

IN THE COURT OF APPEALS OF IOWA

No. 3-222 / 12-1216
Filed April 24, 2013

WENDY R. SMOKER, M.D.,
Plaintiff-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Wendy Smoker, M.D., appeals from the district court ruling on judicial review affirming the disciplinary action of the Iowa Board of Medicine.

REVERSED AND REMANDED.

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

Thomas J. Miller, Attorney General, and Theresa O'Connell Weeg, Assistant Attorney General, Des Moines, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

DOYLE, P.J.

Wendy Smoker, M.D., appeals from the district court ruling on judicial review that affirmed the disciplinary action of the Iowa Board of Medicine. We reverse the decision of the district court and remand to the Board for entry of an order dismissing the disciplinary action against her.

I. Background Facts and Proceedings

Dr. Wendy Smoker is an internationally renowned physician and full professor in the field of neuroradiology. She is the recipient of numerous awards and honors for her extensive work and expertise in her field, and is praised by colleagues for her excellence in the profession and devotion to her work. As a prelude to our review of Dr. Smoker's history of alcohol dependence, we find it important to note there is no dispute her condition has never affected her medical practice.

Dr. Smoker received her undergraduate and medical education at the University of Iowa. In 1978, she was issued an Iowa medical license. In 1982, she began working as an assistant professor at the University of Iowa. In 1986, she took a position as an associate professor at the University of Utah. From 1990 to 2001, Dr. Smoker was a full professor and director of neuroradiology at the University of Virginia.

While she lived in Virginia, Dr. Smoker developed an alcohol dependency. In 2000, she self-reported to the Virginia Board of Medicine and completed a ninety-day inpatient treatment program. She was sober for one year before she had an isolated relapse in September 2001. Dr. Smoker immediately completed a six-week relapse program at the direction of the Virginia Board of Medicine.

In November 2001, Dr. Smoker moved to Iowa to begin her present position as a full professor at the University of Iowa Hospitals and Clinics (UIHC), where she is also the director of neuroradiology. Because she was on the diversion program in Virginia, the Board required her to participate in Iowa's version of the program, the Iowa Physician Health Program (IPHP). Dr. Smoker self-reported to IPHP and entered into a confidential physician health contract for alcohol dependence, which required urine analysis, a worksite monitor, and a psychiatrist.

Dr. Smoker did "very well" with her sobriety but for an isolated relapse in October 2003. She immediately completed a ninety-day treatment program. In light of her relapse, IPHP extended her contract to December 2008.¹ She successfully maintained her sobriety² and the Board released her from her contract in December 2008.³ Upon her release from IPHP, Dr. Smoker continued to attend four Alcoholics Anonymous (AA) meetings each week, had an active AA sponsor, and spoke with her life coach approximately two times each month.

¹ Prior to the relapse, the contract was set to expire in October 2006.

² Dr. Smoker registered a false-positive reading for alcohol metabolites in 2007, after which she was required to do an evaluation at Resurrection in Oak Park, Illinois. The evaluation indicated she was "maintaining her sobriety and was in recovery." The standards for metabolite readings used by the Board were subsequently changed as the result of Smoker's false-positive readings.

³ Paragraph 25 of the IPHP contract specified that if Dr. Smoker experienced a relapse or the recurrence or worsening of her condition anytime after she was released from the IPHP contract, IPHP could refer the contract and all documents related to her impairment and recovery to the Board to be maintained as part of a confidential investigative file. In addition, by signing the contract, Dr. Smoker acknowledged that although the material in the investigative file was confidential, information from those files could be incorporated into a public document in the event the Board filed a statement of charges.

In February or March 2009, one of Dr. Smoker's junior colleagues, staff professor Dr. Jack Kademian,⁴ reported to Dr. Smoker's supervisor and former workplace mentor under her IPHP contract, Dr. Joan Maley, that he had observed Dr. Smoker intoxicated at a national medical conference in Florida in February 2009.⁵ Dr. Maley informed Dr. Kademian that Dr. Smoker was "no longer under contract with the IPHP," and took no action on his report.

In September 2009, Dr. Kademian again reported to Dr. Maley that he had observed Dr. Smoker intoxicated, this time at a professional dinner following the UIHC's annual Dolan lecture hosted by the neuroradiology department.⁶ Again, Dr. Maley did not act on Dr. Kademian's report. One other physician observed Dr. Smoker consuming alcohol at the Dolan event, but did not believe she was intoxicated. The following morning, Dr. Smoker told her department chair Dr. Laurie Fajardo that she had "slipped" and she attended an AA meeting a few hours later. There are no allegations or evidence to suggest Dr. Smoker consumed alcohol after September 2009.

In October 2009, Dr. Kademian reported his observations to the Board. When questioned by IPHP coordinator Deb Anglin,⁷ Dr. Smoker admitted she had "slipped" a few times, but reported there had been no recent incidents and that she was still working on her program. She declined Anglin's recommendation that she self-report to the Board.

⁴ The evidence suggests Dr. Smoker and Dr. Kademian have a strained relationship aggravated by Dr. Smoker's unfavorable evaluations of Dr. Kademian's medical performance.

⁵ This allegation was never substantiated.

⁶ As head of the neuroradiology department, Dr. Smoker was in charge of organizing and orchestrating the entire Dolan event.

⁷ It is apparent Dr. Smoker has a strained relationship with IPHP and Deb Anglin.

In January 2010, the Board's chief investigator submitted an investigative report in response to Dr. Kademian's complaint against Dr. Smoker. The report's synopsis states, "[t]here are new reports of continued drinking" by Dr. Smoker. The report's narrative states, "Dr. Smoker has been reported to be intoxicated at two social functions and has said she will not self-report." A case history, IPHP Executive Summary, and an IPHP cover email were attached to the report. In February 2010, the Board issued an order requiring Dr. Smoker to undergo a comprehensive physical, neuropsychological, and substance abuse evaluation at Resurrection Health Care in Illinois at her expense. She complied with the order.

During the evaluation, Dr. Smoker stated she had consumed alcohol on two occasions following her release from her IPHP contract in December 2008; namely, she bought a bottle of wine and consumed two glasses of wine at home on September 12, 2009, and she consumed three or four glasses of wine at the UIHC Dolan dinner on September 14, 2009. She had no explanation for why she did it and stated it was a "stupid thing to do." She denied drinking on any other occasion after her release from IPHP. From the evaluation, Resurrection released a comprehensive assessment in April 2010.⁸ The assessment adduced Dr. Smoker suffered from alcohol dependence in partial sustained remission that required monitoring.⁹ It also recommended that she have a therapist and a workplace mentor.

⁸ In conducting its evaluation, Resurrection relied on documents provided by the Board, which it "shredded" upon completion of Dr. Smoker's assessment. Neither Anglin nor Dr. John Larson, a Resurrection psychiatrist, could recall what information was provided to Resurrection for consideration.

⁹ Monitoring was recommended "to assure that [Dr. Smoker] is abstinent from alcohol." Additionally, monitoring was recommended by the Board "because of [Dr. Smoker's] acrimonious feelings toward the Iowa PHP."

In June 2010, the Board filed a statement of charges against Dr. Smoker alleging:

Count I: Excessive use of alcohol which may impair her ability to practice medicine with reasonable skill and safety, in violation of Iowa Code sections 147.55(4), 148.6(2)(h), 272C.10(4), and 653 IAC 23.1(6).

Count II: Suffering from a physical, neuropsychological or mental condition which may impair her ability to practice medicine and surgery with reasonable skill and safety, in violation of Iowa Code sections 148.6(2)(h) and 653 IAC 23.1(8).

In January 2011, following a hearing, the Board issued a final decision on the charges against Dr. Smoker. The Board made no findings as to Count II alleging a mental condition and dismissed that charge. As to Count I alleging excessive use of alcohol, the Board found:

There is no evidence [Dr. Smoker] has consumed alcohol or been impaired while working[, but] she would become a danger to the public and her patients if she resumes actively drinking. . . . [Dr. Smoker] is an admitted and diagnosed alcoholic. . . . The preponderance of the evidence established that [Dr. Smoker] relapsed when she consumed alcohol on two occasions in September 2009. . . . The preponderance of the evidence established that [Dr. Smoker], a diagnosed alcoholic, has engaged in the excessive use of alcohol in a manner which may impair her ability to practice her profession with reasonable skill and safety This is true even though there is no evidence that [Dr. Smoker] has ever provided medical care while impaired by alcohol.

The Board cited and warned Dr. Smoker that such conduct in the future may result in further disciplinary action, fined her \$5000, and placed her on probation for five years, which included participation in a monitory program, drug screening,

substance abuse meetings, therapy, quarterly reports, Board appearances, and a monitoring fee.¹⁰

Dr. Smoker sought judicial review. In July 2012, following a hearing, the district court affirmed the Board's decision.¹¹ Dr. Smoker appeals.

II. Scope of Review

Judicial review of a contested proceeding both in the district court and the appellate courts is to correct errors at law. *Paulson v. Bd. of Med. Exam'rs*, 592 N.W.2d 677, 678 (Iowa 1999). Our review is governed by the Iowa Administrative Procedure Act. See Iowa Code § 17A.19(10) (2011). "We must determine whether the agency decision is supported by substantial evidence when reviewing the record as a whole." *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676 (Iowa 1995); see Iowa Code § 17A.19(10)(f) (2011).

III. Analysis

The Board's jurisdiction is set by Iowa Code section 147.55, which provides in relevant part: "A licensee's license to practice a profession shall be revoked or suspended, or the licensee otherwise disciplined by the board for that profession, when the licensee is guilty of . . . [h]abitual intoxication or addiction to the use of drugs." Iowa Code § 147.55(4). Further, section 148.6 explains, "The board . . . may issue an order to discipline a licensee for any of the grounds set forth in section 147.55," including an "[i]nability to practice medicine and surgery or osteopathic medicine and surgery with reasonable skill and safety by reason of . . . drunkenness . . . or as a result of a mental or physical condition." *Id.*

¹⁰ Other ramifications of these proceedings included multiple press releases issued by the Board and media coverage detailing the charges and findings against Dr. Smoker.

¹¹ The district court's affirmance spawned another press release from the Board.

§ 148.6(2)(h); see also Iowa Code § 272C.10(4) (requiring the Board to define provisions for the revocation or suspension of a license for “[h]abitual intoxication”). Pursuant to the authority granted by these provisions, the Board promulgated Iowa Administrative Code rule 653-23.1, providing for the discipline of a licensee found guilty of “substance abuse,” which is defined as “excessive use of alcohol . . . in a manner which may impair a licensee’s ability to practice the profession with reasonable skill and safety.” Iowa Admin. Code r. 653-23.1(6).

As an initial matter, Dr. Smoker contends the Board has no authority to discipline licensees where no violation of the law has occurred,¹² and claims “the excessive use of alcohol must actually exist and it must be of such an extent that it may impair a licensee’s ability to practice.” She contends in this case, “[t]he Board improperly interpreted this statute to justify disciplining for potential future violations if they believe the licensee may, potentially, utilize alcohol excessively in the future and that future use may impair the licensee’s ability to practice.”

Our supreme court has recognized that section 147.55 does not require that proof of actual injury be established. See *Paulson*, 592 N.W.2d at 681.

Indeed, in discussing the section, the court observed:

We think the [Board] proceeded in this case within the proper parameters of these jurisdictional phrases in Iowa Code section 147.55. [The Board] should not be required to wait until the habitual intoxication becomes so debilitating that there is immediate danger of harm to patients. The section should be liberally applied so as to protect the public by allowing the [Board] to interfere when harm is imminent, and before it occurs.

¹² Contrary to the Board’s contention, we find this issue was properly preserved for our review.

Burns v. Bd. of Nursing, 495 N.W.2d 698, 701 (Iowa 1993). Considering the facts and circumstances in this case, we find the Board proceeded “within the proper parameters of these jurisdictional phrases in Iowa Code section 147.55,” and “acquired jurisdiction to adjudicate the charge against [Dr. Smoker].” See *Paulson*, 592 N.W.2d at 681.

We proceed to the crux of Dr. Smoker’s appeal—that the Board’s finding her guilty of “[e]xcessive use of alcohol which may impair her ability to practice medicine with reasonable skill and safety” is not supported by substantial evidence. Because Iowa Code chapter 17A delegates fact finding to agencies, “we defer to an agency’s fact finding if supported by substantial evidence.” *Glowacki v. Bd. of Med. Exam’rs*, 516 N.W.2d 881, 884 (Iowa 1994). “The question is whether there is substantial evidence to support the finding actually made, not whether evidence might support a different finding.” *Sahu*, 537 N.W.2d at 676-77. The burden of proof is a preponderance of the evidence. *Id.* at 677. “Evidence is not substantial when a reasonable mind would find the evidence inadequate to reach the conclusion reached by the agency.” *Id.* (internal quotations omitted). “We are bound by the agency’s factual findings unless a contrary result is demanded as a matter of law.” *Id.* (internal quotations omitted).

At the outset, the parties agree there is no evidence Dr. Smoker “has consumed alcohol or been impaired while working” nor are there any reports of behavior by her “that negatively impacted patient care, her teaching responsibilities, or public safety.” However, as mentioned above, “proof of actual injury need not be established” in order for the Board to impose disciplinary

action under section 147.55. *Paulson*, 592 N.W.2d at 681; see *Burns*, 495 N.W.2d at 701. We fully observe “[o]bvious public policy considerations are implicated . . . in the crucial and exacting matter of health care,” see *Burns*, 495 N.W.2d at 700, and the Board should not have to wait until habitual intoxication becomes so debilitating that there is immediate danger of harm to patients.

Still, there must be substantial evidence supporting the finding made by the Board. Here, as the Board noted, Dr. Smoker voluntarily participated in the IPHP beginning in November 2001. Following a few isolated relapses, she was successfully discharged from the program in December 2008. The Board recognized that upon her discharge, Dr. Smoker continued to attend four AA meetings each week, had an active AA sponsor, and spoke with her life coach approximately two times each month.

The Board found Dr. Smoker “subsequently relapsed when she consumed alcohol on two occasions in September 2009”: Dr. Smoker admitted that on September 12, 2009, she purchased a bottle of wine and consumed two glasses of wine at home, and on September 14, 2009, she consumed three to four glasses of wine at a professional dinner. The Board ordered Dr. Smoker to undergo a comprehensive evaluation at Resurrection Health Care. The Resurrection report opined Dr. Smoker suffered from alcohol dependence “in partial sustained remission,” and recommended she (1) return to a monitoring program through the Board to assure she is abstinent from alcohol; (2) meet with a therapist to help her identify and alleviate sources of stress and emotional pain in her life; and (3) obtain a workplace mentor, noting “[t]he role of the mentor is

not to monitor her clinical work, about which [Resurrection] found no concerns, but to act as a coach and advocate.”

The Board found Dr. Smoker “admits she is an alcoholic and acknowledges that she is unable to safely drink alcohol on a social basis without returning to her past pattern of alcohol abuse.” As the Board noted, “It was the conclusion of the evaluators at Resurrection that with [Dr. Smoker’s] history of relapse, she would become a danger to the public and her patients if she resumes actively drinking.” The Board found the preponderance of the evidence established that Dr. Smoker relapsed when she consumed alcohol on two occasions in September 2009, and noted her consumption of alcohol at a professional dinner in particular “demonstrated extremely poor judgment as well as her inability to control the impulse to drink.”

The Board cites *Paulson* and *Burns* as support for its conclusion. In *Paulson*, 592 N.W.2d at 680-81, the supreme court reviewed the Board’s disciplinary action against Paulson, a physician. In that case, an investigation was prompted following reports raising concerns about Paulson’s medical condition. *Id.* at 678. Following an evaluation and during treatment for alcohol abuse, Paulson “agreed to a board-approved combined statement of charges and informal settlement.” *Id.* The informal settlement placed Paulson’s license on probation for five years with various conditions including continued treatment. *Id.* The settlement indicated the Board’s approval of the settlement would constitute a final order of the Board regarding a disciplinary action. *Id.* On appeal, in addition to finding Paulson’s petition for judicial review time-barred, the court observed Paulson “voluntarily entered” into the settlement, which set forth

the charges against him, and the Board properly asserted its jurisdiction even though no patient health concerns were involved. *Id.* at 680. *Paulson* is not applicable to the issue at hand.

In *Burns*, 495 N.W.2d at 701, the supreme court reviewed the Board's disciplinary action under section 147.55 against Burns, a nurse. In that case, an investigation began after Burns' supervisor and other hospital personnel noticed Burns smelled of alcohol while at work. *Id.* at 699-700. Hospital personnel also noticed she experienced increasing absenteeism from work and was seen eating lemon at work in order to hide the odor of alcohol. *Id.* As part of the investigation, the nursing director spoke to Burns by phone and noted her speech "was so slurred she could scarcely be understood." *Id.* at 700. However, "[d]irect evidence of extreme intoxication was limited to two incidents, both off duty." *Id.* Notwithstanding her previous reputation as highly competent, in light of her behavior at work, Burns was eventually demoted from her position as charge nurse. *Id.* The supreme court found substantial evidence supported the Board's finding the nurse "was habitually intoxicated when her repeated ingestion of alcohol compromised her professional capacity while on duty and thereby threatened the safety of hospital patients subject to her care." Although the court's finding in *Burns* offers guidance in the case at hand, the facts here are distinguishable.

Here, as set forth above, in reaching its decision the Board mainly relied on the Resurrection report and Dr. Smoker's admissions to drinking on two occasions in September 2009. Although assessment of the weight of the evidence is within the exclusive domain of the Board, see *id.* at 699, we find it

prudent to point out some aspects of this record that are particularly troubling to us.

At the outset, we question the propriety of the “investigation” conducted by the Board’s chief investigator in response to Dr. Kademian’s complaint against Dr. Smoker that ultimately culminated in the Board’s order that she undergo an assessment at Resurrection. Normally, the Board investigates claims brought against physicians by interviewing the accused physician, witnesses, colleagues, and the complainant in order to determine whether the allegations are founded. In this case, however, *no* interviews were conducted in regard to Dr. Kademian’s allegation. Instead, the investigative report submitted to the Board was comprised of an “executive summary” authored by Anglin, which the chief investigator stated he did not review. Moreover, on direct examination by Dr. Smoker’s attorney, the Board’s chief investigator testified:

Q. And in terms of evidence, is it fair to say, . . . that you have no evidence supporting the charges that were made against Dr. Smoker? A. Correct.

Q. She was charged with excessive use of alcohol which may impair her ability to practice medicine with reasonable skill and safety. Do you remember I asked you that question before? A. Yes.

Q. And you indicated [you] have no evidence. A. Correct.

. . .

Q. And you’re the chief investigator. A. Yes.

Q. And in terms of how this process works here, did you make any kind of recommendation to the [Board] when this report was completed? A. No.

In its decision, the Board did not acknowledge the blatantly sub-par investigation other than to observe it was the investigator’s “first case involving a licensee who had been in the IPHP.”

We also question whether the Resurrection report relied on by the Board substantiates the Board's findings. It seems our concerns regarding the strength of the report are not alone—three months after the statement of charges was filed against Dr. Smoker (in preparation for hearing), Anglin emailed Resurrection requesting “to know specifically which of the 7 criteria . . . for substance dependence applied to Wendy Smoker during her last eval.” Resurrection responded with a two-page letter that added no new information but for some notes of Dr. Smoker's recovery treatment a decade prior.

We further observe the testimony of Dr. John Larson, the evaluating psychiatrist and addiction specialist at Resurrection, does little to strengthen the Board's findings. On cross-examination of Dr. Larson, the following colloquy occurred:

Q. Would you agree with me, Dr. Larson, that you have no evidence supporting a charge that Wendy Smoker's excessive use of alcohol which may impair her ability to practice medicine with a reasonable degree of skill and safety? No evidence; right? A. No.

Q. And would you further agree with me that you have no evidence she suffers from a condition which may impair her ability to practice medicine and surgery with reasonable skill and safety; correct? A. That is currently active?

Q. That's right. A. I would say active alcoholism could potentially interfere but she does not, not present with those symptoms.

Q. And you have no evidence of any kind that would indicate she's a danger to the public. And I think you testified and told me you weren't saying that; is that right? A. That's correct.

Dr. Craig Rypma conducted an independent evaluation of Dr. Smoker that contradicted the Resurrection report. Specifically, Dr. Rypma's report opined Dr. Smoker met the criteria for alcohol dependence “in full remission” and that she did need to return to monitoring. Dr. Rypma testified to the extensive information

and documents he reviewed, in addition to his interview with Dr. Smoker, during the course of his assessment. This can be contrasted with Dr. Larson's testimony that he could not recall the documents sent by the Board for purposes of the Resurrection assessment and stated the documents were shredded immediately after the evaluation was complete. The Board's ruling dismissed Dr. Rypma's evaluation, noting the evidence from Resurrection was "more persuasive."

The question before us is not whether evidence might support a different finding, but whether there is substantial evidence to support the finding actually made by the Board. Upon our review of the record as a whole, there is no substantial evidence of Dr. Smoker's excessive use of alcohol which may impair her ability to practice medicine with reasonable skill and safety. We conclude a reasonable mind would find the facts and circumstances presented in this proceeding to be inadequate to reach the conclusion reached by the Board.

Dr. Smoker also raises constitutional challenges of due process and equal protection. In this regard, Dr. Smoker points out she sought the documents the Board provided to Resurrection for purposes of its evaluation through a motion to produce several months before trial, but it was not until four days before trial that the state produced the 1500 pages of documents that had been provided to Resurrection. Clearly, this substantially impeded Dr. Smoker's ability to cross-examine the state's witnesses at trial and potentially violated her right to due process. However, in light of our resolution of this case on other grounds, we need not reach this issue. *See Sahu*, 537 N.W.2d at 678.

We reverse the decision of the district court and remand to the Board for entry of an order dismissing the disciplinary action against Dr. Smoker.

REVERSED AND REMANDED.