

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p><b>THERESA SEEBERGER,</b>  <b>Petitioner,</b>  <b>vs.</b>  <b>DAVENPORT CIVIL RIGHTS COMMISSION,</b>  <b>Respondent,</b>  <b>MICHELLE SCHREURS,</b>  <b>Intervenor.</b></p>	<p><b>CASE NO. CVCV 51252</b>  <b>RULING ON PETITION FOR JUDICIAL REVIEW</b></p> <p>JUL - 7 2016</p> <p>Kg</p>
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This is a judicial review proceeding in which the petitioner seeks judicial review of a decision of the respondent dated January 7, 2016 in which it approved a decision of an administrative law judge that the petitioner had engaged in discriminatory conduct directed at the intervenor on the basis of familial status and which ordered emotional distress damages, the assessment of a civil penalty and assessed attorney fees and costs. The petitioner contends that the decision of the respondent should be reversed on the following grounds: 1) the decision was based in part upon an erroneous interpretation of the applicable language in the city ordinance at issue; 2) the ordinance in question violates the petitioner's rights to free speech, violates the home rule provisions of the Iowa Constitution and violates the petitioner's rights to substantive due process; 3) the award of emotional damages and attorney fees were both improper and excessive; 4) the decision was not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy; 5) the

decision was unreasonable arbitrary, capricious and an abuse of discretion; and 6) the decision was 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. Iowa Code §17A.19(10)(a), (c), (e), (k), (n) (2015).

Background facts. The petitioner has not challenged the sufficiency of the findings of fact upon which the respondent's decision is based. Accordingly, this court assumes that these findings are so supported and is bound by them on judicial review. Palmer College of Chiropractic v. Davenport Civil Rights Comm'n, 850 N.W.2d 326, 332 (Iowa 2014); see also In re C.K., 2010 WL 1576850 \*3 (Iowa Ct.App., Case No. 09-1367, filed April 21, 2010). From a review of the decision of the administrative law judge which was adopted by the respondent, the pertinent facts are as follows: The petitioner was the owner of a single family home located at 2314 North Ripley Street ("the property") in Davenport, Iowa, having purchased it in 2011. She lived in the property until November or December of 2012, when she moved into her spouse's residence. She decided to rent rooms at the property to tenants (the property has three bedrooms and is furnished). After she rented out the property, she continued to visit on a daily basis to feed her four cats that remained there.<sup>1</sup>

One of the petitioner's tenants was Peter King, who was dating the intervenor. The intervenor approached the petitioner about renting a room in the property; the petitioner eventually agreed to rent a room to the intervenor for \$300 per month. At the time of this agreement, there were two other tenants at the property—King and Roberta Hodge. These tenants also paid \$300 per month in rent. The intervenor did not have a written lease. The intervenor and her daughter (Trinity Crews) moved into the property

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<sup>1</sup> Petitioner's spouse is allergic to cats.

in August of 2013. While she lived at the property, the intervenor took care of the petitioner's cats. Sometime around the time the intervenor moved into the property, the petitioner's marriage ended and she moved into an apartment a few blocks away from the property; she did not want to move into the property with her tenants, as she had lived alone for many years previously. Hodges moved out of the property in November of 2013 after a dispute with the petitioner. After she moved out, the petitioner increased the intervenor's rent to \$450 per month, payable in two installments. King moved out of the property in June or July of 2014.

On September 16, 2014, while the petitioner was at the property, she saw a bottle of prenatal vitamins on the kitchen counter. She took a photograph of the bottle and sent the intervenor a text message asking, "Something I should know about?" The message was not received by the intervenor that day. The next evening, the petitioner, the intervenor and Crews were all at the property. The petitioner asked the intervenor if she had received the text message; the intervenor replied that she had not. When the petitioner showed the intervenor the picture of the bottle of vitamins, the intervenor advised the petitioner that Crews (who was 16 years old at the time) was pregnant. The petitioner responded by telling the intervenor, "You're going to have to leave." This was the first time the petitioner had told the intervenor she had to leave. When the intervenor asked why they would have to leave, the petitioner advised her, "You don't even pay rent on time the way it is, and...Now you're going to bring another person into the mix." The petitioner also made the comment to the intervenor that "she [Crews]'s taking prenatal vitamins,...obviously, you're going to keep the baby." The ALJ summarized the petitioner's testimony in this regard as follows:

Seeberger testified she believes people should be responsible and that Schreurs should have been more responsible in preventing her teenage daughter from becoming pregnant. Seeberger reported she was disappointed with Schreurs and believes Schreurs took advantage of her because she was paying less rent than she would anywhere else.

At some point after the interaction on September 16-17, the petitioner provided the intervenor with a written notice (dated September 15, 2014) advising her that her lease expires on October 19, 2014 and that all her possessions must be removed by 5:00 p.m. on that date. At the bottom of this notice, the petitioner added the following handwritten note: "No more rent. Save your \$ to find a new home."

On September 23, 2014, the petitioner sent the intervenor a text message advising her as follows:

Laura is moving everything out of her apartment Friday morning, so starting Friday night I will be staying at Ripley. I would like to set up my bed in one of the bigger rooms. I would appreciate if you could get one of them completely empty by Friday. Whichever is easier. Let me know if you that's possible. Thanks.

A follow-up text message was sent by the petitioner to the intervenor on Friday, September 26, 2014; the intervenor responded she would not be able to move her belongings that day. On October 1, 2014, the petitioner sent the intervenor a text message telling her that her rent was due in full. The intervenor responded, "Per our verbal agreement half is due the first week of the month on Friday when I get paid." The petitioner responded as follows:

What verbal agreement? I recall no such thing. You guys are as bad as Roberta—amazing. First you want practically a free house. Now free lawyer. It's a shame you have to

use everyone. I asked Peter if he was the father and he didn't deny it....

The petitioner's comment about King being the father of Crews' child upset the intervenor because Crews had been sexually abused by her ex-husband, who was incarcerated.

Later that evening, the intervenor returned to the property with her boyfriend, Jason Alton. The petitioner was at the property when they arrived; in the ensuing altercation that eventually resulted in the police being called, the petitioner asked the intervenor once again, "Is Peter the father of the baby?" The intervenor ultimately moved out of the property on October 5, 2014. She lived with her parents for five months until she could secure housing of her own. She testified that she was very emotional and cried a lot after she moved out. She had previously taken medication for anxiety and depression; her prescription for anxiety medication was increased after she moved out. She also suffered from Crohn's disease, colitis, gastritis and psoriasis.

Underlying and related proceedings. The intervenor filed a complaint with the respondent on November 14, 2014, alleging that the petitioner made discriminatory statements against her related to the rental of a dwelling based on familial status. On March 13, 2015, the respondent determined that probable cause existed to show that the petitioner had made such statements as alleged. On June 22, 2015, the intervenor's complaint was set for hearing on August 24, 2015 before Administrative Law Judge Heather Palmer; that hearing was ultimately continued to November 4, 2015.

On October 16, 2015, the petitioner (through counsel<sup>2</sup>) filed a civil lawsuit against the City of Davenport and the respondent, challenging the validity of the proceedings resulting from the intervenor's complaint. On October 20, the petitioner sent a text message to Tim Hart, the chairperson of the respondent, which read as follows:

Hi Tim—As you likely know I'm the subject of an upcoming hearing before the commission. I'm filing a lawsuit against the city and the commission. You are the person that needs to be served. Would you be willing to accept service or do you want me to have you served with the petition? Let me know—Thanks—Theresa Seeberger

The executive director for the respondent, Latrice Lacey, contacted the petitioner's counsel (with a copy to ALJ Palmer) on the evening of October 20, calling into question the propriety of the petitioner's contact with Hart. Both counsel and the petitioner responded the next day, pointing out that intervenor's counsel and the ALJ had been copied in on the message and that it only involved the issue of service. Lacey replied to these communications (again copying in Palmer) on the evening of October 21 as follows:

Mr. Motto, your client's communication with the Chair of the Davenport Civil Rights Commission violates Rules 32:4.2(a) and 32:3.5 of the Iowa Rules of Professional Conduct. She should not be contacting members of the Commission directly as they are represented by the Director as their counsel. Further, her threats of litigation appear to be a bullying tactic employed to influence the Commissioner in his official capacity as a decision maker in this proceeding.

If there is any further communication with any of the Commissioners regarding this proceeding, I will have no other choice but to report her conduct.

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<sup>2</sup> The petitioner is a practicing attorney with an office in West Branch, Iowa; in addition, she serves as a magistrate for Cedar County.

On October 23, ALJ Palmer filed a complaint form with the Iowa Supreme Court Disciplinary Board regarding the petitioner; in that complaint, she forwarded on the correspondence between the parties and counsel that she had been copied in on. In addition to this correspondence, Palmer noted:

I do not have additional information concerning Seeberger's contact with a Commissioner of the Davenport Civil Rights Commission. The Commission will receive the appeal following the hearing scheduled for November 4-5, 2015 in Davenport.

The petitioner was notified on October 26 of the filing of the complaint by Palmer, and was provided with a copy. No effort was made prior to or at the November 4-5 hearing to seek the disqualification or recusal of ALJ Palmer as the presiding officer over that hearing.

ALJ Palmer issued her finding and conclusions on December 11, 2015. She concluded that the petitioner had violated Davenport City Ordinance §2.58.305(C)<sup>3</sup>, which provides as follows:

It shall be unlawful:

....

C. To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation or an intention to make any such preference, limitation or discrimination.

In reaching her conclusions, ALJ Palmer reasoned as follows:

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<sup>3</sup> Palmer initially concluded that the "small landlord" exemption under the ordinance were not applicable to the present dispute, as the city ordinance specifically excludes §2.58.305(C) from the exemption. Davenport City Ordinance §2.58.310(A) ("Nothing in subsection 2.58.305 of this Chapter other than subsection 2.58.305(C) shall apply to....")

Seeberger's statements on September 16 and 17, 2014, related to Schreur's rental of the Subject Property. Seeberger immediately terminated Schreur's tenancy after finding out her teenage daughter was pregnant. Seeberger testified she was disappointed with Schreurs and believed Schreurs had taken advantage of her. Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status. Seeberger engaged in a discriminatory housing practice by making the statements.

Earlier in her decision, ALJ Palmer rejected as not credible the petitioner's testimony that she had completely moved back into the property by the time of the discussion of the pregnancy and was sleeping on the sunporch; this credibility determination was based on conflicting testimony from other witnesses and the inconsistencies in the petitioner's own testimony. ALJ Palmer also rejected the petitioner's argument that she terminated the intervenor's tenancy because she wanted to have the house back just for herself, because the intervenor was "a little bit messy," that Crews had left the oven on twice and because the intervenor was routinely late in her rent.

ALJ Palmer awarded the intervenor \$35,000 in emotional distress damages and the maximum civil penalty (for a first offense) of \$10,000 based on the following reasoning:

Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents. Schreurs has a history of anxiety, depression, psoriasis, Crohn's disease, colitis, and gastritis. Her

conditions were aggravated by the termination of her tenancy.

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While this is Seeberger's first violation, this is not a typical case of discrimination. Seeberger intentionally discriminated against Schreurs based on her familial status by making discriminatory statements in housing. Seeberger's lack of candor during the investigation and hearing is disconcerting. Seeberger did not present any evidence of her current financial circumstances. Imposition of a \$10,000 civil penalty is appropriate.

On December 23, 2015, the intervenor made application for attorney fees and costs pursuant to Davenport City Ordinance 2.58.350(G). In a ruling filed on December 31, 2015, ALJ Palmer awarded the intervenor \$23,200 in attorney fees and \$681.10 in costs. The respondent issued its final decision on January 7, 2016. In its decision, the respondent "approve[d] the Hearing Officer's decision in its entirety with exception to a reduction in the award of emotional distress damages to \$17,500." No further explanation was provided for the reduction; in all other respects, the decision of the ALJ was summarily approved and adopted by the respondent. A timely petition for judicial review was filed in the present proceedings on February 5, 2016.

#### **ISSUES PRESENTED FOR REVIEW**

Statutory interpretation. The petitioner argues that the respondent incorrectly interpreted a number of terms within the applicable ordinances, including "aggrieved person," "familial status," "statement" and "dwelling." Ordinarily, the standard of review for such an argument would depend on whether the respondent had been clearly vested with the discretion to interpret the authorities at issue. Eyecare v. Dep't of Human Services, 770 N.W.2d 832, 835 (Iowa 2009). If, after this review, the court has a "firm conviction" that the legislature intended or would have intended to delegate to the agency

“interpretive power with the binding force of law over the elaboration of the provision in question,” that power has been clearly vested with the agency. NextEra Energy Resources LLC v. Iowa Utilities Board, 815 N.W.2d 30, 37 (Iowa 2012) (citation omitted). If interpretative authority has been found to have been clearly vested with the agency, any such interpretations may be reversed only if found to have been irrational, illogical or wholly unjustifiable. Iowa Code §17A.19(10)(I) (2015). On the other hand, if this conclusion is not forthcoming, the court grants no deference to the agency and reviews for corrections of errors at law. NextEra, 815 N.W.2d at 38. In that instance, the court is free to substitute its judgment de novo for the agency’s interpretation. Bearinger v. Iowa Dep’t of Transp., 844 N.W.2d 104, 105 (Iowa 2014).

However, as the respondent and intervenor point out, the petitioner is making this argument for the first time on judicial review, which typically results in a failure to preserve error and waiver of the issue. Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm’n, 394 N.W.2d 375, 382 (Iowa 1986). The petitioner conceded at hearing that this issue had not been raised before the agency, but argued that the ability to interpret the legal authorities in question goes to the subject matter jurisdiction of the agency, which can be raised at any time. See TMC Transp. v. Davidson, 2006 WL 334178 \*1 (Iowa Ct.App. Case No. 04-1044, filed February 15, 2006); Heartland Express, Inc. v. Terry, 631 N.W.2d 260, 265 (Iowa 2001).

The petitioner’s argument is misplaced. As applied in an administrative context, subject matter jurisdiction is the power of an agency to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the agency’s attention. Klinge v. Bentien, 725 N.W.2d 13, 15 (Iowa

2006). Whether the respondent had subject matter jurisdiction over the matter at hand is dependent on whether the ordinances in question empowered it to hear and determine the kind of complaint filed against the petitioner by the intervenor. Alberhasky v. City of Iowa City, 433 N.W.2d 693, 695 (Iowa 1988); see also MC Holdings, LLC v. Davis County Bd. of Review, 830 N.W.2d 325, 329 (Iowa 2013) (subject matter jurisdiction of an administrative agency is authority conferred by statute).

On the other hand, when an agency interprets an ordinance in order to determine whether a particular dispute is or is not meritorious as measured against that statutory standard, it is merely exercising its authority to resolve that particular case as compared to the class of all such cases. Alliant Energy-Interstate Power and Light Co. v. Duckett, 732 N.W.2d 869, 874-75 (Iowa 2007); see also Comm'r of Political Preferences for State ex rel. Motl v. Bannan, 380 Mont. 194, 196, 354 P.2d 601, 603 (2015) (“The District Court is not deprived of subject matter jurisdiction when asked to address issues of statutory interpretation and construction”); MHM & F, LLC v. Pryor, 168 Wash.App. 451, 460, 277 P.3d 62, 67 (2012). Any defect in this authority can be waived if not raised through a timely objection. Alliant, 732 N.W.2d at 875. Accordingly, the petitioner has failed to preserve error on this issue.

Constitutional issues. The petitioner raised three constitutional issues before the administrative law judge: 1) Davenport City Ordinance §2.58.305(C) as applied violated her constitutional rights to free speech; 2) Davenport City Ordinance §2.58.310 violates Article III, §38A of the Iowa Constitution as an exercise of municipal power that is irreconcilable with state law; and 3) application of the ordinance violated her substantive due process rights. ALJ Palmer and ultimately the respondent appropriately deferred on

these constitutional issues, leaving them for this court to analyze on judicial review. Soo Line R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688 (Iowa 1994); Shell Oil Co. v. Bair, 417 N.W.2d 425, 429 (Iowa 1987). Despite this lack of authority, constitutional issues must be preserved with the agency for judicial review; a review of the record reveals that these issues have been so preserved. McCracken v. Iowa Dep't of Human Services, 595 N.W.2d 779, 785 (Iowa 1999).

In her first constitutional argument, the petitioner contends that §2.58.305(C) of the city ordinance violates her rights under the First Amendment<sup>4</sup> as a content-based restriction on speech. There appears to be no dispute between the issues on this preliminary issue, in that it is clear that the ordinance “distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.” State v. Musser, 721 N.W.2d 734, 743 (Iowa 2006) (citations omitted); see also Campbell v. Robb, 162 Fed.Appx. 460, 468 (6<sup>th</sup> Cir. 2006) (comparable version of Fair Housing Act [42 U.S.C. §3604(c)] “is clearly a content-based speech regulation in that it allows landlords to express certain preferences while outlawing others”).

The petitioner goes on to argue that this restriction must be analyzed using the highest level of constitutional scrutiny (based on a compelling state interest); however, this argument misses the point. Such scrutiny is not required where, as here, commercial speech is being restricted. Her claim that her statements are non-commercial presupposes a factual scenario expressly rejected by the respondent—namely, that she lived in the house with the intervenor and was a roommate rather than a landlord. Her inquiries into and statements concerning the pregnancy of the intervenor’s daughter and their ultimate

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<sup>4</sup> While the petitioner argues a free speech violation under both the federal and Iowa constitutions, she concedes that there is no need to differentiate between them in terms of the constitutional analysis required. See State v. Dudley, 766 N.W.2d 606, 624 (Iowa 2009).

impact on the continuation of the tenancy pertain directly to the commercial transaction between landlord and tenant, which has been held to clearly fall within the “core notion of commercial speech.” Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983); see also Campbell, 162 Fed.Appx. at 469 (“a statement made by a landlord to a prospective tenant describing the conditions of rental is part and parcel of a rental transaction”).

As the petitioner’s statements constitute commercial speech, they are subject to a lesser scrutiny test to pass constitutional muster:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). It is well-settled that discriminatory statements made in the context of housing are illegal and therefore cannot meet the first part of the Central Hudson four-part test. Campbell, 162 Fed.Appx. at 470 (discriminatory statements made to prospective tenant “akin to a want ad proposing a sale of narcotics or soliciting prostitutes”) (quoting Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973)); see also Ragin v. New York Times Co., 923 F.2d 995, 1002-03 (2<sup>nd</sup> Cir. 1991) (publishing advertisements that indicate a racial preference furthered illegal discrimination and were not protected commercial speech). The statements made by the

petitioner to the intervenor which formed the basis for her liability under §2.58.305(C) are not protected under the First Amendment.

The petitioner's next constitutional argument is that Davenport City Ordinance §2.58.310 violates the home rule provisions of the Iowa Constitution, which provides that municipalities "are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government,...." Iowa Const., art. III, §38A. Specifically, the petitioner argues that the exclusion from the exemption in §2.58.310 for liability under §2.58.305(C) is inconsistent with the scope of liability for unfair or discriminatory practices in housing under the Iowa Civil Rights Act, which does not extend to "[t]he rental or leasing of less than four rooms within a single dwelling by the occupant or owner of the dwelling, if the occupant or owner resides in the dwelling." Iowa Code §216.12(1)(c) (2015). An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with that law; which in turn requires that the ordinance prohibits an act permitted by statute or permits an act prohibited by a statute. Baker v. Iowa City (Baker I), 750 N.W.2d 93, 99-100 (Iowa 2008).

The petitioner's argument fails on both factual and legal grounds. First, once again it presupposes the rejected argument that the petitioner lived at the property with the intervenor and her daughter. Thus, §216.12(1)(c) does not even come into play. However, even if it did, the Iowa Civil Rights Act specifically provides that a municipality may provide by ordinance for broader or different categories of unfair or discriminatory practices. Iowa Code §216.19(1)(c) (2015). As a result, the city of Davenport is within its rights to prohibit discriminatory statements based on familial

status made by persons who might otherwise come within §216.12(1)(c). Accordingly, the petitioner has not established a violation of the home rule provisions of the Iowa Constitution.

The petitioner's final constitutional issue is that §2.58.305(C) violates her substantive due process rights under the federal constitution; specifically, that it impinges upon her constitutional rights of association. This argument has been summarized in petitioner's brief as follows:

There is no indication that the City of Davenport intended to interfere with personal relationships where an individual is selecting someone who will reside with another individual sharing the same living space. Because Seeberger had personal belongings and her pets at the [property], and was free to come and go as she pleased, she is entitled to constitutional protection.

Once again, this argument assumes that the petitioner enjoys the status of a roommate of the intervenor rather than the status found by the respondent—her landlord. Just as the right to hire someone in violation of a city's anti-discrimination ordinance is not a fundamental right, see Baker v. Iowa City (Baker II), 867 N.W.2d 44, 55 (Iowa 2015), neither is the right to make statements to a tenant in violation of the ordinance in question. In the absence of a fundamental right, there need only be a rational basis between the ordinance and the furtherance of a legitimate state interest. Id. at 55-56 (citation omitted).

The city clearly has a legitimate interest in prohibiting discriminatory statements related to housing based on familial status. See Senior Civil Liberties Ass'n, Inc. v. Kemp, 761 F.Supp. 1528, 1557 (M.D.Fla. 1991) (“[T]he primary purpose and basis of the familial status provisions of the [Fair Housing] Act...is to provide a remedy for the

widespread housing discrimination against families with children”); Rackow v. Illinois Human Rights Comm’n, 152 Ill.App.3d 1046, 1060, 504 N.E.2d 1344, 1354, 105 Ill.Dec. 826, 836 (1987) (“Plaintiffs, while raising a legitimate interest in the right to use their property as they see fit, are unable to demonstrate that their personal property rights outweigh the public need of assuring fair and equal housing opportunities and avoiding discrimination on the basis of family status”) (statute upheld under rational basis test). As a result, §2.58.305(C) does not violate the petitioner’s substantive due process rights.

Award of damages and attorney fees. It must be remembered that under the administrative scheme set out in the ordinances in question, the petitioner is exempt from liability for the termination of the tenancy between herself and the intervenor based on familial status, and that any liability can only extend to discriminatory statements made by the petitioner on such a basis. See Davenport City Ordinance §2.58.310 (exemption for liability under §2.58.305(A), (B), (D), (E) and (F) for small landlords); cf. id. at §2.58.305(A) (making denial of housing based on familial status unlawful). Accordingly, any damages awarded to the intervenor on a finding of liability under §2.58.305(C) can only causally relate to the discriminatory statements, not the termination of the tenancy. H.U.D. v. Denton, 1992 WL 406537 \*9 (H.U.D.A.L.J., Case Nos. 05-90-0012-1 and 05-90-0406-1, decided February 7, 1992); H.U.D. v. Dellipaioli, 1997 WL 8260 \*9 (H.U.D.A.L.J., Case No. 02-94-0465-8, decided January 7, 1997) (damages discounted to reflect award limited to act of making discriminatory statement, not denial of housing).

It is clear from a review of the decision of the ALJ that was adopted by the respondent that the damages that were awarded were tied to the termination of the tenancy by the petitioner, not just her discriminatory statements:

Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy. Schreurs had nowhere to go and had to move in with her parents....Her [physical and mental] conditions were aggravated by the termination of her tenancy.

Although the respondent reduced the ALJ's award by half, there is no analysis that would reflect whether they differentiated between damages properly related to the discriminatory statement and improperly related to the termination of the tenancy. As a result, the award of damages to the petitioner was improper and should be reversed. As it is unclear whether the respondent's calculation of an appropriate civil penalty may have relied upon such an improper causal connection, that penalty should also be reversed. See May v. Colorado Civil Rights Comm'n, 43 P.3d 750, 758-59 (Colo. 2002).

The petitioner also challenges the award of attorney fees on the basis that there is no authority for such an award within the city ordinance. The respondent and intervenor both rely upon a recent amendment to the ordinance that provides for such fees. Davenport City Ordinance §2.58.175(8)<sup>5</sup>; see also Bostko v. Davenport Civil Rights Comm'n, 774 N.W.2d 841, 845 n. 2 (Iowa 2009). The provision for attorney fees in §2.58.175(8) comes within that part of the ordinance titled, "Remedial Action," and comes immediately after that part of the ordinance laying out the procedure for dealing with complaints of unfair practices in areas other than housing. Davenport City Ordinance §2.58.170. That procedure is different than that set out when the complaint deals with allegations of unfair or discriminatory practices in housing. See id. at §2.58.340. The procedure followed in the present dispute on an allegation of discriminatory practices in housing does not afford the administrative law judge with the

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<sup>5</sup> The original request was pursuant to §2.58.350(G); it appears from the briefing that all parties concede that this section has no applicability to the issue of attorney fees in the present context.

authority to assess attorney fees and expenses on a finding that such a practice has taken place; the relief available is limited to an award of actual damages, equitable or injunctive relief and the assessment of a civil penalty. *Id.* at §2.58.340(F)(3). As a result, the court agrees with the petitioner that the city ordinance does not clearly authorize an award of attorney fees in the context of a discriminatory housing practice. *Bostko*, 774 N.W.2d at 845 (reference to the court’s “stringent approach to attorney fees”).<sup>6</sup> The attorney fee award is therefore reversed.<sup>7</sup> The assessment of costs is not affected by this ruling.

Private rights versus public interest. An additional ground for reversal cited by the petitioner is where agency action is “[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from [the] action that it must necessarily be deemed to lack any foundation in rational agency policy.” Iowa Code §17A.19(10)(k) (2015). As applied to the present dispute, the petitioner contends that a “full prosecution” of alleged discriminatory actions “should be saved for those most egregious examples of discrimination” and her private rights have been disproportionately impacted as a result of the present prosecution.

The starting point for an analysis under this statute is whether the challenged agency action is not required by law. *See Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007). To the degree the petitioner challenges the ability of the respondent to proceed on a complaint alleging discriminatory practices in housing, one might wonder whether this argument even clears this preliminary hurdle. The respondent is required under the procedures set forth in the city ordinance governing housing complaints

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<sup>6</sup> *Bostko* dealt with allegations of a hostile work environment; accordingly, the reference to the amendment to the ordinance in the footnote quoted above was appropriate. *See id.* at 843. The reference should not be construed as an approval of such fees in a context not covered by the scope of the amended ordinance.

<sup>7</sup> This disposition renders moot the petitioner’s alternative argument that the fee award was excessive.

(“shall”) to investigate such complaints and provide for a hearing before an administrative law judge once probable cause has been found (absent an election by the complainant to proceed in a civil proceeding). Davenport City Ordinance §2.58.325(4)(d), §2.58.340(B)-(D).

Even assuming that the actions of the respondent may not have been entirely required by law, the court cannot conclude that the impact on the petitioner’s rights have been disproportionately affected in comparison to the public interest. First, the “private rights” asserted by the petitioner relate to the debunked theory that she was merely sharing her home in which she lived with the intervenor. Second, any disproportionality argument is now premature since the award of damages and assessment of a civil penalty have been reversed as set forth above. As a result, the court is not persuaded that the conclusions reached by the respondent regarding the petitioner’s discriminatory housing statements should be otherwise reversed pursuant to Iowa Code §17A.19(10)(k).

Unreasonable, arbitrary, capricious and abuse of discretion. Agency action can be reversed if “[o]therwise unreasonable, arbitrary, capricious or an abuse of discretion.” Iowa Code §17A.19(10)(n) (2015). Such action is “unreasonable” if it is against reason and evidence as to which there is no room for difference of opinion among reasonable minds. Norland v. Iowa Dep’t of Job Serv., 412 N.W.2d 904, 912 (Iowa 1987). Such action is “arbitrary” or “capricious” when it is made without regard to the law or underlying facts. Id. “Abuse of discretion” has been similarly defined as whether “the agency action was unreasonable or lacked rationality. Hough v. Iowa Dep’t of Personnel, 666 N.W.2d 168, 170 (Iowa 2003). For the reasons noted above, this court has concluded that the damages awarded, as well as the assessment of a civil penalty and

attorney fees, were improper; they should also be reversed as otherwise unreasonable, arbitrary, capricious and an abuse of discretion.

Improper purpose/disqualification. The petitioner's final argument is that the conclusion of the respondent was the product of decision-making undertaken by persons who were motivated by an improper purpose or were subject to disqualification. Iowa Code §17A.19(10)(e) (2015). This argument is three-fold: 1) Lacey, as the executive director for the respondent, acted improperly in participating in the investigatory, prosecutorial and decision-making phases of the underlying proceeding; 2) Lacey improperly copied ALJ Palmer on correspondence between Lacey and the petitioner in which Lacey threatened to file an ethics complaint against the petitioner if she continued to contact individual members of the respondent; and 3) ALJ Palmer should have been disqualifying from presiding over the evidentiary hearing once she filed a grievance against the petitioner.

As to the first prong of this argument, it is well-settled under Iowa law that "there is no...violation<sup>8</sup> based solely upon the overlapping investigatory and adjudicatory roles of agency actors." Bostko, 774 N.W.2d at 849 (emphasis in original). In order to prove such a violation, "the challenging party must bear the difficult burden of persuasion to overcome the presumption of honesty and integrity in those serving as adjudicators." Id. The petitioner has offered no evidence in this regard, and has therefore failed to meet this heavy burden.

On the other hand, the combination of prosecutorial and adjudicative roles can be problematic:

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<sup>8</sup> Bostko and its progeny have addressed this issue in the context of a due process violation. Even though the issue has been brought to the court's attention in the present case as part of the analysis under §17A.19(10)(e), the due-process analysis appears to be appropriate.

A different issue is presented however, where advocacy and decision-making roles are combined. By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.

Hewitt v. Superior Court, 3 Cal.App.4<sup>th</sup> 1575, 1585, 5 Cal.Rptr.2d 196, 202 (1992) (emphasis in original) (quoted in Bostko, 774 N.W.2d at 850)). Or in other words, “[W]hen an agency staffer functions as an advocate, experience teaches that the probability of actual bias is too high to allow the staffer to also participate in the adjudicative process.” Bostko, 774 N.W.2d at 852.

This record is devoid, however, that Lacey ever participated in the adjudicatory process that led to the final decision of the respondent, beyond transmitting that decision to the parties once it was issued. There is, therefore, no indication that any “will to win” that may have been created through Lacey’s role as an adversary tainted the deliberative process resulting in the final decision. Cf. id. at 853 (director’s presence during deliberations “simply answering questions” after participating in hearing “as a second-chair advocate” for complainant created due process violation). Her absence from the adjudicatory process also eliminates her transmittal of the email to ALJ Palmer as a grounds for challenging the final decision of the respondent.

What remains in this regard is the impact of ALJ Palmer’s decision to remain as the presiding officer after she in turn filed an ethics complaint against the petitioner. Preliminarily, it is clear to the court that this issue has not been preserved for judicial review.<sup>9</sup> Even though the petitioner was advised that ALJ Palmer had filed the complaint

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<sup>9</sup> The issue of error preservation may be raised by the court despite a party’s omission to raise it as part of these proceedings. Bontrager Auto Service, Inc. v. Iowa City Bd. of Adjustment, 748 N.W.2d 483, 486-87 (Iowa 2008); Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000) (error preservation rules “are also designed to preserve judicial resources by avoiding proceedings that would have been

against her in advance of the evidentiary hearing, no effort was made to seek her recusal. Her failure to address this issue waives any error on this ground on judicial review.

Berger v. Dep't of Transp., 679 N.W.2d 636, 641 (Iowa 2004).

Summary and disposition. The court has addressed all of the issues presented by the petitioner on judicial review. As a result of that review, there is no basis for reversing the respondent's decision that the petitioner made discriminatory statements based on familial status to the intervenor in violation of §2.58.305(C). The court will reverse the respondent's damage award and assessment of a civil penalty for the reasons noted above. As the court is not in a position to resolve an appropriate damage award and civil penalty as a matter of law, this matter shall be remanded to the respondent on the record already made so that a proper determination can be made. IBP, Inc. v. Burress, 779 N.W.2d 210, 220 (Iowa 2010); Armstrong v. State of Iowa Bldgs. and Grounds, 382 N.W.2d 161, 165 (Iowa 1986). The attorney fee award is reversed and vacated for the reasons noted.

**IT IS THEREFORE ORDERED** that the final decision of the respondent dated January 7, 2016 is affirmed in part and reversed in part, and this matter is remanded to the respondent for further proceedings consistent with this ruling. The costs of this judicial review proceeding are assessed equally between the petitioner, respondent and the intervenor.

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rendered unnecessary had an earlier ruling on the issue been made. Consequently, there is more at stake than simply the interests of the opposing party").



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV051252  
**Case Title** THERESA SEEBERGER VS DAVENPORT CIVIL RIGHTS COMM

So Ordered

A handwritten signature in black ink, appearing to read "Michael D. Huppert", written over a horizontal line.

Michael D. Huppert, District Court Judge,  
Fifth Judicial District of Iowa

Electronically signed on 2016-07-07 11:30:27 page 23 of 23