IN THE COURT OF APPEALS OF IOWA

No. 3-847 / 13-0477
Filed January 9, 2014

MARK R. COLLISON, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

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

A doctor appeals the district court's ruling on judicial review upholding Iowa Board of Medicine's decision he knowingly made a misleading or untrue representation in the practice of a profession. **AFFIRMED.**

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

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

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

DANILSON, C.J.

Dr. Mark Collison appeals the district court's ruling on judicial review upholding the Iowa Board of Medicine's decision he knowingly made misleading, deceptive, untrue, or fraudulent representations in the practice of a profession, in violation of Iowa Code sections 147.55(3) (2009), 148.6(2)(a), and 272C.10(3), as well as Iowa Administrative Code rule 653-23.1(14). Collison maintains the Board's decision was not supported by substantial evidence in the record when viewed as a whole and was otherwise unreasonable, arbitrary, capricious or an abuse of discretion. He also contends the Board violated his right to due process. Because we find the Board did not violate Dr. Collison's right to due process and there is substantial evidence in the record when viewed as whole to support the Board's decision that Collison knowingly made a misleading and untrue statement to the Board, we affirm.

I. Background Facts and Proceedings.

Collison is a licensed physician with the Iowa Board of Medicine. He saw patient Georgette Potter for numerous years. Until 2004, Potter alternated appointments between Collison and Collison's physician's assistant (PA), Suzanne Ware. After 2004, Potter requested to only see Ware for appointments; this arrangement continued until 2009. During the period between, Collison was ultimately responsible for Ware's work.

At an appointment in February 2008, Ware referred Potter to the urology department due to a small amount of blood in Potter's urine. A CT scan revealed a small mass in Potter's small bowel, and a PET scan was recommended.

Because Potter's insurance refused to pay for the recommended scan and she elected not to have it, a small bowel study was performed instead. The report from the study indicated there were no abnormalities at that time, but Potter was instructed to follow up with Ware in May of 2008. Potter failed to do so.

Potter was seen by Ware in August 2008 and again in January 2009. Ware's examination of Potter in January revealed a large abdominal mass. Collison then admitted Potter to the hospital. The abdominal mass was later determined to be cancerous. Potter brought a malpractice suit against Collison, alleging failure to order diagnostic testing and late detection of the mass.

In April 2009, Collison's insurance company filed notice with the Board there was a pending malpractice lawsuit against Collison. As a result, the Board sent Collison an investigative inquiry in August 2009. The letter stated, in part:

> The claim alleges failure to order diagnostic tests for a questionable bowel mass. Cancer was eventually diagnosed.
>
> . . . .
>
> It is requested that not more than twenty days from the date of this letter you provide this office with a detailed, personally written narrative outlining and discussing your care of Georgette Potter. In the narrative you should provide specifics regarding the care provided and respond to the allegation of the claim. Please include ALL pertinent medical records and other documents.
>
> . . . .
>
> Thank you in advance for your cooperation. If you have any questions please do not hesitate to contact me.

Collison responded to the inquiry, stating in part:

> Please see enclosed the records as requested on the above named patient. She was never seen by me regarding this incident. She was cared for by Suzanne [Ware] PA-C. I am her supervising physician.
>
> . . . .
>
> She was seen by Ms. Ware with a respiratory infection and abdominal pain 8/21/2008. She was not seen again until she

> presented with a large abdominal mass January 2009 which proved to be malignant GIST tumor.
>
> I can't comment specifically on the allegations, as I was not involved in her care either directly or indirectly. I had not seen her for several years before this incident.

The Board did not contact Collison to correct or explain in writing, the apparent inconsistency of having no indirect care of the patient and being Ware's supervising physician. Rather, in response, Collison was sent a letter on January 12, 2011, requesting he appear before the Board. The letter explained the Board had concerns that Collison had stated he was not involved in Potter's care, "when in fact, she was being treated by Suzanne Ware, PA and you are the supervising physician for Ms. Ware."

Collison personally appeared before the Board on February 10, 2011. The Board questioned Collison regarding his initials on certain medical records and what the notation meant. Collison admitted he did not have a recollection of certain medical records, though they contained his initials, indicating he had reviewed them at some point. Some of the questioning at the meeting was by the Board's legal counsel, Kent Nebel, Board member Dr. Vista-Wayne, and an assistant attorney general. Nebel and Vista-Wayne were present during the Board's deliberations at the subsequent disciplinary hearing.

The Board filed a statement of charges against Collison on September 23, 2011, alleging he had knowingly made misleading, deceptive, untrue, or fraudulent representations in the practice of a profession pursuant to Iowa Code

sections 147.55(3),[1] 148.6(2)(a),[2] and 272C.10(3),[3] and Iowa Administrative Code rule 653–23.1(14).[4] Specifically, the Board asserted Collison "made false or misleading statements to the board when, in response to a board investigation, [he] denied he was involved in a patient's care when the medical records reveal he was." A disciplinary hearing was then held in front of the Board on January 26, 2012.

Ware testified at the hearing. She stated she had worked for Collison for ten years and that he had been her supervisor the entire time she treated Potter.

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[1] This section states, in pertinent 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.

[2] This section states, in part, "Pursuant to this section, the board may discipline a licensee who is guilty of any of the following acts or offenses: Knowingly making misleading, deceptive, untrue or fraudulent representation in the practice of the physician's profession."

[3] This section states, in pertinent part:

> A licensing board established after January 1, 1978 and pursuant to the provisions of this chapter shall by rule include provisions for the revocation or suspension of a license which shall include but is not limited to the following:
>
> . . . .
>
> (3) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the licensee's profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

[4] This section provides the grounds for discipline, which apply to physicians, and states:

> Unprofessional conduct. Engaging in unethical or unprofessional conduct includes, but is not limited to, the committing by a licensee of an act contrary to honesty, justice or good morals, whether the same is committed in the course of the licensee's practice or otherwise, and whether committed within this state or elsewhere; or a violation of the standards and principles of medical ethics or 653—13.7(147,148,272C) or 653—13.20(147,148) as interpreted by the board.

She also reviewed numerous medical records and verified Collison had initialed them, signifying he had reviewed them.

Collison also testified. He claimed he had not fully understood the role of the Board at the time he responded to the investigatory letter. He stated that when he received the letter, he did not understand the Board was looking for information regarding all care Potter received rather than denials of accusations from the malpractice suit. He also stated he never meant to mislead the Board regarding his supervisory role regarding Ware's treatment of Potter. However, Collison admitted the statements in his letter were incorrect and that he was, in fact, indirectly involved with Potter's care. He also admitted he had reviewed Potter's medical records—records from 2004 to 2009 with his initials on them—before he wrote his response to the Board, and that, regardless of his intentions, statements he made in his letter were untrue because his review of her records and his supervisory role of Ware, the treating PA, did constitute indirect care of Potter.

On April 12, 2012, the Board rendered its decision, concluding a preponderance of the evidence established Collison knowingly made misleading, deceptive, untrue, or fraudulent representations to the Board. The Board also found Collison was evasive about his involvement with the patient when he personally appeared in front of the Board in February 2011. Collison was cited by the Board for his conduct and warned "that such conduct in the future may result in further disciplinary action." He was also ordered to pay a $3000 civil penalty and to complete an ethics program.

Collison appealed the judgment to the district court, and the court affirmed the Board's decision. He appeals.

II. Standard of Review.

On appeal from judicial review, the standard we apply depends on the type of error allegedly committed. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. Iowa Code § 17A.19(10). Here, Collison raises two issues:

Collison's first claim of error is the contention that the Board's finding Collison intended to deceive it with his response to the investigative inquiry is not supported by substantial evidence in the record when the record is viewed as a whole. *See* Iowa Code § 17A.19(10)(f).

Collison also claims his constitutional right to due process was violated by the Board. "When a party raises constitutional issues in an agency proceeding, our review is de novo." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004).

III. Discussion.

1. Substantial Evidence in the Record when Viewed as a Whole.

Collison contends the Board's decision he knowingly made misleading, deceptive, untrue, or fraudulent representations in the practice of a profession is not supported by substantial evidence in the record when the record is viewed as a whole. Iowa Code § 17A.19(10)(f). "Substantial evidence" is statutorily defined as:

> [T]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1). When reviewing a finding of fact for substantial evidence in the record as a whole, we judge the finding "in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it." Iowa Code § 17A.19(10)(f)(3). "Our review of the record is 'fairly intensive,' and we do not simply rubber stamp the agency finding of fact." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (quoting *Wal–Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)). "We do not, however, engage in a scrutinizing analysis, for if we trench in the lightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality." *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 525 (Iowa 2012). "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Id*.

Collison maintains that while the record shows his response to the Board's investigative inquiry was ultimately untrue, there is not substantial evidence when viewed as a whole that he intended to deceive the Board. Rather, he maintains he misunderstood the question being asked of him by the Board. He claims he believed the Board's request that he provide a "detailed, personally written

narrative outlining and discussing [his] care of Georgette Potter" meant only care which was under scrutiny in the lawsuit.

Collison admitted to the Board, while he did not provide any of the hands-on care which was the topic of the lawsuit, he was indirectly responsible for the care Potter received as he was the supervising physician of his physician's assistant, Ware, during that period. Furthermore, as the Board recognized, Collison admitted he had personally initialed at least fourteen of the records, orders and reports relating to the patient at question and he had reviewed the patient's records before responding to the Board's investigative inquiry.

Collison argues providing the Board with the medical records that were used against him indicates he did not intend to deceive the Board. As the district court noted, "Although Collison provided the Board with medical records detailing care provided to Potter, he did not outline the care provided in those records for the Board, and denied that the records demonstrated indirect care of Potter until the administrative hearing, which was more than a year after the initial investigative inquiry was sent."

We view this situation as a matter of poor communication on behalf of both the Board and Collison. The Board could have certainly been more specific in their initial inquiry such as explaining a time period beginning when the patient was first seen until the filing of the lawsuit. The inquiry could have also explained what the Board meant by "indirect care." At the same time, Collison should have contacted the Board if he did not fully understand the inquiry. He did not give a

detailed narrative and he acknowledges his statement that he did not provide indirect care was untrue.

The Board recognized that as Ware's supervising physician, Collison was indirectly responsible for the patient's care. The statutory and administrative code provisions upon which the Board relies do not require either an intent to deceive or that someone was actually misled.[5] Rather it is sufficient if the statement is made knowingly and is untrue or misleading.[6] A misleading statement is a statement "calculated to be misunderstood." *Black's Law Dictionary* 1090 (9th ed. 2009). We think Collison's statement that he was not indirectly involved in the patient's care was technically calculated to lead the Board astray even if that was not the result.

The Board's inquiry requested a detailed narrative and "specifics" about Collison's involvement regarding the claim. Collison's response that he was neither directly or indirectly involved in the patient's care was not true and was a misleading statement whether or not the Board was misled. We also agree that Collison's statement was made knowingly as he spent time reviewing the medical records before formulating his response. We think that is enough under the statutory and administrative codes relied upon by the Board.

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[5] Moreover, Iowa Code sections 147.55(3) and 272C.10(3) specifically provide that no actual injury need be proven to constitute a violation.

[6] Iowa Code sections 147.55(3), 148.6(2)(a), and 272C.10(3), and Iowa Administrative Code 653-23.1(14) all prohibit misleading, deceptive, untrue or fraudulent statements. Statutory words and phrases are ordinarily to be construed "according to the context and the approved usage of the language." Iowa Code § 4.1. When the word "or" is used it is presumed to be disjunctive unless a contrary legislative intent appears. *Kearney v. Ahmann*, 264 N.W.2d 768, 769 (Iowa 1978).

Upon review, we find there is substantial evidence in the record when viewing the record as a whole to support the Board's determination Collison knowingly made a misleading and untrue representation to the Board.

2. Due Process.

Collison also maintains his right to due process was violated by the Board. Collison specifically named three persons who were present at his appearance or meeting before the Board: Kent Nebel, the Board's legal counsel, Dr. Vista-Wayne, a Board member, and an assistant attorney general. All three also participated in the contested case after charges were filed. Nebel was present at, and Vista-Wayne served as one of the Board members, during the Board's subsequent adjudication of Collison. The assistant attorney general advised the Board about filing charges against Collison and subsequently served in a prosecutorial role. Collison claims these individuals were "adversaries with the will to win" and their participation "fatally tainted the decision rendered by the board."

Collison admits he failed to file a section 17A.17(7) affidavit[7] with the Board. This failure precludes us from reviewing any statutory claim of agency bias on appeal. *See Fisher v. Iowa Bd. of Optometry Exam'rs*, 478 N.W.2d 609, 612 (Iowa 1994); *see also Kholeif v. Bd. of Med. Exam'rs of Iowa*, 497 N.W.2d

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[7] Iowa Code section 17A.17(7) states:

> A party to a contested case proceeding may file a timely and sufficient affidavit alleging a violation of any provision of this section. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

804, 807 (Iowa 1993) ("Moreover any challenge grounded in agency bias must be presented by written affidavit; an oral objection like the one made here is statutorily insufficient.").

We acknowledge, however, that Collison claims his due process rights were violated was based upon the Fifth and Fourteen Amendments to the United States Constitution and the Iowa Constitution Article I, Section 9, and not a statutory violation.[8]

The Board contends Collison failed to preserve this issue for review. *See Fisher*, 478 N.W.2d at 612 ("Like issues of bias, we have consistently held . . . that constitutional issues must be raised before state agencies in order to be preserved for judicial review under Iowa Code chapter 17A.") (internal citations omitted). We find the issue was preserved in respect to Nebel and the assistant attorney general because Collison raised the issue in his request for rehearing and the Board ruled on it in its response.[9] Thus, we proceed to decide Collison's claim as it pertains to Nebel and the assistant attorney general on its merits.

Collison's due process claim actually involves two separate allegations. He claims the assistant attorney general who advised the Board about filing charges against him and who later prosecuted him for those charges violated his right to due process. He similarly claims Nebel, who was present and questioned

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[8] While Collison cites article I, section 9 of the Iowa constitution, he does not argue the Iowa due process clause should be interpreted differently than the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We therefore assume the standards of due process are the same under the state and federal constitutions. *State v. Feregrino*, 756 N.W.2d 700, 703 n.1 (Iowa 2008).

[9] Collison acknowledged in oral arguments that his motion did not reference Dr. Vista-Wayne.

him at his appearance before the Board and later took part in adjudicating the matter, violated his right to due process by combining investigative and adjudicative powers.

Even if Collison's due process claim survives the failure to file a 17A.17(7) affidavit, we find the argument without merit. "A party in an administrative proceeding is entitled to procedural due process." *Botsko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841, 848 (Iowa 2009). Due process always involves a constitutional floor of a "fair trial in a fair tribunal." *Id*. "[T]he mere fact that investigative, prosecutorial, and adjudicative functions are combined within one agency does not give rise to a due process violation." *Id*. at 849. "[T]here is a consensus in the case law that even where *investigative* and *adjudicative* functions are combined in a single individual or group of individuals, there is no due process violation based *solely* upon the overlapping investigatory and adjudicatory roles of agency actors." *Id*. In fact, "[w]hen a party challenges on procedural due process grounds the combination of investigative and adjudicative processes within an agency, it must overcome a presumption of honesty and integrity in those serving as adjudicators." *Id*. at 848 (internal citations omitted).

First, we consider Collison's claim the assistant attorney general violated his right to due process by both advising the Board about filing charges against him and later prosecuting Collison for those charges.[10] "It is neither unlawful nor

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[10] We note Collison made a passing reference to a claim that Nebel was "clearly involved in one form or another in the litigation strategy utilized by the State to prosecute." He offers no evidence to support his claim. In most cases the appellant's

uncommon for the attorney general to both give advice to various administrative agencies, and thereafter prosecute actions brought by the agency." *Fisher*, 510 N.W.2d at 877. "The State's attorney is an assistant attorney general assigned to prosecute disciplinary cases before the board and exercises no authority, direction or discretion over the board's decision-making process." *Bd. of Dental Exam'rs v. Hufford*, 461 N.W.2d 194, 200 (Iowa 1990). Collison's claim involved only the general role of the assistant attorney general in the proceedings and did not name any specific actions which he believed violated his right to due process. Because the assistant attorney general is allowed to advise the Board about filing charges and later prosecute the offense, Collison's right to due process was not violated. *See Fisher*, 510 N.W.2d at 877.

Next, we consider Collison's due process claim regarding the participation of Nebel in both the investigative and adjudicative process. The mere fact that Board members actively participated in both parts of the proceedings "does not necessarily give rise to a due process violation." *See Botsko*, 774 N.W.2d at 852. "[A] party who contends that the participation of an agency staff member in investigatory and adjudicatory functions violated due process must overcome a presumption of honesty and integrity." *Id*. Nebel's involvement in both parts of the proceedings, without more, is insufficient to overcome the presumption of honesty and integrity. *See Fisher*, 510 N.W.2d at 877 (noting where the defendant argued the board's involvement at the investigatory level contaminated

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"random mention of an issue, without analysis, argument or supporting authority is insufficient to prompt an appellate court's consideration." *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994).

the proceedings and created a strong likelihood of prejudgment, the court ultimately held the facts were not sufficient "to satisfy the high burden" of overcoming the presumption of honesty and integrity). Thus, we find no violation of Collison's right to due process occurred.

Although not identified as a separate issue nor supported by authority, Collison also claims the Board's actions and decision were unreasonable, arbitrary, capricious, and an abuse of discretion. We acknowledge the Board's actions were perhaps not a model to follow in future proceedings, and severe discipline was imposed. Nonetheless, we are unable to conclude that either the Board's actions or decision were unreasonable, arbitrary or capricious. The Board and the public are entitled to expect honesty from licensed physicians and it is a statutorily imposed duty upon them. For the reasons stated, we also conclude the Board did not abuse its discretion.

IV. Conclusion.

Because Dr. Collison's right to due process was not violated and there is substantial evidence in the record when viewed as whole to support the Board's decision he knowingly made a misleading and untrue statement to the Board, we affirm.

AFFIRMED.