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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL E. OLSEN,	* File No. CVCV051068
	*
Petitioner,	*
	*
vs.	* TRANSCRIPT OF PROCEEDINGS-
	* Application for
IOWA BOARD OF PHARMACY,	* Judicial Review
	*
Respondent.	* May 20, 2016

The above-entitled matter came on for hearing regarding Petitioner's Application for Judicial Review before the Honorable Brad McCall, Judge of the Fifth Judicial District of Iowa, commencing at 8:24 a.m. on the 20th day of May, 2016, at the Polk County Courthouse, 500 Mulberry Street, Room 313, Des Moines, Iowa.

A P P E A R A N C E S

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P R O C E E D I N G S

(The hearing commenced at 8:24 a.m. on the 20th day of May, 2016, with the Court and parties present.)

THE COURT: This is the case of Carl Olsen, plaintiff, versus Iowa Board of Pharmacy, defendant, Polk County No. CVCV051068.

This is the time and place set for hearing on the plaintiff's application for judicial review. The plaintiff appears in person, pro se. The Iowa Board of Pharmacy appears by Meghan Gavin, assistant attorney general.

Mr. Olsen. And I will tell you, sir, I have had an opportunity to read your brief. I have not looked in detail at the exhibits attached to your brief in your petition, but I have a general understanding of the issues that are before me.

MR. OLSEN: Good. Thank you, Your Honor. Good morning.

THE COURT: Good morning.

MR. OLSEN: My name is Carl Olsen, O-l-s-e-n. And Carl with a "C."

And the -- I have -- This is, like, about my third case with the Iowa Board of Pharmacy. And the Iowa Court of Appeals issued an opinion last week that

1 is relevant to this case. So in that case the Board had
2 declined to take any action, and the Iowa Court of
3 Appeals ruled that they were not obligated to take any
4 action.

5 And so in this case they actually did take
6 some action, and so that's what distinguishes this case
7 from that one. So in this one I'm complaining about the
8 action that they did take.

9 The Board is basically saying that they
10 think they should follow federal scheduling of
11 marijuana. Marijuana is a federal Schedule I. In Iowa
12 marijuana has been in both Schedule I and Schedule II
13 since 1979.

14 And the Board, in this action, has
15 recommended that marijuana be removed from Schedule II
16 and placed in Schedule I, which is the exact opposite of
17 what they ruled in 2010. They ruled that it should be
18 removed from Schedule I and placed in Schedule II. So
19 that's what the case is about.

20 The inconsistency in Iowa's scheduling was
21 addressed by the Iowa Supreme Court in the year 2005.
22 And the case was *State vs. Bonjour*, 694 N.W.2d 511. And
23 in that case the ruling was that if marijuana had
24 medical use and there was a medical necessity defense
25 available as an affirmative defense that the Board would

1 have acknowledged that marijuana has medical use by
2 creating some kind of something to allow it. I'm not
3 sure. And that they hadn't done that, so there was no
4 medical necessity defense.

5 The dissenting opinion, Chief Justice
6 Lavorato and Justice Wiggins said that the Board had an
7 obligation to resolve this inconsistency in the
8 scheduling.

9 And so the next year the U.S. Supreme Court
10 ruled in a case called *Gonzales vs. Oregon*, 546 U.S. 243
11 (2006), that states have the final say on accepting
12 medical use under the Federal Drug Act.

13 So I began to develop a strategy to get the
14 Board to address this issue. I contacted medical
15 experts and legal experts, and I got the ACLU to help
16 me. And in 2008 I petitioned the Board.

17 And my argument was that marijuana had
18 accepted medical use in 12 states in the United States
19 and that that was accepted medical use in treatment in
20 the United States by definition, that that is the
21 meaning of the language in the statute.

22 The Board denied the petition saying I
23 failed to address abuse potential. So we appealed to
24 the Iowa District Court, and Judge Novak ruled that
25 abuse potential is not relevant and that the Board did

1 not address my argument and that abuse potential was not
2 relevant to the argument that I was making and that they
3 needed to address the actual argument that I was making.

4 So they denied the petition again. I went
5 to the Iowa Supreme Court. While my case was pending,
6 the Board decided independently to look at the
7 scientific evidence. And I had prepared for that, so I
8 had notified everybody that they were going to do that.

9 And after they did that for four months at
10 public hearings, they said that marijuana does have
11 accepted medical use and recommended that it be removed
12 from Schedule I.

13 So that brings us up to the ruling I got
14 last week that said the Board doesn't have to take any
15 action, that that ruling from 2010 still stands as long
16 as they haven't made a different decision. In this case
17 they did make a different decision. So that's what this
18 case is about.

19 So the Board is saying that -- And in the
20 ruling, in the final ruling that I got January 5, 2015,
21 the Board says marijuana does have medical use and then
22 recommended that it be placed in Schedule I.

23 And my argument in my reply brief -- I wrote
24 my reply brief after I got the Iowa Court of Appeals
25 decision, so in the reply brief, I'm not covering stuff

1 that's not really relevant anymore. I made a lot of
2 arguments in my opening brief that were disposed of by
3 that case last week.

4 So the only argument that I have left is
5 that the Board made a recommendation that's contrary to
6 the statute. The statute says if marijuana has medical
7 use, it can't be in Schedule I. They recommended that
8 it be in Schedule I. And they made inconsistent
9 arguments saying that a component of marijuana should be
10 placed in Schedule II which is in federal Schedule I.
11 That would be inconsistent with federal scheduling if
12 there was such an inconsistency. There is not.

13 But they claimed that if they recommended
14 marijuana be in Schedule II, it would create an
15 inconsistency with federal scheduling and then turned
16 around and recommended that a component of marijuana be
17 rescheduled, which would create the same conflict with
18 federal scheduling.

19 So -- But, basically, my argument is that if
20 they say marijuana has medical use, that rules out
21 Schedule I and they cannot recommend Schedule I. So
22 that's my argument.

23 THE COURT: You know, I presided over a case
24 that you were involved in several years ago.

25 MR. OLSEN: Yeah.

1 THE COURT: And in that particular case,
2 basically analyzing the statute, I concluded that
3 marijuana is ordinarily a Schedule I controlled
4 substance except as otherwise provided by rules of the
5 Board for medicinal purposes.

6 MR. OLSEN: Right.

7 THE COURT: And then it is considered to be
8 a Schedule II controlled substance but only if it's used
9 for medicinal purposes pursuant to the rules of the
10 Board.

11 MR. OLSEN: Correct.

12 THE COURT: Do you agree with all that?

13 MR. OLSEN: I absolutely do, yeah.

14 THE COURT: All right. Why then can't it
15 remain a Schedule I controlled substance except for
16 those specific uses that are allowed by the Board?

17 MR. OLSEN: Well, I'm not sure the answer to
18 that is no. The answer is that the Board says they
19 can't make rules like that. They consistently say it's
20 impossible for them to make such rules. But they
21 haven't cured the problem by saying marijuana should be
22 removed from Schedule II until now.

23 This order that they just made would cure
24 that problem. If marijuana were removed from
25 Schedule II and that language about rules of the Board

1 of Pharmacy was removed from the Code, then it would
2 clarify the situation.

3 And just the opposite, if they recommended
4 Schedule II without that extra verbiage about rules of
5 the Board, that would also cure the problem which is
6 what -- And so they've addressed that twice.

7 In 2010 they said the answer is to put it in
8 Schedule II. And now they say the answer is to put it
9 in Schedule I. But the answer that they're giving now
10 is inconsistent with the statute because they say in the
11 order that marijuana does have medical use.

12 THE COURT: Okay. All right. Thank you,
13 sir.

14 MR. OLSEN: Thank you.

15 THE COURT: Ms. Gavin.

16 MS. GAVIN: Thank you, Your Honor.

17 First, Your Honor is correct. Marijuana is
18 confusingly scheduled. It's uniquely scheduled under
19 the Controlled Substances Act, Chapter 124.

20 And Mr. Olsen is correct, that dual
21 scheduling in Schedule I and Schedule II dates back to
22 the late '70s when the federal government authorized a
23 limited number of medical testing with marijuana. Since
24 then the federal government has prohibited all medical
25 testing related to marijuana.

1 And the state's particular program that was
2 authorized in the late '70s never really went to
3 fruition. And the Board currently does not have any
4 rules regarding the medical use of marijuana.

5 I think a couple things are of note,
6 Your Honor. And I agree with Mr. Olsen that the Court
7 of Appeals decision that was issued on May 11th is very
8 relevant to the outcome of this case.

9 This is actually the fourth time Mr. Olsen
10 has challenged the Board's recommendation or lack
11 thereof. And while he focuses exclusively on the 2010
12 recommendation, he does not focus on the Board's 2012,
13 '13, or '14 recommendations.

14 And what's most important about the Court of
15 Appeals decision that was issued last week is that the
16 Court of Appeals applied the heightened deferential
17 standard from the *Renda* decision in evaluating the
18 Board's interpretation of its duty under the Controlled
19 Substances Act. So they didn't apply the correction of
20 errors of law under 17A.19(10)(c). They applied the
21 more deferential standard under 11.

22 So the question, I believe, again, for this
23 Court when it looks at the 2015 decision, is whether the
24 Board's decision is based upon an irrational, illogical
25 or wholly unjustifiable interpretation of its obligation

1 under the Controlled Substances Act.

2 And I don't believe that that -- any review
3 of that with that heightened standard you can come to
4 that conclusion that it is wholly irrational,
5 unjustifiable.

6 Mr. Olsen focuses exclusively on how the
7 Code defines a Schedule I substance versus Schedule II.
8 And a Schedule I substance is a highly-addictive
9 substance with no accepted medical use. And he ends his
10 analysis there.

11 But if you look more closely at the Board's
12 duty to make scheduling decisions, there's language in
13 the Code that the Court of Appeals focused on, and
14 that's -- If you look in 124.201, it says, The board
15 shall -- Annually the board shall recommend to the
16 General Assembly any scheduling decisions which it deems
17 necessary and advisable.

18 So the Board's position consistently for the
19 last four years has been, regardless of whether
20 marijuana has an accepted medical use in the United
21 States, or even in Iowa, the Board, nevertheless, has
22 discretion over which individual recommendations it
23 makes to the legislature about what substances should be
24 rescheduled.

25 THE COURT: Hasn't the legislature, in at

1 least a limited sense, recognized that marijuana does
2 have some medicinal purpose?

3 MS. GAVIN: Yes, Your Honor. And the Board
4 recognized that.

5 THE COURT: Well, how then is it logical or
6 rational or justifiable for the Board to recommend that
7 marijuana be classified solely as a Schedule I substance
8 that by definition, by statutory definition has no
9 medicinal purpose?

10 MS. GAVIN: Well, for two reasons,
11 Your Honor. First, I would say I don't believe that
12 that is an accurate reflection of what the Board did in
13 2015. I don't think it was recommending that marijuana
14 exclusively remain in Schedule I.

15 I mean, the Board talked at length about the
16 intervening acts between 2014 and '15, which was the
17 passage of the cannabidiol bill. And it talked about
18 how, you know, marijuana, sometimes we look at it as
19 this universal thing, but marijuana exists in many
20 derivative forms.

21 Cannabidiol, for instance, has little to no
22 THC in it, and it is substantively different than what
23 we consider recreational marijuana or what people would
24 know as marijuana. So the Board in 2015 took a more
25 nuance view.

1 And I think this has been part of the
2 difficulty of regulating medical marijuana, is that
3 marijuana in general has never gone through any FDA
4 testing, and so it's unlike a synthetic drug where if
5 you take a Lipitor pill every day, it's the same pill,
6 it's the same dosage, it's the same thing. Marijuana
7 doesn't have that kind of regulatory standard to ensure
8 that the active ingredients are the same dosage-wise
9 every day.

10 And the Board has discussed that issue at
11 length, and it's difficult to recommend a medical use
12 for something that can't be put into the formula that we
13 use for medicinal purposes. It's kind of fitting a
14 square peg into a round hole.

15 So the Board took a more nuance view and
16 said, We should look at these derivatives individually
17 where there has been testing, where there is consistency
18 in dosage and there have been some proven results.

19 So in addition to that evidence, it
20 recognized what the legislature did with cannabidiol,
21 and it kept its recommendation consistent with that.

22 THE COURT: So you're suggesting that
23 cannabidiol is a separate and distinct substance from
24 marijuana generically.

25 MS. GAVIN: Yes. I think that it most

1 certainly is, and I think that people that produce it
2 believe that too. Many people don't believe it even
3 falls under the rubric of marijuana.

4 And so where it falls in the scheduling --
5 There's an argument that it's not scheduled at all
6 either under Iowa or federal law based upon its THC
7 content, which is usually less than .3 percent. So it's
8 something that's functionally different than marijuana
9 globally.

10 THE COURT: Okay.

11 MS. GAVIN: And so I think the Board was
12 kind of recognizing some of that reality. And
13 cannabidiol is an exception generally because we do have
14 some medical evidence for it.

15 You know, it's interesting that when the
16 legislature decriminalized the possession of cannabidiol
17 for a very select group of Iowans, it didn't change the
18 scheduling for marijuana. They kept marijuana the same.

19 THE COURT: Did it specifically list
20 cannabidiol on a schedule?

21 MS. GAVIN: It did not. And so the Board
22 recognizes that as a hole; and part of the 2015
23 recommendation was to fill that hole, which is its
24 obligation, I believe, under the Controlled Substances
25 Act, to do so.

1 I also don't think that the 2015 decision is
2 inconsistent with the Board's prior decisions based upon
3 the intervening act between 2014 and 2015, which is the
4 passage of the cannabidiol bill.

5 And since Mr. Olsen has conceded that it is
6 the interpretation of the Board's duty under
7 Chapter 124, which is the sole issue in this case, the
8 Board would rest on its brief and note the distinctions
9 made by the Court of Appeals, unless this Court has any
10 further questions.

11 THE COURT: I don't believe I do.

12 Mr. Olsen, anything further?

13 MR. OLSEN: Yes. Meghan is correct on the
14 four appeals that I have filed. The first one was a
15 2010 ruling, which I won. And the 2012 one, the Board
16 refused to take any action, and I lost. And the 2013
17 one, which was last week, I lost because they didn't
18 take any action.

19 The 2015 ruling is different because they
20 did take action. So the rulings that the Board has --
21 can rationally refuse to take any action are based on
22 them not doing anything, but this case they actually did
23 something. And I'm complaining about how they went
24 about doing it. So that's the distinction between this
25 case and the other three.

1 Ms. Gavin talks about recreational
2 marijuana. Well, there's recreational opium. There's
3 recreational coca plants. They're in Schedule II, not
4 Schedule I. We don't prescribe opium plants, and we
5 don't prescribe coca plants, but we do make medicines
6 from them, which brings me to CBD.

7 Cannabidiol is an extract from the marijuana
8 plant. It doesn't come out of thin air. It's not made
9 synthetically. It's made from a marijuana plant. So it
10 has the same quality that morphine has or the same
11 quality that cocaine has. It's made from a plant.

12 Those plants are not in Schedule I.
13 Schedule I is prohibitive. And that's a problem when
14 you're going to start extracting substances from a plant
15 material.

16 And CBD is Schedule I according to the DEA.
17 Repetitively the DEA has made statements that CBD,
18 cannabidiol, is in federal Schedule I.

19 And my argument is that Iowa can put it in
20 Schedule II. There's no inconsistency because putting a
21 substance in Schedule II, III, IV or V in Iowa doesn't
22 make it legal to use that substance if the federal
23 schedule says it's Schedule I. It's still illegal under
24 federal law.

25 The scheduling doesn't create a conflict,

1 but it doesn't make it legal to do the activity. It
2 would require change in federal classification to make
3 it legal to actually possess or use.

4 The law that we passed here in Iowa requires
5 people to leave Iowa to get this cannabidiol. They
6 cannot acquire it here in Iowa. And it's illegal to
7 possess in Iowa. It's illegal to possess -- to cross
8 state lines. It is Schedule I.

9 So those are my rebuttal arguments.

10 THE COURT: Okay. Thank you very much.

11 MR. OLSEN: Yes. Thank you.

12 THE COURT: I will take a look at things.
13 I'll look at the exhibits in detail, and I'll get a
14 ruling done as quickly as I can. Thank you.

15 MR. OLSEN: All right. Thank you.

16 MS. GAVIN: Thank you, Your Honor.

17 (Hearing concluded at 8:45 a.m., on the
18 20th day of May, 2016.)

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CERTIFICATE OF REPORTER

I, Julie A. Moon, Certified Shorthand Reporter and Official Court Reporter for the Fifth Judicial District of Iowa, do hereby certify that I was present during the foregoing proceedings and took down in shorthand the testimony and other proceedings held, that said shorthand notes were transcribed by me by way of computer-aided transcription, and that the foregoing pages of transcript contain a true, complete, and correct transcript of said shorthand notes so taken.

DATED this 2nd day of June, 2016.

/s/ Julie A. Moon
Julie A. Moon
Certified Shorthand Reporter

Transcript ordered: 5-22-16
Transcript completed: 6-2-16
Ordered by: Carl Olsen

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