**IN THE COURT OF APPEALS OF IOWA**

No. 2-737 / 11-1448
Filed October 31, 2012

**TERRY CHRISTIANSEN,**
Petitioner-Appellant,

**vs.**

**IOWA BOARD OF EDUCATIONAL EXAMINERS,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Johnson County, Robert E. Sosalla, Judge.

Appeal from the district court decision affirming the disciplinary action of the Iowa Board of Educational Examiners. **DISTRICT COURT ORDERS VACATED.**

Michael J. Pitton and Sarah C. Brandt of Pitton Law, P.C., Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Julie Bussanmas, Assistant Attorney General, for appellee.

Heard by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

**EISENHAUER, C.J.**

Terry Christiansen appeals from the district court decision affirming the disciplinary action of the Iowa Board of Educational Examiners (board). The board suspended his license to teach for ninety days and revoked his coaching and physical education endorsements. He contends the board misapplied Iowa Code section 280.21 (2007) and Iowa Administrative Code rule 281-103.4, imposed excessive sanctions, and its decision was not supported by substantial evidence. The board contends Christiansen's petition for judicial review was untimely and the board acted properly. We vacate the district court's July 27, 2010 orders.

**Background Facts and Proceedings.** At the time of the events giving rise to these proceedings, Christiansen was a middle school teacher and football coach in the West Branch school district. In September 2008 Christiansen was in the driver's seat of a parked school bus waiting to drive the middle school football team from the high school to the middle school after practice. Several students had a water fight in the back of the bus. Christiansen told them to stop and eventually went to the back of the bus to enforce his order. M.K. made an obscene gesture toward Christiansen, who ordered M.K. to get off the bus. M.K and some witnesses said Christiansen grabbed M.K. by the arm and pushed him down the aisle toward the door. Christiansen and some witnesses said he tripped or stumbled over something in the aisle and accidently pushed M.K. when he fell into M.K. The school board found Christiansen physically abused M.K., leaving a bruise on his arm, and terminated Christiansen's teaching contract. In a subsequent criminal assault trial, Christiansen was acquitted.

The board issued statements of charges alleging student abuse after complaints were filed by the West Branch school district and the student's parents. A contested hearing before an administrative law judge (ALJ) was held on June 1, 2009, with the State prosecuting the matter through the office of the attorney general. The ALJ issued a proposed decision on June 23, 2009. On appeal to the board, the board with one exception adopted the findings of the ALJ, finding Christiansen "grabbed M.K.'s arm, lifted him up and shoved him forward a few rows, telling M.K. to 'get the hell off the bus' and to 'never set foot on a football bus again.'" The board found, "By intentionally grabbing a student athlete's arm and shoving him as a punishment for misbehavior, [Christiansen] committed physical abuse in violation of 282 IAC 25.3(1)(e)(1)." The board considered two prior instances where Christiansen responded "inappropriately" in determining revocation of his coaching and physical education endorsements was necessary to keep Christiansen out of similar situations. Considering his lengthy service as a teacher without any adverse actions against his teaching certificate, the board determined not to revoke his certification but to suspend it for ninety days "to underscore the seriousness of the founded assault charge." The board's decision on appeal was dated November 24, 2009.

On December 3 the State filed an application for rehearing. On December 14 Christiansen filed an application for rehearing. On December 16 the board issued an order granting the State's application and a separate order denying Christiansen's application.

On January 13, 2010, Christiansen filed a petition for judicial review. On January 28 the State filed a pre-answer motion to dismiss the petition for judicial review, alleging it was premature because the board had not yet issued its final decision on rehearing. Christiansen resisted. The State replied. In the meantime, on March 3 the board issued its order on the State's application for rehearing, replacing two paragraphs in its conclusions of law dealing with the admissibility and use of evidence of prior disciplinary actions against Christiansen, and affirming the sanctions imposed in the November 24, 2009 decision. On April 9 Christiansen filed a response to the State's reply, noting the board's March 3 final decision. On April 16 the court ruled on the State's motion to dismiss. The court concluded "it cannot be said that final agency action has been achieved" and "this court does not have jurisdiction to consider the pending petition for judicial review." The court dismissed Christiansen's petition for judicial review.

On April 16, two hours after the court's ruling, Christiansen filed an amended petition for judicial review with the board's March 3 order attached. On April 26 the State filed a motion to strike Christiansen's amended petition or, alternatively, a pre-answer motion to dismiss the amended petition. In the motion to strike, the State alleged the court was without jurisdiction to consider the amended petition because it had dismissed Christiansen's original petition before he filed his amended petition. In the pre-answer motion to dismiss the amended petition, the State alleged it must be dismissed as untimely because the final board action was on March 3, but Christiansen's amended petition was not filed until April 16, so the court lacked jurisdiction to hear the amended petition. Christiansen resisted the motions on May 10. The State replied to the resistance on May 17. Christiansen supplemented his resistance on June 8.

Also on April 26 Christiansen filed a motion to amend and enlarge findings and conclusions, asserting the court did not consider the board's March 3 final ruling and arguing, "[a]s a result, the grounds asserted by the [State] for dismissal no longer existed." The State resisted the motion to amend and enlarge on May 3. Christiansen replied to the State's resistance on May 10.

On July 23, 2010,[1] the court issued "orders correcting April 16, 2010 ruling and denying respondent's motions to dismiss and motion to strike amendment." The court granted Christiansen's motion to amend and enlarge the April 16 ruling, substituted the July 23 order for the April 16 order, denied the State's January pre-answer motion to dismiss, reinstated the case, accepted Christiansen's amended petition for judicial review, and denied the State's motion to strike the amended petition or pre-answer motion to dismiss.

On August 10 the court issued its ruling on judicial review, denying Christiansen's petition for judicial review and affirming the board's decision in its entirety. The court addressed five claims Christiansen raised. First, concerning whether the board's decision was supported by substantial evidence, the court concluded "[s]ubstantial evidence is found in the form of testimony offered by [Christiansen] and M.K. regarding the incident, as well as the statements of other students who observed the incident, and the credibility assessments made by [the board] with respect to the testimony and statements." Concerning the DVD of videotaped student interviews, the court noted the DVD was admitted without objection. As to the claim the board erred in admitting and considering evidence

[1] The order was filed July 27.

of Christiansen's past discipline, the court determined the board did not err in considering it for the purpose of determining the appropriate sanctions. The court concluded the school district's policies were not introduced as evidence before the board, so Christiansen's claim he complied with school policies was not preserved for review.

Second, concerning the application of the "safe harbor" for teachers to have reasonable physical contact or use reasonable force with students, found in Iowa Code section 280.21 and Iowa Administrative Code rule 281-102.4, the court concluded the board did not misapply the provisions because Christiansen testified he did not have to use reasonable force. The statute and rule set forth situations where reasonable force is permissible, but responding to a student's disrespect is not one of them.

Third, the court considered whether the sanctions imposed were warranted. It concluded the board's authority to impose sanctions is "extremely broad" and the sanctions imposed were not arbitrary and capricious, even though less severe sanctions have been imposed in other more serious cases.

Fourth, concerning Christiansen's claim the school district conducted a biased investigation, the court concluded the investigation was not biased. The board considered the testimony of school officials and Christiansen and based its decision in part on a finding Christiansen was not credible.

Fifth, the court considered Christiansen's assertion the prosecuting attorney was allowed to be present during the board's closed-session hearings. It concluded the claim was not supported by evidence in the record.

**Scope and Standards of Review.** We review a district court's ruling on judicial review for correction of errors at law. Iowa R. App. P. 6.907. "In exercising its judicial review power, the district court acts in an appellate capacity." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). "When we review the district court's decision, 'we apply the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court. If they are the same, we affirm; otherwise, we reverse.'" *Mercy Med. Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011) (citation omitted).

Our first obligation is to determine if we have authority to decide the appeal. *See State ex rel. Vega v. Medina*, 549 N.W.2d 507, 508 (Iowa 1996). A timely petition for judicial review from an administrative decision is a jurisdictional prerequisite. *Sioux City Brick & Tile Co. v. Employ. Appeal Bd.*, 449 N.W.2d 634, 638 (Iowa 1989); *Foley v. Iowa Dep't of Transp.*, 362 N.W.2d 208, 210 (Iowa 1985). If the district court in this case was without jurisdiction to hear the case because the petition for judicial review was untimely, the action must be dismissed. *See Sharp v. Iowa Dep't of Job Serv.*, 492 N.W.2d 668, 669 (Iowa 1992); 2 Am. Jur. 2d *Administrative Law* § 569, at 558-59 (1994).

As set forth in the procedural recitation above, when Christiansen filed his January 13 petition for judicial review, the board had already granted the State's application for rehearing, but had not decided the issues raised in the application. With a limited exception not applicable here, Iowa Code chapter 17A entitles a person to judicial review only of final agency action. Iowa Code § 17A.19(1) (2009). While an application for rehearing is pending, "the final agency decision becomes in effect provisional or conditional until the application is ruled upon."

*Cooper v. Kirkwood Cmty Coll.*, 782 N.W.2d 160, 166 (Iowa Ct. App. 2010). "As a result, there is no final agency decision to seek judicial review of until the application for rehearing is ruled upon." *Id.* Because the petition for judicial review was not from a final agency decision, the district court lacked jurisdiction to review the board's action. Understanding this, the district court in its April 16 ruling correctly dismissed Christiansen's petition for judicial review for lack of jurisdiction.

Christiansen argues he did not need to wait for the board's decision on the State's application for rehearing because section 17A.19(1) provides "a preliminary, procedural, or intermediate agency action is *immediately reviewable* if all adequate administrative remedies have been exhausted." He asserts he had exhausted all adequate administrative remedies. This argument fails because the statute allows immediate review if all adequate administrative remedies have been exhausted *and* "review of the final agency action would not provide an adequate remedy." Iowa Code § 17A.19(1). In this case, review of the board's final action dated March 3 would provide the same adequate remedy as review of the board's earlier action. The circumstances here do not satisfy the statutory requirements for immediate review of preliminary or intermediate action.

Christiansen also argues the court had jurisdiction to consider his petition for judicial review because the State's application for rehearing was no longer pending by the time the court ruled in April because the board ruled on the application on March 3. Section 17A.19(3), in the situation where the agency grants *an* application for rehearing, requires the petition for judicial review to be filed within thirty days *after* the agency's final decision on rehearing. This argument fails because Christiansen's petition was filed *before* the board's final decision on the granted application for rehearing.

Christiansen also argues section 17A.19(3) required him to file his petition for judicial review after *his* application for rehearing was denied. That section provides, in relevant part, "If a party files an application . . . 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." He contends the section means if a party files an application for rehearing, *that party's* petition for judicial review must be filed within thirty days after *that party's* application has been denied. However, we have ruled if a party were not required to wait until the agency has ruled on all pending applications for rehearing, a party "could thwart a potential adverse ruling by filing a petition for judicial review." *See Cooper*, 782 N.W.2d at 167. Christiansen's petition for judicial review was premature and not filed according to the requirements of chapter 17A. "Chapter 17A does not include a savings clause—there are no exceptions for petitions for judicial review prematurely filed while an application for rehearing is pending." *Id.* at 166. Therefore, the district court did not acquire jurisdiction, and it correctly dismissed Christiansen's petition for judicial review on April 16.

Because the district court did not acquire jurisdiction, its July 27 orders "correcting" its April 16 ruling and deciding the merits of Christiansen's petition are void. *See Klinge v. Bentien*, 725 N.W.2d 13, 16 (Iowa 2006). We vacate the district court's July 27 orders.

**DISTRICT COURT ORDERS VACATED.**

Doyle, J., concurs specially; Vaitheswaran, J., dissents.

**DOYLE, J.** (concurring specially)

I concur specially. Although I agree with the majority opinion, I write separately to emphasize that this is the first time we have addressed the circumstances of dueling applications for rehearing in an agency proceeding. Consequently, I believe the issue deserves further comment.

If a party files an application for rehearing, Iowa Code section 17A.19(3) provides, in pertinent part, that a "petition for judicial review must be filed within thirty days after *that* application has been denied or deemed denied." (Emphasis added.) This statutory provision does not specifically address instances where multiple applications for rehearing have been filed in an agency proceeding. *See* Iowa Code § 17A.19(3). It does not say a petition for judicial review must be filed within thirty days after *all* applications for rehearing have been denied or deemed denied. *See id.* With no interpretive guidance from the courts on this point, Christiansen fell into a trap for the unwary. He apparently, and reasonably, in my opinion, believed the "that" in the statute referenced denial of *his* application for rehearing, not all applications for rehearing.[2] Consequently, he filed his petition for judicial review within the thirty-day deadline of the board's denial of his application, even though the State's application was still pending before the board. As it turns out, this was too early. By the time the district court dismissed his first petition for judicial review as having been filed too early, it had been over

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[2] I recognize *Cooper v. Kirkwood Community College* states "section 17A.19(3) explicitly requires that the agency rule on an application for rehearing prior to a party filing a petition for judicial review." 782 N.W.2d 160, 166 (Iowa Ct. App. 2010). But, *Cooper* does not specifically address the issue of multiple applications for rehearing; it dealt with only one application for rehearing. *Id*. at 163.

thirty days since the board ruled on the State's application for rehearing. Thus, his amended petition for judicial review was filed too late. Consequently, neither filing was "just right."[3]

That having been said, I agree with the majority that until the board ruled on the State's application, its decision was not "final" for judicial-review purposes. Although *Cooper* does not specifically address the unique situation presented here, I believe its overarching principle of finality before appeal is applicable. *See Cooper*, 782 N.W.2d at 167. As *Cooper* points out, an agency decision becomes interlocutory upon the filing of an application for rehearing, "and as a result there is no final decision from which to petition for judicial review." *Id.* at 167. It does not say the decision becomes interlocutory only as to the party that filed the application for rehearing. *See id.* Furthermore, permitting a party to proceed with a petition for judicial review from an agency action while another party's application for rehearing before that agency in the same proceeding is pending adds to the problem of piecemeal litigation and multiple appeals, which the finality requirement is designed to prevent. *Cf*. *Banco Mortg*. *Co*. *v*. *Steil*, 351 N.W.2d 784, 787 (Iowa 1984) (discussing piecemeal litigation and the finality requirement as applied to grants for interlocutory appeal). Piecemeal litigation is the antithesis of judicial efficiency and economy, and is therefore frowned upon. *See, e.g.*, 36 C.J.S. *Federal Courts* § 88 (2012) (discussing efficient use of judicial resources in federal courts).

[3] Christiansen's first petition could not be treated as an interlocutory appeal. *Cooper*, 782 N.W.2d at 166. Chapter 17A does not include a savings clause, unlike our rules of appellate procedure. *Id.*

**VAITHESWARAN, J.** (dissenting)

I respectfully dissent for the reasons stated in my dissent in *Cooper v. Kirkwood Community College*, 782 N.W.2d 160, 168 (Iowa Ct. App. 2010). In my view, there is even stronger reason to reach the merits in this case because Christiansen filed his petition for judicial review within thirty days of the denial of his own application for rehearing.