sanction someone for "[w]illful or repeated violation of a lawful rule or regulation . . . or violating a lawful order of the board . . . or violating the terms and provision of a consent agreement or informal settlement . . . ." (Emphasis added.)

incurred in complying with the settlement agreement so far and believes suspending his license and imposing another \$10,000 civil penalty is simply punitive and unnecessary.

While the current charges of violating the settlement agreement do not directly impact patient care, the settlement agreement was based on prior charges that involved professional incompetency and engaging in practice harmful or detrimental to the public. The record on appeal indicates the initial charges involved failing to provide preoperative and postoperative examination and management plans, failing to maintain appropriate medical records, and failing to properly inform a patient about a serious complication. The settlement agreement terms and conditions were put into place to avoid repeating these problems. Tobin failed to comply with nearly all of the deadlines imposed in the settlement agreement and almost every extension the Board granted him. His only explanation for his repeated tardiness was his own laziness. This was his third time in front of the Board on charges. Prior sanctions by the Board of fines in the amount of \$2500 and \$10,000 had failed to ensure compliance with the Board's requirements.

We do not find the Board's decision—to impose the \$10,000 fine and suspend his license for six months—to have been made without regard to the law or facts. See *Doe*, 733 N.W.2d at 707. Nor do we believe the agency acted in the face of evidence as to which there was no room for difference of opinion among reasonable minds. See *id.* The sanction imposed was not unreasonable, arbitrary, capricious, or an abuse of discretion. In addition we have already

found the decision to be based on substantial evidence. *See id.* We affirm the sanctions imposed.

## V. PROCEDURAL DUE PROCESS—SECTION 17A.17.

Finally, Tobin claims his constitutional right to due process was violated when the Board permitted two employees of the Board to be involved in the deliberation of his case who had also been involved in the investigation. He also asserts an assistant attorney general represented the Board by drafting a letter on its behalf in this case and then prosecuting this case before the same Board. He claims those actions violate the separation of functions.<sup>5</sup>

Iowa Code section 17A.17(1)(b) permits a presiding officer in a contested case in front of an agency to communicate with members of the agency who have personally investigated, prosecuted, or advocated in a case under consideration, or a factually related case, so long as those persons do not

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<sup>5</sup> The Board alleges Tobin did not properly preserve error on this claim because he did not file an affidavit, as provided in section 17A.17(7), asserting a violation of separation of functions or bias. Tobin first raised this issue before the agency in his motion to reconsider, but it was not until he filed his request for a stay that he filed an affidavit in support of his section 17A.17 claim. At the time he filed this affidavit, he also filed a petition for judicial review, which the Board claims deprived the agency of its jurisdiction to address the matter.

The district court found the issue preserved because, while he did not file an affidavit with his first motion to reconsider, the agency had an opportunity to respond and addressed the specific allegation made. The motion to reconsider initially filed by Tobin after the Board's decision was filed contained the same allegations and information contained in the affidavit Tobin subsequently filed. The Board had an opportunity to and did address the allegations in responding to the motion to reconsider. We agree with the district court that this claim was preserved sufficiently for us to address. *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 647 (Iowa 2013) (“We have held a party preserves error on an issue before an agency if a party raises the issue in the agency proceeding before the agency issues a final decision and both sides have had an opportunity to address the issue.”); *Office of Consumer Advocate v. Iowa State Commerce Comm’n*, 465 N.W.2d 280, 283 (Iowa 1991) (“[A]n issue not raised in the initial pleading before the agency may be preserved for appeal if raised for the agency’s consideration in a motion for rehearing.”).

communicate to the presiding officer any ex parte communications they have received that the presiding officer would be prohibited from receiving or “furnish, augment, diminish, or modify the evidence in the record.” Similarly, section 17A.17(8) provides, in part:

An individual who participates in the making of any proposed or final decision in a contested case shall not have personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties.

Iowa Administrative Code rule 653–25.8 provides, in part:

(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

. . . .

b. Has personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties.

“Personally investigated” is defined in the administrative code as “taking affirmative steps to interview witnesses directly or to obtain documents or other information directly.” Iowa Admin. Code r. 653–25.8(2). However, the term does not include:

a. General direction and supervision of assigned investigators;

b. Unsolicited receipt of information which is relayed to assigned investigators;

c. Review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding; or

d. Exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case.

*Id.*

Tobin argues the Board violated these provisions when the Board's executive director and legal director investigated the case and also were part of the Board's deliberation. He also claims these provisions were violated when an assistant attorney general drafted a letter on behalf of the Board and then prosecuted this case before the Board. Tobin cites to *Botsko v. Davenport Civil Rights Commission*, for the proposition that it is improper for an attorney to serve as a partisan advocate and as a legal advisor to the neutral decision-maker. 774 N.W.2d at 851. He also points to the submission of an exhibit by his probation monitor, Shantel Billington, which documented her contacts with Tobin over the course of his probation along with Billington's contacts with the Board's executive director, legal director, and the assistant attorney general.

From our review of the exhibit, it is clear Billington routinely forwarded information to the legal director and the legal director forwarded information he received to Billington, including reports about Tobin's educational progress, his neuropsychological exam, and his independent medical examination. The executive director and the assistant attorney general were also involved in receiving some of this information from Billington. The exhibit also shows the assistant attorney general drafted a letter for the Board to send to Tobin following the 2010 settlement agreement outlining the deadlines and what he must do to be in compliance.

Tobin has raised this claim in the agency and twice in the district court. It has been rejected every time. The agency found neither the executive director



nor the legal director ever served as a prosecutor before the Board, neither person has any voting authority on the Board, their presence in deliberations is essential to provide institutional knowledge when requested, and there is no evidence either person inappropriately influenced the Board's decision. The Board also found there was no evidence the assistant attorney general in question acted as a Board representative once the contested case proceeding was initiated.

The district court, in response to a pre-hearing motion, agreed with the agency, finding it was Billington that personally investigated this case and frequently forwarded her findings to the executive director and legal director. The general supervision of assigned investigators does not amount to personal investigation under section 17A.17. In addition, all but one of the assistant attorney general's communications occurred before charges were filed in September 2011. The only communication after that date involved Billington sending the assistant attorney general a copy of the independent medical examination dexterity report. The district court found the receipt of this report from Billington was not a violation of section 17A.17.

The issue was raised once again at the judicial review proceeding and addressed a second time by the district court. The court found the executive and legal directors were merely copied on reports and correspondence received by Billington and Tobin failed to prove they were intimately involved in investigating such that their presence at the deliberations violated section 17A.17. It also found the one communication with the assistant attorney general after the

contested case proceeding had begun was *de minimus* as the report formed no basis for the prosecution against Tobin.

The agency and the district court thoroughly and completely evaluated and correctly resolved this issue.

**AFFIRMED.**