May 10, 2009

Mr. Michael E. Gans
Clerk, United States Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 S. 10th Street
St. Louis, MO 63102

Re: Carl Olsen v. Drug Enforcement Administration
No. 09-1162

Dear Mr. Gans:

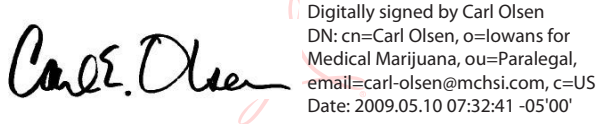
Pursuant to Fed R. App. P. 28(j), Carl Olsen respectfully submits this letter to call the Court's attention to pertinent new authority.

Olsen draws to the Court's attention to the Polk County Iowa District Court's recent decision in McMahon v. Board of Pharmacy, No. CV 7415 (April 21, 2009). In that case, the Iowa District Court remanded Olsen's petition to the Board and ordered the Board to interpret the same language, "accepted medical use in treatment in the United States" found in 21 U.S.C. § 812(b)(1)(B). Unlike the Drug Enforcement Administration (DEA) rules, 21 C.F.R. 1308 *et seq*., Iowa lists marijuana in both Schedule I and Schedule II of the Iowa Uniform Controlled Substances Act (IUCSA). Iowa Code §§ 124.204(4)(m) and 124.206(7)(a). Although the IUCSA was modeled after the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq*., Iowa clearly does not interpret "accepted medical use" to mean what the DEA says it means. For a detailed history of the IUCSA, see the dissenting opinion of Justice Wiggins in State of Iowa v. Lloyd Dean Bonjour, 694 N.W.2d 511, 515-518 (Iowa 2005).

The Iowa District Court's decision in McMahon v. Board of Pharmacy supports Olsen's argument that the meaning of "accepted medical use in treatment in the United States" has always been well understood to mean accepted medical use by state lawmakers, and not what the DEA (DEA did not ask the Secretary of Health for an interpretation) says it means. A copy of the decision in McMahon v. Board of Pharmacy is attached to this letter.

Thank you for transmitting this letter to the Court.

Respectfully submitted,



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IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

GEORGE McMAHON, BRYAN SCOTT and BARBARA DOUGLASS, **Petitioners,** **CARL OLSEN,** **Intervenor,** **v.** **IOWA BOARD OF PHARMACY,** **Respondent.**	**Case No. CV7415** **RULING ON PETITION FOR JUDICIAL REVIEW**

Introduction

The above-captioned matter came before the Court for hearing on March 27, 2009. Petitioners were represented by attorney Randall Wilson. Intervenor, Carl Olsen, was present on behalf of himself. Respondent was represented by attorney Scott Galenbeck. Following oral argument and upon review of the court file and applicable law, the Court enters the following:

Statement of the Case

Petitioners filed a petition with the Iowa Board of Pharmacy on June 24, 2008, seeking removal of marijuana from Schedule I of Iowa's Controlled Substances Act. Petitioners argued that Iowa Code section 124.203 requires the Iowa Board of Pharmacy (hereinafter the "Board") to recommend to the legislature that marijuana be rescheduled because it no longer meets the legislative criteria established for the listing of Schedule I substances. The Board issued a final decision denying Petitioners' request on October 7, 2008. Petitioners have now appealed the Board's decision in this action for judicial review, and argue that the Board's decision is based upon an erroneous interpretation of law.

Standard of Review

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code section 17A.19. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). The Court shall reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. IOWA CODE § 17A.19(10)(c). The Court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. IOWA CODE § 17A.19(11)(b). Appropriate deference is given to an agency's interpretation of law when the contrary is true, although "the meaning of any statute is always a matter of law to be determined by the court." *Birchansky Real Estate, L.C. v. Iowa Dept of Public Health,* 737 N.W.2d 134, 138 (Iowa 2007); IOWA CODE § 17A.19(11)(c). The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Analysis

Marijuana is identified in the Iowa Controlled Substances Act as a Schedule I controlled substance. *See* IOWA CODE § 124.204 (2009). Section 124.203 of the Iowa Code sets forth the criteria for classifying controlled substances under Schedule I. Section 124.203 provides:

> The board shall recommend to the general assembly that it place in schedule I any substance not already included therein if the board finds that the substance:
>
> 1. Has high potential for abuse, and
> 2. Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

IOWA CODE § 124.203. This section further provides that the Board "shall recommend" that the general assembly place a listed Schedule I substance in a different schedule or remove it if it does not meet the previously mentioned criteria. *Id.*

Petitioners argued before the Board that marijuana no longer meets the criteria for classification as a Schedule I controlled substance because marijuana now has accepted medical use in treatment in the United States. In support of their argument, Petitioners cited to the laws of other states that have now authorized the use of marijuana for medicinal purposes. The Board addressed Petitioners' argument and request for reclassification in its final order by explaining:

> While neither accepting or rejecting Olsen's assertion that the medicinal value of marijuana is established by legislation adopted in other states, the Board notes that before recommending to the Iowa legislature that marijuana be moved from schedule I to schedule II, the Board would also need to make a finding that marijuana lacks a high potential for abuse. *See* Iowa Code 124.203 (2007). There exists no basis for such a finding in the record before the Board, as Olsen's submission offers no evidence or information on marijuana's potential for abuse. Absent such evidence or information, Olsen's request must be denied.

(Order, p. 2).

Section 124.203 of the Iowa Code requires that any controlled substance have (1) a high potential for abuse, ***and*** (2) no accepted medical use in treatment in the United States before it may be classified under Schedule I. Because the Code imposes both criteria as a prerequisite to Schedule I classification, the failure to meet either would require recommendation to the legislature for removal or rescheduling. *See id.* As such, the Board's statement that it "would also need to make a finding that marijuana lacks a high potential for abuse" before it could recommend to the legislature that marijuana be moved from Schedule I to Schedule II is based upon an erroneous interpretation of law.[1]

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[1] Pursuant to Iowa Code section 124.205, Schedule II substances must be found to have "currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions," in order to be classified as such. *See* IOWA CODE § 124.205. Controlled substances must also be found to have a "high

The Board now argues in this action for judicial review that its decision should be affirmed by this Court because Petitioners failed to make an adequate record before the agency. The Board asserts that Petitioners failed to present evidence addressing all of the factors delineated in Iowa Code section 124.201. However, this is not the Board's stated reason for its decision in its written order. The Court may not rely on the Board's post hoc rationalizations for purposes of affirming the agency action at issue. Petitioners were entitled to a written explanation of the reasons for the Board's decision regardless of whether the agency action at issue was taken in response to a request for the adoption of agency rules, taken in response to a request for a declaratory order, or taken in a contested case proceeding. *See* IOWA CODE §§ 17A.7(1), 17A(4)(d), 17A.16; *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981). The Court acknowledges that the factors set forth in Iowa Code section 124.201 are relevant in the Board's determination of whether the statutory criteria for Schedule I classification are satisfied.[2] However, Iowa Code section 124.203 clearly requires that the Board recommend removal of marijuana from Schedule I or reclassification under a different schedule if it is found that marijuana "[h]as no accepted medical use in treatment in the United States, or lacks accepted safety for use in treatment under medical supervision." If the Board believes that the evidence presented by Petitioners was insufficient to support such a finding, it should have so stated in its order. Remand of the Board's decision is required so that Board may address Petitioners'

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potential for abuse" before they may be classified under Schedule II. *Id.* As such, one of the main characteristics that distinguishes Schedule II substances from those listed in Schedule I is accepted medical use in treatment in the United States. It is therefore erroneous to state that a substance classified under Schedule I cannot be reclassified as a Schedule II substance if the substance is found to present a high potential for abuse. Both Schedule I and Schedule II controlled substances share the same characteristic of having a high potential for abuse. A finding of accepted medical use for treatment in the United States alone would be sufficient to warrant recommendation for reclassification or removal pursuant to the language of Iowa Code section 124.203.

[2] Iowa Code section 124.201 requires that the Board consider these factors before making a rescheduling recommendation to the legislature. The Board is apparently of the position that these factors must also be considered before recommending rescheduling or removal pursuant to the terms of Iowa Code section 124.203.

Petition through proper application of the law. The Board must determine whether the evidence presented by Petitioner is sufficient to support a finding that marijuana has accepted medical use in the Unites States and does not lack accepted safety for use in treatment under medical supervision.

ORDER

IT IS THE ORDER OF THE COURT that the Ruling on Appeal of the Iowa Board of Pharmacy is hereby **REMANDED.**

SO ORDERED this 21 day of April, 2009.

Joel D. Novak

JOEL D. NOVAK, District Judge
Fifth Judicial District of Iowa

Original Filed.

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