IN THE SUPREME COURT OF IOWA

No. 20-0902

POLK COUNTY NO. CVCV059409

POLK COUNTY ASSESSOR RANDY RIPPERGER,

Petitioner-Appellant,

v.

IOWA PUBLIC INFORMATION BOARD,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR
POLK COUNTY, IOWA
THE HONORABLE JEFFREY FARRELL, PRESIDING

RESPONDENT-APPELLEE'S PROOF BRIEF

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ROUTING STATEMENT

Because this case presents the application of existing legal principles, it should be transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Polk County Assessor Randy Ripperger ("Assessor") seeks judicial review of the Iowa Public Information Board's ("Board") final decision following a contested case. The Board concluded that the Assessor violated Iowa Code section 22.2 when he refused to release a list of property owners for whom the name search function had been disabled in the Assessor's property records database. The district court affirmed the Board's final decision. The Assessor now appeals.

FACTS AND PROCEDURAL HISTORY

On January 18, 2018, following a complaint and investigation, the Board issued an order determining that probable cause existed to believe the Assessor violated Iowa Code chapter 22 when he refused to provide Des Moines Register reporter Clark Kauffman access to the list of property owners for whom the name search function had been disabled in the Assessor's property search website. Probable Cause Order (AR 118, App. ___); *see also* Revised Probable Cause Report (AR 113-117, App.__). The Board initiated a contested case proceeding and designated an Administrative Law Judge ("ALJ") to serve as the presiding officer pursuant to Iowa Code section 17A.11. (AR 32-33, App. ___).

On January 3, 2019, after preliminary proceedings, the Board's prosecutor filed a Second Amended Petition in the contested case proceeding ("Second Amended Petition") (AR 96-99, App. ___). The Second Amended Petition alleged the following facts. On March 27, 2017, the Assessor met with staff from the Des Moines Register. (AR 96, App. ___). During the meeting, there was discussion about the Assessor's use of a name search disabling function for properties on the Assessor's website. *Id*. Mr. Ripperger subsequently informed Des Moines Register reporter, Clark Kauffman, that 2,166 persons had made use of the disabling feature. *Id*. On March 28,

Mr. Kauffman emailed Mr. Ripperger and asked if Mr. Kauffman could "stop over sometime next week and look at the list of 2,166 property owners and/or their written requests (whichever is easier for you to produce)?" *Id*. On March 28, 2017, Mr. Ripperger responded:

> a. . . . I believe those requests should be kept confidential under Iowa Code Section 22.7(18); and
>
> b. We started this policy, we believe, in 2002 and throughout this time, we have told those who made requests that their requests would be confidential. We even stated this on our website and it is still there today even though you have to look hard for it on our legacy site.
>
> c. So that's where I am on your request.

Id. (AR 96-97, App. ___). Mr. Ripperger declined to produce the list of people who had requested that the name search function be disabled for their properties. (AR 97, App. ___). On April 6, 2017, Mr. Kauffman filed a complaint with the Board. (AR 112. App. ___). Mr. Kauffman stated: "On March 28, I asked the Polk County Assessor's Office for the list of 2,166 property owners who had filed written requests with the county asking that their names be pulled from the assessor's web site search engine." *Id*. Mr. Kauffman attached his email correspondence with Mr. Ripperger.

After attempts at a resolution were unsuccessful, ALJ Kristine Dreckman presided over a contested case hearing in the matter on March 29, 2019. (AR 444, App. ___). Following the hearing, ALJ Dreckman issued a

Proposed Decision, which included the following factual findings about Polk County's name search disabling practices:

> A property owner is only allowed to opt-out of the name search function on the website. Once a property owner's name is removed from the search function of the website, his or her records are still accessible by name by searching the records in-person at the office. . . Although the assessor's website stated the opt-out requests must be submitted in writing and signed, its office routinely accepts verbal requests, either in-person or over the telephone.

Proposed Decision at 2 (AR 444, App. ___). The Proposed Decision continued, "Although the office does not maintain a list of property owners who have been removed from the name search function on the website, that information is obtainable through electronic data sources." *Id*. The Proposed Decision concluded that the list in question was not a "communication" within the meaning of Iowa Code section 22.7(18), the exception relied upon by the Assessor. *Id*. at 10.

The Assessor filed a notice of appeal and, following briefing, the Board issued its final decision in the case. (AR 505-510, App. ___). The Board adopted the findings of fact from the proposed decision in full. App. ___. The Board concluded that the records in question did not fall within the exception in Iowa Code section 22.7(18) and agreed with the ALJ's analysis that the list in question was not a "communication." App. ___. The Board affirmed the ALJ's decision requiring production of the list but deferred the effective date

of its order for sixty days to allow the Assessor to seek an injunction to shield the list from disclosure. App. ___. Subsequently, the Board granted the Assessor's request for a stay of its decision pending resolution of the Assessor's Petition for Judicial Review. (AR 521-522).

On judicial review, the district court affirmed the Board's decision. App. ___. The district court concluded that the list of property owners for whom the name search function was disabled fell within the exemption in Iowa Code section 22.7(18) because the initial communication requesting removal was "intrinsic to the list" of property owners, even if the list itself was not the actual communication. However, the district court concluded that the Assessor could not reasonably believe that most people would be dissuaded from making a request if they thought the list itself would become public, agreeing with the Board that it was "illogical to assume the vast majority of those with safety concerns would rather be easily found in the database than merely listed among those who have opted out." App. ___.

STANDARD OF REVIEW

The petitioner challenging agency action has "[t]he burden of demonstrating the required prejudice and the invalidity of agency action." Iowa Code § 17A.19(8)(a). In a review of a contested case proceeding, the court considers whether the agency's decision is supported by substantial

evidence when the record is viewed as a whole. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). "Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the [agency's] decision is not supported by substantial evidence." *Id*. The reviewing court should broadly and liberally apply an agency's findings of fact to uphold rather than defeat the agency's decision. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000).

When the legislature has clearly vested interpretive authority with an agency, the court defers to the agency's interpretation of the statutory language and reverses only when the agency's interpretation is "irrational, illogical, or wholly unjustifiable." *Colwell v. Iowa Dep't. of Human Servs.*, 923 N.W.2d 225, 231 (Iowa 2019). To determine whether an agency has been given authority to interpret statutory language, a reviewing court should consider "the specific language the agency has interpreted as well as the specific duties and authority given to the agency." *Id*. (internal citations and quotations omitted). When the legislature has not clearly vested interpretive authority with an agency, the standard of review is for errors of law. *Id.*; *see also IBP*, 604 N.W.2d at 627.

The legislature has expressly authorized the Board to interpret chapter 22 by giving the Board the power to "[a]dopt rules . . . calculated to

implement, enforce, *and interpret* the requirements of chapter 21 and 22 . . .". Iowa Code § 23.6(2) (emphasis added). In addition to this express statutory grant of interpretive authority, the enumerated powers and duties granted to the Board reflect an intent for the Board to have broad authority to interpret Iowa's open records and open meetings laws. For instance, the Board is authorized to issue declaratory orders with the force of law determining the applicability of chapter 22 to specific situations; prosecute contested cases to determine whether a violation of chapter 22 has occurred; and issue orders with the force of law if the Board determines a violation has occurred. Iowa Code § 23.6. The broad authority granted to the Board by the legislature illustrates the legislature's intent to vest interpretive authority to the Board with respect to chapter 22. Regardless, even if the Court employs a less deferential standard of review, the Board's decision should be upheld because the Board did not commit any legal errors that would require reversing the Board's decision. *Colwell*, 923 N.W.2d at 231.

ARGUMENT

I. THE BOARD'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE BOARD DID NOT COMMIT ANY LEGAL ERRORS.

A. Preservation of Error.

The Assessor did not plead in his petition for judicial review that the board's decision was not supported by substantial evidence in the record under

Iowa Code section 17A.19(10)(f). *See* Petition for Judicial Review (App. ___) The grounds for judicial review must be plead with particularity, and the Court should not consider grounds not raised in the petition. Iowa Code § 17A.19(4)(d); *see also Cooksey v. Cargill Meat Sol. Corp.*, 831 N.W.2d 94, 109 (Iowa 2013) (Mansfield, J., dissenting) (observing that notice pleading is not sufficient in a petition for judicial review under section 17A.19). The Assessor preserved the remaining merits issues.

B. The Board's factual findings were supported by substantial evidence in the record when viewed as a whole.

The Assessor argues in this judicial review proceeding that the Board did not meet its burden to prove that the Assessor violated chapter 22. Iowa Code section 23.10(3)(a) , which authorizes the Board to prosecute potential violations of chapter 22 through a contested case proceeding, is silent on the burden of proof. However, the Iowa Administrative Procedure Act makes clear that in a judicial review of a contested case proceeding, the reviewing court must determine whether the agency's factual findings are supported by "substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). The reviewing court should not reweigh the evidence or determine whether the evidence may support a different finding. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). "When that record is viewed as a whole" means "that the

adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it …" Iowa Code § 17A.19(10)(f)(3).

The Assessor contends that a single factual finding made by the ALJ was not supported by substantial evidence: the Board's conclusion that the actual record in controversy was the list of property owners for whom the name search function had been disabled. *See* Assessor's Br. at 37-38; Proposed Decision at 7-8 (AR 450-51, App. ___); Final Decision (AR 507-08, App. ___). This conclusion was clearly supported by evidence in the record. In his March 28, 2017 email to the Assessor, Mr. Kauffman asked if he could "stop over sometime next week and look at the list of 2,166 property owners and/or their written requests (whichever is easier for you to produce)?" When Mr. Ripperger responded, he did not claim that no such record existed, but rather contended that the records should be kept confidential under Iowa Code section 22.7(18). This email chain was the parties' stipulated Exhibit A in the contested case hearing and was directly quoted in the ALJ's factual findings, which were in turn adopted by the Board. Final Decision (AR 507-08, App. ___); Exhibit A (AR 107-111, App. ___). Thus, the conclusion that

the actual record in controversy was the "list of 2,166 property owners" was supported by substantial evidence in the record.

The Assessor also suggests that the Board's Executive Director should have conducted a more thorough investigation and that the Board's prosecutor should have presented more evidence at the contested case hearing. *See* Appellant Br. 14, 15. The Board does not dispute that it carried the initial burden to demonstrate that the Assessor received a public records request, the Assessor declined to produce the record, and, arguably, that the record existed. *See* Final Decision (AR 507). But, as the ALJ observed in the Proposed Decision, the facts in this case are not particularly complicated. (AR 449, App. ___). The Board's prosecutor presented evidence showing that Mr. Kauffman requested the list of 2,166 property owners; the Assessor acknowledged that such a list exists; and the Assessor declined to produce the list, citing the exemption contained in Iowa Code section 22.7(18). Exhibit A (AR 107-111, App. ___). Because substantial evidence in the record supports the Board's conclusion that the record at issue was the list of properties for which the name search function had been disabled, that determination should be affirmed. Iowa Code § 17A.19(10)(f).

C. The Board's interpretation of chapter 22 was not irrational, illogical, or unjustifiable, and the Board did not commit any legal errors.

The Assessor next contends that the Board should have allocated the burden to prove that the records were not confidential to the Board's prosecutor. Appellant's Br. at 30, 34. This position contradicts the body of caselaw interpreting and applying Iowa Code chapter 22.

Iowa Courts apply a presumption of openness and disclosure when interpreting the Iowa Open Records Act. *City of Riverdale v. Dierks*, 806 N.W.2d 643, 652 (Iowa 2011). The legal framework for applying the statutory exemptions to the Iowa Open Records Act contained within Iowa Code section 22.7 is well-settled. The exemptions are construed narrowly, and the party seeking to invoke one of the statutory exemptions bears the burden of demonstrating the exemption's applicability. *Mitchell v. Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019). This Court has applied this well-established framework in a variety of procedural contexts. *See, e.g., Mitchell*, 926 N.W.2d at 229 (discussing that the party invoking a section 22.7 exemption bears the burden in a dispute over a protective order); *Dierks*, 806 N.W.2d at 652, 654 (discussing the same principle in a case affirming the district court's award of attorney's fees to the records requestor); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999) (discussing same in the context of a declaratory

judgment action brought under chapter 22); *Dierks v. Malin*, 894 N.W.2d 12, 18 (Iowa Ct. App. 2016) (discussing same in a private action brought under § 22.10). Thus, a party seeking to invoke a section 22.7 exemption bears the burden of demonstrating the exemption's applicability in a variety of actions arising under chapter 22, not just private actions under Iowa Code section 22.10, as the Assessor suggests.

There is not any language in chapter 23 suggesting that the legislature intended to upset this well-established framework when it enacted the Iowa Public Information Board Act in 2012. *See* 2012 Acts, ch. 1115. The principle that a party invoking a section 22.7 exemption bears the burden to prove the exemption's applicability was well-settled at the time the Board was created. *See, e.g., DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996). If the legislature wished to modify the long-established burden shifting framework for chapter 22 cases brought by the Board, it could have done so explicitly. *Cf. Lowe's Home Centers, LLC v. Iowa Dep't of Rev.*, 921 N.W.2d 38, 48 (Iowa 2018) (discussing legislative inaction as "tacit approval" of a longstanding rule). In addition, it would be impractical to require the Board to bear the burden to prove an exemption's applicability when that burden is allocated to the record custodian in other contexts. At the time a records request is made, the lawful custodian must determine whether there is

any section 22.7 exemption that applies. The custodian cannot possibly predict how the requestor might eventually seek to enforce compliance with the statute—through a complaint to the board, a private action under section 22.10, or through a request for declaratory relief. The records custodian should anticipate at the time of the request that it may be called upon to explain why the exemption applies.

In any event, in this case the applicability of the section 22.7(18) exemption presented an application of law to fact more than a factual dispute, so the question of who bore the burden of proof is somewhat academic. The original requests received by the Assessor—whether verbally or in writing—no longer exist. Ripperger Testimony (AR 306-07, App. ___). However, the list of property owners for whom the name search function was disabled could be generated from a database. *Id*. (AR 308-09, App. ___). Based on those undisputed facts, the Board concluded that the exemption in 22.7(18) did not apply because the list was not a "communication" within the meaning of Iowa Code section 22.7(18). Final Decision (AR 507-08, App. ___). This application of the law to the facts of this case is not "irrational, illogical, or wholly unjustifiable," and should be affirmed. Iowa Code § 17A.19(10)(m).

The Assessor argues that under the Board's reasoning, a list of job applicants would be public, even though the applications themselves are

confidential under section 22.7(18). Appellant Br. at 46. There are several important distinctions between employment applications and the real property records at issue in this case. As this Court has recognized, job applications are "communications" within the meaning of Iowa Code section 22.7(18). *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 898 (Iowa 1988). Moreover, they fall within the category of "useful incoming communications" that might not be forthcoming if subject to disclosure. *Id*. Job applications are customarily kept confidential so that applicants do not face repercussions from their current employers as a result of searching for new employment. If government bodies were required to make employment applications public, qualified applicants might be discouraged from applying. And a job applicant would only appear on a list of applicants if the applicant had, in fact, sent in an application.

In contrast, a property owner's information is present in the Assessor's database simply by virtue of owning property, not due to any communication. The database itself is a public record under Iowa Code section 22.3A. Unlike employment applications, which are traditionally kept private, property records are traditionally public records. And, with regard to the property owners for whom the name search function has been disabled, there is not a perfect match between the initial "communication" and the final "list." The

person making the request is not always the property owner. Ripperger Testimony (AR 303, App. ___). In some cases, a third party may submit the request on behalf of the property owner. *Id*. For properties with more than one owner, if one owner requests to "opt out," the name search function is disabled for all owners. Ripperger Testimony (AR 303, App. ___). In some cases, the property owner is a commercial entity, not an individual. In fact, Mr. Kauffman testified that he was specifically interested in reviewing whether commercial entities had made use of the "opt-out" feature because he viewed that as going beyond the privacy concerns the opt-out policy was designed to address. Kauffman Testimony (AR 190-91, 198, App. ___). Therefore, the Board's conclusion that the database-generated list was not a "communication" within the meaning of section 22.7(18) was supported by substantial evidence in the record and was a reasonable application of the law to the facts presented in this case.

The district court affirmed the Board's decision on an alternative ground, concluding that the database-generated list was sufficiently intertwined with the initial communications that it fell under the exemption in Iowa Code section 22.7(18). Dist. Ct. Decision at 14. The district court then moved on to the second part of Iowa Code section 22.7(18), which states that the exemption applies "to the extent that the government body receiving those

communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination." Iowa Code § 22.7(18). The district court agreed with the Board that it was "illogical to assume the vast majority of those with safety concerns would rather be easily found in the database than merely listed [among] those who have opted out." District Ct. Order at 15 (quoting Final Decision) (AR 509, App. ___). The district court acknowledged that the Assessor presented some evidence about legitimate safety concerns, but on balance, agreed with the Board that the release of the property owners' names alone, without the corresponding addresses, would not generate safety concerns for most property owners. And in fact, the Assessor's own testimony supported this conclusion. The Assessor testified that he had received phone calls after an article appeared in the Des Moines Register about the Iowa Public Information Board case: "The following week my office received numerous phone calls from people that were on the list that wanted their name removed from the list because they were afraid that their name *and address* would be published in The Des Moines Register." Ripperger Testimony (AR 311) (emphasis added).

Because the Board's decision was supported by substantial evidence in the record as a whole, and the Board did not commit any legal errors, the Board's Final Decision should be affirmed.

D. The Assessor did not Demonstrate by Clear and Convincing Evidence that Grounds Existed to Justify a Court to Issue an Injunction Against Disclosure.

Iowa Code section 23.11 allows a respondent in a contested case proceeding brought by the Board to raise an affirmative defense that grounds exist to justify a court to issue an injunction under Iowa Code section 22.8. Iowa Code § 23.11. The respondent must demonstrate that an injunction would be warranted by clear and convincing evidence. *Id*.; *see also In re Langholz*, 887 N.W.2d 770, 776 (Iowa 2016) (discussing standard under § 22.8). Section 23.11 does not allow the Board itself to issue an injunction; it simply operates as an affirmative defense in the contested case proceeding.

In this case, the Assessor has not shown by clear and convincing evidence that an injunction would issue under Iowa Code section 22.8, as required to establish the affirmative defense. "An injunction may be issued only if the court finds both 'the examination would clearly not be in the public interest' and 'the examination would substantially and irreparably injure any person or persons." *Iowa Film Prod. Servs. v. Iowa Dept. of Econ. Dev.*, 818 N.W.2d 207, 218 (Iowa 2012). At the contested case hearing in this case,

Mr. Kauffman explained some of the reasons he wanted to access the list of names:

> It sounded to me – in reading what the County had posted online about this policy, it sounded like the policy was enacted to provide an extra measure of safety for those people who felt like they didn't want their names out there in public in terms of their address, where they lived. They wanted to make that information – recognizing that it was public information, they wanted to make it harder to access. And that was basically acknowledged on the Assessor's website. That this was the motivation behind this. But in looking at how the policy was actually implemented, it didn't seem to be confined to people who – or should I say properties where there was a Homestead Exemption claimed. So it wouldn't just be individuals who are trying to keep their home address secret, it could be landlords or slumlords, it could be developers, it could be people who have commercial or investment interest in the property. So that goes far beyond these folks who arguably might have a privacy interest in keeping their home address information harder to access.

Kauffman Testimony at 27 (AR 190, App. ___). Given these legitimate reasons for wanting access to the records, it is not clear that a court would conclude that examination would clearly not be in the public interest.

The Assessor presents arguments related to privacy, and several witnesses at the contested case proceeding discussed their personal privacy or safety concerns. As the Board acknowledged, these are compelling concerns. But it is not clear how these individuals would be substantially or irreparably injured by a release of the list of property owners whose names are not searchable in the property search database. The requested list does not include

addresses. Releasing the list would not change the fact that the property owners' names remain disabled in the database, so a member of the public wanting to look up an individual address would still need to do so in person at the assessor's office. (AR 187, App. ___). The default rule in Iowa is that real estate records are public records.[1] Hearing Tr. at 13 (AR 176, App. ___). Because the Assessor has not demonstrated by clear and convincing evidence that a court would issue an injunction, the Court should affirm the Board's decision.

II. THE BOARD MEMBERS WERE NOT SUBJECT TO DISQUALIFICATION.

A. Preservation of Error.

The Board agrees that the Assessor preserved error on this issue.

B. The Board's Final Order was not the product of decision-making undertaken by persons subject to disqualification.

An agency decision is reversible under section 17A.19(10)(e) only if the court determines that the substantial rights of the person seeking judicial relief have been prejudiced by the participation of the allegedly disqualified

[1] Even in circumstances where the legislature has recognized the importance of maintaining address confidentiality, the legislature has carved out real property records. *See, e.g.*, Iowa Code § 9E.5(6) (establishing an address confidentiality program for certain crime victims but making clear that real property records and documents are not included).

person. Iowa Code § 17A.19(10); *Iowa Farm Bureau Federation v. Envtl. Protection Comm'n*, 850 N.W.2d 403, 434 (Iowa 2014). The burden of showing reversible bias is on the petitioner, who must overcome a rebuttable presumption of regularity for official acts of a state agency. *Anstey v. Iowa State Commerce Comm'n*, 292 N.W.2d 380, 390 (Iowa 1980).

The Assessor points to an audio recording of a November 15, 2018 meeting during which the Board considered the Assessor's request for a prehearing conference. Appellant Br. at 19. At the end of the meeting, the Board voted unanimously to allow the prosecutor and the parties to pursue informal settlement. 11/15/2018 Audio at 1:29:18. Following the vote, the Board took a break and the county attorneys left the meeting. Mr. Ripperger remained on the telephone line. Affidavit of R. Ripperger ¶ 7 (AR 134, App. ___). Mr. Ripperger alleges that he overheard some individuals discussing the case. *Id*. ¶ 8 (AR 135, App. ___). He requested that his attorneys obtain the audio recording of the discussion. *Id*. ¶ 11. The Assessor acknowledges that the audio tape can be difficult to hear but alleges there was discussion of whether "they did the right thing on that one." Appellant Br. at 19.

The Assessor alleges that this conversation violated Iowa Code section 17A.17(1)(a), which provides: "[A] presiding officer in a contested case shall not communicate directly or indirectly with any person or party in connection

with any issue of fact or law in that contested case, except upon notice and opportunity for all parties to participate as shall be provided for by agency rules." Iowa Code § 17A.17(1)(a). Appellant Br. at 18. "'[A] claim of bias in the context of contested cases 'becomes a justiciable issue only as it bears on the fairness of the hearing.'" *Iowa Farm Bureau Federation v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 415 (Iowa 2014) (quoting *Anstey*, 292 N.W.2d at 390). At the time the meeting occurred, the Board had already designated an administrative law judge to serve as the presiding officer in the contested case pursuant to section 17A.11(1)(a). (AR 32-33, App. ___). The ALJ was not present at the November 15, 2018 meeting. There are no allegations that the ALJ was biased or did not conduct the contested case hearing fairly. In fact, one of the Assessor's suggested remedies to cure the alleged bias was for the Board to appoint the ALJ as the final decision-maker. Appellant Br. at 20. Had the Board done that, the ALJ's Proposed Decision concluding that the Assessor violated chapter 22 would have been the final decision in the case, and the Assessor would be in the same position he is in today. Because the Board members were not the presiding officers in the contested case, no violation of section 17A.17(1)(a) occurred, and the Board's decision not to recuse should be affirmed on that basis alone.

In any event, as the district court recognized, it is permissible for Board members to talk to employees of the agency. This is true even of employees who have participated in the investigation of a pending case. *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841, 852 (Iowa 2009); *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366, 370 (Iowa 1991). The Assessor takes issue with the fact that the Executive Director allegedly took part in the discussion and was also a witness in the contested case. But she was identified and called as a witness by the Assessor, not the Board. The Executive Director was not the prosecuting attorney in the contested case and was not one of the decision-makers. In addition, the brief discussion during the break took place *after* the Board had voted to pursue settlement discussions, and the discussion was not deliberative in nature.

The presumption of impartiality in contested cases "will typically be determinative of the bias issue and can only be overcome by direct, compelling evidence to the contrary." *Iowa Farm Bureau Federation*, 850 N.W.2d at 415 (internal citations and quotations omitted). The Assessor has not presented any facts to rebut the presumption of regularity that the board members are entitled to or that would warrant reversal of the agency's decision. Nor has the Assessor presented any allegations that would warrant disqualification under the Board's administrative rules regarding

disqualification. *See* 497 IAC 4.8. In *Anstey*, the Iowa Supreme Court considered an allegation that a member of the commerce commission engaged in an ex parte communication when he had conversations with utility employees after the commission dismissed a franchise petition filed by the utility. Because the matter was no longer pending, the communication could not be viewed as having influenced a pending matter and did not require reversal. *Anstey*, 292 N.W.2d at 391. Here, similarly, Mr. Ripperger alleges that some Board members may have continued their discussion *after* the Board voted to allow the prosecutor and the parties to pursue informal settlement. Petitioner Br. at 18. The Board had already voted about the matter at hand.

In its order denying the Assessor's motion to disqualify, the Board observed that the Assessor remained on the line during the entire conversation:

> The Board hereby finds that nothing on the audio tape in question rises to the level of 'ex parte communication' which would require the Board to disqualify itself under any pertinent statute, rule, or legal precedent." See *Ansley v. Iowa State Commerce Comm'n*, 292 N.W.2d 380 (Iowa 1980). No issue of fact or law has been identified in the discussion. There is no basis to extrapolate from an unintelligible chatter among a few unidentified Board members that ALL Board members should be disqualified. Board members are not prohibited under the doctrine of ex parte communications from chatting among themselves during a break. In any event, the chatter was not ex parte because the Respondent was on the line the entire time.

Ruling on Mot. to Disqualify ¶ 9. (AR 511, App.__). In its decision affirming the Board's decision, the district court observed that the conversation was recorded, no new information was presented or discussed, and the Assessor had ample opportunity to rebut the communication. Dist. Ct. Order at 10.

Because the Assessor has not met the high burden to show his substantial rights were prejudiced by the Board's participation in the final decision in this case, the Board's order declining to recuse should be affirmed.

CONCLUSION

Because the Board's Final Decision was supported by substantial evidence in the record and the Board did not commit any legal errors, the Board respectfully requests that the Court affirm its Final Decision and dismiss the Petition for Judicial Review.

REQUEST FOR ORAL ARGUMENT

If the Court grants the Assessor's request for oral argument, the Board requests to be heard.

CERTIFICATE OF COMPLIANCE

This Proof Brief complies with the type-face requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this Proof Brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14-point and contains 5,411 words, excluding the parts of the Proof Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Emily Willits
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Emily Willits, hereby certifies that on the 20th day of November, 2020, I, or a person acting on my behalf, did serve Respondent-Appellee's Proof Brief and Request for Oral Argument on all other parties or counsel for all parties to this appeal via EDMS.

/s/ Emily Willits
Assistant Attorney General

CERTIFICATE OF FILING

I, Emily Willits, hereby certify that on the 20th day of November, 2020, I, or a person acting on my behalf, filed Respondent-Appellee's Proof Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court via EDMS.

/s/ Emily Willits
Assistant Attorney General