

September 27, 2012
FOR IMMEDIATE RELEASE

Disciplined physician denied access to Board's confidential deliberations

DES MOINES, IA – A Polk County District Court judge has denied a motion that would have forced the Iowa Board of Medicine to disclose its closed deliberations of a contested case proceeding involving a physician who was accused of violating terms of a Board order.

Robert F. Tobin, a 69-year-old Iowa-licensed physician who formerly practiced ophthalmology in Council Bluffs and Des Moines, sought the confidential records as a part of his judicial review from a Board decision, dated March 29, 2012, in which he was sanctioned for violating terms of a Board order issued May 6, 2010.

Dr. Tobin wanted to review the deliberations to support his allegations that the Board was unduly influenced by the Board's executive director, Mark Bowden, and director of legal affairs, Kent Nebel, who were present during the deliberations on February 17, 2012. Dr. Tobin alleged these staff members were unlawfully present because they had "personally investigated" the case as they had been frequently apprised about the case by a Board probation monitor who was investigating the physician's non-compliance to the 2010 order.

Dr. Tobin also alleged Theresa Weeg, an assistant Iowa Attorney General assigned to the Board, had ex parte communications, or inappropriate communications, with Board members about the case.

Judge Stovall rejected these arguments, finding that Bowden and Nebel were authorized to be present when the Board deliberated because they did not personally investigate the case and they did not pass along any improper ex parte communication with the Board. The court cited Iowa Administrative Code 653-Chapter 25 which states that to "personally investigate" a case, a person is required to take "affirmative steps to interview witnesses directly or to obtain documents or other information directly." The rule further explains that "general direction and supervision of assigned investigators" does not amount to a personal investigation.

The court said Weeg's communication with the Board was not ex parte communication because it occurred at a time when the law did not prohibit such communication.

The court, in a ruling filed September 24, concluded Dr. Tobin's claims of biased decision-making are "merely speculative" because a document relied on by Dr. Tobin "does not show any violations of his right to due process. Without evidence of any such violations, the Board must not be forced to disclose its deliberations."

The following is Judge Stovall's decision:

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ROBERT F. TOBIN, M.D.,

Petitioner,

vs.

IOWA BOARD OF MEDICINE,

Respondent.

CASE NO. CVCV009176

**RULING ON MOTION FOR ORDER
DIRECTING THE BOARD TO
PRODUCE ITS DELIBERATIONS and
MOTION TO EXPAND THE AGENCY
RECORD PURSUANT TO IOWA CODE
§ 17A.19(7)**

This matter came before the Court for a contested hearing on August 24, 2012. The petitioner was represented by Jay Grimes and David Brown, and Theresa Weeg appeared on behalf of the Iowa Board of Medicine. The Court heard the unreported arguments of counsel. Having reviewed the court file, the certified record, arguments of counsel, and the applicable law, and being otherwise fully advised of the premises, the Court now **DENIES** both the Motion for Order Directing the Board of Medicine to Produce Its Deliberations and the Motion to Expand the Agency Record Pursuant to Iowa Code § 17A.19(7).

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2011, the Iowa Board of Medicine (“the Board”) filed a Statement of Charges against the petitioner, Robert F. Tobin, M.D. (“Dr. Tobin”), alleging he willfully or repeatedly violated an order of the Board or violated the terms and provisions of a consent agreement or informal settlement in violation of Iowa Code section 148.6(2)(i) and Iowa Administrative Code rule 653-23.1(11). Hearing took place before the Board on February 17, 2012. Dr. Tobin was represented by his attorney,

David Brown. Assistant Attorney General Julie Bussanmas appeared on behalf of the state. Administrative Law Judge Margaret LaMarche conducted the hearing and prepared a proposed written decision for the Board's Review.

The Board issued its Findings of Fact, Conclusions of Law, Decision and Order on March 29, 2012, finding that a preponderance of the evidence indicated Dr. Tobin had committed the charged statutory violations. The decision imposed a \$10,000 fine and a six-month license suspension, and ordered Dr. Tobin to continue with his CPEP Educational Intervention plan. Dr. Tobin filed a motion to reconsider and a request for rehearing, which the Board denied in an order dated April 30, 2012. On May 16, 2012, Dr. Tobin filed a Petition for Judicial Review of the Board's final decision and supporting brief. He also filed a motion asking the Court to direct the Board to produce its deliberations and expand the agency record, as well as an affidavit alleging violations of Iowa Code section 17A.17.

ANALYSIS AND CONCLUSIONS OF LAW

As a preliminary matter, the Board argues Dr. Tobin's motion to expand the agency record and for an order to produce deliberations is barred because he did not file an affidavit with the Board raising his allegations of bias. Dr. Tobin bases his allegations on Iowa Code section 17A.17 (concerning ex parte communications and separation of functions in agency procedure), which states in part:

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.

Iowa Code § 17A.17(7) (2012). Dr. Tobin did not file an affidavit alleging a violation of section 17A.17 until May 16, 2012, the same day he filed his Petition for Judicial Review. However, he did raise these issues before the Board in his motion to reconsider and request for rehearing, and the Board addressed the allegations in its Order dated April 30, 2012. Because the Board had the opportunity to respond to the allegations on the record, which is presumably the primary purpose of section 17A.17(7), the Court will consider the merits of Dr. Tobin's motions.

Dr. Tobin bases his motion on State's Exhibit 16, which is a narrative written by his Board probation monitor, Shantel Billington. This narrative contains references to communications with the Board's executive director, Mark Bowden, and the Board's director of legal affairs, Kent Nebel, both of whom were present during the Board's deliberations of Dr. Tobin's case. That narrative also includes several references to Assistant Attorney General Theresa Weeg, and her communications with the Board. Dr. Tobin claims this exhibit creates a question of bias in the Board's decision-making process and therefore justifies requiring the Board to produce its deliberations. The Court does not agree for several reasons.

First, Bowden and Nebel were authorized to communicate with the Board during the contested case as long as they did not "personally investigate" the charges against Dr. Tobin and did not pass along any improper ex parte communications to the Board. Iowa Code § 17A.17 (1)(b) (2012); *see also id.* at § 17A.17(8). The Iowa Administrative Code states that one has not "personally investigated" a matter unless they have "tak[en] affirmative steps to interview witnesses directly or to obtain documents or other information directly." Iowa Admin. Code r. 653-25.8. There is no evidence in the record

to suggest Bowden and Nebel violated section 17A.17 by attending the Board's deliberations. Exhibit 16 shows probation monitor Billington personally investigated the charges against Dr. Tobin, and frequently forwarded her findings to Bowden and Nebel. "General direction and supervision of assigned investigators" does not amount to personal investigation for purposes of section 17A.17. Iowa Admin. Code r. 653-25.8(2)(a).

Secondly, the guidelines for separation of functions and ex parte communications in section 17A.17 apply only during the pendency of a contested case. Of the excerpts of Exhibit 16 which Dr. Tobin claims show violations of this section with respect to Assistant Attorney General Weeg, all but one are dated prior to September 23, 2011, the date the contested case against Dr. Tobin began.¹ There is no prohibition against an attorney advising an agency on a case in which that attorney might later be an advocate for one side, as long as there is no contested case in progress at the time.

Parties in administrative proceedings are entitled to procedural due process, which always includes "a constitutional floor of a fair trial in a fair tribunal." *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 848 (Iowa 2009) (internal quotations omitted). However, "the mere fact that investigative, prosecutorial, and adjudicative functions are combined within one agency does not give rise to a due process violation." *Id.* Also, "[t]he law is fiercely protective of the deliberative process of multi-member bodies [such as the Board] in order to promote candid and uninhibited discussion which produces the give-and-take that is the hallmark of effective collective decision-making."

¹ The only reference to AAG Weeg after the commencement of the contested case is dated October 20, 2011. It states: "Rec'd dexterity report from Dr. Kuhnlein. He found no concerns about his ability to function safely. Forwarded copy to Russell, Mark, [Theresa] Weeg, Julie, Kent, and Mary Knapp." It was not a violation of section 17A.17 for Billington to forward a copy of a medical report to AAG Weeg.

Id. at 847. The Court finds Dr. Tobin's claims of biased decision-making are merely speculative, as Exhibit 16 does not show any violations of his right to due process. Without evidence of any such violations, the Board must not be forced to disclose its deliberations.

ORDER

IT IS THEREFORE ORDERED that the Motion for Order Directing the Board to Produce Its Deliberations and Motion to Expand the Agency Record are hereby **DENIED**.

Dated this 21st day of September, 2012.

**D. J. STOVALL, JUDGE
FIFTH JUDICIAL DISTRICT**

Copy to:

David L. Brown
dlbrown@hmrlawfirm.com

Jay D. Grimes
jgrimes@hmrlawfirm.com

Theresa M. Weeg
tweeg@ag.state.ia.us

Julie J. Bussanmas
jbussan@ag.state.ia.us