IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

THE BOARD'S STATED RATIONALE FOR NOT RENEWING THE RECOMMENDATION TO RESCHEDULE MARIJUANA UNDER SECTIONS 124.201 AND 124.203 DEMONSTRATES AN ABUSE OF DISCRETION.

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)).

On page 9 of its Brief, the Board advances its rationale for refusing to renew its prior recommendation that marijuana be removed from Schedule I. It is entirely different from the stated reasons in its Ruling, *i.e.,* "the supporting documentation did not contain sufficient, new scientific information to warrant recommending the reclassification of marijuana this year." The Board argues:

> [n]othing 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 is deems necessarily (sic) and (sic) advisable" in section 124.201 would be superfluous.

See Br. at 9.

To the extent that the Board implies that the inclusion of "as appropriate" in section 124.203(2) somehow renders optional the recommendation to reschedule a substance that no longer meets the criteria for Schedule I, it is mistaken. This section provides: "If the board finds that 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*." There can be no doubt that "as appropriate" in this context confers discretion on the Board to recommend either rescheduling or removal, depending on the appropriate circumstances, of a substance that no longer meets the criteria for Schedule I. However, in situations where a substance no longer meets the criteria for Schedule I, the recommendation itself is not optional. The use of the term "shall" makes it the Board's duty to recommend under the circumstances. *See* Iowa Code § 4.1(30)(a) (2011).

Reading the statutes together, the same can be said for the use of "necessary or advisable" in section 124.201. That section provides:

> [t]he board shall administer the regulatory provisions of this chapter. Annually, 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 section 124.204, 124.206, 124.208, 124.210, or 124.212, which it deems necessary or advisable.

Iowa Code § 124.201(1) (2011). "Deletions from, or revisions in the schedules" in section 124.201 is the same concept as removing or placing controlled substances in a different schedule in section 124.203. These "deletions" or "revisions" become necessary when a controlled substance listed in Schedule I (section 124.204) no longer meets the criteria, chief among which is the requirement that the substance "has no accepted medical use in

treatment in the United States." Once a substance no longer meets the criteria for Schedule I, the Board has the duty under section 124.203 to recommend rescheduling or removal, whichever is appropriate. The duty to recommend these "deletions" or "revisions" is a continuing one under section 124.201 and must be performed annually within 30 days after the start of the regular session of the general assembly.

Considering the fact there is a duty to recommend under both sections 124.201 and 124.203, it is certainly troubling that the Board claims it can elect to not recommend in situations where it believes the general assembly will not act on it. *See* Br. at 9. There is no exception to the duty to issue a recommendation when a controlled substance no longer meets the scheduling criteria. The legislature directs the Board to make a recommendation under those circumstances; whether the legislature ultimately acts or not on the recommendation is immaterial.

More disturbing is the assertion that the Board is not prohibited "*from failing to make a recommendation for any reason at all*." *Id*. Because the Board previously determined that marijuana has "accepted medical use in treatment in the United States" and, therefore, no longer meets the scheduling criteria, the Board is duty-bound to issue a recommendation to reschedule or remove. As long as the Board maintains marijuana no longer belongs in Schedule I, it is required to annually recommend rescheduling or removal to the legislature. The claim that the Board need not even justify the failure to recommend rescheduling with an explanation smacks of arbitrary and capricious agency action. If there is any discretion involved in the decision whether to renew its previous recommendation that marijuana should be rescheduled, it has been abused by the Board with this rationale.

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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