

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p><b>CARL OLSEN,</b> Petitioner,</p> <p>vs.</p> <p>IOWA BOARD OF PHARMACY, Respondent.</p>	<p>Case No. <b>CVCV056841</b></p> <p><b>PETITIONER'S BRIEF</b></p>
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**I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.**

**A. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is Inconsistent with Respondent's Prior Practice.**

**Cases:**

*Finch v Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328 (Iowa 2005)

*Office of Consumer Advocate v. Iowa Utilities Board.*, 770 N.W.2d 334 (Iowa 2009)

**Statutes:**

Iowa Code § 17A.19(10)(h) (2017)

Iowa Code § 124.201 (2017)

Iowa Code § 124.203 (2017)

**B. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is Irrational, Illogical and Wholly Unjustifiable.**

**Cases:**

*Mycogen Seeds v. Sands*, 686 N.W.2d 457 (Iowa 2004)

**Statutes:**

Iowa Code § 17A.19(10)(m) (2017)

**C. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is an Abuse of Discretion.**

**Cases:**

*Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595 (Iowa 1997)  
*Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828 (Iowa 1994)

**Statutes:**

Iowa Code § 17A.19(10)(n) (2017)

**II. STATEMENT OF THE CASE**

On July 5, 2018, Petitioner Carl Olsen (“**Petitioner**”) filed a Petition for Scheduling Recommendation with the Iowa Board of Pharmacy (“**Respondent**”). R. at 2-45. The Petition sought a recommendation to the Iowa General Assembly that the religious use of cannabis (THC) by Rastafari<sup>1</sup> be exempt from the schedules of controlled substances like peyote used in bona fide religious ceremonies of the Native American Church, which has long been exempted under Iowa Code section 124.204(8). R. at 2. It is based on a claim of equal protection under the Iowa Constitution that arises from the secular use of “medical cannabidiol,” a mixture of cannabinoids extracted from cannabis containing no more than 3.0% THC, which is approved by the Iowa Department of Public Health under Iowa Code Chapter 124E for use in alleviating symptoms caused by a number of debilitating medical conditions.

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<sup>1</sup> The issue of whether the use of cannabis by Rastafari amounts to a bona fide religious practice has already been conclusively determined in Petitioner’s favor as against the State of Iowa. R. at 8-11; *see Olsen et al. v. State of Iowa*, 1986 WL 4045 \*3 (S.D. Iowa Mar. 19, 1986)(same)(finding “Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it.”); *see also State v. Olsen*, 315 N.W.2d 1, 8 (Iowa 1982) (noting “[w]e assume, without deciding, that the religion practiced by Olsen is one which is protected by the free exercise clause and that Olsen’s belief in the marijuana sacrament is “sincere and central to the religion”).

On July 16, 2018, Andrew Funk, Respondent's Executive Director, declined to take any action on the Petition without a hearing. R. at 49-50. The reasons provided include: (1) there is no private right or procedure to petition for agency action; (2) the inappropriateness of making scheduling recommendations specific to any religion; (3) the lack of a corresponding federal exemption for the religious use of cannabis by Rastafari; and (4) the General Assembly, rather than Respondent, is the appropriate body to lobby for change. R. at 49-50.

Petitioner now seeks judicial review of Respondent's decision to not act on the petition.

### **III. ARGUMENT**

#### **A. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is Inconsistent with Respondent's Prior Practice.**

Petitioner has previously filed petitions with Respondent to recommend rescheduling cannabis to the Iowa General Assembly. *See, e.g., Olsen v. Iowa Board of Pharmacy*, 2017 WL 3283296 \*1 (Iowa App. Aug. 2, 2017) (noting Petitioner filed "several petitions" concerning rescheduling with the Iowa Board of Pharmacy in 2014, one of which was the subject of appeal); *Olsen v. Iowa Board of Pharmacy*, 2016 WL 2745845 \*1 (Iowa App. May 11, 2016) (discussing filing, consideration and denial of petition to reschedule filed in 2013). On these occasions, Respondent considered the petition at a regularly scheduled meeting before ultimately voting to deny the recommendation to remove cannabis from scheduling.<sup>2</sup>

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2. Respondent has accepted cannabis rescheduling petitions from Petitioner since 2008. Not every one of Petitioner's requests has been denied by the Board of Pharmacy after hearing. In 2015, Respondent

Based on Respondent's prior practice of considering rescheduling petitions filed by Petitioner, and considering the fact that Respondent is charged with the responsibility of regulating the provisions of Iowa Code Chapter 124<sup>3</sup>, where both the peyote exemption<sup>4</sup> and schedules for marijuana<sup>5</sup> are located, Petitioner filed the instant petition with the agency. However, for the first time, Respondent now asserts that the administrative rules do not allow private request for agency action to reschedule a controlled substance.

Iowa Code section 17A.19(10)(h) authorizes relief from agency action, other than a rule, when that action is "inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency." *See Office of Consumer Advocate v. Iowa Utilities Board*, 770 N.W.2d 334, 341 (Iowa 2009) (quoting Iowa Code § 17A.19(10)(h) (2017)).

The Iowa Supreme Court elaborated on this section in *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005), wherein it stated:

The reporter-draftsman for the 1998 amendments has written that paragraph (h) provides a specific example "of agency action that any reviewing court should overturn as unreasonable, arbitrary, capricious, or

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partially granted Petitioner's request to remove from schedule I the substance then known as "cannabidiol" in former Chapter 124D. Chapter 124D was repealed effective May 12, 2017. "Cannabidiol" as defined in Chapter 124D was an entirely different substance from "medical cannabidiol" as currently defined in Chapter 124E.

<sup>3</sup> Iowa Code § 124.201(1) (2017) (providing "[t]he board [of pharmacy] shall administer the regulatory provisions of this chapter" and "shall recommend to the general assembly any . . . revisions in the schedules of substances . . . which it deems necessary or advisable.").

<sup>4</sup> Iowa Code § 124.204(8) (2017) (providing "[n]othing in this chapter shall apply to peyote when used in a bona fide religious ceremonies of the Native American Church . . .").

<sup>5</sup> Substances derived from cannabis are placed in four separate schedules in Iowa Code Chapter 124 depending on the potential for abuse: marijuana and THC are listed in schedule I; medicinal marijuana in schedule II; Dronabinol, a synthetic form of THC, in schedule III; and Epidiolex, a cannabidiol derivative, which recently received emergency scheduling, in schedule V. Iowa Code §§ 124.204(4)(m), .204(4)(u), .206(7)(a), .208(9)(a)-(c) (2017). "Medical cannabidiol," a mixture of cannabinoids, is *not* a scheduled substance despite the fact that it contains up to 3.0% THC. It is codified in Iowa Code Chapter 124E and exempted from the schedules in Chapter 124.

an abuse of discretion.” The author suggests that this language does not really change the law, “but it should result in somewhat more structured, informed, and systematic review by the courts under the unreasonable, arbitrary, capricious, and abuse of discretion standards, and clearer arguments by and instructions to litigants with respect to the arguments that may be made with respect to such matters.” We agree paragraph (h) does not change the law and was intended to amplify review under the unreasonable, arbitrary, capricious, and abuse-of-discretion standards.

*Id.* (quoting Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 69 (1998)).

The intent of paragraph (h) is not to prohibit any change in practice or procedure, but rather, the rule requires “consistency in reasoning and weighing of factors leading to a decision tailored to fit the particular facts of the case.” *Anthon–Oto Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*, 404 N.W.2d 140, 144 (Iowa 1987). Thus, “an agency’s failure to conform to its prior decisions[,] or furnish sufficient reasoning from which to distinguish them, may give rise to a reversal under [chapter 17A].” *Id.* at 143. Iowa Code section 17A.19(10)(h) is intended to address inconsistencies in agency decisions for individual cases; it does not provide a vehicle to challenge changes in agency procedure that are applicable to all cases that come before the agency. *See Office of Consumer Advocate v. Iowa Utilities Board*, 770 N.W.2d 334, 341-42 (Iowa 2009).

There cannot be any serious dispute that Respondent’s prior practice regarding Petitioner’s requests to reschedule cannabis involved, at a minimum, acting on his petitions at regularly scheduled meetings. Not once has an Executive Director rejected Petitioner’s petitions until now. The agency action here, which denied the petition at the outset without a hearing, is inconsistent with that prior practice. It gives rise to a

remand to Respondent to hear the petition and either affirm or deny it.

**B. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is Irrational, Illogical and Wholly Unjustifiable.**

Because factual determinations are by law clearly vested in the agency, it follows that application of the law to the facts is likewise vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(f); *see generally Mycogen Seeds v. Sands*, 686 N.W.2d 457 (Iowa 2004). The district court can reverse the agency's application of the law to the facts only if it determines such application was “irrational, illogical, or wholly unjustifiable.” Iowa Code § 17A.19(10)(m); *see also Mycogen Seeds*, 686 N.W.2d at 465. By applying this standard, the district court is likewise giving “appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(11)(c); *see also Mycogen Seeds*, 686 N.W.2d at 465.

The decision here to deny action on the grounds that it would be inappropriate to make scheduling recommendations for a particular religion is irrational, illogical and wholly unjustifiable. To be sure, there already exists an exemption from the schedules for the bona fide use of a controlled substance by a particular religion: the peyote exemption for the Native American Church found in schedule I.<sup>6</sup> If Respondent is vested with the authority to administer the regulatory provisions related to Chapter 124, and that very chapter contains an exemption that is specific to a particular religion, then it is irrational, illogical and wholly unjustifiable to now claim addressing other religious

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<sup>6</sup> Iowa Code § 124.204(8) (2017). The peyote exemption has been present in the schedules in Iowa since 1971.

exemptions from scheduling is somehow inappropriate.

The same can be said for Respondent's justification that there is no corresponding federal exemption for the bona fide use of cannabis by Rastafari. While that may be true, it is not the same as saying that such an exemption is unattainable. In fact, there is a process for obtaining a religious exemption from the federal Controlled Substances Act.<sup>7</sup> However, the guidelines make clear that nothing should not be construed as authorizing Petitioner to take any action that is not authorized under the laws of the State of Iowa.<sup>8</sup> In other words, it doesn't matter for our purposes whether such an exemption for cannabis use by Rastafari currently exists at the federal level because Petitioner would not be able to participate in the sacramental use of cannabis in Iowa without a corresponding state exemption authorizing it. Also, Chapter 124E, which permits the secular use of cannabis extract in Iowa, is silent on whether medical cannabidiol is exempt from federal scheduling. Petitioner need not first show a federal exemption for religious use before seeking the same under Iowa law.

**C. The Decision by the Executive Director to Deny Taking Any Action on the Petition for Scheduling Recommendation is 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

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<sup>7</sup> See Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act. [https://www.dea.diversion.usdoj.gov/pubs/rfra\\_exempt\\_022618.pdf](https://www.dea.diversion.usdoj.gov/pubs/rfra_exempt_022618.pdf). Interestingly, the process allows for a private right to petition the DEA for a religious exemption from the federal Controlled Substances Act for substances other than peyote.

<sup>8</sup> *Id.* at 2.

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)).

Petitioner contends the decision denying action amounts to an abuse of discretion if justified on the grounds that the Iowa General Assembly, rather than Respondent, is the appropriate body to lobby for change. The Iowa Uniform Controlled Substances Act places Respondent in a unique position in terms of scheduling. Everything starts with the Board because the Iowa General Assembly assigned it the duty to make recommendations regarding scheduling whether or not they are ultimately codified. Respondent cannot sidestep its responsibility and simply redirect Petitioner to lobby the General Assembly, which, in turn, will undoubtedly inquire whether its advisory board first recommends a second religious exemption in Chapter 124. This proposal is as unworkable as it is unreasonable.

Respectfully submitted,

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