

IN THE COURT OF APPEALS OF IOWA

No. 9-178 / 07-1349
Filed April 22, 2009

BERNARD ROSE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, Alan L. Pearson, Judge.

Postconviction relief applicant appeals dismissal of his complaint.

AFFIRMED.

Mark A. Milder, Waverly, for appellant.

Thomas J. Miller, Attorney General, John R. Lundquist, Assistant Attorney General, and Allan W. Vander Hart, County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Bernard Rose was convicted on November 29, 1993, of four counts of sexual abuse in the third degree, and is serving four, consecutive ten-year sentences. In an application for postconviction relief, Rose asserted the Iowa Board of Parole has never interviewed him for “parole release eligibility” and he should have “relief under the ex post facto clause.” The State moved for summary judgment arguing a postconviction relief proceeding is not the correct procedural mechanism for complaints about the interview process of the parole board.

The postconviction court sustained the State’s motion for summary judgment and dismissed Rose’s application on the grounds postconviction relief “is not the proper procedural mechanism” and “is not available to test the validity of the parole board’s administrative rules.” The court instructed the proper process is for Rose to “take an administrative appeal from the parole board’s failure to give him a parole interview.” Once Rose has exhausted “his administrative remedies, he may then seek judicial review of an adverse agency decision.”

Rose’s motion for reconsideration was denied and he appeals. Postconviction proceedings are civil actions and are generally reviewed for correction of errors at law. Iowa R. App. P. 6.4. The issue before us is whether the parole board’s action of failing to personally interview Rose can be challenged by a postconviction action under Iowa Code chapter 822 (2005).

Rose first argues the postconviction process is appropriate because the same issue was discussed and resolved in a postconviction proceeding in *Taylor v. State*, 752 N.W.2d 24, 30 (Iowa Ct. App. 2008) (finding retroactive amendment to parole review procedures allowing parole board to annually review inmate status without personal interview did not violate ex post facto clause). However, there is no indication the *Taylor* court was presented with the administrative exhaustion issue. See *Taylor*, 752 N.W.2d at 30. Parties waive a defect in the court's authority to hear the case by failing to make a timely objection. See *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 874-76 (Iowa 2007) (holding party waived claim of failure to exhaust administrative remedies). Accordingly, *Taylor* does not aid our resolution of the administrative exhaustion issue.

The parole board is a state agency governed by the Iowa Administrative Procedures Act, chapter 17A. *Frazee v. Iowa Bd. of Parole*, 248 N.W.2d 80, 82 (Iowa 1976) (holding parole revocation is agency action and chapter 17A judicial review is applicable). See Iowa Code ch. 17A. Under chapter 17A, agency action includes the failure to act, the exercise of agency discretion, or the failure to perform any agency duty. Iowa Code § 17A.2(2). Therefore, the board's alleged failure to personally interview Rose is agency action.

By its terms, the judicial review provisions of chapter 17A are “the *exclusive means* by which a person . . . adversely affected by agency action may seek judicial review of such agency action” except as expressly provided otherwise by another statute referring to chapter 17A by name. Iowa Code §

17A.19 (emphasis added). Chapter 822, governing postconviction actions, does not expressly negate the applicability of chapter 17A. *Dougherty v. State*, 323 N.W.2d 249, 250 (Iowa 1982) (upholding dismissal of postconviction action where postconviction chapter does not expressly negate applicability of chapter 17A). See Iowa Code ch. 822. Therefore, the chapter 17A judicial review procedures are Rose's exclusive means of judicial review. See *Dougherty*, 323 N.W.2d at 250 (holding chapter 17A is the exclusive means of reviewing work release revocations).

Rose is required to challenge the parole board's agency action through the board's administrative appeals process. After he has exhausted his administrative appeals, Rose may seek judicial review. See *Johnson v. Dep't of Corr.*, 635 N.W.2d 487, 489 (Iowa Ct. App. 2001) (requiring exhaustion of administrative appeals by prisoner raising constitutional challenges to parole board's denial of parole/work release); see also *Shell Oil Co. v. Blair*, 417 N.W.2d 425, 430 (Iowa 1987) (holding factual record to resolve constitutional challenges should be developed before the agency).

We have considered the additional issues raised and issues not specifically addressed are without merit. We find no error.

AFFIRMED.