IN THE COURT OF APPEALS OF IOWA

No. 3-360 / 12-1118
Filed June 12, 2013

AMJAD BUTT, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glen E. Pille, Judge.

Amjad Butt, M.D., appeals the district court's ruling on judicial review upholding the Iowa Board of Medicine's findings of unethical or unprofessional conduct in the practice of medicine. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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

Thomas J. Miller, Attorney General, and Meghan Gavin, Assistant Attorney General, for appellee.

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

DANILSON, J.

Amjad Butt, M.D., appeals the district court's ruling on judicial review upholding the Iowa Board of Medicine's findings of unethical or unprofessional conduct in the practice of medicine. We affirm the board's conclusion that Dr. Butt engaged in unethical and/or unprofessional conduct in violation of Iowa Code sections 147.55(3) and 272C.10(3) (2007) and Iowa Administrative Code rule 653-23.1(4) in that he acted unprofessionally when he made offensive and threatening statements to Portz and when he made unprofessional comments to Peska, portions of the allegations in Count I. We otherwise reverse and remand for the board to consider the propriety of the discipline imposed upon Dr. Butt in light of our conclusions.

I. Background Facts and Proceedings.

On March 7, 2008, Medical Associates in Clinton, Iowa, reported to the Iowa Board of Medicine that it had terminated the services of interventional cardiologist Dr. Amjad Butt. The board conducted an investigation, subpoenaing records from Medical Associates regarding Dr. Butt's behavior and termination. The board received complaints that Dr. Butt asked a female subordinate co-worker to enter into a romantic relationship with him and he subsequently made numerous harassing telephone calls and threatened to cause serious bodily harm to her; made inappropriate sexual comments to female coworkers on numerous occasions; made inappropriate comments to at least three patients about their sex lives; and made threatening statements to, and harassed, another female subordinate. Ultimately the board levied three charges against Dr. Butt.

On September 17, 2008, in a statement of matters asserted, the board set out these factual allegations against Dr. Butt:

> A. [Dr. Butt] asked a female subordinate co-worker to enter into a romantic relationship with him[.] [H]e subsequently made numerous harassing telephone calls and threatened to cause serious bodily harm to the female subordinate co-worker;
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> B. [Dr. Butt] allegedly made inappropriate sexual comments to female co-workers on numerous occasions;
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> C. [Dr. Butt] allegedly made inappropriate comments to at least three patients about their sex lives; and
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> D. [Dr. Butt] made threatening statements to, and harassed, another female subordinate.

The statement of charges asserted Dr. Butt had thus engaged in unethical or unprofessional conduct in the practice of medicine (in violation of Iowa Code sections 147.55(3) and 272C.10(3) and Iowa Administrative code rule 653-23.1(4)) and inappropriately engaged in a pattern of sexual harassment in the workplace (in violation of Iowa Code sections 147.55(8) and 272C.10(8) and Iowa Administrative code rules 653-23.1(4) and 653-13.7(6)).

During the board's investigation prior to filing charges, Dr. Butt wrote a letter on May 23, 2008, to the board's investigator, which reads in part:

> On February 23rd, Ms. Smith [referred to as Nurse #1 by board] was scheduled to work in the hospital, apparently as part of a second job. However, she was called that morning and told not to come to work due to a low census. As I was making rounds that day, she showed, up in the CCU and started helping me. Later, she stated that she expected to be paid for the work she did on that day. I told her that I had not called her and asked her to come into work and that she should not expect or demand payment for voluntary help. This discussion ended with an argument at the conclusion of which I told her that I could not continue working with her. Afterwards, I felt sorry that I *had threatened to fire her*, *so I called her on the phone to apologize for the argument and to tell her that I was not in a position to fire her*. *This occurred during several phone calls with her*. During these phone calls I thought

> she was attempting to threaten me, physically, so I was attempting to defuse the situation to protect myself.
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> After several phone calls, she eventually stated that she would return to work, but she did not want to continue working with me. She also told me she could not come in on Monday or Tuesday, because she was babysitting her niece. I left for a CTA course in New Jersey on February 25th. On February 27th I received a call from the Clinic advising me that a complaint had been filed. Supposedly I had been accused by Ms. Smith that I threatened to cut her carotid, that I wanted to bury her, that I wanted a baby from her and that I have done something with a patient when he/she was under sedation. Each and every one of these allegations is false.
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> . . . .
>
> Concerning the second person to whom I allegedly spoke in a derogatory and demeaning manner [referred to as Nurse #2], the only incident that this may refer to was when my nurse, Ms. Smith, told me that "'there was a rumor in the hospital that her schedule revolved around my schedule". Ms. Smith told me that a friend of hers had told her this with the implication that there was something going on between Ms. Smith and myself. I told Ms. Smith I wanted to talk to this other nurse.
>
> A meeting was set up for her to come to my office at 3:30 p.m. and when she arrived, she arrived with Michele from administration. I told Michele that this was a personal matter and I wanted to talk to the nurse alone. I spoke to this nurse and told her that saying and spreading such gossip was very dangerous. She denied that she was the source of the gossip and I told her that I accepted her denial, but please do not engage in such gossip in the future. I then spoke with Michele and explained to her that I did not want her present when I talked to the nurse, because I didn't want any disciplinary action taken against the nurse.

(Emphasis added.)

The board sent a proposed settlement agreement to Butt's counsel on November 24, 2008, calling for payment of a $10,000 fine, undergoing and complying with the recommendation of an evaluation by the Behavioral Medicine Institute (BMI), a board-approved polygraph examination, and allowing a worksite monitor. Dr. Butt did not accept the proposed settlement. However, he did voluntarily agree to submit to an evaluation and polygraph examination by BMI.

The results of Dr. Butt's evaluation and polygraph were provided in a report by BMI to the board on April 3, 2009. In this report, BMI Medical Director, Gene Able, M.D., sets out the tests administered and Dr. Butt's test results. Dr. Able reported that Dr. Butt's test profile on one test was "marginally valid because Dr. Butt attempted to place himself in an overly positive light."[1] The report suggested no psychological diagnosis.

Dr. Able reported Dr. Butt underwent a polygraph examination performed by Von Jennings of Northeast Georgia Polygraph Services and was asked the following questions, and answered as indicated: "(1) Did you threaten to kill [Smith]? Answer: No. (2) Did you ask [Smith] to have your baby? Answer: No. (3) Did you comment on the breast cleavage of a woman in her 80s? Answer: No." Dr. Able wrote, "Global analysis of the physiological data from three tests, each containing the previously listed pertinent questions, disclosed No Significant Responses. The examiner is of the opinion that Dr. Butt was truthful during testing." The report concluded, "We believe that there is a low probability that Dr. Butt had threatened to kill [Smith] or that he wanted to have a child with her."

The board filed a witness and exhibit list in December 2010. Dr. Butt objected on hearsay grounds to proposed exhibits 2-11, which included

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[1] The narrative generated for Dr. Butt's Minnesota Multiphasic Personality Inventory-2 indicates:

> This profile has marginal validity because the client attempted to place himself in an overly positive light by minimizing faults and denying psychological problems. This defensive stance is characteristic of individuals who are trying to maintain the appearance of adequacy and self-control. The client tends to deny problems and is not very introspective or insightful about his own behavior. Individuals with this level of defensiveness, as reflected in his high K score, tend to admit few psychological problems.

investigative reports, statements, and letters—he also asserted such evidence violated his rights of confrontation.

Citing *McConnell v. Iowa Department of Job Service*, 111 N.W.2d 234, 237 (Iowa 1982), and Iowa Code section 17A.14(1) (2009), an Administrative Law Judge (ALJ) ruled hearsay is admissible in administrative hearings. As for Dr. Butt's confrontation-rights claim, the ALJ noted the right to cross-examination extends to witnesses who appear at an administrative hearing or whose testimony is submitted in written form. *See* Iowa Code § 17A.14(3).

> However, if an administrative record is composed solely of hearsay evidence, a reviewing court will examine the evidence closely in light of the entire record to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by reasonably prudent persons in the conduct of their serious affairs. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W. 2d 603, 607-08 (Iowa Ct. App. 1990).
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> The fact that Exhibits 2-11 contain hearsay statements does not make them inadmissible in this proceeding. In making its fact findings, the Board will have to review all of the relevant evidence in the context of the entire record, determine the credibility of the evidence, and determine whether it constitutes the type of evidence upon which reasonably prudent persons rely in conducting their serious affairs. If it does not meet this standard, upon review of the entire record, it may not be relied on to make a fact finding. Exhibits 2-11 are all relevant to the Statement of Charges and are the types of documents typically reviewed by the Board in making its decisions.

After additional issues dealing with the availability of witnesses and continuances, the matter was heard before a panel of medical examiners on July 7, 2011. Dr. Butt again raised objection to exhibits 2-11, complaining they "are hearsay upon hearsay upon hearsay."

Board of Medicine hearing.

Eight witnesses testified, including Dr. Butt. However, Nurse #1 (Smith), the person referenced in paragraph A of the board's factual allegations, did not appear or testify at the hearing. Nurse #2 (Portz), the person referenced in paragraph D, did appear and testify.

Exhibit 6 was Smith's internal sexual harassment/sex discrimination complaint form. In her complaint she asserted that on February 23, 2008, Dr. Butt "asked if we could be in a relationship. When response was no, He got angry and stated that if we could not have that kind of relationship then we could not have a working relationship and I was fired." Where the form asks for written documentation, Smith wrote: "38 missed calls on cell phone---many messages on home and cell phone stating he was sorry." She relayed other conversations she had with Dr. Butt on Friday, February 22, Saturday the 23rd, Sunday the 24th, and Tuesday the 26th.

During the testimony of Laura Aldis, counsel for Dr. Butt objected to any testimony as to what Smith "did or didn't say" because it was hearsay. He was granted a standing hearsay objection, "but it's overruled."

Michelle Waltz, the director of human resources for Medical Associates, testified that the first time any issue of significance concerning Dr. Butt came to her attention was when float nurse Portz asked her to attend a meeting Portz had been summoned to by Dr. Butt on February 11, 2008. Portz assumed she was going to be reprimanded by Dr. Butt. Waltz testified she generally participated in meetings of physicians and nurses "as a representative or a neutral party as well

as to document any incident that had occurred." Dr. Butt did not want Waltz present and insisted she leave. This concerned Waltz because Dr. Butt stated something about "if Medical Associates is going to employ people like this that there would be a lawsuit in the future." She also stated, "he did not supervise [Portz], and she had actually never even worked with him so there—there really was no reason on a professional level that the two of them would be having a discussion together."

Waltz and her immediate supervisor, Abe Chacko, later obtained statements from Dr. Butt and Portz about the meeting. Dr. Butt reported that the meeting "was something related to the hospital and that it was resolved." Portz gave a statement by letter dated February 11, 2008, in which she wrote that Smith approached her at about noon that day and announced that Dr. Butt would like to have a meeting with her at 3:30 and said, "You've been summoned." Portz "assumed the meeting was regarding so-called rumors that [Smith] and I discussed over the weekend." Portz asked Waltz to attend the meeting with her. According to Portz, after insisting Waltz leave, Dr. Butt told Portz she was "barking" outside the clinic and he was going to "crush" her. She relayed several other statements made by Dr. Butt. She wrote that Waltz and Chacko "gave me the option to file a formal complaint that would go before the other physicians," but she decided not to because they "could not say if I would be terminated or not, due to the fact that it would be a 'he said, she said'"; Portz was a probationary employee; the community was in desperate need of a cardiologist

when Dr. Butt came; and "I believed that I would be terminated if I pursued this issue." Portz concluded her statement,

> I do, however, believe that I was threatened and harassed by Dr. Butt on Medical Associates time. I am hoping this behavior will not be tolerated from physicians in the future. I am also hoping for a long life ahead of me. If something does happen to me; I hope that Medical Associates will enlighten investigators of the preceding event that has occurred with Dr. Butt.

Waltz testified the next issue that arose concerning Dr. Butt was when Smith approached her on February 26, 2008. Smith was "very upset" and "discussed a sequence of events that had gone on the prior weekend." Waltz further described Smith's statements. Waltz provided Smith with a sexual harassment complaint form and "indicated that for us to take action further we needed her information." Waltz testified about her investigation and the management committee's actions. Waltz further testified that later on in the week she received a phone message from Smith saying she wanted everything dropped. Waltz met with Smith on February 29 and was told Smith was being contacted by others "asking her to drop it" and "she was being offered money to stop talking about anything." Waltz testified that the management committee met with Dr. Butt on March 3. After that meeting, a motion was approved to proceed with Dr. Butt's termination.

Portz testified at the hearing that during the February 11, 2008 meeting with Dr. Butt, he told her she "was never going to work as a nurse again, that he was going to crush" her. She testified further that he stated:

> He was going to file a lawsuit for defamation, of character, that I was barking outside of the clinic and spreading rumors. And then he just kind of attacked me verbally with, you know, what if I

accused you of this, would you like that. I was only allowed to answer yes or no.

. . . .

. . . He brought my mom and dad into this too.

Q. And what did he say about that? A. He asked me if I would like it if he told people that my mom was a whore and if I would like it if he told people that my dad was a dirty, filthy pig. And I'm like no, of course I wouldn't like that because it's not true.

Q. And is your mother in fact an employee at Medical Associates? A. Yes, she is.

. . . .

Q. So he would have actually even known your mother? A. Absolutely.

. . . .

Q. So how did the meeting conclude? A. It essentially concluded with him telling me that I was not allowed to speak about him and that I was going to respect him at all times and that I would never be late to a meeting again because that was unacceptable.

Dr. Butt testified before the board. He stated that he met with Portz after his nurse, Smith,

came to me that she heard from another nurse in CCU in the hospital that why there was something going on between Dr. Butt and [Smith] because his schedule revolves around [Smith].

I said [Smith], are you sure of this. She said yes. And then she said that nurse said this is nothing new, don't get alarmed. [Portz] has this habit. So I said okay. [Smith], let's sit down with [Portz] because it's a small town. I'm a middle-aged man. I'm a professional.

Here people can know in no time what's going on, and how are these ladies—they're young, we're old, so let's talk with her. So she made an appointment. She said she will come at three o'clock.

She didn't come at three o'clock. I think half an hour late she comes with Michelle [Waltz]. . . .

So I said to Michelle, if you please, I said I don't—this matter that I just want to settle it, talk to [Portz] one time, and see what actually has been said.

. . . . There's only one option. I can either let the matter go and file a complaint or I just talk with her, bury the matter so I can go on because I'm new here in this town. I'm new in the practice. I'm developing.

. . . .

Q. And in the meeting, tell me the general nature of what was discussed. A. I asked her this is what I have been told. . . .

> That my schedule revolves around [Smith's] schedule and there's something going on between me and [Smith].
>
> . . . .
>
> Q. And what was [Portz's] response to that? A. She said this is a lie. I did not say it.
>
> Q. What else did she say? A. then I said if you didn't say it, then the matter is buried, this will stay in these four walls, and I have nothing against you then personally. If you haven't said it, I believe you.

As for Smith's allegations, Dr. Butt denied them all. When asked if he had ever telephoned Smith to "patch things up," Dr. Butt stated "I did make a call." When asked how many calls, he responded, "I really don't know." He denied asking others to call Smith, though he noted the

> pizza guy has a lady whose son was very sick. When he heard that this happened, that Dr. Butt will not be here, the lady told Mr. Moe that I heard so many good things, I wanted my son to come to Dr. Butt, why is he leaving. And that might have prompted him. I never asked him to call.

Dr. Butt was asked if Dr. Rasheed was lying when he told the board that Rasheed contacted Smith once in person and twice by telephone at the request of Dr. Butt. Dr. Butt responded, "I don't know." Dr. Butt stated he talked with Dr. Rasheed, who asked him what happened concerning Smith. "I said this is what happened, so I did not ask anybody, No."

Board's findings of fact and conclusions of law.

The board issued its findings of fact and conclusions of law on August 25, 2011. The board found that Dr. Butt:

> Made offensive comments to Nurse #2 [Portz] during their meeting on February 11, 2008, and threatened to "crush" her. The testimony and contemporaneous written statement of [Portz] was more credible than Respondent's characterization of their meeting;
>
> Told Nurse #1 [Smith] that he would hunt her down and find her if she ever left him. Although [Smith] did not testify, Nurse #3

> [Naeve] did testify and she was present when Respondent made the comment to [Smith] and when he pointed out a piece of property to them on the internet. The testimony of [Naeve], as corroborated by [Smith's] written statement, was more credible than Respondent's testimony denying that he ever made this comment [Naeve][2] also credibly testified that the comment was made in a joking manner, and she took it as a joke; and
>
> Asked Employee #1 [Peska],[3] in a joking manner, if she would leave her husband and have his baby; and
>
> Made a large number of unwanted telephone calls to [Smith] on her personal cell phone and asked at least one other person to call [Smith] on his behalf in an attempt to resolve whatever disagreement they were having.

The board concluded that Dr. Butt engaged in unethical and/or unprofessional conduct in violation of Iowa Code sections 147.55(3) and 272C.10(3) and Iowa Administrative Code rule 653-23.1(4) as charged in Count I, in that he acted unprofessionally when he "made repeated unwanted telephone calls to [Smith], when he asked another physician to call [Smith] to resolve their dispute, when he made offensive and threatening statements to [Portz], and when he made unprofessional comments to [Peska]."

The board, however, was "unable to conclude" Dr. Butt threatened to kill Smith; asked Smith to have a personal relationship or have his baby; told Smith he had driven past her house during the night; offered to pay off Smith's car if

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[2] Nurse #3 (Naeve) testified at the hearing she is a nurse at Medical Associates, and worked with Dr. Butt training the nurse he hired—Smith. Naeve stated she did not have any problems with Dr. Butt, but related,

> There was just one instance I had, and it was in a joking manner, that he, you know was joking around with [Smith] and had said on the aspect of, you know, if you ever leave me, you know, I'll come find you and hunt you down.
>
> And later, you know, he had went on the Internet and had shown some properties of like trees and stuff and said there's the place.

[3] Employee #1 (Peska) testified Dr. Butt jokingly asked her to leave her husband and have his baby.

she dropped her complaint; or made inappropriate sexual comments to patients. The board did not find Dr. Butt engaged in sexual harassment as alleged in Count II.

The board cited Dr. Butt for engaging in a pattern of unethical or unprofessional conduct in the practice of medicine, and warned him that such conduct in the future may result in further disciplinary action. Among other things, Dr. Butt was ordered to pay a civil fine of $5000, complete a professional boundaries program, and was placed on five years' probation. Notice of Dr. Butt's discipline was reported to a national database.

Rehearing request.

Dr. Butt filed a request for rehearing in which he asserted Iowa Administrative Code rule 653-23.1(4) violated the Due Process Clauses of the Iowa and United States Constitutions in that it was overbroad and so vague as not to provide fair warning of what conduct is prohibited. He also complained he was not able to cross-examine Nurse #1 and there was not substantial evidence to support the findings of the board. He further objected to the board having made a report to the National Practitioner Database before the matter was final. The State resisted the motion for rehearing.

The board observed: "An issue not raised in the initial pleading before the agency may be preserved for appeal by inclusion in a motion for rehearing if the party could not have raised the issue earlier. Respondent did not raise this constitutional issue at the hearing, although he clearly had the opportunity to do so." (Footnote omitted) The board ruled that "even if the constitutional issue was

properly preserved, a reviewing Court, not the Board, must decide it." The board also rejected Dr. Butt's claim that it had improperly considered hearsay evidence and failed to properly weigh the evidence presented. Finally, it ruled that it was required to report to the NPDB within thirty days of a final decision, which it had.

Judicial review.

Dr. Butt filed a petition for judicial review in the district court. In his petition, Dr. Butt contended the board's findings were not supported by substantial evidence. He also contended that the board's findings that he acted unprofessionally were not based upon incidents included in the original charges and thus he received no notice of the allegations on which he was disciplined, which violated his right to due process. He also argued the board's decision was "not in accord with past practice and precedent and is unreasonable, arbitrary, and capricious." Finally, Dr. Butt contended administrative rule 654-23.1(4) as applied, is unconstitutionally vague.

The board argued Dr. Butt had failed to preserve three of the four issues by not raising them at the earliest possible time. The board noted that the due process claim—that the decision was based on conduct not included in the statement of charges and he thus lacked notice of the charges against him—and the claim that the decision was not in accord with past practices, were not raised in Dr. Butt's request for rehearing and therefore were not preserved for review. As for the rule 653-23.1(4) vagueness claim, though raised in his request for rehearing, the board contended the issue should have been raised prior to the contested hearing.

On June 5, 2012, the district court filed its judicial review ruling. The district court concluded there was substantial evidence to support the board's findings and Dr. Butt failed to preserve error on his vagueness, due process, and past precedent claims.

Dr. Butt now appeals, raising the same issues as he did before the district court. He also argues the board improperly accepted "volumes of improper hearsay and double hearsay" and he had a constitutional right to confront his accusers.

II. Scope and Standard 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). "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). In respect to constitutional issues, our supreme court recently stated:

> We can grant relief from administrative proceedings if the agency's action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." *Id.* § 17A.19(10)(a). The court gives the agency no deference regarding the constitutionality of the statute or administrative rule. *NextEra Energy Res. LLC v. Iowa Utils. Bd.,* 815 N.W.2d 30, 44 (Iowa 2012). Determining whether a statute or administrative rule offends the state or federal constitution is a task "entirely within the province of the judiciary." *Id.* Thus, we review agency action involving constitutional issues de novo. *Id.*

Gartner v. Iowa Dep't of Pub. Health, ___ N.W.2d ___, ___, 2013 WL 1856789 (Iowa May 3, 2013).

III. Analysis.

A. Relevant statutory provisions and rules

It was alleged Dr. Butt engaged in unethical or unprofessional conduct in the practice of medicine, in violation of Iowa Code sections 147.55(3) and 272C.10(3) and Iowa Administrative code rule 653-23.1(4), and inappropriately engaged in a pattern of sexual harassment in the workplace, in violation of Iowa Code sections 147.55(8) and 272C.10(8) and Iowa Administrative Code rules 653-23.1(4) and 653-13.7(6).

Iowa Code section 147.55 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 any of the following acts or offenses:
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> . . . .
>
> 3. Knowingly making misleading, deceptive, untrue, or fraudulent representations in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
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> . . . .
>
> 8. Willful or repeated violations of the provisions of this chapter, chapter 272C, or a board's enabling statute.

Iowa Code section 272C.10 states that the medical board "shall by rule include provisions for the revocation or suspension of a license which shall include but is not limited to" "(3) . . . engaging in unethical conduct or practice harmful or detrimental to the public" and "(8) [w]illful or repeated violations of the provisions of this chapter."

Iowa Administrative Code Rule 653-13.7 provides standards for the practice of medicine. Subparagraph (6)[4] provides, "A physician shall not engage in sexual harassment. Sexual harassment is defined as verbal or physical conduct of a sexual nature which interferes with another health care worker's performance or creates an intimidating, hostile or offensive work environment."

Finally, Iowa Administrative Code rule 653-23.1 defines various grounds for the discipline of a physician. The rule authorizes the board to discipline "for any violation of" Iowa Code chapter 147 or 272C, or the rules promulgated thereunder. Subparagraph (4) reads: "A physician shall not engage in disruptive behavior. Disruptive behavior is defined as a pattern of contentious, threatening, or intractable behavior that interferes with, or has the potential to interfere with, patient care or the effective functioning of health care staff."

B. Due process

As a preliminary matter, we conclude the record does not support Dr. Butt's claim he was denied a "fair trial before a fair tribunal" because the board considered statements made by persons who did not appear or testify.

Under the United States and Iowa Constitutions, "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Iowa Const. art. I, § 9. "Basic due process requires a fair trial in a fair tribunal." *See State v. Voelkers*, 547 N.W.2d 625, 631 (Iowa Ct. App. 1996).

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[4] Subparagraph (5) states, "A physician shall not engage in disruptive behavior. Disruptive behavior is defined as a pattern of contentious, threatening, or intractable behavior that interferes with, or has the potential to interfere with, patient care or the effective functioning of health care staff."

Evidence is admissible at hearings before the medical board in accordance Iowa Code section 17A.14(1), which provides that a "finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial." Section 17A.14(1) "conforms with the general rule that administrative agencies are not bound by technical rules of evidence, and that generally hearsay evidence is admissible at administrative hearings." *McConnell*, 327 N.W.2d at 236-37; *accord IBP Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000).

The fact finder "may base a decision upon evidence, as long as the evidence is not immaterial or irrelevant." *Clark v. Iowa Dep't of Revenue & Fin.*, 644 N.W.2d 310, 320 (Iowa 2002). The testimony and materials upon which the board based its decision here were neither immaterial nor irrelevant. Moreover, we observe that the board ruled against the allegations and charges in a number of respects. The record indicates the board seriously and fairly considered the matters before it.

Dr. Butt has provided no Iowa authority that establishes he has a "constitutional right to confront his accusers" in this administrative proceeding. The confrontation right under the United States Constitution attaches in "all criminal proceedings." U.S. Const., amend. VI. Section 10 of Article I of the Iowa Constitution similarly provides, "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right . . . to be confronted with the witnesses against him . . . ." The confrontation right

generally attaches when one's physical liberty is at stake. *See*, *e.g.*, *Otteson v. Iowa Dist. Ct.*, 443 N.W.2d 726, 728 (Iowa 1989) (rejecting claim that right of confrontation was abridged at discovery deposition because it is not a "stage of trial" and stating, "His argument that even a discovery deposition raises a right of confrontation because it is a part of the criminal prosecution is unpersuasive. It is no more a part of that process than is the grand jury, as to which the Supreme Court has held there is no right of confrontation."); *In re Delanay*, 185 N.W.2d 726, 729 (Iowa 1971) (discussing *In re application of Gault*, 387 U.S. 1, 42-57 (1967), which ruled that confrontation, self-incrimination, and cross-examination rights exist in juvenile delinquency proceedings, and noting "*Gault* is limited by its specific language to cases in which a juvenile might be committed to a state institution").

We acknowledge that *In re Ruffalo*, 390 U.S. 544, 551 (1968), the United States Supreme Court found that because attorney discipline proceedings are "quasi-criminal" in nature, an attorney is entitled *by due process* to reasonable notice of the charges against him before the proceedings commence. The Iowa Supreme Court, however, has held the confrontation right does not apply in an attorney disciplinary proceeding. *See State v. Mosher*, 103 N.W. 106, 107 (Iowa 1905) (rejecting objection to use of depositions in disbarment proceeding: "Were this a criminal action, the point might be well taken. But the proceeding is civil, and within the class designated special proceedings in the Code.").

"Procedural due process requires that before there can be a deprivation of a protected interest, there must be notice and opportunity to be heard in a

proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'" *Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 690-91 (Iowa 2002) (citation omitted). Dr. Butt has provided no authority that the confrontation right attaches in this medical board proceeding beyond the right to cross-examination set forth in Iowa Code section 17A.14 (3).

C. Substantial evidence

Dr. Butt also complains there is not substantial evidence to support the board's findings that (1) he made repeated unwanted telephone calls to Smith, (2) another doctor contacted Smith on Dr. Butt's behalf, or (3) Dr. Butt made offensive and inappropriate statements to Peska.[5]

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. "We are bound by the agency's factual findings unless a contrary result is demanded as a matter of law." *Id.* (internal quotation marks and citation omitted). We turn to address each charge.

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[5] We note that with respect to allegations concerning his conduct in relation to Portz, Dr. Butt does not challenge the sufficiency of the evidence to support the board's factual findings—only the board's conclusion that his statements were threatening or inappropriate. He argues his statements to Portz were made "during a personal dispute."

1. Repeated harassing calls. Dr. Butt was charged with making numerous harassing telephone calls. Ultimately, the Board found that he was unprofessional in making "numerous unwanted calls." Dr. Butt complains that he was never charged with making unwanted telephone calls. During arguments on appeal, it became clear that the agency views unwanted calls as a lesser-included offense to "harassing telephone calls."

In respect to the contention that "numerous" telephone calls were made, Dr. Butt wrote a letter in response to the Board's inquiry, in which he acknowledged calling Smith several times. In his letter to the board, which was introduced as exhibit 15 (and, we note, to which Dr. Butt did not object) Dr. Butt states,

> "I felt sorry that I had threatened to fire her, so I *called her on the phone to apologize for the argument and to tell her that I was not in a position to fire her*. *This occurred during several phone calls with her*. . . . *After several phone calls*, *she eventually stated that she would return* to work . . . ."

Dr. Butt's testimony at the hearing did not contradict that he made a number of calls to Smith, it was equivocal—"I really don't know. Truthfully, I don't know how many, but I did call."

We agree based upon Dr. Butt's letter and his own testimony that there is substantial evidence to support the conclusion that Dr. Butt made numerous telephone calls to Smith.

However, the board apparently concluded, and we agree, that there is not substantial evidence to support the conclusion that Dr. Butt made numerous "harassing telephone calls" to Smith as charged against him. We are also

troubled by the board's conclusion that somehow making an unwanted call is a lesser-included offense to the charge of making a harassing telephone call. Unwanted calls may not be the same as harassing calls. Logically speaking, we conclude that it is fair to say that every harassing call is unwanted; however, the obverse may not be true. For example, a telephone call from a law enforcement officer may be viewed as an unwanted call but not a harassing call. Similarly, any telephone call at home or on a personal cell phone from an employer or a superior at work may be perceived as unwanted but may not be harassing in nature. Moreover, an unwanted telephone call received at home or on a personal cell phone from an employer or superior may not be unprofessional or unethical. Without the benefit of Smith's testimony, we decline to infer the telephone calls from Dr. Butt were harassing in nature. By all indications, Dr. Butt was calling to apologize to Smith.

The hearsay evidence presented by the Board also reflects that Smith acknowledged she accepted some of Dr. Butt's calls and conversed with him. She also acknowledged that when she told him to not call again, she did not receive any other calls from Dr. Butt.

We agree with Dr. Butt that he was not charged with unprofessional or unethical acts by committing "unwanted telephone calls." Moreover, we do not subscribe to the board's theory that an unwanted call is a lesser offense to a harassing call.

We conclude there is not substantial evidence in the record to support the board's charge that Dr. Butt made numerous harassing telephone calls to Smith,

and the board's attempt to consider an unwanted telephone call as a lesser offense is not warranted under these circumstances.

2. Dr. Butt acted unprofessionally in asking another physician to contact Smith on his behalf.[6] The board found, Dr. Butt "asked at least one other person to call [Smith] on his behalf in an attempt to resolve whatever disagreement they were having." Dr. Butt argues this finding is without adequate support in the record and we agree. This allegation is completely reliant upon evidence *not* of the kind "on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs." Iowa Code § 17A.14(1). The board relied solely on hearsay statements of Smith and the report of its own investigator, which was admitted into evidence at the hearing. The report states the investigator followed up on Smith's statement that "one doctor who called her had indicated that Butt was willing to help her with her bills if she would drop her complaint." The board found the investigator "interviewed one of the physicians who allegedly called Nurse #1 [Smith] on Respondent's behalf in late March" and then, in essence, reiterated what that unnamed physician told the investigator.

We acknowledge that the Iowa Administrative Procedure Act authorizes less formal hearings and that agencies are not bound by the technical rules of evidence. *See id.*; *see also IBP Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). Nonetheless, section 17A.14(1) recognizes that evidence may be objected to, and that evidence may be "submitted in verified written form" when a hearing "will be expedited *and the interests of the parties will not be prejudiced*

[6] We would disagree with a premise that it is necessarily unprofessional to ask another to help attempt to resolve a disagreement with another employee.

substantially." (Emphasis added.) And even if evidence is submitted in written form, section 17A.14(3) provides that those witnesses "shall be subject to cross-examination by any party as necessary for a full and true disclosure of the facts."

Here, Dr. Butt was unable to question the complainant, the investigator, or the doctor who supposedly provided the investigator with corroboration of the complainant's claims. When an agency relies solely on hearsay evidence, we must examine the evidence closely in light of the entire record to see "whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by reasonably prudent persons in the conduct of their serious affairs." *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W. 2d 603, 607-08 (Iowa Ct. App. 1990). We are unwilling to conclude that the evidence relied upon here with respect to allegations and findings concerning Smith suffices to impose professional discipline.[7]

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[7] In reaching our conclusion we are mindful of the critieria to consider when faced with a substantial evidence review of an agency record composed solely of hearsay evidence noted in *Schmitz*, 461 N.W.2d at 607-08, and cited with approval in *Christiansen v. Iowa Board of Educational Examiners*, ___ N.W.2d ___, ___, 2013 WL 2278022, at *11 (Iowa May 24, 2013) (page 21). In *Schmitz* our court stated,

> If the record is composed solely of hearsay evidence, we must examine the evidence closely in light of the entire record. Again, we believe we must evaluate the quantity and quality of the evidence, *see Gifford v. Iowa Mfg. Co.*, Iowa 145, 170, 51 N.W.2d 119, 132 (1952); *see also* McCormick § 354, at 1016, to see whether it rises to necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. *See* Iowa Code § 17A.14(1) (1989). In making this evaluation, we will conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *See generally* McCormick [on Evidence] § 353, at 1013–15. None of these criteria, however, should be dispositive, and in each case these criteria must be given appropriate weight.

461 N.W.2d at 607-08.

3. Dr. Butt made offensive and inappropriate statements to Peska. The board "believed the testimony of [Peska] that [Dr. Butt] asked her, in a joking manner, to leave her husband and have his child. [Dr. Butt's] complete denial of this comment was not credible."[8] The board found the comments unprofessional and noted that Dr. Butt's comments caused Peska to become nervous.

Throughout its ruling, the board repeatedly found others' statements and testimony more credible than Dr. Butt's testimony. The credibility of witnesses is for the fact finder to determine. *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995); *see also Cedar Rapids Cmty. Sch. Dist.*, 807 N.W.2d 839, 845 (Iowa 2011). Courts are not allowed to reassess the weight of the evidence upon judicial review. *See Pease*, 807 N.W.2d at 849.

We adopt the district court reasoning when it wrote:

> With regard to Dr. Butt's assertion that any or all of the comments found by the Board to be unprofessional were merely jokes or made in jest, the Court finds nothing in the statue or rules that prohibits the Board from concluding a comment was *both* unprofessional *and* made in jest. The Court agrees with the Board that this type of comment is clearly unprofessional in a work setting, even if both parties understand it is only meant to be a joke. What may be funny to some people may be deeply offensive to others and in general sets a bad example and precedent in work setting. Further, Peska did testify she became more nervous about the

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Here, the nature of the hearsay substantially involves "he said-she said" and better evidence could have easily been obtained by procuring testimony via subpoenas. There was no substantial cost involved to procure the live testimony. There was also a need for precision as Dr. Butt's license to practice medicine was in jeopardy. We acknowledge, however, that the board is jeopardized in disciplining a physician who may commit harassment towards a nurse who later becomes a reluctant witness.

[8] We note that Naeve testified that Dr. Butt made "joking" statements to Smith that if she left him he would hunt her down and find her. We agree with the board and the district court that a statement is no less unprofessional because it is said in a joking manner.

> comments when they continued and after hearing all the allegations made by other employees.

There is substantial support for the board's findings as relating to Dr. Butt's conduct toward Peska.

D. Notice.

Dr. Butt asserts that the board violated his constitutional due process rights by basing its decision on alleged conduct not included in the statement of charges and for which no notice was provided before publication of the decision. The district court ruled, and we agree, that this issue was not properly preserved except as to the distinction we noted between "harassing" and "unwanted" telephone calls.

"Generally, our review is limited to questions considered by the agency. Even issues of constitutional magnitude may be deemed waived on appeal if not raised before the administrative tribunal." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 283 (Iowa 1991) (citations omitted). The *Consumer Advocate* court noted an exception, "an 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." *Id.* The *Consumer Advocate* court ruled that the "exception" applied because the Office of Consumer Advocate "raised its claim of procedural unfairness at the earliest possible opportunity" and the opposing parties "were given the opportunity to address the issue in response." *Id.*

Dr. Butt should have raised this issue in his request for rehearing but did not. His failure to raise the issue at the earliest opportunity left nothing for the district court and this court to review.

E. Claim that board's ruling was not in accord with its past practice.

Dr. Butt did not raise this claim in his request for rehearing and it is therefore not properly preserved for our review.[9] *See id*.

F. Constitutional challenge to Iowa Administrative Code rule 653-23.1(4).

Dr. Butt argues Iowa Administrative Code rule 653-23.1(4), "creates an open-ended, imprecise definition of 'unprofessional conduct' for application in a quasi-criminal proceeding" and it is thus "unconstitutionally vague under both the Fourteenth Amendment of the United States Constitution and Article I, section 9 of the Iowa Constitution." However, he did not raise this claim until his request for rehearing. The claim could have—and should have—been raised earlier except as it related to the interpretation that an unwanted telephone call was unprofessional or unethical. *See Wettach v. Iowa Bd. of Dental Exam'rs*, 524 N.W.2d 168, 170-71 (Iowa 1994) (rejecting similar claim concerning "dishonorable conduct" where claimant raised the issue in a motion to dismiss made during the hearing).

Dr. Butt did preserve error by his request for rehearing on the issue of whether Iowa Administrative Code rule 653-23.1(4) is unconstitutionally vague as

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[9] The district court found the matter not preserved, but rejected it on the merits nonetheless.

applied by the board's interpretation that making numerous unwanted telephone calls is unprofessional and unethical conduct. This claim could not have been raised any earlier because it pertained to the board's ultimate conclusions, not the charges.[10]

Dr. Butt's claim is that the board's application of the rule does not give a person of ordinary intelligence reasonable opportunity to know what is prohibited.

Concerning vagueness claims our supreme court has noted:

The Due Process Clause of the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. "Among other things, the Due Process Clause prohibits enforcement of vague statutes under the void-for-vagueness doctrine." *State v. Nail,* 743 N.W.2d 535, 539 (Iowa 2007). A similar prohibition has been recognized under the Iowa Due Process Clause found in article I, section 9 of the Iowa Constitution. *State v. Todd,* 468 N.W.2d 462, 465 (Iowa 1991). As our supreme court recently noted,

> There are three generally cited underpinnings of the void-for-vagueness doctrine. First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

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[10] Although we have determined that there was insufficient evidence for the board's conclusions in respect to the telephone calls, we choose to address the vagueness claim as it may affect future board proceedings.

Nail, 743 N.W.2d at 539. In assessing whether a statute is void-for-vagueness this court employs a presumption of constitutionality and will give the statute "'any reasonable'" construction to uphold it. *State v. Millsap,* 704 N.W.2d 426, 436 (Iowa 2005) (citation omitted).

Our supreme court has applied such principles to administrative interpretations. *Devault v. City of Council Bluffs*, 671 N.W. 2d 448, 451 (Iowa 2003). We conclude the board's interpretation of Iowa Administrative Code rule 653-23.1(4), prohibiting "unwanted telephone calls," is a violation of due process because, as applied, the administrative rule is vague. We suspect every physician would understand that committing a harassing telephone call would be unprofessional or unethical. However, the definition of an "unwanted telephone call" is only determined by the ears of the recipient. Moreover, there is simply no reasonable or feasible interpretation of an "unwanted telephone call" that gives fair warning that such conduct is prohibited and does not impinge on the speech protected by the First Amendment. Accordingly, the administrative rule prohibiting unprofessional and unethical conduct is unconstitutionally vague as applied by the board.

IV. Conclusion.

There is substantial evidence in the record to support the board's findings that Dr. Butt "[m]ade offensive comments to Nurse #2 [Portz] during their meeting on February 11, 2008, and threatened to 'crush' her," and that he "[a]sked Employee #1 [Peska], in a joking manner, if she would leave her husband and have his baby." We therefore affirm the board's conclusion that Dr. Butt engaged

in unethical and/or unprofessional conduct in violation of Iowa Code sections 147.55(3) and 272C.10(3) and Iowa Administrative Code rule 653-23.1(4) as charged in Count I in that he acted unprofessionally when he made offensive and threatening statements to Portz and when he made unprofessional comments to Peska. We otherwise reverse the findings and conclusions as to that count. We further remand these proceedings and direct the district court to remand these proceedings to the agency to determine the propriety of the discipline imposed in light of our conclusions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Doyle, P.J., concurs specially.

DOYLE, P.J. (concurring specially)

I concur with the majority's opinion, but I write separately to simply add a comment. The Iowa Board of Medicine filed its decision on August 25, 2011. The board asserted it was required to report adverse actions against physicians to the National Practitioner Data Bank (NPDB) within thirty days from the date an adverse licensure action is taken. Nevertheless, the board filed its adverse action report with the NPDB on September 8, 2011, only fourteen days after its decision and well before the asserted thirty-day deadline. The report was filed six days before expiration of the twenty-day time period for Dr. Butt to file an application for rehearing. *See* Iowa Code § 17A.16(2). Dr. Butt timely filed his request for a rehearing on September 14, 2011. Although I think it would have been more prudent for the board to have waited until after the time for rehearing had expired before filing its adverse action report with the NPDB, that is not the most troubling aspect of the filing.

The following question appears on the report form: "Is the Adverse Action Specified in This Report Based on the Subject's Professional Competence or Conduct, Which Adversely Affected, or Could Have Adversely Affected, the Health or Welfare of the Patient?" To this question, the board answered, "Yes." However, none of the unprofessional conduct found by the board related to Dr. Butt's care, treatment, or safety of his patients. Since the board's own findings do not support its statement to the NPDB that Dr. Butt's unprofessional conduct "adversely affected, or could have adversely affected, the health or welfare of [his patients]," the statement was unjustified—and misleading at the very best. I

would hope that in the future the board, in exercising its considerable power affecting the livelihood of medical professionals, would exercise more restraint than has been shown here.