

IOWA BOARD OF PHARMACY EXAMINERS

Petition by Diane Heiken
for a Declaratory Order on
Iowa Code § 272C.6;
Iowa Admin. Code §§ 657-36.2, 657-
14.13(2), 657-36.9, 657-35.19(11),
657-36.12; and
Iowa Const. art. I, § 6

PETITION FOR DECLARATORY
ORDER

Diane Heiken petitions for a Declaratory Order as to the applicability of provisions of Iowa Code, Iowa Administrative Code, and the Iowa Constitution as they relate to the confidentiality of documents published on the Iowa Board of Pharmacy website, including a Statement of Charges, a Motion to Dismiss, and the Order Dismissing the Statement of Charges, and her identity in relation to an unsubstantiated alleged violation, and states as follows:

I. Background

1. Prior to August 2013, Ms. Heiken was actively involved in improving Iowa's pharmacy laws to better protect rights of pharmacy patients following Hy-Vee Inc.'s acquisition of the Econofoods Pharmacy 471, in Dubuque, Iowa, in 2009.
2. Econofoods Pharmacy 471 closed on November 30, 2009, without giving prior notification to the pharmacy's patients, as required by law. (Findings of Fact, Conclusions of Law, Decision and Order, Case No. 2009-160, ¶ 6.)
3. Ms. Heiken cooperated with the Iowa Board of Pharmacy's ("Board") investigation that led to a \$25,000 sanction against Econofoods Pharmacy 471 on July 20, 2010. (See Findings of Fact, Conclusions of Law, Decision and Order, Case No. 2009-160.)

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4. In the ensuing years, Ms. Heiken worked with Iowa lawmakers to secure changes to the administrative code guiding such situations, including increasing the amount of advance notice to which patients are entitled for a pharmacy closure, which certain pharmacy industry members had opposed. *See* Iowa Admin. Code. § 657-8.35(7).

5. After issuance of a sanction against Econofoods Pharmacy 471 on July 20, 2010, for its role in closing the pharmacy without sufficient notice following its contract to sell the pharmacy to Hy-Vee, in January 2012, the Board indicated that it had ended its investigation and closed the matter.

6. When the Board took no further action on the Econofoods Pharmacy 471 closure, Ms. Heiken communicated with the Iowa Office of Ombudsman, which is an independent and impartial agency that, among other things, investigates state administrative agencies.

7. On or around September 4, 2013, Ms. Heiken received a Statement of Charges & Notice of Hearing that had been filed in August 2013 by the Board. (Statement of Charges & Notice of Hearing, Case. No. 2013-50.)

8. The Statement of Charges & Notice of Hearing came as a surprise, as Ms. Heiken had not been given the opportunity to present to the investigator a position or defense respecting the allegations of the complaint prior to the commencement of a contested case, as specified in Iowa Admin. Code § 657-36.2(5).

9. Following receipt of the Statement of Charges & Notice of Hearing, Ms. Heiken sent documentation conclusively demonstrating that she was not on duty during the alleged violation.

10. Almost two months after the State received documentation proving that Ms. Heiken could not have committed the alleged violation, it moved to dismiss the charges against Ms. Heiken prior to a scheduled hearing on the matter. (State's Motion to Dismiss, Case No. 2013-50, ¶ 5.)

11. As a result, the Board dismissed the charges against Ms. Heiken without hearing the case on the merits or issuing a written decision and finding of fact.

12. The Statement of Charges & Notice of Hearing, Motion to Dismiss, and the Order Dismissing the Statement of Charges ("Complaint Documents") are now published in a link under the heading "Discipline Documents" on the Iowa Board of Pharmacy website.

13. The documents appear at a link titled "Heiken, Diane (has never been disciplined by the Board)."

14. Ms. Heiken's name appears on a list alongside numerous others who were found to have committed wrongdoing by the Board.

15. Ms. Heiken's professional reputation has and will suffer harm as a result of her name appearing under the heading "Discipline Documents."

16. Ms. Heiken's professional reputation has and will suffer harm as a result of her identity, the information from the complaint against her, and the investigative details of her case continuing to be published even after the allegations were found to have been unsubstantiated.

17. The harm to Ms. Heiken's professional reputation is particularly heightened in this instance, where further investigation by the State showed that the charges were

erroneously brought against her and a minimum degree of diligence by investigators would have prevented the alleged violation from having ever been brought.

II. The Statement of Charges & Notice of Hearing was invalidly issued, so the Complaint Documents should be withdrawn and removed from publication

18. Iowa Admin. Code Section 657-36.2 anticipates that unsubstantiated complaints against the professionals the Board oversees will be kept confidential and provides layers of protection to ensure unsubstantiated complaints do not result in charges or publication.

19. The Board must determine whether “probable cause exists for a disciplinary hearing,” Iowa Admin. Code Section 657-36.2(5), prior to charging a violation.

20. One of the layers of protection to ensure probable cause exists and to guard against unsubstantiated complaints is a provision giving the subject of an investigation the opportunity to present a defense before a charging decision is made:

The licensee, registrant, or permittee who is the subject of the complaint shall be given the opportunity to present to the investigator a position or defense respecting the allegations of the complaint prior to the commencement of a contested case.

Iowa Admin. Code § 657-36.2(5).

21. The Board’s investigator did not give Ms. Heiken “the opportunity to present to the investigator a position or defense respecting the allegations of the complaint prior to the commencement of a contested case” by the filing of a Statement of Charges & Notice of Hearing.

22. If the investigator had given Ms. Heiken such an opportunity, she would have produced the documentation conclusively demonstrating that the staff member on duty during the alleged violation set out in the Statement of Charges & Notice of Hearing was not Ms. Heiken prior to the initiation of any charges.

23. The Board investigator's failure to comply with Iowa Admin. Code Section 657-36.2(5) makes the ensuing Statement of Charges & Notice of Hearing illegal and all other Complaint Documents issued because of the illegal charging decision are also invalid.

24. Ms. Heiken is entitled to the same confidentiality protections embodied in Iowa Admin. Code Section 657-36.2(5) and Iowa Code Section 272C.6(4)(a) afforded to the targets of unsubstantiated complaints recognized prior to the charging decision.

25. Publication of the Complaint Documents is illegal because it is rooted in a charging decision that itself is illegal for lack of probable cause and non-compliance with Iowa Admin. Code Section 657-36.2(5).

III. The Complaint Documents are not public because details of unsubstantiated complaints and personal information of the targets of those complaints are to be kept confidential

26. The Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents falls under the scope of materials that must be kept confidential under Iowa Code.

27. Iowa Code Section 272C.6(4)(a) provides:

In order to assure a free flow of information for accomplishing the purposes of this section, and notwithstanding section 622.10, all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee acting under the authority of a licensing board or its employees or agents which relates to licensee discipline are privileged and confidential, and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards, their employees and agents involved in licensee discipline, and are not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline. However, investigative information in the possession of a licensing board or its employees or agents which relates to licensee discipline may be disclosed to appropriate licensing authorities within this state, the appropriate licensing authority in another state, the coordinated licensure information

system provided for in the nurse licensure compact contained in section 152E. 1 or the advanced practice registered nurse compact contained in section 152E.3, the District of Columbia, or a territory or country in which the licensee is licensed or has applied for a license. If the investigative information in the possession of a licensing board or its employees or agents indicates a crime has been committed, the information shall be reported to the proper law enforcement agency. *However, a final written decision and finding of fact of a licensing board in a disciplinary proceeding, including a decision referred to in section 272C.3, subsection 4, is a public record.*

Iowa Code § 272C.6(4)(a) (emphasis added); *see also* Iowa Admin. Code §§ 657–36.2(4); 657–14.13(2); 657–36.9 (“At no time prior to the release of the final decision by the board shall any portion or the whole thereof be made public or be distributed to any persons other than the parties.”); 657–35.19(11); 657—36.12.

28. In accordance with Section 272C.6(4)(a) and related provisions of administrative code, the Board does not publish personal information of the professionals it oversees who have received complaints that are unsubstantiated.

29. Ms. Heiken is in the category of professionals that the Board oversees who has had an unsubstantiated complaint filed against her, so her Complaint Documents should not be published in accordance with the Board’s practice and statutory obligations.

30. The only exception to Section 272C.6(4)(a)’s confidentiality requirement is the Board’s “final written decision and finding of fact.”

31. None of the Complaint Documents at issue are such a “final written decision and finding of fact,” because the State dismissed the case during its investigation, prior to any hearing, and before such a final written decision and finding of fact could be issued.

32. The Board remains under an obligation to keep all information regarding Ms. Heiken’s case privileged and confidential.

33. The table decision of *Reveiz v. Iowa Bd. Of Medical Examiners*, 735 N.W.2d 203 (2007), which made a finding whether the notice of hearing and statement of charges against a doctor under review by the Iowa Board of Medical Examiners were public records, does not control under the circumstances at issue here.

34. The complaint and statement of charges against the doctor in *Reveiz* ultimately resulted in a disciplinary hearing and an order in which Dr. Reveiz was directed to complete a competency evaluation.

35. The Complaint Documents in Ms. Heiken's case fall within the scope of "complaint files, investigation files, other investigation reports, and other investigative information," which must be kept privileged and confidential in accordance with Section 272C.6(4)(a). *See also* Iowa Admin. Code §§ 657–36.2(4); 657–14.13(2); 657–36.9 ("At no time prior to the release of the final decision by the board shall any portion or the whole thereof be made public or be distributed to any persons other than the parties."); 657–35.19(11); 657—36.12.

36. Ms. Heiken's case never advanced to a hearing and final written decision, so the exception to the confidentiality requirement of Section 272C.6(4)(a) for the Board's "final written decision and finding of fact" does not apply, and the Complaint Documents must be kept confidential in accordance with Section 272C.6(4)(a) and related provisions of administrative code cited above.

IV. Publication of the Complaint Documents denies Ms. Heiken equal protection of the law

37. Publication of the Complaint Documents and Ms. Heiken's identity denies Ms. Heiken equal protection of the law.

38. Iowa Constitution Article 1, section 6 provides “All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”

39. Professionals overseen by the Board sometimes have unsubstantiated complaints made against them that do not result in charges by the Board and, consequently, the professionals’ identities and details of the complaint are not published.

40. Ms. Heiken is in a class of professionals overseen by the Board who have had unsubstantiated complaints made against them and charges filed, after which the State of Iowa dismissed the charges in recognition that they were unsubstantiated, yet nonetheless published the identity of the subject of the unsubstantiated complaint and documents associated with the unsubstantiated complaint, including the Complaint Documents.

41. The Board’s obligation not to publish identities of the subjects of unsubstantiated complaints and the Complaint Documents associated with those complaints applies equally to Ms. Heiken and others in her class because, in both instances, the allegations of the complaint are unsubstantiated and a reasonable investigation would show that to be the case.

42. Publication of Ms. Heiken’s identity and the details of the unsubstantiated complaint against her denies Ms. Heiken equal protection of the law.

43. Where the Board keeps the identities of the subjects of unsubstantiated complaints against the professionals it oversees and details of those complaints confidential, there is no rational basis to publish the identities of the subjects of unsubstantiated complaints and details of those complaints after a charge has been brought in an instance

where a reasonable investigation, founded on probable cause and completed in compliance with Iowa Admin. Code Section 657-36.2(5), would have prevented the charge from having been brought.

V. The Board is in violation of its obligations in a number respects

44. Based on the foregoing:
 - a. Board policies, administrative rules, or statutes discussed in the preceding paragraphs that purportedly support publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents, or any other policies, administrative rules, or statutes that the Board relies on to justify continued publication, are unconstitutional on their face and as applied and publication is based upon a provision of law that is unconstitutional on its face and as applied.
 - b. The Board acted beyond the authority delegated to it under the foregoing laws cited in this petition in continuing to publish the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents.
 - c. The Board's decision to continue publishing the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is based on an erroneous interpretation of the Board policies, administrative rules, and statutes discussed in the preceding paragraphs of this Petition, and the interpretation of those laws have not clearly been vested to the discretion of the Board.
 - d. Publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents was based upon a procedure or

decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process, including, but not limited to the foregoing laws cited in this petition.

- e. The decision to continue to publish the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is the product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.
- f. To the extent the decision to continue to publish the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is based on a determination of fact by the Board, the determination is not supported by the evidence.
- g. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is inconsistent with Board rules.
- h. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is inconsistent with the Board's prior practice and precedents, lacking any fair and rational basis for doing so.
- i. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is so illogical as to render it wholly irrational.

- j. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is the product of a decision-making process in which the Board did not consider relevant and important matters pertaining to an invalid investigation, confidentiality protections, and equal protection concerns that a rational decision maker in similar circumstances would have considered prior to continuing to publish Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents.
- k. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is not required by law because even a purported public record need not be posted online, and the negative impact from the perception of having been disciplined on Ms. Heiken's professional reputation is so grossly disproportionate to the benefits accruing to any alleged public interest from publication that it must necessarily be deemed to lack any foundation in rational Board policy.
- l. To the extent that the interpretation of the aforementioned statutes, administrative code provisions, and Iowa Constitution provision has been vested in the Board, the Board's interpretation resulting in continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is based upon an irrational, illogical, or wholly unjustifiable interpretation of those laws.
- m. To the extent that the application of the aforementioned statutes, administrative code provisions, and Iowa Constitution provision to the

present facts has been vested in the Board, the Board's interpretation resulting in continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is based upon an irrational, illogical, or wholly unjustifiable application of those laws to the present facts.

- n. Continued publication of the Complaint Documents and Ms. Heiken's identity in association with the Complaint Documents is otherwise unreasonable, arbitrary, capricious, and an abuse of any discretion that may exist.

Questions Presented and Answers Requested

- 45. Ms. Heiken seeks the Board's review of the following questions:
 - a. Should the identities of the subjects of unsubstantiated complaints and the details of those complaints, including a Statement of Charges, Motion to Dismiss, and the Order Dismissing the Statement of Charges, be kept confidential where those materials were generated after a charging decision that was illegal for failure to comply with Iowa Admin. Code Section 657-36.2(5) and where compliance with Iowa Admin. Code Section 657-36.2(5) would have revealed a lack of probable cause?
 - b. Should the identities of the subjects of unsubstantiated complaints and the details of those complaints, including a Statement of Charges, Motion to Dismiss, and the Order Dismissing the Statement of Charges, be kept confidential under Iowa Code Section 272C.6(4)(a) and related Administrative Code provisions cited in the foregoing paragraphs of this Petition where a reasonable investigation would have revealed that the charges were unfounded?
 - c. Should the identities of the subjects of unsubstantiated complaints and the details of those complaints, including a Statement of Charges, Motion to Dismiss, and the Order Dismissing the Statement of Charges, be kept confidential where a reasonable investigation would have revealed that the charges were unfounded so as not to deny the subjects of those unsubstantiated complaints equal protection of the law given that the identities of the subjects of unsubstantiated complaints and the details of those complaints are kept confidential when no charges are brought?

- d. Should Ms. Heiken's identity and the Statement of Charges, Motion to Dismiss, and Order Dismissing the Statement of Charges against Ms. Heiken be removed from the Discipline Documents section of the Board's website?
- e. Should the Statement of Charges, Motion to Dismiss, and Order Dismissing the Statement of Charges against Ms. Heiken be kept confidential along with Ms. Heiken's identity in relation to the unsubstantiated complaints against her?

46. For the foregoing reasons, Ms. Heiken asserts that the Board must answer "yes" to each of the questions presented for the Board's review and requests a declaratory order to that effect.

Additional Details Specified in Iowa Admin. Code § 657-27.1

47. Ms. Heiken requests the Board's declaratory order to protect her professional reputation.

48. Ms. Heiken is not currently a party to another proceeding involving the confidentiality of the Complaint Documents and her identity in relation to those documents, nor is she aware of whether the issue has been decided, is pending determination, or is under investigation by any governmental entity.

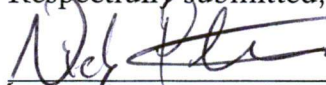
49. Other persons who may be affected by, or interested in, the questions presented to the Board include other professionals overseen by the Board whose names and complaint documents have been published despite dismissal of unsubstantiated charges against them when a reasonable investigation would have prevented those charges from having been brought.

50. Ms. Heiken requests a meeting provided for by Iowa Admin. Code Section 657-27.7.

51. Ms. Heiken resides at 1675 Geraldine Drive, Dubuque, IA 52003, and her telephone number is 563-583-1399 and requests that all communications concerning the petition be directed to the undersigned counsel.

Dated: April 1, 2016

Respectfully submitted,



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