

IN THE IOWA DISTRICT COURT FOR AUDUBON COUNTY

<p>MARK KESSLER, FD, Petitioner, vs. IOWA BOARD OF MORTUARY SCIENCE, Respondent.</p>	<p>Case No. CVCV019265 RULING ON PETITION FOR JUDICIAL REVIEW AND ORDER</p>
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This matter came before the Court on Petitioner's request for judicial review. Petitioner, Mark Kessler, was represented by counsel of record, Julie A. Schumacher. Respondent, Iowa Board of Mortuary Science, was represented by Assistant Attorney General, Pamela D. Griebel. Telephonic hearing was held on November 15, 2010. The Court, after reviewing the record and being duly advised of the premises, finds the following:

I. BACKGROUND FACTS AND PROCEEDINGS

This case arises out of a complaint filed against Mr. Kessler and contested before the Iowa Board of Mortuary Science ("Board"). In 1980 Mark Kessler ("Mr. Kessler") obtained his funeral director's license to practice in Iowa. Located in Audubon, Iowa, Mr. Kessler has been employed by Kessler Funeral Home, Inc. ("Kessler Funeral Home") since 1984. After graduating from mortuary school, T.S. sought out an internship at Kessler Funeral Home. T.S. started working at the funeral home on August 23, 2004, and started her one-year internship program under Mr. Kessler's direction on June 9, 2005.

When it came time for T.S. to file a six-month internship report with the Board, T.S. expressed that the process could be improved if she could speak personally with a Board member. Ruth Ohde, a Board member, followed up with T.S.'s request and called T.S. T.S.

informed Ruth Ohde that Mr. Kessler verbally and sexually harassed T.S. and his comments focused on her homosexuality. Ruth Ohde informed T.S. that the Board could not take action unless T.S. filed a complaint. T.S. did not immediately file a complaint.

T.S. completed her internship on June 9, 2006 and quit her position at Kessler Funeral Home on August 4, 2006. T.S. filed a complaint with the Board on June 8, 2007. T.S. attached a statement to the complaint which alleged that Mr. Kessler called her names such as “bitch”, “fucking bitch”, “dyke”, “carpet muncher”, “smoochy”, “hillbilly”, “white trash”, “trailer trash”. *See Exhibit 2.* T.S. also alleged that Mr. Kessler made inappropriate sexual comments towards her, threw a dirty wash cloth at her after he finished showering, and drank alcohol while working. *Id.*

After the complaint was filed, the Iowa Department of Inspections and Appeals commenced an investigation. The Department of Inspections and Appeals conducted several interviews, all of which were admitted into evidence at the hearing before the Board. *See Exhibit 3.* During T.S.’s interview, she reiterated the inappropriate name calling and sexual comments made by Mr. Kessler. In Mr. Kessler’s interview, he admitted that name calling occurred at the funeral home but noted that it was all in fun and in a joking manner. *Id.* However, Mr. Kessler denied making sexually charged comments or innuendos towards T.S or that alcohol was consumed in the working area of the funeral home. Travis Beckendorf and Dan Mennonoh, employees of Kessler Funeral Home during the alleged conduct, were also interviewed during the investigation. Both stated that they never heard Mr. Kessler make any sexually charged comments nor did alcohol consumption occur in the working area of the funeral home.

Marilyn Eddy (“Ms. Eddy”), a former receptionist for Kessler Funeral Home, stated in her interview that Mr. Kessler engaged in abusive name calling and made numerous sexually

charged comments toward T.S. At one time, Ms. Eddy heard Mr. Kessler tell T.S. that she should give him a “blow job”. She also stated that because there was a keg kept in the basement, alcohol consumption occurred in all areas of the funeral home. Ms. Eddy described that Mr. Kessler would shower in a room attached to her and T.S.’s office. She noted that when Mr. Kessler finished showering, he would throw his wash cloth at the employees.

Pursuant to Iowa Code sections 147.55(3) and 272C.10(c) and Iowa administrative rule 645-103.2(4)(c), the Board charged Mr. Kessler with unethical conduct and practices harmful or detrimental to the public. Mr. Kessler timely answered, denying all allegations. The Board held a hearing on September 10, 2009.

Except for a few points, the witnesses at the hearing generally testified consistent with their prior interviews. The Board found that T.S.’s and M.E.’s testimony was more credible than other witnesses. The Board noted that T.S.’s testimony was consistent with prior statements, and she was able to give very specific information concerning the name calling and sexual comments. The Board found that Ms. Eddy corroborated T.S.’s testimony. Contrary to T.S.’s and Ms. Eddy’s testimony, the Board found Mr. Kessler’s testimony was inconsistent with his prior statements, as he denied calling T.S. a “bitch” but admitted this fact at a previous interview. Moreover, the Board noted that Travis Beckendorf appeared to be struggling to testify in a manner that would not incriminate Mr. Kessler.

Based on all the evidence, the Board found that Mr. Kessler engaged in: (1) inappropriate inquiries and comments about T.S.’s sexual orientation and sexual activity; (2) inappropriate and demeaning name calling; and (3) lewd comments concerning sexual acts and implied requests for sexual acts. The Board was also persuaded that Mr. Kessler and the male employees were minimizing the true alcohol consumption that occurred at the funeral home. Finally, the Board

determined that the evidence established the fact that Mr. Kessler threw his wash cloth at T.S. after he finished showering on multiple occasions.

The Board issued its Findings of Fact, Conclusions of Law, Decision and Order on October 7, 2009. The Board sustained the charges and entered a disciplinary order which imposed a civil penalty; enjoined Mr. Kessler from acting as a preceptor for interns in the future; required an education program on sexual harassment, professional boundaries, diversity and discrimination; placed Mr. Kessler on probation; and assessed hearing costs.

On October 12, 2009, the state applied for rehearing, requesting that the Board redact certain private matters, modify and clarify its findings of fact, and suspend Mr. Kessler's license pending the receipt of a mental and sexual boundaries evaluation. Mr. Kessler resisted the state's application. None of the parties requested oral argument or asked the Board to receive new evidence. On November 5, 2009, the Board issued a Final Order Following Rehearing, suspending Mr. Kessler's license until a mental health and sexual boundaries evaluation was conducted. No party sought rehearing from this decision.

Mr. Kessler petitioned for judicial review on December 7, 2009. In his Petition and supporting Brief, Mr. Kessler raises issue with the Board's findings of fact and also claims certain aspects of the Board's proceedings were unconstitutional. We now turn to our review of these issues.

II. SCOPE AND STANDARDS OF REVIEW

Iowa Code chapter 17A¹ guides our review of agency action in contested cases. *Iowa Ag. Const., Inc. v. Iowa State. Bd. of Tax Review*, 723 N.W.2d 167, 173 (Iowa 2006) (citations omitted). An adversely affected party, after having exhausted all administrative remedies, may seek judicial review of agency action. Iowa Code § 17A.19(1). A district court functions in an

¹ Unless otherwise noted, all statutory references are to the 2009 edition of the Iowa Code.

appellate capacity to correct an agency's errors of law. *Grundmeier v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). "The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action if substantial rights of the petitioner have been prejudiced because of such action." *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 627 (Iowa 2000).

We give appropriate deference to the agency's view on "particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(c). Therefore, the precise claim of error determines our scope of review. *See Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact." *Id.* at 218. We are bound by the agency's findings if supported by substantial evidence in the record as a whole. *Id.* For reviewing purposes, evidence is substantial if a reasonable person would deem the evidence sufficient to establish a fact at issue in light of the serious consequences resulting from established facts. Iowa Code § 17A.19(1)(f)(1). A court does not consider whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Meyer*, 710 N.W.2d at 218.

If the claim of error lies with the ultimate conclusion reached by the agency, we are concerned with the agency's application of law to fact, and the question is whether the agency abused its discretion. *Id.* We allow some agency discretion in the application of law to fact but not the extent of discretion given the findings of fact. *Id.* at 219. Specifically, section 17A.10(10)(m) instructs that we reverse an agency's decision if it resulted from "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.” In a contested case, the agency has discretion in its application of law to the facts. *The Sherwin-Williams Co. v. Iowa Dep’t of Revenue*, 789 N.W.2d 417, 431 (Iowa 2010) (citations omitted).

While we give deference to findings and application of law to fact, when a constitutional issue is raised, we make an independent evaluation of all the evidence. *Office of Consumer Advocate v. Iowa State Commerce Comm’n*, 465 N.W.2d 280, 281 (Iowa 1991). Accordingly, a court reviews constitutional challenges de novo. *Houck v. Iowa Bd. of Pharmacy Examiners*, 752 N.W.2d 14, 17 (Iowa 2008).

To understand how we must review this action, it is important that we pinpoint the precise claim of error Mr. Kessler puts forth as his first issue. Mr. Kessler appears to claim that it was improper for the Board to find that he engaged in questionable conduct because the findings were based on testimony of a disgruntled employee, T.S. Mr. Kessler also claims that the Board erred because “[t]here was not presented substantial evidence that Mark Kessler acted with unethical conduct and practices harmful or detrimental to the public.” Petitioner’s Brief at 4. While Mr. Kessler categorizes the Board’s findings of fact and its ultimate conclusion based on those facts as one issue, we think he actually presents two issues. *See Meyer*, 710 N.W.2d at 219 (noting the Commissioner’s findings of fact concerning petitioner’s injury is distinct from the ultimate conclusion flowing from those facts that the injury did not arise out of the course of employment under the applicable legal standard). Mr. Kessler’s assignment of error is essentially a mixed question of law and fact and cannot be lumped “together within the umbrella of a substantial-evidence issue.” *Id.*

To clarify, we have a mixed question of law and fact for our review. Mr. Kessler frames the issue as whether substantial evidence supports the Board’s factual findings and argues that

there was not substantial evidence to support the Board's determination that he acted with unethical conduct and practices harmful or detrimental to the public. By raising issue with the Board's ultimate determination (i.e., he acted with unethical conduct and practices harmful or detrimental to the public), Mr. Kessler questions the legal conclusion the Board has drawn from the facts. *See Meyer*, 710 N.W.2d at 219-20, 219 n.1. That is, Mr. Kessler challenges whether the Board correctly applied the law to the facts. *Id.*

Although Mr. Kessler's claim of insubstantial evidence may necessarily implicate a challenge to the Board's legal conclusion, we must distinguish the issues because separate standards of review govern. *See Meyer*, 710 N.W.2d at 219 n.1. First, we review Mr. Kessler's disagreement with the Board's factual findings under the substantial evidence standard. *Id.* at 218. Second, we review the Board's ultimate conclusion that Mr. Kessler engaged in unethical conduct or practice harmful or detrimental to the public for abuse of discretion. *Id.* at 219. The latter issue requires us to ask whether the Board's application of law to fact was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(m). By applying these differing standards, we are giving appropriate deference to the Board. *See Iowa Ag. Const., Inc.*, 723 N.W.2d at 172-73; Iowa Code § 17A.19(1)(c).

III. RULING OF THE COURT

In light of our discussion above, we will address the following issues: (1) whether substantial evidence supported the Board's findings of fact; (2) whether the Board correctly applied the law to those facts; and (3) whether the Board deprived Mr. Kessler of due process by failing to provide him with notice of the rehearing and opportunity to be heard. As we proceed with our analysis, we are mindful of the deference afforded the Board. *See Iowa Code* §§ 17A.19(1)(f)(l), (10)(m).

A. *Constitutional Challenge*

As a threshold matter, we must determine whether Mr. Kessler properly preserved these assignments of error for our review. The Board contends that Mr. Kessler did not preserve his constitutional challenge, raising it for the first time on appeal. We agree with the Board and conclude that because Mr. Kessler never raised his constitutional challenge in the earlier proceedings, the issue has not been preserved for our review.

Stemming from the doctrine of error preservation, a party is precluded from raising issues in the district court that were not presented and litigated before the agency. *Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). A party must raise constitutional issues in the agency proceedings notwithstanding the agency's lack of authority to decide constitutional issues. *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (1994). A party may raise a constitutional issue before the agency in the pleadings, motions, or testimony during the hearing. *Fisher v. Iowa Bd. of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991). The issue may also be preserved by raising it "in a motion for or resistance to, a request for a rehearing or at the rehearing itself." *Id.*; *Rosen v. Board of Medical Examiners of the State of Iowa*, 539 N.W.2d 345, 352 (Iowa 1995). While a party may not recognize a constitutional defect until after the agency issues their decision, a party may, nevertheless, raise that issue in an application for, or resistance to, a request for rehearing. *See id.*

Presently, Mr. Kessler failed to preserve his constitutional challenge. On this appeal, Mr. Kessler alleges that he was not afforded due process because the Board failed to give him notice of the rehearing and allow him an opportunity to be heard. A search of the record fails to reveal that Mr. Kessler made this alleged constitutional defect apparent to the Board at any time. In fact, Mr. Kessler had ample opportunity to raise the issue and failed to do so. Indeed, Mr.

Kessler filed a response to the state's application for rehearing but did not raise any constitutional issues. Even if the alleged constitutional defects were not apparent to Mr. Kessler at the time he filed his response to the state's application, he could have requested an oral rehearing to raise the issue or filed a motion for rehearing after the Board made its final decision. *See Fisher*, 478 N.W.2d at 612. Therefore, because Mr. Kessler did not raise his constitutional challenge before the agency, we do not consider it on review.

B. The Board's Findings of Fact

Mr. Kessler claims the Board's findings of fact are not supported by substantial evidence. Specifically, Mr. Kessler appears to argue that T.S.'s testimony was not credible as she was a disgruntled employee, and, therefore, the evidence does not support the Board's findings. Mr. Kessler supports his position by relying on the testimony of other employees who described him as a good employer. In our review of the entire record, there is substantial evidence to support the Board's thorough findings that Mr. Kessler committed the conduct alleged.

Mr. Kessler's primary argument is essentially a question of whether T.S.'s testimony was credible enough to establish facts. Determining the credibility of witnesses and the weight of evidence are issues solely within the province of the agency. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007). "The reviewing court only determines whether substantial evidence supports a finding *according to those witnesses whom the [Board] believed.*" *Id.* (internal quotation marks and citations omitted; emphasis in original). The Board made a credibility assessment and found T.S. and Ms. Eddy more credible than Mr. Kessler and his witnesses. We do not question the Board's credibility assessment as that was within its discretion. Thus, we need only consider whether, after evaluating the entire record, a reasonable person would deem that it contains sufficient evidence to support the Board's finding that Mr.

Kessler committed the conduct alleged.

Clearly, after T.S. and Ms. Eddy described in detail Mr. Kessler's conduct, a reasonable person would find their testimony sufficiently established that Mr. Kessler called T.S. names such as "bitch", "fucking bitch", "trailer trash" and "carpet muncher". T.S. also gave a previous statement maintaining this same type of name calling. *See Exhibit 2.* Moreover, Mr. Kessler admitted that he called T.S. a "bitch", although in a joking manner.

There is also substantial evidence in the record to support the findings that Mr. Kessler engaged in sexual harassing and inappropriate conduct. Ms. Eddy and T.S. both gave statements about the sexual comments and sexual joking Mr. Kessler made toward T.S., including that if T.S. wanted a raise she would have to sleep with him. *See Exhibit 2.* Ms. Eddy also heard Mr. Kessler tell T.S. that she should give him a "blow job". T.S.'s testimony revealed that Mr. Kessler made statements and actions insinuating that she should perform oral sex on him and made demeaning statements about her sexual orientation. Additionally, it was undisputed that Mr. Kessler showered in the bathroom connected to Ms. Eddy and T.S.'s office. Based on the location of the bathroom and Ms. Eddy's and T.S.'s testimony, a reasonable person would conclude that while walking through their office, Mr. Kessler threw his wash cloth at T.S.

Finally, although it was disputed, we conclude there was substantial evidence for the Board to find that Mr. Kessler and his witnesses were minimizing the alcohol consumption going on at the funeral home. Ms. Eddy and T.S. both testified that excessive alcohol consumption occurred in all areas of the funeral home. It was also undisputed that a beer keg was installed in the funeral home's basement. From this, a reasonable person would conclude that more alcohol consumption was taking place than Mr. Kessler admitted.

Relying on T.S.'s prior consistent statement, her testimony, her demeanor at hearing, and

the corroborating testimony of Ms. Eddy, the Board was persuaded that Mr. Kessler committed the alleged conduct. Therefore, after reviewing the record as whole, we find substantial evidence supports the Board's factual findings concerning Mr. Kessler's conduct.

C. The Board's Application of Law to Fact

Based on the factual findings, the Board concluded that Mr. Kessler engaged in unethical conduct and practices harmful or detrimental to the public. Because the Board's decision did not result from an "irrational, illogical, or wholly unjustifiable" application of law to fact, we affirm the Board's decision.

The Iowa legislature has promulgated several provisions dealing with licensees in a health-related profession. *See, e.g.*, Iowa Code § 147.1 *et seq.* Specifically, section 147.55(3) requires the board governing a licensee's profession to discipline a licensee who "engage[s] in unethical conduct or practice harmful or detrimental to the public." Similarly, section 272C.10(3) gives a licensing board the authority to create rules for the revocation or suspension of a license, including a provision that applies when a licensee is "engaging in unethical conduct or practice harmful or detrimental to the public." In addition to the sections noted above, section 156.9(1) specifically grants the Board of Mortuary Science the authority to revoke or suspend one's license to practice mortuary science or otherwise discipline a licensee.

Pursuant to this statutory authority, the Board has prescribed rules that delineate what type of conduct is deemed "unethical, harmful, or detrimental to the public." *See* Iowa Admin. Code r. 645-103.3(4). The following provision constitutes conduct that is "unethical, harmful or detrimental to the public":

Verbal or physical abuse, improper sexual contact, or making suggestive, lewd, lascivious, offensive or improper remarks or advances, if such behavior occurs within the practice of mortuary science or such behavior otherwise provides a reasonable basis for the board to conclude that such behavior would place the

public at risk within the practice of mortuary science.

Iowa Admin. Code r. 645-103.3(4)(c). Because the Board has explained the type of actions that constitute conduct that is “unethical, harmful or detrimental to the public”, the Board need not make a specific finding that the practice at issue is unethical or is harmful or is detrimental to the public. *See Franich v. Real Estate Comm’n of State*, 681 N.W.2d 620, 624-25 (Iowa 2004).

In the present case, the Board made extensive findings of fact. Namely, the Board found that Mr. Kessler engaged in: (1) inappropriate inquiries and comments about T.S.’s sexual orientation and sexual activity; (2) inappropriate and demeaning name calling; and (3) lewd comments concerning sexual acts and implied requests for sexual acts. Mr. Kessler engaged in this conduct while working in the confines of the funeral home. This type of action falls precisely within the Board’s definition of conduct that is “unethical, harmful or detrimental to the public.” *See Iowa Admin. Code r. 645-103.3(c); Franich*, 681 N.W.2d at 624-625. Therefore, the Board properly concluded that Mr. Kessler’s actions constituted “unethical conduct or practice harmful or detrimental to the public” and certainly, its application of law to fact was not “irrational, illogical, or wholly unjustifiable.” Accordingly, we affirm the Board’s decision in its entirety.

IT IS THEREFORE ORDERED that Respondent’s decision and Final Order Following Rehearing is affirmed.

IT IS FURTHER ORDERED that costs are taxed to Petitioner.

DATED: December_____, 2010.

JEFFREY L. LARSON, JUDGE
IOWA FOURTH JUDICIAL DISTRICT