

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

<p>CARL OLSEN, Petitioner, v. IOWA BOARD OF PHARMACY, Respondent.</p>	<p>Case No.: CVCV056841 ORDER: Ruling on Petition for Judicial Review</p>
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On February 8, 2019, this matter came before the Court on Petitioner’s Application for Judicial Review. Attorney Colin Murphy appeared and argued on behalf of Petitioner. Attorney Laura Steffensmeier appeared and argued on behalf of Respondents. Having considered the arguments and authority of counsel, and after studying the underlying record herein, the Court now finds as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Only July 5, 2018, Petitioner emailed the Executive Director of the Iowa Board of Pharmacy. Petitioner’s email contained the following attachments:

1. Petition for Scheduling Recommendation;
2. Exhibits;
 - a. Act No. 11, April 2, 1976, Jamaica;
 - b. State v. Olsen, No. 171/69079, July 18, 1984;
 - c. Registered Agent, Florida Corporation Document Number P03208;
 - d. Restated Articles of Incorporation, January 1, 2016;
 - e. USPTO Registration No. 5,039,494, September 13, 2016;
3. Memorandum in Support of the Petition.

The petition requested the Board to make a recommendation to the General Assembly regarding the bona fide religious use of cannabis. Specifically, the petition requested adding the following language to Iowa Code section 124.204(8):

Nothing in this chapter shall apply to the bona fide religious use of cannabis by Rastafari; however, persons supplying the product to the church shall register, maintain appropriate records of receipts and disbursements of cannabis, and otherwise comply with all applicable requirements of this chapter and rules adopted pursuant thereto.

Petitioner claimed the additional statutory language was mandated by Article I, §§ 1, 3, and 6 of the Iowa Constitution, as well as the First, Fifth, and Fourteenth Amendments to the United States Constitution. Petitioner further argued that Iowa Code § 124.201 granted the Board the requisite authority to make the scheduling recommendation.

On July 16, 2019, Andrew Funk, acting in his official capacity as Executive Director of the Iowa Board of Pharmacy, formally denied Petitioner's request. After discussing the applicable Code sections, Mr. Funk concluded that complying with Petitioner's request would exceed the Board's statutory mandate. Specifically, Mr. Funk acknowledged the Board has authority to recommend to the general assembly revisions to chapter 124 that the Board deems "necessary or advisable." The caveat, however, is because of the very nature of the Board itself, its recommendations must be based on scientific or medical evidence. Religious practices do not fall within that ambit. For all of those reasons, Mr. Funk formally denied Petitioner's request.

On August 15, 2018, Counsel for Petitioner filed this Petition for Judicial Review.

II. ISSUES

Petitioner presents three issues in this Petition for Judicial Review:

- 1) The Executive Director's Decision was Inconsistent with the Iowa Board of Pharmacy's Prior Practice;
- 2) The Executive Director's Decision was Irrational, Illogical, and Wholly Unjustifiable;
- 3) The Executive Director's Decision was an Abuse of Discretion.

III. STANDARD OF REVIEW

Iowa Code Chapter 17A governs judicial reviews of an agency action. The district court acts in an appellate capacity and reviews agency action to correct errors at law.¹ The Court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)."² "The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity."³

¹ *Bearinger v. Iowa Dept. of Transp.*, 844 N.W.2d 104, 105 (Iowa 2014); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

² *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc., v. Iowa Utilities*

When, as here, “the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency’s application of the law to the facts, and the question on review is whether the agency abused its discretion, by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence.”⁴ Finally, if the challenge is to an agency’s interpretation of the law, the level of deference afforded will depend on whether the agency had been “clearly vested” with the authority to interpret the law.⁵ If the agency has been so “clearly vested,” the district court reviews the agency’s interpretation under the abuse of discretion standard. Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent.⁶

IV. ANALYSIS

Petitioner’s first claim is that the Executive Director’s Decision violated Iowa Code section 17A.19(10)(h) in that the decision was inconsistent with the agency’s prior practice and the agency has failed to provide a fair and rational basis or otherwise sufficiently justify that inconsistency. Petitioner claims that on prior occasions, Respondent has considered Petitioner’s petitions at a regularly scheduled meeting. Because the Executive Director denied Petitioner’s request outside of a regularly scheduled meeting, Petitioner argues, the decision should be remanded so the Board can hear the petition and either affirm or deny it. This Court disagrees.

Iowa Code section 17A.19(10)(h) contains two separate, yet equally important, clauses. Petitioner’s argument only addresses the first. The first clause provides that: 1) this section authorizes relief from agency action, other than a rule, when that action is inconsistent with the agency’s prior practice or precedents *unless* 2) the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.

It is debatable whether this was indeed the first time the Executive Director, acting on behalf of the Board, had summarily denied one of Petitioner’s request. In its briefing,

Bd., 805 N.W.2d 758, 762 (Iowa 2011)).

³ Iowa Code §17A.19(8)(a).

⁴ *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006) (citing Iowa Code §17A.19(10)(i), (j)).

⁵ *Burton*, 813 N.W.2d at 256.

⁶ *See Equal Access Corp. v. Utils. Bd.*, 510 N.W.2d 147, 151 (Iowa 1993).

Respondent noted without resistance that, on May 12, 2017, the Board responded to a “Petition for Agency Action” filed by Petitioner in a similar fashion. On May 31, 2017, the Board’s Executive Director sent a responsive letter to Petitioner detailing the Board’s rationale for declining to act in response to that particular request. Given Respondent’s May 2017 interaction with Petitioner, the Court cannot conclude, as Petitioner does, that “[n]ot once has an Executive Director rejected Petitioner’s petitions until now.”

That factual dispute notwithstanding, Petitioner cannot overcome the second clause of Iowa Code section 17A.19(10)(h). Here, Respondent fully explained why it was declining Petitioner’s request. First, any recommendations made by the Board must be on scientific and medical evidence – not religious practices. Second, the Board has no expertise in analyzing the use of controlled substances for religious purposes. Third, given the clear public policy considerations at issue in Petitioner’s request, the Iowa legislature is the appropriate body to implement the types of changes Petitioner seeks in chapter 124. These are all credible explanations for summarily denying Petitioner’s request.

The Board is intended through the Iowa Pharmacy Practice Act to promote, preserve, and protect the public health, safety, and welfare through the effective regulation of the practice of pharmacy and the licensing of pharmacies, pharmacists, and others engaged in the sale, delivery, or distribution of prescription drugs and devices or other classes of drugs or devices which may be authorized. Iowa Code §155A.2(1). In order to further that purpose, Iowa Code section 124.201(1) authorizes the Board to make recommendations to the general assembly for “deletions from or revisions in the schedules of substances...which it deems necessary and reasonable.” Before making any recommendation, the Board must consider the factors set forth in section 124.201(1)(a)-(h). Noticeably absent from that list of factors the Board shall consider is a catchall provision (i.e. “any other factor the Board deems appropriate to consider”). Nothing about Petitioner’s request is remotely related to the Board’s purpose or statutory mandates.

Instead of establishing a nexus between the Board’s purpose and authority and the requested relief, Petitioner attempts to backdoor an equal protection claim into this Petition for Judicial Review. In doing so, Petitioner fundamentally mischaracterizes

Respondent's position when he argues, "[t]he 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." (emphasis added). Nothing in this record suggests that Petitioner's *particular religion* was a factor the Executive Director considered when he denied Petitioner's request. Petitioner's argument, however, suffers from a greater deficiency.

Petitioner's argument is as follows:

Major premise: Respondent is vested with the authority to administer the regulatory provisions related to Chapter 124.

Minor premise: Chapter 124 currently contains a religious exemption (i.e. the peyote exemption for the Native American Church).

Conclusion: It is irrational, illogical, and wholly unjustifiable for Respondent to deny Petitioner's request for a religious exemption.

Petitioner's argument is defective for two reasons. First, the major premise is flawed. Respondent's "authority to administer the regulatory provisions related to Chapter 124" is not free and unfettered. Rather, Respondent's authority to make recommendations to the legislature is restricted to the factors set forth in section 124.201(1)(a)-(h). Second, there is an unstated – and unsupported – minor premise: Respondent recommended or authorized the current religious exemption in Chapter 124. Respondent correctly notes that the Iowa Legislature codified the peyote exemption for the Native American Church in 1971. The language in section 124.201 authorizing Respondent to make recommendations to the legislature was not even codified until 1973. Therefore, one can reasonably conclude the Legislature, and not the Iowa Board of Pharmacy, was responsible for codifying the peyote exemption for the Native American Church. This historical fact buttresses the Executive Director's assertion that given the clear public policy considerations at issue in Petitioner's request, the Iowa legislature – and not the Iowa Board of Pharmacy – is the appropriate body to address the types of changes Petitioner seeks in chapter 124.

V. CONCLUSION

To the extent Petitioner argues in this Petition for Judicial Review that: 1) Respondent's Decision was inconsistent with its prior practice; or 2) Respondent's decision was irrational, illogical, and wholly unjustifiable; or 3) Respondent abused its discretion, this Court finds Petitioners' claims to be meritless.

ORDER

IT IS THEREFORE ORDERED the Petition for Judicial Review should be and is hereby DENIED and DISMISSED. Costs shall be assessed to Petitioner.

So Ordered.



State of Iowa Courts

Type: OTHER ORDER

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So Ordered

A handwritten signature in black ink, appearing to read "David Porter".

David Porter, District Court Judge,
Fifth Judicial District of Iowa