

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

**CARL OLSEN,**

Petitioner,

vs.

**IOWA BOARD OF PHARMACY,**

Respondent.

**CASE NO. CVCV045505**

**RULING AND ORDER ON PETITION  
FOR JUDICIAL REVIEW**

This matter came before the Court upon the Petition for Judicial Review filed by the Petitioner, Carl Olsen. Although the Petitioner filed his petition pro se he has subsequently been represented by his counsel, Mr. Colin C. Murphy. The Iowa Board of Pharmacy is represented by Iowa Assistant Attorney General, Ms. Meghan Gavin. The Court, having reviewed the Petition, the briefs and the entire court file and otherwise being duly advised in the premises makes the following findings and order:

**FACTS AND PROCEDURE**

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 in Petition for Judicial Review. The Iowa Board of Pharmacy considered the Petition and supporting documentation at

its bimonthly meeting on November 8 and 9, 2012. 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).

The Respondent filed a motion to dismiss this action on April 22, 2013. In the Respondent's Motion to Dismiss the Petition for Judicial Review, the Iowa Board of Pharmacy stated 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 stated that a remand would be too late as the legislative session had ended and, therefore, the petition is moot and should be dismissed.

Petitioner's resistance to the Motion to Dismiss Petition for Judicial Review stated 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 stated 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 alleged 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 went 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.

This Court denied the motion to dismiss on October 23, 2013. Later, on December 24, 2013 the Petitioner moved for leave to amend its Petition for judicial review which was granted on January 6, 2014.

**APPLICABLE LAW**

On judicial review of an agency action, the District Court functions in an appellate capacity. *Greater Community Hospital v. Public Employment Relations Board*, 553 N.W.2d 869, 871 (Iowa 1996). Judicial review of a final agency action is governed by application of standards set out in Iowa Code § 17A.19. The District Court’s review is limited to corrections of errors of law and is not *de novo*. *Second Injury Fund v. Klebs*, 539 N.W.2d 178, 180 (Iowa 1995).

“The Court may affirm the agency action or remand to the agency for further proceedings.” Iowa Code § 17A.19(10). “The Court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced” for any of the fourteen grounds listed under Iowa Code 17A.19(10).

Specifically, the Court may reverse, modify or grant appropriate relief, when the agency determination of fact clearly vested in the discretion of the agency is not supported by substantial evidence in the record. Iowa Code § 17A.19(10)(f). The Court must view the record as a whole when determining whether the agency’s finding is based on substantial evidence. Iowa Code § 17A.19(10)(f). In viewing the record as a whole, the Court must consider any determination of veracity made by the agency fact finder, who personally observed the demeanor of the witnesses, and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code § 17A.19(10)(f)(3). In deciding whether substantial evidence exists, the Court must consider 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.” Iowa Code § 17A.19(10)(f)(1). The substantial evidence standard only applies to factual findings. Iowa Code § 17A.19(10)(f).

Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the Court must give appropriate deference to the agency’s findings. *Freeland v. Emp. Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). “The ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made.” *Munson v. Iowa Dep’t of Transp.*, 513 N.W.2d 722, 723 (Iowa 1994). The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency’s decision is not supported by substantial evidence. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996).

Moreover, the Court shall reverse, modify or grant appropriate relief, if it determines based upon the record as a whole the agency applied or interpreted a provision of the law irrationally, illogically or wholly unjustifiably. Iowa Code § 17A.19(10)(l) & (m). The Court shall also reverse, modify or grant appropriate relief, if the agency action is “based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.” Iowa Code 17A.19(10)(c). If there is nothing in the Iowa Code showing the legislature delegated any special powers to the agency regarding the statutory interpretation of the area of law in question, the court “need not give the agency any deference regarding” the interpretation of the statute in question. Iowa Code § 17A.19(10)(c); See, *Mycogen Seeds v. Sands*,

668 N.W.2d 457, 464 (Iowa 2004). However, in areas of the agency's expertise an agency's determination of a question of law is given careful consideration. *Id.* On the contrary, "the final interpretation and construction of pertinent statutes" is reserved for the reviewing court. *Brown v. Star Seeds, Inc.*, 614 N.W.2d 577, 579 (Iowa 2000)(quoting *Second Injury Fund v. Braden*, 459 N.W.2d 467, 468 (Iowa 1990)). "In deciding whether there has been a clear delegation of discretion" to the agency regarding interpretation of the area of law in question, the Court may consider "the following comments concerning the meaning of 'clearly' as used in section 17A.19(10):"

[The word "clearly"] means that the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question.

*Mosher v. Dept. of Inspections and Appeals*, 671 N.W.2d 501, 509 (Iowa 2003) (quoting Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, *Report on Selected Provisions of Iowa State Bar Association and Iowa State Government* 63 (1998)).

Finally, the Court shall reverse, modify or grant appropriate relief to a petitioner, if the agency's decision was unreasonable, arbitrary, capricious or an abuse of discretion. Iowa Code § 17A.19(10)(n). An agency's action is "arbitrary" or "capricious" when the agency acts "without regard to the law or facts of the case." *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998)(citation omitted). "An 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)(quoting *Frank v. Iowa Dep't of Transp.*, 386 N.W.2d 86, 87 (Iowa 1986). "An abuse of

discretion occurs when the agency action ‘rests on grounds or reasons clearly untenable or unreasonable.’” *Dico, Inc.*, 576 N.W.2d at 355 (quoting *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997)).

### **ANALYSIS**

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.

The Iowa Board of Pharmacy’s duty under Section 124.203 of the Code of Iowa is that the Board shall recommend to the General Assembly that it place a substance in Schedule I that 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 agrees with the Iowa Board of Pharmacy's first argument, as stated in its brief, that the record is insufficient for this Court to determine if there is substantial evidence to support the agency action. Without a record the Court cannot adjudicate the Petitioner's claim that the action of the agency was done without substantial evidence. *Smith v. Iowa Bd. Of Medical Examiners*, 729 N.W.2d 822,827 (Iowa 2007).

The Court also finds that the Board of Pharmacy did not fail do perform its duty under Sec. 124.203, The Code of Iowa. The Board did in fact make its recommendations to the General Assembly that marijuana not be reclassified specifically finding 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).

Although the agency, in this case, the Board of Pharmacy, did not outline in detail the "supporting documentation" for its recommendation, this does not make such agency action

irrational, illogical or wholly unjustifiable. Neither does it make such action arbitrary, capricious or unreasonable. The Court cannot review that which is not there. The “supporting documentation” was not set forth nor did the Petitioner provide any evidence from which the court could make a finding that the agency was in error. The Petitioner had some duty to present to the reviewing court a record from which a determination could be made that the agency action be reversed, affirmed or remanded as allowed by the statutes. *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 4 (Iowa 2005). Since no sufficient record exists the Court can make no determination that the Petitioner’s claims are viable and require the relief he is seeking. Therefore, the Court must affirm then agency decision.

Costs are taxed to the Petitioner.

Dated this 18<sup>th</sup> day of February 2014.

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

Copies to:  
All parties



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV045505  
**Case Title** CARL OLSEN V. IOWA BOARD OF PHARMACY

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**