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IOWA BOARD OF MEDICINE  
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## Physician denied reimbursement of expenses for drug screening

DES MOINES, IA -- A Polk County District Court judge has denied an Iowa City physician's petition for the Iowa Board of Medicine to reimburse her for expenses she paid to a drug screening laboratory to comply with a disciplinary order that was subsequently overturned by the Iowa Court of Appeals.

Judge Jeffrey Farrell, in a decision issued July 28, granted the Board's motion to dismiss a second petition for judicial review by Wendy R. Smoker, M.D., who sought reimbursement of \$12,720.35 for drug screening and related expenses incurred in her compliance with the order.

In the January 24, 2010, order, the Board concluded Dr. Smoker engaged in the excessive use of alcohol which may have impaired her ability to practice medicine with reasonable skill and safety. Dr. Smoker filed a petition for judicial review challenging the Board's determination. She did not ask the Board or the district court to stay of the terms of the disciplinary order while on appeal. The district court affirmed, but the appeals court reversed the order and ordered dismissal of the charges and action against Dr. Smoker. The appeals court did not order reimbursement of third-party expenses.

The Board withdrew its decision and refunded all civil penalties and hearing fees she paid to the Board, but denied her request for reimbursement of monitoring expenses paid to a drug screening laboratory. Dr. Smoker again filed for judicial review.

Judge Farrell dismissed the second appeal for a judicial review, finding that the issues raised by Dr. Smoker should have been raised in the first judicial review and that she should have requested a stay of the Board's order while on appeal.

"[T]he difficulty in obtaining a stay does not mean petitioner can file a second judicial review action to seek reimbursement of fees when she had legal remedies available to address the issue in the first action. Questions of reimbursement of costs must be considered and decided as part of the original action," Judge Farrell wrote.

**The following is Judge Farrell's ruling dismissing Dr. Smoker's Petition for Judicial Review:**

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

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**WENDY R. SMOKER,**

**Petitioner,**

**v.**

**IOWA BOARD OF MEDICINE,**

**Respondent.**

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**Case No. CVCV047376**

**RULING ON MOTION  
TO DISMISS**

On March 31, 2014, petitioner filed a petition for judicial review. On April 18, 2014, respondent filed a motion to dismiss. On April 28, 2014, petitioner filed a resistance. On June 24, 2014, the court held a hearing on this matter. Attorney David Brown appeared for petitioner. Attorney Julie Bussanmas appeared for respondent.

**BACKGROUND FACTS AND PROCEEDINGS**

The following facts were derived from the petition and court documents attached as exhibits A and B to the petition. The facts are undisputed.

Petitioner Dr. Wendy Smoker is a board-certified physician, professor of neuroradiology, and director of neuroradiology at the University of Iowa Hospitals and Clinics (UI). While working in Virginia from 1990 to 2001, she developed an alcohol dependency. After she moved to her present position at UI in 2001, she self-reported to the Iowa Physician Health Program (IPHP) and entered into a confidential physician health contract for alcohol dependence. She did well other than one relapse and was released from her contract in 2008.

In 2009, respondent Iowa Board of Medicine (the board) received a complaint that petitioner had consumed alcohol. The board undertook an investigation which was completed in January of 2010. In February 2010, the board required petitioner to undergo a physical and neuropsychological exam as well as a substance abuse evaluation. She complied with the order.

Petitioner admitted during the evaluation that she had consumed wine on two occasions: 1) once at home and 2) at a dinner following a professional conference at UI. Both events occurred following her release from her IPHP contract.

After receiving the evaluation, the board issued a statement of charges against petitioner. The board held a hearing, found a licensing violation and imposed disciplinary sanctions including \$5,000.00 fine, placing her on probation for five years, and requiring her to participate in a monitoring system including drug screenings. Petitioner sought judicial review. The district affirmed, but the Iowa Court of Appeals reversed the board's decision. The court remanded the case to the board for entry of an order dismissing the disciplinary action against petitioner.

On June 28, 2013, pursuant to the Iowa Court of Appeals' decision, the board withdrew its findings of fact, conclusions of law, decision and order. The board eventually refunded all civil penalties and disciplinary fees paid to the board. However, the board did not refund drug screening fees. In an order issued on July 25, 2013, the board stated that "such monies were paid directly by [petitioner] to FirstLab, an independent contractor, and other independent collection sites and labs, and the Board is unable to refund [petitioner's] drug screening fees."

On January 8, 2014, petitioner filed a motion for reimbursement of expenses. Petitioner argued that she incurred expenses in the amount of \$12,720.35 in complying with the board's order, including \$8,383.00 to FirstLab, \$2,889.00 in drop fees, \$1,107.35 for mileage for testing, and \$341.00 for mileage for counseling.

On March 14, 2014, the board issued an order denying petitioner's motion for reimbursement. The board cited a number of grounds in support of its decision. First, it stated it could not reimburse fees that had been paid to third parties. Second, petitioner did not file a motion to stay enforcement of the order, so compliance with the order was required until

overturned by the court of appeals. Third, the court of appeals did not order the board to reimburse petitioner for her expenses relating to drug testing, so there is no order to require compliance. Fourth, petitioner failed to identify any rule of law that would require the board to reimburse petitioner for expenses. Last, the board stated that petitioner may have a remedy by filing an action with the Iowa Appeal Board within the Iowa Department of Management to seek reimbursement.

Petitioner filed this petition for judicial review challenging the board's decision on the reimbursement issue. Respondent moved to dismiss the petition for judicial review arguing that petitioner has failed to state a claim upon which relief may be granted.

### **STANDARD OF REVIEW**

When considering a motion to dismiss:

A court should grant [the motion] if the petition fails to state a claim upon which any relief may be granted. Iowa R. Civ. P. 1.421(1) (f). In considering a motion to dismiss, the court considers all well-pleaded facts to be true. *O'Hara v. State*, 642 N.W.2d 303, 305 (Iowa 2002). A court should grant a motion to dismiss only if the petition on its face shows no right of recovery under any state of facts. *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003) (quoting *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999)). Nearly every case will survive a motion to dismiss under notice pleading. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). Our rules of civil procedure do not require technical forms of pleadings. Iowa R. Civ. P. 1.402(2)(a).

*U.S. Bank v. Barbour*, 770 N.W.2d 350, 354–55 (Iowa 2009) (internal quotation marks omitted).

As in most civil cases, in the context of a judicial review proceeding, “[a] motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted.” *Schreiber v. Bastemeyer*, 644 N.W.2d 296, 298 (Iowa 2002) (quoting *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994)) (internal quotation marks omitted). “While the rules of civil procedure are applicable to proceedings for judicial review of agency action, this is only so if a

rule does not conflict with the particular provisions of the IAPA.” *R & V Ltd. v. Iowa Dep’t of Commerce, Alcoholic Beverages Div.*, 470 N.W.2d 59, 64 (Iowa Ct. App. 1991) (quoting *Kohorst v. Iowa State Commerce Comm’n*, 348 N.W.2d 619, 621 (Iowa 1984)). “A party is only entitled to judicial review when the party ‘has exhausted all adequate administrative remedies’ and ‘is aggrieved or adversely affected by [a] final agency action.’” *Cooper v. Kirkwood Cmty. College*, 782 N.W.2d 160, 165 (Iowa Ct. App. 2010) (quoting Iowa Code § 17A.19(1)). In addition, “[a] party must file a petition for judicial review according to the requirements of section 17A.19 in order for the district court to have jurisdiction to hear the petition.” *Id.* at 164–65. Where the district court lacks jurisdiction over the petition for judicial review, the petition must be dismissed. *See id.*

### **MERITS**

There is no dispute as to the facts underlying petitioner’s claim that the board is liable to reimburse her drug testing fees. The board originally found petitioner committed a disciplinary action and imposed sanctions including a fine, hearing costs, probation, and drug screenings. The drug screenings were performed by a third party, FirstLab, that contracts with the board to conduct testing. After petitioner won her petition for judicial review at the court of appeals, the court remanded the case to the board for entry of an order dismissing the disciplinary action. The board has deleted the disciplinary action from its records, and returned the money paid to the board for the fine and hearing costs. The only question concerns whether petitioner can recover from the board, as part of this judicial review proceeding, money paid to a third party (FirstLab) for costs of a term of her probation (drug testing).

The petition raises an interesting point. Petitioner prevailed in all aspects on her appeal. The board has returned all payment made to the board as relating to her discipline. The money

petitioner spent on drug testing was not paid to the board because the board contracts with a third party to perform those services. Further, the costs relating to drug testing were used to conduct the actual testing and are thus consumed, as opposed to the fine and hearing costs, which are readily refundable. Nonetheless, petitioner argued that, to be made whole, the board should reimburse all costs that were paid to comply with the board's disciplinary order, whether paid to the board or a third party.

The board characterized the petition as a claim for money damages, but that is not an accurate description of the claim made. Petitioner only incurred the costs for drug testing due to her compliance with the board's order in her disciplinary case. After she prevailed on judicial review, she asked the board to refund all payments made and costs incurred. The board has not returned fees petitioner paid to FirstLab for drug testing. Petitioner's claim cannot be characterized as one for money damages, but rather, a claim for reimbursement resulting from the reversal of the ruling in her disciplinary case.<sup>1</sup>

The board primarily argued that the remedy sought in the petition is barred by claim preclusion because petitioner could have raised the claim as a remedy in the disciplinary action. The principles of claim preclusion were well-discussed in *Arnevik v. University of Minn. Board of Regents*, 642 N.W.2d 315, 319 (Iowa 2002) as follows:

Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated. It does not, however, apply unless the party against whom preclusion is asserted had a full and fair opportunity to litigate the claim or issue in the first action. A second claim is likely to be barred by claim preclusion where the acts complained of, and the recovery demanded are the same or where the same evidence will support both actions. A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong. (citations and internal quotations omitted).

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<sup>1</sup> The board argued that petitioner should make a claim pursuant to Iowa Code chapter 25. Section 25.2(1) lists a number of claims that may be made to the state appeal board. Petitioner's claims do not fit within any of the claims listed in section 25.2(1).

The party seeking to invoke the doctrine of claim preclusion must establish three elements: (1) the parties in the first and second action were the same; (2) the claim in the second suit could have been fully and fairly adjudicated in the prior case; and (3) there was a final judgment on the merits in the first action. *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006) (citations and internal quotations omitted).

There is no question as to the first and third elements. The parties are the same and there is a final judgment on the merits of the first action. The only question is whether the claim in the second suit could have been fully and fairly adjudicated in the prior case. The court finds that it could. Petitioner knew when she filed her petition for judicial review in the first action that the board had ordered her to comply with drug screens. She knew that there would be costs incurred as part of her compliance with that order. She knew the drug testing costs were made to FirstLab. Whether or not she asked the court to order the board to reimburse her for the costs of complying with the disciplinary order, the court made no such order. She cannot file a second action to order the board to reimburse her for those costs now.

In a sense, the board's argument is similar to an exhaustion claim that is made in administrative appeals when a party makes a claim in court that was not raised in the agency proceeding. For example, in *Drake Univ. v. Davis*, 769 N.W.2d 176, 185 (Iowa 2009), the Iowa Supreme Court denied a worker's compensation claimant a credit for benefits because it was not raised before the agency; *See also Fisher Controls v. Clark*, 686 N.W.2d 235 (Iowa App. 2004) (the court cannot consider a claim for temporary worker's compensation benefits that was not raised before the agency). This is not an exhaustion case – the assigned error is not that petitioner failed to raise the claim before the agency, but rather, that petitioner failed to obtain a ruling on that issue in the judicial review of the disciplinary case. However, the claim preclusion

and exhaustion doctrines are based on similar principles that claims must be raised at the initial stage of a proceeding to ensure fairness and prevent protracted and unnecessary litigation.

The board also argued that petitioner failed to mitigate her damages by applying for a stay of the drug testing requirement. The filing of a petition for judicial review does not stay enforcement of an agency action, but a party may ask the agency for a stay “on appropriate terms or other temporary remedies” during the pendency of judicial review. Iowa Code section 17A.19(5)(a). If the agency refuses to grant a stay, the aggrieved party may file an application for stay with the court. Iowa Code section 17A.19(5)(c). The court has the power to deny or grant a stay on appropriate terms or by “granting other temporary remedies.” Iowa Code section 17A.19(5)(d). Accordingly, the court could stay one or more aspects of an agency action without staying the entire action.

Petitioner did not ask the board or the court for a stay of the terms of the board’s disciplinary order. If she had, the board or the court may have granted her relief in whole, or at least as to the term requiring drug testing. If a stay had been entered, petitioner would not have incurred the drug testing costs and there would be no need for her to seek the remedy she requested as part of this second action. While there is no means to know whether she would have received a stay, this case is no different than other cases in which mitigation principles are applied. *See e.g. Barnum v. Nebergall*, 367 N.W.2d 317, 319 (Iowa App. 1985) (finding that mitigation may apply when a party has not applied for work but reasonable work is available).

Certainly, it might be a rare administrative appeal that qualifies for a stay as to enforcement of a professional licensing order. The courts have long-recognized that loss of revenue, even if substantial, does not amount to the type of irreparable damage needed to support a stay of agency action. *Teleconnect Co. v. Iowa State Commerce Comm’n*, 366 N.W.2d 511,

514 (Iowa 1985). A litigant has typically had to show a much more dramatic impact to meet the irreparable harm element. *See e.g. R & V, Ltd. v. Iowa Dep't of Commerce, Alcoholic Beverage Division*, 470 N.W.2d 59, 62-63 (Iowa 1991) (affirming a district court order granting a stay of a 45 day liquor license suspension after finding that the suspension would effectively result in a closure of the business). Petitioner incurred a fair amount of costs complying with the board's drug testing order, but she does not suggest that the order prevented her from teaching, managing her department, or engaging in a medical practice. Still, the difficulty in obtaining a stay does not mean petitioner can file a second judicial review action to seek reimbursement of fees when she had legal remedies available to address the issue in the first action. Questions of reimbursement of costs must be considered and decided as part of the original action.

**RULING AND ORDER**

The motion to dismiss filed by respondent Iowa Board of Medicine is granted. This action is dismissed. Costs are assessed to petitioner.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV047376  
**Case Title** SMOKER V. IOWA BOARD OF MEDICINE

So Ordered

A handwritten signature in cursive script, reading "Jeffrey Farrell".

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Jeffrey Farrell, District Court Judge,  
Fifth Judicial District of Iowa