

March 15, 2013
FOR IMMEDIATE RELEASE

District Court denies review of decision to discipline physician for surgical issues

DES MOINES, IA – A Polk County District Court judge has denied a Clive, Iowa, physician's request for a judicial review of the Iowa Board of Medicine's decision to discipline a physician for failing to provide appropriate surgical care to three patients.

Judge Robert B. Hanson ruled that Fawad S. Zafar, M.D., did not meet the 30-day deadline established by statute for filing his petition after being served with the Board's final action on the case on January 13, 2011.

"(Dr.) Zafar did not file his petition for judicial review with that 30-day period; therefore his petition must be dismissed as untimely," Judge Hanson writes in an order filed March 7, 2013.

On January 17, 2008, the Board filed charges against Dr. Zafar alleging that he failed to provide appropriate urology and general surgery care to numerous patients in his practice at several hospitals in south-central Iowa. His case was heard by a three-member panel of the Board on November 19-20, 2009, and the panel's proposed decision was affirmed by a quorum of the 10-member Board on October 22, 2010.

The Board concluded that Dr. Zafar failed to provide appropriate surgical care to three patients. He was prohibited from practicing general surgery until he completed a comprehensive clinic competency evaluation and received approval from the Board. He was issued a public reprimand and ordered to pay a \$5,000 civil penalty and to complete a medical record keeping course.

On April 19, 2011, the Board approved Dr. Zafar's return to the practice of general surgery, subject to a Board-approved practice monitoring plan and Board monitoring. On November 16, 2012, the Board terminated the order, returning Dr. Zafar's medical license to its full privileges, free and clear of all restrictions.

The following is the Judge Hanson's decision:

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

FAWAD S. ZAFAR, M.D.,	:	CV 008563
	:	
Petitioner,	:	
	:	
v.	:	RULING ON PETITION FOR
	:	JUDICIAL REVIEW
IOWA BOARD OF MEDICINE,	:	
	:	
Respondent.	:	

This matter came before the court on November 16, 2012, for hearing on a petition for judicial review. Petitioner Fawad S. Zafar, M.D., was represented by attorneys Jay D. Grimes and David L. Brown. Respondent Iowa Board of Medicine was represented by Assistant Attorney General Theresa O’Connell Weeg. Having entertained the arguments of counsel, reviewed the court file, and being otherwise fully advised in the premises, the court now makes the following ruling:

I. FACTUAL BACKGROUND

On January 17, 2008, the Iowa Board of Medicine (“the Board”) filed charges of professional incompetency and practice harmful or detrimental to the public against Dr. Fawad S. Zafar, M.D. (“Zafar”). (Cert. Rec. at 10–14.)¹ The Board held a contested case hearing on these charges on November 19th and 20th, 2009. (Cert. Rec. at 322.) A three member panel of the Board issued a Proposed Decision of the Panel on March 10, 2010, in which the Board found that Zafar had violated the standard of care in certain cases brought before the Board. (Cert. Rec.

¹ The parties submitted separate appendices in this matter. The State submitted the complete certified record, consisting of 5,340 pages, in electronic format. Zafar submitted an edited appendix consisting of 1,404 pages, in three bound parts. In this ruling, the court will cite to the complete certified record.

at 177, 193–94.) In the Proposed Decision, the Board cited and warned Zafar regarding his engagement in acts of professional incompetence and practice harmful and detrimental to the public in the practice of medicine, ordered Zafar to pay a \$5,000 civil penalty, and restricted Zafar from practicing general surgery until the completion of a comprehensive clinical competency evaluation for general surgery at the Center for Personalized Education for Physicians in Denver, Colorado (“CPEP”). (Cert. Rec. at 195–96.)

Zafar moved to remand the Proposed Decision for further proceedings on March 26, 2010. (Cert. Rec. at 200.) That motion was denied on April 16, 2010 by Administrative Law Judge Jeffrey Farrell. (Cert. Rec. at 239–40.) Zafar then requested the full Board review and rule upon his motion for reconsideration. (Cert. Rec. at 241–43.) That request was denied on procedural grounds. (Cert. Rec. at 246.) Zafar then filed a “Demand For Remand,” requesting that the full Board review the Proposed Decision filed by the three member panel. (Cert. Rec. at 252–55.) Zafar also filed a “Formal Request for Appearance,” requesting permission to appear at a scheduled Board meeting on June 10th and 11th 2010. (Cert. Rec. at 261.) Zafar’s request for appearance was denied on June 8, 2010, and Zafar’s demand for remand was denied on June 11, 2010. (Cert. Rec. at 267–70.)

A quorum of the Board held a contested case hearing in this matter on August 19, 2010. (Cert. Rec. at 5277.) Following the hearing, the Board filed its findings of fact, conclusions of law, decision and order on October 22, 2010. (Cert. Rec. at 322.) The Board reviewed motions filed by Zafar, the entire record before the three member panel, and briefs submitted by Zafar and the State. (Cert. Rec. at 323.) The Board affirmed the Proposed Decision of the Panel, and adopted that decision as the final decision of the Board. (Cert. Rec. at 324.)

Zafar requested rehearing on November 17, 2010, stating that certain materials had not been made available to the Board for consideration during the previous hearing. (Cert. Rec. at 329.) On November 23, 2010, the Board set time to hear additional arguments on the request for rehearing from the parties on December 17, 2010. (Cert. Rec. at 338–40.)

After hearing additional argument, the Board issued its Decision on Request for Rehearing on January 13, 2011. (Cert. Rec. at 344.) The Board denied Zafar’s request for rehearing, stating that the Board had the disputed materials available for consideration, and did consider the materials in reaching its decision. (Cert. Rec. at 344–45.) The Board, therefore, affirmed its decision as previously written. (Cert. Rec. at 345.)

On January 26, 2011, Zafar requested that the Board replace the requirement that he attend evaluation at CPEP with a requirement that he attend evaluation at an alternative location in San Diego, California. (Cert. Rec. at 349.) On January 27, 2011, Zafar filed a second request for rehearing regarding replacing the evaluation location. (Cert. Rec. at 353.)

Zafar filed a petition for judicial review in district court on March 4, 2011. (Petition at 1.) The Board granted Zafar’s request to substitute evaluation locations on March 10, 2011. (Cert. Rec. at 362–64.) In the same ruling, the Board also denied Zafar’s second request for rehearing, finding that it lacked jurisdiction to consider a second application for rehearing as the first application for rehearing was denied. (Cert. Rec. at 364.)

The State filed a motion to dismiss on March 30, 2011, arguing that Zafar’s petition for judicial review was filed more than thirty days after his first request for rehearing was denied, and that, as the Board had no jurisdiction to hear the second request for rehearing, that request did not toll the thirty day filing requirement for a judicial review petition. (Motion to Dismiss.) Zafar resisted, arguing that there is no statutory limit placed on requests for rehearing, and,

therefore, his second request tolled the thirty day filing requirement. (Resistance to Motion to Dismiss.) The district court denied the motion to dismiss on May 16, 2011. The parties filed briefs and argued the merits of the petition for judicial review on November 16, 2012.

II. 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).

Iowa Code section 17A.16(2) provides:

Except as expressly provided otherwise by another statute referring to this chapter by name, any party may file an application for rehearing, stating the specific grounds for the rehearing and the relief sought, within twenty days after the date of the issuance of any final decision by the agency in a contested case. A copy of the application for rehearing shall be timely mailed by the presiding agency to all parties of record not joining in the application. An application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing.

IOWA CODE § 17A.16(2) (2011).

Iowa Code section 17A.19(3) provides:

If a party files an application under section 17A.16, subsection 2, for rehearing with the agency, the petition for judicial review must be filed within thirty days after that application has been denied or deemed denied. If a party does not file an application under section 17A.16, subsection 2, for rehearing, the petition must be filed within thirty days after the issuance of the agency's final decision in that contested case. If an application for rehearing is granted, the petition for review must be filed within thirty days after the issuance of the agency's final decision on rehearing. In cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time petitioner is aggrieved or adversely affected by that action.

IOWA CODE § 17A.19(3) (2011).

Iowa Rule of Civil Procedure 1.904(2) provides:

On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

IOWA R. CIV. P. 1.904(2).

The Iowa Rules of Civil Procedure have been applied in administrative actions. *See McCormick v. N. Star Foods Inc.*, 533 N.W.2d 196, 197–98 (Iowa 1995) (noting that an agency commissioner was able to hear a rule 179(b), now rule 1.904(2), motion to reconsider until divested of jurisdiction by a petition for judicial review).

Where a litigant’s “first motion to reconsider [is] denied and the original judgment remain[s] in effect and unchanged,” and the litigant “had a full opportunity to alert the [body hearing the matter] to any error in its consideration of and ruling on” the matter in the first instance, a litigant’s “second motion to reconsider [is] improper.” *Boughton v. McAllister*, 576 N.W.2d 94, 96–97 (Iowa 1998).

III. ANALYSIS

Zafar submitted his brief in this matter. (Pet. Brief.) In response to the brief, the State argues that “Zafar did not timely file his petition for judicial review as required by Section 17A.19(3)” and that the petition should be dismissed. (Resp. Brief at 12.) The State points out that the final Board decision was issued on October 22, 2010, from which Zafar requested rehearing on November 17, 2010. (Resp. Brief at 12.) Zafar was granted additional argument before the Board, after which the Board denied his request for rehearing on January 13, 2011. (Resp. Brief at 12.) The State argues that, as the Board denied Zafar’s first request for rehearing,

there were no grounds for Zafar to request a second rehearing and he then had thirty days in which to file a petition for judicial review. (Resp. Brief at 12–13.) The State asserts that Zafar’s petition for judicial was due on February 21, 2011, thirty days after the Board’s denial was served, but Zafar did not file his petition for judicial review until March 4, 2011. (Resp. Brief at 13–14.) As failure to timely file a petition for judicial review is jurisdictional, the State argues this petition must be dismissed as it was untimely filed. (Resp. Brief at 13.)

Zafar responds, arguing first that the district court has already held that his petition for judicial review was timely filed. (Pet. Reply Brief at 2.) Zafar next argues that a request for rehearing may be submitted after any final decision, which request tolls the thirty day requirement for filing a petition for judicial review. (Pet. Reply Brief at 2–3.) As no limiting language exists in the section 17A.16(2), there is no limit on the number of requests for rehearings which may be submitted after a final decision from an administrative body. (Pet. Reply Brief at 3.) Zafar asserts that, because there is no limit, his second request for rehearing tolled the time in which he was required to file his petition for judicial review, thus making his petition filed on March 4, 2011 timely. (Pet. Reply Brief at 3.)

Here, Zafar’s petition for judicial review is untimely. Under Iowa law,

an untimely or improper rule 1.904(2) motion cannot extend the time for appeal. [Likewise], a rule 1.904(2) motion filed by a party following a denial of the party's prior rule 1.904(2) motion is improper and cannot extend the time for appeal if the judgment remained unchanged following the first motion. Finally, a rule 1.904(2) motion filed after a new judgment or decree has been entered by the court in response to a prior rule 1.904(2) motion is permitted under the rule and extends the time for appeal.

In re Marriage of Okland, 699 N.W.2d 260, 265–66 (Iowa 2005) (internal footnote omitted). The Iowa Rules of Civil Procedure have been applied in administrative actions, just as in actions in district courts. *See McCormick*, 533 N.W.2d at 197–98.

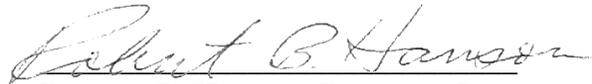
Zafar is correct that Iowa Code section 17A.16(2) does not limit the number of requests for rehearing. IOWA CODE § 17A.16(2) (2011). However, Iowa Rule of Civil Procedure 1.904(2) similarly does not limit the number of motions a party may submit to enlarge, amend or modify the findings or conclusions of a court. IA. R. CIV. P 1.904(2). Even so, Iowa courts construe rule 1.904(2) to prevent duplicative or successive motions from having any legal effect unless substantive changes were made to past findings or conclusions based on previous rule 1.904(2) motions. *See Okland*, 699 N.W.2d at 265–66; *Boughton*, 576 N.W.2d at 96; *Doland v. Boone Co.*, 376 N.W.2d 870, 875–76 (Iowa 1985).

Applying this analysis to requests for rehearing under Iowa Code section 17A.16(2), it is clear that Zafar’s petition for judicial review is untimely. Zafar’s first request for rehearing was denied by the Board, and the original decision was affirmed as written. (Cert. Rec. at 345.) Any further requests for rehearing by Zafar after this denial were “improper and cannot extend the time for appeal [as] the judgment remained unchanged following the first [request].” *Okland*, 699 N.W.2d at 266. As Zafar’s second request for rehearing had no legal significance, the thirty day period for filing a petition for judicial review began on January 20, 2011, when Zafar was served with the denial of rehearing by the Board. Zafar did not file his petition for judicial review within that thirty day period; therefore, his petition must be dismissed as untimely. *See IOWA CODE § 17A.19(3)* (2011); *Paulson v. Bd. of Med. Exam’rs of State of Iowa.*, 592 N.W.2d 677, 678–79 (Iowa 1999).

IV. CONCLUSION

IT IS THEREFORE THE ORDER OF THIS COURT that Fawad S. Zafar, M.D.'s
Petition for Judicial Review is **DISMISSED**. Costs are taxed to petitioner.

DATED: March 7th, 2013


ROBERT B. HANSON, DISTRICT JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

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