

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN,

Petitioner,

vs.

IOWA BOARD OF PHARMACY,

Respondent.

CASE NO. CVCV045505

**RULING AND ORDER ON
RESPONDENT'S MOTION TO DISMISS
PETITION FOR JUDICIAL REVIEW**

Now on Aug 2, 2013, this matter came before the Court upon the Respondent's Motion to Dismiss the Petition for Judicial Review. The Petitioner was personally present and represented by his counsel, Mr. Collin C. Murphy. The Iowa Board of Pharmacy was present by Iowa Assistant Attorney General Meghan Gavin. The Court, having reviewed the Respondent's Motion to Dismiss the Petition for Judicial Review, the resistance thereto, and the entire court file, makes the following findings and order:

The Petition for Judicial Review was filed by the Petitioner on April 3, 2013 seeking judicial review of the Iowa Board of Pharmacy's action take on January 16, 2013, which denied the Petitioner's Petition for Agency action. The Petitioner had requested that the Iowa Board of Pharmacy recommend to the Iowa General Assembly that the drug marijuana be reclassified. That Petition apparently included supporting documents as alluded to by the ruling on Petition for Agency action. That ruling further stated that the Iowa Board of Pharmacy considered the Petition and supporting documentation at its bimonthly meeting on November 8 and 9, 2012.

The ruling went on to state that the board voted to deny the Petition. The Board further stated in its ruling that it recognized pursuant to Section 124.201(1), the Code of Iowa, that the Board is required within 30 days after the convening of each regular session of the General Assembly to 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. The Board went on to state the following in its ruling:

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, January 16, 2013).

In the Respondent's Motion to Dismiss the Petition for Judicial Review, the Iowa Board of Pharmacy states that while it has the duty to make recommendations and such duty is mandatory, the substance of those recommendations is left to the Board's discretion. Further, the Iowa Board of Pharmacy stated in its Motion to Dismiss that even if the Board had recommended the reclassification of marijuana in January as requested, there is no evidence this action would have yielded any substantive change. The Respondent further stated in their Motion to Dismiss that two reclassification bills were already introduced in the current legislative session and that both bills failed. Further, the Respondent states that at best the only relief that the Petitioner could be entitled to under his petition, assuming he would prevail, would be an order from this Court remanding his Petition to the Board for reconsideration and a more extensive explanation of its decision. The Iowa Board of Pharmacy states that a remand at this point would be too late

as the legislative session has ended and, therefore, the petition is moot and should be dismissed.

Petitioner's resistance to the Motion to Dismiss Petition for Judicial Review states that mootness does not apply in this matter because the challenged action by the Iowa Board of Pharmacy is capable of repetition, yet evading review. The Petitioner states that the Petitioner filed a Petition with the Board on August 3, 2012, and the Board failed to consider the Petition and render a decision until January 16, 2013, two days after the start of the legislative session. The Petitioner further alleges that these delays "make it virtually impossible for Petitioner to obtain complete judicial review of the controversies before the end of the session on May 3, 2013." (Petitioner's Resistance to Motion to Dismiss Petition for Judicial Review, April 29, 2013, page 2). The Petitioner goes on to state that even assuming that the controversy here is rendered moot by the Board's delay, that the public interest exception to the mootness doctrine requires the district court to consider the Petition for Judicial Review. Further, that because Iowa law provides for annual recommendations from the Iowa Board of Pharmacy, there is a strong likelihood of future recurrence of this same problem.

Regarding motions to dismiss, the Court may grant a motion to dismiss only if the petition shows no possible right of recovery under the facts. *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003). A motion to dismiss will rarely succeed. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). When considering a motion to dismiss, courts assess the petition "in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in plaintiff's favor." *Robbins v. Heritage Acres*, 578 N.W.2d 262, 264 (Iowa Ct. App. 1998) (citation omitted). A petition must contain factual allegations sufficient to provide the defendant

with “fair notice” of the claim asserted. *Id.* A petition satisfies the “fair notice” standard “if it informs the defendant of the incident giving rise to the claim and of the claims general nature.” *Id.* “The only issue when considering a motion to dismiss is the “petitioner’s right of access to the district court, not the merits of his allegations.” *Hawkeye Food Service Distribution, Inc. v. Iowa Educator’s Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (quoting *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001); *Cutler v. Klass, Whicher and Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (“Both the filing and the sustaining [of motions to dismiss] are poor ideas.”))

In regard to the standards for mootness, the Iowa Supreme Court has stated that:

An appeal is moot if it no longer presents a justiciable controversy because the contested issue has become academic or nonexistent. The test is whether the court’s opinion would be of force or effect in the underlying controversy. As a general rule, we will dismiss an appeal when judgment, if rendered, will have no practical legal affect upon the existing controversy.

There is an exception to this general rule, however, where matters of public importance are presented and the problem is likely to recur. Under these circumstances, our court has discretion to hear the appeal. An important factor to consider is whether the challenged action is such that often the matter will be moot before it can reach an appellate court.

In re M.T., 625 N.W.2d 702, 704-705 (Iowa 2001) (internal citations, quotations, and alterations omitted).

In considering the first prong of the test of whether there should be an exception to the mootness rule, the Court considers whether or not the question presented is one of public importance. The Court takes the Petition for Judicial Review filed by the Petitioner at face value as the Court must assess the Petition in the light most favorable to the Plaintiff with all doubts

and ambiguities resolved in the Plaintiff's favor. In doing this the Court does not render a decision on the merits of the Petition but rather whether or not the Petitioner has the right of access to the district court. In reviewing the Petition for Judicial Review, the Petitioner makes allegations that the usage of marijuana has an accepted medical use in the United States and that as of the date of the filing of the Petition 19 jurisdictions, 18 states and the District of Columbia, have legally recognized that marijuana has accepted medical use and treatment of various medical conditions. It would appear that on the face of the Petition, and applying the standards as set out by the Iowa Supreme Court for the review of a motion to dismiss, that the issue has one of public importance. Added to this is the Iowa Board of Pharmacy's duty under Section 124.203 of the Code of Iowa that the Board shall recommend to the General Assembly that it place in Schedule I any substance is not already included therein if the Board finds that the substance:

- a. Has high potential for abuse; and
 - b. Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.
2. If the board finds any substance included in schedule I does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

Section 124.203, the Code of Iowa.

In the Petition for Judicial Review, the Petitioner alleges that the Iowa Board of Pharmacy in its ruling went beyond the authority delegated the Agency by any provision of law;

made a decision based on the erroneous interpretation of law whose interpretation has been clearly vested by a provision of law in the discretion of the agency; took action without following the prescribed decision-making process; that the ruling was the product of a decision-making process which the agency did not consider relevant and an important matter relating to the propriety or desirability of the action in question that a rationale decision-maker in similar circumstances would have considered prior to taking that action; and the action of the agency is otherwise arbitrary, capricious or an abuse of discretion.

The Court finds that the issue presented does contains one of public importance as stated above, but also is capable of repetition but evading review. The time periods in which the Petition was filed first with the Iowa Board of Pharmacy and the final decision by the Iowa Board of Pharmacy severely constrained the time period for which the Petitioner had available to him to seek judicial review. Based upon the timing of the Iowa Board of Pharmacy's ruling and the Iowa legislative session, the Court finds that the capable of repetition but evading review element has been met.

The Court, therefore, finds that the motion to dismiss is hereby denied. The Court finds that the issue is not moot. The Petition for Judicial Review presents a justiciable controversy regarding agency action; that it further involves matters of public importance, when assessing the petition in the light most favorable to the petitioner with all doubts and ambiguities resolved in the petitioner's favor, and is capable of repetition but evading review.

Dated this 22nd day of October, 2013.

SCOTT D. ROSENBERG
Judge, 5th Judicial District of Iowa

Copies to:

Carl Olsen
Meghan Gavin



State of Iowa Courts

Type: OTHER ORDER

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So Ordered

A handwritten signature in cursive script that reads 'Scott D. Rosenberg'. The signature is written in black ink and is positioned above a horizontal line.

**Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa**