

March 14, 2013  
FOR IMMEDIATE RELEASE

## District Court upholds findings that physician deceived Board

DES MOINES, IA – A Polk County District Court judge has upheld the Iowa Board of Medicine’s decision to discipline a Carroll, Iowa, physician for deceiving the Board in an investigation into a medical malpractice lawsuit.

The ruling by Judge D.J. Stovall said the Board had substantial evidence to support its findings that Mark R. Collison, M.D., “knowingly made misleading, deceptive, untrue or fraudulent representations to the Board.” Dr. Collison appeared before the Board on February 10, 2011, and denied he had provided “hands on” care to a patient in Clive, Iowa, between 2004 and 2009, but the medical records revealed he was involved. He was responsible for the patient’s care as the supervising physician of the physician assistant who provided care to the patient during the same period in question.

On September 23, 2011, Dr. Collison, 60, was charged with deceiving the Board. A hearing was held January 26, 2012, and on April 12, 2012, the Board concluded that a preponderance of the evidence established that he had deceived the Board. Dr. Collison then sought judicial review, contending that substantial evidence did not support the Board’s decision.

He also argued it was inappropriate for a Board member, the Board’s legal director, and an assistant Iowa Attorney General to have been involved in his hearing because they were also present when he was originally questioned by the Board. Judge Stovall did not address this argument because Dr. Collison failed to properly raise the bias allegations at his hearing.

The Board issued Dr. Collison a public reprimand and ordered him to pay a \$3,000 civil penalty and complete a Board-approved professional ethics program. He completed the terms of his order and the Board terminated the order on November 16, 2012.

The following is Judge Stovall’s decision:

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

**MARK R. COLLISON, M.D.,**

Petitioner,

vs.

**IOWA BOARD OF MEDICINE,**

Respondent.

**CASE NO. CVCV009230**

**RULING RE: PETITION FOR  
JUDICIAL REVIEW**

**I. INTRODUCTION**

THIS matter now comes before the Court for final ruling on petitioner's petition for judicial review. Attorneys David L. Brown and Jay D. Grimes argued and submitted briefs on behalf of petitioner Mark R. Collison. Assistant Attorney General Julie J. Bussanmas argued and submitted a brief on behalf of respondent Iowa Board of Medicine. Having reviewed the court file, the certified record, the applicable law, and being otherwise fully advised of the premises, the Court now **DENIES** the petition for judicial review as substantial evidence exists to support the Iowa Board of Medicine's finding that the petitioner knowingly made misleading, deceptive, untrue or fraudulent representations to the Board; and **DENIES** the petition for judicial review regarding due process since a required section 7A.17(7) affidavit was not filed with the Iowa Board of Medicine.

**II. FACTS**

Dr. Mark R. Collison, M.D., ("Collison") is a licensed physician with the Iowa Board of Medicine ("Board"). (Admin. Rec. at 1.) Collison saw Georgette Potter ("Potter") as a patient for numerous years. (Admin. Rec. at 55.) Suzanne Ware ("Ware"), Collison's physician's assistant, also saw Potter. (Admin. Rec. at 55.) Initially, Potter would alternate appointments between

Collison and Ware; however, after 2004, Potter requested to only see Ware for appointments. (Admin. Rec. at 55.) Collison was responsible for Ware's work, and continued to be responsible after 2004, though he did physically see Potter again as a patient until 2009. (Admin. Rec. at 55.)

Potter saw Ware in February of 2008, at which time Ware referred Potter to the urology department due to a small amount of blood in Potter's urine. (Admin. Rec. at 55.) A CT scan revealed a mass in Potter's small bowel, and a PET scan was recommended. (Admin. Rec. at 55.) Potter's insurance refused payment for a PET scan, and a small bowel study was instead performed, which showed no abnormalities. (Admin. Rec. at 55.) The urology report also stated that Potter was being referred back to Collison for follow up. (Admin. Rec. at 55–56, 109, 111.)

Potter was instructed to follow up with Ware in May of 2008, which Potter did not do. (Admin. Rec. at 55.) Potter saw Ware in August of 2008 for a sinus infection, and again in January of 2009 for abdominal pain. (Admin. Rec. at 55.) In January 2009, a large abdominal mass was identified, and Potter was admitted to the hospital by Collison. (Admin. Rec. at 55.) Potter later brought a malpractice lawsuit against Collison, alleging failure to order diagnostic testing and late detection of the abdominal mass. (Admin. Rec. at 56.)

Based on Potter's lawsuit, the Board initiated an investigation. (Admin. Rec. at 96.) A Board investigator, Cathy McCullough ("McCullough"), sent an investigative inquiry to Collison on August 9, 2010. (Admin. Rec. at 96.) The inquiry requested that Collison provide the Board with all pertinent medical records and other documents, as well as "a detailed, personally written narrative outlining and discussing [Collison's] care of [Potter]" which should include "specifics regarding the care provided and respond to the allegations of the claim." (Admin. Rec. at 96.)

Collison responded to McCullough on August 29, 2010. (Admin. Rec. at 97.) In his response, Collison stated that Potter "was never seen by [him] regarding this incident. She was

cared for by [Ware]. I am her supervising physician.” (Admin. Rec. at 97.) Collison further stated that because Potter’s insurance denied payment for a PET scan, a different exam was performed which showed no abnormalities. (Admin. Rec. at 97.) Collison stated that Potter was instructed to follow up but never did. (Admin. Rec. at 97.) She presented with a large abdominal mass in January of 2009. (Admin. Rec. at 97.) Collison stated that he could not comment on the lawsuit’s allegations because he “was not involved in [Potter’s] care either directly or indirectly. [He] had not seen her for several years before this incident.” (Admin. Rec. at 97.)

The Board sent Collison a letter on January 12, 2011, requesting he appear before the Board on February 10, 2011. (Admin. Rec. at 148.) The Board specified that it had concerns about Collison’s response that he was not directly or indirectly involved in Potter’s care, when he was Ware’s supervisor during the time Potter was treated. (Admin. Rec. at 148.)

Collison appeared before the Board on February 10, 2011. (Admin. Rec. at 151.) The Board discussed with Collison his initials on certain medical records, and what is meant when he places his initials on a medical record. (Admin. Rec. at 152–156.) The Board and Collison further discussed the process for review of test results, and how certain results may not have crossed Collison’s desk though they should have. (Admin. Rec. at 157–61.) Collison admitted that he did not have direct recollection of certain medical records, though they contained his initials, meaning he had reviewed them at some point. (Admin. Rec. at 161–162.) This appearance was audio recorded. (Admin. Rec. at 217.) On September 23, 2011, the Board charged Collison with “knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession,” as Collison denied involvement with the care of a patient when medical records revealed he was involved. (Admin. Rec. at 3–4.)

A disciplinary hearing was held before the Board on January 26, 2012. (Admin. Rec. at 365.) Administrative Law Judge Margaret LeMarche was present to assist the Board in conducting the hearing. (Admin. Rec. at 368.) Board members present included: Dr. Allen Zagoren, Dr. Joyce Vista-Wayne, Ambreen Mian, Dr. Colleen Stockdale, Dr. Craig Hoversten, Dr. Analisa Haberman, and Paul Thurlow. (Admin. Rec. at 369.)

McCullough testified at the hearing. (Admin. Rec. at 381.) McCullough stated that she sent a letter to Collison inquiring about the malpractice claim, and received a response from Collison which included partial medical records. (Admin. Rec. at 382.) McCullough reviewed Collison's letter and medical records, and submitted a report to the Board. (Admin. Rec. at 383.)

McCullough stated that there is no general rule that investigators meet with licensees being investigated, but that she meets with one quarter to one half of those individuals being investigated. (Admin. Rec. at 384.) In this case, McCullough did not meet with Collison, Ware, or the patient before submitting her report to the Board. (Admin. Rec. at 385.)

Ware also testified at the hearing. (Admin. Rec. at 386.) Ware testified that she has been a physician assistant with Mercy Clinics for the past ten years, and that Dr. Collison is her supervisor. (Admin. Rec. at 386–87.) Collison was her supervisor at all times while Ware treated Potter. (Admin. Rec. at 387.) Ware testified that when she began working with Collison, he reviewed all of her patient charts. (Admin. Rec. at 387.) After they developed a rapport, the full chart review decreased. (Admin. Rec. at 387.) Now, they do not perform formal chart reviews, but are available to each other to discuss difficult cases, or to answer questions. (Admin. Rec. at 387.) Additionally, their office system rotates most patients back and forth between Collison and Ware for appointments, allowing both professionals to see each patient. (Admin. Rec. at 387.)

Ware reviewed numerous medical records during the hearing. Ware testified that Collison initialed numerous medical records for Potter, signifying that Collison reviewed the records. (Admin. Rec. at 388–91.) When Ware starting working with Collison, Potter was already a patient. (Admin. Rec. at 396.) Initially, Potter alternated between Ware and Collison, but later requested that she be seen only by Ware. (Admin. Rec. at 396.) Potter would have appointments once or twice per year for annual physicals and cholesterol follow-ups. (Admin. Rec. at 396.) Ware testified that Collison had not seen Potter since 2004. (Admin. Rec. at 397.)

Ware testified that, during the time in question, Potter came in for a physical, and that Ware referred Potter to urology. (Admin. Rec. at 397.) Urology performed a CT scan of Potter’s abdomen and identified a questionable small bowel mass. (Admin. Rec. at 398.) Ware ordered a PET scan, but Potter’s insurance denied payment, so Ware then ordered a small bowel follow through, which did not show any issues. (Admin. Rec. at 398.) Ware directed Potter to follow up in three months time, which Potter did not do. (Admin. Rec. at 398.) There is no internal process to remind patients to follow up, and Potter did not follow up with Ware until August of 2008, which was five or six months after the last visit. (Admin. Rec. at 398–99.)

During the August 2008 appointment, Potter complained of constipation and abdominal pain. (Admin. Rec. at 399.) Ware advised her of certain over-the-counter treatments, and told Ware to report to the emergency room if she experienced further pain. (Admin. Rec. at 400.) Potter again saw Ware in January of 2009 for acute abdominal pain. (Admin. Rec. at 400.) An abdominal exam showed a large mass, and Ware informed Collison, who examined Potter and admitted her to the hospital. (Admin. Rec. at 401–02.) Ware has not seen or treated Potter since that time. (Admin. Rec. at 402–03.)

Ware testified that, regarding the Board's investigation of Collison, she was never contacted by the investigator McCullough, or any person associated with the Board. (Admin. Rec. at 404.) Ware believes that Collison is an excellent physician, and that, though he had general oversight over the care of Potter after 2004, the last time he physically saw Potter or directed her care was in 2004, and then after Potter was admitted to the hospital in 2009. (Admin. Rec. at 405–06.) Ware stated that she has found Collison to be honest and truthful in her interactions, and that he has always been very truthful. (Admin. Rec. at 406–07.) Ware further testified that she understood that Collison was responsible for anything she did, and that he was available for consultation with patients at any time. (Admin. Rec. at 412–13.) Ware testified that she and Collison now have a record review system in place through which Collison reviews the records of three of Ware's patients each week. (Admin. Rec. at 414.)

Collison testified at the hearing. (Admin. Rec. at 419.) Collison testified about his education and work history. (Admin. Rec. at 420–22.) As a doctor, Collison first worked as a solo practitioner, and then hired Ware. (Admin. Rec. at 423.) Collison testified that Potter had been a patient for some time, and that Potter initially saw both he and Ware in alternating visits. (Admin. Rec. at 424.) After 2004 though, Potter requested that she only see Ware. (Admin. Rec. at 424.) After 2004, Collison did not have any direct interaction with Potter until January of 2009, when Collison admitted Potter to the hospital. (Admin. Rec. at 424–25.) Collison did not have any further interactions with Potter as a patient after her treatment regarding the hospital admission in January of 2009. (Admin. Rec. at 426.)

Collison was sued by Potter, who claimed that he and Mercy Clinics made mistakes in the diagnosis and treatment of the abdominal mass. (Admin. Rec. at 427.) That lawsuit eventually settled. (Admin. Rec. at 427.) Collison's malpractice insurance carrier reported the

case to the Board, which then initiated an investigation. (Admin. Rec. at 428.) Collison received an investigation letter from investigator McCullough, and responded to that letter on August 29, 2010. (Admin. Rec. at 429–30.) Collison testified that, in writing his response letter, he did not consult with any person, or any attorney. (Admin. Rec. at 430.) Collison stated that he did not even consult with his attorney hired to represent him in the malpractice suit, even though that case was still pending at the time Collison replied to the investigator. (Admin. Rec. at 430.)

Collison testified that he received a follow up letter from Nebel, legal counsel to the Board, which stated that the Board had follow-up questions based on Collison’s letter, and which requested that Collison meet with the Board in person. (Admin. Rec. at 431.) Collison also did not share this letter with his attorney or any other person. (Admin. Rec. at 431.) Collison met with the Board, and was asked numerous questions about initials placed on records in Potter’s charts. (Admin. Rec. at 432–33.) After this meeting, Collison was charged with intentionally misleading the Board. (Admin Rec. at 433.)

Collison testified that when he received the letter from investigator McCullough, he did not fully understand the different role that the Board had in regulating licensing as opposed to liability in the lawsuit. (Admin. Rec. at 433.) Collison states that, when he received the letter, he did not understand that the Board was looking for facts and explanations of medical care given, and not for denials of accusations from the malpractice lawsuit. (Admin. Rec. at 433–34.) Collison also testified that he met in person with the Board without counsel, and that he did not discuss the meeting with any person beforehand. (Admin. Rec. at 434.) At that meeting, Collison stated that he was questioned about whether he intentionally misled the Board in his response letter to the investigator. (Admin. Rec. at 434–35.) Collison stated that he never intended to mislead the Board, and that when he wrote the letter he only focused on the time period when

Potter's abdominal mass was first observed in August of 2008. (Admin. Rec. at 425.) At that time, Collison stated, he did not have hands-on care of Potter, and intended to convey that in his letter, but he never intended to mislead or misrepresent his ultimate supervisory role regarding Ware's treatment of Potter. (Admin. Rec. at 435.)

Collison admitted that his statements in the letter were not correct, and that he was indirectly involved in Potter's care. (Admin. Rec. at 435.) Collison testified that he meant to state that he had no hands-on care between 2004 and 2009. (Admin. Rec. at 435.) Collison stated that he was not trying to "hide the ball;" his intent was not to blame another person for Potter's care, though he could see how the Board came to the initial conclusion that it did. (Admin Rec. at 436–37.) Collison stated that he did not intentionally mislead the Board, which statement he believes is supported by the fact that he disclosed to the Board the medical records which he reviewed and initialed, and which led the Board to question Collison's statements. (Admin. Rec. at 438–39.)

On cross-examination, Collison admitted that he reviewed Potter's medical records before he wrote the letter to the Board. (Admin. Rec. at 440.) Collison stated that there were numerous records for Potter between 2004 and 2009 with his initials on them, meaning that he had seen and reviewed those records. (Admin. Rec. at 440–41.) Collison also stated that, even though he did not consult with any attorney before writing his response letter or meeting with the Board, he knew that it was important to be truthful with the Board, and he did not need an attorney to tell him that. (Admin. Rec. at 441–42.)

When asked about the initial meeting with the Board, Collison stated that he was asked pointed questions, and often more than one question at a time. (Admin. Rec. at 443.) Collison stated that it was difficult to answer those questions while at the same time trying to flip through

a chart he was provided at the meeting, which was not page-numbered and appeared inconsistent with copies certain Board members had. (Admin. Rec. at 443.) Collison also stated that the Board did not ask him to give a narrative of what happened, or to explain his letter. (Admin. Rec. at 443.) Collison did admit that he never called the investigator to clarify what was meant by the investigative inquiry, and that he never told the Board that he did not understand the inquiry or the reason the Board wanted him to appear. (Admin. Rec. at 443–44.) Collison admitted that, regardless of his intentions, statements he made in his letter were untrue. (Admin. Rec. at 444.)

Collison was questioned by members of the Board. He explained that when he wrote that he did not treat Potter directly or indirectly, he meant that he did not see Potter as a patient between 2004 and 2009, and that he was never asked a question by Ware regarding treatment options for Potter. (Admin. Rec. at 447.) When asked about his mindset through the ordeal, Collison told the Board that he was generally frustrated. (Admin. Rec. at 447–48.) Collison further told the Board that when he writes his initials on a document, it means that he has seen and read that document. (Admin. Rec. 448.) Collison further stated that his initials do not mean that he has read every word of a document, but that he has seen it and is aware of the information in the document. (Admin. Rec. at 448–50.) When asked to again explain the difference between direct and indirect care, Collison stated that direct care was hands-on, seeing the patient. (Admin. Rec. at 454.) Collison stated that he could see how his letter was misleading regarding indirect care, and that he was trying to convey that he was not directing the care from behind the scenes when he wrote that he was not involved in Potter’s care indirectly. (Admin. Rec. at 454–55.) Collison further stated that he was unsure whether he considered reviewing and initially patient medical records alone to constitute indirect care. (Admin. Rec. at 456–57.) However, after

considering the whole situation, Collison would consider his review and supervisory role to constitute indirect care of Potter. (Admin. Rec. at 458–59.)

The Board rendered its decision on April 12, 2012. (Admin. Rec. at 58.) The Board found that on August 9, 2010, McCullough had notified Collison that the Board received notice of a professional liability claim filed against him, and that the Board requested from Collison all pertinent medical records and a detailed discussion of Collison’s care of Potter. (Admin. Rec. at 53.) The Board found that Collison replied on August 29, 2010, providing medical records and stating that Potter was cared for by Ware, whom Collison supervised, and that Collison was not involved in Potter’s care “directly or indirectly.” (Admin. Rec. at 54.)

The Board further found that, on January 11, 2011, it wrote Collison, asking him to personally appear before the Board to discuss matter, including the Board’s concern regarding Collison’s statement that he was not directly or indirectly involved with Potter’s care, although he was the supervising physician for Ware. (Admin. Rec. at 54. The Board found that when Collison appeared on February 10, 2011, he admitted that he reviewed and initials numerous medical records from Potter’s file, and that though he stopped seeing Potter in person in 2004, he continued to be the supervisor for Ware, who saw Potter after 2004. (Admin. Rec. at 54.)

The Board concluded that a preponderance of the evidence established that Collison knowingly made misleading, deceptive, untrue or fraudulent representations to the Board. (Admin. Rec. at 56–57.) In so concluding the Board relied on Collison’s written statement that he was not involved in Potter’s care either directly or indirectly, when compared with evidence that Collison was Ware’s supervisor, certain of Potter’s medical records were initialed by Collison and which Collison also admitted that he reviewed, and the evidence that Collison treated Potter in January of 2009, which fact was not mentioned by Collison in his written

statement to the Board. (Admin. Rec. at 56–57.) The Board further found that Collison was evasive about his involvement and care of Potter when given the opportunity to correct untrue statements, which supported its conclusion. (Admin. Rec. at 57.) Collison was cited and warned by the Board, ordered to pay a civil penalty, and ordered to complete an ethics program. (Admin. Rec. at 57.)

Collison moved the Board to reconsider, or, in the alternative, requested a rehearing. (Admin. Rec. at 62.) That motion was denied on April 12, 2012. (Admin. Rec. at 82.)

### **III. STANDARD OF REVIEW**

Courts “review agency action for correction of errors at law.” *Skaufle v. Iowa Bd. of Med. Exam’rs*, 752 N.W.2d 35, 2008 WL 942290, at \*2 (Iowa Ct. App. 2008) (citing *Doe v. Iowa Bd. of Med. Exam’rs*, 733 N.W.2d 705, 707 (Iowa 2007)). Review is governed by the Iowa Administrative Procedure Act. IOWA CODE § 17A.19(10) (2011); *Iowa Ag Constr. Co. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 172 (Iowa 2006).

Reviewing courts “are bound by the agency’s factual findings if they are supported by substantial evidence. In deciding whether a finding is supported by substantial evidence in the record, we consider the evidence that detracts from the challenged finding as well as the evidence that supports it.” *Miulli v. Iowa Bd. of Med. Exam’rs*, 683 N.W.2d 126, 2004 WL 893934, at \*2 (Iowa Ct. App. 2004) (citing *Dawson v. Iowa Bd. of Med. Exam’rs*, 654 N.W.2d 514, 518 (Iowa 2002)) (internal citations omitted).

The question is whether there is substantial evidence to support the finding actually made, not whether evidence might support a different finding. The burden of proof is a preponderance of the evidence. Evidence is not substantial when a reasonable mind would find the evidence inadequate to reach the conclusion reached by the agency. [Reviewing courts] are bound by the agency’s factual findings unless a contrary result is demanded as a matter of law.

*Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676–77 (Iowa 1995) (internal citations and quotations omitted).

On constitutional issues, review is de novo. *Glowacki v. Iowa Bd. of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993).

The Iowa Supreme Court has “defined willful in a dental license suspension proceeding as meaning an intentional act.” *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 678 (Iowa 1995) (internal quotations omitted). Likewise, the Iowa Supreme Court has stated

[t]o act knowingly has been defined to mean that a person acted voluntarily and intentionally, and not because of mistake or accident or other innocent reason. Knowledge is defined in Iowa's uniform instructions to mean the defendant “had a conscious awareness” of the element requiring knowledge. An honest mistake or understandable mistake is not a dishonest act. Honesty requires that a person make representations in good faith and without a conscious knowledge of the falsity of the representations.

*Id.* (internal citations and quotations omitted).

“The Iowa Administrative Procedure Act prescribes the manner by which issues of alleged agency bias shall be raised.” *Kholeif v. Bd. of Med. Exam'rs of State of Iowa*, 497 N.W.2d 804, 806 (Iowa 1993).

Iowa Code section 17A.17(7) provides:

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) (2011).<sup>1</sup>

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<sup>1</sup> Iowa Code section 17A.17 was amended in 2008. Prior to 2008, the section providing the affidavit requirement, Iowa Code section 17A.17(4), read:

A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection 3, or asserting personal bias of an individual participating in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances

This emphasis on proper presentation of bias claims lies at the heart of section 17A.17(7)'s affidavit requirement. The requirement is not a mere formality. It rests on the premise that bare allegations and conclusory statements are insufficient to justify a probe of decision makers' mental processes. By requiring that a challenger's objection be reduced to writing and fact-based, a reviewing court is given objective grounds for deciding whether [ ] proceedings should be [ ] examined. And it furnishes an objective basis on which a reasonable fact finder could be convinced that bias may in fact be at work in the process.

Sound public policy reasons underlie the affidavit requirement and courts' general reluctance to examine closed-session deliberations. . . . inquiry into the mental processes of administrative decisionmakers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision there must be a strong showing of bad faith or improper behavior before such inquiry may be made.

....

[A]ny challenge grounded in agency bias must be presented by written affidavit; an oral objection like the one made here is statutorily insufficient. On judicial review the court may only examine the affidavit, and determine whether it discloses sufficient reason to expand the record to include [review of the agency decision-making process].

*Kholeif*, 497 N.W.2d at 806–07 (internal citations and quotations omitted).

Where a litigant does not comply with section 17A.17's affidavit requirement, “and thus did not set forth sufficient facts to enable the district court to determine whether an examination of the decision-making process] was warranted,” a district court may not rule on any alleged bias claim brought on appeal. *Id.* at 807.

#### **IV. ANALYSIS:**

##### *a. Substantial Evidence Supports the Board's Finding*

Collison first argues that “substantial evidence does not support the Board's decision when the record is viewed as a whole.” (Pet. Brief at 8 (internal bolding and capitalization omitted).) Collison states that he “had no intent to deceive the Board with his response to the

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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(4) (2007).

investigative inquiry” though he admits that he “was the supervisory authority for Ms. Ware, who did provide the care in question in the underlying civil case”. (Pet. Brief at 8 (underlining omitted).) Collison asserts he “provided an honest response to the Board’s letter, based on his understanding of the question presented in it,” and points out that he “provided all of the medical records that have been subsequently used by the Board” in the administrative matter. (Pet. Brief at 9.) Collison argues that the Board “impos[ed] an after-the-fact view and understanding of [the investigative letter sent from the Board] that was not readily apparent by a plain reading of the letter at the time of Dr. Collison’s response.” (Pet. Brief at 9.) Collison states that there is no support for a finding that he “knowingly made misleading, deceptive, untrue or fraudulent representations,” and that “[t]he Board’s decision is not supported by substantial evidence when the record is viewed as a whole” and “is the product of reasoning that is so illogical as to render it wholly irrational.” (Pet. Brief at 10 (italics omitted).)

In response, the Board argues that “substantial evidence supports the Board’s determination that Dr. Collison knowingly made misleading, deceptive, and untrue statements to the Board.” (Resp. Brief at 8 (bolding and capitalization omitted).) The Board points out that Dr. Collison’s “reading of the Board’s investigative inquiry is not supported by the evidence in this case” as “the Board did not limit its request to care provided prior to January 2009,” “Dr. Collison did not indicate he was limiting his response to care provided prior to January 2009,” and “the Board knew nothing about the patient care at the time it sent its investigative inquiry.” (Resp. Brief at 10.) The Board states that “[t]he [investigative] letter requested a detailed narrative outlining and discussing Dr. Collison’s care of the patient, including specifics regarding the care provided and a response to the allegations of the malpractice claim.” (Resp. Brief at 10.) Therefore, “Dr. Collison’s interpretation of the letter limiting its request to care provided prior to

January 2009 is not supported by the evidence.” (Resp. Brief at 10.) Finally, the Board points out that intent to deceive may be proven in more than one way, and that “[i]t is the Board’s duty as the trier of fact to determine the credibility of witnesses, to weigh the evidence, and to decide the facts in issue.” (Resp. Brief at 11.) As the Board determined that Collison ““had to know that his statement that he was not involved in the patient’s care, either directly or indirectly, was misleading, deceptive, and untrue,”” substantial evidence supports the Board’s decision. (Resp. Brief at 11 (quoting Board Decision, Apr. 12, 2012, Admin. Rec. at 57).)

Collison responds, re-stating that he did not intend to deceive the Board, and that the Board justifies its decision “by imposing an after-the-fact view and understanding on Ms. McCullough’s letter that was not readily apparent by a plain reading of the letter at the time of Collison’s response.” (Reply Brief at 2.) Collison further argues that “the Board has misinterpreted the law . . . to justify disciplining Dr. Collison[sic].” (Reply Brief at 2.) Therefore, Collison argues, “[s]ubstantial evidence does not support the Board’s finding that Dr. Collison [sic] was intentionally ‘misleading, deceptive and untrue’ with his August 29, 2010 response to the Board investigatory inquiry.” (Reply Brief at 4 (internal underlining omitted).)

The Board reviewed Collison’s response to the investigative inquiry, including the medical records sent. Collison appeared before the Board and answered questions about his supervision of Ware, about his review of certain medical records, and what his initials on certain medical records indicated. During the hearing, Collison told the Board that statements in his letter were only meant to discuss his care of Potter during the time when the abdominal mass was observed, but admitted that he could see how his letter was misleading regarding indirect care of Potter. Collison, after direct questioning by the Board, admitted that his review of medical records and supervisory role of Ware constituted indirect care.

The Board, relying on these facts, concluded that a preponderance of the evidence established that Collison knowingly made misleading, deceptive, untrue or fraudulent representations to the Board, based on Collison's written statement when compared to medical records which Collison initialed and the admission that his statement was misleading. The Board also found that Collison was evasive in certain answers, which further supported its finding.

Here, substantial evidence supports the Board's findings. "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. Collison was instructed in the investigative inquiry to outline and discuss his care of Potter. Though he was asked to also address the malpractice allegations, the investigative inquiry did not limit itself to only the facts surrounding the alleged malpractice. Collison also admitted, after direct questioning by the Board, that he did indirectly care for Potter between 2004 and 2009, although he denied indirect treatment in his statement responding to the investigative inquiry. Additionally, 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. These facts provide substantial evidence to support the Board's finding that Collison knowingly made misleading, deceptive, untrue or fraudulent representations to the Board. Therefore, Collison's petition for review must be denied.

*b. Failure to File a Section 17A.17 Affidavit Precludes Judicial Review for Bias*

Collison next argues that his "constitutional right to due process was violated by the Board." (Pet. Brief at 15 (internal bolding and capitalization omitted.)) Collison asserts that "the

AAG prosecutor, Mr. Nebel and Dr. Vista-Wayne were ‘adversaries with a will to win’ whose blended roles [between the investigatory and adjudicatory phases of this matter] have fatally tainted the decision rendered by the Board.” (Pet. Brief at 16.) This is so, according to Collison, because “the AAG prosecutor, Board legal counsel Mr. Kent Nebel, and, at a minimum, Dr. Vista-Wayne were present and questioned Dr. Collison [sic] at the [investigatory] hearing,” and “[b]oth Mr. Nebel and Dr. Vista-Wayne participated in adjudicating this matter.” (Pet. Brief at 16.) Further, Collison points out that “the same AAG prosecutor advised the Board about filing charges and then prosecuted the case before the Board.” (Pet. Brief at 16.) Collison argues that, because “Mr. Nebel was clearly involved in one form or another in the litigation strategy utilized by the State,” because “Dr. Vista-Wayne clearly personally investigated the matter and reached decisions on contested matters prior to the hearing,” and because “the AAG prosecutor was afforded the opportunity to taint the Board by assisting their investigation and advising them whether or not to file charges . . . [and then] prosecuting the very charges she recommended to the Board,” that “Dr. Collison did not receive a ‘fair trial in a fair tribunal’ and was deprived of his right to procedural due process.” (Pet. Brief at 16–17, 18.)

In response, the Board argues that it “did not violate Dr. Collison’s [sic] constitutional right to due process under the State and Federal Constitutions.” (Resp. Brief at 12 (bolding and capitalization omitted).) The Board first asserts that Collison “failed to properly raise the issue before the Board” through an affidavit under section 17A.17(7). (Resp. Brief at 12.) “This failure [ ] forecloses [Collison] from raising this issue on judicial review.” (Resp. Brief at 12.)

The Board next asserts that “[e]ven if . . . Dr. Collison was not required to file an affidavit under section 17A.17, the law expressly authorizes the presence of the Board staff during deliberations as long as the staff members have not personally investigated, prosecuted, or

advocated in the case.” (Resp. Brief at 13.) In addition, the Board points out that Collison “presents no evidence that [staff and Board members] contributed to any litigation strategy or personally investigated beyond the appearance” at the investigatory hearing. (Resp. Brief at 14.) Finally, the Board argues that Collison’s due process rights were not violated by the AAG’s participation in the investigatory hearing and later prosecution of the charges as there “was not pending contested case at the time of the investigative appearance,” and therefore, the AAG’s presence was statutorily allowed. (Resp. Brief at 15–16.)

Here, Collison admits that no affidavit conforming to the requirements of Iowa Code section 17A.17(7) was filed with the Board. (Pet. Brief at 17.) This fact is determinative on Collison’s second issue; a district court may not rule on an appeal alleging bias in an administrative decision where no 17A.17 affidavit was filed with the agency. *Kholeif*, 497 N.W.2d at 807. Though Collison did argue the bias issue on rehearing, there is no provision for bias allegations to be brought before an agency on rehearing, as opposed to through affidavit. IOWA CODE § 17A.17(7) (2011). Collison’s petition for judicial review must be denied.

## V. ORDER CONCLUSION

**IT IS THE ORDER OF THE COURT** that the petition for judicial review asserting substantial evidence does not support the decision of the Iowa Board of Medicine is **DENIED IN ITS ENTIRETY**. Costs, if there be any, are taxed to the Petitioner.

Dated this 4<sup>th</sup> day of March, 2013.

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

Copy to:

David L. Brown  
Jay D. Grimes  
Fifth Floor – U.S. Bank Building  
520 Walnut Street  
Des Moines, IA 50309  
**dlbrown@hmrlawfirm.com**  
**jgrimes@hmrlawfirm.com**

Julie J. Bussanmas  
Attorney General Office  
1305 East Walnut Street, 2<sup>nd</sup> Floor  
Des Moines, IA 50319  
**jbussan@ag.state.ia.us**