IN THE COURT OF APPEALS OF IOWA

No. 0-475 / 10-0347
Filed October 20, 2010

OFFICE OF CONSUMER ADVOCATE,
Petitioner-Appellant,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

The Office of Consumer Advocate appeals the district court's conclusion that the Iowa Utilities Board did not abuse its discretion in finding that no reasonable grounds existed for further investigation into allegations of an unauthorized charge for telecommunications services. **REVERSED AND REMANDED.**

Craig Graziano, Office of Consumer Advocate, Des Moines, for appellant.

David Lynch, Iowa Utilities Board, Des Moines, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Our supreme court recently determined that the Iowa Utilities Board did not violate due process in declining to launch formal proceedings in response to a petition from the Office of Consumer Advocate (OCA) where the Board did not find any reasonable ground to investigate allegations of unauthorized telecommunications charges. *Office of Consumer Advocate v. Iowa Utils. Bd.,* 770 N.W.2d 334, 341 (Iowa 2009). Now we are asked to decide a logical follow-up question: what constitutes any reasonable ground to investigate? More precisely, would any reasonable ground to investigate under Iowa Code sections 476.3 and 476.103[1] include a company's failure to provide regulators with a recorded telephone call verifying its authorization to charge nearly $400 for a "yellow pages" listing in light of the consumer's assertion that the billing was not authorized and the recording played for her sounded like it was "doctored?" Because we believe the Board should have considered the company's failure to comply with verification procedures as a ground for initiating formal proceedings, we reverse the district court and remand for the Board to investigate whether civil penalties are appropriate.

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[1] Iowa Code section 476.103 (2007) and Iowa Administrative Code rule 199-22.23(2) prohibit "unauthorized changes in telecommunications service" known as "slamming" and "cramming." "Slamming is the practice of changing a consumer's service without permission." *Office of Consumer Advocate*, 770 N.W.2d at 336. "Cramming refers to charging a consumer for services that were not ordered, authorized, or received." *Id.*

I. Background Facts and Procedures

The OYP Group, which lists its address as Plattsburg, New York, purports to sell "yellow pages" advertising. The company sent an invoice to Kingsgate Insurance, a Fort Dodge, Iowa firm, indicating Kingsgate owed $399.95 for a yellow pages listing and $54.45 in late charges for a total of $454.40. Kingsgate declined to pay the invoice. In May 2008, Denise Smith, a Kingsgate employee, complained to the Iowa Utilities Board that her firm did not authorize the charge. In an email sent to the Board, Smith described her communications with The OYP Group:

> The . . . company sent us a bill and when I called and told them it was not authorized by the owner they told me I had to pay it anyways and I have refused. I listened to the tape but all you hear is yes and no as their response and I feel the tape has been doctored.
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> . . . .
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> . . . I have talked to this company until I am blue in the face. Sarah [Lindner] who was a temp never authorized this even though the recording says yes. I sat next to her and she never said they could charge this to us. I told Malissa [Malbogat with OYP] that I would be contacting my Senator and she didn't care—she said I had to pay for it. I said if they called and talked to the janitor and they said charge it they would go ahead and do it. She said if they say yes then they would. I have asked for a copy of the record to take to my attorney but they said that cannot be done. Not sure where to go from here. Any help would be appreciated.

On June 2, 2008, an analyst with the Board forwarded Kingsgate's complaint to The OYP Group and asked for proof that the consumer authorized the billing. The letter asked for a complete copy of the entire verification conversation if The OYP Group used an independent third-party verification (TPV) service and informed The OYP Group that it had ten days to comply.

On June 10, 2008, The OYP Group responded to the Board in a letter stating it had received authorization for the billing from Sara Lindner at Kingsgate Insurance. The letter noted that The OYP Group retained the disputed recording by stating as follows:

> [The OYP Group] was in possession of a recording in which she gave his [sic] authorization for the purchase and the audio recording is accessible for the client to listen to verify the authenticity of the order that was placed. Please contact me by telephone to listen to the recording.

The OYP Group denied any wrongdoing in the authorization process, but to "ensure that all customer contact and interactions are positive in nature," the company advised the Board that it would accept Denise Smith's explanation of events and "close out the account to zero balance."

The Board wrote back to The OYP Group on June 16, 2008, telling the manager that "acceptable proof of the authorization" including "the entire verification conversation" had been due in the Board's office on June 12, 2008, and should be provided "as soon as possible." On June 18, 2008, a representative from The OYP Group told the Board a response would be provided by June 20, 2008, but the Board did not receive the promised communication.

Despite receiving no response from The OYP Group concerning the TPV recording, the Board sent a letter to Kingsgate on June 23, 2008, informing the consumer that because The OYP Group did not bill the invoice on a telecommunications account, the Board staff was unable to find that a cramming violation occurred.

On June 30, 2008, the Office of Consumer Advocate (OCA)—which is charged with representing consumers and the public before the Board—filed a petition under Iowa Code section 476.3 asking the Board to commence a proceeding to consider a civil penalty for the alleged cramming violation. The OCA challenged the Board's proposed resolution of the matter, asserting that Iowa Code section 476.103(2)(a) and Iowa Administrative Code rule 199-22.23(1) both define "change in service" to include "the addition . . . of a telecommunications service for which a separate charge is made to a consumer account" without requiring that the charges be included on the consumer's local telephone bill. The OCA urged that The OYP Group was in violation of the statute for not providing verification of Kingsgate's authorization for the $454.40 in charges.

On August 15, 2008, the Board denied OCA's petition. The Board held that it did not have jurisdiction to investigate the possibility of civil sanctions because the direct invoice issued in this case was not covered under section 476.103. The Board concluded that the case did "not fit within the parameters of the statute" because "OYP's charges were billed on a separate statement, not on the customer's telephone bill." The OCA moved to reconsider, arguing that the "change in service" definition at section 476.103(2)(a) is not limited to charges appearing on a bill issued by a local exchange carrier.

On September 26, 2008, the Board denied OCA's request for reconsideration. The Board acknowledged it had jurisdiction to investigate the allegations of an unauthorized charge for telecommunications services, even if

billed in a stand-alone fashion: "To the extent that the Board's August 15, 2008, order in this matter was unclear on that point, the Board's order is hereby clarified." But the Board went on to conclude there had been no showing of any reasonable grounds for further investigation. The reconsideration ruling explained that the individual invoice for $454.40 allowed Kingsgate to investigate and protest its authorization of the charges; "the charge was not subject to being overlooked as part of a multi-page bill for telecommunications service."[2] The ruling also found it significant that The OYP Group credited the charges back to Kingsgate "shortly after being contacted by Board staff."

The OCA petitioned for judicial review on October 23, 2008. The district court stayed the matter until the Iowa Supreme Court issued its decision in *Office of Consumer Advocate*, 770 N.W.2d at 334. The OCA amended its petition in September 2009 to remove arguments foreclosed by the Supreme Court's July 2009 opinion. The amended petition alleged that the Board's orders declining to consider civil penalties against The OYP Group were legally erroneous, arbitrary and capricious, and prejudiced the substantial rights of consumers and the public generally. The district court denied the petition, concluding the Board did not

[2] At the end of its reconsideration ruling, the Board questioned whether "the advertising services at issue in this matter are telecommunications services." Although The OYP Group described the service as "yellow pages" advertising, the Board noted that such advertising is now offered by publishers who are not telephone companies. The Board stated it was "not convinced" that its slamming and cramming jurisdiction extended to all advertising that "alludes to being similar to the Yellow Pages." The Board asserted in its appellate briefing that this portion of the order was "dicta" and not the basis of its decision not to investigate. Accordingly, we express no opinion on whether this kind of yellow page listing fits the definition of a telecommunications service.

abuse its discretion in finding no reasonable grounds for further investigation. The OCA appeals the district court's denial.

II. Standard of Review

The provisions of Iowa Code section 17A.19(10) control judicial review of an agency decision. Our review of the district court's decision upholding the Board's action is limited to deciding whether that court correctly applied the law in exercising its own review function under section 17A.19. *See IBP, Inc., v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001).

Earlier this year our supreme court clarified when a reviewing court should give deference to an agency's interpretation of the law. In *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8, 13–14 (Iowa 2010), the court stated:

> [I]t is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions. Accordingly, broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority.

Renda drew a distinction between substantive terms within the special expertise of an agency and terms with an independent legal definition not uniquely within the subject matter expertise of the agency. *Renda*, 784 N.W.2d at 14. In cases involving the specialized terms, the agency is vested with interpretative authority; in cases involving general terms, the agency is not vested with interpretative authority. *Id*.

"If we find the legislature has clearly vested the agency with interpretive authority for the phrase under consideration, we reverse only if the interpretation is 'irrational, illogical, or wholly unjustifiable.'" *Andover Volunteer Fire Dep't v.*

Grinnell Mut. Reins. Co., 787 N.W.2d 75, 80 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(*l*)). On the other hand, if we do not find that the legislature has clearly granted the agency authority to interpret, we do not defer to the agency's interpretation. Iowa Code § 17A.19(11)(b). We will reverse if we find the agency's decision was "[b]ased upon an erroneous interpretation of a provision of law." *Id.* § 17A.19(10)(c).

In *City of Coralville v. Iowa Utilities Board*, 750 N.W.2d 523, 527 (Iowa 2008), our supreme court determined that the Board had been vested with the authority to interpret the "rates and services" provision of section 476.1. Therefore, a reviewing court could overturn its decision only if it was "irrational, illogical or wholly unjustifiable." *City of Coralville*, 750 N.W.2d at 527 (citing Iowa Code § 17A.19(10)(*l*)). In the case we decide today, the district court was required to determine whether the Board properly interpreted the phrase "any reasonable grounds" for initiating formal proceedings to consider a civil penalty for cramming under section 476.3. The phrase "any reasonable ground" has an independent legal definition not limited to the specialized work of the Utilities Board. "Any reasonable ground" is not a phrase "uniquely within the subject matter expertise of the agency." *See Renda*, 784 N.W.2d at 13. Accordingly, we do not give deference to the Board's statutory interpretation of that standard.

The OCA also argues that the Board ignored important and relevant evidence and reached a decision that was unreasonable, arbitrary, capricious, or an abuse of discretion. *See* Iowa Code § 17A.19(10)(j), (n). "'Arbitrary' and 'capricious' are practically synonymous; both mean an agency decision taken

without regard to law or the facts of the case." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 154 (Iowa 1988).

III. Analysis

In *Office of Consumer Advocate*, 770 N.W.2d at 334, the OCA challenged the Board's revised policy to deny OCA's petitions for formal hearings where the Board found no reasonable grounds for investigating consumer complaints of alleged cramming and slamming violations. That appeal addressed three instances in which consumers detected unauthorized charges on their phone bills. *Office of Consumer Advocate*, 770 N.W.2d at 338. The Board decided not to initiate formal proceedings because the disputed charges resulted from employee mistakes or misunderstandings and the companies removed the erroneous charges. *Id*. The supreme court rejected OCA's argument that the Board's refusals to investigate ran afoul of procedural due process. *Id.* at 340. The court found the deterrent value of civil penalties would have been minimal because the violations at issue did not result from intentional misconduct. *Id*. The court held: "[T]he Board's policy of allowing formal hearings for civil penalty petitions only in cases with reasonable grounds for further investigation does not violate constitutional due process standards." *Id*. at 341.

In the 2009 appeal, the supreme court was not required to decide whether a certain set of circumstances would trigger the "any-reasonable-ground" standard for investigating a complaint under sections 476.3 and 476.103. That question is before us today.

Section 476.3 requires the Board to promptly initiate a formal proceeding if "the board determines that there is any reasonable ground for investigating the complaint." In its reconsideration ruling, the Board offered two reasons for not proceeding with a formal investigation. The first reason was that the stand-alone invoice received by Kingsgate was not typical of cramming schemes:

> Since OYP directly billed Ms. Smith, sending an individual bill as opposed to the charges being placed on her local telephone bill, Ms. Smith has the opportunity to investigate and protest service and accompanying charges without potentially involving the rest of her local telephone service. Moreover, because the account was billed directly, the charge was not subject to being overlooked as a small part of a multi-page bill for telecommunications service.

The Board's second reason for closing the case was that The OYP Group credited Kingsgate for the charges "shortly after being contacted by Board staff."

The reasons cited by the Board fall short of satisfying its statutory obligation to proceed if there is "any reasonable ground" for investigating the consumer complaint. The direct-invoice rationale just repackages the Board's initial, erroneous conclusion that it did not have jurisdiction to consider stand-alone billings under section 476.103. If this form of billing is within the scope of the Board's authority to investigate, it is unreasonable to refuse to investigate on that basis. As for the second reason given by the Board, the company's decision to issue a credit after being contacted by Board staff may be relevant to mitigation of an eventual civil penalty, but does not speak to whether any reasonable ground exists for investigating the initial billing as a violation of the cramming statute. *See In re Canales Complaint*, 637 N.W.2d 236, 245 (Mich. Ct. App. 2001) (holding that without imposition of civil penalties, companies would

not have sufficient incentive to stop slamming "because they would simply reimburse those customers who complain . . . but continue to collect fees from the other slammed customers"). More compelling than The OYP Group's issuance of a credit in response to the Board's inquiry is the consumer's complaint that she talked to the company until she was "blue in the face" without any satisfaction. The consumer's frustration with the company's response could lead a reasonable person to believe that further investigation may be warranted.

But more important than the reasons the Board gave for not going forward is the reasonable ground for investigating that it overlooked. The OCA contends the Board should have determined that a reasonable ground for investigation existed based on the factual dispute between the consumer's complaint and The OYP Group's response. Denise Smith's complaint asserted temporary employee Sarah Lindner did not authorize the approximately $400 yellow page listing and Smith described her suspicion that The OYP Group had "doctored" the verification tape. Smith told the Board she requested a copy of the recording to take to her attorney, but the company declined to provide it.

The OYP Group countered:

> The audio recording for this account shows that we clearly represented the publication, the pricing, the billing and invoicing of our product in an ethical manner. Sarah Lindner explicitly stated she was the "authorizing" personnel on this and asked to be invoiced as opposed to submitting a PO number for reconciliation of the invoice of $399.95.

Pointing to these differing versions, the OCA argues further investigation is needed to determine "what is on the recording if the company can produce it and

why the company cannot produce it if the company cannot produce it." We agree.

As the Board's June 2, 2008 letter to The OYP Group indicated, it was the company's obligation to provide a complete copy of the TPV recording to the Board. The Board did not hold The OYP Group to this burden because it erroneously concluded it did not have jurisdiction over this kind of billing. The Board contends on appeal the differing versions were not a reasonable ground because The OYP Group's verification recording was "made available" to Board staff. The Board bases this argument on the following statement in The OYP Group's June 10, 2008 response: "Please contact me by telephone to listen to the recording." This argument is inconsistent with the Board's June 17, 2008 letter to The OYP Group asking the company to provide "acceptable proof of authorization" in the form of the "entire verification conversation" and indicating that such information was overdue.

In justifying its decision not to follow-through on its initial demand that the company submit its recorded verification in response to the consumer complaint, the Board takes a rather narrow view of the controversy, finding "no legitimate dispute in the record that the recording exists and contains the voice of a Kingsgate employee, Sarah Lindner, purporting to authorize OYP to provide service to Kingsgate Insurance." This assertion by the Board ignores the crux of the consumer's complaint: that the recording was "doctored" to make it appear that Lindner approved the charge.

The Board argues it did not abuse its discretion in denying the OCA's request that it investigate "the consumer's unsupported allegation" that The OYP Group's recording was altered. The Board contends any alteration would be "extremely difficult to detect" and not worth a substantial investment of resources "to detect a single instance of tampering."

The Board's argument suggests that in deciding whether to initiate formal proceedings it has discretion to balance the cost and effort of further investigation against the likelihood that a violation will be established. Our supreme court recognized that "providing a hearing in only those cases that have a reasonable basis for further action is an efficient means of allocating the agency's limited resources in order to serve the public interest and the interests of the customer." *Office of Consumer Advocate*, 770 N.W.2d at 341. But the Board's discretion is not unfettered. Section 476.3 requires the Board to initiate formal proceedings if "the board determines that there is any reasonable ground" for investigating. While a petition filed by the OCA will not automatically trigger formal proceedings, the "any reasonable grounds" language discloses a legislative intent that the Board should investigate credible cramming and slamming complaints where there are allegations of intentional wrongdoing and the company has not provided the Board with the requested verification recordings.

Our courts have interpreted the term "any" to have broad application. *See Swiss Colony, Inc., v. Deutmeyer*, ___ N.W.2d ___, ___ (Iowa 2010) (citing Merriam-Webster's Collegiate Dictionary 53 (10th ed. 2002) (defining "any" as "every" or "used to indicate one selected without restriction")); *see also Fisher*

Controls Int'l, Inc. v. Marrone, 524 N.W.2d 148, 149 (Iowa 1994) (holding phrase "any legal action" was broader than "an action"). The legislature's use of the word "any" signaled its intent that the Board consider "every" reasonable ground as cause to proceed with further investigation.

We also consider that in other legal contexts our courts have viewed "reasonable grounds" as a relatively modest threshold for going forward with a further investigation. For instance, when applied to criminal arrests, we have equated the "reasonable ground" standard with "probable cause" and considered it met when the totality of circumstances would lead a reasonable, prudent person to believe a crime had been committed or that the arrestee committed it. *See State v. Ceron*, 573 N.W.2d 587, 592 (Iowa 1997). The facts supporting reasonable grounds need not be strong enough to sustain a conviction under the beyond-a-reasonable-doubt standard, but must rise above a mere suspicion. *Id*. Other jurisdictions have described "reasonable grounds" as a "low standard." *See, e.g.*, *L.A.R. v. Ludwig*, 821 P.2d 291, 294 (Ariz. Ct. App. 1991) (interpreting state statute requiring persons to report to authorities if they have reasonable grounds to believe a child has been abused); *In re J.K.M.*, 557 N.W.2d 229, 231 (N.D. 1996) (finding "reasonable grounds" for juvenile transfer to adult court was "minimal burden of proof").

The consumer's belief, after listening to the recording, that The OYP Group altered the audiotape to make it sound like Sarah Lindner approved the charge constitutes a reasonable ground for further investigation. Denise Smith explained in her complaint that she sat next to Lindner in the office and would

have been able to hear a conversation where the temporary employee authorized the billing in question. When Smith heard the recording, it did not sound like a complete rendition of the conversation. When coupled with The OYP Group's evasive treatment of requests for the recording, Smith's complaint provides more than a mere suspicion of a possible cramming violation.

The district court concluded that "the lack of corroborative evidence on the part of Ms. Smith" justified the Board's decision not to initiate formal proceedings. The district court here compared the consumer's lack of corroboration to the complaints considered by the supreme court in *Office of Consumer Advocate*, 770 N.W.2d at 334. The district court erred in suggesting the consumer was required to provide the Board with corroborative evidence at the complaint stage. It is unclear how Smith could have substantiated her belief that the recording was "doctored" when The OYP Group refused to provide her with a copy of the recording. The allegation of intentional wrongdoing against The OYP Group separates the complaint in this case from the unauthorized charges resulting from employee mistakes considered by the supreme court in the 2009 appeal.

The Board asserts that the stand-alone nature and the amount of The OYP Group's billing "are not typical of a company engaged in a pattern of intentional cramming violations." The OCA criticizes the Board's assertion as "unwarranted speculation" and argues that "requiring allegation and proof of a series or pattern of violations would leave the statute largely unenforced and the violators largely free to injure the public." The OCA also cites outside sources—which were not offered as evidence before the Board—to show other complaints

have been leveled against The OYP Group across the country. We do not need to consider the OCA's citation to other complaints to decide this question against the Board. Given the complaint from Kingsgate that the authorization recording may have been "doctored" and The OYP Group's non-compliance with the Board's request to provide the recording, the statutory standard of "any reasonable ground" is met in this case.

In conclusion, we find the Board erred in interpreting the phrase "any reasonable ground" in section 476.3 as allowing it to deny the OCA petition based on the stand-alone billing and the crediting of Kingsgate's account. In this case, the OCA petition alleged that the consumer reported that her firm never authorized the yellow pages billing and The OYP Group violated the telecommunications statute by failing to turn over the required verification of the alleged authorization for the charges. These combined circumstances provided a reasonable ground for investigating. We reverse and remand for the Board to initiate a formal proceeding.

REVERSED AND REMANDED.