

October 12, 2012
FOR IMMEDIATE RELEASE

District Court upholds Board's findings, sanctions for Council Bluffs anesthesiologist

COUNCIL BLUFFS, Iowa – A Pottawattamie County District Court judge has upheld the Iowa Board of Medicine's decision that a Council Bluffs anesthesiologist violated the standard of care in his treatment of chronic pain patients at his clinic.

The ruling by Judge Timothy O' Grady was issued September 7, but it was sealed to the public until October 9. The ruling had been sealed at the request of the physician.

The case involves Michael C. Prescher, M.D., of Omaha, Nebraska, who had practiced anesthesiology and pain management medicine in a clinic connected to Jenny Edmundson Hospital, Council Bluffs, where he had been on staff.

On December 8, 2011, the Board issued an emergency order suspending his Iowa medical license pending a hearing on charges of sexual misconduct, unethical or unprofessional misconduct, and professional incompetency. It was alleged he committed sexual misconduct, failed to obtain written informed consent before treating patients, sedating patients at his clinic without a staff member present, failing to monitor and document the patients' vital signs during these procedures, and allowing patients to drive home by themselves after their procedures.

A hearing on the charges was held January 12-13. The Board, in a decision issued March 29, concluded that Dr. Prescher engaged in unethical or unprofessional misconduct and violated the standard of care in his treatment of four female patients. The Board concluded that allegations of sexual misconduct were not supported by the preponderance of evidence presented at the hearing. His license was suspended for one year and he was ordered to pay a \$10,000 civil penalty. In addition, he was required to complete a professional boundaries evaluation and a medical records-keeping course before he could seek reinstatement of his Iowa medical license.

Dr. Prescher filed a petition for judicial review, challenging the Board's findings and sanctions.

Judge O'Grady dismissed Dr. Prescher's challenges to the Board's actions, but reversed the Board's finding on Count II (unethical or unprofessional conduct) because the Board failed to specify the manner in which it found Dr. Prescher guilty. The judge noted that the Board had

“lumped its analysis of Count II together with its analysis of Count III (professional incompetency)” and did not make a particularized finding of unethical or unprofessional misconduct. The judge affirmed the sanctions imposed by the Board.

The following is Judge O’Grady’s decision:

IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

<p>MICHAEL C. PRESCHER, M.D., Petitioner, v. THE IOWA BOARD OF MEDICINE, Respondent.</p>	<p>NO. CVCV 107353 ORDER OF COURT</p>
--	--

ON THE 9th day of October, 2012, this matter came before the Court for hearing on Respondent's Motion to Enlarge Judicial Findings and Conclusions. Petitioner, Michael C. Prescher, M.D. (Prescher) appeared by counsel, David E. Richter, John M. French, and Greg Abboud. Respondent, the Iowa Board of Medicine (the Board), appeared by counsel, Julie J. Bussanmas. Based on the pleadings filed and the arguments of counsel, the Court FINDS:

Prescher filed a Petition for Judicial Review on April 27, 2012, seeking judicial review of a decision of the Board which was dated March 29, 2012. In its March 29, 2012 decision, the Board suspended Prescher's Iowa medical license for a one year period, beginning December 8, 2011. The Board assessed a civil penalty of \$10,000. The Board set other conditions of Prescher's suspension and re-instatement. The Board generally denied Prescher's assertions, and asked for dismissal of the Petition.

Order of Court on judicial review of the proceedings before the Board was filed September 7, 2012. The Court found that the Board failed to specify the manner in which it found Prescher guilty of 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 under Count II. Instead the Board combined its analysis of Count II with its analysis of

Count III. The Board made no particularized findings of how Prescher's actions, as established in the record, were violations of the statutes and regulations cited in Count II. This Court held that the Board's conclusions of law that the allegations of Count II had been proven by a preponderance of the evidence were not supported by substantial evidence in the Record when considered as a whole. The Court ruled that Prescher had properly preserved his challenge to the Board's conclusions under Count II. Prescher argued that the decision-making process of the Board was motivated by an improper purpose, relying on an email from a member of the Board, Greg Hoversten. The Court ruled that Prescher had not carried his burden to show that Hoversten should have been disqualified.

The Board filed its Motion to Enlarge Judicial Findings and Conclusions on September 26, 2012. In its Motion, the Board asked for expanded findings on whether Prescher had properly preserved error on the issue of the Board's analysis of the elements under Count II. The Board asserted that Prescher had first raised this issue in his Reply Brief. The Board also asked for a specific ruling on whether Prescher had preserved error on disqualification of Board Member Hoversten. The Board also asked that the judicial review proceeding be unsealed, except for the administrative records that are confidential pursuant to § 272C.6(4). Prescher resisted the Board's motion to enlarge.

In the Petition for Judicial Review, Prescher asserted that the Board's findings and conclusions were not supported by substantial evidence in the record when viewed as a whole. When the elements of the charges set forth in Count II are analyzed, the Board's conclusion that Prescher committed unethical or unprofessional conduct, in violation of §§ 147.55(3) and 272C.10(3) and 653 IAC 23.1(4), is not supported by substantial evidence in the record. Prescher has preserved this issue and he has properly raised it for judicial review.

In the September 7, 2012 Order of Court, the court specifically found that "Prescher did not

ask that Hoversten disqualify himself from the proceedings before or during the hearing in January 2012 and he did not raise the issue in his Petition for Judicial Review.” The September 7, 2012 Order of Court failed to state the Conclusion of Law which should flow from the foregoing finding: Prescher did not raise the issue of Hoversten’s disqualification before the Board and he has not preserved the issue for judicial review. The statement in the September 7th Order of Court that Prescher did not carry his burden of proof on the disqualification issue was dicta.

At the time Prescher’s Application for Stay of Agency Action was ruled on, the entire Court file, including all pleadings filed, all exhibits received, and all transcripts of court proceedings, was sealed from viewing by any person except counsel for the parties, without Order of Court authorizing viewing by the specific person seeking to view the file. In general court records are considered public records. See Chapter 22, Code of Iowa. The Iowa Board of Medicine licenses and regulates medical practitioners for the benefit of the general public. See Chapters 147 and 272C, Code of Iowa. All health care boards must file written decisions which specify the sanction entered by the board with the Iowa department of public health, and those decisions shall be available to the public upon request. § 272C.3(4)(b). Complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee acting under the authority of a licensing board or its employees or agents which relates to licensee discipline are privileged and confidential. However, a final written decision and finding of fact of a licensing board in a disciplinary proceeding is a public record. § 272C.6(4). The present proceedings are not required by statute to remain confidential. See § 22.7, Code of Iowa. Public access to court records is the rule and exceptions are rare. *Judicial Branch, State Court Adm’r v. Iowa Dist. Court For Linn County*, 800 N.W.2d 569 (Iowa 2011). Given the ruling made on the petition for judicial review, the reasons to seal the record no longer exist. The

IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

<p>MICHAEL C. PRESCHER, M.D., Petitioner, v. THE IOWA BOARD OF MEDICINE, Respondent.</p>	<p>NO. CVCV 107353 ORDER OF COURT</p>
--	--

This matter is before the Court on a Petition for Judicial Review filed by Petitioner, Michael C. Prescher, M.D. (Prescher).

PROCEDURAL HISTORY

Prescher filed a timely Petition for Judicial Review on April 27, 2012. He asked for Judicial Review of Findings of Fact, Conclusions of Law, Decision and Order of the Iowa Board of Medicine (the Board), which was dated March 29, 2012. In its March 29, 2012 decision, the Board suspended Prescher's Iowa medical license for a one year period, beginning December 8, 2011. The Board assessed a civil penalty of \$10,000. The Board set other conditions of Prescher's suspension and re-instatement. Prescher timely and properly served the Petition upon Respondent. The Court has jurisdiction of the parties and of the subject matter herein.

The Board filed its Answer on May 21, 2012, generally denying Prescher's assertions, and asking for dismissal of the Petition. The Record of proceedings before the Board was transmitted on May 25, 2012. After hearing, Prescher's Application for Stay was denied and a briefing schedule was established. Brief of Michael C. Prescher, M.D. was served on July 2, 2012. Prescher also served a Supplemental Brief on July 2, 2012. Respondent's Brief & Argument on Judicial Review was served on August 1, 2012. Petitioner's Rebuttal Brief was served August 16, 2012.

STANDARDS FOR JUDICIAL REVIEW

The procedure for discipline of a person who is licensed to practice medicine is established in Chapter 148 of the Code of Iowa. An evidentiary hearing on a complaint is to be held before the Iowa Board of Medicine or a panel of at least six Board Members. § 148.7. Judicial review of the Board's action may be sought in accordance with the terms of the Iowa administrative procedure Act. § 148.7(9). The process for Judicial Review of an Agency Action is established in § 17A.19.

The Court's review of a final agency decision is not de novo. *Glowacki v. Iowa Bd. of Medical Examiners*, 516 N.W.2d 881 (Iowa 1994). Review of an agency action is limited to correction of errors at law. *Gallardo v. Firestone Tire & Rubber Co.*, 482 N.W.2d 393, 395 (Iowa 1992). The court may not consider new evidence or issues not raised during the agency hearing, including constitutional questions. § 17A.19(7); *Fisher v. Board of Optometry Examiners*, 478 N.W.2d 609 (Iowa 1991).

The Court is bound by the agency's findings of fact if they are supported by substantial evidence when the record is viewed as a whole. *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352 (Iowa 1998); § 17A.19(10)(f). The agency's findings of fact are binding if the evidence is in dispute or if reasonable minds could draw different inferences from it. *Meyer v. IBP, Inc.*, 710 N.W.2d 213 (Iowa 2006). The agency's factual findings will be upheld unless a contrary result is required as a matter of law. *Hartman v. Clarke County Homemakers*, 520 N.W.2d 323 (Iowa Ct. App. 1994). The question is whether the evidence supports the factual findings made, not whether the evidence may support a different finding. *Asmus v. Waterloo Community School Dist.*, 722 N.W.2d 653 (Iowa 2006). Substantial evidence means the 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. § 17A.19(10)(f)(1). The record is to be weighed as a whole including any determinations of veracity by the presiding Board that observed the demeanor of the witnesses along with the agency's explanation of why the relevant evidence in the record supports its material findings of fact. § 17A.19(10)(f)(3). The evidence must be viewed in the light most favorable to the nonmoving party. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388 (Iowa 2001). The burden to demonstrate the required prejudice and invalidity of the challenged agency action is on the party asserting the invalidity. § 17A.19(8)(a).

EMERGENCY ADJUDICATIVE ORDER

On December 8, 2011, the Iowa Board of Medicine issued a Statement of Charges against Prescher. The Board found that Prescher was licensed to practice medicine in Iowa. In Count I, Prescher was charged with Sexual Misconduct, in violation of § 148.6(2)(i) and 653 IAC 23.1(10), 23.1(5), and 13.7(4)(a)-(c). In Count II, Prescher was charged with Unethical or Unprofessional Conduct, in violation of §§ 147.55(3) and 272C.10(3), and 653 IAC 23.1(4). In Count III, Prescher was charged with Professional Incompetency, in violation of §§ 147.55(2), 148.6(2)(g) and (i), and 272C.10(2), and 653 IAC 23.1(2)(c), (d), (e), and (f). The Statement of Charges specifically referred to Prescher's treatment of Patient #1 at his office in February 2009 and to his treatment of Patient #2 in his office in April 2010. The Board asserted that there was probable cause to file the Statement of Charges.

Contemporaneously with the Statement of Charges, the Board issued an Emergency Adjudicative Order. The Board concluded that Prescher's continued treatment of female patients constituted an immediate danger to the public health, safety, and welfare. The Board concluded that there was a serious and immediate threat to patient health if Prescher continued to practice medicine before the Board reached final resolution of the pending charges. In the Emergency Adjudicative

Order, the Board suspended Prescher's license to practice medicine until the pending charges were resolved.

ADJUDICATION HEARING

A hearing was scheduled for January 12, 2012. Prior to hearing, the Board amended the charges against Prescher by adding allegations from three additional female patients who had been treated by Prescher. The amended charges concerning the additional patients did not allege sexual misconduct under Count I, but professional incompetency under Count III. Hearing was held on January 12 and January 13, 2012. Testimony was received from the Board's expert, Dr. Simon, Prescher's expert, Dr. Loudermilk, four of the patients who made allegations against Prescher, two Council Bluffs police officers, two criminalists with the state's forensics lab, two physicians who are both peers and patients of Prescher, three nurses who were patients of Prescher, and Dr. Prescher himself. The Board's subsequent motion to reopen the Record was denied.

The Board issued Findings of Fact, Conclusions of Law, Decision and Order on March 29, 2012. In its decision, the Board specifically found that all four Patients who testified were unconscious while receiving treatment from Prescher. The Board accepted the opinion testimony of Dr. Simon, the Board's expert and of Dr. Loudermilk, Prescher's expert. Based on the weight of the evidence presented at the hearing, the Board found that the allegations of Sexual Misconduct in Count I with regard to Patient #1 and Patient #2 were not supported by a preponderance of the evidence.

In its decision, the Board discussed Counts II and III together, stating that they are comparable. In particular, the Board focused on questions of standards of care outlined in Count III. The Board found that Prescher violated standards of care by seeing patients under sedation without a staff member present. The Board found that Prescher violated standards of care by failing to obtain

written informed consent from the patients prior to treatment. The Board found that Prescher violated standards of care by failing to monitor and document the patients' vital signs during these procedures. The Board found that Prescher violated standards of care by allowing Patients #2 and #4 to drive home by themselves after their procedures.

In explaining its decision, the Board stated: "The seriousness of this case cannot be more underscored. While the Board did not find a preponderance of the evidence to support the sexual abuse charges, the Board continues to question whether sexual abuse occurred." The Board imposed a civil penalty of \$10,000 on Prescher. The Board suspended Prescher's license to practice medicine in Iowa for one year, beginning December 8, 2011. Before applying for reinstatement, Prescher was ordered to complete an evaluation at his own expense at Behavioral Medical Institute (BMI) in Atlanta, Georgia. Prescher was ordered to release the results of the evaluation to the Board. Prescher was ordered to complete a medical record-keeping course. Prescher was taxed fees and costs.

PRESCHER'S CHALLENGES TO THE BOARD'S ACTIONS

Prescher asserts several challenges to the Board's actions. He notes that the allegations of Sexual Misconduct under Count I were not supported by even a preponderance of the evidence. Prescher argued that the Board continued to question whether sexual misconduct had occurred, even without sufficient evidence. Prescher argued that the Board's conclusion that the patients were unconscious during his procedures is contrary to the medical evidence presented to the Board and the conclusion is not supported by substantial evidence. He asserted that the substance used with the patients at the dosages used could not cause unconsciousness in the patients. Prescher argued that the sanctions imposed by the Board are disproportionate to its actual findings. Prescher argued that the Board's reliance on the opinions of Dr. Simon was erroneous because of his inexperience in the

use of IV Lidocaine and because of a financial conflict of interest. Prescher argued that the Board committed error by analyzing Counts II and III together and characterizing them as comparable, when the standards for each charge are different.

Prescher asserted that the findings of fact, conclusions of law, and sanctions imposed by the Board were not supported by substantial evidence in the record when it is viewed as a whole, contrary to § 17A.19(10)(f). Prescher argued that the decision-making process of the Board was motivated by an improper purpose, contrary to § 17A.19(10)(e). Prescher asserted that the Board improperly delegated some of its statutory authority to BMI, a private entity, in contravention of § 17A.19(10)(b). Prescher claimed that the steps taken by the Board are the product of reasoning that is so illogical as to render it wholly irrational, contrary to § 17A.19(10)(i). Prescher argued that the Board's actions are not required by law and have such a negative impact on him so as to be grossly disproportionate to the public interest that it lacks foundation in rational policy, in contravention of § 17A.19(10)(k). Prescher asserted that the Board's actions are unreasonable, arbitrary, capricious, and an abuse of discretion contrary to § 17A.19(10)(n). For relief from these illegal actions of the Board, Prescher asked that his license to practice medicine be immediately reinstated, that the requirement of an evaluation at BMI be rescinded, and that he be allowed to proceed with his practice after completion of any other sanctions imposed in the March 29, 2012 decision.

THE BOARD'S RESISTANCE

The Board noted that Judicial Review is not de novo review, but is a review for properly preserved errors of law. The Board argued that Prescher had not carried his burden to demonstrate the invalidity of the Board's action. The Board argued that the conclusion that the patients were unconscious during their treatment is supported by substantial evidence in the record. The Board argued that its conclusion that Prescher violated standards of care is supported by substantial

evidence in the record. The Board argued that the weight to be assigned Dr. Simon's testimony and the testimony of any other fact witness or expert witness is for the Board to decide. The Board asserted that its conclusion that Prescher's conduct constituted professional incompetency is supported by substantial evidence in the record. The Board asserted that it has authority to order Prescher's evaluation at BMI pursuant to § 272C.9(1). The Board asked that its final decision be affirmed because it was just, reasonable, and necessary to protect the public.

BOARD'S ROLE IN WEIGHING EVIDENCE

The Board has the duty, as the trier of fact, to determine the credibility of witnesses, to weigh the evidence, and to decide the facts in issue. *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455 (Iowa 1969). Weighing evidence and assessing the credibility of witnesses is a matter for the Board, and the Board's findings have the effect of a jury verdict. *IBP, Inc. v. Harpole*, 621 N.W.2d 410 (Iowa 2001). Likewise, the weight to be given to any expert opinion is determined by the Board. *Keystone Group v. Davis*, 771 N.W.2d 653 (Table) (Iowa App. 2009). The expert opinion may be accepted or rejected, in whole or in part. *Burns v. Board of Nursing*, 495 N.W.2d 698 (Iowa 1993). The weight to be given to an expert opinion by the Board depends on the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. *Bodish v. Fisher, Inc.*, 133 N.W.2d 867 (Iowa 1965).

DR. SIMON'S TESTIMONY

Prescher challenged the testimony of Dr. Simon, arguing that Simon was biased because of a financial conflict of interest. Prescher argued that Simon is an anesthesiologist practicing in pain management in Des Moines and he is an anesthesiologist practicing in pain management in Council Bluffs. Prescher asserted that he and Simon compete in the same market for patients, particularly in the smaller towns and rural areas between the two cities. Prescher argued that it was error for the

Board to retain or rely on an expert witness with a financial interest in the outcome of the case.

Prescher claims that Simon has a conflict of interest. However, he presented no evidence to support his assertion that Des Moines and Council Bluffs constitute the same market or that he and Simon compete for the same patients. Prescher presented no evidence to support his assertion that Simon had a financial interest in the outcome of the case against him. Prescher did not raise Simon's potential conflict of interest before the Board. The facts supporting Prescher's claim of Simon's conflict of interest were known to him at the time of the hearing. Because Prescher did not raise Simon's potential conflict before the Board, Prescher has not preserved error for judicial review.

Prescher argued that the Board should not have relied on Simon's opinions because he does not use IV Lidocaine in his treatment practices. Prescher argued that when Simon's unqualified opinions are removed from considerations, there is insufficient medical evidence in the record to support the Board's conclusions about the standards of care and whether or not Prescher had met those standards of care.

Prescher's arguments on this issue must fail. The scope of an area of expertise for a witness is not defined as narrowly as Prescher argues. As Prescher noted in his argument on Simon's financial conflict of interest, he and Simon are both anesthesiologists who practice in the area of pain management. Simon's opinions were not limited to Versed based pain management, but were instead were directed to the type of pain management treatment provided by Prescher. Simon's opinions about having a staff member present during certain types of procedures, using informed consents, and monitoring and documenting vital signs during a procedure were offered regarding IV Lidocaine treatment. Simon's lack of experience with IV Lidocaine use in pain management was brought out by Prescher on cross-examination and it was a factor for the Board to weigh. Prescher's

criticisms of Simon's opinions go to the weight to be given his opinions and not their admissibility. Prescher's objections to the admission of and use of Simon's opinion testimony are unsound. The Board did not find a breach of standard of practice regarding each of Simon's criticisms of the cases, such as his criticism of Patient #1's rectal exam, showing that the Board did weigh his opinions.

BREACH OF STANDARD OF CARE

The Board concluded that Prescher had breached the applicable standards of care in four areas. Both Dr. Simon and Dr. Loudermilk testified that failure to have a chaperone or staff member present while a patient is receiving treatment during which they are unconscious is a breach of standards of practice. (Simon at p. 1179; Loudermilk at p. 1438). Both Simon and Loudermilk testified that failure to obtain written consent to treatment from a patient when rendering treatment that produce unconsciousness is a breach of standards of practice. (Simon at p. 1178; Loudermilk at p. 1440). Both Simon and Loudermilk testified that failure to monitor and document vital signs of a patient who is undergoing a treatment while unconscious is a breach of standards of practice. (Simon at p. 1182; Loudermilk at p. 1440-41). Simon testified that allowing a patient to drive home after undergoing a treatment during which the patient was unconscious is a breach of standards of practice. (Simon at p. 1199). There was substantial evidence presented to the Board from expert witnesses that Prescher violated standards of practice in the foregoing respects.

Underlying the expert witness opinions on these issues was the assumption that the patients were unconscious during treatment in Prescher's office. Loudermilk did have some concerns with Prescher's care, which he characterized as "not related to medical care." However, Loudermilk acknowledged that if a patient was unconscious during the treatment provided by Prescher, his methods breach standards of practice in those four areas.

WERE THE PATIENTS UNCONSCIOUS DURING TREATMENT?

Prescher asserts that the Board's conclusion on this issue is not supported by substantial evidence in the Record. Patient #1 testified that she fell "asleep" during the procedure. (Pages 1299, 1303). She testified that she had no memory of the events during the treatment, including a rectal examination that was performed by Prescher. Patient #2 testified that she was lying on an exam table when Prescher started her IV, and "that's all I remember until I woke up." (Pages 1355, 1357.) Patient #3 testified that she was unconscious for an hour and that she has no memory of events during that time. (Pages 1393-94). Patient #4 testified that she was "out" for an hour after receiving the IV from Prescher. (Pages 1402-03). The evidence was not opinion testimony from the witnesses, but was testimony about their perceptions.

Dr. Prescher testified that he uses IV Lidocaine in his pain management practice, which takes place in his office instead of the hospital setting. Lidocaine is not a controlled substance, so it can be used in the office setting. Prescher uses Lidocaine to treat pain symptoms, and a side benefit is that it reduces anxiety in the patient during the procedure. Prescher testified that patients do not become unconscious from his use of Lidocaine, because that would be "impossible." Prescher compared the effects of Lidocaine to drowsing off on a Sunday afternoon, but testified that a patient will not become unconscious from the Lidocaine. Prescher acknowledged that patients may have amnesia about what happened to them while on IV Lidocaine, particularly when they are taking narcotics, muscle relaxers, or other medications.

There is substantial evidence in the record to support the Board's conclusion that the four patients were unconscious during their treatment. A review of the Board's March 29th decision shows that it considered and weighed the evidence for and against the assertion that the patients were unconscious. Prescher complained that the Board erred by assigning more weight to the

testimony of the four patients than it did to his testimony. Weighing the evidence and making decisions about credibility of witnesses is the obligation and province of a trier of fact, and the Board is within its discretion to choose to believe the patients.

Prescher complained that the Board accepted the testimony of the four patients over the medical evidence. The medical evidence in the Record is the testimony of Prescher himself, which the Board is free to weigh, the written medical records, which were dictated by Prescher after he was aware investigations of those patients had commenced, and the opinions of Simon and Loudermilk. Simon and Loudermilk reviewed the medical records pertaining to the patients in forming their opinions. The medical records are silent about the rate of IV Lidocaine used in the procedures. One record erroneously stated that Versed was used instead of Lidocaine. Loudermilk was asked how four patients could have been unconscious for an hour, or believed themselves to be, if they had been treated as indicated in Prescher's records. Loudermilk had no explanation for the discrepancy. Loudermilk opined that IV Lidocaine would not typically cause the patients to be unconscious for an hour. Simon could not account for the discrepancy between the version of events given by the four patients and the version of events provided by Prescher. The Board has the obligation to weigh the medical evidence in light of all of the other evidence and to give it the weight it deems appropriate.

There is substantial evidence in the record before the court when considered as a whole to support the Board's conclusion that Prescher breached the standards of practice by failing to have a chaperone or staff member present while a patient is receiving treatment during which they are unconscious, by failing to obtain written consent to treatment from a patient when rendering treatment that produced unconsciousness, by failing to monitor and document vital signs of a patient who is undergoing a treatment while unconscious, and by allowing a patient to drive home after undergoing a treatment during which the patient was unconscious.

ELEMENTS OF CHARGES

The Court must next review whether the Board's findings of fact support its conclusions that the allegations of Counts II and III have been proven by a preponderance of the evidence. Prescher argued that the Board's analysis was faulty because it did not adequately distinguish Count II from Count III. Consideration of the elements of each Count is necessary.

In Count III, Prescher was charged with Professional Incompetency, in violation of §§ 147.55(2), 148.6(2)(g) and (i), and 272C.10(2), and 653 IAC 23.1(2)(c), (d), (e), and (f). 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 professional incompetence. § 147.55(2). A licensing board shall by rule include provisions for the revocation or suspension of a license which shall include professional incompetency. § 272C.10(2). The board may discipline a licensee who is guilty of a willful or repeated departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine and surgery in which proceeding actual injury to a patient need not be established; or the committing by a physician of an act contrary to honesty, justice, or good morals, whether the same is committed in the course of the physician's practice or otherwise, and whether committed within or without this state. § 148.6(2)(g). The board may discipline a licensee who is guilty of willful or repeated violation of lawful rule or regulation adopted by the board. § 148.6(2)(i). Professional Incompetency includes, but is not limited to a substantial lack of knowledge or ability to discharge professional obligations within the scope of the physician's or surgeon's practice; a substantial deviation by the physician from the standards of learning or skill ordinarily possessed and applied by other physicians or surgeons in the state of Iowa acting in the same or similar circumstances; a failure by the physician or surgeon to exercise in a substantial respect that degree of care which is ordinarily exercised by the

average physician or surgeon in the state of Iowa acting in the same or similar circumstances; or a willful or repeated departure from or the failure to conform to the minimal standard of acceptable and prevailing practice of medicine and surgery or osteopathic medicine and surgery in the state of Iowa. 653 IAC 23.1(2)(c), (d), (e), and (f).

The Board found that Prescher provided treatment to four adult females in his office which rendered them unconscious, without having staff or adult chaperone present. The Board also found that Prescher had failed to obtain written consents from these patients before the procedures were done, that he failed to adequately monitor or document their vital signs during their procedures, and that he allowed two of the patients to drive home after the procedure. The Board received evidence about these practices and it discussed these practices in its decision. It concluded that these practices violated standards of practice and were harmful or detrimental to the public. The Board also found that these practices were repeated after Prescher stated he would change his methods.

The foregoing findings of fact support the Board's conclusion under Count III that Prescher's conduct was a willful or repeated departure from, or failure to conform to, the minimal standard of acceptable and prevailing practice of medicine. That Prescher repeated his conduct after giving assurances that it would stop shows a substantial lack of knowledge or ability to discharge professional obligations within the scope of his practice; a substantial deviation by Prescher from the standards of learning or skill ordinarily possessed and applied by other physicians in the state of Iowa acting in the same or similar circumstances; a failure by Prescher to exercise in a substantial respect that degree of care which is ordinarily exercised by the average physician in the state of Iowa acting in the same or similar circumstances; and a willful and repeated departure from the minimal standard of acceptable and prevailing practice of medicine in the state of Iowa. The Board's conclusions of law that the allegations of Count III against Prescher have been proven by a

preponderance of the evidence is supported by substantial evidence in the Record.

In Count II, Prescher was charged with Unethical or Unprofessional Conduct, in violation of §§ 147.55(3) and 272C.10(3), and 653 IAC 23.1(4). 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 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. § 147.55(3). A licensing board shall establish provisions for the revocation or suspension of a license for 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. § 272C.10(3). 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 as interpreted by the Board. 653 IAC 23.1(4).

In its decision, the Board did not specify the manner in which it found Prescher guilty of 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. Instead the Board lumped its analysis of Count II together with its analysis of Count III. The Board made no particularized finding of what representation Prescher had made that was misleading, deceptive, untrue, or fraudulent. The Board made no particularized finding of what unethical conduct or practice that Prescher had engaged in. The definition of unethical or unprofessional conduct in the administrative rules includes, but is not limited to, an act contrary to honesty, justice, or good

morals. The Board made no particularized finding of an act that Prescher committed that was contrary to honesty, justice, or good morals. There was no specific finding that medical records were fraudulent. There was no specific finding of perjured testimony. The Board made no particularized finding that Prescher had violated the standards and principles of medical ethics. The Board's failure to make particularized findings of fact and conclusions of law for the elements of Count II does not comply with § 17A.19(10)(f)(3). The Board's conclusions of law that the allegations of Count II have been proven by a preponderance of the evidence is not supported by substantial evidence in the Record before the Court when considered as a whole.

DISQUALIFICATION OF BOARD MEMBER

Prescher argued that the decision-making process of the Board was motivated by an improper purpose, contrary to § 17A.19(10)(e). In support of this argument, he presented an email apparently from a member of the Board, Greg Hoversten, in which he stated his opinion that Prescher had made incriminating statements to the police. In the email, Hoversten expressed doubt about Prescher's explanation that the substance Patient #2 found on her face was Lidocaine. Hoversten stated that he was very interested in participating in the hearing, and he did in fact participate in the hearing. The email in question is dated September 24, 2011. Prescher did not ask that Hoversten disqualify himself from the proceedings before or during the hearing in January 2012 and he did not raise the issue in his Petition for Judicial Review. It is not clear from the email that Hoversten independently investigated the allegations or whether he was commenting on investigative materials that had been submitted to him as a Member of the Board. Prescher has not carried his burden to show that a Board member should have been disqualified.

SANCTIONS

In his Petition for Judicial Review, Prescher challenged the appropriateness of the sanctions

imposed. He noted that the Board continued to question whether sexual misconduct had occurred even without proof by a preponderance of the evidence. Prescher argued that the sanctions imposed by the Board are disproportionate to its actual findings. Prescher asserted that the Board improperly delegated some of its statutory authority to BMI, a private entity, contrary to § 17A.19(10)(b). Prescher argued that the action taken by the Board is the product of reasoning that is so illogical as to render it wholly irrational, contrary to § 17A.19(10)(i). Prescher argued that the Board's actions are not required by law and have such a negative impact on him so as to be grossly disproportionate to the public interest that it lacks foundation in rational policy, in contravention of § 17A.19(10)(k). Prescher asserted that the Board's actions are unreasonable, arbitrary, capricious, and an abuse of discretion contrary to § 17A.19(10)(n).

There must be a reasonable proportion between a sanction imposed and a party's transgression. *Zieckler v. Ampride*, 743 N.W.2d 530 (Iowa 2007); § 17A.19(10)(k). An agency action may not be unreasonable, arbitrary, capricious, or an abuse of discretion. *McCormick v. Iowa Div. of Labor*, 728 N.W.2d 224 (Table) (Iowa App. 2006); § 17A.19(10)(n). Discretion is abused when it is exercised on grounds clearly untenable or to an extent clearly unreasonable. *Martin Marietta Materials, Inc. v. Dallas County*, 675 N.W.2d 544 (Iowa 2004). An abuse of discretion also means the decision lacked rationality and was made clearly against reason and evidence. *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352 (Iowa 1998). In making the determination whether the agency's action is unreasonable, arbitrary, capricious, or an abuse of discretion, the court shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency. *Marovec v. PMX Industries*, 693 N.W.2d 779 (Iowa 2005); § 17A.19(11)(c). The Board of Medicine is constituted for the purposes of licensing medical practitioners and imposing licensee discipline. §§ 147.1(1)

and 147.2(1).

Prescher challenged the requirement that he receive a professional boundaries evaluation at BMI and that he submit the results of the evaluation to the Board. Prescher presented materials from BMI's website. Those materials recite that BMI specializes in the treatment of professionals with sexual problems, disruptive behavior, and medical and psychological problems. According to the BMI materials, a disruptive professional may display unusual beliefs or attitudes or extensive rule breaking. Among the types of professional misconduct that are treated at BMI are forming personal relationships with patients outside of the professional setting and failing to maintain proper boundaries with patients.

A medical licensee is under a duty to submit to a mental or clinical competency examination when directed in writing by the board for cause. § 272C.9(1). The Board's decision did not delegate any authority to BMI to take any direct action against Prescher's license or status to practice. Prescher was not referred to BMI for evaluation of sexual misconduct but for a professional boundaries evaluation. The findings of fact and conclusions of law give the Board sufficient cause to invoke § 272C.9(1) and direct an evaluation. This was not an improper delegation of the Board's authority.

Likewise, a referral for a professional boundaries evaluation is not arbitrary, capricious, unreasonable, or an abuse of discretion, given the Board's findings of fact. Treating an unconscious patient of the opposite sex without the presence of staff or an adult supervision shows that Prescher has an issue with professional boundaries. Treating an unconscious patient of the opposite sex without the presence of staff or adult supervision after being alerted that the practice is problematic confirms the reasonableness of the Board's requirement of an evaluation. The evidence does not prove that Prescher committed sexual misconduct with any patient. However, the evidence does

prove that Prescher's breach of standards of practice with regard to being alone with an unconscious patient of the opposite sex had a serious impact on two of his patients. His arguments that the sanctions imposed are disproportionate to any wrongdoing, demonstrate a lack of understanding of the purposes for the requirement of an adult chaperone and a lack of empathy for the complaining patients.

Prescher argued that the severity of the sanctions imposed were excessive as compared to his misconduct and to sanctions imposed on other practitioners for similar conduct. He asserted that the sanctions are arbitrary, capricious or based on lingering suspicions of the allegations under Count I. Prescher pointed to decisions in *Vidal v. The Iowa Dental Board*, Polk County, CVCV008228 and *In the Matter of the Charges Against Ashar Afzal, M.D.*, filed No 02-07-575, Before the Iowa Board of Medicine. In *Vidal* no discipline was imposed, but the allegations of unprofessional conduct against Vidal were dismissed. In *Afzal*, no discipline was imposed, but the allegations of unprofessional conduct and sexual misconduct against Afzal were dismissed. In the present case, the Findings of Fact, Conclusions of Law, Decision and Order of the Board have been affirmed for Count III. The facts found by the Board for its decision under Count III concerned four different patients over a period of time. Even after being confronted by police about his conduct with one patient and assuring authorities that he would change his practices, Prescher repeated his violations of the standards of practice. The sanctions imposed on Dr. Prescher are not arbitrary, capricious, or excessive. The sanctions imposed on Dr. Prescher are a reasonable exercise of the Board's discretion, based on the Board's findings of fact and conclusions of law.

DISPOSITION

The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action if it determines

that substantial rights of the person seeking judicial relief have been prejudiced. § 17A.19(10). No party has challenged the Board's decision or disposition with regard to Count I, and that decision should be affirmed. For reasons set forth above, the Board's findings of fact and conclusions of law under Count II, that Prescher committed unethical or unprofessional conduct should be reversed. For the reasons set forth above, the Board's findings of fact and conclusions of law under Count III, that Prescher committed professional incompetence should be affirmed. For the reasons set forth above, the sanctions imposed by the Board in its March 29, 2012 Findings of Fact, Conclusions of Law, Decision and Order are affirmed.

IT IS THEREFORE ORDERED AND ADJUDGED that Findings of Fact, Conclusions of Law, Decision and Order filed by the Iowa Board of Medicine on March 29, 2012 is hereby affirmed as to Count I and Count III, and is reversed as to Count II. Counts I and II are dismissed. The Sanctions imposed by the Board of Medicine in the Findings of Fact, Conclusions of Law, Decision and Order filed March 29, 2012 are affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that court costs are taxed one half to Petitioner and one half to Respondent.

SO ORDERED AND ADJUDGED this 7th day of September, 2012.

/s/
TIMOTHY O'GRADY, JUDGE
FOURTH JUDICIAL DISTRICT