

BEFORE THE IOWA BOARD OF PHARMACY

Re:) Case No. 2010-172
)
PETITION REQUESTING)
MEDICAL MARIJUANA) ORDER
USE RULE MAKING)
)

I. PROCEDURAL HISTORY

On July 20, 2010, a Petition for Rule Making (hereinafter, "First Petition") was received by the Iowa Board of Pharmacy ("Board") requesting that the Board adopt rules relating to medical use of marijuana. The Board issued an order denying the First Petition on September 28, 2010.

Another Petition for Rule Making ("Second Petition") was filed with the Board on October 12, 2010. The second, follow-up petition requested that the Board adopt an administrative rule designating marijuana as a schedule II controlled substance. This order relates to the Second Petition.

II. JURISDICTION

The Board has broad rule making authority relating to regulation of the practice of pharmacy. Iowa Code § 147.76 (2009); *Houck v. Board of Pharmacy*, 752 N.W.2d 14, 17 (Iowa 2008). *See also*, Iowa Code chapter 155A (2009). The Board's authority to engage in rule making relating to controlled substances is articulated in Iowa Code chapter 124, "Controlled Substances." Iowa Code § 124.301 (2009) provides:

The board may, subject to chapter 17A, promulgate rules and charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this state."

Iowa Code § 124.204(4)(m) (2009) provides specific authority for rule making regarding the medicinal use of marijuana. That section categorizes marijuana as a schedule I (generally, prohibited) controlled substance "*except as otherwise provided by rules of the board for medicinal purposes.*" (emphasis added)¹ A fourth source of rule making authority is found in Iowa Code § 124.206(7)(a) (2009), which lists marijuana as a schedule II controlled substance (generally, available by prescription) "*when used for medicinal purposes pursuant to rules of the board.*" (emphasis added)

Additionally, if a new substance is designated a controlled substance under federal regulation, the Board has authority to adopt temporary rules making a similar controlled substance designation. However, this temporary designation expires sixty days after the next regular session of the general assembly convenes – unless the legislature adopts the same controlled substance designation as part of Iowa Code chapter 124. Iowa Code § 124.201(4) (2009). Beyond this temporary authority, the Board has no power to create controlled substance schedules. The Board can only recommend changes to the controlled substances schedules, which schedules are statutory. See Iowa Code §124.201 et seq. (2009)

Rules promulgated by the Board must conform to the legislature's grant of authority. Courts will set aside rules which are beyond the authority delegated to the Board in a provision of law. Iowa Code § 17.19(10)(b) (2009); *Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510, 517-518 (Iowa 1977) (agency's administrative rules were *ultra vires*; beyond statutory grant of authority).

¹ Iowa Code §124.101(3) (2009) provides that "the board" refers to the Board of Pharmacy.

III. DISCUSSION

A. *Specifics of Petition*

The Second Petition requests that the Board adopt an administrative rule creating a schedule of controlled substances. Under the petition's proposal, marijuana would be a schedule II controlled substance.

B. *Proposed Rule is Beyond the Authority Delegated to the Board*

The Second Petition proposes rule making that is beyond the authority granted to the Board by the legislature. Iowa Code §§ 124.206(7)(a), 124.204(4)(m) and 124.301 (2009) do not authorize the Board to create controlled substance schedules. Instead, the Iowa Code is clear that the Board may only *recommend* changes to the statutory controlled substance schedules. Iowa Code §§ 124.201, 124.203, 124.205, 124.207 124.209 and 124.211 (2009).

The Second Petition does not suggest that marijuana is a new substance, needing temporary placement on schedule II. Thus, even the Board's temporary scheduling authority does not apply. *See* Iowa Code § 124.201(4) (2009).

In short, the Board's authority relating to "registration and control of the manufacture, distribution, and dispensing of controlled substances in this state" (Iowa Code § 124.301 (2009)) does not grant the Board authority to designate *which* drugs are controlled substances. Those choices are reserved for the legislature. *See* Iowa Code § 124.201(1) (2009).

C. *Marijuana Is Already a Schedule II Controlled Substance.*

Assuming, for the sake of argument, that the Board has authority to permanently place marijuana on a schedule of controlled substances, no such action is necessary.

The Iowa legislature has already listed marijuana, when used for medicinal purposes, among the schedule II controlled substances. Iowa Code § 124.206(7)(a) (2009).

The issue presented by the legislature's choice to place marijuana on schedule II is not *whether marijuana is lawful for medical use*; the listing of marijuana on schedule II effectively recognizes that medical use may be permitted. Instead, the issue is *what constitutes appropriate medical use for marijuana*? As explained in the Board's September 28, 2010 Order responding to the First Petition, appropriate medical uses for marijuana must be determined by either the Iowa Board of Medicine or some other qualified medical body.

The Board's expertise and rule making authority is not nearly broad enough to allow the Board to address all of the challenging medical, legal and practical questions relating to use of marijuana. Questions as to appropriate marijuana dose forms, marijuana supply sources, medicinal properties of marijuana and medical conditions marijuana may be useful to treat are yet to be answered. But, if those issues can be resolved, no additional scheduling of marijuana is required.

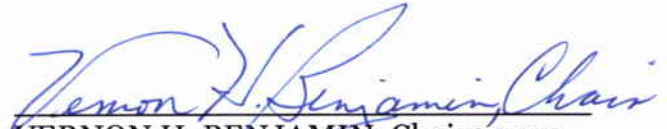
IV. CONCLUSION

The Second Petition requests rule making activity that the Board is not authorized to do. Moreover, marijuana is already a schedule II controlled substance, which renders the requested rule making activity unnecessary.

V. ORDER

The Second Petition is denied.

IT IS SO ORDERED this 11th day of January 2011.


VERNON H. BENJAMIN, Chairperson
Iowa Board of Pharmacy

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