IN THE COURT OF APPEALS OF IOWA

No. 3-450 / 12-1827
Filed July 24, 2013

LEE BIRCHANSKY, M.D.,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF PUBLIC HEALTH,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Dr. Birchansky appeals from the district court order dismissing his petition for judicial review. **AFFIRMED.**

Deborah M. Tharnish and Sara K. Franklin of Davis, Brown, Keohn, Shors & Roberts, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Heather Lynn Adams, Assistant Attorney General, for appellee.

William J. Miller of Dorsey & Whitney, L.L.P., Des Moines, for intervenor Mercy Medical Center.

Rebecca A. Brommel of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for intervenor St. Luke's Hospital.

Heard by Doyle, P.J., Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

BOWER, J.

Following an unsuccessful administrative challenge to the Iowa Department of Public Health's notice of proposed action imposing a civil penalty and ordering he cease and desist performing cataract surgery in his office, Dr. Lee Birchansky filed a petition for judicial review. The district court dismissed the petition, finding Dr. Birchansky failed to serve the intervenors in the action within ten days of filing the petition, as required by law. The question presented for our review is solely a legal one: whether the district court properly dismissed the petition for failure to timely serve all required parties.

Having considered the arguments advanced by Dr. Birchansky, we find he was required to serve the intervenors in the action within ten days of the filing of his petition for judicial review. We further find Dr. Birchansky has failed to comply or substantially comply with the service requirements found in the Iowa Code. Because this failure deprives the district court of jurisdiction to entertain the judicial review action, we affirm the order dismissing Dr. Birchansky's petition.

I. Background Facts and Proceedings.

The facts are not in dispute.[1] Dr. Birchansky is an ophthalmologist who practices in Cedar Rapids. On three occasions, he has applied for a certificate of need from the State Health Facilities Council in order to perform cataract surgeries in his office, rather than in a hospital. The council has denied each of these applications. After receiving reports that Dr. Birchansky was performing

[1] The district court docket does not show the agency record was received or made a part of the record in the case at bar. We rely on the recitation of the facts in the underlying dispute provided by the parties and the district court.

cataract surgery in his office without a certificate of need, as well as an acknowledgement of the same by the doctor, the Iowa Department of Public Health (IDPH) issued a notice of proposed action against Dr. Birchansky on April 15, 2010. The notice of proposed action assessed a $20,000 civil penalty against Dr. Birchansky and ordered him to cease and desist performing the surgeries in his office.

On May 5, 2010, Dr. Birchansky filed a notice of appeal of the proposed action, as well as a request for a contested case hearing. Mercy Medical Center (Mercy) and St. Luke's Hospital (St. Luke's) sought to intervene in the proceedings and were admitted on August 5, 2010. The administrative hearing occurred on September 24, 2010, and both Mercy and St. Luke's participated. On December 2, 2010, the administrative law judge entered a proposed decision finding Dr. Birchansky had violated the law by performing outpatient surgery in his office without a certificate of need. The decision found the civil penalty and the cease-and-desist orders were both reasonable sanctions. The IDPH affirmed and adopted the proposed decision on December 28, 2011. Dr. Birchansky's requests for rehearing and a stay were denied on February 24, 2012.

Dr. Birchansky filed a petition for judicial review on March 6, 2012. The petition named the IDHP as a party, but did not list either Mercy of St. Luke's despite their intervention in the contested case. Dr. Birchansky promptly served the IDHP with notice of the action. The IDHP provided Mercy and St. Luke's with copies of the petition for judicial review the day after the action was filed, but Dr. Birchansky failed to serve either until April 2, 2012.

On March 29, 2012, Mercy moved to intervene and to dismiss, arguing Dr. Birchansky failed to serve it with a copy of the petition for judicial review within the time limit provided by statute and, therefore, the district court lacked subject matter jurisdiction over the case. On April 2, 2012, Dr. Birchansky served Mercy and St. Luke's. St. Luke's also moved to intervene and dismiss on April 10, 2012. Dr. Birchansky resisted the motions, arguing counsel for the IDPH sent both hospitals an electronic copy of the petition the day after it was filed, and his own counsel had provided them with copies on April 2, 2012—two weeks after the deadline for service had passed.

On September 10, 2012, the district court entered an order dismissing Dr. Birchansky's petition for judicial review. The court held that because both Mercy and St. Luke's were permitted to intervene in the contested case hearing, they became parties of record; accordingly, service was necessary pursuant to Iowa Code section 17A.2(8) (2011). Because Dr. Birchansky failed to serve both Mercy and St. Luke's within ten days of filing the petition for judicial review, the court found it lacked jurisdiction. It rejected Dr. Birchansky's argument that he had substantially complied with the service provisions of section 17A.19(2).

II. Scope and Standard of Review.

We review a dismissal of a petition for judicial review for the correction of errors at law. Iowa R. App. P. 6.907; *Strickland v. Iowa Bd. of Medicine*, 764 N.W.2d 559, 561 (Iowa Ct. App. 2009). Issues of statutory interpretation and application are also reviewed for errors at law. *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011).

III. Analysis.

The right to appeal an agency decision is purely statutory and is controlled by Iowa Code section 17A.19. *Neumeister v. City Dev. Bd.*, 291 N.W.2d 11, 14 (Iowa 1980). A party must comply with the requirements of section 17A.19 before seeking relief from the district court in a judicial review action. *Id.* The question before us is whether Dr. Birchansky fulfilled the service requirement of Iowa Code section 17A.19(2). Failure to do so deprives the district court of subject matter jurisdiction to review the agency decision. *Dawson v. Iowa Merit Emp't Comm'n*, 303 N.W.2d 158, 160 (Iowa 1981).

Dr. Birchansky first argues the service requirement found in section 17A.19(2) is inapplicable here. That section states in pertinent part:

> Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition *and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency*. Such personal service or mailing shall be jurisdictional.

Iowa Code § 17A.19(2) (emphasis added). This case involves review of an agency action in a contested case. Dr. Birchansky argues Mercy and St. Luke's were not parties to the action and therefore did not require service of the judicial review action. He cites *City of Hiawatha v. City Development Board*, 609 N.W.2d 496 (Iowa 2000), for support.

In *Hiawatha*, our supreme court addressed the question of whether the district court had jurisdiction to entertain judicial review of a voluntary annexation proceeding where some of the property owners who appeared at the board

hearing were not served with copies of the petition for judicial review. 609 N.W.2d at 498-99. The intervenors in the voluntary annexation proceeding argued that pursuant section 17A.19(2), the city's failure to serve those homeowners deprived the court of subject matter jurisdiction. *Id.* Our supreme court rejected the argument, holding the property owners were not parties of record and, accordingly, service was not required simply because the property owners had signed the petition for annexation or because they had participated in the board hearing. *Id.* at 499.

Unlike the homeowners in *Hiawatha*, both Mercy and St. Luke's were admitted as intervenors in the action. However, Dr. Birchansky focuses on one sentence in the *Hiawatha* ruling to argue Mercy and St. Luke's were not parties of record. In rejecting the appellants' jurisdiction argument, the court stated: "All parties of record *and* intervenors were served either personally or through their attorneys." *Id.* (emphasis added). Dr. Birchansky argues the use of "and" signals that intervenors in an action are not parties of record.

Iowa Code section 17A.2(8) defines a "party" as "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." Mercy and St. Luke's were not named parties to the action when it was filed, but rather were admitted as parties to the contested case and therefore fall within the definition of party in section 17A.2(8). We find our

supreme court's use of "and" in *Hiawatha* does not warrant the strained interpretation of section 17A.19(2) Dr. Birchansky advocates.[2]

Dr. Birchansky also argues he provided timely service by reading the provisions 17A.19(2) in conjunction with the provisions of section 17A.19(3). Section 17A.19(3) requires a party to file a petition for judicial review "within thirty days" of the agency's denial of an application for rehearing. Adding the ten-day time limit to serve the parties with the thirty-day time limit to file a petition for judicial review, Dr. Birchansky argues section 17A.19(2) "essentially requires that all parties receive notice of a petition for judicial review within forty days after final decision by an administrative agency." Dr. Birchansky filed his petition for judicial review only ten days after the agency's denial of his application for rehearing, but did not serve the parties until nearly one month later. Dr. Birchansky argues that because he served notice within forty days of the agency ruling, his service was timely and, accordingly, the court has subject matter jurisdiction.

Dr. Birchansky never raised this argument before the district court, nor did the district court decide the issue. Therefore, it is not properly before us on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Even so, we find no authority in the statute or our case law for such an interpretation. Either way, Dr. Birchansky's argument fails.

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[2] While the word "and" is ordinarily a conjunction term, it is frequently used to join words of similar meaning. *Ness v. H.M. Iltis Lumber Co.*, 128 N.W.2d 237, 239 (Iowa 1964).

Finally, Dr. Birchansky argues the district court has subject matter jurisdiction because he substantially complied with the provisions of section 17A.19(2). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. HCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). Such compliance with section 17A.19(2), rather than strict or literal compliance, is all that is necessary to invoke the court's jurisdiction. *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194 (Iowa 1988).

In determining whether Dr. Birchansky has substantially complied with the provisions of section 17A.19(2), we must determine "whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted." *See id.* In order to show substantial compliance, it must appear that the purpose of the statute is shown and has been served. *Id.* What constitutes substantial compliance depends on the facts of each particular case. *Id.*

In *Monson v. Iowa Civil Rights Commission*, 467 N.W.2d 230, 232 (Iowa 1991), our supreme court excused a delay in service of a petition for judicial review by finding substantial compliance with the statute. In that case, one party was timely served but the other—due to a "blunder" by the sheriff—was not served until days after the deadline. *Monson*, 467 N.W.2d at 232. The court held that substantial compliance was shown because (1) a technical error that

was not attributable to the petitioner caused a "brief" delay in timely service and (2) no prejudice was shown from the delay.[3] *Id*.

The case at bar differs substantially from *Monson*. Here, Dr. Birchansky made no attempt to serve the intervenors prior to the expiration of the ten-day deadline for service. This failure is not the fault of any third party; this failure to timely serve the intervenors falls solely on Dr. Birchansky.

Other cases in which Iowa courts have found substantial compliance have involved situations in which the petitioner has made some attempt to comply with section 17A.19(2). *See Brown*, 423 N.W.2d at 196 (finding the petitioner's act of mailing the petition to the respondent two days before it was filed substantially complied with the service requirements of section 17A.19(2); *Buchholtz v. Iowa Dep't of Pub. Instruction*, 315 N.W.2d 789, 792-93 (Iowa 1982) (holding petitioner substantially complied with section 17A.19(2) despite misidentifying the board as the department in the petition where the names of the board and department were used interchangeably and notice was received by the board); *Cowell v. All-American, Inc.*, 308 N.W.2d 92, 94-95 (Iowa 1981) (finding the act of mailing copies of the petition to a party's attorney of record substantially complied with the version of section 17A.19(2) in effect at the time, which required mailing of copies of the petition to a party's "last known address," because the petitioner could "reasonably conclude" the employer wished all communications in the proceeding to be sent to its attorney's address; all the employer's

[3] While one of the factors the court may consider in determining whether a party has substantially complied with the provisions of section 17A.19(2) is whether a party has been prejudiced, prejudice is not a requirement for substantial compliance. *Brown*, 423 N.W.2d at 195.

communications went through counsel); *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651, 654 (Iowa 1980) (holding failure to designate the agency as a respondent in the petition was insufficient to defeat jurisdiction when the agency was identified in attached exhibits and received timely mailed notice); *Frost v. S. S. Kresge Co.*, 299 N.W.2d 646, 647-48 (Iowa 1980) (finding substantial compliance where the petitioner misnamed the Industrial Commission rather than Industrial Commissioner in the petition because the commissioner actually received notice and no prejudice occurred). Here, Dr. Birchansky made no attempt to serve Mercy or St. Luke's with original notice or to mail either party a copy of the petition until well after the deadline for service had passed. The IDPH's act of electronically providing both with a copy of the petition does not excuse Dr. Birchansky's failure.

Because Dr. Birchansky cannot show he complied or substantially complied with the requirements of section 17A.19(2), we affirm the district court's grant of the intervenor's motions to dismiss.

AFFIRMED.