

February 15, 2013
FOR IMMEDIATE RELEASE

Court upholds suspension of medical license of ophthalmologist who violated board order

DES MOINES, IA -- A Polk County District Court judge has upheld the Iowa Board of Medicine's order to suspend the medical license of a physician who was found to have repeatedly violated the terms of a board order.

Robert F. Tobin, M.D., of St. Joseph, MO, a 71-year-old Iowa-licensed physician who formerly practiced ophthalmology in Council Bluffs and Des Moines, asked the court to reverse the Board's decision, dated March 29, 2012, in which he was sanctioned for violating a board order issued May 6, 2010. The Board determined he did not complete many terms of the order.

Dr. Tobin contended that he was in substantial compliance with the order, that the sanctions meted out by the Board were unreasonable, and his due rights were violated by the deliberative process utilized by the Board.

Judge Michael Huppert, in a ruling filed February 8, affirmed the Board's decision and order in its entirety to suspend Dr. Tobin's medical license for at least six months, to assess a \$10,000 civil penalty, and to publicly reprimand him. Dr. Tobin was also ordered to comply with an educational intervention plan, obtain a Board-approved worksite monitor, implement a practice monitor and practice monitoring plan, and comply fully with terms of the May 6, 2010, order prior to seeking reinstatement of his license.

Dr. Tobin said 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 after a hearing on February 17, 2012. Dr. Tobin alleged these staff members were unlawfully present because they had "personally investigated" the case when they were apprised about the case by a Board probation monitor who was investigating the physician's non-compliance with 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 Huppert 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 inappropriate because it occurred at a time when the law did not prohibit such communication.

Last fall, in a separate motion related to Dr. Tobin’s judicial review, Polk County District Court Judge D.J. Stovall denied the physician’s request that the Board disclose its closed deliberations that were held on February 17, 2012. Dr. Tobin had sought the confidential records to prove his allegations that the Board had been unduly influenced by Bowden and Nebel, but the court denied the motion, concluding Dr. Tobin’s claims of biased decision-making were “merely speculative” and without evidence.

The following is Judge Huppert’s decision:

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ROBERT F. TOBIN, Petitioner, vs. IOWA BOARD OF MEDICINE, Respondent.	CASE NO. CVCV 9176 RULING ON PETITION FOR JUDICIAL REVIEW
--	--

This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the Iowa Board of Medicine (“Board”) dated April 30, 2012 in which it suspended the petitioner’s license and imposed a number of sanctions, after concluding that the petitioner had violated the terms and provisions of a prior settlement agreement between the parties. The petitioner contends that this decision should be reversed for one or more of the following reasons: 1) it is not supported by substantial evidence; 2) the sanctions imposed were unreasonable, arbitrary, capricious or an abuse of discretion; and 3) the deliberative process undertaken by the Board violated the petitioner’s due process rights.

The appropriate standard of review for this court is governed by Iowa Code §17A.19(10) (2013). The factual determinations of the Board regarding any claimed violations on the part of the petitioner would be clearly vested by a provision of law in the discretion of the Board, as it must make such findings to determine whether discipline is appropriate and the nature of that discipline. Iowa Code §148.7(8) (2013); Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012). Accordingly, the reviewing court is bound by the Board’s findings of fact if supported by substantial evidence in the

record before the court when that record is viewed as a whole. Id.; Iowa Code §17A.19(10)(f) (2013).

Substantial evidence is defined for purposes of the Administrative Procedure Act as “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.” Iowa Code §17A.19(10)(f)(1) (2013). Viewing the record as a whole requires the court to review not only the relevant evidence in the record cited by any party that supports the agency’s findings of fact, but also any such evidence cited by any party that detracts from those findings along with any determinations of veracity made by the presiding officer who personally observed the demeanor of the witnesses and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code §17A.19(10)(f)(3) (2013); Acuity Ins. v. Foreman, 684 N.W.2d 212, 216 (Iowa 2004), abrogated on other grounds in Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391-92 (Iowa 2009).

The court on judicial review is required to engage in a “fairly intensive review” of the record to ensure the agency’s fact finding was reasonable. Univ. of Iowa Hosps. v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). Although the court is required to scrutinize the agency record, substantial evidence is not absent simply because it is possible to draw different conclusions from the same evidence. Id.; see also Riley v. Oscar Mayer Foods Corp., 532 N.W.2d 489, 491-92 (Iowa App. 1995) (“The focus of the judicial inquiry is whether the evidence is sufficient to support the decision made, not whether it is sufficient to support the decision not made.”). This would be the appropriate deference

afforded to this agency function, as required by Iowa Code §17A.19(11)(c). Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004).

Likewise, in making the determination whether the Board's action in disciplining the petitioner was unreasonable, arbitrary, capricious, or an abuse of discretion, the court is required to 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.” Iowa Code §17A.19(11)(c) (2013); Marovec v. PMX Indus., 693 N.W.2d 779, 782 (Iowa 2005). Agency action is arbitrary or capricious when it is taken without regard to the law or facts of the case. Doe v. Iowa Board of Medical Examiners, 733 N.W.2d 705, 707 (Iowa 2007). Agency action is unreasonable if the agency acted in the face of evidence as to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence. Id. The Board would be considered to have abused its discretion if its actions rested on grounds or reasons clearly untenable or unreasonable. Dico v. Iowa Employment Appeal Board, 576 N.W.2d 352, 355 (Iowa 1998) (“an abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence”) (citations omitted).

Constitutional issues which are raised in a judicial review proceeding are reviewed de novo, requiring an independent evaluation of the totality of the evidence from which the constitutional question arise. Botsko v. Davenport Civil Rights Comm’n, 774 N.W.2d 841, 844 (Iowa 2009); Timberland Partners XXI, LLP v. Iowa Dep’t of Revenue, 757 N.W.2d 172, 174 (Iowa 2008).

The petitioner was 69 years old at the time of the hearing before the Board on February 17, 2012. He is a board-certified ophthalmologist who has maintained his primary office in St. Joseph, Missouri, but has maintained satellite offices in Nebraska and Iowa. When it was active, his Iowa practice would require him to travel to this state approximately two days a week. He closed his Iowa office (located in Council Bluffs) in late September of 2011. The primary focus of his practice has been cataract surgery with intraocular lense transplantation.

On November 15, 2005, the petitioner reached a settlement agreement with the Board pertaining to disciplinary charges against him related to alleged deficiencies in his surgical practices. The petitioner agreed to be cited for failing to conform to the minimal standard of acceptable and prevailing practice in his practices, was assessed a civil penalty of \$2,500, and agreed to fully comply with a number of terms and conditions regarding his practice going forward. On November 8, 2007, the Board filed a Statement of Charges against the petitioner, alleging that he had violated the terms of the 2005 settlement agreement and “had demonstrated a pattern of professional incompetency and practice harmful or detrimental to the public in his practice of ophthalmology.” That complaint was also settled by agreement of the parties on May 6, 2010.

The 2010 settlement agreement contained the following terms:

- a. The petitioner was again cited and warned that further problems could result in disciplinary action, including revocation of his Iowa license;
- b. He was assessed a civil penalty in the amount of \$10,000, which was to be paid by May 26, 2010;
- c. He was ordered to undergo a Board-approved neuropsychological re-evaluation no later than December 31, 2010;
- d. He was required to successfully complete an ethics program (PROBE) and a record keeping program within 60 (sixty) days of the date of the agreement;

- e. He was placed on probation for a period of five years, subject to compliance with a monitoring program and a number of other conditions relative to his practices;
- f. He was to successfully complete a Board-approved educational program as recommended by Center for Personalized Education for Physicians (CPEP). This program was to be facilitated by an educational preceptor as recommended by CPEP. In addition, the petitioner was to complete a Board-approved documentation program within ninety (90) days of the agreement and complete a reassessment as recommended by CPEP;
- g. He was to fully comply with a practice monitoring plan approved by the Board. The monitoring was to be performed by an Iowa-licensed, board-certified ophthalmologist who would agree to serve under the terms of the plan and to submit quarterly reports to the Board quarterly (January, April, July and October) of each year by the 20th of the month in which the report was due;
- h. He was to provide the Board with the name of a physician who was in a position to regularly observe and supervise him as worksite monitor. This monitor was required to make quarterly reports to the Board on the same as the practice monitor.
- i. The petitioner was also required to file quarterly reports with the Board attesting to his compliance with all the terms of the settlement agreement, on the same schedule as the practice and worksite monitors.
- j. He was also required to appear before the Board annually or upon request, and pay a monitoring fee at the time of the submission of his quarterly reports.

The person assigned by the Board to monitor the petitioner's compliance with the terms of the settlement agreement was Shantel Billington. They met on September 23, 2010 (140 days after the settlement agreement went into effect)¹ in order to informally go over the requirements of the settlement agreement and to help the petitioner prepare for his first meeting with the Board on October 21. During this interview, it was noted that he had paid his civil penalty one day late, had not completed either the PROBE program or the record keeping program at all (which were now past due some 80 days) and was

¹ This interview was originally scheduled for July 28, 2010, but had to be rescheduled because the petitioner was scheduled to undergo an angiogram.

continuing to work on identifying both a practice monitor and worksite monitor, as well as finalizing his educational program.

On October 21, 2010, the petitioner met with the Board in order to further gauge his compliance. At this meeting, the petitioner submitted the name of Dr. Joseph Parelman as his worksite/practice monitor. This name was rejected due to Dr. Parelman not being an Iowa licensed physician. The petitioner advised the Board that he was scheduled to take the PROBE course on December 3-4, 2010, but that he would like to take a later course in order to attend a board meeting at his alma mater. This request was denied, and the Board gave the petitioner a deadline of December 31, 2010 in which to complete the PROBE and record keeping courses. In light of the petitioner's failure to have contacted CPEP to establish his educational plan, the Board also set a deadline of October 29, 2010 in which to enroll with CPEP and until December 1, 2010 in which to submit a signed educational plan.

Billington followed up with the petitioner's office on November 16, at which time she was advised by his office manager that it was his understanding he did not have to participate in an educational plan and only take certain courses. Billington advised the office that they were mistaken, and referred them back to a lengthy letter sent by the Board dated October 27 outlining all the requirements set down from the meeting with the Board. Billington described the petitioner's actions as of this time as "stalling" in her narrative of contacts involving the petitioner (Exhibit 16). The petitioner and his attorney were advised of the need to formulate an educational plan by the end of the year.

The petitioner was able to have his neuropsychological examination performed on January 7, 2011 (one week past the deadline set in the settlement agreement). The report

from this examination (Exhibit 10) concluded that the petitioner performed within normal limits, but displayed relatively weaker performance on selected measures of visual memory, visuoconstructive skills and fine motor control. The examiner concluded that there was no strong evidence of any progressive neurodegenerative disease, but noted that the petitioner at times exhibited mild cognitive weakness, weakness in right-hand manual dexterity figure-ground perception and encoding of detailed figures. It was suggested that he have a colleague observe his surgeries to determine whether these weaknesses were impacting his skills.

The petitioner did not complete the PROBE courses until January 30, 2011. The record keeping course was not completed until March 11, 2011. Progress on the educational plan through CPEP proved particularly problematic for the petitioner to address. Although a plan was submitted for his signature on January 20, he failed to sign it and return it to CPEP. The Board was notified in March of 2011 that the petitioner had not initiated his educational plan and had not presented a person to serve as his educational preceptor. This prompted the petitioner to finally return the signed educational plan on March 20, 2011, over three months from the December 1 deadline imposed by the Board. Despite this submission, the petitioner did not present the name for his educational preceptor until April 27 (two weeks after the final deadline for this information). The proposed preceptor, Dr. Ira Priluck, never accepted the position, and the petitioner was given another deadline of July 1 to provide the name of a replacement preceptor. While the petitioner was participating in the educational plan as of April of 2011, CPEP noted in a progress report that his progress and participation “needed improvement.” It was not until December of 2011 that a preceptor (Dr. Parelman) was

finally approved by CPEP. As of the time of his hearing before the Board in February of 2012, the petitioner had only been meeting with Dr. Parelman for about one month, and had not yet started that part of the plan dealing with his surgical skills. The plan as originally formulated (Exhibit 11) that the entire plan would be completed in nine to twelve months.

After Dr. Parelman was rejected as the petitioner's practice/worksite monitor, it was not until almost three months later, on January 17, 2011, that he submitted Dr. Priluck as his proposed replacement. This designation was approved by the Board on April 8, 2011, and the petitioner was given until July 1 to have Dr. Priluck functioning in these capacities. This deadline was not met as well, as Dr. Priluck never assumed the responsibilities required of him, out of a number of concerns related to the distance between his office and the petitioner's Iowa office and his possible liability for any professional negligence related to the petitioner's patients. When the petitioner met with the Board on June 2, 2011, he advised the Board he would let them know Dr. Priluck's decision on remaining on as monitor by the next day. When this date passed, the Board gave him until July 1 to designate a new monitor if Dr. Priluck was not going to be involved. When this deadline also passed, the Board voted on July 28, 2011 to file formal charges against the petitioner for failing to comply with the terms of the 2010 settlement agreement.

The statement of charges was not filed until September 23, 2011; prior to the filing, the Board continued to work with the petitioner on the issue of his practice/worksite monitor. By August 23, Billington opined that "Dr. Priluck is getting cold feet on monitoring" and did not realize the time commitment involved. On

September 6, the Board received a progress report from CPEP covering the months of April through August (Exhibit 15, pp. 382-390), which noted that both the petitioner's educational progress and his participation in activities "need[] improvement." Of the eight areas of participation identified in this report, five were noted as "not started." On September 20, Billington was advised by counsel for the petitioner that he would be closing his Iowa office, effective October 1, 2011. On that same date, Billington received a letter from the petitioner (which had been transmitted by counsel) requesting once again that Dr. Parelman be approved as his practice monitor, as he would not be seeing Iowa patients in the near future. This request remained pending at the time of the Board hearing on the statement of charges, which took place on February 17, 2012. Just before the hearing, on February 13, 2012, CPEP produced another progress report for the months of September 2011 through January 2012. Certified Record, pp. 373-380. While progress had been made from the earlier report, several components of the plan were still noted as "in progress," and one area (having the petitioner update his surgical skills) was shown as "not started."

During the hearing, Billington testified regarding her contacts with the petitioner and his representatives regarding compliance with the settlement agreement, and the problems or issues encountered with that compliance as measured by the Board's expectations and deadlines. In addition to the non-compliance noted above, Billington also testified that of the three quarterly reports due to the Board between the settlement agreement and the hearing, two were filed on time and one (which had been due October 20, 2011) was not filed until December. She did note that the petitioner had acted "in

good faith” in terms of his filing of the required quarterly reports (Certified Record, p. 493), but offered no opinions regarding his overall compliance.

The petitioner also testified at the hearing. He acknowledged the deficiencies in his compliance, but denied that he acted willfully in his inability to comply. He did acknowledge that the only time he had any direct contact with Billington was in his face-to-face interview in September of 2010; the remainder of the contacts with Billington was with his office manager. When asked to reconcile “a record of delays and procrastination” with the lack of any cognitive deficits (as evidenced by his most recent neuropsychological evaluation), the petitioner responded:

I guess I’m a real good procrastinator, putting things off which doesn’t have much to do with cognition. Laziness.

Id. at 519-20. He conceded that the issues that resulted in the 2005 agreement were related to his inability to provide professional patient care, that the 2010 agreement was related to his failure to comply with the 2005 agreement, that he fully understood the terms of the 2010 agreement and that he did not follow the terms of that agreement that established certain deadlines for compliance.

The Board entered its findings of fact and conclusions of law on March 29, 2012. It concluded that the preponderance of the evidence established that the petitioner violated Iowa Code §148.6(2)(i) and 653 IAC 23.1(11) through his repeated failures to comply with the terms and conditions of the 2010 settlement agreement. Specifically, the Board noted:

Respondent failed to provide any satisfactory explanation for his failure to timely comply with the CPEP educational requirements or for his failure to obtain a practice monitor and worksite monitor in a timely manner. The Board’s Compliance Monitor has committed extraordinary effort

and time to aid Respondent's compliance with the terms of the order. In the twenty plus months that Respondent has been on probation, he has had minimal direct contact with the Board's Compliance Monitor. Respondent has repeatedly failed to give appropriate attention and priority to his obligations under the Board's Order.

Id. at 66. As a result, the Board imposed the following sanctions:

1. The petitioner was again cited for the violations, and again warned that similar conduct could result in disciplinary action including revocation;
2. The petitioner's medical license was suspended for a minimum period of six months;
3. The petitioner was ordered to pay another civil penalty in the amount of \$10,000;
4. The petitioner was ordered to fully comply with the CPEP educational plan while he was under suspension, and his license would not be reinstated until he had paid the civil penalty, remained in full compliance with CPEP, obtained Board approval for a practice/worksites monitor and executed a signed practice monitoring plan. In the event his license was reinstated, he would also be required to satisfy the terms of probation established in the 2010 agreement.

The petitioner filed a motion to reconsider and request for rehearing on April 18, 2012. In this filing, the petitioner raised for the first time his concern that his due process rights had been violated by the manner in which his hearing had been conducted by the Board, specifically that certain staff members of the Board had been improperly involved in the deliberative process leading up to the Board's decision. This argument was not supported by the petitioner's affidavit as otherwise required by Iowa Code §17A.17(7). The Board denied the petitioner's request in their entirety on April 30, 2012. In so holding, the Board concluded that there was no violation of Iowa Code §17A.17(1)(b) by allowing staff members Nebel and Bowden to be present for the deliberations of the Board and that the petitioner had failed to provide evidence that Assistant Attorney General Theresa Weeg acted as a Board representative once the contested case

proceeding was initiated. On the latter point, the Board specifically found that the petitioner's own motion for reconsideration/rehearing made it clear that any communications between the Board and Weeg took place before the Statement of Charges were filed on September 23, 2011.

The petitioner's timely petition for judicial review was filed on May 16, 2012. On that same date, the petitioner filed a motion in the district court requesting an order directing the Board to produce its closed-session deliberations and to expand the agency record to include those deliberations. A similar request, supported by the petitioner's affidavit,² was filed with the Board at the same time as the district court motion. The Board denied the requests made at the administrative level on June 1, 2012, concluding that it no longer had authority to entertain such requests, now that the matter was pending in the district court on judicial review.³

The district court denied the petitioner's request to have the Board produce its deliberations and expand the agency record on September 21, 2012.⁴ In so doing, the court concluded they had been preserved for judicial review despite the late filing of the petitioner's affidavit, based on his prior requests to the Board on these subjects and the Board's action in denying those requests in its order dated April 30, 2012. In denying the petitioner's requests, the court ultimately concluded, as had the Board in its April 30 order, that the record did not establish any violation of separation of functions or improper ex parte communications:

² With the exception of the first five introductory paragraphs, the affidavit is essentially identical to the statements and arguments made in the parallel motion filed in district court.

³ The Board did note it retained authority to entertain a motion for stay which had also been filed by the petitioner; that request was denied based on its conclusion that a decision to suspend or discipline a medical licensee "shall remain in force and effect until the appeal is finally determined and disposed of on its merit." Iowa Code §148.7(10) (2011).

⁴ This ruling was made by Judge D.J. Stovall; the undersigned assumed the responsibility for this proceeding when Judge Stovall's docket rotated to him at the beginning of 2013.

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

Substantial evidence. The petitioner vehemently argues that the record taken as a whole does not generate substantial evidence supporting the facts upon which the Board relied in determining that the petitioner was in violation of the 2010 settlement agreement. Specifically, it is the petitioner's argument that all material times, he acted in good faith in his efforts to comply with the agreement, or that he was in substantial compliance with those terms. The essence of these arguments is that any delay beyond the deadlines and extensions approved by the Board were due to factors out of the petitioner's control and were the result of the Board's unreasonable conditions (most notably, the requirement of an Iowa-licensed ophthalmologist to serve as his worksite/practice monitor).

To the contrary, the record taken a whole establishes that it was the petitioner's own procrastination and lack of attention that resulted in his repeated failures to comply with the 2010 settlement agreement. Examples of this inattention would include his refusal to prioritize his coursework over his attendance at a trustees meeting for his alma mater and his misreading of the settlement agreement to somehow exempt him from participating in an educational plan at all. These efforts at avoiding the requirements of the settlement agreement stretched into 2011 and, despite several extensions by the Board, several of the petitioner's obligations under the settlement agreement remained outstanding at the time of the hearing in February of 2012.

The petitioner glosses over his situation by essentially saying, “I had everything done by the time of the hearing, except having a workplace/practice monitor in place,” suggesting that this requirement was a minor or technical part of his compliance. It is clear from the history of the petitioner’s interaction with the Board that the requirement of a monitor was essential to the petitioner addressing the deficiencies in his practice skills that had him under the Board’s scrutiny since 2004. The requirement of a monitor, just like timely completion of the petitioner’s coursework and educational plan, warranted much more consideration and attention by the petitioner than he was able to muster. While the court agrees with the petitioner that his omissions were not willful,⁵ the Board’s conclusion that the petitioner had violated the terms of the 2010 settlement agreement were supported by substantial evidence.

Unreasonable, arbitrary, capricious or abuse of discretion. The petitioner contends alternatively that even if he was properly the subject of sanctions by the Board for his violations of the 2010 settlement agreement, the sanctions ultimately imposed by the Board were unnecessarily punitive and vindictive.⁶ The record in this matter reveals a frustrated Board (as evidenced by the members’ own questioning of the petitioner at hearing) trying to gain the attention of a practitioner who showed little if any interest in their efforts to assist him in reclaiming the professional skills of a licensed medical

⁵ This position is irrelevant, since the Board never found his actions to be willful, and such findings are not necessary to justify discipline. The Board relied upon that part of the code and regulations that makes the violation of a lawful order by the Board in a disciplinary hearing, or a violation of a consent agreement or informal settlement agreement between a licensee and the Board sanctionable. Iowa Code §148.6(2)(i) (2013); 653 IAC 23.1(11).

⁶ The petitioner appears to suggest that these sanctions were also inconsistent with the Board’s past practice and precedent, in an apparent reference to Iowa Code §17A.19(10)(h). If this is in fact one of the petitioner’s claimed basis for reversal on judicial review, it is wholly unsupported by the record or any legal authority. The only purported basis for this argument is the unsubstantiated statements by petitioner’s counsel in his briefs and oral arguments to the court to that effect. Any reliance on this ground for reversal fails for these reasons.

practitioner. This was not the petitioner's first foray into the Board's sphere of influence; this was his third disciplinary proceeding in eight years, and the second which dealt with his failure to comply with the terms of a settlement agreement with the Board. Taking into account the history and track record of the petitioner and the Board, this court is satisfied that the sanctions meted out by the Board, while significant and potentially career-ending, were proportionate and appropriate under all the circumstances presented. Any argument that they were unreasonable, arbitrary, capricious or an abuse of discretion are not founded.

Due process. The petitioner presents the same due process argument he urged in making his request for production of the Board's deliberations and to expand the agency record, which were denied by the district court on September 21, 2012. His only factual basis for this argument is that the facts as summarized in Exhibit 16, the narrative prepared by Billington to document the status of the petitioner's compliance, shows that 1) staff members Nebel and Bowden were "personally investigating, prosecuting or advocating in, either the case under consideration or a pending factually related case involving the same parties," and were therefore improperly included in the deliberative process; or 2) Assistant Attorney General Theresa Weeg was improperly acting as a Board representative in violation of the separation of functions of advocate and legal advisor. See Iowa Code §17A.17(1)(b), §17A.17(8) (2013); Botsko, 774 N.W.2d at 85. As both the Board concluded in denying the petitioner's request for rehearing/reconsideration, and Judge Stovall concluded in denying the petitioner's request for production/expansion of the agency record, Exhibit 16 provides no evidentiary support for either contention.

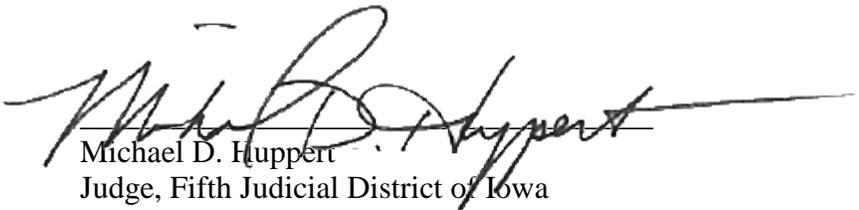
The only possible ground for concern regarding Nebel's and Bowden's involvement as documented in Exhibit 16 would be whether their actions rose to the level of "personally investigating" the petitioner's case. The administrative rule promulgated to effectuate Iowa Code §17A.17(1)(b) makes it clear that "personally investigating" means "taking affirmative steps to interview witnesses directly or to obtain documents or other information directly" and does not include such tasks as "general direction and supervision of assigned investigators." 653 IAC-25.8(2)(a). At best, Exhibit 16 documents that Nebel and Bowden were merely copied in on reports and correspondence received by Billington in her role as the Board's compliance monitoring. The petitioner has failed to prove that these individuals were so intimately involved in the investigation of the petitioner that their presence during Board deliberations violated Iowa Code §17A.17.

Regarding Weeg's involvement, she would be in violation of the separation of functions set out in Iowa Code §17A.17 only if it were determined that she, as one of the prosecuting attorneys in the case against the petitioner, advised the Board once a contested case proceeding had been commenced. Iowa Code §17A.17(1)(b) ("a presiding officer in a contested case...."), §17A.17(8) (2013) ("An individual who participates in the making of any proposed or final decision in a contested case...."). Until the contested case has been commenced through the delivery of notice of hearing, there is no deliberative function that need be separated from the investigatory, prosecutorial or advocacy functions. With one exception, all of Weeg's contacts as documented in Exhibit 16 took place prior to the commencement of the contested case proceeding against the petitioner on September 23, 2011. That lone exception was on October 20,

2011, when it was noted by Billington that she forwarded a report from Dr. Kuhnlein to a number of individuals, including Weeg. It is undisputed that this report formed no basis for the prosecution of the case against the petitioner, such that any impact on the overall case was de minimis. The petitioner has failed in his burden to establish that his due process rights were violated by the deliberative process utilized by the Board.

IT IS THEREFORE ORDERED that the decision of the Iowa Board of Medicine is affirmed in its entirety. The petition for judicial review is dismissed with prejudice, at the cost of the petitioner.

Dated this 6th day of February, 2013.



Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

David Brown
Jay Grimes
Theresa Weeg
Julie Bussanmas