IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. IOWA BOARD OF PHARMACY, Respondent.	)))))))))	Case No: CVCV045505 **RESPONDENT'S JUDICIAL REVIEW BRIEF**

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STATEMENT OF THE CASE

On August 3, 2012, the Petitioner Carl Olsen filed a Petition for Agency Action with the Iowa Board of Pharmacy (Board). The petition requested the Board recommend the removal of marijuana from a Schedule I classification. On November 9, 2012, the Board considered the petition. On January 16, 2013, the Board issued an order denying Mr. Olsen's petition. In its order, the Board noted, "The Board recommended the reclassification of marijuana in 2010. The General Assembly took no action on the Board's recommendation at that time. On January 16, 2013, the Board concluded that the supporting documentation did not contain sufficient, new scientific information to warrant recommending the reclassification of marijuana this year." (Ruling on Petition for Agency Action, Ex. 1 of Petition for Judicial Review).

On April 3, 2013, Mr. Olsen filed a Petition for Judicial Review (Petition) challenging the Board's refusal to recommend the rescheduling of marijuana. Thereafter, the Board moved to dismiss the Petition asserting that the propriety of the Board's recommendation was moot as the legislative session had ended and the legislature took no action on two bills calling for the rescheduling of marijuana. The Petitioner resisted. The motion has not yet been ruled upon and the Board has not answered the Petition for Judicial Review.

ARGUMENT

I. PETITIONER WAIVED ANY ARGUMENT REGARDING SUBSTANTIAL EVIDENCE.

As Petitioner's first point of error, he asserts that the Board's decision not to recommend the rescheduling of marijuana was not supported by substantial evidence. The Petitioner, however, has waived this argument. In adjudicating a petition for judicial review the district court sits in its appellate capacity. As a result, notice pleading is not applicable to a 17A action. *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984). Iowa Code section 17A.19(4) sets forth the required elements of a petition for judicial review. Included in these is the duty to set forth the "grounds on which relief is sought." Iowa Code § 17A.19(4).

Mr. Olsen set forth five grounds upon which relief was sought in his petition. Those grounds were listed in paragraph 28 and include: (1) "Beyond the authority delegated to the agency by any provision of law;" (2) "Based on an erroneous interpretation of law whose interpretation has not been clearly vested by a provision of law in the discretion of the agency;" (3) "Taken without following the prescribed decision-making process;" (4) "The product of a decision-making process in which the agency did not consider relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action;" and (5) "Is otherwise, arbitrary and capricious or an abuse of discretion." In other words, petitioner sought relief from the Board's decision based upon section 17A.19(10)(*b*), (*c*), (*d*), (*j*), and (*n*).

Nowhere in the Petition did Mr. Olsen challenge the Board's decision under section 17A.19(10)(*f*) as based upon a finding of fact unsupported by substantial

evidence. He cannot raise a substantial evidence claim for the first time in brief. As a result, Mr. Olsen has waived any argument regarding substantial evidence.

Even assuming Mr. Olsen can bring forth a substantial evidence argument, there is no record before the Court from which this argument can be adjudicated. Mr. Olsen brought a judicial review of "other agency action." Unlike review of a contested case, where Iowa Code section 17A.19(6) requires the agency to transfer the administrative record to the district court within thirty days, there is no such requirement to transfer the agency record upon review of "other agency action." The reason for this omission is clear—unlike a contested case, what constitutes the record in "other agency action" is not readily apparent. The undersigned attempted both in person and by electronic communication to stipulate to an agency record with opposing counsel. No stipulation was reached. As a result, the only portions of the agency record currently before the district court are those documents attached to the original petition. In fact, Mr. Olsen's Petition for Agency Action is not in the record.

"It is the appellant's duty to provide a record on appeal." *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005). As such, any omissions in the record must be taken against Mr. Olsen. Without a record to properly adjudicate this claim, this Court cannot adjudicate his substantial evidence claim. *Smith v. Iowa Bd. of Med. Exam'rs*, 729 N.W.2d 822, 827 (Iowa 2007). Because the Board's decision is not fundamentally erroneous on its face, its decision should be affirmed. *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 4 (Iowa 2005).

Assuming the failure to provide a record could be remedied at this late date, the question becomes what is the record in this "other agency action." Mr. Olsen seemingly assumes that the record consists of *all* material *ever* considered by the Board in making

its rescheduling recommendations. He repeatedly references the Board's 2010 public hearings on medical marijuana and evidence presented to the Board at that time. The 2010 recommendation was a discrete agency action. Likewise, the 2012 recommendation was a discrete agency action. The recommendations, while obviously related, are not a continuous action. If that were true, the Board's decision to recommend or not recommend the rescheduling of certain controlled substances would never be final and would thus never be reviewable under chapter 17A. Mr. Olsen has failed to cite any support for his assertion that the "record," either by law or in fact, included the 2010 materials.

II. THE BOARD'S INTERPRETATION OF ITS STATUTORY DUTY TO MAKE CONTROLLED SUBSTANCE RESCHEDULING RECOMMENDATIONS IS NOT IRRATIONAL, ILLOGICAL, OR WHOLLY UNJUSTIFIABLE.

Like his first point of error, Mr. Olsen has waived any argument that the Board's application of law to fact in this case is irrational, illogical, or wholly unjustifiable because he did not raise such a challenge in his Petition. Even assuming this error was properly raised, it cannot be sustained. Mr. Olsen's entire argument is premised on an erroneous assumption.

Mr. Olsen assumes that once the Board makes a rescheduling recommendation it has an affirmative duty to continue to make this same recommendation in perpetuity until acted upon by the General Assembly. Of course, he cites no support for this assumption and cannot as the assumption ignores both the change in composition of the Board and the relevant law.

The Board is comprised of five members licensed to practice pharmacy and two members of the general public, who are not licensed in the profession. Iowa Code §

147.14(1)(*e*). Board members serve three-year terms. *Id.* § 147.19. Members may serve up to nine years total. *Id.* Member appointments are made by the governor subject to senate confirmation. *Id.* Thus, the composition of the Board does not remain static, nor is it intended to do so.

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 Board members bring different experiences, worldviews, and opinions to their roles. Mr. Olsen has cited no support which would prevent the 2012 Board from reaching a different conclusion on the advisability of recommending the rescheduling of marijuana than the 2010 Board. And he certainly has not shown that the 2012 Board's conclusion is somehow illogical, irrational, or wholly unjustifiable simply because it is contrary to its predecessors.

Mr. Olsen further assumes that the Board's decision to recommend rescheduling is based entirely on whether a controlled substance has an "accepted medical use in treatment in the United States." This assumption ignores the Board's duty to make rescheduling recommendations under the entire statutory scheme in Iowa Code chapter 124. *See Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 565–66 (Iowa 2011) (noting that in determining legislative intent the Court will "avoid placing undue importance on isolated portions of an enactment by construing all parts of the enactment together"). Iowa Code section 124.203 directs the Board to recommend the removal of a controlled substance from a Schedule I classification if the substance no longer meets the Schedule I criteria, "as appropriate." Section 124.201 likewise directs the Board to make recommendations for the scheduling of controlled substances "which it deems necessary or advisable."

It is undisputed that under these two provisions the Board has an affirmative duty to make scheduling recommendations to the General Assembly. Mr. Olsen ignores, however, that under these same two provisions the Board has discretion as to what recommendations it makes. "Appropriate," "necessary," and "advisable" are not defined in chapter 124. Nor are these words generally construed as terms of art. In the absence of a 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. 2013).

Chapter 124 is further silent on what criteria the Board should consider in deeming its recommendations "wise, sensible, or reasonable." Nothing prohibits the Board from failing to make a recommendation because it does not believe that recommendation will be acted upon. Nothing prohibits the Board from failing to make a recommendation for any reason at all. If chapter 124 required the Board to recommend rescheduling a controlled substance solely because it no longer meets the Schedule I criteria, the words "as appropriate" in section 124.203 and "which it deems necessarily 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").

III. THE BOARD'S DECISION NOT TO RECOMMEND THE RESCHEDULING OF MARIJUANA IS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

Unlike his two prior points of error, Mr. Olsen did challenge the Board's decision as arbitrary, capricious, or unreasonable in his Petition. As a result, this issue is properly before the Court.

An agency's action is arbitrary or capricious when it is taken without regard to law or facts of a case, and it is unreasonable when it is clearly against reason and evidence. *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 831 (Iowa 2002). Board action is unreasonable when taken in the presence of evidence to which there is no room for difference of opinion among reasonable minds. *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007).

The Board's decision not to recommend the rescheduling of marijuana is not arbitrary, capricious, or unreasonable for the same reasons noted previously that it is not irrational, illogical, or wholly unjustifiable. Moreover, as Mr. Olsen's Petition notes, the accepted medical use of marijuana is subject to great debate. Mr. Olsen noted, "To date, 19 jurisdictions, 18 states and the District of Columbia, have come to legally recognize that marijuana has accepted medical use in treatment of carious medical conditions." Petition at 2. If Mr. Olsen is correct, thirty-two states, including Iowa, do not currently recognize a medicinal use for marijuana. Mr. Olsen cannot point to a national consensus on the scheduling of marijuana. Reasonable minds have reached, and will likely continue to reach, different conclusions on this issue. Simply because the Board reached a contrary conclusion to Mr. Olsen does not make the Board's decision arbitrary, capricious, or unreasonable.

CONCLUSION

For the reasons expressed above, the Board respectfully requests that its order be affirmed. The Board notes that Mr. Olsen did not address the proper remedy should the Board's order be reversed. In his Petition, however, he prayed for a declaratory ruling, establishing as a matter of law that marijuana has an accepted medical use in treatment in the United States and a writ of mandamus requiring the Board to reconsider its decision denying his Petition for Agency Action. Mr. Olsen failed to cite support for these requests. Should the Court reverse the Board's order, the only proper remedy would be a remand for the Board to reconsider the petition in light of the Court's decision. *See Johnston v. Iowa Real Estate Comm'n*, 344 N.W.2d 236, 240 (Iowa 1984) (concluding that on judicial review the court has no original authority to declare the parties' rights, so remand is the proper remedy unless another remedy is required as a matter of law).

Respectfully submitted,

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