IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, vs. IOWA BOARD OF PHARMACY, Respondent.	Case No. ***CVCV045505*** ***PETITIONER'S BRIEF IN SUPORT OF PETITION FOR JUDICIAL REVIEW***

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

A. Substantial Evidence Does Not Support the Board's Conclusion that "the Supporting Documentation Did Not Contain Sufficient, New Scientific Information to Warrant Recommending the Reclassification of Marijuana this Year."

Cases:

Lange v. Iowa Dep't of Revenue, 710 N.W.2d 242 (Iowa 2006)
Mycogen Seeds v. Sands, 686 N.W.2d 457 (Iowa 2004)

Statutes:

Iowa Code § 17A.19(10)(*f*) (2011)
Iowa Code § 17A.19(11)(*c*) (2011)
Iowa Code § 124.201 (2011)
Iowa Code § 124.203 (2011)

B. The Board's Conclusion to not Renew its 2010 Recommendation to Reschedule Marijuana is Irrational, Illogical and Wholly Unjustifiable.

Cases:

Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006)
Mycogen Seeds v. Sands, 686 N.W.2d 457 (Iowa 2004)

Statutes:

Iowa Code § 17A.19(10)(*l*) (2011)
Iowa Code § 17A.19(10)(*m*) (2011)
Iowa Code § 124.201 (2011)
Iowa Code § 124.203 (2011)

C. The Board's Conclusion to not Renew its 2010 Recommendation to Reschedule Marijuana is Arbitrary, Capricious and Unreasonable.

Cases:

Soo Line R.R. v. Iowa Dep't of Transp., 521 N.W.2d 685 (Iowa 1994)
Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997)

Statutes:

Iowa Code § 17A.19(10)(*n*) (2011)
Iowa Code § 124.201 (2011)
Iowa Code § 124.203 (2011)

II. STATEMENT OF THE CASE

Following four public hearings and the review thousands of pages of supporting documents, the Iowa Board of Pharmacy ("**Board**") recommended on February 17, 2010 that the 83rd General Assembly reschedule marijuana from state Schedule I (section 124.204) to Schedule II (section 124.206) based on the finding that marijuana has "accepted medical use in treatment in the United States." *See* Iowa Code § 124.203 (2011) (reserving Schedule I only for substances having "no accepted medical use in treatment in the United States").

On August 3, 2012 Petitioner Carl Olsen ("**Petitioner**") filed a Petition for Agency Action with the Board. Petitioner requested the Board renew its 2010 recommendation to reschedule marijuana as required under Iowa Code section 124.201, which provides:

> [a]nnually, within thirty days after the convening of each regular session of the general assembly, the Board ***shall*** recommend to the general assembly any deletions from, or revisions in the schedules of substances, enumerated in sections 124.204, 124.206, 124.208, 124.210, or 124.212, which it deems necessary or advisable.

Iowa Code § 124.201(1) (2011) (emphasis added); *see also* Iowa Code § 124.203 (mandating the Board recommend rescheduling of any substance listed in Schedule I when it finds the substance no longer meets the criteria).

On January 16, 2013 the Board denied Petitioner's request because "the supporting documentation did not contain sufficient, new scientific information to warrant recommending the reclassification of marijuana this year." *Ruling* at 1. The supporting documentation consisted of *additional* studies demonstrating marijuana's continued accepted medical use in treatment published since the 2010 recommendation by the Board as well as evidence of several additional states that accepted marijuana for medical use in treatment in the interim.

In rendering its decision, the Board neither received nor considered any evidence that marijuana had "no accepted medical use in treatment in the United States" such that it must remain in Schedule I contrary to its 2010 recommendation. The Board held no further public hearings.

III. ARGUMENT

Standard of Deference. Iowa law vests the decision to recommend rescheduling of controlled substances within the discretion of the Board. *See* Iowa Code § 124.203 (2011). As a result, the district court should give appropriate deference to the view of the Board "with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code §17A.19(11)(*c*) (2011).

A. Substantial Evidence Does Not Support the Board's Conclusion that "the Supporting Documentation Did Not Contain Sufficient, New Scientific Information to Warrant Recommending the Reclassification of Marijuana this Year."

Regarding the Board's factual determinations, the district court can grant relief if Petitioner's substantial rights have been prejudiced because the Board's actions is "[b]ased

upon a determination of fact clearly vested by a provision of the law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." *Id.* § 17A.19(10)(*f*). "Substantial evidence" means "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." *Id.* § 17A.19(10)(*f*)(1). "In assessing evidentiary support for the agency's factual determinations, [the district court] consider[s] evidence that detracts from the agency's findings, as well as evidence that supports them, giving deference to the credibility determinations of the presiding officer." *Lange v. Iowa Dep't of Revenue,* 710 N.W.2d 242, 247 (Iowa 2006); *see* Iowa Code § 17A.19(10)(*f*)(3).

The district court is bound by the Board's findings of fact if supported by substantial evidence. *See Lange,* 710 N.W.2d at 246–47. It can reverse the Board's action regarding findings of fact only if they are not supported by substantial evidence. *Mycogen Seeds v. Sands,* 686 N.W.2d 457, 465 (Iowa 2004). By applying this requirement, the district court gives "appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(*c*); *see also Mycogen Seeds,* 686 N.W.2d at 465.

In 2010 the Board carefully reviewed hearing testimony and supporting documentation in making a finding that marijuana should be removed from Schedule I pursuant to Iowa Code section 124.203 because it had "accepted medical use in treatment in the United States." In 2012, Petitioner submitted additional evidence to the Board that

marijuana has "accepted medical use in treatment in the United States." Several states had since accepted marijuana for medical use in treatment by implementing medical marijuana programs for qualifying individuals. Also, Petitioner provided the Board with copies of more recent studies from the ever-expanding body of scientific literature regarding the beneficial use of marijuana in medical treatment. The undersigned is unaware of any evidence in this record that detracts from the 2010 conclusion by the Board that marijuana no longer belonged in Schedule I because it has "accepted medical use in treatment in the United States.

Petitioner contends once the Board determined in 2010 that marijuana has "accepted medical use in treatment in the United States," which means it no longer meets the criteria for Schedule I, the Board cannot recommend *against* rescheduling until such time as it makes a finding that it has "no accepted medical use in treatment in the United States." The information Petitioner submitted in 2012 lends additional scientific and legal support for the Board's prior recommendation. No reasonable person could conclude based on the quantity and quality of additional evidence submitted in support of the 2012 Petition that marijuana no longer has "accepted medical use in treatment in the United States." To the extent the Board found that "*the supporting documentation did not contain sufficient, new scientific information to warrant recommending the reclassification of marijuana this year,*" this finding is not supported by substantial evidence in the record when viewed as a whole.

B. The Board's Conclusion to not Renew its 2010 Recommendation to Reschedule Marijuana is Irrational, Illogical and Wholly Unjustifiable.

Because factual determinations are by law clearly vested in the agency, it follows that application of the law to the facts is likewise vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(*f*); *see also Mycogen Seeds,* 686 N.W.2d at 465. The district court can reverse the agency's application of the law to the facts only if it determines such application was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(*m*); *see also Mycogen Seeds,* 686 N.W.2d at 465. By applying this standard, the district court is likewise giving "appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11)(*c*); *see also Mycogen Seeds,* 686 N.W.2d at 465.

The Board already determined that marijuana does not meet the criteria for Schedule I controlled substances because it has "accepted medical use in treatment in the United States" under Iowa Code section 124.203. Once that determination is made, the Board is duty-bound to continue to make that recommendation annually to the General Assembly under Iowa Code section 124.201 until such time as it determines that marijuana has "no accepted medical use in treatment in the United States." Of course, the Board's Ruling makes no such claim. In the absence of a sufficient explanation that marijuana suddenly meets the criteria for Schedule I in 2012, the Board's decision to not renew its prior 2010 recommendation for rescheduling is irrational, illogical and wholly unjustifiable

especially considering the additional record developed between February 2010 and the instant Petition for Agency Action.

C. The Board's Conclusion to not Renew its 2010 Recommendation to Reschedule Marijuana is Arbitrary, Capricious and Unreasonable.

"An agency's action is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case . . . . Agency action is 'unreasonable' when it is 'clearly against reason and evidence.'" *Soo Line R.R. v. Iowa Dep't of Transp.,* 521 N.W.2d 685, 688–89 (Iowa 1994). An abuse of discretion occurs when the agency action "rests on grounds or reasons clearly untenable or unreasonable." *Schoenfeld v. FDL Foods, Inc.,* 560 N.W.2d 595, 598 (Iowa 1997). The Iowa Supreme Court has said an "'abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence.'" *Id.* (quoting *Stephenson v. Furnas Elec. Co.,* 522 N.W.2d 828, 831 (Iowa 1994)).

Petitioner contends the Ruling amounts to an arbitrary, capricious and unreasonable action by the Board for the same reasons asserted in Part B. The facts in this matter demonstrate the Board recommended rescheduling marijuana from Schedule I to Schedule II in February 2010. The additional record developed since the recommendation only further buttresses the Board's position that marijuana cannot remain in Schedule I because it has "accepted medical use in treatment in the United States."

The inexplicable about-face by the Board regarding rescheduling (and the concomitant recommendation to the General Assembly) is contrary, however, to reason and evidence in this record. Perhaps the Board doesn't believe that a 2012

recommendation is "necessary or advisable" under section 124.203 simply because it already recommended rescheduling in 2010? The Board implies as much when it mentions the General Assembly "took no action on the Board's recommendation . . . ." *Ruling* at 1. If that is truly the Board's position, then it should justify its interpretation in the Ruling that Iowa Code sections 124.201 and 124.203 do not impose a continuing duty to (1) reschedule a substance that no longer meets its current scheduling criteria; and (2) recommend rescheduling to the General Assembly annually. The Ruling clearly provides no such justification.

Petitioner contends that "necessary or advisable" in this context means that as long as the Board maintains that marijuana has "accepted medical use in treatment in the United States," it can no longer be classified as a Schedule I controlled substance. The Board is obligated to make that recommendation to the General Assembly under 124.203(2). Furthermore, that recommendation must be made annually for as long as marijuana has "accepted medical use in treatment in the United States." The phrase "necessary or advisable" modifies "deletions, from, or revisions in the schedules of substances enumerated in sections 124.204 . . . ." In other words, as long as it is necessary to revise Schedule I because marijuana no longer meets the criteria, the annual recommendation to the General Assembly is mandatory.

Considering the fact that the Board already recommended rescheduling in 2010, it is unreasonable not to renew the recommendation in 2012. In the face of the mandatory requirements under sections 124.201 and 124.203, the Ruling to not recommend rescheduling amounts to an arbitrary, capricious and unreasonable exercise of authority.

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