IN THE COURT OF APPEALS OF IOWA

No. 9-321 / 08-0752
Filed July 22, 2009

JOEL McKEAG,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

On interlocutory appeal, Joel McKeag seeks review of the district court's rulings denying his motion for authorization to take depositions at state expense and denying his motion to reconsider, enlarge, and amend. **AFFIRMED.**

Merrill Swartz of The Swartz Law Firm, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, David Vancompernolle, Assistant Attorney General, and Jennifer Miller, County Attorney, for appellee State.

Heard by Eisenhauer, P.J., and Doyle and Mansfield, JJ.

PER CURIAM

On interlocutory appeal, Joel McKeag seeks review of the district court's rulings denying his application for authorization to take depositions at state expense and denying his motion to reconsider, enlarge, and amend. We affirm.

I. Background Facts and Proceedings.

McKeag pled guilty to sexual abuse in the second degree and burglary in the first degree in violation of Iowa Code sections 709.1(1), 709.3(1), 713.1, and 713.3 (1991) for crimes he committed on February 5, 1993. On August 24, 1993, he was sentenced to a term of imprisonment of twenty-five years on each count, to be served consecutively.

On April 18, 2007, McKeag filed a pro se application for postconviction relief, alleging the Iowa Board of Parole had violated the Ex Post Facto Clause of the Constitution by giving him a case file review rather than an in-person interview in determining whether to grant him parole. Thereafter, McKeag's court-appointed counsel filed a supplemental application for post-conviction relief, further alleging that the parole board's use of case file reviews in lieu of personal interviews violated McKeag's procedural due process rights.

On December 5, 2007, the State filed an answer and a motion for summary dismissal, arguing a postconviction relief proceeding is not the correct procedural mechanism for complaints about the parole board's interview process; but rather, that chapter 17A is the exclusive mechanism through which McKeag

can appeal the actions of the board.[1] McKeag filed a motion to take six depositions at state expense, which was eventually denied by the court after a hearing. McKeag then filed a pro se motion to reconsider, enlarge, and amend, which the court also denied. The supreme court granted McKeag's application for interlocutory appeal from those district court rulings, and his appeal is now before us.

II. Scope and Standard of Review.

We review a district court's discovery rulings for an abuse of discretion. *Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008). We afford the district court wide latitude with regard to such rulings. *Martin v. B.F. Goodrich Co.*, 602 N.W.2d 343, 345 (Iowa 1999). An abuse of discretion will be found when the district court exercises its discretion on grounds or for reasons that are clearly untenable or to an extent that is clearly unreasonable. *Baker*, 750 N.W.2d at 97. Insofar as the district court's rulings in this case to date have effectively dismissed McKeag's application for postconviction relief, we review those rulings for corrections of errors at law. Iowa R. App. P. 6.4.

III. Merits.

With regard to whether McKeag's action was properly brought as an application for postconviction relief under chapter 822, the district court stated:

> Applicant filed a petition on April 18, 2007 which he has denominated a postconviction relief action. He does not, however, challenge either his conviction or sentence, but rather asserts that the Iowa Board of Parole has failed to follow proper procedures and allow him a personal interview as part of the Board's consideration

[1] The State's motion for summary judgment has been continued several times and has yet to be ruled upon. This case is now on interlocutory appeal and all district court proceedings related to this matter are stayed.

> of his release. Accordingly, the court finds that the action presently pending is not properly brought under Chapter 822 of the Iowa Code but is indeed an appeal from an administrative decision under Iowa Code Chapter 17A.

The court further determined:

> The general rule with respect to appeals to the district court from agency decisions is that the trial court is limited to the record made at the agency level. As with any rule there are exceptions. Iowa Code Section 17A.19(7) provides that the reviewing court "may hear and consider such evidence as it deems appropriate." It is discretionary with the trial court whether it will go outside of the record made at the agency level. If the court does allow additional testimony or evidence, it is limited as "the additional evidence may not be used as a springboard for the trial of factual issues de novo in district court." The Iowa Supreme Court in *Sindlinger v. Iowa State Board of Regents*, 503 N.W.2d 387, 390 (Iowa 1993) stated that any additional evidence should be for the "limited purpose of highlighting what actually occurred at the agency level in order to facilitate the court's search for error of law or unreasonable, arbitrary, or capricious action."
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> Applicant has requested that he be allowed to take the depositions . . . at state expense. To the extent that those individuals have any information that is relevant to this proceeding, that information would be contained in the file. If there is additional information which they have that is not contained in the file, then it would not have been used by the Parole Board and would have no relevance in this proceeding. Any information those individuals have but which was not supplied to the Parole Board if given now to the trial court would be tantamount to retrying the agency case at the district court level and is not appropriate.

(Citations omitted.)

Through his counsel, McKeag contends the district court abused its discretion by not allowing him to take depositions at state expense, and that the court erred in determining his action was not a postconviction relief action. In his pro se brief, McKeag further claims the State waived or failed to preserve any affirmative defenses,[2] and supplements his counsel's argument that the court

[2] Among other contentions, McKeag argues the State's answer was untimely filed.

erred in deciding the controlling authority for his action was chapter 17A rather than chapter 822.

The parole board is a state agency governed by the Iowa Administrative Procedures Act, chapter 17A. *Frazee v. Iowa Bd. of Parole*, 248 N.W.2d 80, 82 (Iowa 1976) (holding parole revocation is agency action and chapter 17A judicial review is applicable); *see also* Iowa Code ch. 17A. Under chapter 17A, agency action includes the failure to act, the exercise of agency discretion, or the failure to perform any agency duty. Iowa Code § 17A.2(2). Therefore, the board's alleged failure to personally interview McKeag is agency action.

By its terms, the judicial review provisions of chapter 17A are "the *exclusive means* by which a person . . . adversely affected by agency action may seek judicial review of such agency action" except as expressly provided otherwise by another statute referring to chapter 17A by name. Iowa Code § 17A.19 (emphasis added); *Johnson v. Dep't of Corr.*, 635 N.W.2d 487, 489 (Iowa Ct. App. 2001) ("The district court is deprived of jurisdiction over the case if administrative remedies are not exhausted."). Chapter 822, governing postconviction actions, does not expressly negate the applicability of chapter 17A. *Dougherty v. State*, 323 N.W.2d 249, 250 (Iowa 1982) (upholding dismissal of postconviction action where postconviction chapter does not expressly negate the applicability of chapter 17A). *See* Iowa Code ch. 822. Therefore, the chapter 17A judicial review procedures are McKeag's exclusive means of judicial review. *See Dougherty*, 323 N.W.2d at 250 (holding chapter 17A is the exclusive means of reviewing work release revocations).

As such, we find no error in the district court's determination that McKeag's action is not properly brought under chapter 822. McKeag is required to challenge the parole board's agency action through the board's administrative appeals process. After he has exhausted his administrative appeals, McKeag may seek judicial review. *See Johnson*, 635 N.W.2d at 489 (requiring exhaustion of administrative appeals by prisoner raising constitutional challenges to parole board's denial of parole/work release); *see also Shell Oil Co. v. Blair*, 417 N.W.2d 425, 430 (Iowa 1987) (holding factual record to resolve constitutional challenges should be developed before the agency).

Here, regardless of whether McKeag has exhausted administrative remedies,[3] we find the district court did not abuse its discretion in refusing to authorize McKeag to pursue depositions at state expense. Although Iowa Code section 17A.19(7) contemplates that additional evidence may be taken under certain circumstances, for a number of reasons McKeag has not met his burden of showing that the depositions he sought were necessary and appropriate here.

First, in *Taylor v. State*, 752 N.W.2d 24 (Iowa Ct. App. 2008), we discussed the evidence that would be needed to prove an ex post facto violation based on the 1995 change in the law. Specifically, we held that it was not enough for an inmate to prove that a higher percentage of inmates with personal interviews currently receive parole than inmates who have undergone file reviews. *Taylor*, 752 N.W.2d at 29-30. There could be many reasons for this, including differences in the two inmate populations. Rather, the inmate must

[3] The State argues that the district court properly treated McKeag's action as one for judicial review of administrative action under Iowa Code section 17A.19, but does not specifically argue that McKeag failed to exhaust administrative remedies.

prove that "receiving annual case file reviews instead of personal interviews *creates* a sufficient risk of serving a longer term of incarceration." *Id*. at 30 (emphasis added). In other words, the inmate must show that the change from personal interviews to file reviews has actually *caused* him or her to have a significant risk of a longer period of incarceration.

To establish this, it would seem that McKeag at a minimum should have hard statistical data that prove causation, not just correlation. Thus, McKeag may need to present regression analysis through expert testimony. *See Shabazz v. Gabry,* 123 F.3d 909, 914-915 (6th Cir. 1997) (indicating that a prisoner had to prove a legal nexus between the decrease in regularly scheduled parole hearings and eligibility for parole based on "reliable statistical analysis" rather than "anecdotal observations and personal speculation"). Against this backdrop, it is difficult to see how the depositions that McKeag seeks would advance his claim.

Second, McKeag refused to tell either the district court or this court what topics he intends to explore in the depositions or what he intends to prove with them. McKeag argues that he "should not be forced to lay out the exact questions he will ask." However, we believe it is not an abuse of discretion to deny depositions at state expense when the party seeking the depositions refuses to say, with some degree of specificity, what he or she hopes to establish in those depositions and how they will help prove his or her case. For this reason as well, the district court was well within its discretion to deny McKeag's deposition requests.

Third, the district court properly exercised its discretion to deny the depositions given McKeag's list of deposition candidates. For example, four of the proposed deponents were individuals who had interacted with McKeag in prison but would not have been involved in the parole decision.

Accordingly, we uphold the district court's ruling denying McKeag's request to take depositions.

We have considered the additional issues raised and issues not specifically addressed are without merit. We find no error or abuse of discretion by the district court, and we affirm the court's prior rulings.

AFFIRMED.