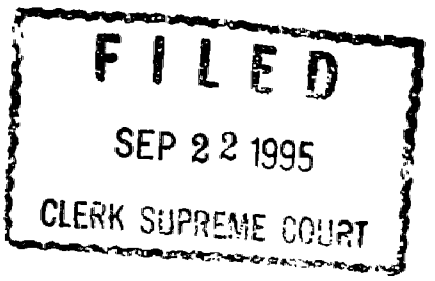
IN THE COURT OF APPEALS OF IOWA



No. 5-378 / 94-1004

VERLYN MICHAEL MILLER, M.D.,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS FOR THE STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Donna Paulsen, Judge.

Miller appeals an order affirming the Iowa Board of Medical Examiners' decision to indefinitely suspend his medical license. **AFFIRMED.**

Michael M. Sellers, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Linny Emrich, Assistant Attorney General, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ. Donielson, C.J., and Sackett, J., take no part.

HAYDEN, P.J.

Verlyn Michael Miller, M.D., was licensed by the Iowa Board of Medical Examiners (Board) to practice medicine in 1974. He was continuously licensed until 1993 when the Board indefinitely suspended his license. The Board's decision was based on evidence Miller had falsely answered a question on a North Dakota application for a medical license. In the application, Miller answered "no" to question 19(I), "Has any hospital, clinic, or military authority altered your privileges to practice in any facility?" Miller was charged with violating Iowa Code section 148.6(1)(a) which prohibits a licensee from "[k]nowingly making misleading, deceptive, untrue or fraudulent representation in the practice of the physician's profession."

A disciplinary hearing was scheduled for March 31, 1993, and Miller was served with notice. On March 17, 1993, Miller filed a lengthy written response to the complaint. On March 30, 1993, Miller faxed a letter stating he would not be able to attend the hearing. Miller did not appear at the hearing on March 31, nor did any attorney appear on his behalf.

Evidence presented at the hearing revealed the North Dakota Board of Examiners (North Dakota Board) denied Miller a medical license because they believed he made a false statement in response to question 19(I) on his application. The North Dakota Board made this decision after receiving two letters from medical chiefs of staff in the Veterans' Administration. A letter from Togas, Maine, stated Miller had been

relieved of all clinical duties at their facility. The other letter from Wichita, Kansas, stated Miller did not disclose the Maine restriction on his privileges when he moved to the medical center in Kansas, thus he was separated from service in 1987. At the hearing, the Board also considered Miller's written response which explained his answer to question 19(I). The Board, however, suspended Miller's license to practice medicine in Iowa.

Miller filed a petition for judicial review of the Board's decision. First, he argued the Board did not conduct an adequate investigation of the charge against him. He asserted the Board should not have relied solely on the North Dakota records but was obligated to independently investigate the allegations raised in the two letters from the Veterans' Administration chiefs of staff. Additionally, Miller requested the case be remanded to the Board for reconsideration of its decision in light of new and additional evidence which was not part of the administrative record. Alternatively, Miller argued to reverse the Board's decision based on a lack of substantial evidence to support the suspension.

The district court affirmed the Board's decision. The district court held the agency did not have an affirmative duty to conduct an investigation of the charge against Miller. The district court also held Miller had not established good reason to remand the case to consider new evidence because Miller had ample opportunity to present additional evidence at the agency level but failed to do so. Furthermore, the

district court held there was substantial evidence to uphold the agency's decision. Miller appeals asserting the three grounds raised at the district court level.

I. Scope of Review.

The scope of review in cases arising out of the Iowa Administrative Procedure Act is limited to the correction of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. *Id.* To make the determination this court applies the standards of Iowa Code section 17A.19(8) (1991) to the agency action to determine whether our conclusions are the same as the district court's. *Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). The scope of review encompasses a review of the entire record and is not limited to the agency's findings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 191 (Iowa 1984).

II. Investigation of Allegations.

Miller contends the Board did not conduct an adequate investigation of the charge against him. Miller argues the Board has a duty to protect licensees from unfounded charges or extortionate allegations. In support of this claim Miller cites Iowa Code section 272C.3(c) and (d). Section (c) states each licensing board has the power to "[r]eview or investigate, or both, upon written complaint or upon its own motion pursuant to other evidence received by the board, alleged acts or omissions

which the board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline." Section (d) gives each licensing board the power to "[d]etermine in any case whether an investigation, or further investigation, or a disciplinary proceeding is warranted." Miller argues the agency's failure to adequately investigate is grounds for reversing the agency's decision under Iowa Code section 17A.19(8)(b) and (c) because its action was "in excess of the statutory authority" and "in violation of an agency rule."

We reject Miller's argument. The Board does not have an affirmative duty to independently investigate allegations raised before the agency. Iowa Code section 272C.3 gives the Board the power to determine *whether or not* an investigation, further investigation, or a disciplinary proceeding is warranted. (Emphasis added.) The plain language of the statute commits the investigation of complaints to the discretion of each licensing board.

Furthermore, Iowa case law has never imposed upon agencies an affirmative obligation to investigate complaints. To require the Board to conduct an investigation before every hearing would require it to act as legal counsel for every individual brought before it. Such a result is impractical. It was Miller, not the agency, who had the obligation to develop and present his case to the Board. The purpose of a disciplinary hearing is to give the *licensee* full and fair opportunity to be heard. Miller

was given the opportunity, yet he chose only to write a letter in response to the complaint.

We hold the Board had no affirmative obligation to investigate the charge against Miller. Therefore, we affirm.

III. Consideration of New Evidence.

Miller filed an affidavit and brief with attachments consisting of documents purportedly from his personnel file. These documents were not presented at the hearing before the Board. Miller argues these documents are new and additional evidence which should be considered by the agency upon remand. The district court refused to consider the documents and also denied Miller's request to remand to the agency so it could consider the documents. Miller again raises this issue on appeal.

Our review is limited to determining whether the district court abused its discretion in refusing to remand the case so the agency could consider additional evidence. *Interstate Power*, 463 N.W.2d at 702. Iowa Code section 17A.19(7) governs when we remand a contested case to the agency for the presentation of additional evidence. Section 17A.19(7) states, "[i]n proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate . . . . If it is shown to the satisfaction of the court that the additional evidence is *material* and 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." Iowa Code § 17A.19 (emphasis added). Therefore, in order to be granted a remand, Miller must establish this additional evidence is material and there was good reason for his failure to present it to the agency. *Fisher v. Board of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991); *Interstate Power v. Commerce Comm'n*, 463 N.W.2d 699, 702 (Iowa 1990); *Heidemann v. Sweitzer*, 375 N.W.2d 665, 670 (Iowa 1985).

In his brief, Miller did not give any legitimate reason for his failure to present the additional evidence to the agency. He merely presents a series of excuses which we find unpersuasive. First, Miller states the case should be remanded to consider new evidence because the Board failed to investigate the claim made against him. As stated in part II of this opinion, however, it is not the agency's responsibility to seek out evidence which will exonerate the person charged. The purpose of an administrative hearing is to give the *person charged* an opportunity to be heard and present his or her case to the agency. Miller's reliance on the Board to uncover evidence for him does not justify his failure to present this evidence to the agency.

Additionally, in his reply brief, Miller states it was difficult to attend the hearing because some time after March 8 his schedule was changed by his employer. According to Mr. Miller, he spoke with Mr. Carr about changing the hearing to April if his written response was inadequate. On March 29 the agency told Miller it was impossible to change the date of the hearing. Miller claims this late notice is good

cause to remand. We find this is not adequate reason for failing to present the evidence to the agency. Miller was made aware of the charges and date of the hearing on January 28. He had ample time to gather evidence and either find time to attend the hearing or hire an attorney to represent him. At no time did Miller attempt to acquire or present the evidence he now seeks to be reviewed. As appellant points out, Miller does not contend the personnel file he now attempts to present was not available at the time of the hearing. Therefore, we do not believe the late notice is reason to remand.

Miller also claims he was at a disadvantage because he did not know what a serious impact the Board's actions would have on his career. He claims he was only told the Board was asked to take "disciplinary action." We believe, however, Miller was well aware of the seriousness of the charges. The original notice informed him the complaint prayed his license be revoked or suspended, or he be disciplined. This alone should have indicated to Miller the charges were serious and he should act to defend himself. We determine Miller's failure to take the charge seriously is not good enough reason to justify remanding to the agency.

Miller argues he could not properly defend himself at the hearing because the Board waited until four days prior to the hearing before sending Miller the documentation it would rely upon in seeking disciplinary action. He believes this act "disarmed" him from being able to defend himself. Whether Miller had the documentation is irrelevant. As stated above, Miller was fully informed of the details

of the charges when he received a copy of the complaint dated January 28. This put him on notice of the type of proof he needed to gather in his defense. Therefore, this is not adequate grounds to remand.

We hold there was no showing Miller had good cause for his failure to present this additional evidence to the agency. Since the statutory grounds necessary under Iowa Code section 17A.19 are not present, the district court did not err in refusing Miller's motion to remand to the agency for consideration of new evidence. We affirm.

IV. Substantial Evidence.

Iowa Code section 17A.19(8)(f) provides in a contested case the court shall grant relief from an agency decision which is unsupported by substantial evidence made before the agency when the record is viewed as a whole. *Eaton v. Iowa Dep't of Job Serv.*, 376 N.W.2d 915, 916-17 (Iowa App. 1985). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion. *Id.* at 917. The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 734 (Iowa App. 1986). The fact two inconsistent conclusions can be drawn from the evidence does not mean one of those conclusions is unsupported by substantial evidence *Id.*

We find there is substantial evidence in the record to support the agency's action. Support for the agency's decision is found in the certified records received from the

North Dakota Board and in the two letters from the Togas, Maine, and Wichita, Kansas, Veterans' Administration medical facilities. The letter from Maine reveals Miller was relieved of all clinical duties in April of 1986. The letter from Kansas stated Miller was separated from service due to Miller's failure to inform the Wichita facility his practice privileges had been previously restricted.

In addition to the letters, Miller's response to the complaint lends support to the agency's decision. In paragraph four of Miller's response to the complaint, he admits he was separated from clinical service by the Veterans Administration. He states the separation was due to minor incident of indecisiveness. Furthermore, in paragraph six Miller admits he answered "no" to question 19(I), "Has any hospital, clinic, or military authority altered your privileges to practice in any facility?" This alone is enough to support the agency's decision. Regardless of the reason for or validity of his separation from the Veteran's Administration, the fact remains his privileges were altered and he answered "no" to question 19(I).

Miller, however, contends the Board misunderstood his response in paragraphs four and six. He states his response in paragraph four was not an admission his privileges had been altered. In fact, he claims he did not believe there was any reduction in his privileges. According to Miller there was no system in place for such reduction at the Veterans' Administration. Regardless of whether a formal system

existed, we fail to understand how being separated from clinical services could be viewed as anything but a reduction in privileges.

Miller attempts to explain his answer to question 19(I) by stating a positive response would have falsely implied negligence or incompetence on his part. Additionally, he states, "The community in North Dakota wanted and needed Respondent's services urgently. At the time Respondent did not have the services of a secretary to use for a long explanation and was attempting to complete the necessary application and documentation in rapid haste. Respondent mistakenly thought a 'yes' answer would unnecessarily have prolonged the application process." We find this reasoning skewed. The importance of quality medical care demands honesty in applications for licensure regardless of the processing time or the possibility an answer may imply negligence. Miller should have taken the time to honestly answer question 19(I) and write an explanation *himself*.

Lastly, Miller contends by relying on the two letters, the Board relied on uncorroborated hearsay. Miller cites *Nieman v. Iowa Department of Transportation*, 452 N.W.2d 203 (Iowa App. 1989), for the proposition uncorroborated hearsay can never be substantial evidence. In *Nieman*, however, the court noted a split in authority about whether hearsay requires corroboration or only "sufficient probative force." *Id.* at 206. The court never chose between the competing lines of authority. Rather, the court held the hearsay relied upon by the agency in the case at hand did not have

sufficient probative force to meet either test. *Id.* In a subsequent case the court rejected the requirement of at least a scintilla of admissible evidence to support or corroborate an administrative finding based on hearsay. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 606 (Iowa App. 1990). The court stated we should "ignore the character of the evidence as out-of-court statements and focus on the qualitative and quantitative sufficiency of the evidence offered." *Id.* at 607. As such, these letters can and do constitute substantial evidence.

We find there is substantial evidence in the record to support the agency's decision. Therefore, we affirm.

V. Conclusion.

We conclude the district court did not err in holding the agency does not have an affirmative duty to investigate contested cases brought before it. The district court also correctly refused to remand the case to the agency for consideration of the additional evidence because Miller did not have good cause for failing to present the evidence before the agency. Furthermore, the district court was correct in finding there was substantial evidence in the record to support the agency's decision. We affirm.

AFFIRMED.