

# **Contested Case Hearings & Judicial Review 101**

**Polk County Bar Association CLE**

**November 20, 2015**

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# Q'S AND A'S ON DISCIPLINARY HEARINGS

## **What is the board's role before charges are filed?**

Board members review the complaint and investigative materials to determine whether charges should be filed or whether some other resolution is appropriate. At this point, the board is only deciding if there is basis to believe a licensee has violated a law or rule enforced by the board, and whether the evidence is sufficient to hold a hearing.

## **What is the probable cause determination based on?**

The probable cause determination is based on the investigative file provided to the Board. A board may not base its decision on rumor, reputation, or other information that may be known to an individual board member.

## **What is the board's role after charges are filed?**

The Board's role is to decide the case, after considering only the evidence and the argument presented at hearing. As decision makers, board members use their expertise to resolve any factual or legal disputes in reaching a final decision on whether a violation has occurred and what, if any, discipline is warranted.

## **What is the role of the assistant attorney general before charges are filed?**

The assistant attorney general (AAG) who typically advises the board reviews draft charges to determine whether there is a legally sufficient basis to proceed to hearing, and whether the specific charges are adequately supported by the complaint, investigative materials, peer review reports, or other information in the Board's investigative file.

## **What is the role of the assistant attorney general assigned to prosecute the case?**

Once charges are filed, the function of the AAG is restricted to prosecuting the case. The AAG prosecutes the case on behalf of the public interest, and presents evidence supporting the charges at hearing. As prosecutor, the AAG cannot act as legal advisor to the board on issues arising in that case.

### **Who answers legal questions after charges are filed?**

Most legal or procedural questions can be answered by the administrative law judge (ALJ) before, during or after the hearing. If necessary, board members may consult with a neutral advisor from the Attorney General's Office.

### **What is the role of the administrative law judge?**

The ALJ assigned by the Department of Inspections and Appeals assists the full board or a panel of the board in conducting the hearing. Many boards refer procedural or evidentiary rulings to the ALJ, although the board retains the right to rule on these matters either initially or on appeal from a proposed ruling by the ALJ. Boards typically rely on the ALJ to draft documents reflecting the board's decision. The Board then reviews the proposed final order to make sure it adequately reflects its deliberations.

### **What is public and what is confidential?**

The statement of charges is a public document once it is filed and the notice of hearing is delivered to the licensee. Final written decisions of the board, whether by settlement or after hearing, are also public records. If the licensee elects a public hearing, witness testimony and most exhibits (unless sealed by the ALJ) are open to the public. Most licensees elect closed hearings. The complaint and all investigative materials which do not become exhibits in open hearing remain confidential. Inquiries about a pending case should be referred to the board office.

### **What information is the licensee entitled to receive?**

After charges are filed, the licensee is entitled to a complete copy of the investigative file. Except as provided above, however, these documents remain confidential to the general public.

### **What is an ex parte communication?**

As soon as the charges are delivered to the licensee, board members are prohibited from having ex parte communications about the case with:

- the prosecutor (AAG), the licensee and the licensee's counsel
- all advocates, such as witnesses
- anyone with a personal interest in the case
- anyone who personally investigated the case, such as board investigators or peer review committee members
- anyone who is supervised by anyone who prosecuted, advocated or personally investigated the case

Once a Statement of Charges has been issued, it is unfair for either the prosecutor or the licensee to communicate with the decision maker about issues to be decided in the case without the other side being present. Communications about the issues with only one side present are ex parte communications. No ex parte communication about the pending case are allowed from the time formal charges are delivered to the licensee until after a final decision has been made and time to petition for rehearing has expired (or the board has ruled on any petition for rehearing).

In some instances (such as proposed settlement) the licensee may authorize the prosecutor to communicate with the board without the licensee present. Staff may receive ex parte communications which the board would be prohibited from receiving, but staff may not share those communications with board members.

### **Are ex parte communications prohibited before charges are filed?**

Ex parte communications are not prohibited before charges are filed, but if board members receive material factual information relating directly to the merits of a case on an ex parte basis they will need to disclose those facts after charges are filed unless the facts are supplied to the licensee and prosecutor in investigatory materials or discovery. This assures that all parties are aware of facts known to the decision makers which may impact the outcome of a case and gives all parties

the opportunity to use or rebut the information at hearing. Board members assigned to hear a case that may need to disclose facts should promptly seek advice from the ALJ or neutral legal advisor on whether and how disclosure should be made. The issue can be minimized if investigators document factual findings in written investigative materials.

**What if a board member receives or initiates a prohibited ex parte communication after the case is on file?**

Receiving or initiating prohibited ex parte communications after the case is on file is a serious matter which can trigger a variety of remedies including, placing the details of the communication and response in the record of the case, disqualification of a board member, and discipline against the person responsible for the communication. Board members should promptly seek advice from the ALJ or neutral legal advisor on the correct legal way to address prohibited ex parte communications occurring after the case is on file.

**When is a board member disqualified from hearing a case?**

Board members must disqualify themselves if they are personally interested in the case or have prosecuted, advocated in, or personally investigated the pending case, or a factually similar case or controversy involving the same parties. Board members can also be disqualified if they are biased. Board members are not required to disqualify themselves merely because they are acquainted with the licensee, but they must disqualify themselves if due to a relationship with the licensee or other factors they are not capable of fairly judging the facts. When in doubt, board members should seek advice on whether the issues which trouble them provide grounds for disqualification or should be disclosed.

**What does “personally investigate” mean?**

The term “personally investigate” means taking affirmative steps to interview witnesses directly, including the licensee, or obtain documents directly. The term does not include general direction or supervision of assigned investigators, unsolicited receipt of information which is relayed to investigators, exposure to investigative materials while making a probable cause determination, or exposure to factual information while performing other board functions, such as fact

gathering for purposes other than investigation of the matter which culminates in a contested case. Licensees can waive the right to seek disqualification on this ground, but absent waiver, a board member who personally investigates a case is disqualified from making any decisions in the case.

### **What is the procedure at hearing?**

The ALJ usually guides the board through the procedures at hearing. The order of most hearings is similar to that in a trial, including opening statements outlining the evidence, the presentation of testimony and exhibits, and closing arguments. The AAG generally goes first because the State has the burden of proof at hearing. Each charge must be proven by a preponderance of the evidence. The board and the ALJ then proceed to deliberations in closed session.

### **Can board members ask questions?**

Board members may ask questions of each witness after the witness is questioned by the prosecutor and licensee. Questions should be relevant to the issues included in the statement of charges and should be designed to elicit information, not to berate or lecture witnesses, argue with witnesses about the merits of their testimony, or offer opinions about the merits of any issue in the case. Board members should reserve expressing their opinions until deliberations.

### **Who can a board member consult with in deliberation about the case?**

Board members may talk with each other about the case after the case has been submitted at hearing. Board members may also receive the assistance of board staff, including consultation during closed session deliberations, as long as the staff member is not personally interested in the case, has not prosecuted, advocated or personally investigated the case, and is not supervised by someone who prosecuted, advocated or personally investigated the case. Deliberations about the evidence should not occur until all of the evidence and arguments have been presented to the Board or panel.

### **What are decisions based on?**

Decisions must be based on evidence and argument presented at hearing. Board members are not permitted to rely upon any information which has not been introduced at hearing.

### **What should a decision include?**

All decisions and rulings must be in writing or stated in the record. Final decisions in a licensee disciplinary case are written documents which contain separately stated findings of fact and conclusions of law. The decision must explain why the relevant evidence in the record supports each material finding of fact. The decision should also explain why contrary evidence was rejected. Where witness credibility is important to resolving disputed facts, the board's opinion on witness credibility should be addressed. After setting forth the facts and law, the decision should carefully explain how the board arrived at its final decision. Although an ALJ will draft the decision, the ALJ only memorializes the board's decision. Board members should use their expertise when reading draft decisions to make sure technical matters, such as professional standards, are accurately and completely described, and that the basis for the board's decision, including the basis for any discipline imposed is fully explained.

### **What are the available sanctions?**

The board has broad authority to impose sanctions if a violation has been proven. Sanctions include citation and warning, civil penalty, continuing education, evaluation, additional training and/or education, probation, monitoring, suspension, and revocation.

### **Can the board consider prior decisions?**

Yes! Boards are required to file and index all contested case rulings. The board can be reversed on appeal if the board fails to follow prior precedent unless the board distinguishes the prior decision or otherwise justifies the inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency. Agency staff should provide information on pertinent board precedent from prior disciplinary rulings.

### **Are board members guided by a code of conduct?**

Board members are governed by a Code of Administrative Judicial Conduct whenever they act in an adjudicatory capacity, including presiding at the hearing, reviewing proposed decisions by an ALJ or board panel, or issuing final decisions. A reprint of portions of the Code follows:

**10.29(1) Canon 1.** A presiding officer shall uphold the integrity and independence of the administrative judiciary.

*a.* An independent and honorable administrative judiciary is indispensable to justice in society.

*b.* A presiding officer shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved.

*c.* The provisions of this code are to be construed and applied to further that objective.

**10.29(2) Canon 2.** A presiding officer shall avoid impropriety and the appearance of impropriety in all adjudicative functions in contested cases.

*a.* A presiding officer shall respect and comply with the law and at all times shall act in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

*b.* A presiding officer shall not allow family, social, political, or other relationships to influence the presiding officer's judicial conduct or judgment. This provision shall not be construed as prohibiting the development of public policy by contested case adjudication. A presiding officer shall not lend the prestige of the office to advance the private interests of the presiding officer or others; nor shall a presiding officer convey or permit others to convey the impression that they are in a special position to influence the presiding officer.

*c.* A presiding officer shall not hold membership in any organization that the presiding officer knows practices invidious discrimination on the basis of race, sex, religion or national origin.

**10.29(3) Canon 3.** A presiding officer shall perform the duties of the office impartially and diligently.

*a. Adjudicative responsibilities.* A presiding officer in the performance of adjudicative duties in contested case proceedings shall follow these standards:

(1) A presiding officer shall be faithful to the law, unswayed by partisan interests, public clamor, or fear of criticism.

(2) A presiding officer shall maintain order and decorum in proceedings before the presiding officer.

(3) A presiding officer shall be patient, dignified, and courteous to litigants, witnesses, attorneys, representatives, and others with whom the presiding officer deals in an official capacity, and shall require similar conduct of attorneys, representatives, staff members and others subject to the presiding officer's direction and control.

(4) A presiding officer shall not, in the performance of adjudicative duties by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon sex, race, national origin or ethnicity and shall not permit staff and others subject to the presiding officer's direction and control to do so.

(5) A presiding officer shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law, and neither initiate nor consider ex parte communications prohibited by Iowa Code section 17A.17.

(6) A presiding officer shall dispose of all adjudicative matters promptly, efficiently and fairly.

(7) A presiding officer shall abstain from public comment about a pending or impending contested case proceeding that might reasonably be expected to affect the outcome or impair the fairness of the proceeding, and shall require similar abstention by agency personnel subject to the presiding officer's direction and control. This subparagraph does not prohibit a presiding officer from making public statements in the course of official duties or from explaining for public information the hearing procedures of agencies.

(8) A presiding officer shall not disclose or use, for any purpose unrelated to adjudicative duties, nonpublic information acquired in an adjudicative capacity except as lawfully permissible in the performance of official duties by an agency head or member of a multimember agency head.

(9) A presiding officer shall report any violation of this code to the appropriate authority for any disciplinary proceedings provided by law.

*b. Disqualification.* A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

(1) Has a personal bias or prejudice concerning a party or a representative of a party;

(2) Has personally investigated, prosecuted or advocated, in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

(3) Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

(4) Has acted as counsel to any person who is a private party to that proceeding within the past two years;

(5) Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

- (6) Has a spouse or relative within the third degree of relationship that:
1. Is a party to the case, or an officer, director or trustee of a party;
  2. Is an attorney in the case;
  3. Is known to have an interest that could be substantially affected by the outcome of the case; or
  4. Is likely to be a material witness in the case; or
- (7) Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

*c. Disclosure on record.* In a situation where a presiding officer knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, the presiding officer shall disclose the relevant information on the record and shall state reasons why voluntary withdrawal is unnecessary.

# Judicial Review 101

## I. Judicial Reviews are APPEALS

### a. Evidence

- i. Do not show up at a judicial review hearing *involving a contested case* and expect to present additional evidence.
- ii. Section 17A.19(7): In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that [1] the additional evidence is material and [2] that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision in the case by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court and mail copies of the new findings or decisions to all parties.

### b. The Record

- i. The court cannot review your appeal without a record.
- ii. The agency is responsible for transmitting the record in judicial review of a contested case, but is not responsible for it on judicial review of other agency action. *Olsen v. Iowa Bd. of Pharmacy*, No. CVCV045505 (Dist. Ct. Iowa Feb. 18, 2014) (“The Petitioner had some duty to present to the reviewing court a record from which a determination could be made that the agency action be reversed, affirmed or remanded as allowed by the statutes.”)
- iii. Absent an issue such as bias, the deliberations of an agency in a contested case proceeding are not part of the record and are therefore not subject to

judicial review. *Fisher v. Bd. of Optometry Exam'rs*, 478 N.W.2d 609 (Iowa 1991).

- iv. Section 17A.19(6): Within thirty days after filing of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of any contested case which may be the subject of the petition. By stipulation of all parties to the review proceedings, the record of such a case may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

**c. Stays**

- i. Filing for judicial review *does not* stay the agency action.
- ii. Request a stay from the agency first; then request it from the court.
- iii. Section 17A.19(5):
  - a. The filing of the petition for review does not itself stay execution or enforcement of any agency action. Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.
  - b. A party may file an interlocutory motion in the reviewing court, during the pendency of judicial review, seeking review of the agency's action on an application for stay or other temporary remedies.
  - c. If the agency refuses to grant an application for stay or other temporary remedies, or application to the agency for a stay or other temporary remedies is an inadequate remedy, the court may grant relief but only after a consideration and balancing of all of the following factors:
    - (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
    - (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
    - (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
    - (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

- d. If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.

**d. Pleading with Specificity**

- i. State the *specific grounds* for seeking judicial review under 17A.19(10) in the petition; do not cite the entirety of 17A.19(10).
- ii. Section 17A.19(10): The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
  - a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied.
  - b. Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law.
  - c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.
  - d. Based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process.
  - e. The product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.
  - f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:
    - (1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral,

detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

(2) "Record before the court" means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) "When that record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity 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.

- g. Action other than a rule that is inconsistent with a rule of the agency.
- h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.
- i. The product of reasoning that is so illogical as to render it wholly irrational.
- j. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.
- k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.
- l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has

clearly been vested by a provision of law in the discretion of the agency.

- m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.
- n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

**e. Exhaustion of Administrative Remedies**

- i. A court will dismiss a petition for judicial review if petitioner failed to exhaust administrative remedies.
- ii. A petition must first petition an agency for a declaratory order as to whether it complied with a particular statute or regulation prior to filing a petition for judicial review. *Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636 (Iowa 2013).
- iii. Section 17A.19(1): A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter. When agency action is pursuant to rate regulatory powers over public utilities or common carriers and the aggrievement or adverse effect is to the rates or charges of a public utility or common carrier, the agency action shall not be final until all agency remedies have been exhausted and a decision prescribing rates which satisfy the requirements of those provisions of the Code has been rendered. A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy. If a declaratory order has not been rendered within sixty days after the filing of a petition therefore under section 17A.9, or by such later time as agreed by the parties, or if the agency declines to issue such a declaratory order after receipt of a petition therefore, any administrative remedy available under section 17A.9 shall be deemed inadequate or exhausted.

**II. Time Frame for Filing Petition for Judicial Review**

**a. Governing statute**

- i. Section 17A.19(3): 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.

**b. Rehearing considerations**

- i. If both parties file for re-hearing at the agency level, the proper time to file a petition for judicial review is within 30 days after the agency's final decision on the last application granted for rehearing, even if more than 30 days has transpired since the denial of the party's own application for rehearing. *Christiansen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179 (Iowa 2013).
- ii. A party does not have a right to file a second request for rehearing before an agency if the agency did not issue an amended order following the first application for rehearing. A second application for rehearing in these circumstances does not toll the 30-day period for filing a petition. *Zafar v. Iowa Bd. of Med.*, No. 3-916/13-0476 (Iowa Ct. App. Dec.18, 2013).

**c. Post-trial motion considerations**

- i. A proper post-trial motion, such as a rule 1.904(2) motion, tolls the 30-day period until the court enters a ruling on the motion, provided that (1) the movant file notice of the appeal within 30 days after the court's ruling on the motion and (2) the post-trial motion was filed for the proper reason. *Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636 (Iowa 2013).
- ii. A rule 1.904(2) motion is only proper if the agency action was taken in a contested case proceeding or if the district court reviewing agency action other than a contested case made a factual determination. In a proceeding considered "other agency action" that does not involve factual determinations, a rule 1.904(2) motion cannot extend the applicable time

period for filing a petition for judicial review. *Deibler v. Iowa Bd. of Regents*, No. 12-1505, 2013 WL 3458177 (Iowa Ct. App. July 10, 2013).