IN THE IOWA SUPREME COURT

No. 14-2164

CARL OLSEN,

Petitioner-Appellant,

vs.

IOWA BOARD OF PHARMACY,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ELIZA OVROM, JUDGE

RESPONDENT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Iowa Code § 17A.19(10)(*l*)

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State v. Pickett, 671 N.W.2d 866 (Iowa 2003)

Iowa Code § 147.19

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Iowa Code § 124.201(1)(*a*)-(*h*)

21 C.F.R. § 1308

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(*a*), this case should be transferred to the Court of Appeals. Resolution of the issue presented rests exclusively on the applicability of existing legal principles.

STATEMENT OF THE CASE

The Petitioner, Carl Olsen appeals the district court's dismissal of his petition for judicial review of the Iowa Board of Pharmacy's denial of Petitioner's request to recommend rescheduling of marijuana.

FACTUAL AND PROCEDURAL HISTORY

In July 2013, Petitioner Carl Olsen filed a Petition for Agency Action with the Iowa Board of Pharmacy (Board), requesting the Board recommend to the legislature removing marijuana's Schedule I classification.[1] (Petition for Agency Action; App. 2-17). In November 2013, the Board duly considered the Petition and issued a ruling declining to make such a recommendation. (Board Order; App. 18-19). In its written decision, the Board noted the legislature considered and declined to act upon two bills calling for the rescheduling of marijuana in the 2013 legislative session and concluded "it was not advisable or appropriate to recommend the rescheduling of marijuana for 2014." *Id.*

[1] On appeal, Mr. Olsen has characterized his Petition as a request for the "Board to initiate the reclassification of marijuana according to the procedures set forth in the Iowa Uniform Controlled Substances Act." The scheduling of controlled substances is set by statute and, thus is dictated solely by the General Assembly. Board action is not necessary to "initiate" rescheduling.

In June 2014, Petitioner filed a Petition for Judicial Review of the Board's denial of his 2013 petition for agency action. Petitioner later amended the Petition and filed numerous motions for judicial notice. (Amended Petition for Judicial Review; Motion for Judicial Notice, July 5, 2014; Second Motion for Judicial Notice, July 9, 2014; Third Motion for Judicial Notice, July 19, 2014; App. 20-66).

In December 2014, the District Court for Polk County affirmed the Board's order, concluding the Board's decision not to recommend rescheduling was within its jurisdiction and was not irrational, illogical, or wholly unjustifiable. (Ruling on Petition for Judicial Review; App. 133-143). Petitioner filed a timely notice of appeal.

ARGUMENT

I. The Board's Decision Not to Recommend Rescheduling of Marijuana Was Not Irrational, Illogical, or Wholly Unjustifiable.

A. Error Preservation & Standard of Review.

The Board concedes that Mr. Olsen preserved error. (Ruling on Petition for Judicial Review; App. 133-143).

The standard of review is governed by the Iowa Administrative Procedure Act. Indisputably, the sole issue in this case turns on the proper interpretation of Iowa's Controlled Substances Act. Or more specifically, the proper interpretation of the Board's duty to make annual recommendations to the General Assembly on the scheduling of controlled substances. The standard of review for this appeal, therefore, depends on whether the Board's statutory interpretation is entitled to deference. Iowa Code §§ 17A.19(10)(*c*), (*l*).

Interpretation of the statutory language at issue has clearly been vested by a provision of law in the agency's discretion. *Houck v. Iowa Bd. of Pharmacy Examiners*, 752 N.W.2d 14, 16 (Iowa 2008). If the agency has been clearly vested with the interpretive authority, the court generally defers to the agency's action and may only grant

relief if the agency's action is "irrational, illogical, or wholly unjustifiable." *Id.* (quoting Iowa Code § 17A.19(10)(*l*)).

The Iowa Supreme Court recently reviewed the standards for determining whether an agency's interpretation of law should be afforded deference. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8 (Iowa 2010). In determining whether an agency has been "clearly vested" with the authority to interpret a word or phrase, the court will "take a careful look at the specific language the agency has interpreted as well as the specific duties and authority given the agency with respect to enforcing particular statutes." *Id.* at 13.

Under the factors articulated in *Renda*, the Board's interpretation of its duty is to make scheduling recommendations under the Controlled Substance Act is entitled to deference. First, the legislature has delegated broad authority to the Board to review the scheduling of controlled substances. *See* Iowa Code § 124.201(1) ("The board shall administer the regulatory provisions of this chapter. Annually . . . the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances . . . which it deems necessary or advisable."). If the Board finds that a drug is improperly scheduled, the Board must issue a recommendation to the

General Assembly. *Id.* § 124.201(2). The Board has also been given general policymaking and rulemaking authority under Iowa Code section 135.31.

Second, at issue here is the Board's interpretation of its own duty. This is not a question of the Board's regulation of someone else. In order to fulfill its own obligation under chapter 124, the Board must *necessarily* interpret the words and phrases at issue.

Most importantly, the decision to recommend rescheduling of controlled substances necessarily evokes the Board's expertise. Five of the seven Board members must be licensed pharmacists and all are appointed by the governor. Iowa Administrative Code § 657.1.2. The recommendation for the rescheduling of controlled substances is a highly technical decision for which the Board's expertise is particularly suited. *See State v. Bonjour*, 694 N.W.2d 511, 514 (Iowa 2005) ("[T]he Board of Pharmacy Examiners . . . is far better equipped than this court—and the legislature, for that matter—to make critical decisions regarding the medical effectiveness of marijuana use. . . .").

Even if the Board's interpretation is not entitled to deference, its decision must nevertheless be affirmed as the Board properly

construed the applicable law. As will be demonstrated below, the Board's interpretation is consistent with legislative intent.

B. Argument.

The Controlled Substances Act, Iowa Code chapter 124, creates five schedules for the classifications of controlled substances. Schedule I is the most heavily regulated, while Schedule V is the least. Marijuana is listed as a Schedule I drug. *See* Iowa Code § 124.204(4)(*m*) ("Marijuana, except as otherwise provided by rules of the board [of pharmacy] for medicinal purposes." Marijuana is also listed as a Schedule II drug "when used for medicinal purposes pursuant to rules of the board." *Id.* § 124.206(7)(*a*).

Chapter 124 further directs the Board to make annual recommendations to the General Assembly on the proper scheduling of controlled substances. Iowa Code section 124.203 directs the Board to recommend the removal of a controlled substance from Schedule I classification if the Board determines the substance no longer meets the Schedule I classification, "as appropriate." Iowa Code § 124.203. Further, section 124.201 directs the Board to make recommendations for the scheduling of controlled substances "which it deems necessary or advisable." Iowa Code § 124.201.

Based upon this statutory duty, Mr. Olsen sought to compel the Board to recommend the removal of marijuana from Schedule I. The Board denied Mr. Olsen's request. The Board does not dispute that it has an affirmative duty to make annual scheduling recommendations to the General Assembly. Where the parties differ is whether the Board has discretion as to what *specific* recommendations it makes.

Mr. Olsen interprets chapter 124 to afford the Board no discretion in making recommendations. According to Mr. Olsen if the criteria for schedule I is no longer met, the Board must recommend that the substance be rescheduled. This interpretation, however, is inconsistent with the specific language in chapter 124. As noted above, the Board's duty to make recommendations is conditioned on that recommendation being "appropriate," "necessary", and "advisable."

The words "appropriate," "necessary," and "advisable" are not defined in chapter 124. Nor are these words generally considered terms of art. In the absence of statutory definition, words are given their plain and ordinary meaning. *Lauridsen v. City of Okoboji Bd. of Adjustment*, 554 N.W.2d 541, 543-44 (Iowa 1996). *Merriam-Webster's Dictionary* defines "appropriate" as "right or suited for

some purpose or situation;" "necessary" as "so important that you must do it;" and "advisable" as "wise, sensible, or reasonable." *Merriam-Webster's Dictionary* (Online ed. 2014).

Chapter 124 is further silent on what criteria the Board should consider in deeming which recommendations are "wise, sensible, or reasonable." Nothing prohibits the Board from refusing to make a recommendation because it does not believe the recommendation will be acted upon.

Furthermore, if the Board was required to recommend rescheduling a controlled substance solely because it arguably no longer meets the Schedule I criteria, the words "as appropriate" in section 124.203 and "which it deems necessary and advisable" in section 124.201 would be superfluous. Words have meaning. *See State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003) (noting that courts "avoid rendering any part of the enactment superfluous.").

Because the Board has discretion over what specific recommendations it makes, Mr. Olsen must show that the Board abused its discretion in refusing to recommend the rescheduling of marijuana in 2014. Mr. Olsen cannot meet this high burden. First, the Board did not abuse its discretion solely because a previous

incarnation of the Board recommended the rescheduling of marijuana in 2010. Members of the Board are appointed by the Governor, subject to confirmation by the Senate. Iowa Code § 147.19. Members are appointed to serve three-year terms. *Id.* Members may serve up to nine years total on the Board. *Id.* The composition of the Board, therefore, by legislative design does not remain static over time.

Requiring later incarnations of the Board to abide in lockstep to prior decisions of the Board thwarts the legislative intent expressed in chapter 147. New members bring different experiences, worldviews, and opinions to their roles on the Board. Mr. Olsen has cited no authority that would prevent the 2013 Board from reaching a different conclusion on the advisability of recommending the rescheduling of marijuana than the 2010 Board. In fact, under Mr. Olsen's interpretation, the 2010 Board acted unlawfully by making a recommendation on marijuana different than all of the prior incarnations of the Board. Mr. Olsen has failed to show that the 2013 Board abused its discretion simply because it came to a different, yet reasonable, conclusion than previous iterations of the Board.

The Board further did not abuse its discretion simply because other states have found a medical use for marijuana. Mr. Olsen

argues that federalism and his constrained interpretation of statute obligates the Board to recommend rescheduling of marijuana if any state has recognized its potential medical use. Such an interpretation wholly destroys the purpose of the Board and illogically delegates rescheduling of controlled substances in Iowa to scheduling authorities throughout the country.

When considering a reclassification recommendation, the Board must consider *eight* different factors, including the state of current scientific knowledge regarding the substance, the history and current pattern of abuse, and the risk to the public health. Iowa Code § 124.201(1)(*a*)-(*h*). The current status of the controlled substance in other states is not listed among the factors to be considered by the board. At no point in the factoring process is the Board required to defer to the determinations of any other state, as Mr. Olsen claims. After weighing the factors, the Board is only obligated to make a rescheduling recommendation when the Board "deems it necessary or advisable." *Id.*

Requiring the Board to follow the scheduling decisions of other states would lead to peculiar results. For example, if Wyoming decided tomorrow that heroin is an acceptable treatment for

diabetics, under Mr. Olsen's interpretation, the Board would have to recommend rescheduling to allow such treatment in Iowa even if the Board strongly disagreed. Such a result would be absurd. It is also impossible to validate the scheduling decisions of all other states. While Mr. Olsen is certainly correct that many states recognize a medicinal use for marijuana, an equal number of states do not. The federal government also continues to classify marijuana as a Schedule I drug—meaning it has no acceptable medical use. 21 C.F.R. § 1308. Contrary to Mr. Olsen's assertion, therefore, principles of federalism cut both ways. The scheduling of controlled substances in Iowa is an issue for Iowa authorities under chapter 124.[2]

CONCLUSION

For the reasons expressed above, the Board respectfully requests that the decision of the district court be affirmed.

REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests to be heard in oral argument.

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[2] Mr. Olsen asserts for the first time on appeal and in passing that the Board's denial of his Petition violated due process because of its brevity. First, Mr. Olsen has not preserved a constitutional argument for this court's review. Second, if there were issues Mr. Olsen believes the Board did not address in its decision, it was Mr. Olsen's obligation to seek an expanded ruling by the agency.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because this brief contains 1,965 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Georgia font.

/s/ Meghan Gavin Date: August 24, 2015

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