

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

CARL OLSEN, :
 :
 Petitioner, : **CVCV051068**
 :
 v. : **RULING**
 :
 IOWA BOARD OF PHARMACY, :
 :
 Respondent. ___ : ___

The above matter came before the Court on a Petition for judicial review of agency action taken by the Iowa Board of Pharmacy. Hearing was held on May 20, 2016. Petitioner appeared in person, pro se. Respondent, Iowa Board of Pharmacy, appeared by Assistant Attorney General Meghan Gavin.

The Petition before the Court is the most recent in a series of efforts by Petitioner to have marijuana reclassified under Iowa's Controlled Substances Act.¹ Pursuant to the provisions of Chapter 124, drugs are classified in five different schedules. Placement of a substance on a particular schedule depends upon a variety of factors:

- a. The actual or relative potential for abuse;
- b. The scientific evidence of its pharmacological effect, if known;
- c. State of current scientific knowledge regarding the substance;
- d. The history and current pattern of abuse;
- e. The scope, duration, and significance of abuse;
- f. The risk to the public health;
- g. The potential of the substance to produce psychic or physiological dependence liability; and
- h. Whether the substance is an immediate precursor of a substance already controlled under this division.²

Substances with a high potential for abuse and with no accepted medical use in treatment or lacking in accepted safety for use in treatment are listed on schedule I.³

Substances having a high potential for abuse which may lead to psychological or

¹ Iowa Code Chapter 124. Prior cases in which Petitioner has sought action related to the scheduling of marijuana include *Olsen et al. v. State of Iowa*, CVCV008682 (Iowa Dist. Ct. 2011), *Olsen v. Iowa Bd. of Pharmacy*, CVCV045505 (Iowa Dist. Ct. 2014) and *Olsen v. Iowa Bd. of Pharmacy*, CVCV047867 (Iowa Dist. Ct. 2014)

² Iowa Code §124.201(1)

³ Iowa Code §124.203

physical dependence, but with a currently accepted medical use are listed on schedule II.⁴ Substances with currently accepted medical use but a lower potential for abuse than schedule II substances are listed on schedule III.⁵ Substances with currently accepted medical use but a limited potential for abuse are listed on schedule IV.⁶ Finally, substances with currently accepted medical use and a low potential for abuse or dependence are listed on schedule V.⁷

In Iowa marijuana is listed on both schedule I and schedule II. It appears as a schedule I “hallucinogenic substance . . . except as otherwise provided by rules of the board for medicinal purposes.”⁸ It also appears on schedule II, as a “hallucinogenic substance . . . when used for medicinal purposes pursuant to rules of the board.”⁹

By statute, the Iowa Board of Pharmacy Examiners makes “recommendations” to the general assembly as to the placement of substances on particular schedules. The Code directs the Board to make recommendations for placement on a particular schedule if it is not already on that schedule, and also directs the Board to recommend removal or reclassification of a substance if the Board does not believe a substance fits the criteria for the schedule it is on.¹⁰ Iowa’s statutory scheme vests the ultimate decision making determination as to schedule assignment to the general assembly. The Board of Pharmacy Examiners is limited to making recommendations, which the general assembly may then choose to accept or reject.

As noted by the Iowa Supreme Court in *State v. Bonjour*, “the legislature has recognized that marijuana may have medical value. . . . These statutes¹¹ show that our

⁴ Iowa Code §124.205

⁵ Iowa Code §124.207

⁶ Iowa Code §124.209

⁷ Iowa Code §124.211

⁸ Iowa Code §124.204(4)(m)

⁹ Iowa Code §124.206(7)(a)

¹⁰ Compare Iowa Code §124.203(1) with Iowa Code §124.203(2).

¹¹ Iowa Code §124.204(4)(m) and §124.206(7)(a)

legislature has foreseen the potential medical uses for marijuana but has deferred on the issue until the Board of Pharmacy Examiners has acted.”¹²

In 2010 the Iowa Board of Pharmacy voted unanimously to recommend that the legislature reclassify marijuana from Schedule I to Schedule II. The Board action included a recommendation that the legislature convene a task force/study committee “for the purpose of making recommendations back to the legislature regarding the administration of a medical marijuana program”.¹³

While the legislature did not take action on the Board’s 2010 recommendation to reclassify marijuana, in 2014 the Iowa legislature did enact the Medical Cannabidiol Act.¹⁴ Pursuant to the provisions of this Act, permanent residents of Iowa may possess cannabidiol for purposes of treating intractable epilepsy.¹⁵

On July 7, 2014 Petitioner filed a Petition for Agency Action with the Iowa Board of Pharmacy, requesting the Board again recommend legislative removal of marijuana from Schedule I. After appointing a committee to study the request, the Board ultimately voted unanimously, at a meeting held on January 5, 2015, to deny the Petition.¹⁶

In deciding to deny the request to reschedule marijuana the Board noted it was “hesitant to recommend a change in the state scheduling of a substance that directly conflicts with federal law”.¹⁷ The Board recognized the Iowa legislature had taken action to legalize possession of cannabidiol for certain individuals, but observed “[m]any substances can be derived from marijuana – some may have a medical use, while others may not. Therefore, in the Board’s opinion, it would be more accurate to

¹² 694 N.W.2d 511, 513 (Iowa 2005).

¹³ Iowa Board of Pharmacy, Board Minutes, February 10, 2010 (Petitioner’s Exh. 10).

¹⁴ Iowa Code Chpt. 124D; 2014 Acts, ch. 1125.

¹⁵ Although legalizing the possession of the substance, the Act did not create a method by which Iowa residents can obtain cannabidiol within the state.

¹⁶ Order Denying Petition, appended as Exh. A to Iowa Board of Pharmacy, Board Minutes, January 5-6, 2015 (Petitioner’s Exh. 1). A request by Petitioner to reconsider the decision was denied, without written decision, at the Board’s March 9, 2015 meeting.

¹⁷ *Id.* at 3.

schedule each derivate after an individualized analysis.”¹⁸ The instant proceeding is for review of the Board’s decision to deny the Petition.

Judicial review of agency action is governed by the provisions of Iowa Code §17A.19, which sets forth “the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action”. “The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.”¹⁹

The Court “may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n).”²⁰ Where an agency has been “clearly vested” with a fact-finding function, the appropriate “standard of review [on appeal] depends on the aspect of the agency’s decision that forms the basis of the petition for judicial review”—that is, whether it involves an issue of 1) findings of fact, 2) interpretation of law, or 3) application of law to fact.²¹

In the case now before the Court, Petitioner asserts the Board incorrectly interpreted its statutory duty in connection with making scheduling recommendations to the legislature. The scope of this Court’s administrative review depends on the level of statutory interpretation vested in the agency. If statutory interpretation has been vested in the discretion of the agency, the court is obligated to defer to the agency’s actions unless the agency interpretation is “irrational, illogical, or wholly unjustifi[ed]”.²² If

¹⁸ *Id.* While the Board refused to recommend the rescheduling of marijuana, consistent with the quoted language the Board did recommend the rescheduling of cannabidiol as a Schedule II controlled substance.

¹⁹ Iowa Code §17A.19(8)

²⁰ *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011))

²¹ *Id.* at 256

²² Iowa Code §17A.19(10)(l)

statutory interpretation has not been vested in the discretion of the agency the inquiry is whether the agency has erroneously interpreted the statute.”²³

Unless the legislature has explicitly authorized an agency to interpret a statute, it is necessary to evaluate “the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency”.²⁴ This determination “requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes.”²⁵ Where the provision is a “substantive term within the special expertise of the agency” it is more likely the agency has been granted authority to interpret the provision.²⁶

Based on the broad authority delegated to the Board in terms of making recommendations regarding the scheduling of controlled substances, the specialized expertise of the Board itself²⁷, and the fact the Board is not enacting rules or regulations but simply making “recommendations” for legislative action, the Court finds the Board has been granted broad interpretive authority regarding its scheduling recommendations. This conclusion is reinforced by legislative language directing the Board to make recommendations “as appropriate”²⁸, which the Board deems “necessary or advisable”²⁹. Thus, determinations made by the Board should be affirmed unless irrational, illogical or wholly unjustified.

Insight into the powers and responsibilities of the Board comes from a recent Iowa Court of Appeals decision involving a prior attempt by this Petitioner to challenge

²³ Iowa Code §17A.19(10)(c)

²⁴ *Renda v. Iowa Civil Rights Com’n.*, 784 N.W.2d 8, 11-12 (Iowa 2010)

²⁵ *Renda*, 784 N.W.2d at 13

²⁶ *Renda*, 784 N.W.2d at 14

²⁷ Five of the seven Board members are required to be licensed pharmacists. Iowa Admin. Code r. 657-12

²⁸ Iowa Code §124.203

²⁹ Iowa Code §124.201

the action of the Board.³⁰ In that case Petitioner challenged a 2013 ruling of the Board rejecting his petition seeking a recommendation to the legislature for marijuana to be removed from inclusion on Schedule I. The Court of Appeals noted “the Board could reasonably conclude it was unnecessary to repeat its recommendation for reclassification that it provided in 2010 in light of the fact that the legislature gave consideration to reclassification in the 2013 legislative session.”³¹ The Court affirmed the Board’s conclusion “it has discretion to recommend or to choose not to continually recommend reclassification under section 124.401(1). . . Although the Board must make annual recommendations, section 124.401 does not require a running list of its past recommendations on an annual basis.”³²

This decision, that the Board “has discretion to recommend or to choose not to continually recommend reclassification”, is dispositive of Petitioner’s arguments in the case at bar that “Iowa law prohibits the Board from recommending the inclusion of substances with accepted medical use in the United States in schedule I.”³³

It is apparent from the Board’s decision the Board clearly understands its legislative direction to make recommendations as to scheduling changes to the legislature. In the Order under review the Board recognizes that while marijuana, or derivatives thereof, has some accepted medicinal use in treatment in the United States, it also has high potential for abuse.³⁴ Insightfully, the Board suggests the rescheduling of marijuana derivatives on a case by case basis, after individualized analysis of each

³⁰ *Olsen v. Iowa Bd. of Pharmacy*, No. 14-2164, 2016 WL 2745845 (Iowa App. May 11, 2016).

³¹ *Id.*

³² *Id.*

³³ Petitioner’s Reply Brief, p. 8

³⁴ Petitioner’s Exh. 1 at 3.

derivate reveals its unique medicinal value. In keeping with that philosophy the Board affirmatively recommended to the legislature rescheduling cannabidiol to Schedule II.³⁵

In denying Petitioner's request to remove marijuana from inclusion in schedule I the Board noted marijuana's continued inclusion as a Federal schedule I controlled substance and observed it was "hesitant to recommend a change in the state scheduling of a substance that directly conflicts with federal law". Although it recommended ongoing study to ascertain potential medical uses for marijuana, the Board observed a particular concern "about the ability of any program to establish the standardization of dosage and potency necessary to ensure patient safety and effective treatment."

Contrary to Petitioner's arguments, the Board action in denying Petitioner's request was not irrational, illogical or wholly unjustified. This Court concludes the Board action was learned, reflective and insightful.

IT IS THEREFORE ORDERED the action of the Board of Pharmacy in denying the Petition to recommend to the legislature the removal of marijuana from Schedule I is affirmed. This matter is hereby dismissed. Costs are assessed against the Petitioner.

³⁵ Again evidencing their clear understanding of the statute and their legislative directive, the Board also recommends exclusion of rescheduled marijuana derivatives from the broad definition for marijuana contained Iowa Code §124.101(19).



State of Iowa Courts

Type: OTHER ORDER

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So Ordered

A handwritten signature in black ink, appearing to read "Brad McCall".

Brad McCall, District Court Judge,
Fifth Judicial District of Iowa